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# film music

# some legal notes

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by richard hahn and  
howard knopf

**Putting music to film can be a complicated business. Here, Richard Hahn and Howard Knopf summarize some of the legal technicalities — a 'must' for any filmmaker's file.**

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The production output of feature films in Canada has been estimated at \$150 million for 1979. This compares to approximately \$80 million for 1978. Canadian film producers suddenly have found themselves producing significant numbers of feature films for world markets. This rapid industry development has strained both creative and technical resources in Canada. Problems in the production of feature film music are therefore indicative of the Canadian film industry in general.

In Canada, copyright subsists in four distinct types of "works"; namely, literary, artistic, musical and dramatic works. Copyright therefore subsists in the material reproduced in the film, that is, such things as the scenario, the book on which the scenario is based, and the music. Therefore, the film producer must acquire rights to each of the elements which comprise the film, including the music used in the film.

This article will touch on some of the legal aspects of film music production and exploitation. The complexities in dealing with film music illustrate the need to establish a sound relationship between the film composer and the film producer at an early stage in the production process. Many of the issues to be resolved in the relationship between the composer and the film producer are legal in nature and are the subject matter for contractual negotiations. Therefore, reference is often made to precedents of the United States film industry. While this may be initially helpful in defining the issues, it should be noted that the agreement between the composer and film producer must conform to the provisions of the Canadian Copyright Act, Revised Statutes of Canada, 1970, c.C-30 (the "Copyright Act") and to the provisions of copyright legislation applicable in each country in which the film music will be exploited. The differences between copyright legislation in the various countries must therefore be carefully considered.

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## Sources of Film Music

There are two basic sources of film music: music originally composed for film and music which existed prior to the production of the film. Each of these categories engenders distinct legal issues.

### Original Music

In this instance the producer engages the composer to create music for the film. The composer may also be engaged to create the arrangements of the music and additionally to produce the master recording of the film music. In some instances, each of these roles is performed by a different person.

### Pre-existing Music

The category of pre-existing music includes: previous recordings of music such as popular songs or symphonic works, rearrangements of such music which are re-recorded for the film. In the first instance, the producer secures permission to use both the music and recording of the music. In the second instance, only the right to use the music is required.

## Rights of Copyright in Film Music

The four rights of copyright relevant to film music are (a) synchronization, (b)

performance, (c) mechanical and (d) print. Only the first two of these are of major importance to film. The third is necessary if a soundtrack album is contemplated and the last is relevant when the music score achieves significant popularity.

#### **The Synchronization Right**

The synchronization right is the right to record and reproduce the music in synchronization with the film.

Sub-Section 3(1)(d) of the Copyright Act provides the sole right:

"In the case of a literary, dramatic or musical work, to make any record, perforated roll, cinematographic film or other contrivance by means of which the work may be mechanically performed or delivered . . . and to authorize any such acts as aforesaid."

With pre-existing music, the synchronization right is often owned by a music publisher. In Canada, many music publishers have appointed the Canadian Musical Reproduction Rights Agency ("CMRRA") as their agent to represent their interests. The CMRRA does not actually hold title to the music and does not control the performing rights in music in Canada. In the negotiation which takes place between the film producer and the

CMRRA, the terms are defined for the use of music including the nature and duration of the right, the fees or royalties to be paid and the countries and media in which this right will be used. It should be underlined that the producer must acquire the right for each country in which the film will be shown and in which music in copyright subsists. Where the CMRRA represents the copyright owner, the producer can deal with this one agency regardless of the intended geographical market for the film. If the CMRRA does not represent the copyright owner, the producer must seek out the owner to conclude the agreement.

For original music, this right forms part of the agreement between the composer and the film producer.

#### **The Performing Right**

Section 3 of the Copyright Act provides for the right to perform a work in public and to communicate it by radio communication. Performing rights in music are administered in Canada by the two performing rights societies, the Composers, Authors, Publishers Association of Canada Limited ("CAPAC") and the Performing Rights Organization of Canada Limited ("PROCAN"), formerly BMI Canada Limited. The existence of

these societies is recognized by the Copyright Act and composers in Canada belong to one of the two societies. The society receives an assignment of the performing right from its Canadian composers for all of the music created by them throughout the duration of their agreement with the society. The performing right societies collect from the users of music including broadcasters, cabarets and theatres and distribute royalties to the composers whose works are performed after deductions of administrative expenses. Each of the two societies in

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*Editor's Note: This article has been prepared as a public service for information on a topic of general interest to the Canadian film industry. The reader is cautioned to seek the advice of the reader's solicitor concerning the applicability to the reader's activities of the principles discussed in the article.*

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Canada has agreements with foreign performing rights societies to collect royalties for the performance of music of Canadian composers.

Motion picture theatres in Canada are licensed by both CAPAC and PROCAN. In most other countries, theatres are licensed by the respective foreign societies: for example, SACEM, the French performing rights society; the performing rights society in Britain; GEMA in Germany; and SAIE in Italy.

Performing rights revenue is also derived from the television broadcast of a film and the performance of soundtrack

music on radio. A "cue sheet" identifies the music in a film and provides details to permit identification. It is circulated to users of the music and to the performing rights society in each country where the music will be performed. Film producers are the only source of some of the identification data and are the key link in the preparation of the cue sheet and the process of collection and allocation of performing rights royalties.

#### **The Action by the Film Exhibitors Against the Performing Rights Societies**

At the time of writing of this article,

litigation is pending in the Appeal Division of the Federal Court of Canada.

The applicants in the action, Curley Posen (a Canadian theatre owner) and the Motion Picture Theatres Association of Canada (MPTA which represents ninety per cent of all Canadian theatre owners and operators), have applied under Section 28 of the Federal Court Act for a judicial review of a decision of the Copyright Appeal Board. This decision recommended the approval by the Minister of Consumer and Corporate Affairs of the tariff of royalties of each of the Canadian performing rights societies for theatres. The MPTA had previously objected to the tariffs and the Copyright Appeal Board held hearings pursuant to the provisions of the Canadian Copyright Act. The Board heard the evidence of the societies and of the MPTA which objected to the tariff on the grounds that the societies do not have the legal right in Canada to collect such tariffs. Upon approval of the tariffs by the Minister of Consumer and Corporate Affairs, the MPTA then applied to have the decision of the Copyright Appeal Board reviewed by the Appeal Division of the Federal Court of Canada. The MPTA's main arguments may be briefly described as follows: (1) the performing rights societies have no rights in musical works in films, as the producer owns the copyright in the music when employing the composer on the basis of a "work for hire" arrangement; (2) the assignment of rights from composers to the performing rights societies does not include the assignment of the "dramatic component" in music, and music written for films becomes an "integral part of the film and loses its 'non-dramatic' qualities when performed in a film."

In presenting its evidence, the MPTA relied on the United States law related to film music. Reference was made to a decision of the United States courts, **Alden v Rochelle**, a decision which prevented the United States performing rights society, ASCAP, from enforcing its performing rights in United States motion picture theatres on the basis of United States anti-competition laws. In Canada, the Copyright Appeal Board considers the public interest in determining the level of tariffs or fees to be levied by each of the performing rights societies.

The performing rights societies in Canada argue that a decision such as **Alden v Rochelle** has no relevance in Canadian law. Each of the societies have presented a memorandum to the Court in which they argue that, in Canada, the reproduction of music in synchronization with the film has not extinguished the right of the composer to royalties for the

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performance of his music.

The application by the MPTA under Section 28 of the Federal Court Act has not yet been heard by the Court. Furthermore, it is not an appeal from a judgment of a court; rather, it is application for review of a decision of a tribunal, the Copyright Appeal Board to approve the amount of royalties which are to be paid by theatres to the societies.

The tariffs in dispute have been in effect in Canada for many years. At the present time CAPAC collects from theatres in Canada a royalty equal to ten cents per seat per annum for theatres of a seating capacity of 499 or less seats and PROCAN collects an annual fee of \$12.00 for equivalent theatres. This is to be contrasted with the significant theatre tariffs in Europe which equal a portion of box office revenues.

In the United States theatres do not pay a license fee for performing rights; therefore, the composers have negotiated with the film producers for synchronization fees for reproduction of film music in the United States which compensate the composer for the lack of such performance royalties.

### The Mechanical Right

Section 19 of the Copyright Act provides for a royalty of "two cents for each playing surface of each record" where film music is produced on phonograph records and pre-recorded tapes. In practice, the producer of the soundtrack LP pays a royalty to the owner of the mechanical right equal to two cents (\$0.02) per song per record sold. The CMRRA administers the mechanical rights in Canada as it is a form of a reproduction right. Ordinarily, a negotiation takes place between the film producer and the CMRRA. In the instance of an impasse, the compulsory provisions indicated above may be invoked. For example, in the United States, the statutory royalty for such use is generally equal to two and three quarter cents (\$0.0275) per song per record and in some countries, the royalty is based upon a percentage of sales.

### The Print Right

The consent of the copyright owner in the music is also required for a film producer to produce "sheet music." The market for music in this form has grown recently and is significant for successful films which include themes and featured performances of popular songs. Should the film producer wish to exploit this aspect of the promotion of the film, the print right must be acquired.

## The Agreement Between the Composer and the Film Producer

### Elements of Film Music Costs

When original music is to be created, the film producer negotiates with the composer or his representative. In determining the compensation to be paid for the creation of original film music, the reputation of the composer is significant. The scope of the work is also considered; that is whether the composer is simply to underscore the film or, in addition, to create themes and feature songs. The markets in which the film will be exhibited and whether a film is to be produced in foreign language versions are also relevant. Non-theatrical uses such as broadcasting and video discs are also considered. The production of an LP recording of the soundtrack involves additional considerations of mechanical royalties for the sale of the recording and the performing right royalties for the broadcast performance of the music.

Apart from expenditures for the creation and use of music in film, the film producer must also absorb the cost of arranging the music, the cost of production of the music including the costs of musicians, vocalists, recording studios and all technical support and materials.

Film producers sometimes resort to pre-recorded film music libraries which provide various types of music which can be edited to conform to the needs of the film producer. Criteria such as exclusivity of use of music and adaptability to the artistic requirements of the film must be considered in addition to the above elements.

## The Transfer of Copyright in Original Music

The Canadian Copyright Act is specific in requiring an assignment of copyright to be in writing. Assignment is the transfer of the ownership of copyright and is to be distributed from a license or permission to use the copyright.

The Canadian Copyright Act contains an exception to the general rule of assignments in writing. This exception is set out in sub-Section 12(3) of the Copyright Act, as follows:

"Where the author was in the employment of some other person under a contract of service or apprenticeship and the work was made in the course of his employment by that person, the person by whom the author was employed shall, in the absence of any agreement to the contrary, be the first owner of the copyright . . ."

The issue of "contracts of service" where "the work was made in the course of his employment" has been considered by the courts and it may be concluded from these decisions that the composer must be a *de facto* employee to vest rights of copyright in the film producer. In determining whether a "contract of service" exists, the courts will examine the relationship between the film producer and the composer including the services rendered, the relationship between the parties, the exercise of the person rendering the services, and the place where services are to be rendered. This position contrasts with that of the United States copyright laws which permit a transfer of copyright by an agreement for a "work for hire." In Canada, the composer must actually be an employee to lose his rights to ownership of his music. In the United States, by stating in a contract that a work



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is a "work for hire" a composer may lose rights in his music.

It should be noted that sub-Section 12(3) noted above is also an exception to the general rule of ownership of copyright set out in sub-Section 12(1) of the Copyright Act which states:

"12(1) Subject to this Act, the author of the work shall be the first owner of the copyright therein."

#### Other Considerations

Prior to finalizing the agreement with the composer, the film producer should perform a title search to determine the existence of prior claims to the music. This task is made difficult by the voluntary

nature in Canada of registration of copyright. This is in contrast to the United States where registration of copyright was necessary for music of U.S. residents until the revision of the United States Copyright Act, effective January 1, 1979. The title search will hopefully reveal the existence of obviously similar works. However, the producer should insist on a warranty from the composer that the music is original and that it does not infringe the rights of others. This warranty should also be coupled with a covenant to indemnify the producer.

The film producer should also review the provisions of the International Copy-

right Conventions. There are two International Copyright Conventions, the Berne Convention (to which most nations have adhered) which does not permit formalities of registration of copyright and the Universal Copyright Convention (UCC). Canada has adhered to both Conventions, but the United States has adhered only to the UCC. The UCC permits the protection of published works of copyright in member countries provided the works are published with the proper notice of copyright ownership. This notice may be in a number of forms, including the familiar:

© publication date, owner's name

In the creation of a feature film, a number of elements are the proper subject matter for copyright protection. Notice of copyright must be carefully reviewed for all such rights.

In many instances, the director of a film will differ with the producer concerning the music to be used and the choice of the composer. Since the director's contract is one of the first to be completed, and the composer's contract usually one of the last, it is suggested that many of the problems respecting film music could be solved by involving the composer at an early stage in production.

Where music is derived from more than one source, or when a successful recording artist performs music in the film, the considerations of billing and credit must be reviewed and several credits may be required.

In drafting the agreement between the composer and the film producer, reference is often made to United States precedents. Since the provisions of the Canadian Copyright Act govern the relations between the parties in Canada, the agreement must conform to Canadian law.

#### The Involvement of Record Companies and Recording Artists

The performance by a successful recording artist of the title song or other music in the film involves a number of issues. The performer may insist upon a royalty based upon a percentage of profits of the film and/or of the soundtrack LP in addition to a fee. A performer is often bound to an exclusive agreement with a record company which requires the company's consent. As a condition of waiver of consent, the company may insist on distribution rights for the soundtrack LP or for 45 rpm "singles" culled from the LP. It may also require consent in determining which portion of the soundtrack should be released in the LP. Additional difficulties may arise in coordinating the release of the record and the release of the film.

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When an existing recording is to be reproduced in the film, the consent of the record company, which owns the rights to the master of the recording, is required. Consent may also be required from the artists whose performances are embodied in the recording and from the producer of the recording. The American Federation of Musicians may require substantial re-use fees for the work of the musicians performing the music in the record. The Union representing actors and vocalists (ACTRA in Canada and AFTRA in the United States) must also give its consent where its members are involved.

An extensive analysis of the elements of agreement between the film producer and the distributor of the soundtrack LP is beyond the scope of this article. However, the film producer should carefully review the distribution agreement for the soundtrack LP. Several alternative distributors should be considered to optimize the opportunity to exploit the soundtrack as there are significant differences between distributors in each market for the LP. The selection of a record distributor involves many of the same criteria considered in selecting a film distributor.

It should be underlined that the affiliation between the film distributor and a record distributor should not be the sole

criterion for selection of distribution of the soundtrack LP.

### Film Music and Certification of Feature Film

The Canadian Income Tax Act permits the deduction of a capital cost allowance of one hundred percent of the cost of an ownership interest in a feature motion picture film which is certified by the Secretary of State for Canada. The Regulations issued pursuant to the Income Tax Act require an aggregate of at least six "units of production" from a total of ten. The engagement of a Canadian "music composer" will permit the producer to claim one unit obtained. In such instances the office of the Secretary of State will closely scrutinize all material agreements and other dealings with respect to film music.

In many instances, the determination of the composer for the film is left until after completion of principal photography. However, a producer cannot count on the availability at the last moment of an experienced composer, capable of devoting the necessary time to both create and produce music, who will satisfy the needs of the production team. It is therefore suggested that music should be one of the first units to be secured to ensure that this production unit is in place for certification. □



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