WHEN TWO WORLDS COLLIDE…MUSIC IN FILM
A User's Guide for Film Producers

By David Steinberg

The independent film industry generally has little understanding of the music industry, and *visa versa*. This is a rather strange phenomenon considering that the two areas – film and music – are "married" to each other in virtually every project. Why this disconnect? Well…both industries are complicated and have a "language" all their own. It takes a lot of time and patience to gain a working knowledge of either business.

I've written this paper to give those working in the film industry a little education on music rights and how they work in the context of a film project. I'll be discussing composer agreements as well as licensing the use of pre-recorded songs. This is not meant to be an exhaustive list of the issues, nor is it the 'gospel' on the subject – it's meant to explain the somewhat complex world of music rights in a way that you will [hopefully] understand.

In Part "1" of this paper, I will deal with the general 'language' of the music industry and the licensing of pre-recorded music for film – sometimes referred to as "source cues" (e.g. Captain Beefheart's "*Her Eyes Are a Blue Million Miles*" in "*The Big Lebowski*"). This is to be distinguished from what I will primarily discuss in Part "2" of the paper – namely, original score compositions written and recorded by a film composer and commissioned by the producer for use in the film. Part "3" will be a short quiz. OK – here we go…

PART "1"

A. THE RECORDED MUSIC EQUATION

1) Musical Compositions AND Master Recordings = Music

Before we start learning about the basics of music rights, we must understand two essential concepts. Recorded music is comprised of two layers of copyright – a musical composition and a recording of that composition. Think of it this way – Lennon and McCartney wrote a musical composition entitled "*A Day in the Life*". Each of them contributed music and lyrics to the composition. Their co-written musical composition (credited to Lennon/McCartney as were so many others) was then recorded by Paul, John and the other guys in their group – George and Ringo. Therefore, two layers of copyrighted subject matter were created. A **musical composition** and a **master recording** of a musical composition. In many cases, these two copyrights are owned by different entities. For instance, the musical composition may be owned and controlled by a music publisher and the master recording may be owned and controlled by a record company.

You could record a version of "*A Day in the Life*" – it would be *your* master recording of a Lennon/McCartney musical composition (probably not a very good one…).

If you still don't get it – try thinking about it by using a film analogy…A musical composition is akin to a screenplay; A master recording is akin to a finished film. A screenplay can be written without a feature film based on the screenplay ever being produced (*boy…ain't that the truth?*). Similarly, a musical composition can be written without there ever being a master recording of that composition produced (e.g. *a crappy song that you wrote in high school that was never recorded*). A master recording of a song always involves the recording of a musical composition – just like a feature film is always based on a screenplay. Got it?

Musical composition = screenplay.

Master recording = finished film.

For ease of reference, here's a quick and easy chart to help you remember the difference between a musical composition and master composition…

MUSICAL COMPOSITION	MASTER RECORDING
▪ Composers write a **musical composition** (and may have assigned their rights in the composition to a publisher) ▪ Composers and/or Music Publishers own and control musical compositions	▪ Musicians perform on a **recorded version of the musical composition** (and may have assigned their rights in the master recordings to a record company) ▪ Recording artists and/or Record Companies own and control master recordings

B. WHAT RIGHTS DO YOU NEED?

1) Pre-recorded Music

If you were paying attention above, you now known that, when you hear recorded music in a film, you are hearing a **master recording** of a **musical composition.** Therefore, in order to have the rights necessary to use the music in the film, you need a license to use the musical composition (typically called a Synchronization or "Synch" License, because you are synchronizing the composition with visual images) and a license to use and also synchronize the master recording of the music composition (typically called a Master Use license). You need *two* licenses **– Synchronization** and **Master Use**.

Here's a little test for you: If you were producing a film that included a scene where a character was sitting in her car humming a song, what license(s) would you need?

Answer: You would only need a Synchronization License for use of the musical composition. However, if that character were humming along with a song playing on the radio in her car, you would need both a Synchronization License for use of the underlying musical composition and a Master Use License for use of the master recording of that musical composition.

For ease of reference, here's a quick and easy chart to help you remember the difference between a Synchronization License and a Master Use License…

SYNCHRONIZATION LICENSE	MASTER USE LICENSE
▪ License of the right to synchronize a **musical composition** with visual images (such as a film or television program)	▪ License of the right to use a **master recording** of a musical composition in synchronization with visual images (such as a film or television program)

2) Score compositions (a.k.a. "underscore"):

In the context of score composers, both synchronization and master recording issues are dealt with, but in a slightly different manner. In typical cases, the producer will actually take entire (or sometimes partial) ownership of the composer's publishing rights in the score…That obviously takes care of the Synchronization License. The producer will also typically take complete ownership of the master recording of the score…That obviously takes care of any issues related to the master recording. When you own both the publishing rights and the master recording, you don't need a license, do you?

At this point, you're probably a bit confused about my use of the term "***publishing***". Don't worry – I'm going to explain publishing rights a little later on. In the meantime, just make note of the fact that "publishing" is a music industry term used to describe who owns, controls and administers the copyright in a musical composition. In other words, the publisher controls how and when the musical composition can be exploited – and, most importantly – controls the money generated by the use of the musical composition (more about the money later as well…). Remember this: **Publishing has nothing to do with master recordings. Publishing is related to musical compositions**.

C. HOW DO YOU GET MASTER USE AND SYNCHRONIZATION LICENSES FOR PRE-RECORDED MUSIC?

1) Who issues these Licenses?

Synchronization Licenses are issued by the entity that owns the copyright to the underlying composition (normally a music publishing company or the composers themselves). However, in certain cases, Synchronization Licenses may be obtained through the Harry Fox Agency in the United States or the CMRRA (Canadian Mechanical Rights Reproduction Agency) in Canada. These are non-exclusive music licensing agencies that represent music publishers.

Master Use Licenses are issued by the entity that owns the master recording (normally a record company).

For ease of reference, here's a quick and easy chart to help you remember where and how to obtain a Synchronization License and a Master Use License…

WHO GRANTS THE SYNCHRONIZATION LICENSE?	WHO GRANTS THE MASTER USE LICENSE?
▪ License is granted by the **publisher** of the musical composition or other owner thereof (e.g. the composer herself) ▪ Remember, a licensing agency such as the Harry Fox Agency or the CMRRA *may* have the non-exclusive right to issue the license on behalf of the publisher or owner	▪ License is granted by the **record company** that owns or controls the master recording or other owner thereof (e.g. the recording artist himself)

2) How much will it cost?

The cost of licenses is dictated by "market value" and the particular circumstances that apply to the use of the song. The price will be determined by the popularity of song and/or the recording artist, the nature of the use (e.g. background or featured, duration, territory, period of license, media), the budget of the production, the type of production (studio, independent, documentary, short, student), etc. For a major studio picture, it would not be uncommon to find synchronization fees charged by publishers to be in the range of $15,000 to over $50,000. The fees charged by record companies for master recordings to be used in a major studio picture will also be in this range. Fact is – major studio budgets can absorb these costs, but what about independent producers? Well – in many cases, the prices will be more reasonable for independent films with smaller budgets, but – even then – it can still cost prohibitive for many producers.

Major publishers and record companies will hate this…but there are a lot of great songs out there that a producer can get for free or very little money. A few years ago, I had a producer client that paid $10,000 for the master use and synch rights for one song. The problem was he

then needed a lot of other songs for the episodes of his television series. I advised him that we could get all kinds of good music for next to nothing provided that he didn't care whether a "famous" artist recorded the songs. He didn't. So…he elected to buy the one song for $10,000 to get the name value of having a song by [*insert name of reasonably big rock star here*]. Then he and I managed to get together approximately 15 more songs for a grand total price of $3,750 (or $250 per track). These were great songs by various recording artists – some of who once had major record deals, but who didn't at the time. They were happy to license the tracks, get the exposure and – most importantly – collect the public performance royalties from ASCAP, SOCAN, etc. generated by the worldwide exploitation of the series on free television. Also, as an added bonus, the licensors were incredibly easy to deal with – no waiting for months for licenses to get negotiated and signed, no big legal fees required to deal with the agreements and no limitations or unacceptable terms incorporated in the licenses. Clean, cheap and simple! I love when that happens!

So, where does one access this treasure trove of cheaper, yet cool stuff? Simple: Speak with friends and family about recording artists and songwriters they may know. Check out unsigned bands (on web-sites, etc.), smaller record companies and publishers. You will be surprised at what's out there.

3) <u>Are Synch and Master Use Licenses difficult to obtain?</u>

There are two answers to this question.

If you are an independent producer attempting to license songs from major publishers and recording companies, it can at times be difficult. The application for the licenses and negotiation (*if you can even call it that*) and settlement of license agreements can drag on. This can be frustrating and expensive (e.g. legal fees). The bottom line is that, the more you know about the process and what rights you require, the easier it will be. I certainly don't want to discourage you from pursuing licenses for use of the material owned by major companies. However, it may be best to retain the services of someone who understands music licensing to assist you in your pursuit of proper licenses. A music supervisor, perhaps? More about them later…

If, on the other hand, you are licensing songs from independent artists who are not affiliated with major publishers and record companies, it can be a lot easier – especially if the licensor (e.g. artist, independent record label) is somewhat sophisticated in the area. If you have an attorney that keeps the license agreements relatively simple and fair, the licensor may sign them without much hassle. That will give you the chance to worry about other - possibly more important - things on your production.

4) <u>What should I watch out for in Synch and Master Use Licenses?</u>

If you are licensing music from a company that presents you with its own standard form agreement, there may be certain controversial provisions that you will need to watch out for. Among them are:

(a) **Limited Media and Internet Rights**

Be very careful about the media for which you are obtaining the licenses. Ideally, rights for *all* media should be obtained for the majority of projects. Sure – you may not end up exploiting the project in *all* media, but you should have the right to do so if necessary. Besides, your distributor will probably require this. You don't want to get caught with your pants down when your distributor discovers that it can't license "video-on-demand" rights because the only television rights you have cleared are for "free TV". Believe me – you don't want to have to *go back* to the licensor for *more* rights down the road. Get them now!

If you have an agreement with a distributor, sales agent or broadcaster, you may be required to deliver the production for exploitation in many (if not all) media, including the Internet. Without getting into all of the issues regarding Internet distribution and exploitation (e.g. territory, required technology, "freezing" rights, etc.), it is common for distributors to demand the inclusion of Internet rights in their agreements. Here's a surprise… publishers and record companies are extremely wary of the Internet. Seeing as the Internet has been a stake in the heart of their industry, it's sort of understandable. Regardless, for producers that need these rights covered in their music licensing agreements, it presents a difficulty when music licensors refuse to include such rights in their licenses – or offer these rights on an extremely limited basis, insist upon additional fees, etc. If this happens, try obtaining the Internet rights on a limited basis for "linear" broadcast or exhibition of the film and in on-line advertisements. Don't even mention "*downloading*" unless you have a mean streak…

(b) **Term of Rights**

This one kills me…A license for a limited period of time (e.g. 5 years) can potentially be useless to you - unless you plan to stop exploiting your film after 5 years, or are willing to go through the process of renewing the licenses following this period. Film distributors will generally require that music rights are cleared for the term of their agreements with the producer. Get it over with – clear the rights now for the duration of copyright or "in perpetuity".

(c) **Sales and Mechanical Royalties**

Major record companies and publishers will often insist on additional royalties on top of the fixed license fee. Watch out for this. For example, royalties based on the number of DVD units sold can add up quickly if your film is successful. Sure, 5¢ per unit payable to both the publisher and record company doesn't sound too bad …unless your distributor sells 100,000 units, in which case, you'll be in the hook for $10,000 in royalty payments.

(d) **Termination and Other 'Nasty' Rights**

The record company or publisher may wish to retain the right to terminate your license if you breach the license agreement. This could complicate not only your ability to continue exploiting your film, but will cause severe problems with your distributors and broadcasters. I'm certainly not expecting that any of you good corporate citizens would

ever breach your obligations under a license agreement (Heaven forefend!), but if it does happen, you would much rather have an agreement that gives the licensor the limited right to make a claim for monetary damages and not affect your overall exploitation of the film (e.g. the right to apply to the court for an injunction).

D. NO PROBLEM! I'LL GET A MUSIC SUPERVISOR!

Many producers retain the services of music supervisors. Why? Because they serve a number of valuable functions. They can be extremely helpful on a creative basis, identifying and placing interesting music in your film. Some of them can also provide immense assistance in obtaining and coordinating your music clearances. As in the case of any professional, some provide good service; others do not. Part of the problem is undefined expectations.

What is it that you want from your music supervisor? Possibly all you want is assistance tracking down music and connecting with record companies and publishers. Maybe you have an attorney that will deal with the actual licensing agreements. Alternatively, maybe you are looking for someone who will act as a 'one-stop shop' for music and all the clearances that go with it. Whatever the case may be, make sure that you clearly define the scope of the services.

Clearing music – or more specifically, obtaining the **proper** form of Master Use and Synchronization Licenses is a very tricky business that requires a lot of business and legal expertise. If you expect that your supervisor will secure proper licenses, make sure that she has the requisite experience and business/legal knowledge to perform this task in the context of a film deal. Otherwise, you will have a pile of useless 'quote letters', deficient licenses or no paperwork at all to present to your distributors, etc. A disaster! Then, to make matters worse, you will have to bring in a legal advisor to fix the mess – a time-consuming and expensive venture!

PART "2"

Now that we've covered the licensing of pre-recorded music and some of the "language" of the industry, I'm going to get into original score compositions – music commissioned and written especially for your film. In these cases, it is likely that you will be dealing with the **ownership** of the publishing rights - unlike "source cues", where you are merely **licensing** the use of the music; not owing it. Therefore, I thought that we should begin this section with an explanation of "publishing".

A. WHAT IS "PUBLISHING"?

1) Why should you want publishing?

Not to be too repetitive, but again, when speaking of "*publishing*", we are referring to the ownership, exploitation and administration of copyrights in and to **musical compositions** – not **master recordings** thereof. In this section, we will be discussing publishing in the context of score compositions because, aside from some highly unique situation, you will **not** be able to

obtain the publishing rights for songs licensed from record companies and publishers on a *non-exclusive* basis (as described above).

In the context of a film deal, the producer generally wants to own and control both the musical compositions and master recordings written and recorded by the score composer.

This means that the producer becomes the owner of the master recordings (as would a record company in the examples noted above) *and* the music publisher.
Why do producers want to own the publishing on the score music commissioned for their films? Well, firstly to have exclusivity and control over the musical compositions. In other words, the producer normally doesn't want to hear the music in her film later used in another film or television commercial. The producer ideally wants the music to be unique to her film. Therefore, having the right to decide how and when the compositions will be exploited is an important issue. Secondly, the producer wants to collect and administer the publishing revenues generated through the exploitation of the musical compositions (generally with the exception of the so-called "*writer's share*" of public performance royalties as further described below).

2) Sources of Revenue for the exploitation of copyrights in musical compositions

Copyrights in musical compositions are exploited in a number of ways. The principal areas of exploitation are: (a) public performance; (b) licensing for synchronization with motion pictures (as described above); (c) mechanical licensing to record manufacturers; and (d) sale of print copies of musical compositions (e.g. piano music). From the perspective of a film producer, the most important of these is generally public performance rights. Why? Because when musical compositions are performed in public, including on radio, television, in movie theatres and other public venues, public performance royalties are payable to composers and music publishers by the performing rights societies with which they are affiliated.

While I will be briefly discussing mechanical licensing in the soundtrack album section, both composers and publishers operating in the context of a feature film or television production are generally more concerned with public performance royalties than any other sources of publishing revenue because they are more likely to significantly profit from such royalties.

In the United States, the principal performing rights societies are the American Society of Composers, Authors and Music Publishers ("ASCAP") and Broadcast Music, Inc. ("BMI"). In Canada, it's the Society of Composers, Authors and Music Publishers of Canada ("SOCAN"). Writers and publishers become signatory to such societies and assign to them the **exclusive** right to collect and administer public performance royalties on their behalf. The musical compositions are registered with the societies by, among other things, identifying the percentages payable to the writers and publishers of the compositions. Generally, in respect of "published" works, 50% of the royalties are payable to directly to the writers of the composition (in their percentages of authorship) and 50% is payable to the publisher (in their percentages of ownership).

The methodology used by public performing rights societies in respect of the collection of public performance royalties from the various users of registered compositions is beyond the scope of this paper. Needless to say, it is a somewhat complex system of payment tariffs, calculations etc. that ultimately result in the society disbursing public performance royalties to its members in proportions to which they are entitled (depending on the level and nature of exploitation of the members' compositions).

THIS IS IMPORTANT! **You will not receive public performance royalties as a publisher unless you are a member of a performing rights society and have properly registered your compositions (and music cue sheets where appropriate)**. Otherwise, you will not receive a dime! Many people believe that, in addition to proper registration, it is a good idea to retain the services of a sub-publisher or other music publishing entity to assist you in monitoring your public performance royalties on a worldwide basis to ensure that they are being collected and distributed properly.

3) What is "Co-Publishing"?

Over the years, many producers have told me that they wish to "co-own" the publishing, or do a "co-publishing deal" with their score composer. Sounds fair, right? Maybe – but, I am always surprised by the number of producers that don't ultimately know what this means! When two sophisticated music industry types discuss a "co-publishing" deal, they generally know what they mean, given the particular context in which they are having the conversation. If film producers plan to deal with music rights, they too much appreciate the meaning of a "co-publishing" deal.

Many producers believe that "co-publishing" means that the composer will receive his writer's share of public performance royalties from his performing rights society (50% of the total royalties) while the producer (as publisher) will receive the publisher's share of such royalties (the other 50% of the total royalties). **This is not co-publishing!** This split of public performance royalties will occur anyway (unless some nasty contractual arrangements exist regarding the writer's share of royalties – that's a topic for another day).

Remember, owing the publishing rights entitles you to control and administer the musical composition and the revenues generated by its exploitation. However, when publishers and composers sign on with a performing rights society, they assign the exclusive right to collect and administer public performance rights. Therefore, the administration of these royalties by the publisher (e.g. paying some of the publisher's share to third parties) really occurs after the performing rights society has distributed to the revenue to the publisher.

This may help you understand …"co-publishing" can mean one of two things when being discussed in the context of an independent film project:

a) The producer (as publisher) will own, control and administer the musical compositions and then share the net revenues collected with the composer in negotiated percentages (normally 50/50 when we speak of "co-publishing). In this scenario, the composer would notionally receive 75% of the public performance royalties - 50% payable to him as a writer, plus 50% of the publisher's 50% share. However, he would have to wait for the producer/publisher to account to him and pay the 50% of the publisher's share. In other words, it will go directly into the hands of the publisher first, and then be distributed as a 50% net profit in the publishing. Co-Publishing. Get it?

b) The producer (as publisher) will own, control and administer 50% of the musical compositions. The composer will own, control and administer the other 50% of the musical compositions. In effect, this amounts to co-ownership of the compositions. This means that the consent of **both** co-publishers is required for exploitation of the compositions. It also means that both co-publishers directly receive their publisher's

share of public performance royalties from the performing rights society. In other words, the composer (or his publishing designee) will actually be registered as the 50% co-publisher of the compositions. Therefore, the composer would still receive 75% of the total (as described in (a) above), but he would receive the percentage directly from the performing rights society without having the money pass through the hands of the publisher first. Composers obviously like this alternative more than the one presented in paragraph (a) above.

B. EXPLOITATION OF THE MASTER "SCORE" RECORDINGS

1) Soundtrack Album Rights

As I stated earlier, film producers will normally take ownership of the master recordings of score compositions. As the owner of the masters, the producer will typically have the right to exploit them on soundtrack albums.

In a typical case scenario, the producer will agree to pay to the composer a sales royalty based on the sale of the masters (e.g. on compact discs). These sales royalties are generally paid as a percentage of, for example, the suggested retail price of records sold (subject to a number of terms and conditions). The percentage of the royalty is determined by, among other things, the status and bargaining power of the composer.

Record companies and other manufacturers of mechanical reproductions of musical compositions (e.g. on compact discs) require a license from the copyright owner (e.g. the writer or publisher if a published work) to mechanically reproduce the musical compositions. In other words, a record company must normally pay a mechanical royalty to the publishers of the musical works embodied on the records manufactured and sold by the record company. If the producer owns the master recordings and the publishing rights, it will, depending on the terms of its deal with the record company, receive both **sales royalties** (as the licensor of the masters) and **mechanical royalties** (as the publisher of the compositions embodied on the masters).

Mechanical royalty rates are established by statute in the United States (a "*statutory rate*"). In Canada, they are established through an industry negotiation conducted by the CMRRA (on behalf of writers and publishers) and Canadian Recording Industry Association (on behalf of record companies). In the United States, for the period from January 1, 2004 to December 31, 2005 the statutory mechanical royalty rate is 8.5¢ for a composition with a duration of 5 minutes or less (adding 1.65¢ per minute or fraction thereof over 5 minutes). In Canada, the current rate for a composition with a duration of 5 minutes or less is 7.7¢ (adding 1.54¢ for each additional minute over 5 minutes). Remember, these rates are calculated on a per composition basis. Therefore, a soundtrack album in the United States containing 10 compositions (each with a running time of 5 minutes or less) will generate a total of 85¢ in mechanical royalties payable to the publisher of the compositions. Record companies will often attempt to reduce the amount of mechanical royalties payable depending on the circumstances. However, any such attempt is normally the subject of significant negotiation.

PART "3"

Now, let's see how much you absorbed. Try this little quiz:

Facts

You have commissioned a score composer to write original music for your film. Pursuant to your agreement with the composer, you will own the publishing in the score compositions and the master recordings. However, you have agreed to share the net proceeds derived from publishing and any exploitation of the masters on a 50/50 basis with the composer.

You also wish to use various hit songs from the 1970's in your film and on your soundtrack album.

A record company has approached you about releasing a soundtrack album containing both score compositions and songs from your film.

Questions

1) **Must you become a member of a performing rights society (such as ASCAP or SOCAN) in order to receive public performance royalties?**

Answer – Absolutely! The compositions must also be properly registered with the performing rights society, setting out the names of the composer(s) and publisher(s) and their respective percentages of ownership in the categories of authorship and publishing.

2) **If public performance royalties are generated by the exploitation of the score compositions in the film, how much of the total will the composer be entitled to?**

Answer – 75%. However, 25% of this amount will initially be collected and then administered by you (as publisher of the compositions). In other words, the composer will receive 100% of the so-called "writer's share" (representing 50% of the total) and 50% of the so-called "publisher's share" (representing 25% of the total) from you.

3) **Mechanical Licenses are generally available at established industry rates (e.g. currently 8.5¢ for a five minute composition in the United States). Are rates similarly established for Synchronization Licenses?**

Answer – No. The cost of a Synchronization License is negotiated by the publisher (possibly through a conduit such as the CMRRA in Canada), assuming that the applicable composition is even available for synchronization (…just try licensing a Lennon/McCartney composition for your low budget horror picture and see what happens!)

4) **What licenses must you obtain, and from whom, in order to use the hits songs from the 70's in your film?**

Answer – You will need a Synchronization License from the publisher (or copyright owner) of the musical composition embodied on the master recording; and you will need a Master Use License from the record company (or owner) of the master recording.

5) **If you have a scene in your film where an actor sings 10 seconds of a Barry Manilow song (Yikes!!), what license(s) to you need?**

Answer – Synchronization only. Remember, you only need a master use license if you're using a master recording of a composition. In this example, all you are using is the composition itself.

6) **If you have obtained a Synchronization License and Master Use License to use each of the hits songs from the 70's in your film, do you have all the rights necessary for you to license use of these songs to the soundtrack record company?**

Answer – No. You will need soundtrack album rights to either be included in your Master Use Licenses from the applicable record companies that own the masters for the songs, or obtain a separate agreement for such rights. You (or the soundtrack record company) will also need to obtain Mechanical Licenses from the applicable music publishers in order to make mechanical reproductions of the underlying compositions contained on the masters (e.g. on compact discs).

7) **How will you make money from the sales of the soundtrack album?**

Answer – Depending on the specific terms of your deal, you should be receiving a sales royalty from the soundtrack record company and, as publisher of the score compositions, mechanical royalties as well for the use of those compositions.

8) **Will you have to share your soundtrack royalty money with any other parties?**

Answer – Yes. You will be sharing all of the sales royalties and mechanical royalties with your composer on a 50/50 basis. Pay up (on no more than a semi-annually of course)! You will also likely have to share your sales royalties with the record companies that own the master recordings of any of those hits songs from the 70's that are embodied on the soundtrack album.

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