

Music Licensing

Tips & Tricks for Film/TV

by

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Music Licensing 101 *by Amy E. Mitchell, Esq.*

It's difficult to avoid music in day-to-day life. Whether you're watching television, surfing the Internet, sitting at a coffee shop, playing a video game, or driving in the car, music is likely a regular part of your environment. However, who owns that music and who benefits from its use is frequently misunderstood. Even content producers who are tasked with sourcing music for a project may not know where to start, or they may fall prey to one of the many myths about using music for free.

To properly license music for your audiovisual project (e.g., motion picture, television commercial, web series), it's essential to have a basic understanding of copyright law.

Copyright Basics

Copyright is a fairly complex area of the law that varies from country to country. In the United States, there are two Copyright Acts that are relevant in today's music industry-- the 1909 Act and the 1976 Act. Any music written, recorded, or published in the last 40 years would fall under the 1976 Act; however, songs created between 1924 and 1977 may need to be researched under the terms of the 1909 Copyright Act.

A copyright is defined as “an original work of authorship that has been fixed in a tangible medium.” For a song, that means when you have written down the lyrics/chords or have recorded it (even a rough demo). The copyright owner is automatically entitled to what's known as the “bundle of rights,” which gives him or her all of the following rights:

1. to reproduce the work in copies or phonorecords
2. to distribute copies or phonorecords of the work to the public by sale or other transfer of ownership, or by rental, lease or lending
3. to prepare derivative works based upon the work, such as converting a book into a movie
4. to perform the work publicly; the performance may be live, by broadcast or over loudspeaker in a public place (e.g., restaurant, retail); “public” is defined as persons outside of your family or immediate circle of acquaintances
5. to exhibit the work publicly
6. to perform the work publicly by means of a digital audio transmission (only for sound recordings, added in 1995)

Importantly, these rights are “exclusive¹,” meaning others are excluded from doing any of the above without the owner's permission. As a result, the copyright owner gets to decide how and who uses his/her copyrighted works and, in most cases, how much that use will cost.

Unless prepared within the scope of employment or pursuant to the work-for-hire doctrine, ownership of a copyright and all exclusive rights vest with the author. However, like tangible goods, copyrights may be traded or sold, with some or all of the rights held by the copyright owner being licensed or assigned to other individuals or entities. Copyright ownership may also change hands automatically by inheritance or pursuant to the terms of the author's estate plan.

¹ There are some exceptions to these exclusive rights, such as reproduction by libraries, educational uses, fair use, and parody, but these topics are beyond the scope of this article.

The term of copyright protection is determined by many factors, but a good rule of thumb in the United States is that copyright protection extends for 70 years beyond the death of the author. So, unless the music you want to use was published² more than 100 years ago, there's a good chance that the music is still protected by copyright. Once the term of copyright protection ends, the work falls into the "public domain"³ meaning that anyone can use the works without additional permissions or payment of monies.

Song v. Master Copyrights

Understanding music copyright issues can be more confusing than copyrights in other creative works because there are two distinct copyrights in recorded music. The first is a copyright in the musical composition (i.e., the words and music) and the second is a copyright in the sound recording (i.e., a particular performance of a musical composition). This translates to two separate copyright assets that can be owned, controlled, and/or exploited by two (or frequently more) rights holders. For simplicity, let's refer to the musical composition as the "Song" and a sound recording as a "Master."

Generally speaking, musical compositions are owned and/or controlled by the songwriter or the songwriter's music publishing designee. Sound recordings are typically owned by the recording artist (if the artist is unsigned and released the recordings on their own) or a record label (if the artist is signed⁴). Indie artists may well own the copyrights in both the musical compositions and the sound recordings if they are performing their own original music; however, record producers may also claim an ownership stake in the artist's masters or songs, especially if there is no paperwork between the artist and producer.

Prior to licensing music for a project, it's imperative that you understand the distinction between song and master copyrights so that you secure all of the rights that you need for your project.

Synchronization & Master Use Licenses

The two main music licensing agreements for film and television projects are master use and synchronization licenses, which makes sense when you recall that recorded music is composed of two distinct copyrights.

Master use agreements must be obtained from the person or entity that owns or controls the master (i.e., the sound recording) whereas synchronization⁵ (or "sync") licenses must be obtained from the person or entity that owns or controls the song (i.e., the music and lyrics). These licenses permit the licensee to "marry" or "synchronize" the song/master for use in a particular scene of an audiovisual project such that each time a particular visual image is shown, then that music will be heard.

Tip: Public performance rights language should also be included in these licenses to cover exhibition and broadcast of the productions outside the United States because many countries require that motion picture theaters pay performance royalties for music used in theatrically-distributed films.

² The term of protection for unpublished works may vary.

³ Verifying public domain status can be complicated because a composition may be public domain in the United States, yet under copyright control in another country. In addition, remember that even while a composition may be public domain, a specific arrangement or recording of it may not.

⁴ The copyrights in older recordings may revert to the recording artist under certain circumstances.

⁵ Though not specifically mentioned in the U.S. Copyright Act, "synchronization" rights are deemed to be included in the copyright owner's exclusive right to reproduce and authorize others to reproduce the copyrighted work in copies, such as television programs, motion pictures, and home videos.

Initial Considerations

If you are the producer, the first step is to determine whether you want to use new or existing (i.e., pre-recorded) music for your project, or some combination thereof. You will also want to consider your music budget at the outset. 10-20% of the total production budget is a fairly standard allocation, although much more could be required if music is a central part of the film or you wish to include a lot of commercial “pop” music.

It’s usually helpful to have a detailed music clearance log to assist with tracking the clearance of desired music for the project. The clearance log should include, at a minimum, song title, publisher(s), recording artist (if pre-recorded), label (if any), date released, sound recording owner, together with any specific contact information you have located.

As discussed above, **for pre-recorded music**, you are looking at potentially two layers of clearance for the rights in the song and the master. Commercial “pop” music usually involves clearance from both a music publisher(s) and a record label. If you want a one-stop shop so that you’re only negotiating with one party, then you’ll want to look for “true indie” artists that own all song and master rights (i.e., they have not assigned any rights to a music publisher or signed a record or production deal) or production music libraries such as Musicbed, Music Vine, Artlist, or FirstCom.

Tips for Clearing Pop Music:

1. *Start with publisher and start as soon as the music is being considered for use. If you can’t clear publishing, there is no sense going after the master rights. If you can clear publishing, but not master rights, then consider re-recording.*
2. *Hiring a professional music supervisor or clearance specialist to manage the process can save a lot of time and ensure that you are getting charged reasonable fees.*

For new music, production typically hires a composer to create original score. Production may own the musical score as work-for-hire or license score produced by the composer. New music might also include a re-record (known as a “cover”) of an existing song. In that case, you would first negotiate (or “clear”) the synchronization rights from the music publisher. Once the publishing rights were cleared, then you could hire musicians to record a new version of the cleared song (i.e., a new master copyright).

Tips: Spend time finding the right composer and bring him/her in as early as possible to meet the sound engineer and mixer.

Here’s a chart that may be helpful in determining what rights you need:

You want to use...	Then you need...
Existing Song + Existing Recording	Sync license + master use license
Existing Song + New Recording	Sync license + rights from performers
New Music	Composer deal

Music Licensing Process in a Nutshell

1. Research and identify relevant rights holders.

The first step in licensing music for a production is identifying the copyright owners of the songs and/or masters that you wish to use. This research can be time-consuming as there can be many different songs with the same titles, or many different recordings of the same song. To further complicate matters, copyright ownership may be split between several parties, either by ownership percentage or territory, or both. For example, clearing a song co-written by Bob and Sally may require that you negotiate with both Bob's and Sally's publisher for the desired rights.⁶ If either one denies approval, then you can't use the song (or any recordings of it!). And if Bob assigned his foreign publishing rights, then there might be yet another publisher to contact if you want to release your project worldwide.

For songs, performing rights organizations ASCAP, SESAC, and BMI each have websites that allow users to research contact and ownership information for the songs in their respective catalogs. However, it's important to verify the publishing information because database information is not always accurate or complete, particularly if there are owners of rights outside the United States.

For masters, you would normally contact the recording artist and/or the record label to see who controls the rights.

If you cannot find a rights holder, you are well-advised not to use the track.

Note: There is a trend in music licensing that record labels and music publishers must get approval from their artists/songwriters in order to license the music for audiovisual use. These approvals typically happen in the background between the label/artist or publisher/songwriter, but this background issue highlights why as much lead time as possible is helpful when licensing music.

2. Prepare your request for quote.

In determining whether permission will be granted and what license fee will be requested, a prospective licensor will want to know the following information regarding the project into which the music will be licensed:

- Name of the production
- Name of the production company
- Key talent (e.g., actors starring in the production, director/writer bios)
- Total film budget/music budget
- Synopsis of the film
- Specific scene description where music will be used (script pages may be requested)
- Usage (visual or background, vocal or instrumental) and approximate timing

Most prospective licensors will ask you to submit your quote request in writing via email. Again, the more lead time you can give them, the better.

⁶ Under common law principles, if there is no agreement between the parties otherwise, any co-owner can grant non-exclusive rights on behalf of the entire copyright without consulting his co-publishers, subject to a duty to account to the other parties. In practice, however, most publishers are reluctant to grant rights for another party. A producer will not know if an agreement between the parties for separate licensing and administration exists, so the prudent thing to do is to negotiate with each party separately.

3. Cross your fingers and wait for a quote. Follow up, if needed.

There is no compulsory license for synch or master use licensing so a rights holder has absolute discretion to grant (or deny) permission for any reason, or for no reason at all.

Similarly, there is no fixed time for prospective licensors to respond to your request. You may well have to follow up on several occasions to see if they require more information and/or to get an idea of the licensor's timeline. **Silence never constitutes approval.**

4. Evaluate the offer. If permission is granted, confirm and finalize main deal terms.

After receiving a fee quote, the producer should evaluate the terms and restrictions to see if it works for the production. If the terms work, the producer should issue a letter of confirmation to the licensor setting out the key deal terms to ensure that there is no miscommunication between the parties. This is commonly handled via email.

Tip: If the fee quote is out of your budget, don't be afraid to negotiate! The prospective licensor may prefer some money to no money. If the project is unscripted, a documentary, or a news story⁷, then you may also seek a fair use opinion from an experienced entertainment lawyer to see if "clearing" such music is absolutely necessary.

Licensors typically quote a fee that is contingent on the music actually being used in the production, but some major licensors are now requiring indie productions pay the quoted fee **before** they will issue a license to prevent licensees from requesting licenses and then not following through and paying and/or executing the license. The major labels have also recently entered into agreements with the American Federation of Musicians and SAG/AFTRA that require them to invoice production for union fees if the total master use fee is \$7,500 or less. These union charges are on top of the quoted fees and typically invoiced separately.

The actual fee quoted is at the licensor's absolute discretion; however, popular songs or recordings by popular artists tend to command higher fees. You should also expect to pay more for full songs, songs actually performed on camera, and songs used over the opening or end credits. You may be able to get gratis or low-cost rights for student films or festival rights only.

Tip: Songs for use in trailers may require separate fee negotiation.

Bear in mind that quotes may only be valid for a limited time (e.g., 60-90 days). If you expect a lengthy post-production schedule, consider negotiating a longer time to accept the quote. Ideally you are able to accept anytime through the final audio mix.

⁷ Most narrative or scripted productions disfavor a fair use determination because it is assumed that the producer controlled all aspects of what was captured (e.g., they chose to have that music playing in the background).

5. Issue license or review license from rights holder.

Once the deal terms have been confirmed by both parties, you will want to enter into a more formal licensing agreement. Major or sophisticated rights holders have their own form licenses that they will provide. However, some rights holders may request that production issue a license.

Here are some key licensing terms to review/include in your music licenses:

Fee: This is what you have agreed to pay for the rights. The license agreement should make clear when and how such fee is payable.

Term: This is the length of time the producers want to exploit the production. “In perpetuity” is best for production, but many licensors will want to restrict to shorter intervals such as 1, 5 or 10 years.

Territory: This refers to the geographic area where the production will be distributed. Producers typically try for worldwide (or “throughout the universe”), but the license may be restricted to U.S. or North America only, the world excluding U.S. and Canada, or the names of specific countries or geographical regions.

Media: This describes the method by which the production will be made available to the public. Producers are wise to seek an “all media” buyout, but, if the music budget will not support all media, there are multiple steps that can be broken out such as film festivals, theatrical, non-theatrical, home video, Internet streaming and downloading, and television (which can be further subdivided into free, basic cable, satellite, pay-per-view, VOD, etc.).

Special Note on Agreeing to “MFN”: Many licensors will quote and add a note that the license should be on an MFN basis with all other licensors. This is particularly common on lower budget productions where license fees are low and licensors do not wish to spend a lot of time negotiating a license. MFN stands for “most favored nations.” It essentially means that whatever licensor has MFN status gets the benefit of the best deal negotiated by *any* licensor. Now, if production is able to treat all licensors the same way because music is easily swapped out, this may not be an issue. But if you have a mix of popular songs (or recordings by popular artists) and indie songs (or recordings by unknown artists), granting MFN can be problematic. In that case, take care to “carve out” certain licenses. For example, you might agree to MFN excluding a particular song title. Or perhaps you say MFN with all similar uses excluding opening and end credits.

SAMPLE QUOTE REQUEST FOR INDEPENDENT FILM

Our client, _____, is interested in using the song “ _____ ” performed by _____ and written by _____ in the independent film currently entitled “ _____ ” (“*Picture*”).

[INSERT KEY TALENT BIOS (e.g., producer, director):]

Following please find a synopsis of the film and a synch use request:

FILM SUMMARY:

SONG TITLE:

PUBLISHER(S):

WRITER(S):

TERRITORY: Worldwide

TERM: Perpetuity

RIGHTS: The non-exclusive unrestricted and irrevocable right to use and perform in any manner in and in connection with the Picture for exploitation in any and all media now known or hereafter devised and includes in-context promos and/or trailers.

OPTION 1: Home Video

OPTION 2: Theatrical

SCENE DESCRIPTION:

USAGE/TIMING: [e.g., background vocal, approximately 1:11 minutes]

DISTRIBUTION:

FEE (based on 100% of copyright): \$ _____

Percentage owned and/or controlled: ____%

Should any of the foregoing writer/publisher information be incorrect in any manner, please contact me immediately to resolve any such discrepancies.

Thank you in advance for your anticipated prompt response. If you should have any questions, please do not hesitate to contact me.

Sincerely,

[Clearance Rep]

MASTER USE REQUEST TEMPLATE FOR DOCUMENTARY

TO: [LICENSOR]

VIA E-MAIL:

Please let this letter serve as a request for master use rights for the following sound recording in connection with the indie documentary —:

Recording:

Artist:

Label:

Usage/Timing:

Scene Description:

Film Budget: \$ _____

Territory: worldwide

Term: perpetuity

Rights/Term: all media/perpetuity

Distribution:

Film Synopsis:

COMMON RESTRICTIONS AND CONTINGENCIES FOR QUOTE

All terms subject to our license form.

Quote valid for 90 days and applies only to prospective uses of the composition.

Approval is contingent upon the production not being rated NC-17 or X and use not being derogatory.

Internet rights exclude Twitter, Snapchat, vevo.com, vimeo.com and YouTube restrictions will apply.

We respectfully reserve the right to approve any digital subscription platform that is predominantly a music service (e.g., Spotify, Apple, Google Play and Tidal)

Excludes out-of-context promos, endorsement of any product, brand or service or any cross-promotional advertisements.

Your request is approved for platforms and channels with valid PRO licenses only.

If major artist involved, you might see something like this:

Except as approved by [ARTIST/ESTATE], you are expressly prohibited from utilizing or authorizing the use of any of the following in connection with the rights herein granted: (i) the name, likeness, and/or biography of ARTIST or any member of ARTIST's family; (ii) any look-alike or sound-alike performance mimicking, impersonating or in any other way resembling ARTIST or any member of ARTIST's family; and/or (iii) any costume, prop, or other material associated with or depicting ARTIST.

Quote response from a major label might look like this:

Fee: \$2,500.00

+ additional steps due at \$1M, \$2M, \$3M, & \$5M of world gross receipts based on all forms of exploitation

Step Fee: \$2,500.00

All terms/fees MFN with publishing/similar uses

Quote is for Master Recording only and publishing approval must be sought separately.

This quote is only valid for 90 days.

Approval is subject to your signing MAJOR LABEL's non-negotiable standard formal agreement.

This quote does not include any third-party payments for which you are responsible as a result of your use of the Master, including but not limited to SAG/AFTRA, AFM or other union obligations and requirements.

Please note the recording industry recently entered into agreements with the AFM & SAG/AFTRA that require MAJOR LABEL to invoice you for applicable reuse fees on Traditional Uses if the total master use fee is \$7,500 or under. Such invoice will detail (a) the reuse fee amounts due per union (e.g. for Traditional Uses, the SAG-AFTRA and AFM fees are calculated as the greater of 7% of the master use fee or \$165 per union); and (b) the applicable amount due for Health and Retirement (e.g. the current rates are 12.75% for SAG-AFTRA and 12.81% for AFM). Should the total master use fee exceed \$7,500, the standard rules for both AFM & SAG/AFTRA continue to apply.

Quote excludes out-of-context trailers, featurettes, behind-the-scenes making ofs, EPKs, DVD menu, bonus features & audio soundtrack usage.

Please notify MAJOR LABEL of your intent to proceed with this license in writing accompanied by payment for the entire quoted amount. Permission will not be deemed granted and formal licensing agreements will not be issued unless and until fees are received by MAJOR LABEL.

Please send payments to: _____.

Screen credit must read:

“SONG TITLE”
Performed by ARTIST
Courtesy of LABEL

Do's and Don'ts for Artists Approaching Music Supervisor

By Roanna Gillespie

1. When pitching music digitally DO include METADATA: Title, Artist, Publishing Splits. Is it one-stop? If not helpful to supply co-writers, publisher and master owner and most importantly Contact Info. If I don't know the name of the track or who to contact, I will move on.
2. Do not send too much music or music that does not apply to the brief. 3-5 tracks max at one time. If you have a description of what a supervisor is looking for, don't be afraid to say you don't have anything appropriate at this time. If you send something totally unrelated they (I) will not be inclined to listen next time. Don't waste yours or other people's time. If it's for an ongoing series of some type, pay attention to the styles of music used.
3. Do not send large file attached to emails. Send links or use a service like BOX.
4. There is such thing as TOO MUCH FOLLOW UP. If you are annoying, a supervisor will scratch you off his/her list.
5. Do have alternative versions available for pitches, ie. TV track (instrumental), acoustic, etc.
6. Do have WAV or AIFF files ready for the mix.