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The use of

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# © COPYRIGHTED MATERIALS

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## LIVE THEATRE PRODUCTIONS

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by Richard Thomas

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### THE ETHICS OF COPYRIGHT INFRINGEMENTS

Let's face it. We live in an age of rights. Society is propelled forward by the notion that, if we create a better mousetrap, the world will beat a path to our door. Unfortunately, sometimes the world beats a path to our neighbor's door, and he give them *our* mousetrap. For free. Sometimes we'd just as soon not have the world use our mousetrap—especially if it is to be used to kill hamsters. The electronic age has brought several new twists to this age-old dilemma.

Such is the case of theatre sound score design. The particular mousetrap in question is music and performances by other artists. Most theatre practitioners genuinely believe when they use a piece of previously composed/recorded music in a theatre production, they are doing a service to the music. But is this really their decision?

Recently I found myself caught for the first time on *both* sides of this dilemma. The play was *As Is*. The music in question was the song "Survivors" off an album by the group "Stone Soup." It was a natural combination. The play deals with the delicate subject of AIDS and the devastating effect it has had on the homosexual community. The song speaks triumphantly for a major theme throughout the play: Somehow

**F**rom strictly an ethical perspective, you should always secure permission for the use of existing musical material. It is clearly a disservice to our fellow artists to ignore their interests in their work.

the human spirit can overcome even the most deadly of obstacles:

Lately I've been tryin' to be  
brave and strong,  
And to rely on no one but  
myself  
And sometimes I'm real strong,  
sometimes I act real well,  
Hell, sometimes, I just do what  
I have to do.  
Survivors, you know we are  
survivors—  
Survivors.<sup>1</sup>

The director jumped at the idea to end the play on this song. Typically the sound designer would simply record the song and insert it into the show tape, no questions asked. What made the situation different for me was that on this occasion I was not only the sound designer, but the *producer of the record*. What if the artists involved had misgivings about having this song become emotionally connected with this topic?

Did they have the right to agree or disagree to its use in the play? Are the Producer/Director/Sound Designer obligated to secure permission before including it in the show?

Fortunately, permission was secured, and the song was used in what turned out to be a moving and provocative production. Most everyone who hears this story agrees

there was some ethical responsibility on the part of the production company to ask permission. But what about situations that are not quite so close to home? Should Pink Floyd or Aaron Copland be ignored simply because they are not as close to the actual production? Is it the responsibility of the theatre producer to secure permission from artists before using their material in a play? The answer, of course, is clearly YES.

## USITT Survey

The USITT Sound Design Commission recently surveyed a large number of theatres around the country – from the biggest professional companies to the smallest community theatres. A sidebar article [p. 62] includes the results of this survey. (It should be noted that this was an *continued on page 58*)

# MISTER Z SCORES A KNOCKOUT

*The following story is fictitious. Any similarity to persons living or dead is purely coincidental.*

It was the thirteenth day of *Twelfth Night* rehearsals. The show was far from ready to open – and what it didn't need was any more setbacks. The sound score, however, was working well, and almost everything had fallen into place. Almost.

The director approached me with one of those martyred looks that only a veteran can give. This could only mean trouble.

"About this finale, Mister Z," he started cautiously. "I think we need something a little more in tune with the period."

"Egads," I said to myself. I never was all that attached to the post-disco dance sound of the '80s. But this was the style we had agreed to use, and it was obvious that I had better learn to like it a little quicker.

"I'll get on the system right away and see what I can come up with."

"Thanks, Mister Z. I always know that I can count on you." The pained look was gone and the director lurched into the sunset.

I went back to the room and fired up the old DX7XIV. It was an older machine, and didn't have all the bells and whistles of the newer DX7XVs. But who could afford one of those on a sound score designer's wages? Nevertheless, it was incredibly improved over the early days of the DX7s, with its 240-channel/hour built-in 20-bit digital memory, auto-orchestrator with dynamic genre recall, 10,000-sample built-in library, and Boeing 837 flight simulation program.

I called up "'80s Dance" on the auto-orchestrator and was given an old Michael Jackson tune as a working model. I had forgotten that the dealer had included that "Motown Grows Up" bootleg software package. This was just the ticket, I thought. I cranked it up and was just about to get into some serious customization when there was a loud hammering at the door.

"Open up, in there, this is the police!"

"Yikes," I thought. "It's those damned Copycops!" These guys had become the artist's nemeses ever since the great theatre copyright trials of the mid '90s. I turned off the computer and pretended to be listening to the video.

"Don't try to fool us. We know you're in there using copyrighted material."

I opened the door and tried to appear nonchalant. "I'm sorry, I didn't hear you with the video playing so loud."

They burst into the room and confronted me and my machine. "All right, open it up!"

"Wait a minute. I know my rights. Do you have a search warrant?"

They stuttered and stumbled for a moment and then confessed that they just happened to be in the area and heard what sounded like suspect material. I thought I was going to get off easy, but they launched into the standard copyright infringement lecture – a fate worse than being caught.

"You know, we thought we heard the music bed to an old Michael Jackson song."

"Who me? No, sir!"

"You know that it is a serious violation of copyright laws to use a music bed without the permission of the artists involved?"

I feigned ignorance. "Even if I modify it beyond the point of recognition?"

"That depends on what you mean when you say 'modify it.'"

"Well what if I played the bass line like this," I said and turned the machine back on to demonstrate.

Quicker than one could change a preset they pulled out one of those nasty copy meters. It looked like an old breathalyzer meter like they used to use to test drunk driving. "Play that into here, son," they growled. I did and the machine made a funny little whirring noise that ended in a

nasty beep. "Sorry, but that line is owned by the SONYIBM Corporation."

This didn't surprise me – they owned just about everything in the music business these days. It was getting tougher and tougher to be an independent artist. But I refused to give in to the commercial pressure of the big corporations to push product over aesthetics. Without warning the machine let out another beep.

"Where exactly did you get that bass sample?" the cops glowered.

"It came with the machine."

"I'm sorry but that's a Strato-CompuBass sound – we'll have to confiscate it."

"But I customized that sound myself."

"Sorry, but we were able to extrapolate the company's digital ID numbers. All that's left are some random sine waves and you know about that."

Who could forget that the JBEVL Company had copyrighted all known sine waves at the turn of the century? With a few swift key-strokes, my prized bass was gone.

"And one more thing."

"Yeah, what's that?"

"Those sixteenth notes in the run?"

"You mean . . .?"

"That's right. Those are all owned by the P. Glass Consortium. And that last sustained tone?"

"EnoTunes?"

"And don't you forget it."

The next day I explained the situation to the director, and subtly suggested that we just end the play in silence.

"No way!" he said emphatically.

"Why?"

"The Cage Group holds the copyright on that – and they want your first-born son to use it."

We decided to cancel the production after all.

—Richard Thomas

## "Copyright"

*continued from page 6*

informal survey and the results only tend to show trends, not hard-and-fast statistics.) The outcome: In nearly every theatre involved in theatre sound score design, the law is being violated—sometimes blatantly, sometimes not.

A lot of misconceptions and limited information are floating around. Many universities and other theatres are under the impression that the university's ASCAP/BMI/SESAC licenses cover all use of sound and music in a production. This is not true. Another group claimed to have a "standing contract with ASCAP et al. to use their jurisdiction as much as we want." As we will see, this is usually a matter that is outside of ASCAP's jurisdiction. There was talk as well of some theatres having a "blanket license." They may discover they've also bought the Brooklyn Bridge for their production of *Hello Dolly*.

But the main sentiments the survey shows are confusion, apathy, and fear, as witnessed by such comments as "Don't know," "Who does (secure rights)?," and "We've often wondered..." In cases where responsibility was acknowledged, permission was often not sought, usually due to financial and logistic implications such as "Simply can't afford it," and "When would it be possible to trace?" On more than one occasion I have been politely warned not to "open this can of worms," or commended for "tackling an impossible situation." There were even a couple of

lengthy letters that asked that "somebody" do "something."

After all, what could be easier than securing the rights to use a record to underscore a scene in a play? All you have to do is pick up the phone and give Mick Jagger or Henry Mancini or whomever a call and ask him if it's OK, right? If life were that simple, more theatres would be securing permissions. As a matter of fact, unraveling the ins and outs of securing these types of permissions may require anything from a Harvard law degree to the ability to raise Stravinsky from the dead.

Quite frankly, it's an area that almost no one wants to touch. Rights agencies do not believe there is enough money involved to be bothered with prosecuting violators and are not sure it is their domain to grant permission anyway. Publishers can't afford to go out and prosecute anyone but the biggest and most obvious violators. Producers don't have the time to deal with the complicated process of legitimately securing rights, and believe that any additional expense will just raise ticket prices. Directors don't want to make the production process any more complicated than it already is. And at the bottom of the pile taking most of the heat is the theatre sound score designer.

It took more than a year of lengthy phone negotiations (of the seemingly endless kind) to get anything resembling hard-and-fast information on this issue. There will probably have to be several major law suits before the matter ever moves forward. However, after a great deal of persistence, a highly respected group was organized, and a panel discussion was held at the 1988 USITT National Conference in Anaheim. Representatives from ASCAP, BMI, and The Old Globe Theatre in San Diego, as well as an attorney specializing in copyright law, all helped to shed some much-needed light on the subject.

### GRAND RIGHTS/SMALL RIGHTS

One of the most important distinctions that needs to be made in this matter is the difference between what are called "Grand Rights" and "Small Rights." Dramatic performance rights (Grand Rights) are not licensed by rights agents. Only non-dramatic rights may be licensed by these agents. Unfortunately, what constitutes a dramatic or non-dramatic performance is often subject to many interpretations.

Clearly, Grand Rights apply whenever a piece of music is used as *underscoring* in a play. It also seems to be clear that Small Rights apply to background music, e.g., in a theme park.

But what about a grey area such as pre-show or intermission music? The answer here seems to be that if the music is totally unrelated to a production, it would be considered Small Rights. However, if the music could be shown in some way to be related to the main body of the production, it would be considered Grand Rights. So, in some cases, university ASCAP/BMI licenses may apply to these types of uses. However, even with these licenses, a university could be found liable for violation of Grand Rights infringements.

Securing Small Rights clearances is a relatively simple matter (that is, compared to negotiating for Grand Rights). You need only to apply and receive a license from the respective agency, such as ASCAP or BMI, representing the artist in question.

Securing Grand Rights clearances is another matter entirely. First, you must secure the permission of the publisher of the music. This is no easy feat. Sometimes (especially with older material) it is almost impossible to locate the name of the publisher. Publishers often would rather not be bothered by these small nuisances, and produce an incredibly wide range of responses, from "Absolutely not" to "Sure, go ahead" to the most dreaded response of all: "We will license this piece to you for \$ . . ." What makes this last response so dreaded is that often the price quoted is higher than the royalty for the production itself!

Don't forget the tremendous time constraints that a production staff is under, usually putting together a show in a four-to-eight-week period. There is simply no point in communicating with a publisher until you know what pieces you want to use, and the nature of theatre dictates that this choice is often unknown until halfway through the production period.

Once the "perfect" piece is found, producers are legitimately panicked over opening up a smorgasbord of responses such as those described above. What do you do when, two weeks before opening night, the perfect piece is nixed for one reason or another? Dare you suggest going through the entire process again, with the potential for the same results? Should a sound score designer pick a half a dozen choices or so for each cue, and if so, should the director rehearse with each one of them?

But let's assume, through some minor miracle, the matter of securing clearances from the publisher has been quickly and neatly accomplished. Wait a minute—don't relax yet. If this piece of music exists on a record, the battle has really only just begun. "Jumpin' Jack Flash" may not so much as hop without clearance from *the record company* that produced the record! Note that this is not something that ASCAP or BMI can license. This permission can conceivably include additional royalties to musicians, producers, engineers, etc.

Indeed, in venues like Broadway, where the stakes are highest, these matters are attended to with meticulous detail by knowledgeable legal people, and material is not used without securing all the necessary permissions. This is fine for a high-budget Broadway production that can be literally several years in the making. However, the rest of the theatre world functions on much more severe temporal restraints. What should the rest of the world do?

#### TO SECURE OR NOT TO SECURE?

From strictly an ethical perspective, you should always secure permission for the use of existing material. It is clearly a disservice to our fellow artists to ignore their interests in their work. Unfortunately, much of the time the artists are long out of the picture, and interests are held strictly on a profit-making basis, with very little consideration given for the financial realities of the theatres involved.

Many artists *cannot* give you permission to use their work—they don't "own" it. Whether art can be "owned" or becomes a different piece when used in a theatre sound score are complex issues that are being examined in other areas such as digital sampling (see related article, p. 6). You just have to use your best judgment when treading the murky waters of modern ethics—keeping in mind that

when your head goes under those murky waters, there is a legal system designed to right the wrongs.

For theatre sound score designers, this creates a difficult dilemma: they must record the music to keep the job, but doing the job requires that they openly break the law. To keep clear of this dilemma, designers should make it explicit in their contracts that securing rights clearances are the responsibility of the producers (they are). Sound score designers should also provide a list of pieces to be used in their shows along with the publishers' and record companies' names.

Most producers seem to be handling their part of the responsibility as more of a legal gamble than anything else. Generally, the more prominent the theatre, or the larger the operating budget, the more potential there is for a lawsuit. For example, the University of Texas was recently sued by a publisher for using music without securing permission. The case was settled out of court, but it should leave the clear impression that not obtaining clearances leaves a theatre in a precarious position. In the least vicious of reprisals, the theatre would be ordered to refrain from using the piece (which could cause some frantic scurrying about in the middle of a run). Of course, a particularly vindictive artist with a good attorney could potentially retire from the income off punitive damages.

#### **WHAT NEEDS TO BE DONE**

Surprisingly, this rigmarole exists only in the United States. Outside of the United States, the necessary licenses can usually be secured through a single agent and at realistic rates. Why this is not possible in this country is beyond

imagination. (We can put a man on the moon but he better not sing "God Bless America" while he's there.) This entire situation could be a win-win proposition. Publishers, record companies, and, most importantly, artists are losing a good deal of potential income from the use of their work in sound score designs. The use of copyrighted material is widespread in hundreds of theatres, and it is almost impossible to prosecute illegal use effectively. Although many theatres balk at the idea of paying yet more royalties, many more would welcome the chance to relieve themselves of the liability.

Is this likely to happen? Not in the near future. First, a couple of major lawsuits are needed to scare theatre producers into action. There would then have to be such a barrage of requests for rights that publishers and others would be forced to form some sort of organization to more efficiently handle the requests. Neither of these scenarios seems likely in the near future, so the malaise seems destined to continue. The bottom line is that nobody really seems to care enough to do anything about it.

A couple of other solutions seem more feasible. First, agents such as Samuel French and Drama Book Publishers could start acquiring rights to many more sound scores used in original productions. They have the legal expertise in the licensing of scripts and musicals, as well as an insider's understanding of the small theatre industry in this country. Small theatres could then get a complete package for a show and avoid the problems of finding the right score for a show on a limited budget.

Second, it is odd that a small cottage industry has not developed dealing in sound scores the same way rental houses have succeeded in renting costumes and sets. This

## SURVEY RESULTS

would again aid the smaller theatres in need of more professional results for their money, and help supplant the income of theatre sound score designers, who are among the poorest paid of all designers. Both solutions would appear to create a win-win situation.

There is one last rather radical solution: "Just Say No" to pre-recorded music! We live in a heyday of theatre sound score design. There are so many potential composers, performers, and other sound artists working in theatre and other allied fields (e.g., film, television, radio) that pre-recorded music may start sounding more and more like a crutch than a godsend. The equipment is becoming increasingly available to accomplish an incredible array of sound jobs. By following the above directions, sound score designers can put additional pressure on producers to go for an original score. The more time, energy, and money a producer has to spend on securing permission, the more likely the producer will be to hire sound designers/composers to dream up original creations that are more organically tied to the production. Producers and directors will then be forced to choose sound for a show more on the basis of what is best for the production than on finding the cheapest, easiest solution. It could be an important boost to the emerging field of sound score design. ■

1 Carrie Newcomer, "Survivors," *Longfields*, Windchime Records, RC101, ©1984. Lyrics reprinted by permission (of course).

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## Part I: Demographics

## 1. Please check all appropriate affiliations:

- LORT A: 3.9%
- LORT B: 13.7%
- LORT C: 11.7%
- LORT D: 7.8%
- Actors' Equity: 60.1%
- IATSE: 21.5%
- USA: 27.5%
- University: 29.4%
- Civic: 17.6%

## 2. What is the seating capacity for your theatre?

Average size: 557 Seats

## 3. What is your ticket pricing structure for each theatre?

Average price: \$9.89

## 4. What is your average production budget?

Straight Plays: \$72,051

Musicals: \$88,170.

Opera: \$22,642

Dance: \$8,200

## Part II: Use of Sound

## 1. What percentage of sounds used in your productions consists of:

Original music: 80% of the theatres use original music in about 37.5% of their productions

licensing agent for the show (i.e., Tams-Whitmark Music Library, Inc., etc.)

- Yes, if available, certainly in case of musicals
- Process is too difficult and royalties are unrealistic
- When possible to trace, yes; we fail to find appropriate party on about 25% of our inquiries
- Only if necessary; usually, no, with six-week limited run in non-commercial theatre
- Sometimes, from artist
- By writing to the publisher
- Yes; contact recording company or estate
- Simply can't afford it
- Rarely
- We don't do that at all because we are not presenters
- No; because of the above agreement we don't need to secure permission each time; it is VERY much worth the money we pay
- Classical composers used most frequently; generally don't secure permission for the odd contemporary selection(s)
- Yes; through agent listed on published material
- Yes; through publisher
- Either an annual licence from APRA or for commercial hirers referral to the Phonographic Performances Company
- Sometimes
- Completed by managing director
- On occasion if major aspect of scene; through information on record jacket
- Capac and Procan
- No; do not secure permission for each piece of music used
- We've often wondered if we should, but never have and don't know the procedure should we want to
- When possible through ASCAP/BMI
- In productions where pre-recorded music is used, we usually go through a production company which handles all legalities of copyright materials covered under CAPAC, Ltd., which is the copyright institution for Canada
- No: 56.9%

5. How are composers/musicians/publishers credited in your programs, posters and advertisements?

Comments:

- If contracted, yes; otherwise, no
- Original music composers are listed as such; live musicians are listed as such; no credit is given to published/pre-recorded music
- Composers: title page credit with bio; musicians: last equivalent listing; publishers of music: no
- Printed recognition
- Programs: equally with all other artists; poster/advertising: only credited if "name artist" is involved (e.g., Max Roach)
- Composer of musicals is credited in programs; composers (publishers) or musicians of "incidental music" rarely acknowledged
- In our contract with the licensing agent it stipulates how the composers must be listed
- Original music is credited in all materials at the same level as designers
- Same as designers for composers; same as actors for musicians

- Similar to playwrights and directors
- As agreed on by each person
- Only if necessary
- In program credits
- As they wish to be acknowledged; generally, as composers or musicians are often also cast members
- Listed by discipline
- Original music by . . . ; musicians are credited on staff page (if live)
- As required by play publishers
- Not unless actually hired
- As requested as per contract
- Composers: almost always credited; musicians: credited for live performance, occasionally for recordings; publishers: only when required
- Credits in programs and on posters
- Varies widely
- Usually credited in program
- Composers/sound designers (program only)
- Only original music is usually credited in programs except for composers of musicals who receive credit in everything
- Unless the music is presentational (i.e., meant to be noticed by the audience) we do not give credit; if we use Cole Porter music as a presentation (a song that is sung, a dance sequence, etc.), then we list the composer; musicals are always listed, regardless
- All given full credit on the title page along with cast, directors, et al.
- Commissioned composition(s) are credited in program; most musicians are credited; pre-recorded is not

- Rarely, unless original or required
- Composers listed with artistic staff in program and bio recording; studio musicians named on lobby poster—too late for program; publisher listed if they insist on it
- That varies according to clients
- Composers receive title page program credit
- Composers: full credit title page; musicians and publishers: listing “for this production”
- Credited IF major contribution to production
- Listed when possible
- On every program, poster, advertising, etc., we use the French expression: “musique originale”
- No credit given
- Credit is only given to original music composers and musicians
- Title page for composers, musicians, and in print on publisher’s request
- On playbill title page
- Are not credited
- Original compositions are acknowledged in program bios and cast list; musical directors and musicians are credited when music is performed live
- If principal creator, then credited in program/advertising; if prerecorded, nothing
- Depends on contribution (how much, how often, how important reputation of composer or musician)
- Composers get full program, poster, and advertisement credit (original music); featured musicians or composers are also fully credited; incidentals are not credited
- Usually credited by composition ■