CHAPTER 21

Publishing and Copyrights

One of the first lessons I learned in this business is you don't have the luxury of being a tortured artist. Go get a gig in the tortured artist venue. Hollywood has no time for that. It isn't allowed.
—Mark Isham

Publishing and copyrights is an area of the film composing business that is crucial to the composer's financial well being. *Most of the time, for feature films and television, film composers do not own their music due to a clause in their contract called "a work made for hire."* However, this is not always the case, and how your music is published, who owns the copyright, and in what proportions that ownership is divided between writer and publisher determines how much money in royalties you see down the road in the months and years to come after a film has been released. Royalties are discussed in depth in chapter 22, so first let's talk about what makes a work *published*, and what it means to have that work *copyrighted*.

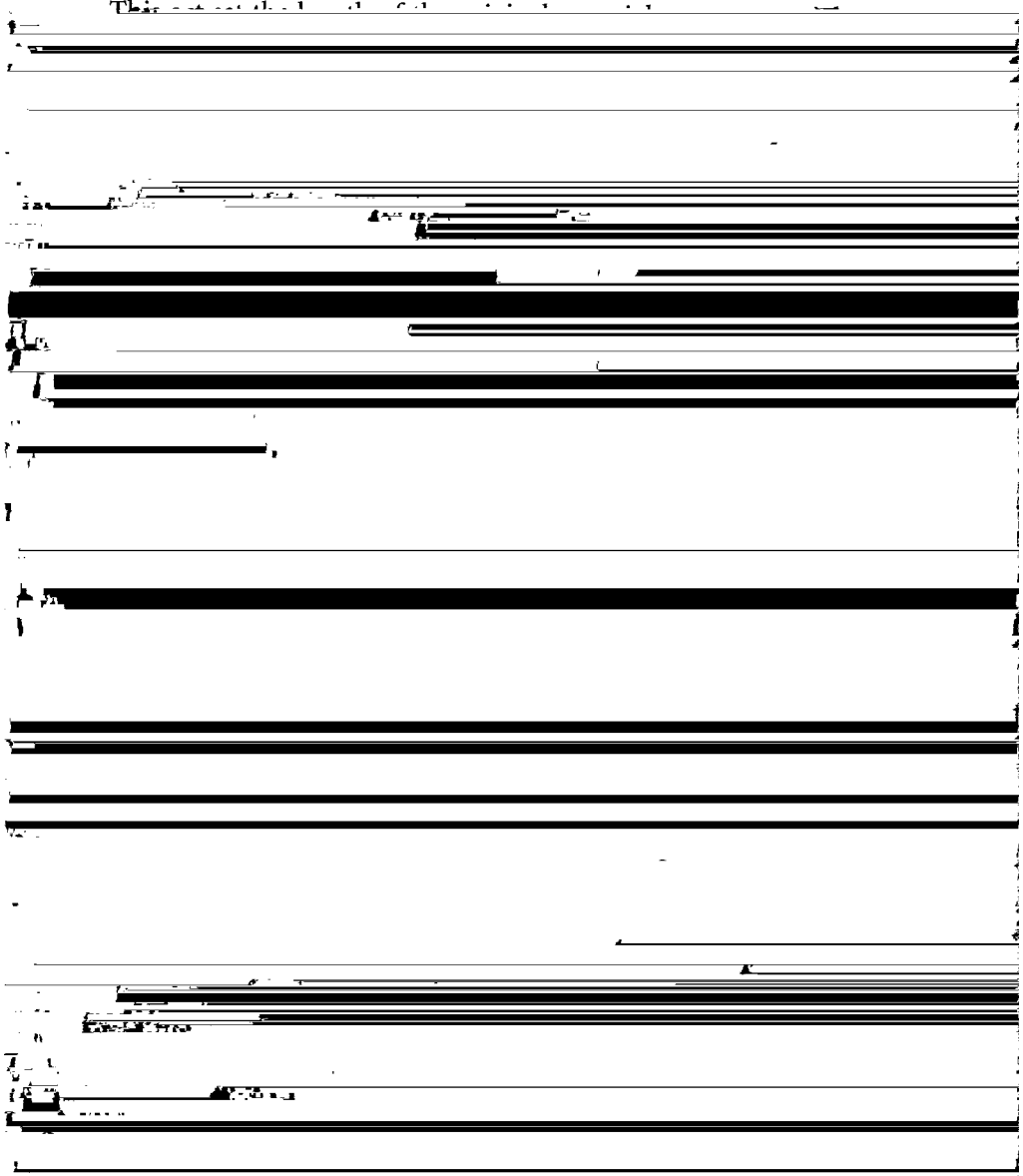
What is a Copyright?

Copyright refers to the ownership of a creative work—in this case music. (It could also be a book, a poem, a photograph, an artwork, etc.) It sounds somewhat circular, but copyright means "the right to copy," or the right to reproduce a certain work. The person who owns the copyright owns the rights to that work. Therefore, the person who owns the copyright controls how it will be published—that is, offered for sale to the public.

The history of copyright laws in the United States is a complex subject. Simply put, in the earliest days of the nation, laws were enacted that gave authors and publishers exclusive ownership of their creative

works and protected them from theft of those works. In this century there have been three significant copyright laws enacted: in 1909, 1976, and in 1998.

The first copyright law in this century is the Copyright Act of 1909.



the renewal forms, thus seeing the work enter the public domain after only twenty-eight years. This newest law insures the heirs or estate of the composer seventy years of copyright protection and potential income, whereas under the previous laws that protection was usually much shorter. And it also brings the United States into line with similar protection offered in European countries.

What is a "Published" Work?

The legal definition of *publishing* according to United States copyright law is "*the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending.*" In addition, a published work is one in which there has been "*an offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display.*"

A work is considered to be published if it is offered for sale to the public. If a composer writes an incredible heart-stopping symphonic poem but leaves it on a shelf in his studio for years, that work is not considered to be published. However, if copies of the same work are printed and consequently offered for sale in a classical music store, that work is considered published. If a band makes a CD and just gives it away to friends, that work is not published. If the same CD is offered for sale at gigs and the local music store, that music is then considered to be published. When a film is released in theaters or shown on TV, that music is also considered to be published. (Note that in all the above examples, the works are protected by copyright whether or not they are published. More on this below.)

Once a work is published, royalties can be collected from performances of the work and from sales of recordings, sheet music, and songbooks. These royalties are divided into two portions: half goes to the publisher who is the owner of the copyright, and half goes to the writer (composer). In some cases the publisher and the writer are the same person, in some cases they are different. In addition, both the publishers' and the writers' portions can be divided into smaller parts if there are co-writers or co-publishers.

When a work is considered published, by natural implication, that work has a publisher. A publisher can be an individual, such as a film composer or songwriter, who is self-publishing their own catalogue of works, or it can be a large corporation with hundreds or even thousands of titles to oversee. The duties of the publisher are to register the copyright, oversee the financial administration of a work, collect royalties, negotiate new uses, and make sure that there is no infringement on the copyright.

Registering a Copyright

Registering a copyright is very easy. This is done through the United States Copyright Office, a branch of the Library of Congress in Washington, D.C. You can obtain forms from them over the phone or Internet; the one that applies to film scores and songs is called *Form PA*, for "Performing Arts." You simply fill out the form and send in a copy of the work with the $20 registration fee. This copy can be in the form of a tape, CD, video, or a handwritten or printed manuscript. After a period of about three weeks to three months, you will receive a copy of your completed form with a stamped seal of the U.S. Copyright Office indicating completed registration and full copyright protection. However, your protection begins on the day your form is received by the Copyright Office, as long as it is filled out correctly.

Copyright Protection

The questions are often raised: Should I bother to register my work? Is there any benefit to me in doing the paperwork and paying the fee? and, Am I not protected as soon as I create the work? The answers are yes, yes, and yes. But first, an explanation of how copyright protection works.

Whether or not a work is protected by copyright has to do with a term used by the writers of the law. This is where they refer to a work being *fixed.* This means that the work is set down, or fixed in some kind of tangible, physical form, like writing it down on paper or recording it. Here is the copyright law of 1976 defining what is fixed:

> *A work is "fixed" in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. A work consisting of sounds, images, or both, that are being transmitted, is "fixed" for purposes of this title if a fixation of the work is being made simultaneously with its transmission.*

As soon as you begin to put the musical idea on tape or on paper it is considered to be fixed, and protected by copyright law. No registration needs to take place; no forms need to be filled out. If you are writing the work over a period of time, whether it is days, weeks, or years, the protection is in effect as you work. In addition, the last sentence of this excerpt of the law says that if an uncopyrighted work is transmitted or broadcast over TV or radio, and the author of the song has given permission for a recording of the initial broadcast, that work is considered to be "fixed" and protected by the copyright law.

This is actually the answer to the question above: Am I not protected as soon as I create the work? The answer is that you are protected in a technical and legal sense. However, strange things happen in a world of laws, attorneys, and courtrooms. If you created a work in the privacy of your home, the burden of proof as to when that work was created is on you. Unless you have witnesses, you could be hard-pressed to convince a judge or jury of the truth your story. If you are ever involved in a copyright infringement suit, you will want to have the most foolproof evidence of the origination of the copyright. This would be the stamped registration form you received from the Copyright Office. You would be kicking yourself if you lost a lawsuit you should have won because you did not want to pay a $20 fee and take ten minutes filling out the copyright registration form several years before.

One thing to remember is that as a film composer you often do not own the copyright—the producer of the film owns it (see *work made for hire* at the end of this chapter). In this case, the producer has the copyright registration form filled out and returned to him. However,

on some projects you will retain the ownership of the copyright and will have to go through the registration process yourself. Either way, it is good to know the procedures.

The Rights of the Copyright Owner

What exactly does it mean to own a copyright? To sum it up, the owner of the copyright has the right to reproduce the copyrighted work, to distribute it through "phonorecords," and to perform the work publicly. (*Phonorecords* used to apply to just that—records that go on a turntable; now it legally means anything that reproduces sound. CDs, cassettes, prerecorded MiniDiscs, and any future invention of reproducing sound is covered by this term.) If you own the copyright to a piece of music, you have the exclusive right to decide how to initially reproduce copies of it, where and when the initial performance takes place, and who initially performs it.

Notice how that word "initially" snuck into those last few phrases. This is important since after the work is initially "offered to the public," or published, your ability to control the use of your copyrighted material changes. Remember that a copyrighted work is not necessarily a published work. A work can be under copyright but not yet be published. So if someone wants to use your music on their CD or perform it in public, and your music is copyrighted but not yet published, they need to get your permission. You have the right to decide about the initial performance or reproduction of copies. If your song or film score is yet to be published and another artist wants to record the entire work or a portion of it, they must get your permission first. However, if the work is already published, if you have already recorded and released it on a CD, or if it has been released in the theaters as a film score, then your permission is not necessary as long as they pay you a minimum royalty. This is a royalty paid at a rate established by the Copyright Royalty Tribunal (a five-person panel appointed by the President) called the *minimum statutory rate.* Or you could agree to a lower rate if it suits your interests. For songs, this minimum statutory rate is calculated by the song; currently it is set at 6.95 cents per song per unit sold. So if someone else records one song of yours, and their album sells 1,000,000 units, then the royalty would be $69,500. This is called a *mechanical royalty* that is paid to you by the record company for the privilege of using your music. If the music is instrumental film music, the royalty rate is calculated either by how many minutes in duration the piece is, or sometimes by how many selections appear on the album. For a film composer, this arrangement is one of the important items covered in his contract. (For more about royalties, see chapter 22.)

Copyright Infringement

Another question that often comes up is "What constitutes copyright infringement?" There are two types of copyright infringement: the unauthorized use of a copyrighted work, and the copying of substantial portions of a work.

The unauthorized use of a copyrighted work is the more clear-cut type of infringement. This is when someone records or performs copyrighted material without paying royalties to the owner of the copyright. This can happen if a performer records a copyrighted song, sells thousands of units and doesn't pay the appropriate royalty. Even though the copyright owner does not have to give permission for use of a published song, he must still be notified that the song will be used, and must be paid at least the statutory minimum royalty. In a film score, if a producer uses music from another film or recording but does not obtain a *sync license* (a license that gives permission to use the music and synchronize it to picture), that producer is guilty of copyright infringement; he has violated the copyright owner's exclusive rights.

The copying of substantial portions of a copyrighted work is a more difficult issue to determine. Many composers and songwriters are under the impression that you can copy up to four bars, or some other amount of actual music, before you are in danger of violating the copyright laws. This is a misconception. The copyright law says that you must have music that contains a "substantial similarity" to the copyrighted work before you are guilty of copyright infringement. In addition, the law says that for there to be infringement, the owner of the copyright must show "proof of access." In other words, if you are

being accused of copying a substantial portion of a copyrighted work, the owner of the copyright must prove that somehow you had access to hearing the work in question.

For example, if this work has had substantial radio or TV airplay, then it is assumed that you had access to it. You cannot claim that because you do not own a TV, you never heard that sit-com theme song. The same applies for a film score. You cannot claim that you never saw the movie and therefore are not guilty of copyright infringement. If the music is widely disseminated to the public, either in theaters or on the radio or TV, then it is assumed that you had access to it.

On the other hand, say you have written a work that has only been performed locally in your city, Burlington, Vermont. Suppose that a composer based in Los Angeles comes out with a hit movie theme or song that sounds just like your song. In this case, you cannot claim copyright infringement, since you would be hard-pressed to prove that a composer from Los Angeles had access to your song that was only played in a nightclub in Burlington, Vermont. However, if you can prove that the composer in question had recently spent time in Burlington, and even was present at your gig, then you would have a case.

Copyright infringement is an area in which you should pray never to be involved. Be aware if you are subconsciously "borrowing" someone else's music. Try to always be original. These kinds of lawsuits can be messy, lengthy, and expensive. In our litigious society, there are people out there with no case at all who go after those they perceive as having deep pockets, hoping that they will at least get a settlement. This has happened to major performers including the Rolling Stones, the Beach Boys, and Sarah McLachlan. There are also cases where composers do unconsciously copy someone else's music. For example, this happened to George Harrison of the Beatles when he wrote "My Sweet Lord," which was obviously an unintentional rip-off of "He's So Fine" by the Chiffons. He was taken to court where he admitted that he unconsciously used this tune, and had to pay the writers and publisher a substantial settlement.

In songs, infringement could be based on musical or lyrical similarities. In film scores, there is only music. Actually, you often will hear similarities in two or more different scores of the same composer's work. For example, John Williams uses the interval of a fifth as the opening motive for the main themes of *Star Wars (1977)*, *Superman (1979)*, and *E.T. (1982)*. Is this copyright infringement on the part of the latter two scores? The answer is no, because the rest of the music after the opening interval in each of these scores continues on in different melodic, harmonic and rhythmic directions. One could find similar examples in the work of many of the top Hollywood composers, including Jerry Goldsmith, Ennio Morricone, James Horner, and others.

You will hear similarities in themes, harmonies, and instrumentation that run through almost every composer's work. One could dissect Mozart or Beethoven in this way and claim that they repeated themselves. Some self-repetition is bound to happen, since every composer has his own style. When it becomes copyright infringement (stealing from themselves) once again depends on whether the similar parts of the music are considered to have "substantial similarity," and whether or not someone has the desire to file a lawsuit.

What Is a Sync License?

There is an added dimension for film composers that makes its way into this discussion of copyrights and publishing. If a published work is going to be used for a film, television show, television commercial, or radio spot, the person desiring to use the copyrighted and published material must obtain a *sync license* from the publisher. This license allows the person to synchronize the music to their film, TV show, or commercial. Therefore, if you own the copyright to a song or film score and PepsiCo wants to use a portion of it for their next ad campaign, they must obtain a sync license from you allowing them to use the music for a specified amount of time, and for a specified amount of money.

Note that when you agree to write original music for a film, in the contract it will state that you are allowing the producer to use the music for that particular film, the promotion of that film, and purposes

related to the marketing of the film. However, *under normal conditions, you will not own the music written for that film—the producer will.* You are still entitled to the writer's share of the royalties, but the producer controls the copyright because the standard agreement between composer and producer is that the composer is creating a "work made for hire."

Work Made for Hire

Work made for hire is yet another dimension for film composers in the complex, yet important area of copyrights and publishing. Many of the above hypothetical examples assume that the composer actually owns the copyright of his work. However, the usual conditions under which a film composer signs a contract and delivers the score is that he is completing a *work made for hire,* or simply, *work for hire.* This legal term describes a work, in this case a film score, that is created as a commission. The composer is hired to write the work by the producer, and while he is writing he is actually considered to be an employee of the producer. Once the work is completed and delivered, it belongs to the producer, who paid for it. The producer then owns the copyright and can decide how the music is to be used, both in the project it was composed for, and in the future. The composer still receives the "writer's share" of the royalties, but cannot control the reuse of the music. (Note: Future reuses are sometimes dependent on the agreement of the composer, depending on the kind of contract that was signed.) This is standard procedure, with some exceptions, in the film-scoring business.

Work for hire applies to both instrumental underscore as well as songs. If a composer is commissioned to write a song for a film (James Horner, "My Heart Will Go On," from *Titanic*; Michael Kamen, "Everything I Do, I Do It For You," from *Robin Hood, Prince of Thieves*), then that song is written as a work for hire. This is different from the song that is already in the composer's catalogue for which the producer must obtain a sync license from the publisher. When a song is written as a work for hire, the producer becomes the publisher.

Many composers have commented on the unfairness of this situation—that a person should spend weeks of his time using his creative talents and training to produce a unique product, only to turn over the ownership and future control of that product to someone else. This is not the case in the classical or concert music scene, where a composer usually retains the copyright ownership. In the film business, the future use of the music and potential royalties are often controlled by a producer who has no artistic interest in the music, only a financial one (sometimes not even that). As one producer's attorney said, "When we buy a score, it's as if we are buying a suit of clothes. If we want to hang it in the closet and just leave it there, that's our business."[1]

In addition to this hard-nosed attitude that the score will never see the light of day after the film is released, there is the possibility that the music will be used in a way that is creatively or morally reprehensible to the composer. To use a crass hypothetical example, a composer who has been a life-long vegetarian and animal-rights activist might not want his music to be used in a McDonalds commercial. And although he might reap tens of thousands of dollars in royalties, he still might not want his music to be used for that purpose. Yet, he may have no say in the matter.

Some composers have achieved a degree of success and enough clout in Hollywood that they can negotiate at least part ownership of their music. Once a composer is in demand, he has some bargaining power. If he is at the top of the field and has some choice over what projects he undertakes, he might be willing to turn down a project because the producer will not share the ownership of the music.

Composers have many horror stories as a result of a producer owning a copyright. Some involve the composer suffering significant loss of income because a producer or studio refuses to give permission for use of the score. Others instances are more benign but equally outrageous in the behavior of the studios. Writer Roy. M. Prendergast relates two such stories:

> *In 1971 composer Lalo Schifrin received a request to conduct the music from one of his films in connection with an appearance at*

a university. He called the studio and asked for a score, but was perfunctorily informed that the music did not belong to him and that if he wanted to play it he would have to rent the music from the studio. Eventually the studio was gracious enough to lend him the music for nothing.

Another well-known film composer, Maurice Jarre, was asked by a major symphony orchestra to conduct his score for Dr. Zhivago. *Incredible as it may sound, when Jarre asked MGM for the score, he was told that it had been destroyed since MGM needed more storage space.*[2]

There is also a historical side to this issue that puts the disagreement between the composers and producers into another perspective. As mentioned earlier, in the early days of the movie studios, all the music at a given studio was done in-house. All the composers, orchestrators, and musicians were under contract to the studio. Under this system, the studio automatically owned any musical creation. Even though the origination of the studio system was in the 1930s, and the dissolution of this system came about in the 1950s, studios and producers today have resisted changing the nature of the ownership of the music. They know a good thing when they see it; a film score can generate thousands—or even millions—of dollars in royalties over several years. In addition, the producer or studio owns all the other creative elements of a film: the script, costumes, sets, etc. To them, the music is just one more "suit of clothes" for the closet.

Work for hire is a tricky subject, and for some it is an uncomfortable working situation. However, it is the reality of the film-scoring business, and all composers have to deal with it, from the newcomer fresh out of music school to the established old-timer.

One instance where a composer might want to try to negotiate out of the work-for-hire clause of his contract and retain the rights to his music is on certain low-budget projects. Occasionally on such projects the composer is offered a very low amount of money to do a package deal. If this is the case, you can attempt to negotiate retaining ownership of the music—or at least sharing the ownership—in exchange for an extremely low fee. In this way, you can make some extra money down the road collecting both writers and publishers royalties, especially if the film is ever shown on television. However, even low-budget producers are often resistant to giving up their ownership of the music.

Also, it is a good idea to attempt to retain ownership of the music if you are scoring a student film. Some universities do not allow this, but some do. Since most student films don't even pay for music production costs, you might as well attempt to keep the copyright ownership and be able to use the music somewhere down the road. The chances of a student film having a long theatrical life are nil, so it is a shame to write some good music that gets lost forever under the work-made-for-hire contract clause.

Keep in mind that you should never push too hard on this issue unless you are willing to walk away from the project if your demands are not met. It is standard procedure throughout the industry for a composer to write the music as a work for hire.

As a composer, I obviously have a bias about this issue. However, it is one of those unpleasant things, like taxes or telephone solicitations at dinner time, that is very difficult to change and is a part of life. Therefore, students and composers who are just starting should accept this arrangement at the beginning of their career as necessary. Once a composer has some degree of success, he is in a position to negotiate for part ownership of the copyright and be able to have more control over the use of his music.