



## **VISUAL MUSIC: THE MUSICIAN AND SYNC RIGHTS**

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The use of music in film, TV, video and webcast production involves two aspects of copyright law: synchronization rights and performance rights. Performance rights come into play when a production is shown to the public -- typically via broadcast or cablecast. Performance rights are primarily of concern to film distributors and TV and cable stations. Synchronization or "sync" rights, on the other hand, are involved whenever recorded music is used in combination with visual images in a production. It is important for producers to understand what is involved in obtaining sync rights.

Some producers incorporate music in their productions without permission, particularly for programming produced for private use (in in-company training videos, for example) or for distribution in the smallest markets where the likelihood of detection is low. Not only does this practice violate the copyright law (for which the consequences can be severe) but it can also unnecessarily limit opportunities to exploit the production. Other producers treat music rights clearance as an afterthought, only to discover that obtaining sync rights can be complicated, time-consuming, expensive and not guaranteed. Experienced producers budget for, and negotiate the terms of, sync licenses before including music in a production. If the rights are too costly or are not available, the producer is able to look for alternatives.

In many cases, a producer commissions original music for a production. When a musician is hired to compose original music, the producer may own the work outright under a "work-made-for-hire" agreement and does not need to license the sync rights separately. In such an agreement, the producer may agree to pay the musician or music publisher a flat fee and/or grant a royalty interest in the production. Work-for-hire agreements must be in writing and contain specific language to be enforceable.

More typically, the musician or music publisher insist on retaining all or part ownership of the work and agree only to license the sync rights to the producer for a set fee, a royalty interest, or based on some other formula. Under this approach, the producer can usually keep the cost of the sync license low (perhaps only compensating the musician for actual costs), because the performance license fees for a commissioned work -- which the producer does not pay -- can be very lucrative for the musician and/or music publisher.

In a typical flat fee arrangement, the musician is paid fifty percent of the total compensation to start work. Music is composed and presented to the producer who offers comments and criticism. After revisions are made, players are hired and the music is recorded. An additional twenty-five percent is usually paid on the first day of recording. The music is then mixed and edited and the final twenty-five percent is paid on delivery.

If the music was previously recorded and published, the producer will have to obtain a sync license from the copyright owner (usually the music publisher, or the musician in the case of self-published work). The use of music in film, TV, video and webcast is not covered by the compulsory license provisions of the Copyright Act. As a result, sync licenses for these uses must be negotiated on an individual basis between the copyright owner and the producer.

The heart of the sync license describes the rights which are being licensed. This normally will be a non-exclusive right to record and edit the music in sync with the production, to make copies of the recording in sync with the production, to perform the music in sync with the production in theaters, through broadcast and cablecast, and to reproduce and sell home videos containing the music in sync. Usually the sync right is structured so that all other rights other than the sync right may continue to be licensed or otherwise exploited by the musician. The sync license is also normally limited to a specific period of time, after which the sync rights themselves can also be licensed to other productions.

The sync license may also provide for use of the music for promotional purposes such as advertising the production, and for other ancillary uses. Musicians with particularly strong bargaining power may insist on additional compensation for such ancillary uses. For relatively unknown musicians, however, the additional exposure gained from such uses can be invaluable. In a similar vein, the sync license typically requires the producer to credit the musician not only in



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the production, but also in connection with advertising and promotional activities, and on home videos. Due to the current lucrative market for soundtrack albums, it is becoming increasingly common in film and TV sync licenses to also negotiate for the right to produce a soundtrack album containing the music featured in the production.

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