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The Legal and Business Aspect of Motion Picture and Television Soundtrack Music

Lionel S. Sobel

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ARTICLES

THE LEGAL AND BUSINESS ASPECTS OF MOTION PICTURE AND TELEVISION SOUNDTRACK MUSIC

*Lionel S. Sobel**

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I. INTRODUCTION

In the Spring of 1984, Paramount Pictures released an unpretentious little film about conflict between the generations in a small, rural town. Entitled "Footloose," the movie was produced by industry-veteran Daniel Melnick, who earlier had produced "That's Entertainment," a compilation of clips from popular MGM films made during the golden age of the Hollywood musical.

"Footloose" too is a musical, though not one in the golden-age style. Instead, "Footloose" is a 1980s-style musical, one whose lineage can be traced to such movies as "Saturday Night Fever," "Grease," "Fame" and "Flashdance." "Footloose," in other words, features a rock-'n-roll score, the soundtrack album from which propelled the movie to boxoffice success. That success reminded the industry that there is a commercial, as well as artistic, relationship between a movie and its score—and in doing so, "Footloose" inspired what *Newsweek* later characterized as "an unprecedented number of rock-ribbed films" that went into production soon thereafter.

The production of "Footloose" illustrates another business reality as well. The movie business is a deal-intensive and document-intensive industry. And the music part of the movie business can be the most deal-and-document intensive part of all. Forty-seven separate agreements had to be made to acquire and exploit the rights to the nine songs that are in the "Flashdance" soundtrack—on average, more than five deals per song. And creating the "Flashdance" score was not as legally complicated as it could have been, because all nine of its songs were written and

recorded especially for the movie. Had any of them been pre-existing songs or recordings, even more deals would have been required, assuming they could have been made. Sometimes, they can't. In 1984, Bruce Springsteen gave Peter Bogdanovich permission to use three Springsteen songs in the movie "Mask" which Bogdanovich was then directing for Universal Pictures. But Springsteen had recorded those songs for CBS Records, and CBS and Universal could not come to terms. As a result, before the movie was released, Springsteen's songs were replaced with other songs recorded by Bob Seger, over Bogdanovich's objections.

From a legal point of view, movie music deals are based on principles that involve a fascinating hodgepodge of copyright, labor, antitrust and contract law. Movie music agreements are necessarily influenced by this legal hodgepodge, and seem complicated for that reason. There is, of course, a logical foundation beneath the array of deals that must be made, and the purpose of this article is to explain that foundation.

II. ACQUIRING SOUNDTRACK MUSIC

When musicians classify music, they distinguish between classical, jazz, rock-'n-roll, country-and-western and other musical *styles*. Movie and television producers make similar distinctions. But musical *style* classifications have no *legal* significance. So when lawyers classify music, they distinguish between "specially ordered or commissioned music" on the one hand, and "pre-existing music" on the other.

"Specially ordered or commissioned music" is music that is written especially for a particular movie or television program, at the producer's request. The rock-'n-roll songs in "Footloose" are examples of such music, and so is the orchestral score written by Bruce Broughton for the movie "Silverado."

"Pre-existing music" is music that was written and published before a producer decided to use it in a soundtrack. The songs in "The Big Chill" are examples of this type of music.

Lawyers distinguish between "specially ordered" and "pre-existing" music, because the movie and television rights to each are acquired in different ways, and because the income earned by each is (by custom and law) split in different ways as well.

A. *Specially Ordered Music*

Producers obtain specially ordered or commissioned music by hiring a composer or songwriter to create it. Sometimes, a composer and several songwriters are hired to work on a single project. The score for

"Ghostbusters," for example, was created by composer Elmer Bernstein and several songwriters, including Ray Parker, Jr. Bernstein composed the movie's main title theme and dramatic underscoring, while Parker wrote and performed the title song.

When hiring composers and songwriters, producers use written agreements. There are, however, no industry-wide "standard" forms, nor even "customary" deals. Terms vary enormously from project to project, and depend on such things as whether the film is a theatrical motion picture or television program, the film's total budget, and the composer/songwriter's reputation, experience and credits.¹

1. Composers' Agreements

a. Composers' Duties and Compensation

A composer's agreement, as distinguished from a *songwriter's* agreement,² typically requires the composer to write, arrange, and orchestrate all of the dramatic underscoring and theme music in a film, and to conduct the musicians who perform that music during the soundtrack recording session. If the film is a big-budget theatrical motion picture, one having a budget of \$15 million or more, an established composer may earn a fixed fee of \$100,000 to \$150,000 for these services. On the other hand, a composer without previous theatrical credits may earn as little as \$25,000 for the same services.

Such agreements almost always provide that the music written by the composer is a "work made for hire," so that, pursuant to the Copyright Act, the copyright to the music automatically belongs to the production company rather than to the composer.³

Although the copyright almost always belongs to the production company, it is customary for composers' agreements to provide that, in addition to the composer's fixed fee, the composer shall receive agreed-upon publishing royalties from specified non-theatrical uses of the music.

1. For an excellent overview and a provision-by-provision analysis of one form of theatrical film composer agreement, see Halloran, *Film Composing Agreements: Legal and Business Concerns*, 5 LOY. L.A. ENT. L.J. 1 (1985), reprinted in 4 ENTERTAINMENT INDUSTRY CONTRACTS ch. 185 (1986). See also 2 ENTERTAINMENT INDUSTRY CONTRACTS form 86-2 (1986); 4 ENTERTAINMENT INDUSTRY CONTRACTS form 189-1 (1986) (television composer/producer agreements, with commentary).

2. See 4 ENTERTAINMENT INDUSTRY CONTRACTS, *supra* note 1, form 169-1 (single song contract, with commentary) and form 170-1 (term exclusive songwriter agreement, with commentary).

3. 17 U.S.C. §§ 101, 201(b) (1983). See also Sobel, *A Practical Guide to Copyright Ownership and Transfer: The Differences Between Licenses, Assignments and Works Made for Hire . . . and Suggestions for Analyzing Which One is Best for a Particular Transaction*, ENT. L. REP., Feb. 1984, at 3.

For example, composers' royalties from the sale of soundtrack albums usually are 50% of the mechanical license fees paid to the production company (or its music publishing subsidiary) by the record company that releases the album.⁴ Composers' royalties from non-theatrical public performances of their music are 50% of the amount collected for such performances by the American Society of Composers, Authors and Publishers ("ASCAP") or Broadcast Music Inc. ("BMI") (paid directly by ASCAP or BMI to composers).⁵ Composers' royalties from the sale of print versions of their music usually amount to 6 to 10 cents per copy of single-song sheet music and 10% to 12½% of the wholesale price of multi-song folios. This results in a royalty of 40 to 50 cents per folio, assuming a \$10 per copy retail price and a \$4 per copy wholesale price. A composer writing all the songs in a folio would be entitled to the entire royalty. If the folio were comprised of songs written by more than one composer, the royalty would be prorated among all of the composers whose songs appeared in the folio in proportion to the number of songs written by each.

In addition to a fixed fee and the publishing royalties just described, an established composer may receive an *artist's* royalty in connection with the sale of soundtrack albums (for performing services rendered as a conductor), and perhaps an additional royalty as the soundtrack album *producer*. This artist's royalty typically is in the range of 4% to 7% of the suggested retail price of the album, and the producer's royalty is in the 2% to 3% range.

In a deal of this sort, the expenses of recording the *motion picture* soundtrack (for such things as musicians' salaries and studio rental fees) are paid by the movie production company. The composer does not pay them, nor are such expenses deducted from the composer's fixed fee or royalties. On the other hand, costs attributable to producing a soundtrack *album* may be treated as "advances" against the album royalties earned by the composer as a performing artist, just as they would be in agreements customarily entered into between recording artists and record companies.

Composers' agreements used in connection with low-budget theatrical movies, those with budgets of less than \$5 million or \$6 million, differ substantially from those used for big-budget productions. The composer

4. See *infra* § III. B. 2. for a discussion of the amounts paid by record companies to musical copyright owners for mechanical license fees.

5. See Sobel, *The Music Business and the Sherman Act: An Analysis of the "Economic Realities" of Blanket Licensing*, 3 LOY. L.A. ENT. L.J. 1 (1983) for a description of the histories of ASCAP and BMI and their roles in the licensing of public performances of music.

may not have an established reputation in the movie business, and may even be looking for his or her first movie scoring credit. The fixed fee is much smaller, in some cases as little as \$5,000 or \$10,000.

The upper end of the scale for composers' fixed fees on low-budget pictures depends on the importance of the music to the movie. If the music were not central to the production, the upper range, even for an experienced composer, is unlikely to exceed \$50,000. If, however, the music were an especially important feature of the movie's appeal, a composer's fee might be as much as \$100,000.

In a low-budget deal of this sort, the composer may be entitled to publishing royalties, plus soundtrack album "artist" and "producer" royalties, just as an established composer would be in a big-budget agreement. In most instances, the royalty rates in a low-budget deal are likely to be the same as those in a high-budget agreement.

However, the agreement for a low-budget theatrical movie may require the composer to do much more than simply write, arrange, orchestrate and conduct the music. The composer also may be required to perform as a musician during the soundtrack recording sessions. In addition, the composer may even be required to produce and deliver—at the composer's *own* expense—a master tape recording of the music score.

The difference between a high-budget and low-budget deal becomes dramatic if the composer is required to produce a master recording at his or her own expense, because the cost of doing so may be as much as the composer's entire fixed fee. Indeed, if the composer's fixed fee is in the \$5,000 to \$10,000 range, the agreement necessarily (even if not expressly) contemplates the use of a non-union musician combo or an electronic synthesizer, rather than an orchestra. Even when the composer's fee is in the \$25,000 to \$50,000 range, there is a likelihood that recording expenses will exceed the composer's fee if a union orchestra of any size is used. Nevertheless, composers have been known to make such deals, in the belief that a motion picture scoring credit may be worth enough in the development of their careers to justify doing such projects even at a deficit.

Composers' agreements used in connection with network, prime-time television programs have elements in common with those used for big-budget theatrical productions as well as those used for low-budget theatricals. On the one hand, the soundtrack recording expenses for a network, prime-time television program would be paid by the program's producer, not by the composer, just as they would in a big-budget theatrical movie deal. On the other hand, the composer's fixed fee is likely to be as small, and perhaps smaller, than it would be for a low-budget theat-

rical. However, a composer's publishing royalties from a network television program are likely to be much greater than they would be from a low-budget theatrical, for reasons explained below.⁶

Composer's agreements used in connection with day-time and non-network television programs are similar to low-budget theatricals. Fixed fees are relatively small and the composer may be required to produce and deliver a master recording of the score, at the composer's own expense, using a combo or electronic synthesizer rather than an orchestra.

b. Composers' Guilds and AF of M

One reason there is so much variation, and such an enormous financial spread, in the terms used to hire motion picture and television composers is that composers are not represented by a guild or union for collective bargaining purposes. From 1955 to 1972, motion picture and television composers were represented by the Composers and Lyricists Guild of America ("the Guild"). In 1972, however, after a two-month strike failed to persuade production companies to share ownership of soundtrack score copyrights with composers, Guild composers filed an antitrust suit against the members of the Association of Motion Picture and Television Producers.⁷ Under federal labor and antitrust law,⁸ in order to win their case, the composers had to establish that they were "independent contractors" rather than "employees." Since only employees—and not independent contractors—are eligible (under federal labor law) to form unions, the Guild relinquished its union status.

The composers' case was finally settled in 1979. Though the settlement did not give composers an ownership interest in the copyrights to the music scores they create, the settlement does give composers certain rights to exploit that music, if producers do not, within specified time periods.⁹

After the composers settled their antitrust suit in 1979, the Composers and Lyricists Guild began to revitalize itself and to rebuild its membership rolls. But despite some success in doing so, it was an informal professional organization, not a labor union. Then in 1981, CBS began seeking options to acquire, directly from composers and music publish-

6. See *infra* § III. A.

7. *Bernstein v. Universal Pictures, Inc.*, No. 72 Civ. 542-CLB (S.D.N.Y. 1972), discussed in Havlicek and Kelso, *The Rights of Composers and Lyricists: Before and After Bernstein*, 8 COLUM.-VLA J.L. & ARTS 439 (1984).

8. National Labor Relations Act, 29 U.S.C. §§ 141-188 (1983); Sherman Act, 15 U.S.C. §§ 1-7 (1982).

9. See *infra* § III. D. outlining these rights.

ers, public performance rights for the music in the soundtracks of programs that CBS produced or acquired for network broadcast.¹⁰ CBS had always held blanket licenses from ASCAP and BMI, making such options unnecessary, *unless* CBS intended to let those blanket licenses expire. It thus appeared that CBS did intend to let its blanket licenses expire, or at least was giving serious consideration to not renewing them.

Moreover, the specter of the end of blanket licensing was magnified in 1982 when, in a case known as the *Buffalo Broadcasting* case,¹¹ a federal district court decided that the blanket licenses issued by ASCAP and BMI to local television stations violated federal antitrust law.

Suddenly, composers found it extremely important to be represented by a formal union once again, especially in conjunction with television scoring work. In order to avoid being saddled with tactical positions taken by the old Composers and Lyricists Guild in the *Bernstein* case, composers formed a new union known as the Society of Composers and Lyricists. Production companies refused to recognize or bargain with the new society, however. And when the Society petitioned the National Labor Relations Board ("NLRB") for certification as a formal labor union, the NLRB's Regional Director ruled that motion picture and television composers are not eligible to be represented by a formal union, because they are "independent contractors" rather than true "employees."¹²

Shortly before the NLRB ruled that motion picture and television composers do not have the right to form a union, a federal court of appeals reversed the *Buffalo Broadcasting* decision and held that the blanket licenses issued to local television stations by ASCAP and BMI do not violate the antitrust laws.¹³ Thus, part of the reason composers felt they needed a new union was eliminated. And as matters stand at this time, they do not have a union.

Although composers are not represented by a union, the American Federation of Musicians ("AF of M") represents orchestrators and conductors, as well as musicians, in collective bargaining with production companies that are members of the Alliance of Motion Picture and Television Producers ("AMPTP"). Since composers' agreements usually require composers to orchestrate and conduct their film and television scores, composers are represented by the AF of M in those capacities.

10. See Sobel, *CBS Tests its Clout*, ENT. L. REP., June 1983, at 4.

11. *Buffalo Broadcasting Co. v. ASCAP*, 546 F. Supp. 274 (S.D.N.Y. 1982), *rev'd*, 744 F.2d 917 (2d Cir. 1984), *cert. denied*, 469 U.S. 1211 (1985).

12. *Aaron Spelling Prods. & Soc'y of Composers and Lyricists*, NLRB Case No. 31-RC-5755 (Dec. 14, 1984) *summarized at* ENT. L. REP., Mar. 1985, at 7.

13. *Buffalo Broadcasting*, 744 F.2d 917 (2d Cir. 1984).

Under the AF of M collective bargaining agreement with the AMPTP, orchestrators and conductors must be paid a specified minimum wage. The minimum wage for orchestrations ranges from more than \$17 to almost \$39 per page, depending on the number of lines of music each page contains. Thus, simply preparing the orchestrations for a large orchestra can cost \$15,000 to \$20,000. The minimum wage for conductors is approximately \$200 per three-hour session; since it usually takes three to five recording sessions to record a feature film score, the minimum wage for a conductor would be \$600 to \$1,000.

Because orchestrating and conducting services are covered by the AF of M agreement, it is common for a composer's agreement to split the composer's fixed fee into two parts: a specified amount for orchestrating and conducting services rendered as an AF of M member, and a separate specified amount for composing services. Agreements that do not split the fixed fee into two parts often accomplish the same objective by providing that the specified fixed fee includes compensation at AF of M "scale" for any services rendered by the composer that come under the jurisdiction of the AF of M. Note, however, that if a single fixed fee is to include compensation at AF of M scale for covered services, the composer should take this into account in determining how much actually is being paid for *composing* services, especially if the orchestrations are likely to be lengthy, and especially if the composer is going to be hiring an assistant to do the orchestrations who will be paid by the composer personally. The composer for a low-budget movie may be surprised to discover that his or her compensation for the service of composing is minimal at best.

2. Songwriters' Agreements

a. Types of Agreements and Common Provisions

When producers hire songwriters to write songs especially for a movie or television program, two types of agreements are commonly used. Some production companies use their *composers'* agreement form, and simply modify it slightly to indicate that the songwriter will write a certain number of *songs* rather than an entire score. This works well, so long as the modifications are done carefully and completely. For example, language concerning "orchestrations" and "conducting" is likely to be irrelevant where rock-'n-roll songs are being written, and should be removed to avoid later confusion.

The second type of agreement commonly used by producers to hire songwriters is the same sort of agreement that music publishing companies use to hire songwriters. When this sort of an agreement is used, the

producer—or its music publishing subsidiary—becomes the song's "publisher." There is no "standard" songwriter's agreement—in the movie business or the music publishing business. Even in music publishing, there are at least two broad categories of songwriters' agreements: single song agreements (covering a particular, named song),¹⁴ and term agreements (covering all songs that are written during a specified time period).¹⁵ Movie and television producers are more likely to use the single song version, and will specify both the number of songs to be written and their movie or television-use purpose.

The producer will want the agreement to provide that the songs are "works made for hire," so the copyrights to those songs belong, automatically, to the producer. (Such a provision is customary when composers are hired to write dramatic scores.) The songwriter, on the other hand, may want to enter into a "co-publishing" agreement pursuant to which ownership of the copyright is shared or "split" by the producer and the writer's own publishing company.¹⁶ Prominent songwriters sometimes retain as much as 50% of "the publishing" (meaning, up to a 50% interest in the *publisher's* share of income from the music), and indeed, in some cases, a "superstar" composer may be able to retain 100% of the copyright to the music. Producers resist giving up copyright ownership, but may compromise either by granting the songwriter a percentage of the copyright ownership or by giving the songwriter a percentage of the producer's share of publishing royalty income, which would be in addition to the *songwriter's* share of publishing income. By doing the latter, the producer retains ownership and control of the copyright, while the songwriter benefits by increasing his or her potential income.

Where there are such conflicting desires, the outcome of negotiations depends on the relative bargaining powers of the parties. The outcome also is likely to be influenced by how much the producer is willing to pay the songwriter as a fixed fee for the use of the song: the less the fixed fee, the greater the likelihood that the songwriter will insist on a co-publishing arrangement. Other relevant factors include whether the producer intends to exploit the music (separate from the movie), and whether the composer intends to exploit the music and has the business facilities for doing so.

14. See, e.g., 4 ENTERTAINMENT INDUSTRY CONTRACTS, *supra* note 1, form 169-1 (single song contract, with commentary).

15. See 4 ENTERTAINMENT INDUSTRY CONTRACTS, *supra* note 1, form 170-1 (term exclusive songwriter agreement, with commentary).

16. See Medow, *Copublishing and Administration*, in 4 ENTERTAINMENT INDUSTRY CONTRACTS, *supra* note 1, ch. 173.

Often songwriters do not have their own music publishing companies, but are signed *exclusively* to an established publishing company (such as Almo/Irving Music, CBS Songs or Warner Bros. Music). If a producer wishes to hire such a songwriter, the producer must deal not only with the songwriter, but with the writer's exclusive publishing company as well. A co-publishing agreement—between the producer's publishing company and the songwriter's exclusive publishing company—is a possible and logical way to accommodate the interests and legal rights of all three parties.

b. Songwriters Guild and AF of M

Songwriters, like composers, do not have a union to represent them in collective bargaining with producers. Many songwriters do belong to the American Guild of Authors and Composers, which also is known as The Songwriters Guild. And the Guild has developed a widely-circulated, printed form agreement known as the "Popular Songwriters Contract." However, the Guild is not a labor union, and the Popular Songwriters Contract is not a collective bargaining agreement. It is a model form that contains provisions that are favorable to songwriters. And songwriters (and their lawyers) use it as a guide in negotiations with music publishing companies (few if any of which use it themselves).

Although songwriters are not represented by a union, virtually all songwriters also are musicians and play the piano, guitar or some other instrument themselves. Thus, songwriters may belong to the AF of M which represents musicians, including those who play soundtrack recording sessions for producers who are members of the AMPTP. Songwriters often play an instrument at the sessions during which their own songs are recorded, and when they do, songwriters are paid AF of M scale as musicians: approximately \$200 per three-hour recording session. If this possibility is not anticipated when the songwriter is hired, it can give rise to later disputes.

For example, if a composer's agreement form has been used to hire the songwriter, the agreement may provide that the songwriter's fixed fee includes payment for services rendered as an AF of M member. Such a provision would conform to industry custom for hiring a *composer* to create an entire dramatic *score* and to *conduct* the orchestra that performs that score in the soundtrack recording session. It is not customary, however, for a songwriter's fixed fee to include the amount that a songwriter may earn as an instrument player at the soundtrack recording session. Indeed, if the songwriter were hired to create a song for a television program—even a prime-time, network program—the songwriter's

fixed fee for songwriting may not be much greater than his or her salary, at AF of M scale, for performing as a musician at the recording session. That is, a songwriter might be paid \$250 to \$500 to write a song for a television series pilot,¹⁷ and might be paid \$200 to \$400 as an AF of M musician for playing at the session where the song is recorded.

B. *Pre-Existing Music*

"The Big Chill" and "American Graffiti" share one very important characteristic: soundtrack music was one of the most prominent features of both movies. Moreover, the music in both of these boxoffice successes consisted of songs that already existed, and were already popular, long before the movies were produced. Indeed, one purpose of both soundtracks was to evoke audience recollection of the years when those songs were popular.

When pre-existing music is to be used in a soundtrack, it is essential to distinguish between the musical composition itself and any recording that already has been made of that composition. In the eyes of the Copyright Act, two distinct works are embodied in a recording: one is the underlying song (which exists in sheet music or demo-tape form, separate from the recorded performance of the song); and the second is the recorded performance of the song. These two separate works are protected by two separate copyrights¹⁸ which may be, and usually are, owned by two separate companies. Typically, the copyright to a pre-existing song is owned by a music publisher; and the copyright to a recording of that song is owned by a record company. As a result, two separate sets of licenses may be necessary.

1. The Pre-Existing Musical Composition

In order to use a pre-existing musical composition in a movie or television soundtrack, as many as three licenses may be necessary just to use the underlying music—not a recording of it. A "synchronization license" is necessary to record the musical composition on the movie or television program's soundtrack.¹⁹ For a theatrical motion picture, a "performance license" is necessary to permit movie theaters to publicly

17. See *infra* § III. A. 2. for an explanation of how television performance royalties compensate for small composing fees.

18. 17 U.S.C. § 102(a)(2) (1983) (defining "musical works, including any accompanying words"); 17 U.S.C. § 102(a)(7) (1983) (defining "sound recordings").

19. See 4 ENTERTAINMENT INDUSTRY CONTRACTS, *supra* note 1, forms 178-1, 178-2 and 178-3 (free television, pay television and motion picture synchronization licenses, with commentary).

perform the musical composition by exhibiting the movie to theater patrons.²⁰ And if a soundtrack album is to be released, a "mechanical license" is necessary to permit the composition to be recorded and released in album form.²¹

In order to obtain these licenses, a producer may negotiate directly with the song's publisher. There are, however, several thousand music publishers in the United States, and not all of them are easy to locate. Some 3,500 publishers have retained the Harry Fox Agency in New York City to represent them in connection with negotiating and issuing synchronization and mechanical licenses. Thus, producers often deal with the Fox Agency, rather than with music publishers directly. Many producers find it useful to be represented themselves, and retain firms such as The Clearing House, Ltd., in Hollywood, which are experienced in music license negotiations, and which have enormous data banks of copyright ownership information concerning millions of songs.

a. Synchronization Licenses

A commercial television synchronization license is relatively inexpensive—perhaps \$250 to \$500 per song. This is because television broadcasts of a song generate additional "public performance" royalties that are paid by television networks, local stations, cable programming services (such as HBO and Showtime), and cable systems. In effect then, television synchronization licenses are offered by music publishers at "loss leader" prices, in the hopes of earning significant performance royalties from the program's broadcast.

Synchronization license fees charged by music publishers for theatrical motion pictures are more expensive than television synchronization licenses, because theatrical movie licenses include not only the *synchronization* rights needed by the movie's producer, but also the public *performance* rights needed by American movie theaters where movies are exhibited. The reason for this unique situation is explained in the following section of this article,²² but here it is important to note simply that although movie theaters do perform soundtrack music when they exhibit movies, movie theaters do not obtain performance licenses from ASCAP or BMI. Instead, American movie theaters obtain their performance licenses from movie distributors, which obtain them from producers,

20. See, e.g., 4 ENTERTAINMENT INDUSTRY CONTRACTS, *supra* note 1, form 178-3, cl. 4.

21. See 4 ENTERTAINMENT INDUSTRY CONTRACTS, *supra* note 1, forms 178-4 and 178-5 (mechanical licenses, with commentary).

22. *Infra* § II. B. 1. b.

who obtain them from music publishers, either directly, or through the Harry Fox Agency.

Since publishers do not receive public performance royalties from ASCAP or BMI in connection with the exhibition of motion pictures in American movie theaters, publishers naturally build a performance fee into the fee they charge a movie's producer. Thus, the fee charged movie producers is more than the fee charged television producers. The right to use a hit song—just the song, not a recording of it²³—in a motion picture soundtrack may cost a producer as much as \$50,000. Most songs of medium popularity cost \$10,000 to \$15,000. And no song costs less than \$500. In all likelihood, motion picture producers pass this cost on to distributors, which in turn pass it along to theaters in the form of greater exhibition license fees. The difficulty with this procedure is that it requires music publishers and movie producers to guess, at the time of their negotiations, how popular a movie will be many months later, because synchronization/performance licenses are granted in exchange for a flat fee, rather than a royalty or profit participation.

b. Movie Theater Performance Licenses

Movie theaters are the only places in the United States where music is publicly performed for profit that do not pay performance fees to ASCAP or BMI. Concert halls, amphitheaters, nightclubs, restaurants, bars and even universities obtain public performance licenses from ASCAP and BMI. And prior to 1948, American movie theaters did as well. In fact, movie theaters first began obtaining licenses from ASCAP in 1923, when movies were still silent, and the music performed by theaters was played by live pianists or orchestras. Even after "talkies" became common, and music became part of the movie soundtrack, it was still the case that producers *recorded* the soundtrack music but did not *perform* it, while movie theaters did perform it even though they did not record it. As a result, ASCAP continued to issue performance licenses to movie theaters in exchange for license fees agreed upon in negotiations in which movie theater owners were jointly represented by theater industry trade associations.

Although the license fees paid by theaters prior to 1948 were later described by a federal district judge as "very reasonable" and "fair and reasonable," theater owners thought otherwise and filed an antitrust suit against ASCAP alleging that its blanket license illegally restrained trade in violation of the Sherman Act. The same judge who found that AS-

23. See *infra* § II. B. 2.

CAP's rates had been "reasonable" also agreed with the *theaters* that ASCAP's blanket license (as it existed prior to 1948) violated federal antitrust law. As a result, ASCAP was prohibited from issuing any further licenses to movie theaters, and ASCAP members were ordered to grant performance licenses to producers at the same time that synchronization licenses were issued.²⁴

Ironically, European movie theaters still do obtain performance licenses from their local performing rights societies (for which theaters pay 2½% to 5% of the ticket price). Thus, when American movies are exhibited in Europe, American publishers and composers receive performance royalties on account of the European movie theater performances of their music, even though they do not receive performance royalties from American movie theater performances of their music.

c. Homevideo Licenses

Although it has been customary for music publishers to grant synchronization and performance licenses to producers on a flat fee basis, the law does not prohibit the use of royalties or profit participations. Old customs die hard however. This became apparent when the homevideo industry was born, and producers began to release videocassettes of theatrical motion pictures—thereby creating a need for a new type of license, the homevideo license.

Producers view videocassettes as nothing more than another way to *exhibit* movies. Thus, producers instinctively offer publishers the customary flat fee for the right to use music in homevideo versions of motion pictures. Music publishers, on the other hand, view videocassettes as another form of *recording*, like ordinary records or tapes that just happen to have pictures. As a result, music publishers instinctively ask producers for a royalty based on the number of videocassettes sold, because such a royalty is similar to the "mechanical" royalty that is customarily used in the record business. Movie producers recoil from the suggestion that music publishers should be paid a royalty on videocassette sales, because such a royalty looks to producers like a gross profit participation—something that is given only to superstar actors, directors and writers.

The industry "norm" that has developed is something of a hybrid between the movie and record industries' customs because it combines the concept of a flat fee and a royalty. That is, the synchronization fee paid by movie producers for the right to use pre-existing music²⁵ typi-

24. *Alden-Rochell v. ASCAP*, 80 F. Supp. 888 (S.D.N.Y. 1948).

25. *See supra* § II. B. 1. a.

cally includes a homevideo license for the first 100,000 to 250,000 videocassette units sold. Thereafter, producers usually pay a royalty of 5 to 7 cents per unit, in increments of 50,000 units. (For example, if the "synch" license fee covered 250,000 units, as soon as that number of videocassettes had been sold, the producer would pay the music publisher an additional \$2,500 to \$3,000 per song for a homevideo license covering the next 50,000 units.)

2. Obtaining a Recording of the Musical Composition

Acquiring the right to use a pre-existing musical work is only the first step in getting the work into a movie's soundtrack. The second step is obtaining a recording of the music. This is done in one of two ways. A new, custom-made recording of the music can be produced; or a pre-existing recording of the music can be obtained.

a. Producing a New Recording

In order to produce a new, custom-made recording of a pre-existing song, it is necessary to use musicians, vocalists and a recording studio. The minimum terms of employment for musicians are set forth in the AF of M collective bargaining agreement. The minimum terms of employment for background or chorus vocalists are set forth in the collective bargaining agreements of the Screen Actors Guild ("SAG") and American Federation of Radio and Television Artists ("AFTRA"). At the present time, AF of M musicians earn approximately \$200 per three-hour session; and SAG and AFTRA members earn somewhat more (for off-camera singing). Of course, these minimum obligations apply only when movie and television production companies are parties to these collective bargaining agreements.

As might be expected, lead vocalists who are recording artists in their own right require more legal attention. While the minimum terms of their employment are set forth in the SAG and AFTRA agreements, they usually command higher fees for their services. A superstar may be paid as much as \$20,000 or \$25,000 to record a single soundtrack song, in addition to a "recording fund" for the payment of the expenses of producing a master recording of the song. Recording artists also receive royalties on the sale of soundtrack albums containing songs they have performed. Their royalty rates vary from 5% to 10% of the suggested retail price of the album, divided by the number of songs on the album. (The actual royalty provisions of an artist's contract with a movie or television producer are likely to be more complicated than this percentage-of-retail description suggests; instead, the royalty provisions are

likely to be quite similar to those found in contracts between recording artists and record companies.²⁶⁾

Moreover, if a recording artist is signed to a record company other than the record company that will be releasing the soundtrack album, a further legal complication will be created by the "exclusivity clause" that is likely to be part of the artist's contract with his or her own record company.²⁷ In these cases, the artist's own company must consent to the use of the artist's performance on the soundtrack album. Consent is frequently granted and results in an on-screen and on-album credit indicating that the artist appeared through the "courtesy" of the record company to which the artist is exclusively signed. The financial terms on which such "courtesies" are granted vary from movie to movie. Sometimes, for example, the artist's record company is given the right to release a single of any song performed by that artist, even though the soundtrack album is to be released by another company. The royalty that otherwise would have been paid to the artist sometimes is paid to the artist's record company (which first applies it to any outstanding advances previously made by it to the artist, and then shares it with the artist in accordance with his or her contract).

b. Master Recording Licenses

When producers use pre-existing music, they often want to use a particular pre-existing recording of that music as well. Since the copyright in a recording is separate and distinct from the copyright in the underlying music, a separate license is necessary to use a pre-existing recording. Such a license is known as a "master recording license" or a "master use license" and is obtained from the record company that owns the copyright to the recording itself.²⁸

Naturally, the fee for a master recording license depends on the popularity of the recording. The usual range for such a license is from \$500 for the use of an excerpt from a recording to \$5,000 to \$25,000 for the use of an entire recording. The fee would be closer to \$25,000 if the recording were "featured" in the movie, while an incidental background use, such as a song being played on a car radio while two actors are talking and driving would be worth less. In rare cases, pre-existing re-

26. See 4 ENTERTAINMENT INDUSTRY CONTRACTS, *supra* note 1, form 160-1 (exclusive recording artist agreement, with commentary); Sobel, *Recording Artist Royalty Calculations: Why Gold Records Don't Always Yield Fortunes*, 4 ENTERTAINMENT INDUSTRY CONTRACTS, *supra* note 1, ch. 161.

27. See 4 ENTERTAINMENT INDUSTRY CONTRACTS, *supra* note 1, form 160-1, cl. 1.

28. See Greenberg, *Master Use Licenses*, 4 ENTERTAINMENT INDUSTRY CONTRACTS, *supra* note 1, ch. 186.

cordings are worth even more than \$25,000. In 1984, for example, it was reported that Universal offered CBS Records \$200,000 for a license to use three Bruce Springsteen recordings ("Badlands," "Thunder Road" and "The Promised Land") in Peter Bogdanovich's movie "Mask." Despite the enormity of this sum, no deal was made, reportedly because CBS Records also demanded a royalty on sales of videocassette versions of "Mask"—a demand which Universal was said to have rejected as a matter of principle.²⁹

While a master recording license usually is issued by a record company, sometimes the approval of the artist also is required for particular uses. Such approval rights, if they exist, are found in recording contracts between record companies and artists. Recording contracts also often provide that the artist is entitled to a portion of any master recording license fee received by the record company, in which case, if the record company is unrecouped against advances previously made to the artist, that portion of the fee will be credited to the artist's royalty account.

Finally, any new use of a recording will generally require additional "re-use" payments to the musicians and vocalists performing on the recording, especially if the recording was made under AF of M, SAG or AFTRA jurisdiction.

c. Sound-Alike Recordings

When producers are able to make a satisfactory deal for a pre-existing song with a music publisher, but are unable to make a satisfactory deal with a record company to use a pre-existing recording of that song, the law gives producers an option that is useful in some cases. That option is to produce a new "sound-alike" recording of the song using musicians and vocalists who—with the aid of modern recording equipment and engineers—are frequently able to duplicate the original artists' sound and style exactly. This option is available, as a matter of law, because under the Copyright Act, the exclusive right to reproduce a sound recording is limited to the right to "recapture" and re-record the actual sounds created by playing the very recording that is protected by copyright.³⁰ Independently recreating those sounds, using musicians and vocalists, and then recording those newly created sounds, does not infringe the copyright to the original recording, "even though such sounds imitate or simulate those in the copyrighted sound recording."³¹

It thus would have been *legally* permissible for Bogdanovich and

29. L.A. Times, Nov. 21, 1984, part VI, at 8, col. 1.

30. 17 U.S.C. § 114 (1983).

31. *Id.*

Universal to have obtained synchronization and performance licenses from the publisher of the three Springsteen songs for the "Mask" soundtrack, using another singer who—with the aid of electronics, if necessary—could have been made to sound just like Springsteen. This was not done. Bob Seger recordings were used in the "Mask" soundtrack instead. But in other cases, producers have created "sound-alike" recordings for movie soundtracks, and have been entirely satisfied with the results.

III. EARNING INCOME FROM SOUNDTRACK MUSIC

A. *Music Income from Exhibition of the Movie or Television Program Itself*

Movies like "Dirty Dancing," "Saturday Night Fever," "Flashdance" and "Footloose" were financial successes—in record stores as well as movie theaters. As a result, producers realize that soundtrack music can be a significant source of "ancillary" income. Indeed, in some cases, a movie's music income exceeds its revenues from other sources, including theatrical distribution. It has been said, for example, that the theme songs from the movies "Mondo Cane" ("More") and "Endless Love" earned more than the movies themselves did. So far, this article has described how producers acquire the *rights* that are necessary to use music in movie and television soundtracks (and soundtrack albums), and how producers obtain master recordings of that music. This part of the article describes how soundtrack music earns income for producers and others—even apart from the "rental" fees paid by movie theaters in exchange for exhibition rights, and apart from licensing fees paid by television networks and stations in exchange for broadcasting rights.

Soundtrack music earns income from several legally distinct sources.

1. Movie Theater Performances

Theatrical performances of a movie necessarily result in the public performance of the movie's soundtrack music. However (for reasons explained above) *American* movie theaters have not paid public performance fees for soundtrack music since 1948.³²

On the other hand, movie theaters in Europe do pay public performance fees to their local performing rights societies, for the right to publicly perform soundtrack music (in addition to whatever rentals those

32. See *supra* § II. B. 1. b.

theaters pay for the right to exhibit the movies themselves). Eventually, the money collected by European performing rights societies, approximately 2½% to 5% of ticket prices, flows back to American music publishers and composers.

If a movie's soundtrack music was "specially ordered or commissioned music," the copyrights to that music will be owned by the producer's own music publishing company. Consequently, the producer eventually will receive the "publisher's share" of performance royalties, amounting to 50% of those European public performance fees, in addition to whatever distribution income the producer earns from the movie itself. The other 50% of these public performance fees, known as the "writer's share" or "composer's share," is paid to the composer directly by ASCAP or BMI (both of which are affiliated with their European counterparts), even where the producer's music publishing company owns the copyright.

Of course, if the producer had acquired pre-existing music (the copyrights to which were owned by music publishers that were not affiliated with the producer), the European public performance fees would be received by those publishers, rather than by the producer. The composer would still receive the "composer's share," however.

2. Television Performances

Television broadcasts and cable transmissions constitute public performances. As a result, ASCAP and BMI issue licenses to television networks, individual television stations, pay-TV companies (such as HBO and Showtime), and basic cable programming services (such as ESPN, CNN and MTV). The licenses issued by ASCAP and BMI are known as "blanket licenses" because they authorize the performance of all of the compositions in the ASCAP and BMI catalogs. The legality of this form of licensing has been upheld despite antitrust challenges by CBS and a committee of individual television stations.³³

When cable-TV systems (i.e., the companies that own the cable *hardware*) retransmit television programs that are broadcast by conventional television stations, cable systems publicly re-perform the sound-

33. *CBS v. ASCAP*, 620 F.2d 930 (2d Cir. 1980), *cert. denied*, 450 U.S. 970 (1981); *Buffalo Broadcasting Co. v. ASCAP*, 546 F. Supp. 274 (S.D.N.Y. 1982), *rev'd*, 744 F.2d 917 (2d Cir. 1984), *cert. denied*, 469 U.S. 1211 (1985). See also Sobel, *The Music Business and the Sherman Act: An Analysis of the "Economic Realities" of Blanket Licensing*, 3 LOY. L.A. ENT. L.J. 1 (1983). But see Basson, *Syndicated Television Music: The Source Licensing Debate Rages On*, ENT. L. REP., July 1987, at 3 (part 1) and ENT. L. REP., Aug. 1987 at 3 (part 2), for a discussion of legislation introduced in the 99th and 100th Congresses which, if enacted, would "overrule" the *Buffalo Broadcasting* decision.

track music in those programs. Cable systems, however, are not required to negotiate performance licenses with ASCAP or BMI—or even with the owners of the copyrights to the re-transmitted programs themselves. Instead, the Copyright Act grants cable systems a statutory, compulsory license to re-transmit programs that are broadcast by television stations.³⁴ In exchange for this compulsory license, cable systems make semi-annual payments to the Register of Copyrights, for each “distant” non-network signal they re-transmit.³⁵

The amount of the fee that cable systems must pay is periodically re-determined by the Copyright Royalty Tribunal. The Tribunal also conducts annual proceedings to determine how to allocate the collected fees among all of the copyright owners whose programs and music have been retransmitted by cable systems. ASCAP and BMI represent music publishers and composers in these proceedings, and receive from the Register of Copyrights whatever share the Tribunal decides is due them. ASCAP and BMI then distribute the amounts they have collected from all of these sources (networks, television stations, pay-TV companies, basic cable programming services, and the Register of Copyrights) to their publisher and composer members.

The amounts paid to composers and music publishers may be quite substantial. For example, a network television broadcast of a theme song or one minute of background music will earn approximately \$150 each for the music's composer and publisher, while a network broadcast of a feature performance of music (for example, a song sung on camera) will earn the publisher and composer more than \$1,400 each. Syndicated television programs earn less for composers and publishers, but nice amounts nonetheless: theme and background music earns about \$50 per broadcast, and a feature performance earns about \$165, for the composer and publisher each. These earnings are distributed by ASCAP and BMI directly to composers and music publishers. Thus, when a producer's own music publishing company owns the copyrights to soundtrack music, the producer receives this income in addition to whatever licensing fee the producer may have received for the program itself.

B. Soundtrack Album Income

Soundtrack albums may generate significant income from three different sources: album sale royalties, mechanical license fees, and per-

34. 17 U.S.C. § 111(c) (1983).

35. *Id.* at § 111(d). Distant signals are those broadcast by television stations located outside of a cable system's own territory.

formance fees (from radio play and other public performances of the album).

1. Album Sale Royalties

A soundtrack album agreement between a movie or television producer and a record company is similar in many ways to a recording agreement between a performing artist and a record company.³⁶ When a soundtrack album deal is made, the producer delivers to the record company a master recording of the soundtrack music (as well as advertising and other artwork prepared in connection with the movie) which the record company uses to manufacture albums (and album covers). Typically, the movie producer promises that the movie will be released for public exhibition in accordance with a specified schedule. In return, the record company promises to use its best efforts to release the soundtrack album within a specified number of days after the movie's release. In some instances, particularly in foreign territories, an album may be released even prior to the release of the movie.

Record companies pay movie producers a royalty on album sales which generally is from 14% to 18% of the album's suggested retail price. Record companies also often pay producers an advance against future royalties, though the size of the advance varies enormously from one deal to another. A purely orchestral recording of dramatic underscoring, released by a small independent record company that specializes in soundtrack music, may not receive any advance at all. On the other hand, a rock-'n-roll soundtrack album from a movie that will be widely released (that will, in other words, open in a couple of thousand theaters across the country) may earn an advance of \$300,000 or so. And a soundtrack album embodying the recordings of major rock-'n-roll artists may result in an advance of as much as \$500,000.

The soundtrack album royalties received by a movie production company do not go entirely to its "bottom line," because the release of an album triggers certain financial obligations that must be paid by the movie producer, or by the record company.

Perhaps the most significant financial obligation is the AF of M "re-use" fee. This is a fee that must be paid to AF of M musicians whose performances were recorded for the movie soundtrack itself, whenever those recorded performances are used to manufacture soundtrack albums. The "re-use" fee can be very substantial if a large orchestra was

36. See 4 ENTERTAINMENT INDUSTRY CONTRACTS, *supra* note 1, form 160-1 (exclusive recording artist agreement, with commentary).

used to record the soundtrack, because its amount is 100% of the amount that was paid to the musicians who recorded the tracks for the movie that are then used on the album. This is one reason why some soundtrack albums of orchestral scores are not the "original soundtrack" version but are new performances of the same music recorded in Europe using European orchestras whose musicians are not AF of M members. Often the cost of making a new master recording of an orchestral score in Europe is less than the "re-use" fee that would have to be paid to release, in album form, an already-existing master recording that was made for a movie soundtrack.

The release of a soundtrack album also is likely to impose royalty *paying* obligations on the movie producer. For example, the producer's agreement with a composer may provide that the composer is to receive an *artist's* royalty on the sale of soundtrack albums (for services rendered by the composer as a *conductor* at the soundtrack recording sessions), and perhaps an additional royalty as the soundtrack album *producer*. Furthermore, the producer's agreements with vocalists who are recording artists in their own right may provide that the vocalists receive artists' royalties on the sale of soundtrack albums.³⁷

In the case of an orchestral score composed by an established composer, the composer's "artist" royalty may be as much as 7% of suggested retail, and the composer's "producer" royalty may be as much as 3%. Where vocalists have performed songs for a soundtrack, their artist royalties may amount to 10% of the suggested retail price of the album. (Naturally, where several different artists contribute to a single soundtrack album, they share the royalty among them in proportion to the number of songs contributed by each.)

Since a movie producer may have to pay as much as 10% in artist and album producer royalties from the 14% to 18% in royalties received from the record company, it is very important that artist/producer royalties be calculated in precisely the same fashion as the producer's royalties. Otherwise, producers run a risk that they may have to pay out more in royalties than they receive, because even slight variations in royalty provisions may have an enormous impact on the amount of royalties that are due.³⁸ This potential problem is avoided by inserting a paragraph in the producer's agreements with composers and vocalists providing that royalties payable to composers and vocalists by the producer "shall be defined, computed and paid in precisely the same manner and at the

37. See *supra* §§ II. A. 1. a. and II. B. 2. a.

38. See, e.g., Sobel, *Recording Artist Royalty Calculations: Why Gold Records Don't Always Yield Fortunes*, *supra* note 26.

same times as the Producer's royalties are defined, computed and paid by the Record Company."

2. Mechanical License Fees

Record companies actually pay two separate royalties in connection with their sale of albums (soundtrack or otherwise). One of these royalties is in payment for the *performance* that is recorded on the album and is generally payable to the artist rendering the performance. However, in the case of a soundtrack album, the movie (or television) producer receives this royalty, and then pays a portion of it over to the artists whose performances were recorded.³⁹

The second royalty paid by record companies in connection with their sale of albums is a payment for the underlying *musical compositions* that are recorded on the album. This royalty is known as a "mechanical license fee" and is paid to the owners of the copyrights to the musical compositions. Where a soundtrack consists of "specially ordered or commissioned music," the producer will own the copyrights to the musical compositions embodied on the soundtrack, and thus the mechanical license fees resulting from the sale of the soundtrack album will be paid by the record company to the producer.

Although the composer or songwriter may have been paid a fixed fee (or salary) for writing the music in the first place, it also is customary for composers and songwriters to receive the "writer's share" or "composer's share" of publishing royalties from non-theatrical uses of the music. As their "writer's share," composers and songwriters usually receive half of the amount of the mechanical license fees received by producers from record companies.

The amount of the mechanical license fee is established by the Copyright Royalty Tribunal, an independent body created by the Copyright Act.⁴⁰ Technically, the Tribunal rate applies only to new recordings of previously recorded music, and does not apply to first-time recordings of musical compositions.⁴¹ In practice, however, the fees paid by record companies for first-time recordings usually are "pegged" in some fashion to the rate set by the Tribunal. From July 1, 1984 to December 31, 1985, the mechanical license fee established by the Tribunal was 4.5 cents per song, or .85 cents per minute (whichever was greater), per record distributed. Since January 1, 1986, the rate established by the Tribunal has been 5 cents per song, or .95 cents per minute (whichever is greater), per

39. See *supra* §§ II. A. 1. a. and II. B. 2. a.

40. 17 U.S.C. § 801 (1983).

41. *Id.* at § 115.

record distributed.⁴²

Often, record companies will demand—and be given—a mechanical license at a rate which is less than the rate set by the Tribunal. This reduced rate usually is referred to as a “controlled compositions” rate, and though its amount is subject to negotiation, it often is 75% of the Tribunal rate.

Thus, the mechanical license fees payable by a record company for a soundtrack album containing ten songs (each of which is less than 5.26 minutes) would be 50 cents per album at the current Tribunal rate, or 37.5 cents per album at a controlled compositions rate of 75% of the Tribunal rate. Assuming that all ten songs were specially ordered or commissioned for the movie, this money would be paid to the movie’s producer by the record company (in addition to album sales royalties), and the producer (or the producer’s own music publishing company) would (typically) pay half of it to the songwriters who created the songs.

3. Public Performance License Fees

Soundtrack albums, and individual songs from them, frequently are performed publicly by radio broadcasts and, to lesser extent, by record or tape play in public places. As a result, ASCAP and BMI issue performance licenses to radio stations and public facilities that play records and tapes (other than record stores, which are exempt⁴³). ASCAP and BMI then distribute half of these license fees to the owners of the copyrights to the songs (which would be the movie producer, if the songs were specially ordered or commissioned), and the other half directly to the songwriters who created them.

C. Other Income Sources

1. Mechanical License Fees

Occasionally, music from a movie (or television program) will become so popular that other recording artists will want to record it themselves. John Williams’ score for “Star Wars” has been recorded several times by several different orchestras, for example. Each time a new recording is made, the record company that releases the new recording must pay mechanical license fees to the copyright owner.⁴⁴ If the movie producer is the copyright owner, those fees will be paid to the producer, who (typically) will pay half to the composer of the music.

42. Adjustment of Royalty Rate, 37 C.F.R. § 307.3(c) (1987).

43. *Id.* at § 110(7).

44. *See supra* § III. B. 2.

2. Synchronization License Fees

Soundtrack music also may earn "synchronization" income, if another producer wants to use that music in a new movie or television program. Again, it would be customary for half of any such synchronization income to be paid to the composer who created the music.

3. Master Sound Recording License Fees

If another producer wanted to use not only the underlying music in a new movie or television program, but also the master recording made for the earlier movie, the second producer would have to obtain a master recording license to do so (in addition to a synchronization license). A portion of that income may have to be paid to the recording artists whose performances were recorded on the original soundtrack master. And a re-use fee would have to be paid to any AF of M musicians and SAG and AFTRA vocalists whose performances were recorded on the original master.

4. Sheet Music and Folio License Fees

The music from popular movies and television programs is frequently released in sheet music and folio form.⁴⁵ Sheet music and folio publishers pay a license fee for the right to do so. A portion of that fee is customarily paid to the composers who created it. For reasons that appear lost in unrecorded history, the customary composer's share of sheet music and folio income does not amount to half of the amount paid by sheet music and folio publishers. Instead, the composer's share is customarily specified in pennies per "regular piano copy" of sheet music, as a percentage of the selling price of other sheet music versions, and as a percentage of the selling price of folios. The amounts involved range from 6 to 10 cents per piano copy of sheet music, and 10% or so of the wholesale price of other sheet music versions and folios.

5. Live Public Performance License Fees

Finally, music from popular movies and television programs is frequently performed live by musicians in restaurants, cocktail lounges, nightclubs and other public facilities. ASCAP and BMI issue performance licenses to such places. The fees collected are distributed by ASCAP and BMI, half to copyright owners and half to composers (in the

45. See Meadow, *Print Agreement*, 4 ENTERTAINMENT INDUSTRY CONTRACTS, *supra* note 1, ch. 177.

same way that fees from the public performance of soundtrack recordings are distributed).

D. *The Bernstein Case Settlement*

As the preceding sections of this article indicate,⁴⁶ movie and television composers have a personal financial interest in seeing that the music they create is used in as many ways as possible. This is so, because their agreements with producers customarily provide that composers receive publishing royalties from the non-theatrical use of their music (in addition to whatever fees they are paid for composing the music in the first place).⁴⁷ Although producers also have a financial reason for wanting that music to be used in as many ways as possible, producers are primarily in the movie or television business, rather than the music business. As a result, composers have complained that producers do not make an adequate effort to exploit soundtrack music.

In 1971, the Composers and Lyricists Guild of America—the union that had represented movie and television composers since 1955—demanded that its members be permitted to retain an interest in the copyrights to the music they composed for producers. In this fashion, composers themselves would have had the right to license the use of that music. Thus, composers would not have had to depend on the music-licensing efforts of producers in order to earn further income. However, the producers, who were represented in those 1971 negotiations by the Association of Motion Picture and Television Producers (“AMPTP”), would not agree to share copyright ownership with composers. A two-month strike by the composers failed to change the producers’ position.

In 1972, the Composers and Lyricists Guild filed an antitrust suit, known as the *Bernstein* case,⁴⁸ against the AMPTP and its members. The case was settled in 1979. Though the settlement did not give composers ownership of the copyrights to the music they create, it does give composers certain limited rights to exploit that music, if producers do not, within specified time periods. The settlement applies to music composed for movies and television programs produced by Universal, Twentieth Century Fox, Paramount, MGM, Warner Bros., Columbia, Walt Disney, United Artists, CBS and ABC.

The settlement agreement is difficult to summarize accurately, because it treats movie music and television music separately (though simi-

46. *Supra* §§ III. A - III. C.

47. *Supra* § II. A.

48. *Bernstein v. Universal Pictures*, *supra* note 7.

larly), and because it creates several separate classes of music: music composed after February 2, 1978; music composed between January 1, 1960 and November 2, 1976; movie music that is not publicly performed within 18 months of the initial release of the movie for which it was composed; television music composed for series; television music composed for "non-series" programs; and exempt television music.⁴⁹

In general, however, the settlement agreement works as follows (for movie music composed after February 2, 1978). The producer has the exclusive right to exploit the music for 15 months from the release of the movie. If the producer does not do so, the composer may exploit the music for 30 months. If the composer does so, both the composer and the producer have the right to exploit the music forever. But if the composer fails to exploit the music during his or her 30-month period, the exclusive right to exploit it reverts to the producer. Satisfactory exploitation is precisely defined in the agreement. The copyright to the music always remains with the producer. If the producer does exploit the music, the income is split as specified in the composer's contract. If the producer does not exploit, and the composer then does, the composer receives his or her share of the income (as specified in his or her contract) plus 75% of the producer's share of the income.

Movie and television composers' agreements do not typically incorporate or even refer to the *Bernstein* settlement—at least as drafted by producers' legal departments. Presumably, the settlement is binding on the studios and networks that were parties to it, even though the settlement is not incorporated by reference; though cautious composers' lawyers specifically incorporate the settlement if there is any chance at all their clients may wish to take advantage of its provisions.

Ironically, although in 1971 producers would not agree to give composers an interest in the copyrights to their music, it is conceivable that today, at least some producers—including those who were not parties to the *Bernstein* settlement—may want to grant composers similar music exploitation rights. If, after all, the producer has not exploited the soundtrack music (apart from its use in the movie or television program itself) within a reasonable period of time, there seems to be little if any reason to reject the composer's assistance in doing so. The sources of income from soundtrack music are many. And in most cases, at least a portion of that income will be profit.

49. A detailed description of the settlement agreement is set forth in Havlicek and Kelso, *supra* note 7.