



IP Watch™

Intellectual Property Law Alerts from Ober|Kaler's IP Group

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Intellectual Property Group

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How to Rock Your Film – Without Landing in Copyright Jail

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It's a miracle that Nina Paley's feature length animation, "Sita Sings the Blues," escaped a life sentence. Sadly many films never do. Great music enhances film and video. Digital video editing tools make it easy to add popular music and remixes to a film. Unfortunately, permission to use commercial music in an independent film is not easy to acquire. Filmmakers, who sync commercial music to their films planning to seek permission later when the film attracts investors, are often devastated to learn that the music is unavailable or prohibitively expensive.

Filmmaker Nina Paley is one of the lucky few who find a way to keep their films out of copyright jail. A veteran of syndicated comic strips, Paley began creating short animations in 1998. Inspired by a Ramayana tale she encountered while living in India, Paley spent 5 years creating "Sita Sings the Blues" by hand. Along the way Paley was attracted to similar themes of romance gone wrong found in Annette Hanshaw's 1920's blues recordings. Paley did some research and concluded that her desired recordings are in the public domain. So she developed her animation to sync with Hanshaw's recordings and entered "Sita Sings the Blues" in several film festivals. As it often happens, Paley won awards and was soon offered distribution deals.

Unfortunately, Paley then learned that the songs Hanshaw sang in the recordings were not public domain. For example, one of the songs, *Mean to Me*, was published by Fred Ahlert and Roy Turk in 1929. Ahlert, the last surviving co-author, died in 1953 which means that *Mean to Me* remains under copyright protection until 2023. Paley sought permissions from the various parties owning rights in the 11 songs in the film. Every owner agreed to permit use of their songs, but the total license fees required to fully release Paley's film was \$220,000. Many filmmakers, upon learning the cost of the license fees, shelve or laboriously reedit their films with less expensive or royalty-free music. Paley found another way. She accepted the music owners' offer of minimal rights to permit limited screening, reducing her license fees to a mere \$50,000. Paley went a step further to ensure her film would not be shelved, by allowing everyone the opportunity to distribute her animation for free under a Creative Commons license, subject only to payment of license fees owed to owners of the songs in the film, see sitasingstheblues.com/license.html#total-compliance.

Public domain music can be freely used in a film if *all* relevant copyrights are expired. But copyright protection lasts nearly 100 years from creation, so there is

precious little public domain music available. Public domain status of music can be very difficult and very expensive to comprehensively confirm because numerous separately copyrightable elements — lyrics, melody, harmony, and instrumental and vocal performances must be researched and cleared. If just one element of a song is not in the public domain, that element must be licensed. Many sound recordings made prior to 1978 are public domain, like those used by Paley, but most compositions underlying the sound recordings — all which were published after 1922 — are not.

A few unauthorized uses of music in a film *may* constitute fair use, if used in a transformative manner. For example, Ben Stein's film "Expelled" used John Lennon's *Imagine* without authorization when Yoko Ono and other song owners refused to grant permission for a use they found disparaging of Lennon's legacy. Ono sued to stop release of the film but the court found Stein's use of a short segment of *Imagine* to be a transformative fair use of the song and denied Ono's request. Investors and distributors are mostly unwilling to rely on fair use, however, no matter how compelling. The cost of defending a copyright infringement lawsuit, even with a meritorious defense like Stein's, is too expensive. For this reason, distributors require filmmakers to obtain professional liability insurance to protect against copyright lawsuits. Insurers almost never accept fair use in lieu of properly licensed music. Even self-distribution of films with unlicensed music through social media sites like Flickr and Vimeo is risky as filmmakers risk take-down notices and lawsuits under the Digital Millennium Copyright Act. See our other article in this issue for a description of this process.

But you can avoid such hassles. Here are a few ways to keep your film out of copyright jail.

It's Your Thing – Do What You Wanna Do!

Use your own music in your film. If you compose your own musical score for the film, you will not need anyone's permission, or to clear any rights before using it in your film. Simple music synthesizer programs bundled with personal computers make it easy to compose simple musical compositions that can be looped with special effects to provide interesting sound tracks for films.

Maybe you already have music you created. Make sure it's really yours. Remixes are more complicated to clear than ordinary music because they may contain samples from numerous songs. Bear in mind that even brief samples of a few notes of other people's sound recordings require rights clearance, even if the original song is unrecognizable in your music.

Royalty-free music is available in DVD libraries and in some video editing programs, and can be adapted as your score. Read all license agreements or terms of use agreements associated with the music to ensure that the music is free for all of your intended purposes. Some purposes may not be free. For example, royalty-free music may require payment of license fees for commercial uses of the music, such as in advertising. Read the fine print!

Don't Stop Thinking About Tomorrow!

Plan music rights clearance early! Rights clearance is the process used to research ownership of rights in music (and other materials like video clips and graphics) and to request permission from owners for use of their materials in your work. If you are determined to use another person's music in your film, allow plenty of time to determine whether the music is available and fits in your budget. Clear the rights to your chosen songs long before you start planning the film around the music. Often owners are difficult to identify and contact. Even if you identify and locate the owners, they may not respond in a timely manner or may refer you to another person authorized to administer the rights. Allow additional time to negotiate rights and license fees.

Make a wish list of the songs you want to use in the film. Identify the exact sound

recordings you want. Some recordings are performed by songwriters, but numerous songs are covered by several different artists who perform the song with different styles.

Identify all music owners associated with the sound recordings you want to use. Review artist and writer credits on liner notes and track listings. Search for connections on the Internet. Note all names and companies associated with each recording. Start contacting music owners for estimated costs. Costs vary depending on the source. Generally, commercial music is very expensive while independent music is modestly priced. However, if the desired music is available and essential to the production, a budget can be structured and funds raised to accommodate that need.

Double Vision!

You need 2 permissions for each song you wish to use. As Paley found out, each sound recording has two copyrights that must be cleared—the musical composition and the sound recording. In some cases one person, such as a singer-songwriter, may own both copyrights in a recording. More often, two or more organizations must be contacted for permission to use each recording.

Sometimes there are multiple owners of the two rights. Often songwriters transfer part or all of their rights in the composition to a publishing company. Publishing companies administer the rights for use of musical compositions, including rights to sync the musical composition to moving images, and to publicly perform the song in a film.

Recording artists initially own the sound recording copyright. They may transfer part or all of their copyright to record labels to distribute the sound recordings. The owner(s) of the sound recording copyright control the use of the master recording.

Music owners often demand fees equal to those demanded by their counterparts, both between music composition and sound recording owners as well as between owners of rights in all songs used in the film. If one demands agreement on a “most favored nations” basis, it means that they want to be paid the same as the highest rate demanded by other rights owners. This phenomenon drove Paley’s fees to \$220,000 for 11 songs. On the other hand, sometimes rights are negotiated as one rate for all owners of a song on an “all in” basis.

Send Lawyers, Guns and Money!

Get help to request the correct rights. Music owners have many different rights that may be licensed by a filmmaker. You need to know which rights to request. Reproducing the music in the film, screening a film in a theater, distributing the film as home videos or digital downloads, and broadcasting the film on television each require different rights from music owners. Each of these rights may cost thousands of dollars per song. All rights to use one commercial song in your film could cost tens of thousands of dollars depending on how much of the song you use.

To lower your licensing costs, engage an entertainment lawyer BEFORE you plan your music. To reduce your attorney’s fees, do your homework. Identify every use you intend to make of your film. Will the film be used as viral advertising? Or in a documentary on an important political or social issue to be screened at fundraisers and rallies? Will it be an independent film and screened in film festivals around the country? Is it to be a horror movie intended for home video distribution? Will your film be broadcast on television? Each of these uses involves different rights and may be licensed separately.

Next determine how each song will be used in the film. Will it be used in the trailer, as the theme song, or performed live in the film? Do you plan to feature the song performance as part of the story told by the film or will you simply use the song in the background? What is happening on screen when the track is heard? Music

owners will request this information to determine what rights you need. Depending on how a sound recording is used, the license fees may cost more or less.

Talk to the lawyer about your goals for the film and any marketing plans. Make realistic plans to use music that you can afford. Have the lawyer make initial inquiries to determine the music's availability and cost. The lawyer may refer you to a music clearance agency or music supervisor to assist you to locate appropriate music and rights.

With a Little Help from my Friends!

Use music created by friends or local musicians. Copyright owners are entitled to deny your request to use their music in a film or other work. If you cannot obtain permission or if license fees exceed your budget, you need a back-up plan. Commissioning music from a composer on a work-made-for-hire basis can provide music that evokes the sound you desire for a flat fee. Once you have a written agreement with the composer, no further clearance is needed — even if your plans for the film change. Alternatively, local independent artists may license their music to your film for a fraction of the cost of commercial pop songs. You should still work with an entertainment attorney to make sure that you get the correct rights — up front and in writing. If you wait until the film is about to be released to paper the deal, you could end up paying much more than you originally agreed.