MUSIC FOR TV AND FILM: IS NEW OR EXISTING MUSIC RIGHT FOR YOUR CLIENT?

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I. USING EXISTING MUSIC

A. Synchronization Licensing

Sometimes a television or film producer will want to use a popular or recognizable (or even unknown) song in a production to add a specific flavor to the scene or because of the secondary meaning attached to it. Movies that take place in a certain time period may wish to use music from that era (i.e., *Forrest Gump*). Certain song lyrics can be used as a substitute for dialogue to convey a message left unspoken by the characters (*One Tree Hill*). A nightclub scene may have a band or recording playing in the background with the actors dancing (*Pulp Fiction*).

When copyrighted music is included in an audio-visual production, be it a television program, motion picture, home video, video game, or interactive media, there are potentially two separate copyrights involved that need to be licensed: (1) the musical composition, typically owned by the music publisher; and (2) the specific recording of that composition, typically owned by the artist's record company. Licensing of these two copyrights is generally called synchronization (sync) rights and master recording rights, respectively .

Licensing sync rights from the music publisher might be possible without needing master rights from the record company if the music is recorded specifically for the production, such as being sung on camera or recorded by the underscore composer. However, any time a master recording is used, a sync license must also be obtained for the song, unless the composition is in the public domain. Because any one song may have several different recorded versions, the owner of the sync rights will remain constant while the owner of the master may vary, depending on which recorded version used. For example, the song "Yesterday," by John Lennon and Paul McCartney, has been recorded by approximately 6,000 different artists. Each artist's record company controls the rights to that artist's master recording, but the publisher of the song remains the same, no matter which version is used.

For both music publishers and producers of audio-visual productions, clearing and licensing music is an area that requires a certain amount of knowledge regarding copyright, the policies and practices of the potentially numerous parties involved, and the parameters of the terms necessary to structure the deal correctly. There are companies who specialize in this area, can offer expert opinions and guidance, and actually perform the function of clearing the music on behalf of production companies.

Copyright Law Basics for Sync Licensing

Licensing the use of a copyright in copies of audio-visual works is part of the right of reproduction granted exclusively to copyright owners in Section 106 of the Copyright Act (Title 17 U.S.C.). Although the word "synchronization" is not mentioned specifically, Section 106 gives the copyright owner the exclusive right to reproduce and authorize others to reproduce the copyrighted work in copies, such as television programs, motion pictures, and home videos. "Synchronization" is the right to reproduce an audio representation of a copyrighted work with a visual image on film, tape, or other visual media. The visual image is "married" or "synchronized" to the music, so that every time the same scene is shown the same music is heard. (With the exception of video games, most licenses do not allow for the manipulation of the audio track to be shown with a different scene than the one being licensed.)

Many producers are under the mistaken impression that a small portion of a song may be used without obtaining a license. One often hears, "You can use (a) up to *X* number of measures of music (b) up to *X* seconds of music or (c) up to *X* notes for free." **This is totally false.** Any part of copyrighted music reproduced in a production must be licensed. This includes lyrics that are spoken instead of sung, since the lyrics are copyrighted as part of the song and cannot be used without clearance even though there is no music accompanying them.

That said, you often hear lines from songs spoken in these productions. While no exact rules exist, as a rule of thumb, if the dialog is such that normal people would speak the same words in the course of conversation, this may not require clearance. But if the use of the lyric is unusual for conversation, the song must be cleared. As an example, if one character says to another, "She loves you," that is normal. But if one character says, "She loves you" and the second character says, "Yeah, yeah, yeah," that may require clearance of The Beatles' song.

In this context, the "Fair Use" doctrine (17 U.S.C. 107) does not apply except in rare instances. Also, distinguish between a comedic use and a true parody, which must make fun of the work that is the subject of parody. Keep in mind also that the Fair Use and parody exceptions are defenses to claims of copyright infringement for an unauthorized use and are part of United States law only. Other countries, which have adopted the concept of "*droit moral*," or moral rights, will not recognize the defense to an unauthorized use on these grounds. This could have a significant impact on a producer's ability to distribute the production throughout the world.

Identifying the Owners

The first step in licensing music for a production is identifying the copyright owners of the material. Titles of songs are not protectable, so there can be many different songs with the same title, or many different recordings of the same song. Since copyrights may be split, with ownership by several parties, making sure that the production company is able to locate all parties that have an interest in any particular song is essential to the licensing process. On a practical level, publishers should know who their co-publishers are and how to reach them. Songs may be divided both by ownership percentage or territory, or both, resulting in multiple owners. With the increased awareness of the value of music publishing, it is not uncommon for the interests of each writer of more recently created compositions to be controlled by separate publishers.

ASCAP, SESAC, and BMI have Internet sites that allow the user to access some of their contact and ownership information for research. This can usually provide the composer and publisher names and many of the addresses and telephone numbers. The publishers' duty is to provide accurate information to the PROs to allow users to contact them. That includes supplying and maintaining current address, phone, and email information. Many publishing companies have information on their websites as well. Caution should be exercised, however, as the information in the performing rights societies' databases only applies to the copyright owners of the United States rights and is not always accurate. If there are owners of rights outside the United States, a producer searching these databases would be unaware of the additional parties and might think they are obtaining all the rights they need from only the U.S. publishers.

A good practice for publishers to follow where there are multiple parties owning the same song is to advise the production company representative of that fact and supply as much contact information as is available. If a production company cannot locate all co-publishers of a song, the more likely it is that the song cannot be cleared and will not be used in the production.

Issues with Multiple Publishers

If there are multiple publishers, in most cases the producer will need to obtain permission and negotiate a fee with each party separately. Each of the multiple parties has the right to grant or deny permission, which means if one publisher grants approval and one publisher denies approval, the producer cannot use the song, as he will be unable to obtain rights to 100% of the composition.

Under common law principles, if there is no agreement between the parties otherwise, any co-owner can grant rights on behalf of the entire copyright without consulting his co-publishers, subject to a duty to account to the other parties. In the real world, however, most publishers are reluctant to grant rights for another party because (1) the other party may be more likely to grant rights without them next time, and (2) there is a duty to account to the other party. A producer will not know if an agreement between the parties for separate licensing and administration exists, so the prudent thing to do is to negotiate with each party separately.

There was a recent example of multiple parties owning a song where a major music publisher owned and controlled 0.5% of a song by a major artist. **0.5%?** One has to ask what the contribution to that song was that entitled the writer and his publisher to earn 0.5% of the song. Did the writer add a word to the lyrics? Did he bring the donuts to the recording session? Was this a tip to the pizza delivery guy? In this instance, with the total license fee being $750.00, a check was written to the major publisher for $3.75, which they then had to split with the writer.

For older songs, copyright terminations and reversions under both domestic and foreign copyright laws may cause a split in the ownership of the copyright. For example, one company may have rights for the United States while another may have rights for the balance of the world. With the relatively recent practice of sampling, there can be 10–15 publishers of a single song, all of which administer their own shares and need to be contacted.

Using Most-Favored-Nations Clauses

In the same fashion that each party can grant or withhold approval, once approved, each party can set the fees for its share. A common practice, however, is for co-publishers to set fees on a Most Favored Nations ("MFN") basis, so that each party receives an equal fee, pro rata to their share of the song. Sample MFN language is as follows:

> *In the event that Producer grants more favorable terms including, without limitation, additional consideration in any form, to the co-publisher(s) of the Composition(s) (where applicable) licensed hereunder or any third party granting rights with respect to use of musical compositions in the Program, Producer shall notify Publisher thereof, and this Agreement shall be deemed amended to incorporate same as of the date when such higher rate is paid or such more favorable terms are granted to such third party, and to continue for the duration of the period which such more favorable terms are granted.*

It would not be uncommon for the MFN clause to also include the owner of the master recording, so that the record company and publisher(s) receive equal treatment. In rare cases, the MFN will be for all music in the production, not just with co-owners, as the producer may suggest fees based upon certain budgetary criteria, or the nature of the program is such that having all parties treated equally benefits both publishers and producers. For example, for a concert show where an artist is performing all of his No. 1 records, it makes sense to have all songs treated the same. On shows like this, it is always amazing when a publisher will say, "My song was No. 1 for six weeks while some other songs were only No. 1 for two weeks, so I should get more money." At this point, the producer has the option of dropping this song, because increasing the price of this one song increases the price of all the others in the program.

There are also times where a MFN clause can be used to reduce fees instead of increasing them. For example, for a particular song, there are two publishers, each with a 50% interest in the song. One quotes $1,000 and the other quotes $1,500, both quotes based on 100% of the composition, with each publisher taking their *pro rata* share of the fee. The first publisher's share would be $500, while the second publisher's share would be $750.00. If the first publisher had an MFN clause, however, that share would be increased to $750 to match their co-publisher. However, in an attempt to reduce the fees, a producer might go to the second publisher and ask that the quote be lowered from $750 to match the $500 quote of the first publisher, and offer a MFN clause to ensure that both parties are being treated equally.

Key License Terms

Other than the specific contract language, negotiating for a sync license involves two main elements: permission and a determination of the license fee. As an exclusive right of the copyright owner, **permission** *must* be secured for the reproduction of the work in the program. There is no such thing as a compulsory license in sync licensing as there is in mechanical licensing. A publisher has absolute discretion to grant (or deny) permission, for any reason whatsoever, or for no reason at all.

Setting a **license fee** is also within the discretion of the publisher, as there is also no statutory rate as in mechanical licensing. Each production has its own licensing needs and each song has its own unique value to the publisher, so these negotiations are a one-to-one process between the publisher and the production company.

For the use of a composition in a single production, the primary components of the license terms consist of (1) media, (2) territory, and (3) length of the term of the license.

Media describes the method by which the production will be made available to the public. For example, there are various forms of television:

Free or broadcast television, such as CBS, NBC, ABC, and local stations that are available over-the-air without charge to the viewer;

Basic cable television, such as CNN and MTV, which is available to cable customers as part of the basic package they receive upon signing up with the cable service;

Pay or subscription television, such as HBO or Showtime, for which an additional fee is paid by the viewer for access to the pay networks' programming on an all-you-can-eat basis;

Satellite television, which incorporates many of the features of basic cable and pay TV but is delivered via satellite rather than by cable;

Pay-per-view events ("PPV"), such as one-time major sporting events or concerts, for which the viewer pays a fee for that individual program;

Video-on-demand ("VOD"), in which the viewer is able to watch a program at their convenience instead of waiting for the program to be run according to the networks' schedules; and

Pay video-on-demand ("PVOD"), for which the viewer pays a fee for the right to view at their convenience.

There are also theatrical exhibition (publicly performing for profit or non-profit in motion picture theaters, film festivals, and other places of public entertainment where motion pictures are customarily exhibited), non-theatrical exhibition (on common carriers such as commercial airlines, trains, ships, and buses, as well as in educational, religious and penal institutions, health care facilities, libraries, museums, hospitals, military bases, oil rigs, marine and industrial installations, clubs, bars, restaurants, and similar non-theatrical venues where there is typically no direct charge imposed for viewing), home video (audio-visual products for personal use), Internet streaming and downloading (electronically delivered copies regardless of the means of data retention), as well as receiving programming via wireless mobile devices.

Territory is the geographic area where the production will be distributed. It could be as small as a local television market or as broad as throughout the universe. Common intervals between those extremes would be for the United States, U.S., and Canada; world excluding U.S. and Canada; or specifically named territories.

Term would be the length of time the producers want to exploit the production. It could be as short as a few weeks or in perpetuity, depending in the distribution of the production. Again, common intervals could be one year, five years, 10 years, or any other time period requested by the producers.

Below is a grid showing how the items listed above can be mixed and matched, by selecting the media, territory, and term from each column to match what the producer needs and is requesting:

MEDIA	**TERRITORY**	**TERM**
Free Television	United States	1 year
Free and Basic Cable Television	United States & Canada	5 years
Pay & Subscription Television	World excluding United States & Canada	10 years
All Television Media	Worldwide	Duration of copyright term owned and controlled by publisher
All rights in all media	Universe	Perpetuity

Everything else being equal, the more media, territory, or term requested by the producers, the higher the fee will be. One important point to remember as a publisher is that producers have distribution requirements that they must meet, which involve all of the elements discussed above. While the publisher has the right to deny the use of the music on the license terms requested by the producers, rarely can the publisher modify the license terms without the producer deciding *not* to include the song in the production, as to do so on terms that do not meet the needs of the production will require re-editing of the program, taking it out of distribution or breaching the distribution agreement. A publisher who thinks that a 10-year term is too long can either refuse to license or add to the fee to compensate for the additional time period. The same concept applies to the other terms.

This is the function of the marketplace, where buyers determine what they want and sellers determine what terms they will accept. To use a non-music example, a customer wants to buy five steaks at the grocery store. If the grocer doesn't want to sell five steaks, he might try to persuade the customer to buy only three. But if the customer needs five steaks, they will go to a different store that will sell them five steaks instead of trying to modify their purchase. The same principle applies to music licensing, in that the producer has certain needs and will find a publisher of a different song to agree to his terms.

Additional Information for a Publisher to Consider

In determining whether permission will be granted and what license fee will be requested, a publisher will want to know, and the producer should expect to supply, the following information regarding the project into which the music will be licensed:

- Name of the production
- Name of the production company
- Actors starring in the production
- Director and writer
- Film budget/music budget
- Synopsis of the film
- Specific scene description where music will be used (script pages may be requested)
- Usage (visual or background, vocal or instrumental) and approximate timing

All of these factors are important to the publisher, with the last three items of most importance in determining permission and fees. For example, when asked how the song is being used, a producer may say that the scene is a young man and woman, sitting in a car, listening to the radio when the song is played. This sounds innocent enough, so the publisher grants the approval. The writer calls all his family and friends to tell them about the use of the song and everyone tunes in to watch. What transpires is the following: a young man and woman, sitting in a car, listening to the radio when the song is played. The woman says, "I hate that song!" This is not the result that the writer or the publisher had hoped for. By not asking for more detailed information, such as seeing script pages, the publisher has embarrassed the writer and injured not only the value of the copyright but the relationship with a creative partner.

As for usage and timing, all things being equal, the longer the use, the higher the fee. If the song is sung on camera, as opposed to being used in the background, this will raise the fee as well.

Each publisher can value their own songs on whatever criteria they choose. More popular song, or songs by more popular artists, will tend to earn higher fees than less popular songs. For new artists, there are times when there will be opportunities to license songs to a television program but the producer will insist that they will only do so for no fee to the publisher or artist.

Despite my natural objection to licensing music for free, there are valid reasons to do so, especially if there is value in other ways that the artist might receive. If the artist feels that the exposure on the program is important, or that the exposure might drive sales of the song, this is worth something to the artist and publisher. If the program lists the song in the credits, or features the song and artist on an "art card" (a card at the end of the program that says "This episode of the program featured music by [*band name*]"). Perhaps the program website will list the songs with a link to the artist's iTunes page. These all have value to the artist that don't require the production to pay a fee.

The Quotation Process

Generally, the production company (or its representative) will want to contact the publisher as soon as the music is being considered for use. Most companies will require a request in writing, with email being the preference these days. As there are sometimes several approvals necessary, the more lead time available, and the more information supplied, the higher the chance of negotiating a reasonable fee in a timely manner. The publishers will quote a fee that is contingent on the music actually being used in the production. There is generally no obligation to pay a publisher for music not used. Obtaining these quotes is

free, i.e., there is no "option" fee for setting the price, only the requirement of payment if used. Quotes are generally valid for a reasonable period of time (60–90 days) but may be extended, especially if the producer knows that his post-production schedule will require a longer period. This can be part of the negotiation.

After receiving a fee quotation, the producer should issue a letter of confirmation, setting out the key deal terms as he understands them, to ensure that there is no miscommunication between the parties. This also offers the publisher the opportunity to dispute any of the deal points in the confirmation letter prior to the song being used in the production.

Sync licenses are typically non-exclusive, meaning that the same song can be licensed to multiple productions at the same time. Licensing of the copyright does not generally include the right to utilize the title of the song as the title of the production or to incorporate the story of the song into the production. These rights must also be specifically negotiated with the copyright owner. An example of this is the film *Ode to Billie Jo*, from the Bobbie Gentry song of the same name, which used the story of the song as the underlying plot of the film.

As indicated in the titles of each of the sample agreements at the end of these materials, these different agreements are drafted both from the perspective of the publisher and the producer. While there are differences in substantive licensing terms for television and motion pictures, these agreements, taken together, give a representative idea of the positions taken by both parties in this type of negotiation. Keep in mind, everything is negotiable.

Motion Picture Licensing

In licensing for motion pictures, producers generally will want to acquire rights for "any and all media, now known or hereafter devised, throughout the universe, in perpetuity" for a one-time flat fee price ("buyout"). In simpler terms, everything, everywhere, forever. This includes media not currently known or developed. This is a major negotiating point.

In the days before home video, licenses either had language allowing the studios to distribute the films "in any and all media" or the license was silent on this point. When these films began to be released on video, the music publishers and record companies were unable to combat the studios with regard to additional payment for video.

Now, with the advent of all types of new media platforms, such as video on demand, iTunes video, mobile devices, and the Internet, movies can be shown on a personal computer, smartphone, or television screen and be manipulated in ways never dreamed of even five years ago. Most of the studios are requesting rights "in any and all media, *whether now known or hereafter developed*," without wishing to pay any additional fees to music publishers and suggesting that any copyright proprietor who does not grant these rights will not have their music used in these films.

Despite a philosophical objection to this, virtually all publishing and record companies have had to agree with this grant, not only for films but also for television programs. In some cases, the license will allow for future technologies but only where the film can only be shown in a linear manner, as opposed to media in which the film's images can be manipulated and rearranged.

One other difference in motion picture sync licenses is a grant of public performance rights for theatrical exhibition in the United States (currently, there is no right of public performance in master recordings except for digital transmissions). By court consent decrees entered into between the Justice Department and the performing rights societies, music copyright owners are required to issue domestic public performance licenses to movie producers on a per-film basis. This goes back to a case from 1948 (*Alden-Rochelle, Inc., et al. v. American Society of Composers, Authors and Publishers et al.*, 80 F. Supp. 888) when the owners of movie theaters brought suit against ASCAP for anti-trust violations, claiming that ASCAP, in representing the publishing interests of the motion picture studios that produced the films, paid a large portion of the moneys collected from the theater operators back to the same studios. As a result, performing rights societies in the U.S. do not license movie theaters as the foreign societies do in their respective territories. Sync licenses should include a provision granting public performance rights directly to producers for U.S. theatrical exhibition but should also state that television broadcasts in the U.S. should be subject to the stations having performing rights licenses as well as.

With low-budget independent films, the amount of the license fee is always an issue. Sometimes, a small film will have to be shown at festivals in order to acquire distribution. While the exposure of the film is minimal, it still requires a valid license. The producers will want to exhibit the film in what they feel is the final version, with all the desired music included in the film. To achieve that, sometimes music publishers will

grant limited rights for festivals for a nominal fee with an additional pre-negotiated fee as an option if the film gets distribution. Also, sometimes the license fees will be determined on the basis of a "step deal." In this scenario, a small fee is paid upon distribution of the film, with additional payments paid in "steps" based upon the earning of revenue by the film. For example, the initial fee could be $5,000.00, with an additional $2,000.00 payment when the film reaches $5,000,000.00 in box office, another payment at $7,500,000.00, etc., until the license fee equals (or exceeds) what would normally have been charged. The theory here is that small films (with small budgets) also need music but when the film starts earning money, the music publishers will receive additional compensation.

If there is a soundtrack album for the film, this can also have an impact on licensing fees. Many publishers will reduce their fees if they are included on the soundtrack album. The reasons should be obvious: the soundtrack album is another source of potential revenue.

Licensing for Television

As a right of reproduction, a publisher needs to understand what type of television program requires (or does not require) a license. All programs shot on film, a reproductive medium by definition, require a license. However, because there is no reproduction, live programs, such as news programs, sports, and specials like the Academy Awards do not require a license.

In addition, certain programs recorded on videotape do not require a license. An "ephemeral recording" is a reproduction of a work, in the form of a copy or phonorecord, produced by an entity legally entitled to publicly perform the work, made solely for the purpose of later transmission by a broadcasting organization legally entitled to transmit the work. Section 112 of the Copyright Act allows a transmitting organization (such as a television network) to make an ephemeral recording of no more than one copy of a particular transmission program if (1) the copy is retained by the transmitting organization and no further copies are made; (2) the copy is used solely for the transmitting organization's own transmissions; and (3) unless preserved exclusively for archival purposes, the copy is destroyed within six months from the date of transmission. The ephemeral recording privilege would extend to copies or phonorecords made in advance for later broadcast, as well as recordings of a program that are made while being transmitted and are intended for deferred transmission or preservation. Thus, the exemption applies whether the images and sounds to be broadcast are first recorded (on a video tape, film, etc.) and then transmitted, or the program content is transmitted live to the public while being recorded at the same time.

In this case, programs like *The Tonight Show*, which are recorded on videotape earlier in the day for broadcast at a later time, do not require a license. Extending this provision by custom and practice, neither do the first run episodes of other network programs on videotape, such as some of the situation comedies currently running. Reruns of videotaped programs, however, do require a license, since the very fact that they are broadcast again means that they were reproduced outside the scope of Section 112. As a practical matter, since almost all prime time programs are repeated, many television producers of videotaped programs negotiate for sync and master licenses prior to taping their programs in order to have some negotiating leverage and to prevent the use of a song that may not be licensable, either because the use may be denied after the program is already completed, or the fee may be higher than the producer wants to pay. Once the program is completed, the producer's ability to remove the song or negotiate a reasonable fee diminishes greatly, making clearance in advance a practical necessity.

An interesting point here is that, while a program may fall under the exception for the first broadcast, a re-broadcast will violate the exception, as the program (in order to be re-run) had to be recorded for purposes of further broadcasts. In cases like this many publishers will insist that any license include not only the rebroadcasts, but the first broadcast as well. As such, the license term and media might need to be adjusted to take the first broadcast into account.

Licensing Terms for Television Programs

Because of the changing patterns and uncertainty of television distribution, producers commonly negotiate for a number of different licensed rights, both for immediate broadcast needs and no-cost options for future exploitation, in order to fix their costs as the outset of production. As stated previously, for the use of a composition in a single episode of a television program, the license terms consist of (1) media (e.g., free television, basic cable television, pay television, home video); (2) territory (e.g.,: world, United States, world excluding United States); and (3) length of license term (e.g., one year, five years, perpetuity vs. life of copyright vs. duration of copyright owned and controlled by publisher). All of these, including the use and duration of use of the copyright, go into

determining whether permission will be granted and what fee will be charged.

Because of the some of the recent changes caused by additional methods of exploitation, such as video on demand, iTunes video, transmissions to mobile devices, and Internet exhibition, both with streaming and downloading, many of the major production companies are now acquiring all rights in all media (excluding theatrical exhibition), now known or hereafter devised in order to avoid having to make additional payments or secure additional rights each time a new distribution method is developed. This is potentially beneficial to publishers and songwriters as the fees are paid up front instead of having to wait for a variety of options to be exercised. The detriment, of course, is that no new revenue streams will develop if additional forms of distribution are devised.

Licensing for Home Video

For projects being distributed in the home video market, either by physical goods or digital downloads, the process of clearing music is the same as above. One potential difference, however, is the method of payment. For home video licenses, there are three main ways of paying license fees:

1. A per unit royalty: Similar to the process for mechanical royalties, the publisher will set a per unit price for the use of their song in the project. Often, this price is coupled with an advance payment based on a certain number of units, with accountings to the publisher on a quarterly or semi-annual basis for all units sold once the advance is recouped;

2. A buyout: This is a one-time flat fee payment for as many units of the video as the producer can sell. In some ways, this is a gamble by both sides: the producer hopes he sells millions of units for this one-time fee, making the per unit cost go way down. The publisher, on the other hand, hopes that the project sells very few units, making the per unit cost go up; and

3. A rollover, or rolling advance: This technique combines the two scenarios above, where the producer pays an advance for a certain number of units and, once that threshold has been met, pays another advance, and so on. This allows the producer to somewhat avoid the costs of regular accountings and allows the publisher to get larger payments instead of incremental royalties on a lesser number of units.

Video games follow the same model as above, but are one of the rare instances in which the publisher will allow the manipulation of the visual images with the music, as video games are more "interactive" than traditional programming.

As home video productions are for private, not public viewing, there are no public performance royalties generated from the distribution and sale of these programs. Streaming over the Internet, however, could generate some performance income.

Licensing for Commercials

Licensing music for commercials has become one of the most lucrative areas for music publishers and writers, as the use of popular music has grown in recent years. Sponsors realize that having a popular song attached to a product has a benefit and actively seek the right music to provide that benefit.

In the world of commercials, the term can be as short as a few weeks in a local market for a test period to see if an audience responds favorably to the commercial and the music. In many cases, the initial term is for 13 weeks, but sometimes up to a full year. With viral marketing now a reality, rights are obtained not just for television and radio but also for online and mobile uses. In addition, in many situations, the sponsor will obtain options for additional terms for an additional fee. Usually, this fee for the additional term is more than the original fee and is determined by an increase based on a percentage of the original fee, i.e. year two is 15% higher than year one, year three is 15% higher than year two.

This is one of the few areas where exclusivity is requested by the parties licensing the music, as they don't want the same song used to promote another product during their campaign. In most cases, however, the exclusivity is limited to products in the same type of product, sometimes called "category exclusivity." In this instance, if the publisher is licensing music for a soft drink, they may not license it to another soft drink company but are free to license it to a car company.

Writer Approvals for Commercials

This area of licensing is the most sensitive for writers. The right of approval for uses in commercials is one that is almost automatically granted to the writer upon request. By allowing the music to be used in a commercial, the writer is almost endorsing the product. If the product is one that the writer might object to, the publisher should avoid granting permission for the use. For example, a vegetarian would not want to license

music to a burger chain, and a writer with a family history of alcoholism would not want to license to a beer company. For many years, Carole King, who wrote "(You Make Me Feel Like) A Natural Woman," has not allowed her song to be licensed for feminine hygiene products.

Collecting Public Performance Royalties

In order to collect the public performance royalties generated by distribution of the motion picture, television program, or commercial to which you have licensed music, a **music cue sheet** needs to be filed with the performing rights organizations (PROs). This is a document created by the production company which lists every piece of music in the program, in show order, with the title, composer, publisher, performing rights affiliations, usage, and timing of each piece of music. The description of the usage (i.e., VV = visual vocal, IB = instrumental background, etc.) is a factor in what the PROs use in determining the value of the use according to their weighting formulas. The PROs use this document to track the broadcasts or foreign theatrical exhibitions of the production and match it with the music in the productions to determine how much in royalties each composition earns. This music cue sheet is part of the delivery requirement for the production and travels around the world with it to provide the same information to the foreign PROs. The PROs around the world use broadcast data from a variety of sources to determine when, where, and how often a program is broadcast. While the producer's responsibility is to file these documents, a synchronization license should have a provision requiring the publisher to receive a copy as well. This allows the publishers to file with the PROs on their own to ensure that the PROs get this information and allows the publishers to provide copies to their foreign sub-publishers so that foreign performances can be tracked as well.

For commercials, the process is a little more complex. Because broadcast data is not readily available from the same sources that track television programs, a publisher must obtain a copy of the commercial and media buy information from the sponsor. The media buy information contains the stations, dates, and times that the commercials were run, thereby allowing the PROs to do the same type of analysis as they do with regular programming and allocate credits to the music in the commercials. Some sponsors are hesitant to provide this information, as their belief is that their marketing plans are proprietary. Nevertheless, most will provide the information, even if it takes a little while after the campaign finishes to receive it.

Common Music Licensing Problems

There are a number of reasons why producers may have trouble when trying to license music for their productions. Knowing how this area of the business works can be crucial to the process. Music clearance may not be brain surgery, but it does require knowledge and experience to do it right. Often clients question the cost of doing music clearance. After all, isn't it something they could do themselves? Of course, they probably could do it, if they had enough time to learn how to contact all the parties and what each party's policies are. What music clearance companies sell is their expertise. While a producer might need to make 10 phone calls to find out who owns a song, a clearance specialist might need only three (or fewer). This might not seem important until the producer suddenly needs a song for the next day's shooting, when the right knowledge and contacts might be able to make the deal in time.

The most easily controllable problem is the time factor. As is becoming increasingly more common, record companies and music publishers are required to get approval from their artists/songwriters in order to license their music. This, of course, takes time, especially if the artist is on the road and not easily available. With multiple songwriters, this only adds to the time required. In television especially, due to short production schedules, time is a crucial factor. A publisher should try to have their writers pre-approve certain types of programs so that the turnaround time can be kept to a minimum. It's at this stage that a good working relationship and a level of trust between writers and publishers come in handy.

Multiple copyright owners also add to the problems. Simply stated, the more parties that have to be contacted, the longer the approval process. One co-owner can grant rights on behalf of all the owners *only* if there is no co-administration agreement between them. Most agreements of this kind call for each party to administer its own share directly. In addition, there may be disputes as to the respective shares of each owner. Until these are resolved, a producer may face the possibility of licensing (and paying for) more than 100% of the copyright, if the parties are willing to enter into negotiations at all prior to resolution of the ownership splits. In this scenario, as long as all parties are paid for whatever share they think they are entitled to, no one has a right to complain about the fees being paid to their co-owners. Sometimes, if all the ownership parties will agree, a deal can be made for a certain fee, subject to each party receiving its respective share once the ownership splits are finalized.

Along the same line, one co-owner may require a fee disproportionate to its ownership interest. This is especially troublesome if the other co-owners have granted fees on a Most Favored Nations basis, where, despite their willingness to accept a lower and more reasonable fee, they will receive their pro rata share of the higher fee quoted by one owner.

Because licensing terms are totally negotiable, the producer may be at the mercy of a copyright owner who demands unreasonable terms. For example, there is one publisher who, as part of its motion picture license, has a clause making the failure to provide two tickets to the premiere of the movie a material breach, subject to an injunction against distribution and release. While complying with this requirement may not seem like a big deal, the parties responsible for licensing the music for the production company generally have no control over who is invited to the premiere, leaving open the possibility of a breach.

Often, the specific approval of the writer or artist may be necessary. As all approvals are discretionary, the writer or artist may deny the usage of a song for any reason. Sometimes the reasons have to do with the context in which the song is used or the deal terms. Occasionally, however, it has to do with the financial status of the writer/publisher company relationship. For example, if a writer's royalty account is unrecouped, the license fee will be credited to the account, but the writer may not see any of the income. Therefore, there is no incentive to agree to the use. Sometimes the writer and publisher will reach some accommodation regarding a division of the income from the license fee so that the writer will receive a portion of the fee directly and an approval will be given. The producer is at the whim of the other parties regarding that determination.

Producers must also be aware that not all music is available for licensing. Just because it can be heard on the radio or in the context of a live broadcast does not mean that a song can be licensed for your production. As mentioned above, live broadcasts do not require permission and radio is covered under blanket licenses from ASCAP, BMI, and SESAC. In addition, the copyright owner may not approve of the context in which the music is being used. Nudity, profanity and the politics of the artist/songwriter all contribute to the use of a song being denied.

A common practice today is for the music editor, when a rough cut of the film is available, to prepare a temporary soundtrack to the film so that the director can see it with some music behind it and get a better sense of the rhythm and feel of the film. These "temp tracks" can cause some problems, however. Often, the director gets so used to seeing his film with a particular piece of music that he feels that only that music will be acceptable for the film. This is sometimes referred to as "temp love." At that point, the music needs to be cleared and licensed. Unfortunately, because of the director's emotional investment in the music, a deal may have to be struck with publishers on terms that are less than reasonable in the context of the overall film. Music editors, in general, try to place music in the film whatever they think works best, without regard to any considerations regarding licensing or potential costs. Most editors are not aware of publishers who are difficult to deal with, nor should they be. That is not their job. Because of this practice, however, the lives of producers, directors, and clearance personnel are sometimes thrown into turmoil in trying to clear a song that may not be available on the terms required by the producer or, in some cases, not available at all.

With all due respect to directors and producers, there is no one piece of music that will make or break a film.

The production companies must also make sure that they are negotiating with the correct parties. Often, I am told that the writer or manager of the artist has given approval for the use. The producer takes this as the song being cleared while I know that the publisher has the exclusive rights to grant this approval, not the manager or artist, so the "approval" is invalid.

B. Master Use Licensing

The process by which a producer or production company obtains rights to use master recordings in audiovisual productions is very similar to licensing musical compositions.

The first step is still to identify the copyright owner of the master recording. For well-known recordings (think recordings that one would hear on the radio), the masters will usually be owned by a record label. Fortunately, there are fewer co-ownership or split ownership issues with master recordings than with musical compositions. Therefore, you will usually only be negotiating with one entity.

Once the producers know the entity with which they will be negotiating, the key terms will be very similar to those terms that were negotiated for the sync license – namely, license fee, media, term, and territory. In fact, many times producers may find that a record label will simply request the same terms agreed by the publisher of the musical composition embodied on the master. This is usually expressed on a response

to a quote letter as "MFN with publishing." The MFN could be applicable to select terms (e.g., the license fee or the grant of rights only), or to all terms.

This practice highlights the fact that most production companies opt to "clear" the song first (i.e., obtain the sync license prior to negotiating with the owner of the master). It makes sense to approach the music publishers for permission first because it would do little good to obtain the rights to use a particular master recording if the producers are unable to secure the rights to use the song that is embodied in that recording. Further, once a producer gets permission to use the musical composition, unless there's a restriction in the sync license that it is contingent on a particular master recording being used in the production, the producer may have the option to use any one of a number of various existing recordings, or even to commission the recording of a "cover" version.

On the other hand, if it is critical to the producers to have a "hit" recording licensed for the production, then it might make sense to start with the master use negotiation. The more lead time you can give for this process, the better. Record labels are not typically known to act swiftly, and artist approvals that may be required under the recording artist agreements could also be a drag on the process. Generally speaking, producers should be prepared to pay bigger fees for well-known recordings and make sure that their music budgets are structured accordingly. Producers are also well-advised to try to carve out the fees payable for hit songs and recordings from any MFN clauses that may otherwise apply across the music in the production, although it may not be agreed to by the other parties.

II. USING NEW MUSIC: COMPOSER AGREEMENTS

The agreement between an audio-visual production company and a composer sets out the basic relationship, duties and obligations of each party. Similar to a songwriter/publisher agreement, but with some key differences (as discussed below), it assigns complete ownership and control of the music created to the producer, subject to the composer sharing in the royalties earned from exploitation of the music. These royalties would come from the music used within the context of the production and by exploitation of the music by the producer licensing it to others.

Basic Terms

The services to be provided by the composer should be spelled out completely. In some cases, the composer will only create the music for the production and leave it to others to orchestrate, conduct, produce and record the music. Usually, however, the composer will perform all of these functions, under the direction of and in consultation with the producer. Included in these services may be producing the soundtrack album from a motion picture.

As music is usually done in post-production, the composer's services generally begin after the principal photography is complete unless there are scenes in the production where the music is an integral part, such as a concert or nightclub scene where singers or musicians are on camera. As such, the term can usually be clearly defined from the date of "spotting" the picture (reviewing the production with the producer and director to determine where and what kind of music will be used) until the music is dubbed in to the final edited version. In cases where music must be pre-recorded for use in the film, the term may be designated to cover both situations.

Compensation for a composer is determined by the budget of the film and the composer's stature in the industry. Fees range from zero to $1,000,000.00, depending on the situation. This is merely a creative fee and does not cover the costs of recording, such as studio time, engineers and mixers, rental of recording equipment and recording media. The costs of third party musicians, orchestrators, instrument cartage and copyists as well as studio time and engineers are paid by the producer. Payments to the composer are usually staggered and triggered by certain events in the composing and recording process taking place.

Sometimes, however, a composer will be asked to deliver a "package deal", where the composer assumes all responsibility for payments to musicians, copyists, orchestrators, studio time, instrument cartage and rentals and recording media. Any overages are the responsibility of the composer and any money not spent is their compensation. This is more common with electronic scores consisting primarily of synthesizers, since many composers have their own equipment and recording facilities.

If the composer is required by the producer to travel outside their local area in order to record the music, they are usually given no less than business class airfare, hotel and ground transportation and a weekly per diem to cover their expenses. Payment for travel days, "off" days and overtime are usually the subject of negotiation.

Whatever the nature of compensation, the composer's fees include any payments they might receive as a result of their services being under the

jurisdiction of the American Federation of Musicians (AFM). Upon completion of the composer's duties, the producer's only responsibility is to make the appropriate payments. He is under no obligation to actually utilize the music in the production. More than one music score has been dumped by the producer and a new one created instead.

Perhaps the most important part of the typical composer agreement is the section whereby the parties agree that the music created is deemed to be a "work made for hire". Section 101 of the Copyright Act of 1976 (17 U.S.C. ' 101) defines a "work made for hire" as:

(1) a work prepared by an employee within the scope of his or her employment; or

(2) a work specially ordered or commission for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work....if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.

This gives the producer complete control and ownership of the music and recordings created and all associated elements, such as musical scores, instrumental parts, outtakes, etc. This allows the producer to use the music in any way he sees fit, including exploiting the music in the production in any and all media now known or hereafter devised, including trailers, advertisements and other types of promotions. It also eliminates the reversion of any ownership rights to the composer, as might be the situation in the case of a typical songwriter agreement. In addition, the producer may employ others to change, modify or re-write the music to meet his needs in the event that the composer fails to do so. In many cases, the producer will require language allowing it to use the music in prequels, sequels, television programs based upon the film or in any other production produced by this producer at no additional fee for the composer.

The producer has all the powers of a music publisher, such as licensing of the music to third parties and collecting most types of royalties. He may also assign his rights to an actual music publishing company to administer, subject to the composer receiving their share of royalties.

There may be occasions, however, where the producer will allow the composer to keep all or part of the publishing of the music. This is usually done on a low budget project in lieu of compensation to the composer. This allows the composer to receive all or part of the publisher's share of royalties from all sources and to exploit the music in other ways. In cases where the composer retains one hundred percent (100%) of the copyright in the music, the agreement may be in the form of a broadly worded license from composer to producer, giving the producer the right to use the music in the film in any and all media, now known or hereafter devised, including all promotional aspects of the film. In this situation, however, the producer may not use the music for any other project.

Certain restrictions may be placed on the future use of the music so as not to compete with the producer's film. Irrespective, however, the composer is entitled to collect the "composer's share" of public performance royalties from their performing rights organizations (ASCAP, BMI or SESAC) directly, without any interference by the producer. Please note that the right of the composer to collect from their PRO is by custom and practice and must be stated in the contract, as it is not a right guaranteed by copyright, as there is no mention of a composer’s share of royalties in The Copyright Act.

If a soundtrack album from the film is released, the composer would normally be entitled to royalties for the use of their music or their services in connection with creating the music. If his underscore is included, the composer is considered the artist and record producer and would receive a royalty based upon the retail sales price of the album as well as mechanical royalties from the publisher. If there is another artist on a track produced by the composer, only a record producer royalty would be payable.

The composer's soundtrack royalties would be subject to the same terms and deductions that the producer receives from the record company. In addition, no royalties would be payable to the composer until a negotiated portion of the recording costs and "conversion" costs are recouped. Conversion costs are those incurred in transforming the music recorded for the production into a format suitable for release on the soundtrack album. This usually involves editing, re-mixing, any studio costs for each and any additional talent payments.

The composer must warrant that the music created for the film is original and indemnify the producer against any costs incurred by the use of the music, including any claims based upon a breach by the composer of these warranties. See the section below for a more detailed discussion on warranties and indemnification.

If the composer has a "loanout company", i.e., a composer-owned corporation, that employs them for these types of services, the agreement is actually between the producer and the lending company. As such, it is important to have a letter of inducement directly from the composer to the producer. This letter states that the composer agrees to abide by all conditions of the composer agreement, will look solely to the lender for compensation and that if the lender should cease to exist, the composer will become personally responsible for all obligations.

The agreement also includes a provision that, in the event of a breach by the producer, the composer's remedies are limited to damages at law and not equitable relief in the form of an injunction inhibiting or preventing the exhibition or distribution of the project. This clause is crucial because it would disastrous to the producer for a composer paid $200,000.00 to be able to enjoin the release of a $50,000,000.00 movie.

The Certificate of Authorship reiterates the "work made for hire" language and also waives all moral rights.

Lastly, there should be a schedule of royalties to be paid to the composer in the event that the music is exploited by licensing its use to a third party. These royalty provisions are similar in nature to those between a songwriter and a music publisher and define the various types of exploitation and the composer's share of each source of income. Since the producer/publisher collects all license fees and royalties (except the composer's share of public performance royalties, which are paid directly to the composer by their performing rights society), there is also an accounting provision that states how these royalties are to be paid and an audit provision on the composer's behalf.

Composer agreements can range from 4 to 20 pages, but, for the protection of both parties, all of them should contain the basic terms listed above. As these are legally binding agreements, the parties are encouraged to engage competent legal counsel before entering into this type of agreement.

Warranties and Indemnification

One of the most glossed over, but legally important, clauses in a composer agreement for television or film is the Warranty and Indemnification clause. In layman's terms, the most crucial parts of this clause are that this is a guarantee by the composer to the producer that the music is original and that the composer will compensate the producer against any claims that it isn't. It makes sense for the producer to get protection for any acts by the composer that result in claims against the producer but whether the composer should be liable if they don't actually do anything wrong is the focus of most negotiations regarding this clause.

While some agreements are better and some worse, a typical clause reads like this:

> "Composer hereby warrants, covenants and represents to Producer that it is the sole writer, creator and composer of the Score submitted to Producer hereunder, that the Score is original and does not (in whole or in part) infringe upon the copyrights, proprietary rights or any other rights of any third party or entity; that Composer has the full right, power and authority to enter into this Agreement and shall at all times have the full right, power and authority to transfer to Producer all rights to the Score, free and clear of any claim, lien or encumbrance by any third party; that Composer knows of no adverse claim or litigation by any third party; and that Composer has not made and will not make any use (or allow any use) of the Score which violate the terms of this Agreement or infringes upon Producer's exclusive rights to exploit the Score. Composer agrees to hold Producer (and its parent, subsidiary and/or affiliated companies) harmless from all liability for any breach or alleged breach of the representations and warranties herein and to fully indemnify Producer, its shareholders, officers, directors and employees and its parent subsidiary and/or affiliated companies, successors and licensees and assignees, from any and all losses, penalties, damages and/or expense, including attorney's fees, incurred as a result thereof."

While this boilerplate language taken as a whole can be quite complicated, when broken down, it clearly states what the responsibilities of the composer are to the producer and how the composer is financially responsible in the event of certain types of problems. Let's look at this clause phrase by phrase:

"Composer hereby warrants, covenants and represents to Producer" – this sets out the basic

guarantees from Composer to Producer of all that follows in this paragraph;

"that it is the sole writer, creator and composer of the Score submitted to Producer hereunder" – the Producer is hiring a particular composer and wants to make sure that the person hired is the person actually writing the Score. If there is more than one composer that is a formal party to the agreement, they are listed at the top of the agreement with the language "Party A and Party B, (hereafter jointly known as 'Composer')". Although, in reality, the composer may hire others (credited or uncredited) to assist them in the writing, this makes the composer responsible for the actions of others under his direction. Often, if a composer does hire others, having the other composers sign a Certificate of Authorship will usually comply with this clause;

"that the Score is original and does not (in whole or in part) infringe upon the copyrights, proprietary rights or any other rights of any third party or entity;" – the desire of the producer to have an original score is based upon several things. First, one of the reasons for hiring a composer in the first place is to have a score that is original and unique to their film – that's why the composer gets the big bucks! Second, they want to be able to collect the revenue generated by the score. Third, and most important, they want to make sure that the music in their film is not already owned by some third party, which would require permission and a fee to that third party and would probably also include some restrictions on how the producer can use the music. Using music owned by third parties can not only be expensive, but using it without permission can cause the distribution or broadcast of the film to be stopped. Sometimes, a modification of this clause excludes from this representation music in the public domain and/or music specifically requested by the producer;

"that Composer has the full right, power and authority to enter into this Agreement" – this means that the composer has no other legal obligations (such as an exclusive publishing or recording agreement, where his services are already promised to another party) that would prevent him from performing the terms of the agreement;

"and shall at all times have the full right, power and authority to transfer to Producer all rights to the Score, free and clear of any claim, lien or encumbrance by any third party; that Composer knows of no adverse claim or litigation by any third party;" – since most scores are "works-made-for-hire" with the producer owning all rights to the music, the producer wants to make sure that he is actually getting all rights, without the possibility of any claims by an unknown third party. And, since most producers are not musicologists, it is the composer who is in the best position to know if any of the music delivered isn't original and would infringe on someone else's copyright;

"and that Composer has not made and will not make any use (or allow any use) of the Score which violate the terms of this Agreement, or infringes upon Producer's exclusive rights to exploit the Score." – since the producer will exclusively own the score (both compositions and recordings), they want to make sure that the composer has not granted any rights to any third parties in violation of this exclusive ownership;

"Composer agrees to hold Producer (and its parent, subsidiary and/or affiliated companies) harmless" – the composer not only makes these guarantees to the producer who hired him, but to all their affiliated companies, such as the studio, network, other broadcasters, etc. who might be sued in the event of a problem. Remember, those whose pockets are deeper are more likely the target of any claims;

"from all liability for any breach or alleged breach of the representations and warranties herein" – this is one of the most dangerous clauses for composers. It not only makes the composer liable for an actual breach of the agreement but for an alleged breach, which means that even if the composer didn't do anything wrong to breach the agreement, in the event of a claim, the composer is still liable for the costs listed in the next phrase;

"and to fully indemnify Producer, its shareholders, officers, directors and employees and its parent subsidiary and/or affiliated companies, successors and licensees and assignees," – there are those deep pockets again, basically everyone in the potential chain of infringement;

"from any and all losses, penalties, damages and/or expense, including attorney's fees, incurred as a result thereof." – a composer could be liable for is a potentially long list of costs, most of which are out of his control.

The liability for an alleged breach is the main sticking point of these clauses. If, in fact, a composer breaches his warranty of originality, he should be responsible for the consequences. But what about if a

claim of infringement is made that is ultimately defeated? The composer has lived up to the terms of his warranty but still may be responsible for the costs of defending the claim.

In some agreements, the burden of defending the claim falls on the composer and makes him hire an attorney to argue on behalf of the producer's copyright at his own expense. Given the relative financial backing of the parties, this would seem to be inappropriate. Other clauses give the composer the opportunity (but not the obligation) to participate in the defense of the claim at his own expense.

When representing composers, an effort should be made to eliminate the "alleged breach" portion of the agreement, making the composer liable only if there is an actual breach of the agreement. Sometime, if this isn't possible, the composer can try to modify the agreement so that the composer is liable for costs incurred for any breach or claim of breach "adjudicated by a court of competent jurisdiction or settled with the composer's consent, not to unreasonably withheld." This allows the composer to have a say in whether a frivolous claim might be settled at a lesser cost than having to litigate it.

Each production company (and each attorney) has their own version of this clause but knowing the basic meaning of the language can assist both parties in signing an agreement that is fair to each side.

Common Misconceptions in Composer Agreements

In negotiating composer agreements for motion picture and television projects, there are several areas that are frequently misunderstood by both sides to the transaction. While there are many clauses in a composer agreement that can be interpreted incorrectly by someone not familiar with the language, the areas to be discussed in this article are more conceptual in nature.

The first of these areas is the legal and practical significance of a "work made for hire." According to Section 101 of The Copyright Act, a work made for hire is:

(1) a work prepared by an employee with the scope of his or her employment; or

(2) a work specially ordered or commissioned for use as a contribution to a collective work, as part of a motion picture or other audiovisual work... if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.

Note the language in section (2) that requires that there be something signed by the parties expressly stating the work made for hire status of the material. Some production companies issue a document solely for this purpose called a Certificate of Authorship, expressly stating that the material is created by the composer pursuant to an employment agreement and that the work is specially ordered by the producer. This language, when signed by the parties, meets the requirements of the statute, even without a long-form composer agreement.

Under this clause, the employer is technically considered the "author" for purposes of copyright. In most composer agreements, the Certificate of Authorship states exactly that, language that frequently upsets composers because they don't understand the legal significance of it. This does not mean to imply that the employer's name will be listed on the music cue sheet or in the credits of the film (which have nothing to do with ownership or legal authorship) but that, since copyright protection commences upon creation and fixing in a tangible form, the producer wants to be considered the originator of the work.

This is important to the producer because the form of authorship has bearing on the ownership of the copyright in terms of length of the protection granted and any potential terminations or reversions. For example, the general term of copyright in the United States for works created after 1978 is life of the author plus 70 years (thank you, Congress!). The author has the right to terminate an assignment of rights to a third party (such as a songwriter agreement with a publisher) between 35 and 40 years from creation and regain their rights in the work.

For works made for hire, however, the term is now 95 years from publication and there is **no right of termination**. The employer has the ownership rights for the full term of copyright.

The reason that the terms contained in the Certificate of Authorship are created as part of a separate document is that the copyright owner, when registering the copyright, has to indicate how they acquired ownership of the material. Rather than filing the entire composer agreement, they can merely attach the (usually) one page Certificate of Authorship as evidence.

Ownership by the producer does not mean, however, that there may not be continuing obligations to the composer. By industry custom and practice, the composer shares in any revenues earned from the music, even if created as a work made for hire. While there are a few companies who do not follow this custom due to a conscious business practice (a subject too expansive to discuss in this book), many producers mistakenly believe that, just because the music is a work made for hire, their ownership means that the composer is not entitled to any future revenue.

In conversations with these producers, the dialogue usually goes something like this:

SW: The contact needs to have a clause for standard composer royalties.
PROD: What royalties? We own the music.
SW: Yes, but the composer shares in the revenue generated by the music.
PROD: What revenue? We own the music.

This goes on for some time, until the producers can be convinced them that ownership means control over the use of the music, not an exclusion of royalties to the composer. Some producers, although familiar with the terms "ASCAP" and "BMI", don't really know what they are and are unaware of the various sources of income that the music in their programs can generate. All they seem to know is that they need to own the music.

Sometime composers want to believe that the music they create for a particular project can only be used in connection with that project. Generally speaking, however, the owners of the music can use it any way they choose without any further compensation to the composer. This includes the use of the music in other productions created by the producer. While the composer would still be entitled to the writer's share of any performance income generated from these other productions, there would generally not be any out-of-pocket payments from the producer to the composer. As with many other aspects of these agreements, this point is a negotiable one but an area in which most composers, unless they have some leverage, will not succeed.

The use of the words "piece of the publishing" is another widespread misconception. Sometimes, as part of the negotiation, especially for low-budget films where there is not much money (if any) for composing a score, the composer will ask for a "piece of the publishing." What does this really mean? To knowledgeable parties, this means that, in addition to the traditional writer's share of music publishing income, the composer will also share in the publisher's share of the income stream. This might means co-ownership of the material or merely being a participant in the publisher's royalty stream without any ownership. In either case, the composer will earn more than the usual 50% writer's share of income.

Unfortunately, often a producer will misinterpret this as the composer receiving a portion of any music publishing income, including the traditional 50% writer's share. So when a composer asks for 50% of the publishing, the producer may believe that this only represents the writer's share of any royalties. In fact, however, what is meant by the composer is that he gets the writer's share plus 50% of the publisher's share, for a total of 75% of the revenue.

I can't tell you how many times I have had to resolve this type of issue with parties who are unfamiliar with the terms of the industry. I have had producer clients who, in an effort to save on their legal bills, negotiate their own deals, giving the composer "50% of the publishing" and then spend up to three times as much in legal fees for me to "fix" the deal so that the composer receives only his writer's share. This applies to my composer clients as well, who believe they are getting more than what the producer is offering due to the misuse of industry terms.

Too often, there are no written agreements, or even deal memos, until the project is finished. It is at this time, unfortunately, that the parties find that there are substantial differences in their understandings of the deal in question. At this point, crucial negotiating leverage has been lost by both sides and business concerns might interfere with the relationship developed in the creative phase of the project.

Another area that requires clarity is the desires of the producer to have the composer re-score portions of the picture because of some creative or technical problem. Often, there will be language stating that the producer shall have the right to require the composer to make such changes, modifications or additions to the score. Obviously, this is open to potential abuse so there should be some language limiting the amount of re-scoring covered under the original or provisions specifying up how to compensate the composer for the additional work. This is especially important when the composer is working on a "package" deal, where he is responsible for all costs associated with production of the music.

While all of these issues allow for the Attorney's Full Employment Act, a basic understanding of the potential pitfalls can eliminate a host of problems for

both sides to the transaction. And, as an attorney, I am sure I am not alone when I say that I would rather be able to navigate around these land mines for my clients before they blow up in everyone's faces and turn a flourishing creative relationship into a bad working situation for all involved.