

LICENSING PRE-RECORDED MUSIC

by
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Introduction

Music is a powerful storytelling tool, since it has the ability to convey and heighten the emotion in a scene. Nonetheless, independent filmmakers, generally out of necessity, under budget for it. Worse even, they spend the money they did budget, on dealing with unforeseen expenses associated with the production or post-production process.

Filmmakers who decide to reproduce pre-recorded music on their film's soundtrack have to be prepared to spend time and money acquiring the music's synchronization right (these licenses are referred to as "synch licenses"). The endeavor is time consuming because it requires contacting and negotiating with various parties. It is also expensive if you are going to secure the rights to pre-recorded music: you will have pay fees to the record company, publisher(s), the American Federation of Musicians, American Federation of Television and Radio Artists and/or Screen Actors Guild. The information below is basic information. It is not an exhaustive discussion on the topic of music licenses. I suggest that filmmakers use the below information as a jumping board. If the licensing process gets too complicated, then I always suggest that filmmakers either hire a knowledgeable attorney or music supervisor.

Step 1: Contact the Record Company

The approach the filmmaker takes to licensing pre-recorded music will vary depending on whether he/she is licensing prior to production or during post production. Filmmakers are likely to license the music prior to production when the film has a scene, for example, in which an actor is performing the music. They are likely to license music during post production when the music is part of the underscore. In either case, filmmakers should contact the record company's film licensing department to ascertain their procedure and the name of the party authorized to negotiate the licenses required. The record company will want to read the screenplay if the license is required prior to production, and it will want to see a rough cut of the film if the licensing request is during post production. The record company insists on reading the screenplay, or viewing the rough cut, in order to determine whether it wants to be involved, and whether the project is something the artist would consider, since many artists have control over how their music is exploited.

The record company will not consider the licensing request unless the filmmaker can afford the licensing fees. It is highly unlikely that an independent filmmaker, with a limited music budget, will be able to license music by major artists like Mariah Carey, Madonna, Barbara Streisand, Bruce Springsteen, since the record company fees alone can cost as much as \$20,000 - \$50,000. Furthermore, the record company will refuse a request for a film festival license, which generally ranges \$200 - \$300 (one year worldwide), if the filmmaker cannot afford the fees for the additional licenses.

The filmmaker may be able to convince the record company to make special payment arrangements. The "step deal" is one such payment arrangement. In a step deal, the filmmaker makes an up front payment based on the film's budget and he/she makes additional payments when the film's grosses reach certain specified sums. Structuring the license this way may make the filmmaker's licensing request feasible assuming that the he/she can come up with enough money up front.

Record companies all have artists which they want to expose to the public. When short on cash, filmmakers should take advantage of the record company's desire to promote up-and-coming artists. The filmmaker can enlist the record companies assistance in the search for affordable music by contacting the record company and expressing an interest in licensing music by the artist's they want to promote. The record company will read the script, or view the rough cut, so that it can make suggestions which work with the film, and are within the filmmakers budget. Licensing fees are dramatically reduced when the record company views the film as an opportunity for their talent. The filmmaker may well end up licensing a unique piece of music, from an artist that has hit potential, for a mere \$2,000 to \$5,000.

Timing is important when the filmmaker's financial resources are limited. Filmmakers should contact the record company as early on in the process as possible. It is going to take approximately a couple of weeks for the record company to read the screenplay or view the rough cut of the film. If the record company forwards the screenplay or rough cut to the artist for approval, then the filmmaker can count on an additional minimum two week delay. Filmmakers will need to allow for more time if the record company is suggesting talent and music.

Step 2: Contact the Publisher

The filmmaker will have to contact and, subsequently, secure a license from each of the publishers. The most tedious part of the licensing process begins here, since each piece of music can have multiple composers and publishers. ASCAP, BMI and/or SESAC are organizations that represent publishers; they can provide the filmmaker with publisher information if he/she can supply them with the exact title of the song and the name of the author(s).

Publishing licenses are also not inexpensive. A one year film festival license can cost as little as \$500, but a license for a major piece of music can cost upwards of \$50,000. If the music budget is limited, then I suggest that the filmmaker either find a less expensive piece of music to license, or that he/she attempt to structure a step deal (see above). The filmmaker can find a more affordable piece of music by enlisting the publisher's assistance. Most major publishers will read the script, and/or view the rough cut, in order to make licensing suggestions that are within the filmmaker's budget. Again, filmmakers need to allow sufficient time for this process.

Step 3: New Use Fees

The American Federation of Musicians ("AF of M") requires a "new use fee" whenever prerecorded music is incorporated in a film. The new use fee is the equivalent of a session fee for each musician who performed on the song when it was originally recorded. The new use fee is supposed to vary depending on the number of musicians performing on the recording and the size of the film's budget. These fees can range upwards of \$200 per musician, depending on whether you are producing a low or high budget film. In addition to the above new use fees, filmmakers will also have to pay a ten percent (10%) pension fund contribution.

New use fees can inflate the music budget since a fully orchestrated symphonic piece of music, for a "high budget" and "low budget" film, can cost in excess of \$25,000 in new use fees respectively. The AF of M does give preference to films that are not profit driven and, therefore, does not charge a new use fee to films whose only venue is film festivals. Furthermore, the AF of M will waive the new use fees where non-profit (401(c)3) projects are concerned.

Singers on the prerecorded music the filmmaker is licensing may be members of Screen Actor's Guild ("SAG") and/or the American Federation of Television and Radio Artists ("AFTRA"). The filmmaker will, as such, have to pay new use fees to these unions as well. The calculation of these fees is not straightforward, therefore, SAG and AFTRA ask that filmmakers with questions regarding new use fees contact them directly.

The AF of M is supposed to provide the filmmaker with a copy of the original session sheet. The session sheet lists every musician that performed on the recording. Do not agree to pay the new use fee unless they provide the original, since the AF of M cannot pay the musicians unless they know their identity. AFTRA and SAG may not have the original session sheet available but they will identify the performers.

Filmmakers who have never used prerecorded music are unaware of the need to pay the new use fee. Licensing agreements usually include a clause which states that the filmmaker is responsible for paying all union fees, but the clause goes unnoticed, misunderstood, or ignored by many. The novice filmmaker usually does not find out that he/she is responsible for paying new use fees until the union contacts them; this always creates a problem since the union generally contacts the filmmaker after the film is in distribution -- too late for the filmmaker to choose an alternate piece of music, include the fee in the film's budget, or incorporate the cost in the distribution deal. Filmmakers should contact the AF of M, AFTRA or SAG, as soon as they identify the music they wish to license, since knowing the extent of the new use fees beforehand may influence the filmmaker's choice of music, may allow him/her to include it in the budget, or make arrangements for payment.

Conclusion

A filmmaker with a limited music budget must be realistic and flexible when choosing prerecorded music. If licensing music is beyond the filmmaker's financial reach, despite the above suggestions, then he/she should consider hiring a composer to write a comparable piece of music. There are a lot of up-and-coming composers who, for the sake of experience and a film credit, are willing to work for a reasonably small fee.

This article is not a complete review of the subject matter and, as such, the reader should not make decisions on the basis of the above without consulting with an attorney.