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## Film Composing Agreements: Business and Legal Concerns

Mark Halloran

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# FILM COMPOSING AGREEMENTS: BUSINESS AND LEGAL CONCERNS†

By Mark Halloran\*\*

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## I. INTRODUCTION

### A. *The Collaborative Tension*

Composing for motion pictures is one of the least understood yet most important parts of the collaborative process of producing motion pictures. From a creative standpoint, this lack of understanding stems

from the differing viewpoints of composers and filmmakers.<sup>1</sup> Film composers are usually classically trained musicians. The basic focus of a composer is the film score and how its sound impacts the film's visual images. In contrast, most filmmakers are not classically trained musicians; rather, they must be concerned with all the aspects that make a film. Music is generally regarded by filmmakers as a lesser contributor than many other elements of the film, such as the story, screenplay, cast, director, photography and, in some cases, the special effects. In the eyes of many producers and directors, the composer's sole function is to create music which enhances the dramatic and emotional impact of the film on the audience.<sup>2</sup>

From a business standpoint, studio<sup>3</sup> and producer<sup>4</sup> attorneys who draft film composing agreements are often more familiar with talent agreements with writers, directors and actors than with the structure and parameters of film composing agreements. Composing agreements reflect the complicated flow of rights and income peculiar to film composing agreements, which are hybrids of film, songwriter and recording agreements.

Despite these fundamental creative and business tensions, composers, filmmakers and studios are interdependent, and their collaboration is crucial to the successful blend of music and film that each strives for. In this age of the merging of film and music, exemplified by Music Television (MTV) videos<sup>5</sup> and movies such as "Flashdance," there is increasing focus on the impact of music on film. Although the impact of film music is hard to quantify, the average ratings for pictures tested at "sneak" previews increases an average of 8% to 10% when the temporary music

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1. For purposes of this Article, the term "filmmaker(s)" includes the studio, the producer and the director. See *infra* notes 3-4. Since the concerns of the "producer" and "studio" are virtually identical, these terms are used interchangeably in the Article.

2. The main complaint of composers is that filmmakers do not understand music. Leonard Rosenman ("Barry Lyndon") has stated: "Because most filmmakers don't understand music, they feel it has the power to heal, to cure broken legs, to cure stuttering, to cure bad photography, bad acting." 1 FILM MAKERS ON FILM 122 (J. McBride ed. 1983).

3. For purposes of this Article a "studio" is a United States entity which finances, produces and distributes feature-length theatrical motion pictures. The major studios include Warner Bros., Paramount, Columbia, Embassy, 20th Century Fox, MGM/United Artists, Universal, Orion and Disney. D. LEES & S. BERKOWITZ, THE MOVIE BUSINESS 68 (1981).

4. For purposes of this Article a "producer" is the person in charge of bringing the various creative elements in a film together, producing the film, and ultimately, is responsible for delivering the picture to the studio for distribution. In some cases the studio attorneys do the legal work on composer deals; sometimes the producer's attorneys do this work.

5. Some MTV video directors are moving into features, such as Bob Giraldi, who directed the Michael Jackson "Thriller" video.

and sound effects are replaced with the final music and sound effects.<sup>6</sup> David Puttnam, the producer of "Chariots of Fire," has recently stated the film would not have won the Academy Award for Best Picture in 1983 without the Vangelis score.<sup>7</sup> There is no doubt the epic grandeur of John William's "Star Wars" score greatly enhanced the impact of that film. Also, studios are increasingly viewing movie music as a promotional tool that heightens interest in a film and results in higher box office gross.

### B. *Limitations on Scope of Article*

This Article is intended to explain the business and legal aspects of the blend of music and film that is incorporated in theatrical film composing agreements. Before proceeding it is necessary to examine the basic business structure of the film composing business as well as the limits of the scope of this Article. This Article is limited to instrumental film composers in the traditional sense—those musicians who compose, orchestrate and conduct orchestrally-oriented themes, motives and incidental music (e.g., "Gone With The Wind" (Miklos Rozsa), "Ben Hur" (Max Steiner), "Star Wars" (John Williams)). Prince, despite "Purple Rain," and other record chart oriented artists and songwriters do not fit this category. This Article also does not focus on song compilation scores, such as those used in "The Big Chill," "Flashdance" and "Urban Cowboy,"<sup>8</sup> nor the services of lyricists. Also, our basic film composing agreement model is the major studio model governed by California law. Composer agreements for films which are not financed by major studios (but rather produced by so-called "independents") typically involve

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6. Lecture by Rick Rosenberg, UCLA Seminar, *The Role of the Producer on Motion Pictures and Television: Maintaining the Vision* (Oct. 18, 1984).

7. "When you're in postproduction, the composer becomes vastly important. I've seen 'Chariots of Fire' without a score and can speak with great authority: I don't think it would have won the Academy Award or very much else without Vangelis." *Dialogue on Film*, AMERICAN FILM 14, 16 (Nov. 1984).

8. The scores for these three movies were collections of individual songs. "Big Chill" included period music from the 1960's (with an emphasis on Motown hits), "Flashdance" featured distinct songs written for the film, and "Urban Cowboy" used period country and pop hits. The Academy of Motion Picture Arts and Sciences defines an original score as a "substantial body of music in the form of dramatic underscoring originating with the submitting composer(s)" and an original "song score" as (i) no fewer than five original songs by the same writer or writing team; (ii) used either as voice-overs on the soundtrack or in visual performance. Each song must be "substantively rendered" (both lyric and melody) and must be clearly audible, intelligible and recognizably performed as a song. The original song score's chief emphasis must be on the dramatic usage. A group of songs unrelated to the story line does not constitute an original song score according to the Academy.

lower creative fees, and, more frequently, the composer correspondingly retains a larger share of music publishing income.

## II. BUSINESS STRUCTURE

### A. *Film Composers*

Theatrical film composing is dominated by a very small number of composers. Although exact figures are not available, current client lists disseminated by the five major film composing agencies listed below totalled approximately 100 film composers, and this number is further reduced by the fact many composers are primarily television composers.<sup>9</sup> Within this number of composers an even smaller number dominate features released by the so-called "major" Hollywood studios such as Universal, Paramount, and Fox, whose films generate the vast majority of theatrical film rentals in the United States and Canada. The "majors" commenced principal photography of 130 films in 1984 and released 140.<sup>10</sup> Current prominent film composers include Elmer Bernstein, Bill Conti, George Delerue, Jerry Goldsmith, David Grusin, James Horner, Henry Mancini, David Shire and John Williams. These composers also dominate the Academy Awards for best film score.

### B. *Film Composer Talent Agents*

Film composers in Hollywood are represented with respect to their film composing services by an even smaller number of agents. The agents' primary function, as licensed "talent agents" under California law,<sup>11</sup> is to procure employment for their clients. The major film composer agencies, all based in the Hollywood area, are: Bart-Milander (the oldest); The Gorfaine-Schwartz Agency (the young upstart); The Carol Faith Agency; The Robert Light Agency; and Rich Emler & Associates, Inc. The representation offered by these agencies is primarily limited to film and television composing. For example, Bart-Milander does not book Henry Mancini concerts, but they do negotiate his film composing deals. At this time, the major talent agencies (such as the William Morris Agency, Inc., International Creative Management (ICM), Creative Artists Agency (CAA) and Triad) do not have distinguishable film composing departments. William Morris has a joint venture agreement with

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9. Even major film composers venture into television—such as Bill Conti, who wrote the "Dynasty" theme. This trend has been buttressed by the advent of movies-of-the-week and mini-series.

10. Daily Variety, Jan. 3, 1985, at 1.

11. See CAL. LAB. CODE § 1700.4 (West Supp. 1985).

Bart-Milander under which Bart-Milander exclusively represents the William Morris roster for film music,<sup>12</sup> and at least one major talent agency (and perhaps a second) is moving towards entering the film composing field. The typical agent fee is from 10% to 15% of the composer creative fee.

### C. *Old Studio System and Guilds*

The old Hollywood "studio" film composing system, typified by long-term employment agreements with composers (along with other talent), which prevailed in the 1930's and 1940's, is dead.<sup>13</sup> Today, film composers (like writers, directors and actors) are no longer employed on a long-term basis by studios; nor do the studios have studio orchestras to record soundtrack music. Composers are hired on a film-by-film basis, and orchestras are created on a film-by-film basis. Also, there is no current active collective bargaining agreement covering the composing services of composers, although their orchestration and conducting services are covered by the American Federation of Musicians (AFofM).<sup>14</sup> Recently, a new composer and lyricists guild, the Society of Composers and Lyricists, petitioned the National Labor Relations Board in Los Angeles seeking to represent composers and lyricists in bargaining with the studios. The petition was denied, as the Board supported the studios' contention that composers act as independent contractors, not employees.<sup>15</sup>

### D. *Hiring a Composer*

At what point during the production of a motion picture is a composer hired? Although this varies, most typically the composer is hired during a phase of motion picture production called "post-production." This is the period after principal photography of the picture is concluded, and during which the production team is editing and otherwise putting the final touches on the picture before distribution. Typically the music is the last creative element which is added to the picture before distribution. The composer usually appears at a hectic time. The studio is often pressuring the producer and director to finish the picture, and as a rule,

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12. Telephone conversation with Stan Milander, Bart-Milander Associates, Inc., Los Angeles, California (Nov. 13, 1984).

13. For a discussion of the demise of the studio system in the 1950's, see E. MORDDAN, *THE HOLLYWOOD MUSICAL* 186 (1981). See also R. FAULKNER, *MUSIC ON DEMAND* 5 (1983).

14. AFofM Basic Theatrical Motion Picture Agreement, Jan. 14, 1981, amended Jan. 14, 1984 (available in Loyola of Los Angeles Law School library) [hereinafter cited as AFofM Agreement].

15. Aaron Spelling Prods., Inc., No. 31-RC-5755 (NLRB Dec. 14, 1984).

the picture has already been booked in theatres by the studio, which is eager to earn back its investment as soon as possible by putting the film into distribution.

The choice of the composer, like other talent, is usually a collaborative choice among the studio, producer, and director. The input of these various elements varies with their clout. A first-time director may have little choice; however, high-powered directors almost always get the composer they want, and sometimes have the contractual right to designate the composer. For example, Blake Edwards almost always hires Henry Mancini; it is very unlikely that a producer or studio would seek to prevent Edwards from hiring Mancini. In most cases, however, the studio providing the production financing has the final choice.

Composer agents do their best to keep abreast of which pictures are in production at the various studios, and the exact stage of production. The main source of information is the heads of the studio music departments. Production information can also be gleaned from the trade papers (such as *Daily Variety* and *Hollywood Reporter*), contacts with the producers, studio production executives and directors, and casting breakdown services, which report those pictures being cast. In some cases the picture will be screened during post-production for composer agents, and the producer or director will rely on the composer agent to suggest clients most appropriate for the film and the music budget. The agents make sure that the various studios have their client lists, and in some cases will submit composer demonstration tapes, at least for their lesser-known clients without a "track record."

During the phase of considering a composer there usually is a "feeling-out" process in which the composer will be invited to "screen" the picture, usually with the director and producer. Typically, after screening the film, the producer, director, studio music department head and composer will briefly discuss musical concepts for the picture. Some producers and directors have very definite ideas about the type of score they want (although they may have trouble expressing their ideas in musically understandable terms). A very few, however, are comfortable with essentially turning over the picture to the composer and trusting the composer to write an appropriate score. As detailed more fully below, the producer and director will also make sure that the composer's price fits within the music budget, and will discuss those items which impact the cost of recording the score such as the length of the score and what musical instrumentation will be necessary. The composer will consider whether working on the picture will advance his or her career. High-powered composers have the luxury of being able to turn down more



pictures than they take, often because of conflicting commitments or the simple fact they do not believe they can make a creative contribution to the picture. Lesser-known composers find it very difficult to turn down offers to compose a picture, at least for a major studio.

To the producer and director, the basic concern is whether the composer is capable of writing a score which will enhance the impact of the picture. They in effect "cast" the composer by making a subjective evaluation as to whether the composer's musical style will have the proper subliminal effect to enhance the look and feel of the picture. Obviously most producers and directors would love John Williams to compose and conduct the score for their motion picture if it is a grand special-effects film in the vein of "Star Wars" or "Superman."

Another primary concern for the producer is the music budget. Although music budgets vary widely on films financed by major studios, a typical music budget for a film is \$200,000 to \$500,000, or approximately 2% to 5% of the total production budget, which now averages about \$10,000,000 at major studios. Working within this budget the producer must hire a composer, hire musicians to record the score, and perhaps license the use of pre-existing songs and recordings, and perhaps even create a soundtrack LP. Since the recording of the music usually takes place late in post-production, most if not all of the money from the production budget has been spent. The producer or director may be exposing either part of his salary or subjecting himself to a penalty on his net profits participation if the music budget is exceeded. Using an inexperienced composer increases the risk of time and cost overruns, so producers usually stick with composers who have a consistent track record of getting the score done on time and on budget.<sup>16</sup> Also, in some cases the producer or studio is so dissatisfied with the score that a second composer is hired to write a new score.<sup>17</sup>

### III. COMPOSER DEAL STRUCTURE

Once the composer is selected, the next step for the producer or studio is to structure the composer's deal. The first point of reference is whether the composer's creative fee fits within the music budget. The other basic reference point is what the composer's creative fee has been for his past pictures, as well as intervening circumstances, such as the composer receiving an Academy Award (price escalates) or the composer

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16. See R. FAULKNER, *MUSIC ON DEMAND* 23 (1983).

17. Approximately one in twenty scores is thrown out. Telephone conversation with Ross Schwartz, partner in the law firm of Manatt, Phelps, Rothenburg & Tunney, Los Angeles, California (Jan. 7, 1985).

having been fired for drunkenness on the sound stage (price drops). In recent years, the price paid by major studios to major composers has escalated. For top quality composers, the basic composing creative fee has escalated from a range of \$20,000 to \$60,000 to the present range of \$40,000 to \$125,000. A factor which affects the fee is whether or not the composer will insist on participating in the "publisher's share"<sup>18</sup> of music publishing income. As will be discussed below, most major composers at this time do not participate in the "publisher's share" of music publishing income, although they still end up with approximately 50% of music publishing income derived from the score as the "writer's" or "composer's share."<sup>19</sup> Some composers also request a portion of copyright ownership in the score, but this request is rarely granted.

Although particular contractual terms will be discussed with more particularity when examining the form contract in Part VI of this Article, the following is an examination, in broad strokes, of the basic deal points which are negotiated between the studio and/or producer on the one hand, and the composer's agent and/or attorney on the other hand, in structuring a composer agreement.

#### A. *Exclusivity*

Although this seems self-evident, the studio will insist the composer be available to render exclusive services in composing and recording the score.<sup>20</sup> If the composer is already committed to another picture which may conflict, then, absent extraordinary circumstances, the composer will not be hired. In practice, however, studios cannot enforce contractual exclusivity clauses because composers write at home. Also, composers are faced with constantly changing recording dates, which sometimes result in conflicts between pictures.

#### B. *Scope of Services*

Services which are covered usually consist of composing,<sup>21</sup> orches-

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18. The "publisher's share" is basically the 50% of music publishing income not paid to the composer as the "composer's" or "writer's" share, which is retained by the studio's music publishing company.

19. The "composer's share" is basically the 50% of music publishing income not comprising the "publisher's share".

20. See *infra* Part VI at Section V of the Composer Employment Agreement, for a sample clause with comments. "Exclusivity" also is meant to discourage ghost-writing occasioned by overlapping commitments.

21. In the motion picture context, composing is the creation of original musical ideas in the form of a musical sketch.

trating,<sup>22</sup> conducting,<sup>23</sup> recording and delivering the score, and producing the master sound recordings of the score for a soundtrack album. If pre-existing material is adapted, arranging<sup>24</sup> the score may be covered as well. Orchestration (as opposed to composing, conducting and recording) is usually covered by a separate and additional fee for heavyweight composers, and, in some cases, composers do not orchestrate themselves; rather a separate orchestrator is hired.<sup>25</sup> Composer services (as distinguished from orchestration and conducting) are *not* covered by a guild.<sup>26</sup> However, orchestration and conducting services are covered by the AFofM.<sup>27</sup> There is a minimum AFofM charge per page for orchestration which (as of 1983) ranges from \$15 to \$31, depending on the number of lines per page.<sup>28</sup> However, many orchestrators are paid at a negotiated page rate, usually \$35 to \$40 per page. Orchestration costs can approach \$15,000 to \$20,000 for fast-paced scores with numerous instruments. So, if orchestrations are extra, a \$75,000 creative fee may really be \$95,000.

### C. Length of Services

Services usually commence on "spotting" the picture (*i.e.*, screening the picture for purposes of determining where music will be placed and the direction of the music<sup>29</sup>), and end once the score is recorded and delivered. Because this can be open-ended, some major composer agents

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22. Orchestrating is the process of transferring the musical sketch created by the composer to a full score.

23. Conducting is the leading of an orchestra in performing the musical score which is recorded and transferred to the soundtrack.

24. Arranging is the fleshing out of a simple pre-existing musical idea with new counterlines.

25. Major composers have orchestrators with whom they work on a consistent basis. Some composers use orchestrators because they do not have the time to orchestrate; others are not capable of orchestrating and must rely on orchestrators to flesh out the score for an orchestra.

26. The defunct Composers and Lyricists Guild of America (CLGA) was formed in 1954 and was granted bargaining union status by the National Labor Relations Board in 1955. *See* Association of Motion Picture & Television Producers, 219 N.L.R.B. 677 (1975). The AMPTP and CLGA concluded agreements in 1960, 1965 and 1969. For a more complete discussion, see Havlicek & Kelso, *The Rights of Composers and Lyricists: Before and After Bernstein*, 8 COLUM. J. ART & L. 439, 441, 445-46 (1984).

27. The AFofM is the union in the United States and Canada to which all arrangers, orchestrators and conductors must belong in order to provide their services for signatory companies.

28. AFofM Agreement, *supra* note 14, at art. V, para. 41.

29. The "spotting session" usually involves the composer, producer, director and music editor. The music editor gives the composer "spotting notes" so the composer knows the scenes for which music is to be written.

insist on a finite schedule (e.g., ten weeks), with pro-rated overages for additional time, which is sometimes non-exclusive. For example, if a composer gets a \$75,000 fee over ten weeks, and it takes twelve weeks for completion of the score, the composer will get an additional \$15,000 for the extra two weeks, provided the delay is not the composer's fault.

#### D. Credit

Agents for major composers negotiate for credit in three media: in the picture itself; in paid advertising for the picture; and on the soundtrack LP. Unlike director and writer credits, which are controlled by The Director's Guild of America (DGA) and Writer's Guild of America (WGA) respectively, no guild controls composer credits. The most typical form of the credit is "Music By [composer name]." However, there are many variations, such as "Music Composed By," "Music Composed and Conducted By," and others. Usually the producer will give the composer credit in the form the composer desires (at least on the screen), unless the form is too long, would be confusing, would detract from other music credit, or would conflict with credit provisions in other talent contracts. The on-screen credit for a composer typically is in the "main titles" where the writers, director and producer get credit, which typically is at the beginning, but sometimes at the close of the film. Usually the credit will be on a separate card<sup>30</sup> on which no other credit appears. Despite studio resistance, it is now typical for composers to also receive credit in paid advertising<sup>31</sup> for the picture, subject to the producer's or studio's standard exclusions. In general, the size of type displaying the composer's credit is the same as that of the director, writer and producer; often, the composer's credit must appear whenever the credit of the director, writer and producer appears.<sup>32</sup> With respect to soundtrack albums, some high-powered composers get a guarantee of credit on the front cover of soundtrack albums embodying their music. Normally composers get some kind of credit on the album cover, but it is often on the back cover. There may also be an additional credit for the composer's record producer services in the form "Music Produced By" on the soundtrack album jacket.

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30. Utilizing a separate card in shooting credits results in the composer's name appearing alone on screen (as opposed to a "shared card" with more than one credit).

31. There is no industry-wide definition of paid advertising, although some parameters are set in guild agreements. Paid ads usually include print ads. Television and radio ads are usually excluded.

32. This obviates the need to negotiate exclusions, because if the person to whom the composer is "tied" is excluded, the composer is similarly excluded.

### E. Music Publishing Royalties

Assuming only the "composer's share"<sup>33</sup> is negotiated, three royalty rates are usually discussed. First, the rate for "piano copies"<sup>34</sup> is negotiated, which is traditionally stated in the number of pennies per copy sold. Six to ten cents per copy is the current norm. Second, the rate for non-piano copies,<sup>35</sup> such as folios,<sup>36</sup> is negotiated. This typically ranges from 10% to 12½% of the wholesale price, or the price the store pays, which works out to be about 50% of what the publisher gets. Typically the publisher gets 10% to 12% of the retail price, or the price the public pays. This rate is always prorated based on the number of musical compositions. For example, if the composer's compositions comprise one-half of the number of compositions in a folio, the royalty rate would be reduced by one-half. Third, the rates for other income, primarily public performances,<sup>37</sup> mechanical<sup>38</sup> and synchronization licenses,<sup>39</sup> are negotiated. Income from mechanical and synchronization licenses is usually divided 50% to the composer and 50% to the publisher. The composer's and publisher's share of public performance income is typically paid directly by the performing rights societies on a 50-50 basis, and neither party makes a claim for the other's income from this source.

The negotiation for public performance income split was complicated by *Buffalo Broadcasting Co. v. American Society of Composers*<sup>40</sup> and by voluntary direct licensing requested recently by CBS. In light of *Buffalo Broadcasting*, studios have insisted that they be able to grant direct public performance licenses for the composer's music which is embodied in the film to syndicated television stations if ASCAP<sup>41</sup> or BMI<sup>42</sup> are legally foreclosed from doing so. The dispute is not so much as to

33. See *supra* note 19.

34. "Piano copies" have only one song, usually a piano/vocal arrangement.

35. Non-piano copies contain more than one song.

36. A "folio" is a collection of songs, e.g., "Music From The Wizard Of Oz."

37. Public performance is one of the exclusive rights in a musical work protected by the Copyright Act. 17 U.S.C. § 106(4) (1982).

38. Mechanicals are per-record royalties paid for the use of a musical work in phonorecords.

39. Synchronization licenses grant the right to copy and distribute musical works embodied in motion pictures and audiovisual devices.

40. 546 F. Supp. 274 (S.D.N.Y. 1982), *rev'd*, 744 F.2d 917 (2d Cir. 1984), *cert. denied*, — U.S. — (1985).

41. The American Society of Composers, Authors and Publishers (ASCAP) is one of the two major performing rights societies in the United States. It licenses the public performance of non-dramatic musical works for performance on media such as television and radio, and in places like nightclubs. The ASCAP network and syndicated station blanket licenses cover the public performance of the score occasioned by free television exhibition in the United States.

42. Broadcast Music, Inc. (BMI) is the second largest performing rights society in the

whether the studio has the right to grant the direct license, but rather how the composer receives money from such license. Two ways of dealing with the problem are prevalent at this time. First, there is good faith negotiation of a fee to be paid to the composer, with arbitration mandated if the parties fail to agree. CBS is taking a similar position with respect to music embodied in made for network product.<sup>43</sup> Second, the studio negotiates a separate rate for the grant of the performance license with the syndication entity, and then splits the license fee: one-half to the composer as the composer's share, while the studio retains the other one-half as the publisher's share. In some cases, costs are deducted off the top before the split.

Recently, the syndicated television stations lost the *Buffalo Broadcasting* case, as the Second Circuit Court of Appeals reversed the district court decision in favor of the broadcasters, and the United States Supreme Court denied the broadcasters' writ of certiorari.<sup>44</sup> However, the broadcasters will likely pursue reduction of the public performance license fees pursuant to the ASCAP and BMI consent decrees.<sup>45</sup>

#### F. Soundtrack Album Royalties

The negotiation of soundtrack album royalties is probably the most sophisticated and complicated part of the composer deal negotiation. Soundtrack album provisions are, in effect, a mini-recording artist contract built into an agreement for composing and recording services. The main discussions involve the percentage of the record price comprising the composer soundtrack album royalty, what costs are recouped before the composer royalty is paid, and reductions of the composer royalty for pro-ration and non-United States normal retail channel sales.

##### 1. Retail or Wholesale Percentages

The starting point in royalty discussions is what basic percentage of the price of the soundtrack LP the composer gets for conducting the score and "producing" the master sound recordings included in the soundtrack album. There are often two separate negotiations here. One is with respect to the composer's "conducting" or "artist" royalty,<sup>46</sup> and

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United States, next to ASCAP. It functions essentially the same as ASCAP.

43. Sobel, *The Music Business and the Sherman Act: An Analysis of the "Economic Realities" of Blanket Licensing*, 3 LOY. ENT. L.J. 1 (1983).

44. See *supra* note 40.

45. For a discussion of the consent decrees, see Sobel, *supra* note 43, at 6.

46. Since the composer typically conducts the musicians performing the score, the composer/conductor is treated as the "artist" performing the score.

the other is with respect to the composer's record "producer" royalty.<sup>47</sup> Traditionally, as for pop record artists, the conductor and producer royalty are calculated on a percentage of the suggested retail<sup>48</sup> or wholesale<sup>49</sup> selling price of the LP. The composer's royalty also is stated as such a percentage. The rule of thumb under typical major label soundtrack album agreement definitions is that one "point" (percent) of retail equals two "points" of wholesale, since the retail price is usually approximately double wholesale. The typical percentage for a conductor's "base"<sup>50</sup> royalty for high-level composers is from 4% to 7% of the suggested retail list price, and for serving as the record producer,<sup>51</sup> from 2% to 3% of the suggested retail price. An aggregate percentage of from 6% to 10% of the suggested retail price is a typical basic royalty for a composer, provided he or she also conducts the score and produces the recordings. This base royalty is typically a few points less than the producer pays to major pop recording artists. This base royalty is also subject to many reductions, as discussed below.

## 2. Recoupment

The conductor/producer base royalty is relatively meaningless in terms of dollars unless specific limits are placed on the costs the studio can recoup (deduct) from the composer's royalty before the royalty is paid. The studio will insist, before the composer is paid, that the studio recoup all music costs relating to the recordings conducted and produced by the composer which are included in the soundtrack album.<sup>52</sup> These

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47. The composer's "producer" functions are analogous to the producer functions for "pop" producers such as Quincy Jones ("Thriller"). The producer chooses the material, guides the performances, edits the recordings and delivers the final recordings.

48. "Suggested retail price" is the list price suggested by the manufacturer, e.g., \$8.98 or \$9.98.

49. The wholesale price is the price that the record distributor charges the retail outlet.

50. The "base" royalty is the royalty before it is reduced.

51. There is no precise definition of either a record producer or a film producer. However, there are many similarities in function. Basically, the record producer is responsible for making the master recordings suitable for distribution in records; likewise the film producer is responsible for making the film suitable for distribution. Although neither record nor film producers "perform" as such, they have creative input in selecting the creative elements, supervising the creation of their product, and editing the final product.

52. A soundtrack album is basically an album consisting of recordings of songs from the soundtrack of a film. Some soundtrack albums, however, contain either musical compositions not contained in the film ("Mike's Murder") or re-recordings for the album version ("The Falcon and the Snowman"). The Recording Industry Association of America (RIAA) reports that Shows/Soundtracks accounted for 3% of record expenditures in 1983 on shipment dollars of 3.685 billion, or \$110,550,000. See RECORDING INDUSTRY ASSOCIATION OF AMERICA, CONSUMER PURCHASING OF RECORDS AND PRE-RECORDED TAPES IN THE UNITED STATES:

costs typically consist of re-mixing,<sup>53</sup> editing<sup>54</sup> and mastering<sup>55</sup> the score masters so they can be included in the soundtrack album, as well as the AFofM-required "new-use" fees<sup>56</sup> triggered by the release in a soundtrack album of the composer's recordings embodying the performances of AFofM musicians which were initially recorded for use in the soundtrack of a picture. Knowledgeable composer agents and lawyers will insist that the only costs that can be recouped by the studio are those directly related to the soundtrack album, as opposed to the picture, since the composer recordings were created for the picture whether or not there is a soundtrack album. Most studios agree to this limitation. However, from an accounting standpoint, it is often very difficult to separate record costs from picture costs. Some studios will also request that their soundtrack album advance<sup>57</sup> be recouped before royalties are paid to the composer, or that the composer's royalty be paid retroactively after recoupment of the advance, as they do not want to be out-of-pocket to the composer while the record company recoups the advance. However, most studios will not insist on this point.

### 3. Pro-Ration

Another crucial consideration is the pro-ration<sup>58</sup> of the royalty. The composer's base royalty will typically be reduced if there is another royalty artist appearing on the track which the composer conducts.<sup>59</sup> Typically, if another artist (such as a featured instrumentalist who is paid a royalty) is on the track, the composer's royalty is cut to one-half the basic royalty. Also, if the composer masters are combined on the soundtrack LP with non-composer masters, the royalty is further pro-rated. For example, assuming an 8% composer royalty, if the composer masters comprise five of the ten cuts on the album, the royalty will be reduced by half, to 4%. To assure the composer royalty is not reduced too far by

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A FIVE YEAR TREND REPORT 1979-1983 5 (1984). Although "shows" are not segregated, soundtracks now outsell shows by a substantial margin.

53. Re-mixing is the balancing of the various recorded tracks.

54. Editing is the shortening of the various recordings.

55. Mastering is the process of preparing the final version of the recordings so they can be duplicated in phonorecords.

56. AFofM Agreement, *supra* note 14, at para. 8(b).

57. Typically the studio finances the soundtrack album by covering recording costs, costs of converting to a soundtrack album, and new-use fees. The studio then gets an advance against the aggregate royalty to cover at least part of these costs.

58. Pro-ration, in soundtrack royalty terms, means reduction in the base composer royalty by multiplication by fractions.

59. For example, if there is a featured instrumental soloist performing the score that the composer conducts.



pro-ration, some composer agents or lawyers will insist on a royalty "floor," *i.e.*, a percentage below which the composer's royalty rate cannot be reduced notwithstanding pro-ration. Two to three percent of retail is a typical request for the royalty floor.

#### 4. Deductions for Non-United States Normal Retail Sales

A simple statement of the percentage of the suggested retail price is not a sufficient definition of the computation of a royalty rate. In computing record royalties, there are many deductions from the retail list price.<sup>60</sup> Royalty rates are reduced for sales other than of LP's through "U.S. normal retail channels," such as for sales of singles<sup>61</sup> and for foreign sales.<sup>62</sup> There are two ways to handle the computation of the composer's royalty for different kinds of sales. The first way is for the composer's agreement to include a specific royalty definition like the one in Exhibit B to the form composer's agreement examined in Part VI of this Article. This approach makes sense when the studio distributes records itself or through subsidiaries or affiliates. However, most studios now use third-party record companies, with the exception of Universal/MCA and Polygram. If the studio distributes the soundtrack album through a third-party record company, the specific studio definition is almost always less advantageous to the composer than the definition the studio negotiates from a third-party record company.<sup>63</sup> The second way is much simpler, and usually more advantageous to the composer. It is for the composer to receive royalties based on the same definition the studio gets for itself from the record company.<sup>64</sup> Studios often prefer this way because they do not want to make two sets of accounting calculations when paying the composer's royalty, and they sometimes prefer to direct the record company to make this calculation and to pay the com-

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60. Typically record companies reduce the suggested retail price by a "packaging deduction" and taxes included in the retail sales price. Assuming an \$8.98 list price, and a 10% packaging deduction, the royalty would be calculated on \$8.08, or 8.98.

61. This rate is usually one-half to three-quarters of the base rate.

62. This rate is usually one-half to three-quarters of the base rate. Major foreign territories (*e.g.*, England, Germany, Japan) usually approach three-quarters.

63. One exception may be that the composer may want to get paid on 100% of net sales, regardless of the studio definition with the record company.

64. In soundtrack album negotiations the studio is considered the "artist" and is typically paid an aggregate 14% to 19% of the suggested retail price through normal United States retail channels. The studio bears the performers (such as the composer/conductor) and producers from their royalty. The studio keeps the balance, although it is sometimes included in gross receipts for purposes of determining participations by the producer, director, actors and others.

poser directly.<sup>65</sup> The "rule of thumb" at this point is that under typical major label record company definitions one retail point is worth approximately \$.08 through United States normal retail channels, and one wholesale point worth approximately \$.04 on these sales.

### *G. Use of Name, Likeness and Biographical Material*

In addition to the specific rights to use the composer's name for credit purposes, there generally is a broad grant of rights for the use of the composer's name, likeness and biographical material in connection with the exploitation of the motion picture, the music publishing rights, and the soundtrack album. The commercial exploitation of names and likenesses is protected by law,<sup>66</sup> so the studio will insist on a grant of these rights. High-powered composers may want some limitations on these rights. The most typical limitation (which studios almost always give on request) is that the composer's name and likeness will not be used for merchandising<sup>67</sup> and endorsements.<sup>68</sup> If, for example, a studio agrees to this limitation and hires James Horner, it does not have the right to distribute James Horner dolls. It can, however, use his photograph in a music folio from the picture to which Horner composes the score.

### *H. Living Expenses*

Another area of negotiation is personal expense reimbursement for living expenses such as travel, hotel and meals. Since most composers are based in the Hollywood area, and most post-production takes place here, oftentimes expense reimbursement is not negotiated. It is usually negotiated when the composer lives outside the Hollywood area or renders services away from his or her home. The range can be anywhere from \$100 to \$3,000 a week. Agents usually request first class round-trip airfare for the composer (and perhaps another family member, music editor and orchestrator), first class hotel, and a per diem at the location of recording the score.

### *I. Participations in Gross Receipts or Net Profits*

It is typical for the producer, director and stars to participate in the

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65. Record companies will usually pay the composer directly, but only after they recoup their advance from the aggregate royalty.

66. See, e.g., CAL. CIV. CODE § 3344 (West Supp. 1985).

67. In the motion picture context, merchandising is the use of film elements (such as names of stars) to sell merchandise associated with the film.

68. In the motion picture context, endorsements are a recommendation to buy a product or use a service.

money received by the studio from distribution of the film,<sup>69</sup> usually after the studio takes a distribution fee,<sup>70</sup> recoups its investment,<sup>71</sup> overhead<sup>72</sup> and interest.<sup>73</sup> It is highly unusual for the composer to participate in either the gross receipts<sup>74</sup> or net profits,<sup>75</sup> and this generally is not negotiated in a film composing deal.<sup>76</sup>

### *J. Direct Employment, Loan-Out and Independent Contractor Relationships*

Before contracts are drafted, the basic structure of the deal must be examined. There are three basic structures. The first is for the studio or producer to employ<sup>77</sup> the composer. If this is done the contract is drawn as an employment agreement and the studio must treat the composer as it does any other employee by making payroll deductions and covering the employee for worker's compensation. The second is for the composer agreement to be structured as an independent contractor<sup>78</sup> agreement, in which the composer's services are not within the studio's control to the extent they are in an employment agreement. Since the composer is not an employee, he or she is not covered by worker's compensation, and no withholding is deducted from the gross compensation. The composer is responsible for his or her own taxes. The third type of arrangement is a so-called "loan-out"<sup>79</sup> arrangement, in which there are three parties, rather than two. The first party is the studio, which engages the second party loan-out company to provide the services of the third party, its employee/composer. The employment relationship in the loan-out structure is *not* between the studio and the composer, but rather between the

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69. The pool of money (before deductions) which the participants hope to share in is called "gross receipts."

70. Distribution fees average about 33% of monies received by the studio.

71. The studio's investment includes the cost of making the film ("negative cost") and distribution costs (advertising, prints, residuals, etc.).

72. Overhead fees (usually on the negative cost, not distribution costs) range from 10% to 25%.

73. Interest is charged on the negative cost, not on distribution costs. It is usually in excess of the actual cost of borrowing paid by the studios.

74. See *supra* note 69.

75. Basically net profits are what is left after the studio recoups the negative cost (plus interest), distribution costs, overhead and interest. The rule of thumb is that the studio retains 50% of the net profits, and the other 50% is split among the "creative" elements (producer, director, writer, actors, etc.).

76. John Williams allegedly participates in net profits to the "Star Wars" pictures, but the author knows of no other case.

77. See *supra* text accompanying notes 13-15.

78. An "independent contractor" is a non-employee.

79. See *infra* note 142 and accompanying text.

composer and his loan-out company. Thus, the loan-out company receives the gross fee from the studio and is responsible for payroll deductions and worker's compensation, as well as guild-required pension, health and welfare payments with respect to services covered by the guilds. Often the studio will reimburse guild-required payments, so long as they do not exceed those amounts which the studio would pay if the composer were employed directly by the studio.

*K. Acquisition of Rights—Works Made for Hire, Assignments, Licenses*

The single most important concern for the studio or producer in the negotiation is the acquisition of the rights in the score and the composer's contribution to the sound recordings<sup>80</sup> in the masters which embody the score. As the owner of the score and the masters, the studio is free (subject to making additional payments) to exploit the score and masters in all media, or to refrain therefrom. If the studio fails to acquire the requisite rights, it cannot legally distribute the picture or a soundtrack album embodying the composer masters. A federal court recently enjoined distribution of trailers<sup>81</sup> from "Garbo Talks" which contained music allegedly owned by the film composer, not the distributor, MGM/UA.<sup>82</sup> Acquisition of ownership in the score is also important to studios, since in addition to being distributors of films, most major studios have music publishing subsidiaries.<sup>83</sup> The studio assigns the rights in the score to its music publishing subsidiary, which, in turn, collects income and divides that income with the composer on the basis set forth in the composer agreement.

There are three basic ways the studio can acquire rights in the score and in the masters. The first, and most typical, is that the score and masters are works made for hire<sup>84</sup> for the studio. Under federal copyright law there are two ways to create a work made for hire in the motion picture composing context. The first is in an employment relationship.<sup>85</sup>

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80. A sound recording is a work that results from the fixation of a series of musical, spoken or other sounds, but not the sounds accompanying a motion picture or other audiovisual work. 17 U.S.C. § 101 (1982).

81. A trailer is an advertisement for a forthcoming motion picture shown as part of the program of a motion-picture theater.

82. See, e.g., *Selle v. Gibb*, 567 F. Supp. 1173 (N.D. Ill. 1983), *aff'd*, 741 F.2d 896 (7th Cir. 1984) (alleged copyright infringement of the song "How Deep Is Your Love" from "Saturday Night Fever" in which Paramount Pictures was a named defendant).

83. For example, MCA/Universal owns MCA Music; Warner Communications owns Warner Bros. Music.

84. See 17 U.S.C. § 101 (1982).

85. *Id.*

As long as the score and the masters are created within the regular course of the composer's employment, the studio owns the score and the masters from their inception, and, under federal copyright law, is deemed the "author" and owner.<sup>86</sup> The second way for a work made for hire arrangement to be structured, which is applicable to independent contractor relationships and loan-out agreements, is that the score and masters are works made for hire as specially ordered or commissioned for use as part of a motion picture.<sup>87</sup> If the agreement is not structured to create a work made for hire, alternatively, the studio can acquire the rights by an assignment<sup>88</sup> from the composer to the studio. In the work made for hire and assignment context the studio owns the score and masters. However, the crucial distinction is that if the deal is structured as an assignment, rather than as a work made for hire, the composer (or his or her heirs) can cause a reversion of the rights (subject to the studio's right to continue to use the picture with the composer's score and recordings) by written notice during a period from thirty-five to forty years after the assignment.<sup>89</sup> Obviously no studio wants to risk losing the rights to the music embodied in a picture.<sup>90</sup> Thus, almost all film composing agreements are structured as works made for hire.

The third method of acquiring rights is for the composer to own the score and masters, but to license them to the studio. This is typical for pre-existing works, *e.g.*, acquiring a synchronization and performance license for a hit song or recording, but rare for music created specifically for a film.

### L. The Negotiation Process

What happens during the negotiation process? Typically the producer or studio will contact the composer's agent (who may be an attorney) to discuss the deal points set forth above. After an agreement is reached, the basic terms of the agreement are typically reduced to a short-form "deal memo"<sup>91</sup> which sets forth the most basic terms, but

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86. 17 U.S.C. § 201(b) (1982).

87. *See* 17 U.S.C. § 101 (1982).

88. *See infra* note 161 and accompanying text.

89. Since under copyright law the sound recordings are included in the definition of "motion picture," sound recordings are probably not subject to reversion. *See* 17 U.S.C. § 101 (1982).

90. The studio, however, could continue to distribute the picture. 17 U.S.C. § 203(b)(i) provides that a derivative work prepared before termination may continue to be utilized. *See* H.R. REP. NO. 1476, 94th Cong., 2d Sess. 127, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 5659, 5742-43.

91. *See infra* note 156.

which often covers the remaining terms by incorporating standard industry terms, subject to good faith negotiation. More often than not this deal memo will be generated by the producer or by the studio business affairs or legal department, as there is an advantage in drafting their version of a deal. If time is tight, as is often the case, this deal memo (rather than a long-form contract) is executed by the composer. Careful producers and studios will never let a composer begin to render services without some sort of executed documentation which grants the necessary rights. A short cut process is for the composer to execute a "Certificate of Authorship" in which he or she acknowledges that the score and masters will be owned by the studio or producer as works made for hire. A sample Certificate of Authorship is included in the long-form agreement in Part VI of this Article. Often when a deal memo is executed, the parties will agree to negotiate and execute a "more formal agreement" embodying the agreed terms and other standard terms. Sometimes the execution of this long-form agreement is tied to payments, although some composer agents and lawyers resist this, since it creates tremendous leverage for the formal agreement to be signed.

More often than not the composer's lawyer is not involved in the basic deal, but negotiates the long-form agreement incorporating the basic deal. These agreements tend to be relatively standard, and it is not typical for there to be long, drawn-out negotiations, especially since the composer's services are often completed by the time long-form agreements are generated. This renders many points moot.

#### IV. ROYALTY INCOME FROM DISTRIBUTION OF PICTURE AND EXPLOITATION OF MUSIC PUBLISHING AND SOUNDTRACK ALBUM RIGHTS

How does the composer make additional money from the exploitation of the picture, the soundtrack album and music publishing rights? Assume that the picture is distributed in the current typical pattern: in theatres, in videograms (cassettes and discs), on pay television, on network television, and in syndicated television. Assume further that there is a soundtrack album, that there is sheet music embodying the score which is distributed, and that the studio's music publishing subsidiary grants a license to another studio to use the score in another motion picture.

##### *A. Theatrical Exhibition*

Because of an antitrust case brought by theatre owners, *Alden-*

*Rochelle v. American Society of Composers*,<sup>92</sup> and a copyright infringement case brought by ASCAP, *M. Whitmark & Sons v. Jensen*,<sup>93</sup> there are no payments made to composers or publishers for the public performance of scores in motion pictures in theatres in the United States.<sup>94</sup> However, this is not true in many major territories overseas. For example, in England, PRS (Performing Rights Society) grants a public performance license for the score to the motion picture theatres. A percentage of the ticket price is remitted to PRS which in turn remits both the writer's share to the composer and the publisher's share to the publisher through ASCAP or BMI. In major European territories the "rule of thumb" is that the public performance fee approximates 2½% to 5% of the ticket price. The composer gets about one-half of that percentage.

### B. Videograms

Although there has been an explosion in the sale of home video devices such as cassettes and discs ("videograms"), at this time it is very unusual for a composer to receive any income (at least in the United States) from the sale or rental of videograms. In fact, studios are not receiving videogram rental income because of the "first-sale" doctrine in the United States Copyright Act.<sup>95</sup> There have been a few isolated cases of composers receiving a very low up-front creative fee in return for high videogram royalties. This should not be confused with the licensing of pre-existing songs not specifically composed for a film. It is now fairly typical for music publishers who license pre-existing songs and record companies who license pre-existing sound recordings to receive payments from studios based on sales of videograms; some studios, however, have strict policies of never paying videogram royalties and will obtain "buy-outs" (one-time payments) for such rights.<sup>96</sup> Videogram royalties, at least with respect to pre-existing music, are usually computed as a percentage of either the retail or wholesale price, or, more commonly, on a

92. 80 F. Supp. 888, 900 (S.D.N.Y. 1948).

93. 80 F. Supp. 843 (D. Minn. 1948), *appeal dismissed sub nom.* M. Whitmark & Sons v. Berger Amusement Co., 177 F.2d 515 (8th Cir. 1949).

94. For a discussion of both cases, see Sobel, *The Music Business and the Sherman Act: An Analysis of the Economic Realities of Blanket Licensing*, 3 LOY. ENT. L.J. 1 (1983).

95. See 17 U.S.C. § 109 (1982). There is movement towards the repeal of this doctrine. Congress recently passed a statute amending the first sale doctrine with respect to rental of phonorecords embodying sound recordings. Record Rental Amendment of 1984, Pub. L. No. 98-450, 98 Stat. 1727 (amending 17 U.S.C. §§ 109, 115(c) (1982)).

96. MCA/Universal's policy, which prevented Bruce Springsteen's recordings from being included in the film "Mask," resulted in the film's director, Peter Bogdonovich, suing MCA/Universal for breach of his right of "final cut."

penny rate, like mechanical record royalties. If computed on the retail or wholesale price, the royalty is usually pro-rated based on playing time. For example, assuming a 6% wholesale pro-rated royalty applied to a song used for 10 minutes of score in a 120 minute film, if the wholesale price of an \$80.00 cassette is \$40.00, then the music publisher would receive \$.20 per videogram sold.<sup>97</sup> This payment, when received by the music publisher, is typically paid by the publisher one-half to the composer, with the music publisher retaining one-half.

### C. Pay Television

To date, composers have received little if any income from the public performance of their scores on pay television, except for a recent special distribution by ASCAP and BMI of income from Home Box Office (HBO).<sup>98</sup> Technically, pay television operators not licensed by ASCAP or BMI are guilty of copyright infringement because they are publicly performing unlicensed music. Until very recently, ASCAP and BMI have chosen to negotiate rather than to sue. HBO, Showtime and several other pay networks have reached tentative agreements with both ASCAP and BMI, so payments should be forthcoming to composers.<sup>99</sup> However, the amounts at this time are much less than those for network and syndicated television.

### D. Public Television

The performance of musical works by public television is exempt from the payment of royalties because of the exemptions stated in the 1976 Copyright Act.<sup>100</sup> However, PBS has agreed to pay minimal sums to ASCAP and BMI.

### E. Network Television

The major United States television networks, CBS, NBC and ABC, all have blanket license agreements with ASCAP and BMI which cover the public performance of scores on network television. Composers receive a royalty each time a motion picture embodying their score is broadcast on the network. Computation of this royalty is left up to the applicable performing rights society (ASCAP or BMI), which collects public performance royalties for composers. Network public perform-

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97. Computed as follows:  $(\$06) \cdot (.33) [40 \text{ minutes divided by } 120 \text{ minutes}] (\$40)$ .

98. Telephone conversation with Stan Milander, Bart-Milander Associates, Inc., Los Angeles, California, (Nov. 13, 1984).

99. The details of these agreements have not been publicly disclosed.

100. See 17 U.S.C. § 110 (1982).



ance payments are a substantial source of revenue to composers, although recently both videograms and pay television exhibition have reduced the sale of theatrical motion pictures to network television. Creative fees paid to television composers are substantially lower than those paid to theatrical film composers because television composers receive substantial public performance income.

### F. *Syndication*

Syndicated (*i.e.*, non-network or local) stations traditionally have had blanket license agreements with ASCAP and BMI. The performing rights societies again compute a royalty each time that the motion picture score is performed on syndicated television. The source of revenue has diminished substantially because of the *Buffalo Broadcasting* case, which froze the ASCAP and BMI license fees at 1980 levels. However, since ASCAP and BMI have prevailed on appeal in this case, higher retroactive payments should be forthcoming to composers and publishers.

### G. *Music Publishing*

#### 1. Public Performances

Composers and publishers both have agreements with ASCAP or BMI for the non-exclusive licensing of non-dramatic musical works for public performance. ASCAP and BMI each license performances of the score, and collect and divide the revenue. ASCAP and BMI pay composers and publishers directly, so this revenue does not pass through the publisher to the composer.

#### 2. Sheet Music

With respect to sheet music, composers can look forward to the negotiated rate for piano copies which is now typically \$.06 to \$.10 per copy. This is not a primary source of income for composers at this time. With respect to motion picture folios, composers are now typically receiving 10% to 12½% of the wholesale price, which is affected by the suggested retail price. This generally works out to approximately \$.50 to \$.625 per copy, as on a \$10 folio at retail, the split is typically \$6 to retailers and \$4 to distributors.

#### 3. Mechanicals

A composer can look forward to receiving approximately one-half of the mechanical rate paid by the record company to the studio. The current statutory rate in the United States is \$.045 per cut, or \$.085 per

minutes of playing time, whichever is greater. Unfortunately, record companies are insisting in their soundtrack album deals with studios that they only pay three-quarters of this rate, so composers are receiving as their composer's share approximately \$.017 per cut per album sold in the United States. In major European territories the mechanical rate is computed as a percentage of the album price, and the royalty tends to be slightly higher than in the United States. However, foreign mechanical income is diminished by relatively weak soundtrack album sales overseas, the recent strength of the United States dollar, administration fees charged by foreign subpublishers, and slow remittance of sums to the United States.

#### 4. Synchronization Licenses

If the studio's music publishing subsidiary grants a synchronization license to a third party to use the score in a different motion picture or video, the composer should receive 50% of the synchronization fee as the "composer's share," with the publisher retaining the remaining 50%. Some studios insist on free synchronization licenses for pictures they distribute other than the picture for which the music was written. Studios grant themselves a royalty-free synchronization license for use of the score in the film for which the score is written. Composers traditionally do not share in master sound recording synchronization license income.

#### *H. Soundtrack Album*

With respect to the soundtrack album, as discussed above, the composer will typically receive both a conductor's and producer's royalty, assuming that the soundtrack album preparation costs are recouped. Also, the composer will receive AFofM-required new-use payments for orchestration if the composer was the orchestrator. The composer will receive mechanical (record) royalties as writer of the score whether or not the album has recouped its costs.

### V. RECENT TRENDS IN FILM COMPOSING AGREEMENTS

Two recent phenomena are making major impacts on film composing agreements: synthesizer scores and "package" deals. The first, and most radical change, has been the advent of the synthesizer score, typified by "Midnight Express" (Georgio Moroder) and "Chariots of Fire" (Vangelis). Since synthesizers can simulate orchestral scores, composers now can act not only as the composer but also as the score instrumentalist. The AFofM obviously is quite concerned with this change, because it has reduced or eliminated the need for orchestras in many instances.

The new Producer-AFofM Theatrical Agreement prohibits the use of synthesizers as a replacement of orchestras, subject to specific exceptions.<sup>101</sup> However, the AFofM has not stopped this recent trend.

Synthesizer scores have resulted in the more frequent use of composer "package" deals. These deals are very simple. The studio gives a fee to the composer which, unlike the typical composer arrangements, includes all recording costs. The composer is required to deliver a master sound recording for the package price, and retains the balance not spent as the creative fee. This arrangement is analogous to so-called "recording fund" deals now prevalent in the record industry.

Studios are attracted to "package" deals since they cap their outlay for the score. However, the studio often seeks to assure its money is spent in creating the score by requiring a stated number of minutes of music to be delivered, sometimes requiring certain minimum use of an orchestra (e.g., twenty musicians) if an orchestral sound is important, and often requiring delivery of a recording cost statement.

Package deals lead to interesting questions as to agent and legal fees. Composer agents usually charge 10% to 15% of the creative fee, and lawyers sometimes charge 5%. The issue is whether the fee will be based on the gross package fee, or the net fee left to the composer after recording costs. By analogy to the standard composer deal (under which the studio, not the composer, is responsible for costs), calculation of the agent or lawyer fee on the net composer fee seems more fair. However, it is difficult for the agent or lawyer to monitor recording costs. The major composer agencies are split on whether to charge on the gross or net package amount.

Composers who agree to package deals also increasingly are requesting a share of the "publisher's share" of income, since composer "package" deals are usually for an amount less than what the studio would pay for an orchestral score.

## VI. COMPOSER EMPLOYMENT AGREEMENT (LONG FORM): ANALYSIS AND COMMENTARY

We now proceed to examine, in detail, a long-form Composer Employment Agreement. This agreement is "producer oriented," *i.e.*, it was drafted by lawyers seeking to protect the producer. The comments reflect the thoughts of both the producer's lawyer and the composer's lawyer in examining the agreement.

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101. AFofM Agreement, *supra* note 14, at art. I, para. 12.

Dear \_\_\_\_\_, 198 \_

This letter when signed by you and by the undersigned, \_\_\_\_\_ (hereinafter referred to as the "Producer") will confirm our mutual agreement whereby we have engaged you (hereinafter referred to as the "Composer") as an employee for hire to render certain services and to furnish a complete and original musical score (hereinafter referred to as the "Work") for the motion picture tentatively entitled "\_\_\_\_\_" (hereinafter referred to as the "Picture").

[*Comment*]. There are a few legal "buzz words" in this opening paragraph which are of concern. "Employee for hire"<sup>102</sup> is a term of art derived from the United States Copyright Act.<sup>103</sup> It is important to the Producer that the Composer be an employee because the copyright<sup>104</sup> in the score will vest from the inception with the Producer. The copyright will not be subject to termination<sup>105</sup> under the Copyright Act as it would be if this agreement merely provided for an assignment to the Producer of the rights in the score. Also, as an employer, the Producer has the right to control the composer's services. The Composer additionally is obligated to furnish an "original" score,<sup>106</sup> because in order to be copyrightable the score must be original, that is, the Composer must create it rather than copy it.<sup>107</sup> The word "work"<sup>108</sup> is used here because this is the term of art used under the Copyright Act for the types of creations which are capable of copyright protection.

Notwithstanding the employment relationship set forth in this contract, producers typically do not exercise much control over the composer's services.<sup>109</sup> Composers usually write scores at home. The National Labor Relations Board recently determined that composers generally act as independent contractors, not employees.<sup>110</sup>

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102. The term "employee for hire" is prominent in case law, but is not found in the 1976 Copyright Act. It is a hybrid term combining the concepts that the composer is creating the score as an employee of the producer and that the score is a work made for hire.

103. 17 U.S.C. §§ 101-810 (1982).

104. "Copyright" in the United States consists of the legal protections accorded by the Copyright Act. Basically it is a limited duration monopoly granted by Congress for the exclusive use of artistic works, with the attendant right to prevent use by others.

105. See 17 U.S.C. § 203 (1982). See also H.R. REP. NO. 1476, 94th Cong., 2d Sess. 124-28, reprinted in 1976 U.S. CODE CONG. & AD. NEWS 5659, 5740-44; J. ERICKSON, E. HEARN & M. HALLORAN, *MUSICIAN'S GUIDE TO COPYRIGHT* 46-50 (rev. ed. 1983).

106. The two fundamental prerequisites for copyright protection are that the work must be original and must be fixed in a tangible medium of expression. 17 U.S.C. § 102(a) (1982).

107. *Id.* See H.R. REP. NO. 1476, 94th Cong., 2d Sess. 53-56, reprinted in 1976 U.S. CODE CONG. & AD. NEWS 5659, 5666-69.

108. Copyrightable works include musical works and sound recordings. 17 U.S.C. § 102(a)(2), (7) (1982).

109. See Havlicek & Kelso, *The Rights of Composers and Lyricists: Before and After Bernstein*, 8 COLUM. J. ART & L. 439, 448 (1984). Composers claimed they were not employees in *Bernstein v. Universal Pictures, Inc.*, No. 72 Civ. 542-CLB (S.D.N.Y. Apr. 10, 1979).

110. See *supra* note 15 and accompanying text.

### A. Article I—Term and Employment

*Section I-1. Term and Employment.* Producer hereby employs the Composer to render his services to the Producer as hereinafter specified in connection with the Picture commencing on the date hereof, which date is sometimes hereinafter referred to as the "starting date."

[*Comment*]. Again, note the use of the term "employs."<sup>111</sup> Although there is a "starting date," there is no corresponding "completion date." Some composer agents will seek to limit the basic term of services to a stated period, e.g., ten weeks, with extensions in the discretion of the Producer, subject to additional payments (called "overages"). Overages usually are prorated by dividing the total compensation by the term of weeks. For example, if the basic deal is \$70,000 for ten weeks, and the Composer works twelve weeks, the Composer would receive an additional \$14,000.

### B. Article II—Compensation of Composer

*Section II-1. Amount of Compensation.* Producer agrees to pay the Composer as full compensation for all of the services required of him in connection with the Picture and for all of the rights granted by the Composer, upon condition that the Composer shall fully and faithfully perform all of the services required of him hereunder, the sum of \_\_\_\_\_ Dollars (\$\_\_\_\_\_) payable as follows:

- (a) \_\_\_\_\_ Dollars (\$\_\_\_\_\_) upon the execution of the agreement; and
- (b) \_\_\_\_\_ Dollars (\$\_\_\_\_\_) upon the completion of all services required hereunder.

Producer shall have the right to deduct and withhold from the compensation payable hereunder the amounts required to be deducted and withheld by Producer pursuant to any present or future law or governmental or judicial order or regulation requiring the withholding or deducting of compensation.

[*Comment*]. One key word in this section is "full" as used to describe the compensation. This agreement is a so-called "all-in" Composer's deal, i.e., the Producer negotiates one flat payment for all the Composer's services, inclusive of union minimums for the limited areas of union jurisdiction. In many instances now, at least for name composers, there is a separate negotiation for orchestration<sup>112</sup> services, which are covered by the AFofM. Also note that the Producer's obligation to pay the Composer is conditioned upon the Composer "fully and faithfully" performing his or her services. This makes sense, since the Producer does not want to pay the Composer for services that are not rendered, or if the Composer is otherwise in breach of his or her obligations under this

111. Although there is no federal statutory definition of employment, the IRS has promulgated regulations. See 26 C.F.R. § 31.3402(f)(2)-1(g) (1984). The California Administrative Code also defines employment relationships. See CAL. ADMIN. CODE tit. 22, §§ 621(b)-1, 4304-1 (1984).

112. "Orchestration" is defined by the AFofM as "the art of assigning, by writing in the form of an orchestra score, the various voices of an already written composition complete in form." AFofM Agreement, *supra* note 14, at art. V, para. 37(a).

agreement. The standard comment by Composer's lawyers here is that this condition should be limited to performance of "material" services. For example, if the Composer is five minutes late to a scoring session the Producer would be contractually foreclosed from firing the Composer and holding back compensation. The limitation to "material" services is fair, and is accepted by most producers, as the Composer should not suffer for a technical or insubstantial breach of contract. Some producers, however, do not want to fight over what is "material" and what is not, so they resist this change. Also note that the Producer has the right to deduct payments from the compensation, which it is obligated to do by law, since this is an employment contract. A Composer can limit these deductions by claiming many allowances or complete exemption on the W-4 form (subject, of course, to IRS limits), or can eliminate withholding by the Producer completely by using a loan-out corporation. However, the loan-out corporation<sup>113</sup> must make the deductions as employer. Some composers' lawyers will insist that the deal be "pay or play," *i.e.*, that the composer gets paid whether or not his or her services are actually used, and that there be an outside date for the final payment.

*Section II-2. Right to Offset Against Union Payments.* Composer agrees that to the extent the services to be rendered by Composer hereunder are subject to the provisions of any collective bargaining agreement between Producer and any guild, union or labor organization having jurisdiction, the compensation herein provided shall be deemed to include compensation for such services in the minimum amount specified for such services in the applicable collective bargaining agreements (including any residual or reuse payments specified in such agreements), and the excess shall be deemed to be compensation for such services as are not subject to the provisions of any such collective bargaining agreements.

[*Comment*]. This is a "crediting of overscale" provision, and an important money point as far as the Producer is concerned. The AFofM Basic Theatrical Motion Picture Agreement allows the Producer to bargain for crediting of overscale compensation and states:

The Producer and the musician may, by individual negotiations at the time of his employment, agree that the portion of a musician's salary which is in excess of the minimum salary rate for such musician, may be applied to any of the minimum payments, premiums, allowances, doubling, penalties, overtime or any other minimum requirements of this Agreement.<sup>114</sup>

This allows the Producer to receive the benefit of any orchestration and conducting services rendered by the Composer that are subject to

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113. A "loan-out corporation" is a corporation whose function is to lend the services of its employee to third parties. It collects income and pays salaries and bonuses to the employee. The timing of income tax benefits provided by loan-outs are beyond the scope of this Article.

114. See AFofM Agreement, *supra* note 14, at art. I, para. 6.

guild minimums, without an additional, separate payment. Also, the Producer can reduce or avoid residual,<sup>115</sup> reuse,<sup>116</sup> and new-use<sup>117</sup> payments under the same AFofM provision.

*Section II-3. Nights, Sundays, Holidays.* No increased or additional compensation shall accrue or be payable to the Composer by reason of the fact that any of his services are rendered at night or on Sundays or holidays or after the expiration of any particular number of hours of service in any period.

[*Comment*]. This clause is not enforceable under the AFofM Basic Theatrical Motion Picture Agreement, at least with respect to AFofM-governed services, unless there is a "crediting of overscale clause" like the one exemplified in section II-2.<sup>118</sup>

### C. Article III—Services of Composer

*Section III-1. Reporting.* Composer agrees, unless excused by the Producer, to report at the office of the Producer, or elsewhere as it may designate, at such time or times as the Producer may designate during the term hereof and to render his services for the Producer in accordance with the terms and provisions hereof during the term hereof.

[*Comment*]. Obviously in order to make this agreement work the Composer must show up to spot the picture, to meet periodically with the producer and director, and to record the score. This clause makes it clear that he or she is obligated to do so. The Composer's lawyer probably should limit this to "reasonable" times so the client is not required to attend 3:00 a.m. meetings. The actual composing, as noted above, is usually done at home.

*Section III-2. Services.* Producer hereby employs the Composer:

(a) To write, compose, arrange,<sup>119</sup> orchestrate, prepare and submit to the Producer, and, if requested by the Producer, to collaborate with others in the writing, composition, orchestration, preparation and submission of music suitable for use as the complete background score for the Picture;

(b) To conduct an orchestra on a date or dates to be specified by the Producer in the rehearsal, performance and recording of the Work in synchronism<sup>120</sup> and timed relation with the Picture;

115. The residuals which the producer or distributor are required to pay are set forth in paragraphs 15 and 16 of the AFofM Agreement. Paragraph 15 covers free television, and paragraph 16 covers the "supplemental markets" of cassettes and pay television.

116. Re-use payments are triggered when the score, which is recorded under the AFofM Agreement, is exploited in a new medium, but the score remains as part of the picture.

117. "New-use" payments are triggered when the score, which is recorded under the AFofM Agreement, is subsequently exploited apart from the picture, as in a soundtrack album.

118. See AFofM Agreement, *supra* note 14, at art. I, para. 2.

119. "Arranging" is defined as the fleshing out of a simple musical idea with new counterlines, then the orchestration of this embellished version. It is to be distinguished from composing (creation of original music) and orchestration (transfer of a complete music sketch to a full score).

120. "Synchronism" is defined as the fact or state of being synchronized, *i.e.*, to agree in time or rate of speed.

(c) To supervise music editing and dubbing of the recording of the Work in connection with the Picture, including changes or modifications reasonably required by the Producer;

(d) To deliver the Work to Producer in the form of one (1) copy of the conductor's part,<sup>121</sup> two (2) copies each of all lead sheets<sup>122</sup> for the original music and for the arrangements, cues,<sup>123</sup> bridges<sup>124</sup> and derivatives of the Work, and ten (10) music cue sheets,<sup>125</sup> which cue sheets shall set forth the nature, extent and exact timing of the uses made of the Work in the Picture, and such other information as is customarily included in music cue sheets of motion pictures.

[*Comment*]. The description of services in subparagraph (a) is very broad and is favorable to the Producer. This also makes it clear that the Composer must collaborate with the others who are working on the score. Some composers will insist on designating the orchestrator, the lyricists, and the music editor with whom they work. Some agreements are even more broadly drafted, and require that the Composer work on featured songs to be used (as opposed to background score), and also require the Composer to create music for trailers to be used for the advertising of the picture. (Usually music in trailers is taken from music synchronized with the film.) There is also an express obligation for the Composer to supervise the music editing and dubbing<sup>126</sup> of the score recording. The Composer usually wants to do this anyway in order to maintain the artistic integrity of the recorded score when it is balanced with sound effects and dialogue in the final soundtrack mix. The Producer, however, always has the final decision as to how the score is used—there is no such thing as a “final cut” Composer. Subparagraph (d) requires that the Composer deliver certain physical materials to the Producer. The Producer, in turn, will be required to deliver these physical materials to the film distributor. The Composer should always make sure that the music cue sheets (usually prepared by the music editor) are accurate, as the cue sheets are used to calculate public performance payments. Composer attorneys sometimes request that the music editor be obligated to prepare the cue sheets, but that the composer approve them.

Composer acknowledges that the Producer's total budget for all of the services

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121. The conductor's part is the written score from which the conductor conducts the orchestra.

122. “Lead sheets” are typically used for individual songs. They consist of chord notations, lyrics and melody line.

123. “Cues” is the term for the designation of a specific place and length of time for music to be used in a soundtrack.

124. “Bridges” are connecting passages between two sections of a musical composition.

125. Music cue sheets are written summaries of the cues, containing the timing of the music in each reel of the film, the composer, publisher and length of use. Cue sheets serve two primary functions: First, they are a clearance check list; second, they are supplied to performing rights societies for use in computing public performance royalties.

126. “Dubbing” is the act of adding sound to the picture. When the music is “dubbed” it must be balanced with dialogue and sound effects.



to be rendered hereunder, including, but not limited to, the compensation payable to Composer hereunder, any and all compensation and fees payable to musicians in connection with the Work, and the preparation, rehearsal, performance, recording and synchronization thereof, any other costs incurred in connection with such preparation, the cost of studio rental in connection with the rehearsal, performance and recording of the Work, and any fees payable to any guild or union as a result of said rehearsal, performance and recording, is \_\_\_\_\_ Dollars (\$\_\_\_\_\_). Composer agrees to use his best efforts to insure that the actual costs incurred in connection with his services hereunder do not exceed said budgeted cost. Composer's compensation shall include payment for all arrangers, orchestrators, copyists<sup>127</sup> and librarians<sup>128</sup> required, to the extent Composer does not perform such services himself.

[*Comment*]. This form contract also includes an undertaking by the Composer to use his or her best efforts to insure that the composing budget is not exceeded. "Best efforts" is not a guarantee that the score will not go over-budget, or that the Composer is personally responsible for over-budget costs, and the Composer's attorney will want this clarified. Composing budgets vary widely, depending primarily on the length and pace of the score and on the number of instruments to be used. For example, when John Williams does his scores on the "Star Wars" pictures for George Lucas, his scores are lengthy and he uses The London Philharmonic Orchestra. A counterexample would be "Chariots of Fire," in which Vangelis used synthesizers only. Also note that this deal is "all in" and that the Composer's compensation is inclusive of arrangers, orchestrations, copyists and librarians, all of whom are covered by the AFofM.

*Section III-3. Completion of Services.* The term of this Agreement, and the time during which the Producer shall be entitled to the services of the Composer, shall commence upon the starting date and shall continue until completion of all services required by the Producer hereunder, including any services required in connection with changes or modifications during the recording and dubbing of the Work; provided, however, that Producer shall have the right and option to terminate this Agreement forthwith and thereafter shall be under no obligation to Composer of any nature whatsoever if, in the absence of delay caused by the Producer, Composer fails to do the following:

- (a) Complete and deliver the Work not later than \_\_\_\_\_;
- (b) Complete all services hereunder not later than \_\_\_\_\_;
- (c) Render services in connection with any added scenes, changes, additional sound recordings or any retakes of any portion of the Picture, upon Producer's request, at such times and places as Producer shall designate without any additional compensation, unless Composer is unable to do so because of a then existing exclusive services agreement with another person.

[*Comment*]. This paragraph makes it clear that the Composer's services do not end until he or she has completed all services which the

127. A copyist copies the score for the musicians before the recording session. Copyists are covered by article VI, "Music Preparation," in the AFofM Agreement, *supra* note 14. Paragraph 49(a)(i) defines "Full Score" and paragraph 49(a)(2) defines "Condensed Score."

128. Librarians take care of the score and deliver the various written music to the producer at the end of the recording session. They are covered by article VII of the AFofM Agreement, *supra* note 14.

Producer requires. The date to be inserted in subparagraph (a) is used to insure that the score is completed and ready for recording as of a certain date. Subparagraph (b) sets a date when all services are to be completed. It is important to the Producer to deliver a fully scored picture to its distributor as of a specific date, or the Producer will be in breach of his agreement with the distributor. The distributor, in turn, who is often the financier, is concerned with releasing the picture as soon as possible to make back its investment and stop interest from accruing. Also, release schedules are planned by distributors well in advance and theatres are booked. However, no matter what the contract says, these completion dates typically vary because of unforeseen events, so the Composer's attorney may request that the date in (b) be extended for events not within the Composer's control, such as re-editing.

Since there is often re-editing up until the last possible moment, which oftentimes results in changes in the score, it is made clear in subparagraph (c) that the Composer will render services in connection with added scenes and changes. Some Composer agents try to avoid this by inserting a "stop date," as editing (and thus writing and scoring) can go on forever, at least in theory. As discussed above, some deals are structured (which Producers always resist) so that the compensation is increased if the Composer's services are required beyond a stated number of weeks, e.g., ten.

*Section III-4. Services Unique.* The parties agree that the services agreed to be rendered by the Composer are of a special, unique, unusual, extraordinary and intellectual character involving skill of the highest order, giving them peculiar value, the loss of which cannot be reasonably or adequately compensated in damages in an action at law.

[*Comment*]. The Producer insists that this self-serving clause be inserted because under California law the Producer will be unable to get an injunction preventing the Composer from rendering services for others if it cannot demonstrate that the Composer's services are "special, unique, unusual, extraordinary or intellectual."<sup>129</sup> In the unlikely event that the Producer will go into court to seek such an injunction, having this statement from the Composer certainly helps the Producer's position, since under California law this recital is deemed to be conclusively true.<sup>130</sup> However, California courts are loathe to grant injunctions with respect to personal services contracts, even with the inclusion of this clause.<sup>131</sup>

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129. CAL. CIV. CODE § 3423 (West 1970); CAL. CIV. PROC. CODE § 526 (West 1979). The latest reported case in this regard is *Motown Record Corp. v. Brockert*, 160 Cal. App. 3d 123, 207 Cal. Rptr. 574 (1984).

130. See CAL. EVID. CODE § 622 (West 1966).

131. See 7 B. WITKIN, SUMMARY OF CALIFORNIA LAW *Equity* §§ 48-52 (8th ed. 1974).

*Section III-5. Exclusivity.* The Composer shall render his services exclusively hereunder during the term hereof.

[*Comment*]. This "exclusivity" provision is very important to the Producer because it does not want the Composer to render other services which might interfere with the services to be rendered to the Producer. Some composers work on more than one score at a time, which is a breach of this type of provision, although they rarely get caught because they compose at home.

#### D. Article IV—Grant of Rights

*Section IV-1. Name and Likeness and Their Use.* The Composer grants to the Producer the perpetual nonexclusive right to use and license others to use his name and reproductions of his physical likeness and voice in connection with any services that the Composer may perform pursuant to the provisions hereof and in advertising or exploiting the Picture, or the Producer or its products.

[*Comment*]. In addition to the rights to utilize the score and the soundtrack recordings, the Producer needs the right to use the Composer's name (for credit and music publishing, and for soundtrack album purposes) and likeness (for publicity) in connection with the picture. This right is "nonexclusive" because the Composer should be free to grant similar rights to Producers of his or her other pictures. California Civil Code Section 3344 specifically provides that no one may use a person's name and/or likeness for commercial purposes without compensation.<sup>132</sup> The Composer's cash compensation is deemed to include the grant of these rights to the Producer. The Composer's attorney will not object to this clause, although he or she may ask for approvals over the photographs and biographical material used. The grant of rights with respect to the Composer's likeness obviously is not as important to the Producer as the grant of rights to use the likeness of a major star actor in connection with the exploitation of the picture, and therefore is not as precisely negotiated.

*Section IV-2. Commercial Tieups.* The Composer agrees that the Producer may perpetually use or authorize others to use any of the rights herein granted for commercial advertising or publicity in connection with any product, commodity or service manufactured, distributed or offered by the Producer or others, provided such advertising refers to the Picture, or to the Composer's employment by the Producer. The Composer shall not, in such advertising or publicity be represented as using, consuming or endorsing any such product, commodity or service without his written consent.

[*Comment*]. In addition to the right to use the Composer's name and likeness, the Producer also will want to be able to use them for com-

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132. CAL. CIV. CODE § 3344 (West Supp. 1985). Section 3344 was recently amended, and CAL. CIV. CODE § 990 (West Supp. 1985) added, effective January 1, 1985, the effect of which is to create a property right in a person's name and likeness and to provide for a limited descendibility of this so-called right of publicity.

mercial advertising purposes. An example of a commercial tie-up for a Composer would be a member of the public getting a soundtrack album for buying ten boxes of Wheaties. Please note that the Producer's right is limited in that no advertising or publicity can reflect a direct endorsement. John Williams does not endorse R2D2 dolls. Again, this sort of clause is much more important for star actors. The general rule is that composers do not sell merchandise, although John Williams conceivably could make money by endorsing Memorex tapes.

*Section IV-3. Properties.* The Composer hereby warrants that all material written, composed, prepared or submitted by him during the term hereof or any extension thereof shall be wholly original with him and shall not be copied in whole or in part from any other work, except that submitted to the Composer by the Producer as a basis for such material. The Composer further warrants that said material will not infringe upon the copyright, literary, dramatic or photoplay rights of any person. Composer warrants and agrees to indemnify and hold Producer and Producer's officers, shareholders, partners, employees, successors and assigns, and each of them, harmless from and against any claim, demand, damage, debt, liability, account, reckoning, obligation, cost, expense, lien, action and cause of action (including the payment of attorneys' fees and costs actually incurred, whether or not litigation is commenced) based on, or in connection with, or arising out of any breach or failure of any of Composer's warranties, representations or covenants herein contained.

[*Comment*]. This type of warranty and indemnity clause is standard in agreements between the Producer and third parties who are submitting work which will be incorporated into the picture. Again, a key word here is "original," since the Producer wants to make sure that the score is written by the Composer and is capable of copyright protection. The Composer's attorney may want to limit this by requesting that the work will be wholly original except for arrangements<sup>133</sup> which are made from public domain<sup>134</sup> music compositions. This request is fair so long as it only pertains to the public domain material. Certainly the arrangements must be original and capable of copyright protection to the extent they add to the underlying public domain work. The Composer is also guaranteeing that the score will not infringe on the rights of third persons. This clause is designed to insulate the Producer and the distributor from, among other things, copyright infringement claims.<sup>135</sup> The Com-

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133. Arrangements are "derivative works." See 17 U.S.C. §§ 101, 103 (1982). The copyright in the derivative work extends only to the material contributed by the author of the derivative work, as distinguished from the pre-existing material employed in the work. 17 U.S.C. § 103(b) (1982).

134. Public domain materials are those not protected by copyright. Most of the scores of classical composers who have been dead for 50 years or more are in the public domain and may be freely adapted for use in motion pictures.

135. An infringement occurs when any of the copyright owner's exclusive rights are violated, or when unauthorized copies or phonorecords are imported. 17 U.S.C. §§ 501(a), 603 (1982). The worst remedy available to the plaintiff, in the view of the producer, is an injunction stopping distribution of the picture. See 17 U.S.C. §§ 502, 603 (1982). Other remedies include impounding of copies or phonorecords as well as the articles used to reproduce, dam-

poser also agrees to "indemnify" (pay back) the Producer and persons or companies affiliated with the Producer from costs caused by actions by persons whose rights are interfered with because the work is not original. Although this is standard, the Composer's attorney will want this limited to claims which are reduced to a final judgment or settled with the Composer's consent, and may also request that the Composer be named as an additional insured under the Producer's errors and omissions insurance policy. The Producer also has a legal right of offset against royalties payable to the Composer.<sup>136</sup>

*Section IV-3* (continued). The Composer further agrees that all the said material which he may write, compose, prepare or submit during the term hereof, or any extension thereof shall be the sole property of the Producer and that all of the said material shall be written, composed, prepared and submitted by him as the employee of the Producer, and not otherwise, and that the Producer shall be the author<sup>137</sup> and first proprietor of the copyright thereof, and that the Composer shall have no right, title or interest thereto or therein, and that the Producer shall have the right to obtain copyrights, patents and/or other protection therefor. The Composer further agrees to execute, verify, acknowledge, and deliver any and all documents which the Producer shall deem necessary or advisable to evidence, establish, maintain, protect, enforce or defend its rights and/or title in or to the said material or any part thereof. Producer shall have the right, but not the duty, to use, adapt, edit, add to, subtract from, arrange, rearrange, revise and change the said material or any part thereof, and to combine the same with other works of the Composer or of other persons, and to vend, copy, publish, reproduce, record, transmit, broadcast by radio and/or television, perform, photograph with or without sound, including spoken works, dialogue and/or music synchronously recorded, and to communicate the same by any means now known or hereafter devised, either publicly and for profit, or otherwise.

Producer, its successors and assigns, shall in addition to the Composer's services be entitled to and own in perpetuity, solely and exclusively, all of the results and proceeds of said services and material, including all rights throughout the world of production, manufacture, recordation and reproduction by any art or method, whether now known or hereafter devised, and whether such results and proceeds consist of literary, dramatic, musical, motion picture, mechanical, or any other form of work, theme, idea, composition, creation or product. The Composer will, at the request of the Producer, execute and deliver to the Producer in connection with all such material a certificate in substantially the following form:

"I hereby certify that I wrote the material hereto attached, as an employee of \_\_\_\_\_ pursuant to an agreement dated the \_\_ day of \_\_\_\_\_, 19\_\_, in performance of my duties thereunder, and in the regular course of employment, and that said \_\_\_\_\_ is the author thereof and entitled to the copyright therein and thereto, with the right to make such changes therein and such uses thereof, as it may determine as such author.  
IN WITNESS WHEREOF, I have hereto set my hand this \_\_ day of \_\_\_\_\_, 19\_\_."

and will execute such assignments or other instruments as the Producer may from time to time deem necessary or desirable to evidence, establish, maintain, protect, enforce or defend its right or title in or to any such material.

The Composer hereby appoints the Producer the true and lawful attorney-in-

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ages and profits, court costs and attorneys' fees. 17 U.S.C. §§ 503(a), 504 (1982). Criminal penalties are also available. 17 U.S.C. § 506 (1982).

136. See 1 B. WITKIN, SUMMARY OF CALIFORNIA LAW *Agency & Employment* § 208 (8th ed. 1973).

137. Under copyright law the "author" is the first owner. 17 U.S.C. § 201(a) (1982).

fact of the Composer irrevocably to execute, verify, acknowledge and deliver any and all such instruments or documents which the Composer shall fail or refuse to execute, verify, acknowledge or deliver.

[*Comment*]. The second grammatical paragraph makes it clear that this is an employment relationship by which the Producer is vested with the copyright in the score as the "author" from the inception, since the material prepared by the Composer is a "work made for hire" prepared within the regular course of the Composer's employment. This paragraph also includes a clause by which the Composer agrees to sign and deliver all documents which the Producer may need to evidence ownership in the copyright to the score. Usually this only consists of one document, a "certificate of authorship," substantially in the form above. This document will state that the Composer, as an employee and within the regular course of his or her employment, created the score as a work made for hire for the Producer. In the alternative, this document may state that the score is a "specially commissioned or ordered work for use as part of the motion picture," which language should be used by the Producer if there is in fact not an employment relationship between the Composer and the Producer, as when the Composer is an independent contractor or uses a loan-out corporation. Some certificates of authorship state these in the alternative by saying the score is either created in the regular course of employment or in a specially commissioned or ordered work.

There is also a clause in which the Composer appoints the Producer as his or her "attorney in fact."<sup>138</sup> This means the Producer is authorized to sign the documents which it may require in the Composer's name. This does not mean that the Producer is acting as the Composer's attorney in the broad, traditional sense, but rather is only entitled to execute documents in the name of the Composer. The Composer's attorney will sometimes request that the Producer submit the document that the Producer wants to be executed to the Composer, and the Composer has a certain amount of time to sign and return the document before the Producer's right to sign on behalf of the Composer is effective. Also, the Composer's attorney will often try to require that the scope of the document be tempered by the word "reasonable" and not expand the Producer's rights beyond the scope of rights granted in the agreement.

Some Composer's attorneys will request that music not used in the motion picture revert to the composer, especially if the composer writes a

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138. An agent acting under a power of attorney is sometimes called an "attorney in fact." See *Frink v. Roe*, 70 Cal. 296, 306, 11 P. 820, 824 (1886). For a discussion as to California law, see 1 B. WITKIN, *SUMMARY OF CALIFORNIA LAW Agency & Employment* §§ 120-121 (8th ed. 1973).

complete song (as opposed to a cue) which is not used. The settlement in *Bernstein v. Universal Pictures, Inc.*<sup>139</sup> provides for this.<sup>140</sup>

*Section IV-4. Publication Rights and Royalties.* Producer shall have and is hereby granted the complete control of the publication<sup>141</sup> of all or any of the musical material written by the Composer hereunder. Producer agrees, however, that in the event it publishes the musical material or causes the musical material to be published by a third party publisher, Producer shall pay, or its agreement for the publication of said musical material shall require the publisher to pay directly to the Composer, an amount of royalty with respect to such musical material as set forth in Exhibit A attached hereto (it being understood that the term "Publisher" as used therein means the Producer or third party publisher, as the case may be, the term "Composer" means the Composer, and the term "Composition" means the musical material written by Composer or any part thereof).

No royalties shall be payable to Composer on professional or complimentary printed copies or on copies of mechanical derivatives which are distributed free to performing artists, orchestra leaders and disc jockeys or for advertising, promotional, sales or exploitation purposes. Furthermore, no royalties shall be payable on consigned copies unless paid for, and not until such time as an accounting thereunder can properly be made. Composer shall receive public performing royalties throughout the world directly from Composer's own Performing Rights Society and shall have no claim whatsoever against the Producer or publisher for any monies received by the Producer or publisher from any Performing Rights Society which makes payment directly (or indirectly other than through the publisher) to writers, authors and composers.

Except as herein provided, no other royalties or monies shall be paid to Composer. In no event shall Composer be entitled to share in any advance payments, guarantee payments or minimum royalty payments which the Producer or any third party publisher may receive in connection with any subpublishing agreement,<sup>142</sup> collection agreement,<sup>143</sup> licensing agreement or other agreement covering the musical material.

Notwithstanding the foregoing, in the event the Producer causes lyrics to be written for any of the musical material written and composed by the Composer hereunder, and causes the same to be published as a song, then the above-stated royalty payments in connection with said song shall be one-half (1/2) of the sums above set forth.

The Composer shall have no rights in, and shall not be entitled to, any publication or other royalties in respect of musical material owned, controlled or furnished by the Producer which the Composer may use or adapt in connection with the musical material written and composed by the Composer hereunder.

Producer, its successors and assigns, shall have the right but not the obligation to make, distribute, sell and otherwise exploit commercial phonograph records recorded directly from the sound track of the Picture or any subsequent motion picture, or rerecorded for phonograph purposes, embodying all or any part of the material written by Composer hereunder. In connection with any such phonograph record, and in connection with any other phonograph record which may embody any of the material written by Composer hereunder, Composer shall receive mechanical

139. No. 72 Civ. 542-CLB (S.D.N.Y. Apr. 10, 1979).

140. See Havlicek & Kelso, *supra* note 109.

141. "Publication" is the distribution of works or phonorecords of a sound recording to the public by sale or some other means of transferring ownership or control of the work. 17 U.S.C. § 101 (1982).

142. A subpublishing agreement is an agreement in which a publisher authorizes a foreign publisher to act as the publisher in a foreign territory for a limited term.

143. A collection agreement is an agreement authorizing a publisher to collect sums due to another publisher. It is distinguished from subpublishing agreements by the limitation of the grant of rights to collect only.

royalties by virtue of Composer's services as a Composer, as set forth in this Section IV.

[*Comment*]. The Producer is granted all the "music publishing" rights in the score, *i.e.*, the Producer may exploit the music whether in connection with the film or otherwise. This is a very typical provision which all but the most powerful composers live with. Although the Producer is granted these rights, the Producer is obligated to pay the Composer a percentage of the music publishing royalties, which percentage is discussed more specifically later. In general, these royalties amount to approximately 50% of the income generated from publication of the music, and (with the exception of public performance monies) constitute the so-called "writer's share" or "composer's share" of music publishing income.

Infrequently, composers are able to negotiate for a participation in the remaining "publisher's share." One-half or one-quarter participation is most typical. If the Composer gets "half the publishing" he or she will be entitled to approximately 75% of the income generated by the score (50% as composer and 25% (*i.e.*, 50% of 50%) as co-publisher). Also, sometimes in low budget features the Composer is willing to take a reduced fee in return for part or all of the publishing. Composers sometimes also request an ownership in the copyright that mirrors the share in the "publisher's share," and the right to co-administrate the score, *i.e.*, be able to grant licenses and collect income. Studios rarely grant these requests.

There are certain common exceptions to the payment of royalties. This form sets forth exceptions for professional or complimentary copies and for free copies. With respect to consigned copies, the Producer is not obligated to pay until it is paid and until a proper accounting can be made. The Composer's attorney would probably want all of this to be tempered by a provision that, no matter what, if the Producer is paid, then the Composer gets his or her share. The Composer's attorney would also probably find that the concept of proper accounting with respect to consigned copies is rather nebulous.

This paragraph also makes an important point with respect to public performance monies. The writer's share of public performance royalties do not flow first to the Producer and then to the Composer. Instead, the Composer, as writer, will receive his or her approximate 50% share of these royalties directly from the performing rights society, and the Producer will receive its approximate 50% share directly from the performing rights society as publisher. This paragraph also makes it clear that the Composer has no claim with respect to the publisher's share of performing rights societies' monies. This is fair, and no one objects to this,



as long as the Composer does not retain part of the publisher's share of income.

The Producer always wants to limit the money to be paid to the Composer to the specific royalties which are set forth in the contract. The Composer's lawyer will probably want a "catch all" clause which states that the Composer will receive 50% of the monies derived from the score which are not specifically set forth in the agreement. This is fair in view of the increasing number of ways to derive money from music, and most producers will agree to this. What the Producer will not agree to is for the Composer to share in any advances, guarantees, or minimum royalty payments with respect to subpublishing agreements, collection agreements, and the like. The Producer or the studio music publishing company will oftentimes receive an up-front advance guarantee based on its entire catalog, which it gradually earns back. Only when the money is earned will it be credited to the Composer's account. It would be impossible for the Producer, or the studio, in most instances, to allocate the advances among the various compositions in its catalog, so they want this sort of clause to be inserted. However, if an advance is based on the score only, the Composer has a good argument that he or she should share the advance.

The fourth paragraph contains a standard clause whereby the Producer can reduce the Composer's royalties in the event lyrics are added to the score. It is standard in the music publishing industry for the composer of the music and the author of the lyrics to divide the "writer's share" equally. Some composers seek to control the setting of lyrics by retaining the right to approve lyrics set to their score.

The fifth paragraph states that the Composer has neither rights in nor is entitled to money with respect to adaptations of musical material provided by the Producer. The adroit Composer's attorney may want to limit this to material which is not in the public domain, since the Producer does not own such materials in the first instance.

The last paragraph makes it clear that the Producer can exploit a soundtrack album embodying the score. No Composer in his right mind would object to this, since the Composer will receive mechanical royalties on each copy which is distributed and sold, as well as an artist royalty. This clause could be a problem if the Composer were signed exclusively to a record company, but this concern rarely, if ever, arises for "Hollywood" composers who do not have exclusive recording contracts. It is of major concern if the Composer is a "rock" performer with a recording contract, since the label retains the exclusive right to distribute all phonorecords embodying its artist's performance, absent a spe-

cifically negotiated soundtrack exclusion. Also, some labels insist that the inclusion of their artist's performance in videograms is subject to the label's approval, since the recording contract defines "record" as including "sight and sound devices." Also, the Composer's agent may seek a guarantee of a minimum number of cuts on the soundtrack LP.

*Section IV-5. Accounting Statements.* Except as provided to the contrary herein, within ninety (90) days after June 30 and December 31 of each year, Producer or the publisher, as the case may be, will prepare and furnish semiannual statements to Composer hereunder, and each such statement shall be accompanied by payment of any and all sums shown to be due thereby. Producer or the publisher shall have the right to retain as a reserve against returns such portion of payable royalties as shall be necessary in its business judgment. Composer shall notify the Producer or the publisher in writing of any specific objections to such statements no later than one (1) year after the mailing of such statements. Any and all objections, questions or disputes concerning any such statement shall be waived by Composer unless such written objection is actually received by the publisher within such one (1) year period. Composer, or a certified public accountant in Composer's behalf may, at Composer's expense, not more than once during each one (1) year period, examine the Producer's or the publisher's usual business hours and upon reasonable written notice, but solely for the purpose of verifying the accuracy of any statements rendered to Composer hereunder. The Producer's or publisher's books relating to activities during any accounting period may only be examined as aforesaid during the one (1) year period following the mailing of the statement for said accounting period.

[*Comment*]. This paragraph provides for semi-annual accountings to be rendered within ninety days after the end of the applicable semi-annual accounting period. Two statements a year are standard; some producers will account within sixty days. This paragraph also provides that the Producer can retain a portion of the royalties as a reserve against returns as is necessary in its "business judgment." This clause is of much more concern as to artist royalties in a recording agreement, but in any event, the Composer's attorney will probably want to limit the Producer to setting up reserves which are reasonably related to the anticipated returns, and will probably ask that they be liquidated within a stated number of accounting periods (*e.g.*, two or four). There is also a one year period in which to make specific objections to the statement, or the objections are "waived" (*i.e.*, given up). This period, at least for name composers, is usually extended to two years. The Composer may audit, but only once a year, for the sole purpose of verifying the statements, and only within one year following the mailing of the statement. Again, name composers can probably temper this by extending the periods, since it is difficult to make specific objection absent an audit. In effect these shortened periods to object to statements are a contractual method of shortening the applicable statutes of limitations for suits based on breach of written contract or accounts, which in California would be four years.<sup>144</sup> However, this clause would not be enforceable if there is fraud.

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144. CAL. CIV. PROC. CODE § 337 (West 1982).

*Section IV-6. Licenses.* Notwithstanding anything to the contrary contained in this Agreement, Producer, its lessees, licensees and all other persons permitted by Producer to distribute, exhibit or exploit any picture in connection with which any material written, prepared or composed by Composer hereunder is used, shall have the free and unrestricted right to use any such material and to make mechanical reproductions thereof without the payment of any sums whatsoever, and in no event shall Composer be permitted or entitled to participate in any rentals or other forms of royalty received by Producer, its lessees, licensees, or any other persons permitted by Producer to use any such material or mechanical reproductions thereof in connection with the exhibition, distribution, exploitation or advertising of any present or future kind of motion picture, nor shall Producer be obligated to account to Composer for any sums received by Producer from any other persons from the sale or licensing or other disposition of any material written, created, or composed by Composer hereunder in connection with the exhibition, distribution, exploitation or advertising of any motion picture. Without limiting the foregoing, Composer shall not be entitled to any portion of any synchronization fee by reason of the use of the material or any portion thereof in motion pictures produced by Producer or by any of its subsidiaries, affiliates or related companies.

[*Comment*]. This paragraph makes it clear that the Composer will not participate with the Producer in monies received from the exploitation of the musical material in connection with the exhibition, distribution and exploitation of any motion picture produced by Producer or its affiliates. The Composer will not receive additional fees for videograms. Also, if the music is used in other motion pictures by the Producer, such as sequels, there will not be a synchronization fee paid (such as on the "Pink Panther" series). Composer's attorneys always object to this, and try to limit the free synchronization license to the picture for which the score was written.

*Section IV-7. Credit Provision.* Provided Composer fully and satisfactorily renders his services pursuant to the terms and conditions of this Agreement, and that all of the original music contained in the Picture as released is the product of Composer's services, Producer shall accord Composer billing on a separate card by the phrase, "MUSIC BY \_\_\_\_\_" or a phrase substantially similar thereto on the positive prints of said Picture. Except as set forth in the preceding sentence, all other matters pertaining to billing shall be determined in Producer's sole discretion. No casual or inadvertent failure of Producer or others to comply with the provisions of this paragraph shall constitute a breach by Producer of this Agreement.

[*Comment*]. This is a typical credit clause. Before the Producer is obligated to accord credit, (i) the Composer must fully and satisfactorily render his services, and (ii) all the original music contained in the picture as released must be the product of Composer's services. The Composer's attorney will probably ask that the limitations with respect to the performance be "material" services, or, in the alternative, that the only precondition for credit is that any of the Composer's music (or perhaps a "substantial" part) is used in the film. Since the Composer cannot control what other original music the Producer might put in the picture (or, indeed, whether his score is used or not), some sort of limitation seems fair. The Composer's attorney will probably also ask that the Composer's credit be on a separate card "in the main titles" of the picture

(i.e., where the credits for the stars, writer, director and Producer are). This request is very commonplace these days, especially for name composers, and usually granted. The "Music By" credit is the most typical, but there are many variations. Some include "Music Composed By," "Music Composed and Conducted By," or "Music Composed and Recorded By." Unlike the credits for directors which are mandated by the DGA, and for writers which are similarly mandated by the WGA, no music guild has any control over the billing accorded to a Composer.

Additionally, although not mentioned in this contract, most name composers at this time are receiving, in addition to screen credit, paid advertising credit. This clause inferentially excludes paid advertising credit, since credit is restricted to "positive prints" of the Picture. If the Producer grants paid advertising credit to the Composer, the Producer typically will insist that such credit be subject to the Producer's and/or distributor's standard exclusions. One typical exclusion is award and congratulatory ads. For example, in the heat of the Academy Award nomination process, the Producer may take out a full page ad in the trades hyping the star of the picture for an Academy Award. The Producer will not want the effect of this ad to be diminished by having to include credits for performers who are unrelated to the actor, such as the Composer.

This clause also includes standard language that no "casual" or "inadvertent" failure to comply with the credit is a breach of the agreement. Because credits are very complicated, and the picture will probably be distributed by third parties all over the world, the Producer does not want to face having to pay money damages, or be subject to potential interference with the film by an injunction, for a credit *faux pas*. The Composer's attorney will probably allow this language, but may want to require that, upon notice of the credit violation, the Producer is required to fix the credits. The studio will usually insist that this be only on a prospective basis, and only when "practical." Note, however, that intentional failures to accord credit would be a breach of the agreement.

*Section IV-8. Conductor's Royalties.* If Producer, its successors or assigns shall exercise their right hereunder to make, distribute and sell, or authorize others to make, distribute and sell, commercial phonograph records (including, without limitation, discs of any speed or size, tape and wire demos and any and all other demos, whether now known or unknown, for the recording of sound) embodying the material for the Picture and if said records contain Composer's performance as a conductor, they shall pay or cause to be paid to Composer in connection therewith the royalty set forth in Exhibit B attached hereto (it being understood that the term "the record company" as used therein means the Producer or its successors or assigns).

[*Comment*]. In addition to the other royalties which the Composer is entitled to for the exploitation of the musical material, it is typical for a Composer to receive an "artist" or "conductor" royalty on the sound-

track album. Many Composer's agents, in addition to this royalty, negotiate a "producer's" royalty. These royalties vary much more than the music publishing royalties, and can vary from less than 1% of the retail selling price of the album to as much as 12%.

### E. Article V—General Covenants of Composer

*Section V-1. To Perform in Good Faith.* Composer agrees to perform in good faith and to the best of his ability, in the manner and at times and places directed by the Producer, all of the services required of him by the Producer hereunder; and to comply with all reasonable directions, requests, rules and regulations of the Producer in connection therewith, whether or not the same involve matters of artistic taste or judgment.<sup>145</sup>

[*Comment*]. This is a typical clause requiring the Composer to do virtually whatever the Producer tells him or her to do. It may well be superfluous, since even if this were not specifically spelled out in the contract, a court of law would read an implied covenant of good faith and fair dealing into the contract that would require the Composer to do essentially what this paragraph says.<sup>146</sup> Matters of artistic taste and judgment are a fertile area for disputes. However, as stated above, the Producer always has the final say—there is no such thing as a "final cut" composer like there are "final cut" directors.

*Section V-2. Services to Others: Negative Covenant.* Composer agrees that he will not, without the written consent of the Producer, render or agree to render any services of any kind or nature which would conflict or interfere with or prevent the rendition of any services required to be rendered to the Producer hereunder or during the period between the starting date hereunder and the completion of the Composer's services hereunder.

[*Comment*]. This clause is really just a fleshing out of the concept of "exclusivity." Obviously the Producer does not want the Composer to render services which would interfere with the services the Composer is supposed to perform under the contract. Composers' attorneys probably want the "would" deleted in line 4. Also, unless there is a specific term, in theory the Composer's services could go on forever.

*Section V-3. Public Opinion.* If any action or conduct of the Composer (whether before, during or after the term hereof) or any future publicity concerning his past, present or future conduct, declarations or beliefs shall so offend the susceptibilities, prejudices, mores or opinions of a substantial segment of the public, that in the opinion of the Producer the association of the Composer with the Picture would have an adverse effect upon the Picture, the Producer may terminate this Agreement by written notice to the Composer and thereupon be released from all further obliga-

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145. See 1 B. WITKIN, SUMMARY OF CALIFORNIA LAW *Contracts* §§ 563-65 (8th ed. 1973) for a discussion of problems involved when an employer is not satisfied with the product of services. In practice, the producer pays the composer even if the score is artistically unsatisfactory.

146. If the cooperation of the other party is necessary for the performance of any obligation, a promise to give the cooperation and not to do anything which prevents realization of the fruits of performance is often implied. *Id.* at § 576.

tions hereunder; and may (whether or not the term of this Agreement has expired or been terminated) refrain from complying with any of the credit provisions hereof.

[*Comment*]. This is a so-called “morals” clause, which is a dinosaur left in many forms. These sorts of clauses originated under the old studio system in the early twentieth century, when the studios were very concerned that if the artist who rendered services in connection with their movie was involved in public scandals (e.g., Fatty Arbuckle, who was accused of murdering a young actress,) this would diminish the return on their investment in their motion pictures. These sorts of clauses have fallen into disfavor (producers can be as immoral as composers!) and are certainly open to abuse by the Producer. Most producers delete this clause upon request.

*Section V-4. Performing Rights Society Membership.* Producer recognizes and acknowledges that Composer is a member in good standing of ASCAP/BMI [cross out whichever is inapplicable].

[*Comment*]. The Composer, unless he or she is a non-United States resident, will always be a member of either ASCAP or BMI. It is important to the Composer for the Producer to have this information so that the Producer may utilize a music publishing company which is similarly associated to the performing rights society to which the Composer is affiliated. This is important with respect to the collection of performing rights monies for the Composer, which can be very substantial.

*Section V-5. Guild Membership.* The Composer agrees that during the entire term of this Agreement during such period or periods as it may be lawful for the Producer to require the Composer so to do, the Composer will remain or become and remain a member in good standing of the properly designated guild, union or labor organization or organizations (as defined and determined under the applicable law) representing persons performing services of the type and character that are required to be performed by the Composer hereunder.

[*Comment*]. Since most producers and/or studios are signatories to the AFofM, they are required by the AFofM to use members of the guild when services are rendered on their behalf that fall under AFofM jurisdiction.<sup>147</sup> The actual composing services of the Composer do not fall under the AFofM; however, conducting and orchestration services do.<sup>148</sup> Therefore the Producer will require this. Increasingly, producers and studios are seeking to avoid AFofM jurisdiction by shooting overseas and recording outside the United States and Canada.

## F. Article VI—Breach and Termination

### *Section VI-1. Breach and Termination.*

(a) If Composer at any time breaches any term or provision or warranty of this Agreement or at any time is unable, fails, neglects, or refuses to perform any or all of the obligations hereunder (hereinafter referred to as “default”) or in the event of

147. AFofM Agreement, *supra* note 14, at para. 4.

148. *Id.* at para. 1 (conductors), art. V, para. 37 (orchestrators).

incapacity of Composer as defined herein, Producer may, at its option, suspend Composer or terminate this Agreement and the employment hereunder at any time during the continuance of the period of incapacity or default, as the case may be, and for one (1) week thereafter, unless Composer has theretofore, at Producer's request, returned to work and is fully performing Composer's services hereunder. During any period of suspension, no compensation shall accrue to Composer. The term "incapacity" shall mean any physical, mental, or other disability materially rendering Composer incapable of fully performing all services required to be performed by Composer hereunder.

[*Comment*]. Subparagraph (a) makes it clear that if the Composer defaults in his or her obligations then the Producer can either suspend or terminate the Composer. The definition of "incapacity" here is rather loose, and the Composer's attorney will want to tighten this up by asking for a stricter definition.

(b) In the event Producer is prevented from or materially hampered in obtaining the materials, labor, or facilities necessary in filming, developing, distributing, exhibiting, broadcasting, transmitting or otherwise disposing of the Picture by reason of any municipal, state or United States law or ordinance, governmental order, or other regulation, or by reason of fire, strike, act of God, or public enemy or by reason of any other cause, thing, or occurrence not within its control, either of the same or any other nature (including, but not limited to, the inability to obtain or the death, illness, or incapacity of any principal member of the cast or Producer or director with respect to the said Picture) of it, for any reason whatsoever, the majority of the motion picture theaters or television stations in the United States cease exhibiting or broadcasting motion pictures for a period of one (1) week or more, Producer shall have the right at any time after the appending of such contingency, and while such contingency continues, to terminate this Agreement or, at its option, to suspend the operation of this Agreement, for a period equal to the duration of any such contingencies. No compensation shall be paid or become due to Composer in the event of such termination or, if Composer is suspended, for or during such suspended period. Unless this Agreement shall have been terminated prior thereto (as hereinabove provided), this Agreement shall again come into operation as soon as the cause of such suspension shall cease, and for the purpose of computing time hereunder, such period of suspension shall, in all respects, be eliminated and an equal period of time shall be added to the end of the period of employment hereunder, during which period Composer shall receive compensation at the same rate and under the same terms and conditions as though said extended period were originally a part of the period of employment hereunder.

[*Comment*]. Subparagraph (b) is a classic "force majeure" clause, which exculpates the Producer from performing if it is unable to do so because of events out of its control.<sup>149</sup> Again, the Composer's attorney will want to tighten this up, and will probably ask that the Composer not be suspended unless others working on the picture are similarly suspended. However, force majeure events are much more likely to occur during principal photography than during post-production when the

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149. Certain excuses for performance or delay in performance are recognized by statute and case law, generally classified as "impossibility." See 1 B. WITKIN, *supra* note 145, at § 598(2). The California Civil Code specifies as an excuse, unless the parties stipulate to the contrary, prevention of performance by "irresistible, superhuman cause." CAL. CIV. CODE § 1511(2) (West 1982). This should be distinguished from the *defense* of impossibility "in the nature of things." CAL. CIV. CODE § 1597 (West 1982).

Composer usually renders services, so this clause is not as important in composer agreements as it is in actor agreements.

(c) The remedies herein provided shall be deemed cumulative and the exercise of one shall not preclude the exercise of any other remedy for the same event; nor shall the specification of remedies herein exclude any rights or remedies at law, or in equity which may be available in the premises, including any rights to damages or injunctive relief. The Composer agrees that the Producer may recover by appropriate action, or may withhold from any compensation payable to Composer hereunder, the amount of the damage caused the Producer by any failure, refusal or neglect of the Composer to keep and perform Composer's agreements and warranties herein contained.

(d) Composer's sole remedy for any breach hereof shall be an action at law for damages, if any. In no event shall Composer have the right to rescind this Agreement or any of the rights granted hereunder nor to seek or obtain injunctive or other equitable relief restraining or enjoining the production, exhibition or exploitation of any motion pictures based upon or utilizing any portion of the Work.

[*Comment*]. Subparagraph (c) makes it clear that the Producer is not losing any of its legal or equitable rights by exercising its rights under the contract. Remedies at law involve money damages, and the most typical remedy at equity is the seeking of an injunction to prevent the Composer from working for others. This clause also makes it clear that the Producer can withhold money from the Composer in an amount equal to the damage caused to the Producer by the Composer's actions or inactions. Obviously this gives the Producer substantial leverage in dealing with the Composer, and the Composer's attorney will probably object to this. At a minimum the amount withheld should be in an amount reasonably related to the potential damages. This is a troublesome concept because oftentimes it is not capable of precise calculation. For example, the Producer may take the position that because the Composer failed to render services that the Producer had to hire another Composer at a substantial fee, and that the distribution of the picture was delayed. The damages resulting from the Composer's breach could be a very substantial sum, to say the least. Subparagraph (d) is a waiver by the Composer of his right to seek any remedy but money damages.<sup>150</sup> This is crucial to the Producer and the distributor, who want to make sure that they are not subject to interference with the distribution of the picture. This is usually a non-negotiable point.

### G. Article VII—General Provisions

*Section VII-1. Transportation.* If Producer requires the Composer to render his services outside the greater Los Angeles area, Producer will furnish the Composer

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150. See 1 B. WITKIN, *supra* note 145, at § 494. The California Civil Code provides that anyone may waive the advantage of a law intended solely for his benefit, but a law established for a public reason cannot be contravened by private agreement. CAL. CIV. CODE § 3513 (West 1970). Waivers are examined by the courts on a case-by-case basis. No California case interpreting this sort of waiver clause has been found.



with reasonable transportation, or the cost thereof, to and from such place, and furnish the Composer with reasonable meals and lodging, or the cost thereof, while outside such area in connection with the requirement of such services.

[*Comment*]. Instead of "reasonable" transportation, meals and lodging, it is more typical for name composers to be provided with a flat weekly sum, pro-rated on the number of days per week, which can range from \$500 on the lower end to \$2,500 on the high end with the major studios.

*Section VII-2. Failure to Utilize Work.* Nothing contained in this Agreement shall be deemed to require Producer or its assigns to publish, record, reproduce or otherwise use the Work or any part thereof, whether in connection with the Picture or otherwise; and Composer hereby releases the Producer from any liability for any loss or damage Composer may suffer by reason of Producer's failure to utilize the Work. Payment of the compensation at the time set forth in Section II-1 hereof, shall fully discharge Producer of all its obligations hereunder.

[*Comment*]. The first sentence is a typical clause whereby the Producer is given the option of not using the score. If dissatisfied, Producers sometimes throw out the score entirely and either have another score written, or replace the score with prerecorded music. The Producer will insist on this, and this point is usually non-negotiable. The Producer's only obligation is to pay the Composer for his or her services. Just because the Producer does not like the score, and throws it away, does not mean that the Composer should not be paid for his or her work, and this is implicit in the second sentence. Major composers do not work on "spec".

*Section VII-3. Non-Waiver.* No waiver by either of the parties hereto of any failure by the other party to keep or perform any covenant or condition of this Agreement shall be deemed to be a waiver of any preceding or succeeding breach of the same, or any other covenant or condition.

[*Comment*]. A "waiver" is a knowing relinquishment of a right.<sup>151</sup> This clause, although bilateral, is inserted by the Producer to make sure that it can assert whatever rights it wants at any time. For example, it may be that there are lots of problems with the Composer, even problems that could give the Producer the right to terminate the Agreement, but the Producer will continue with the hope things will improve. The Producer does not want to be in a position where the Composer can argue in court that, by not exercising a previous right to termination, the Producer has "waived" his right for future breaches. This language is rarely changed.

*Section VII-4. Effect of Expiration or Termination.* Neither the expiration of this Agreement nor any other termination thereof shall affect the ownership by the Producer of the results and proceeds of the services rendered by the Composer ac-

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151. See 1 B. WITKIN, *supra* note 145, at § 593. A waiver may be an express statement, or it may be implied, as when the party entitled to certain performance accepts partial or defective performance. See *Doryon v. Salant*, 75 Cal. App. 3d 706, 712, 142 Cal. Rptr. 378, 381 (1977).



[*Comment*]. Courts will not enforce "illegal" agreements, e.g., murder contracts, or those contrary to public policy.<sup>153</sup> In some cases courts have taken the position that if one part of the agreement is illegal, then the entire agreement fails, although this position has fallen out of favor in California.<sup>154</sup> This clause is designed to insulate the Producer from this result.

*Section VII-7. Entire Instrument.* This instrument constitutes the entire Agreement between the parties and cannot be modified except by a written instrument signed by the Composer and an authorized officer of the Producer. No officer, employee or representative of the Producer has any authority to make any representation or promise in connection with this Agreement or the subject matter hereof which is not contained herein; and the Composer agrees that he has not executed this Agreement in reliance upon such representation or promise.

[*Comment*]. This paragraph, among other things, is a so-called "integration" clause, by which the entire Agreement between the parties is reduced to a single document. It also contains a "merger" clause<sup>155</sup> to the effect that the writing constitutes the entire contract and that there are no agreements, warranties or representations other than those mentioned. This is important to the Producer because there likely are pre-existing "deal memos,"<sup>156</sup> exchange of correspondence and conversations which may be construed to be part of the Agreement between the parties. In the event of a dispute the Producer would like to have this Agreement, and this Agreement only, submitted into evidence. There is also a disclaimer with respect to representations or promises made to the Composer that are outside the Agreement.<sup>157</sup> The Producer does not want to

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153. See generally 1 B. WITKIN, *supra* note 145, at §§ 340-498. See also CAL. CIV. CODE §§ 1550, 1598 (West 1982). Later California cases tend now to enforce valid parts of contracts where the interest of justice or the policy of the law would be furthered. 1 B. WITKIN, *supra* note 145, at § 343.

154. *Id.*

155. B. WITKIN, CALIFORNIA EVIDENCE § 714 (2d ed. 1966). CAL. CIV. CODE § 1625 (West 1973) states that the "execution of a contract in writing, whether the law requires it to be written or not, supersedes all the negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument." The parol evidence rule, with certain exceptions, prohibits the introduction of any extrinsic evidence to vary or add to the terms of an integrated written instrument. B. WITKIN, *supra* at § 714. An agreement is integrated when the parties thereto adopt a writing or writings as the final and complete expression of the agreement. RESTATEMENT (SECOND) OF CONTRACTS § 228 (1981); B. WITKIN, *supra* at § 720.

156. "Deal memos" are binding contracts so long as they set forth the material terms. See *Smithers v. Metro-Goldwyn Mayer Studios, Inc.* 189 Cal. Rptr. 20, 22 (Cal. App.), *hearing granted*, Mar. 29, 1983. Parties may engage in preliminary negotiations, oral or written, in order to reach an agreement. These negotiations ordinarily result in a binding contract, and all the terms are definitely understood, even though the parties intend that a formal writing embodying these terms be executed later. See 1 B. WITKIN, *supra* note 145, at § 102.

157. This type of clause has been held conclusive on the issue of integration, so that parol

be in a position where the contract says the total compensation is \$50,000, but the Composer alleges that he or she was promised \$75,000.

*Section VII-8. Section Headings.* The headings of articles, sections and other subdivisions hereof are inserted only for the purpose of convenient reference. Such headings shall not be deemed to govern, limit, modify, or in any other manner affect, the scope, meaning or intent of the provisions of this Agreement or any part or portion thereof; nor shall they otherwise be given any legal effect.

[*Comment*]. It is becoming more typical, especially in lengthy documents, for section headings to be used. They certainly make it easier to find a relevant portion of the Agreement, and also can serve as a check list for the parties to make sure all the points that should be covered are covered. However, because section headings are so brief, they are often-times too limited or ambiguous to describe exactly what the contract says. Therefore, this sort of provision is often inserted. This provision does not make much sense, as one of the basic rules in construction of contracts by the courts is that more specific provisions prevail over more general ones. It is also possible that section headings can be “whited out” by the parties before the contract is submitted in court, although it is doubtful that this practice occurs.

*Section VII-9. California Law.* This Agreement shall be deemed to have been made in the State of California and its validity, construction and effect shall be governed by and construed under the laws and judicial decisions of the State of California applicable to agreements wholly performed therein.

[*Comment*]. This is a so-called “election of law” provision, which states that California law applies. The parties are free to contractually elect the state law which will govern the contract.<sup>158</sup> It is likely that the lawyers who drafted this are California lawyers (who prefer California law because they are more familiar with it), and that the Producer is based in California. It should be noted that just because California law governs the contract, this does not mean that an action based on the contract cannot be brought outside California. If the Producer wants to limit venue (*i.e.*, the place where an action is brought) to California, there should be a specific election of exclusive jurisdiction and venue in the State of California.<sup>159</sup>

*Section VII-10. Indemnification.* Composer shall at all times indemnify Producer, its successors, assigns, and licensees, from and against any and all claims, demands, causes of action, costs, expenses, losses, damages, judgments and attorneys’ fees arising out of or resulting from any breach by him of any of his representations, warranties or agreements hereunder. Producer shall have the right to withhold from any royalties which may become due to him hereunder, amounts equal to any sums paid by Producer to settle or discharge any claims, which, in Producer’s sole discre-

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evidence to show that the parties did not intend the document to constitute the sole agreement will be excluded. See B. WITKIN, *supra* note 155, at § 722.

158. See 1 B. WITKIN, *supra* note 145, at §§ 59, 61.

159. See *Manchester v. Arista Records, Inc.*, No. CV81-2134-RJK (C.D. Cal. Sept. 17, 1981) (memorandum decision and order).

tion, are bona fide and result from the infringement or alleged infringement by the Work to be composed by Composer hereunder, and Producer may also satisfy from said royalties any judgments obtained as a result of any such infringement.

[*Comment*]. This is a typical contractual indemnity clause that requires the Composer to indemnify the Producer in the event the Producer suffers a loss resulting from a breach by the Composer.<sup>160</sup> An example of this would be the Composer's plagiarizing another score, causing the Producer to be sued. The Composer's attorney will want to limit the indemnification to final judgments and to those settlements that the Composer consents to. The Composer's attorney also will want the Composer to be able to participate with legal counsel the Composer chooses, even if it is at the Composer's own cost.

*Section VII-11. Assignment.* Composer shall not transfer or assign this Agreement or any interest therein or any sums that may be or become due hereunder without the prior written consent of Producer, and no purported assignment or transfer by Composer in violation of this restriction shall be valid to pass any interest to the assignee or transferee. Producer shall have the right to transfer or assign this Agreement in whole or in part.

[*Comment*]. Although the general legal rule is that contracts are assignable (they can be transferred),<sup>161</sup> personal services contracts are not assignable,<sup>162</sup> but the money due thereunder is assignable.<sup>163</sup> Since the Producer has employed a specific Composer with unique skills, the Producer does not want another person to render the services. Also, the Producer only wants to pay music publishing royalties to the Composer, not a third party. On the other hand, the Producer wants to be free to assign the contract (typically to the distributor who acquires rights in the motion picture).

*Section VII-12. Protection of Work.* Producer may take such action as it deems necessary, either in Composer's name or in its own name, against any person to protect the rights and interest acquired by Producer hereunder. Composer will, at Producer's request, cooperate fully with Producer in any controversy which may arise or litigation which may be brought concerning Producer's rights and interests acquired hereunder. Producer shall have the right, in its absolute discretion, to employ attorneys and to institute or defend any action or proceeding and to take any other proper steps to protect the right, title and interest of Producer in and to the Work, and every portion thereof and in that connection to settle, compromise or in any other manner

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160. With respect to indemnification, see 4 B. WITKIN, SUMMARY OF CALIFORNIA LAW *Torts* § 50 (8th ed. 1974); CAL. CIV. CODE § 2777 (West 1974).

161. The common law definition in California is that an assignment is a manifestation to another person by the owner of the right indicating his intention to transfer, without further action or manifestation of intention, the right to such other person, or to a third person. *Cockerell v. Title Ins. & Trust Co.*, 42 Cal. 2d 284, 291, 267 P.2d 16, 20 (1954). However, if a contract calls for the skill, credit or other personal quality of the promisor, it is neither assignable nor survivable. See 1 B. WITKIN, *supra* note 145, at § 736. The Copyright Act requires that assignments, other than by operation of law, be written and signed by the owner of the rights or by his agent. 17 U.S.C. § 204(a) (1982).

162. See 1 B. WITKIN, *supra* note 145, at § 736.

163. See *id.* at § 740.

dispose of any matter, claim, action or proceeding and to satisfy any judgment that may be rendered, in any manner as Producer in its sole discretion may determine. Any legal action brought by Producer against any alleged infringer of the Work shall be initiated and prosecuted by Producer. If a claim is presented against Producer in respect to the Work pending the final adjudication or settlement of such claim, Producer, in addition, may withhold any royalties to be earned pursuant to this Agreement or any other agreement between Composer and Producer, sufficient, in the opinion of Producer, to reimburse Producer for any contemplated damages, including court costs and attorneys' fees and costs resulting therefrom.

[*Comment*]. The Producer, as owner, wants to have the unfettered discretion to protect the score (e.g., by registering it for copyright) and to sue infringers. The Producer will need the Composer's cooperation in litigation, since the infringer will likely contest the copyright. This clause also states the common law rule of offset against royalties.

### H. Article VIII—Definitions

*Section VIII-1. General Definition.* Except where the context may otherwise require, the following terms used in the Agreement shall be deemed to have the following meanings:

(a) "Picture" shall refer to the motion picture in connection with which the Composer is to render his services under this Agreement.

(b) "Motion Picture"<sup>164</sup> shall be deemed to include silent motion pictures, sound and talking motion pictures, motion pictures produced, transmitted or exhibited with or accompanied by sound and voice recording, transmitting or reproducing devices, radio devices, television devices and all developments and improvements of such devices and all motion picture productions of every kind produced, transmitted or exhibited by any means now known or unknown.

(c) "Render Services as Composer," or similar phrases, when used in this Agreement, shall include such services as may be required of composers according to custom of the motion picture industry.

*Section VIII-2. Gender.* Unless the context otherwise requires, the masculine gender throughout this Agreement includes the feminine and neuter.

If the foregoing is in accordance with your understanding, please acknowledge your acceptance by signing this letter agreement in the lower left-hand corner and such execution shall constitute this a binding and enforceable agreement between us.

Very truly yours,

By \_\_\_\_\_

ACCEPTED AND AGREED:

\_\_\_\_\_

### I. Exhibit A

#### (Music Publishing Royalties)

(a) Five cents (\$.05) per copy for each piano copy of the Composition and for each dance orchestration of the Composition printed, published and sold in the United States and Canada by Publisher or its licensees, for which payments have been received by Publisher, after deduction of returns.

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164. The Copyright Act defines motion pictures as audiovisual works consisting of a series of related images which, when shown in succession impart an impression of motion, together with accompanying sound, if any. 17 U.S.C. § 101 (1982).

[*Comment*]. Sheet music is the major exception to the rule that music publishing income is split 50% to the writer and 50% to the publisher. Most publishers now receive about fifty cents for piano copies, so the Composer is getting 10% of the income, not 50%. Major composers are getting eight to ten cents per piano copy. Note this only applies to the United States and Canada; the writer gets 50% of foreign sheet music income under subparagraph (e) below.

(b) Ten percent (10%) of the wholesale selling price upon each printed copy of each other arrangement and edition of the Composition printed, published and sold in the United States and Canada by Publisher or its licensees, for which payment has been received, after deduction of returns, except that in the event the Composition shall be used or caused to be used, in whole or in part, in conjunction with one or more other compositions in a folio, album or other publication, Composer shall be entitled to receive that proportion of said royalty which the Composition shall bear to the total number of compositions contained in such folio, album or other publication for which royalties are payable.

[*Comment*]. Since publishers typically receive 10% to 12½% of the *retail* selling price, this equals about 50% of the publisher's receipts. High powered composers get 12½% of the wholesale selling price, rather than 10%. The Composer's lawyer will request that the proration be based on "copyrighted royalty-bearing" compositions. This prevents the publisher from using public domain and non-royalty songs to dilute the Composer's royalty.

(c) Fifty percent (50%) of any and all net sums actually received (less any costs for collection) by Publisher in the United States from the exploitation in the United States and Canada by licensees of Publisher of mechanical rights, electrical transcription and reproducing rights, motion picture and television synchronization rights and all other rights (excepting printing and public performing rights) in the Composition, whether or not such licensees are affiliated with, owned in whole or in part by, or controlled by Publisher.

[*Comment*]. The smart Composer's lawyer will want to know what deductions are taken from the "gross" to arrive at "net sums." The most typical deductions are legal fees and fees charged by The Harry Fox Agency, which issues synchronization and mechanical licenses. The lawyer will also want to include the words "or credited to" after the words "actually received," since a credit to the publisher is really money received. For example, a publisher may receive an advance on its catalog, so income on the statement from the subpublisher will be shown as a credit until the advance is earned. The Composer should be paid notwithstanding this.

(d) Composer shall receive his public performance royalties throughout the world directly from his own affiliated performing rights society and shall have no claim whatsoever against Publisher for any royalties received by Publisher from any performing rights society which makes payment directly (or indirectly other than through Publisher) to writers, authors and composers.

[*Comment*]. The Composer is paid public performance monies directly from ASCAP or BMI.

(e) Fifty percent (50%) of any and all net sums, after deduction of foreign taxes, actually received (less any costs for collection) by Publisher in the United States from sales, licenses and other uses of the Composition in countries outside of the United States and Canada (other than the public performance royalties as hereinabove mentioned in paragraph (d)) from collection agents, licensees, subpublishers or others, whether or not same are affiliated with, owned in whole or in part by, or controlled by Publisher.

[*Comment*]. Again, what are “net sums”? The Composer’s lawyer may want to limit the deduction of foreign taxes to those actually paid and not rebated in any manner.<sup>165</sup> Also, the Composer’s lawyer may want to prohibit “double dipping” by prohibiting a subpublishing fee by affiliates of the publisher, or by limiting the amount to that which would be charged in an arm’s-length transaction. Also, the Composer’s lawyer may want either to have the writer’s share computed “at the source,” or to cap subpublishing fees to 15% to 25%, and 50% if the subpublisher procures a “cover” record in the territory. Studios resist all these requests.

(f) Publisher shall not be required to pay any royalties on professional or complimentary printed copies of the Composition which are distributed gratuitously to performing artists, orchestra leaders and disc jockeys or for advertising, promotional or exploitation purposes. Furthermore, no royalties shall be payable to Composer on consigned copies of the Composition unless paid for, and not until such time as an accounting therefor can properly be made.

[*Comment*]. The “freebies” described in this paragraph are typical. The sentence regarding consigned copies is also typical, but ambiguous. The Composer’s lawyer may want to limit freebies to a percentage of all copies, e.g., 25%.

### *J. Exhibit B* (Record Royalties)

(a)(i) A royalty rate of five percent (5%) of the suggested retail list price from time to time, on all sales in the United States of records in the form of discs and on the record company’s sales in said country of records in the form of prerecorded tapes, cartridges or other recorded devices; and (ii) in the case of sales in the United States by the record company’s licensees of records in the form of prerecorded tapes, cartridges, cassettes or other recorded devices (other than discs), the royalty shall be one-half (1/2) of the aforementioned royalty rate based upon the suggested retail list price of each such device.

[*Comment*]. The basic royalty rate of 5% is rather low; 6% to 10% is more typical for name composers. The one-half rate for tapes is outrageous, since most record companies now typically pay royalties on cassettes equal to approximately 90% of the phonograph record disc rate.

(b) In the event of sale of records outside of the United States, the royalty rate shall be two and one-half percent (2½%) and shall be based upon the suggested retail list price of such records in the country of manufacture, the United States, England or the country of sale, as the record company shall elect from time to time. Such royalty shall be computed in the national currency of the country to which the

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165. In the United Kingdom, for example, value-added taxes are rebated.



list price so selected applies and shall be credited to Composer's royalty account at the same rate of exchange as the record company is paid.

**[Comment].** Although half rate outside the United States is a typical provision, studios almost always get a higher rate in major foreign territories, (e.g., United Kingdom, Germany, Japan), typically 75% of the United States rate. The use of the same exchange rate as the record company uses is fair.

(c) Notwithstanding any of the foregoing, the royalty on records sold in the United States through any direct mail or mail order distribution method, including, without limitation, record club distribution, shall be either one-half ( $1/2$ ) of the royalty provided for in (a)(i) above or one-half ( $1/2$ ) of the royalty which the record company shall receive from any licensee, whichever shall be less, and the royalty rate on records sold outside of the United States through any such direct mail distribution shall be one-half ( $1/2$ ) of the royalty rate provided for in (b) above and shall be based upon the price to the club members or direct mail purchasers.

**[Comment].** Mail order records are typically half rate, although at least one major label will pay full rate to the studio.

(d) No royalties shall be payable on records furnished as free or bonus records to members, applicants or other participants in any record club or as free or bonus records to purchasers through any direct mail distribution method, on records distributed for promotional or review purposes, on records sold for scrap or as "cut-outs," or on records shipped on a no-charge basis or sold at less than fifty percent (50%) of the record company's regular wholesale price. The royalty rate on records sold for use as premiums or promotional merchandise or sold on a "budget" or low-price label shall be one-half ( $1/2$ ) of the otherwise applicable royalty rate provided for above and shall be based upon the price received by the record company for such records.

**[Comment].** Record companies usually do not pay royalties on record club "bonus" records, or promotional records. Unfortunately, record company royalty statements do not reflect these, so an audit must be done to check these. Record companies claim they do not pay royalties for scrap or "cutouts" (bargain bin) records because they lose money on them. The one-half rate on "premium" and promotions is typical, although the reduction is much more than half, since the royalty rate is based on the price received by the record company, not the suggested retail price. "No-charge basis" means "free goods." Free goods is the practice of shipping, for example, 100 records and charging for only 85. You can bet the studio will do its best to limit these in its soundtrack album agreement, and the composer should get the advantage of the limitation.

(e) Any discounts granted by the record company to its customers may be applied by the record company, proportionately, in computing the royalties payable hereunder.

**[Comment].** It is not clear what this means, but it looks like the studio could drive a truck through this exception.

(f) Notwithstanding any of the foregoing:

(i) for the purposes of computing royalties, any excise, sales or comparable or similar taxes shall be excluded from the price;

(ii) for the purposes of computing royalties, there shall be excluded from the suggested retail list price, for packaging charges, an amount equal to ten percent (10%) thereof for "single-fold" album jackets, twelve and one-half percent (12½%) thereof for "double-fold" album jackets and twenty percent (20%) thereof for tape and cartridge boxes or containers; and

(iii) royalties shall be computed and paid upon ninety percent (90%) of sales (less returns) for which payment has been received, except that royalties with respect to record club sales shall be computed and paid upon eighty-five percent (85%) of sales (less returns) for which payment has been received.

[*Comment*]. The deduction of taxes from the royalty base price is typical, e.g., a 5% royalty will be computed on \$8.98, not \$8.98 plus tax. The packaging deductions are also typical. These deductions are *not* based on the actual packaging cost to the record company, but are historical. Cassettes now cost slightly *less* than discs to package. In terms of dollars and cents, the 5% royalty on \$8.98 will be calculated for single-fold LPs at \$8.98 less 10%, or about \$8.00, and for tapes \$8.98 less 20%, or about \$7.18. The payment based on 90% of sales again is based on history, since about 10% of records used to break during shipping. Now records don't break when shipped, and most labels pay on 100% of records sold, although some now pay on 85% and dispense with the "free goods" concept.

(g) No royalties shall be payable to Composer on sales by any of the record company's licensees until payment on such sales has been received by the record company. In the event the record company shall not receive payment in United States dollars in the United States from any foreign licensee and shall accept payment in foreign currency, the record company may deposit to Composer's credit (and at Composer's expense) in such foreign currency, in a depository selected by the Composer, any payments so received as royalties applicable to this Agreement which are then payable to Composer, and the record company shall notify Composer thereof promptly. Deposit as aforesaid shall fulfill the record company's obligations hereunder as to record sales to which such royalty payments are applicable.

[*Comment*]. The first sentence contains a common trap, which is that records may be sold by the record company's foreign licensees, but the Composer does not get paid until money is received in the United States. Record companies insist that they cannot control their licensees, but, at a minimum, foreign sales by licensees in which the record company has an ownership interest should be deemed received in the United States within a stated number of accounting periods, e.g., two (one year). The second and third sentences concern so-called "blocked funds" in which a licensee is unable to remit sums to the United States. In this case the record company will try to have the money sent to the Composer's account in the blocked funds territory. This is fair, and better than not getting paid.

(h) In the event the recordings in which Composer participates as conductor, or any of them, are coupled on a record with other recordings, the royalty hereunder shall be based upon that portion of the price which the number of recordings in which Composer so participated which are embodied on such record bears to the aggregate number of all recordings embodied on such record.

[*Comment*]. This is a typical pro-ration provision for "coupling" (*i.e.*, combining Composer's masters with other masters). The pro-ration is based on either playing time, or, as done here, on the more typical and simpler basis of number of recordings. The Composer's lawyer may want to limit this, as with music publishing, to "copyrighted, royalty-bearing" masters. Assuming our Composer has five cuts on a ten cut LP, the Composer's base royalty will be 5% multiplied by  $\frac{5}{10}$ , or 2½%.

(i) If any selection is recorded by Composer jointly with another artist or musician to whom the record company is obliged to pay a royalty in respect thereof, the royalties payable to Composer applicable to records produced therefrom shall be reduced proportionately, and only the proportionate share of the applicable costs shall be charged against Composer's royalties.

[*Comment*]. This is another typical pro-ration. Assuming a featured instrumentalist who works on the composer master gets a 3% royalty, the Composer's royalty will be reduced from 5% to 2%. A Composer's lawyer will want a "floor", *e.g.*, 2½%, to limit this.

(j) Statements as to royalties payable hereunder shall be sent by the record company to Composer on or before the thirtieth day of September for the semiannual period ending the preceding June 30th, and on or before the thirty-first day of March for the semiannual period ending the preceding December 31st, together with payment of accrued royalties, if any, earned by Composer during the preceding semiannual period less all advances and charges under this Agreement or any other agreement between Composer and the record company. Upon the submission of each statement, the record company shall have the right to retain, as a reserve against subsequent charges, credits or returns, such portion of payable royalties as shall be necessary and appropriate in its best business judgment. Composer shall be deemed to have consented to all royalty statements and other accounts shall be binding upon Composer and not subject to any objection by Composer for any reason unless specific objection in writing, stating the bases thereof, is given by Composer to the record company within one (1) year from the date rendered. The record company shall maintain books of account concerning the sale, distribution and exploitation of records made hereunder. Composer or a chartered public accountant on Composer's behalf may, at Composer's expense, at reasonable intervals, examine record company's books pertaining to the records made hereunder during its usual business hours and upon reasonable notice. The record company's books relating to activities during any accounting period may only be examined as aforesaid during the one (1) year period following service by it of the statement for said accounting period.

[*Comment*]. Semi-annual accountings within ninety days after the period ends are typical. Some producers will account within sixty days. There are a couple of traps here. First, advances and charges are deducted. It is not traditional for the Composer's salary to be treated as an advance (and thus recoupable) on the soundtrack L.P. Also, there is a so-called cross-collateralization provision in the words "or any other agreement." From the Composer's viewpoint this Agreement should stand alone, and this language should be deleted. The record company will insist on reserves, but they should be capped (*e.g.*, 50% for singles, 20% for LPs) and liquidated over time (*e.g.*, within two accounting peri-

ods). The Composer is given one year to object to statements. Two or three years is more fair. The time to audit should be similarly extended.

(k) Composer agrees and acknowledges that the record company shall have the right to withhold from the royalties payable to Composer hereunder such amount, if any, as may be required under the applicable provisions of any Revenue and Taxation Code, and Composer agrees to execute such forms and other documents as may be required in connection therewith.

[*Comment*]. At this time the Internal Revenue Service (IRS) does not require withholding on record royalties, which are reported as miscellaneous income on IRS Form 1099. Record royalties are ordinary income, and taxed as such, rather than at lower capital gains rates.

(l) The record company shall have the right to recoup all recording costs (including, without limitation, union scale fees for leaders, contractors, instrumentalists, arrangers, copyists and vocalists, studio and editing costs, pension and welfare payments, instrument hire and cartage and payroll taxes) incurred in the making of the recordings, from the royalties payable to Composer hereunder on a proportionate basis.

[*Comment*]. "Recoup" means "earn back" from a particular source. "Recording costs" are broadly defined here. The Composer's lawyer will want to limit recording costs to those incurred in connection with the soundtrack album, *not* those incurred in connection with the picture (which the studio recoups from the picture's gross receipts). Also, "proportioned basis" is undefined. Does it mean based on the number of recordings or costs attributable to the Composer's recordings?

(m) Notwithstanding anything to the contrary herein contained, Composer shall in no event be entitled to receive, nor shall Composer receive, more than one-half (1/2) of the royalty which shall be paid to Producer or its successors or assigns by the record company which shall acquire the sound track album rights.

[*Comment*]. Since typical soundtrack album royalties are a base rate of 12% to 16% of retail for orchestral scores, the Composer's base royalty will be capped at 6% to 8% of the retail selling price. This is unfair if the Composer is otherwise entitled to a higher royalty. This "floor" of one-half of the Producer's royalty is dangerous to the Composer, especially if the floor is one-half of the Producer's *net* soundtrack royalty. The Composer's lawyer will want this deleted.

## VII. CONCLUSION

Film composing agreements exemplify the complex task of reflecting the hybridization of film and music which is becoming more pronounced in recent years. It is the intent of this Article that a clearer understanding of the business context, and the contractual arrangements that arise from that context, will result in a better creative climate for producers, studios and composers.

