

## ENTERTAINMENT LAW

# Settling the Score

By Mark Litwak

**W**hen it comes time to place music on a soundtrack, the television producer or filmmaker has a choice: One can either obtain the right to use pre-existing music (e.g. a popular song), or commission an original musical score (i.e. hire a composer to create something new specifically for the movie). Of course, the filmmaker could combine aspects of both: Buy some songs and hire a composer to create some new music.

## Purchasing Pre-Existing Music

Music is a work of authorship protected under copyright law. Determining ownership in music can be complex since several people may share the copyright to a single piece of music. For example, the composer may own the copyright to the composition, the lyricist may own the copyright to the lyrics, the musicians may own the copyright to their performances and the record label may own the copyright to the recording. Moreover, rights may have been transferred from one party to another. Songwriters often enter into agreements with music publishers that vest ownership of their songs in the publisher. So a filmmaker must determine which parties have ownership interests in each song and then license the appropriate rights.

Low-budget filmmakers often run out of money by the time they reach post-production. One way to economize is by using songs by unknown songwriters who are available for little or no money. Fledgling songwriters often want to gain visibility and stature by having their music in a movie. The filmmaker should keep in mind that a song performed in a movie that is broadcast can generate significant royalties for the songwriter (through performing rights organizations like the American Society of Composers, Authors and Publishers and Broadcast Music Inc.). Thus, songwriters have a financial incentive to have their music on a soundtrack even if they are not directly compensated by the filmmaker.

Another way for a filmmaker to reduce music acquisition costs is to use music that is in the public domain. One must make sure that all rights are in the public domain. Let's say a low-budget filmmaker decides to put Beethoven's Fifth Symphony on his soundtrack. He goes to the record store and buys the Boston Symphony Pops recording of Beethoven's Fifth. While the composition is in the public domain, this particular recording may not be. The filmmaker is free to use Beethoven's composition, but he will have to find a recording in the public domain, or hire musicians and make his own recording.

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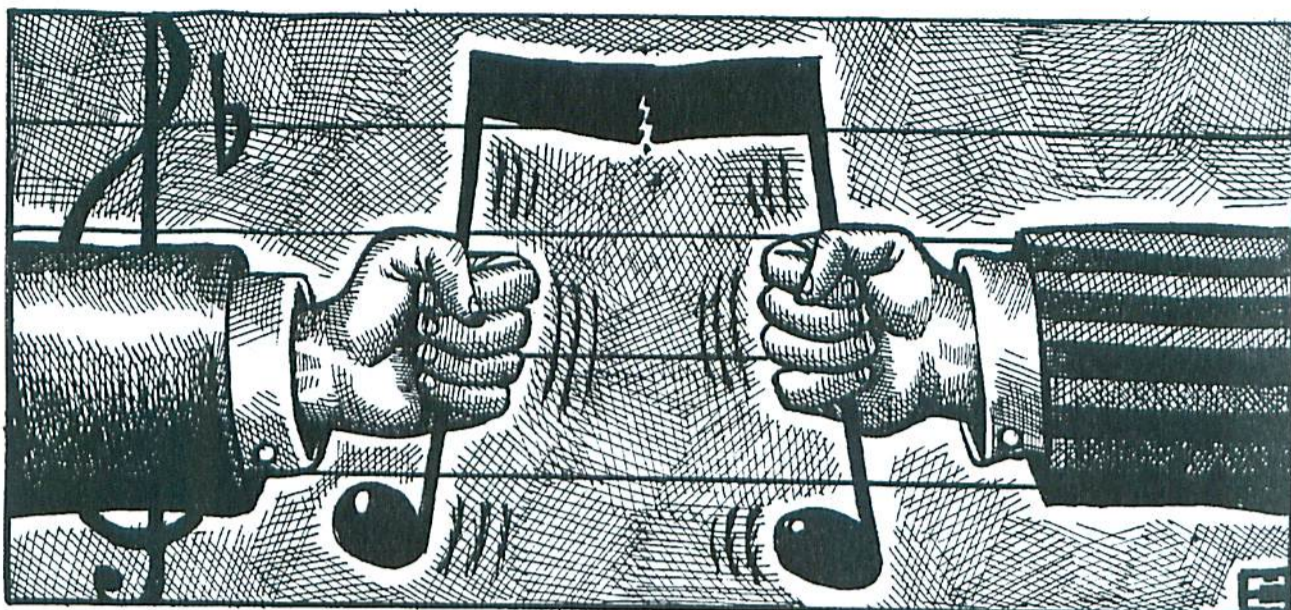
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To produce a new recording, a producer will have to strike a deal with a recording studio, musicians and/or vocalists. The American Federation of Musicians, AFTRA and SAG collective bargaining agreements will apply to films made by Guild signatories. A star artist may receive \$20,000 or more as a fee, as well as royalties based on the retail price of the soundtrack album. If the artist is exclusive to a record label, the label's permission will be needed.

If a filmmaker wants to place recorded pre-existing music that is not in the public domain on a soundtrack, a master use license will be sought from the record company that owns the recording. Fees range





from several hundred dollars for use of a short excerpt to tens of thousands of dollars for the work of a superstar. The artist may have approval rights over licensing his music to another, in which case the artist's permission must also be obtained. Re-use payments to musicians and performers will be required if the recording was made by union members.

### Commissioning an Original Score

Filmmakers need to proceed carefully in hiring composers, lyricists, musicians and songwriters to ensure that all necessary rights have been secured to use the music as a motion picture score. If a filmmaker does not secure these rights, a third party whose copyrightable work has been infringed could stop distribution of a motion picture. For example, if a filmmaker employs a songwriter to create a song, and, unknown to the filmmaker, the songwriter incorporates another copyrightable work, such as lyrics, and a license to use those lyrics was not obtained, the lyricist could obtain an injunction preventing distribution of the film until the offending lyrics are removed. Consequently, when a filmmaker contracts with a composer or songwriter for music, he or she must make sure that the composer/songwriter is not using any underlying work that the composer/songwriter doesn't have the right to use. Likewise, the filmmaker needs to determine if the songwriter is operating under a publishing or recording agreement that might vest ownership rights in a music publisher or record company. Under most exclusive songwriter agreements, the music publisher will own or co-own rights

to musical compositions written during the term of the agreement.

A composer is typically employed to write, arrange and orchestrate the theme music and dramatic underscoring in a motion picture, and to either conduct musicians in a recording session or create music on a synthesizer. A songwriter might be employed to write one or more original songs for a film. If either a composer or songwriter uses the services of lyricists or musicians, the composer/songwriter must have a written agreement signed by the lyricists/musicians vesting ownership of their work in the filmmaker.

The agreement between the parties will determine whether the music is created as a work-for-hire or whether the composer/songwriter will be the copyright owner of the work. Typically, the filmmaker will want the work to be a work-for-hire so that the film maker will own the copyright to the music. An alternative could be joint ownership of a musical score, a so-called participation agreement. Keep in mind that record company permission may also be needed if the filmmaker uses an artist under contract.

Under a "made-for-hire" agreement, the employer owns the copyright. The composer will be entitled to a fee for his work and royalties from non-movie uses of his music. A top songwriter may demand to share the copyright under a co-publishing agreement. The expenses of recording the soundtrack are borne by the producer.

For low-budget movies a composer may wear several hats. He may write, arrange, orchestrate, conduct and perform the music. A composer may even agree to produce and deliver a finished master recording at

his own expense. Some producers minimize costs by using non-union musicians or electronic synthesizers.

When a popular artist is commissioned to provide a song, a filmmaker will pay a creative fee for his services. The deal can be structured by providing the artist with a fund that includes payment for all writing and recording expenses. Thus the artist is paid a flat fee and is responsible for delivering the song and master and paying all recording expenses. Such a deal limits the film maker's liability for recording costs, and can provide greater compensation to the artist if expenses can be minimized.

Complications arise with popular songwriters because many have entered into agreements granting a publisher the exclusive right to the songwriter's services. Both the publisher and a studio/distributor, which may have its own music publishing arm, may want copyright ownership and management of a song written for a movie. The parties will need to reach an agreement, unless the artist has already fulfilled his songwriting contract.

Similarly, an artist may be exclusive to a record label for recordings for a number of albums. The recording company may demand a royalty from the filmmaker or studio in return for granting permission to use the artist on the soundtrack. Often the label and the artist share royalties.

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