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Article for Screenrights: Off the Air Using Music in Films

Ian McDonald, Australian Copyright Council, 14 August 2002

There are basically three ways in which a producer can obtain music for his or her film – commission a composer, reproduce commercial recordings or use library music.

If you are commissioning a composer, what are the main copyright issues that you should be aware of?

The first issue you need to be aware of is that the composer will not always be the right person to talk to insofar as all of the copyright issues are concerned. For example, if the composer has a publisher, You may need to talk some of the issues through with that publisher (generally, the publisher will control reproduction rights and the right to make arrangements of their composers work).

You then need to be aware of what rights you need to obtain or clear: you will need least the rights to synchronise the music into the soundtrack of the film and to make copies of the film. Both in Australia and in many other countries, the right to publicly play the music in the film (for example, in cinemas where the film is being shown) will generally be owned by APRA and its affiliated organisations in other countries, and not by the composer or publisher. APRA and its affiliated organisations also generally control the right to broadcast the music as part of the soundtrack on TV (including cable TV). Nonetheless, because this is not always the case, It is usual for film producers to secure these rights from the composer and publisher, subject to the rights of APRA and its affiliated organisations (for example, in the US, public performance of music in films within cinemas is not controlled by a collecting society).

(You should be aware, however, that composers can "opt-out" of, or "license back", any prior assignment of performance or broadcast/communication rights they may already have assigned to APRA. If you wanted a composer to do this, you would need specifically to negotiate this with the composer.)

Note also that the agreement will generally deal with whether the music can be used other than in the soundtrack to the film. For example, can the producer release trailers containing the music? What about CDs containing music from the soundtrack? Can the music be used by the producer in other films, such as sequels? Can the composer "recycle" the music into other pieces he or she may want to write? and so on.

You also need to be aware that copyright can be dealt with by way of assignment of the relevant rights (in which case you would become the new owner of all or part of the copyright), or for a licence (that is, a permission to use the work in particular ways). If a licence is to be negotiated, you should be aware that licences can be either exclusive or non-exclusive licence.

Further, note that copyright royalties will generally be discussed (that is, payments in addition to those monies you are paying the composer for writing the music and, in some cases, recording it). For example, if the relevant rights have been obtained, the agreement will deal with what royalties will be paid on sales of videos, DVDs and CDs.

Be aware that the way any of these issues are dealt with may differ in relation to music used in the film, and music which either is not used at all or which hits the cutting room floor prior to the film's release.

Also, be aware that if the composer will be responsible for recording the music, you may need to address all the above issues both in relation to the music itself and in relation to the copyright in the recording.

In addition to copyright issues, you also need to be aware that, whether or not a creator owns copyright, the composer has various "moral rights". (Generally, subject to various defences such as consent or "reasonableness", composers and other creators have the right to be attributed; the right to object to uses of their work which would prejudice their reputations; and the right not to have their work falsely attributed.) Moral rights issues which are likely to need to be addressed *with the composer* (rather than with his or her publisher) include:

- how the composer is going to be attributed (for example, in the credits, in trailers and elsewhere);
- whether or not the composer has any level of artistic control when the music is being synchronised; and
- whether or not the producer has the right to ask for or to make changes to the music.

As a general comment, be aware that a composer (or publisher) may not want to deal with his or her copyright in the same way as you want them to. In many cases, you may need to negotiate a number of issues, and reach an agreement which is not merely a complete assignment of all copyrights, together with full consents covering every possible moral rights abuse claim that might conceivably arise.

As with any agreement relating to copyright, it is best to have agreements documented in signed contracts, preferably drafted by a lawyer with the relevant expertise.

For further information on copyright and moral rights generally, see the Australian Copyright Council's information sheets, available from www.copyright.org.au. The Australian Screen Composers Guild publishes a standard agreement which it has approved (www.agsc.org.au); see also the chapter

on "Music in film" in Shane Simpson, *Music Business*, 2nd ed (Omnibus Press, Sydney, 2002).

If you are reproducing commercial recordings, what are the main copyright issues that arise?

There are generally two copyrights you need to consider - the copyright in the recording and the copyright in the music and any lyrics on the recording. There are therefore two copyright owners you will generally need to contact for permission.

Contact the relevant record company for permission to use the recording, and the relevant music publisher for permission to use the music and any associated lyrics.

What is library music and what kind of clearances do you need?

"Library music" (also referred to as "production music"), is a useful source of music for films. This is because the copyrights in the music and the recording are owned by the one entity – the company operating the "music library" – and because the music is specifically written and recorded to be licensed for audio and audio-visual productions, including films.

In Australia, most library music is licensed by AMCOS (administered by APRA). Rate cards for both Australia and New Zealand, together with "Client Registration" forms for production music are available on the APRA site at www.apra.com.au.