

# SHOOT

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## Spot Music Biz Abuzz Over E&O Insurance Coverage

Affordable Policy Generates Significant Membership Momentum For AMP.

By Robert Goldrich

NEW YORK An errors and omissions (E&O) insurance policy tailored specifically for the commercial music and sound design business has been fine tuned and, thanks to the potential collective buying power of Association of Music Producers (AMP) member companies, made more affordable.

Originally developed by Chicago-based insurance agency JMB in tandem with an underwriter a couple of years ago, the E&O insurance had an initially modest following among rank-and-file commercial music houses. Since then, JMB has brought in another underwriter, New York Marine, and the policy's premium was reduced. A key meeting this spring in New York during which representatives of AMP, the Association of Independent Commercial Producers (AICP), New York Marine and JMB hashed out details of the coverage helped to build momentum for the policy. So much so that an increasing number of companies are joining AMP to take advantage of a special lowered premium available only to members of the organization.

National AMP president Jan Horowitz, VP/business manager of David Horowitz Music Associates, New York, estimated that some 40 companies will have joined AMP by year's end. She also projected that more associate members, such as audio post houses, will come aboard AMP due to the appeal of the E&O policy.

In recent years, a number of major ad agencies have come to require that music houses carry significant E&O coverage. Generally cited as being the first agency to issue this initiative was DDB Chicago in 2001. As a result, interest grew in developing E&O insurance that could meet advertising music industry needs, but the cost generally remained high, with five-figure premiums being the norm.

However, Horowitz noted that an AMP survey of its member companies several years ago regarding insurance uncovered the name of a JMB agent, Renee McGovern, who garnered high marks from a prominent music house owner for her service and responsiveness. AMP contacted McGovern, who brought New York Marine into the picture, eventually leading to a viable policy that passed ad agency muster and was enhanced during the aforementioned industry meeting in New York.

The coverage now looks likely to gain widespread acceptance, addressing concerns related to music copyright infringement, indemnification and potential litigation issues. The insurance not only offers protection, but also helps to promote business practices that could reduce the chances of copyright infringement.

As chronicled in *SHOOT*, AMP has been grappling with ways to address the copyright infringement quandary for some time. This was reflected in AMP's set of music production guidelines, which were introduced four years ago (*SHOOT*, 10/27/00, p. 1). The guidelines are published in the AMP section of the annual AICP Directory and available on the AMP Web site, [www.ampnw.com](http://www.ampnw.com). (AICP and AMP have maintained a strategic partnership since 00.)

The AMP guidelines read in part that caution must be exercised in the use of existing music as direction for companies and composers. Copyright laws apply not only to the literal notes of musical compositions, but to the sound of the musical arrangement, as well. Thus there can be great risk to the advertiser, the agency and the music production company in making something sound like someone else's song or soundtrack. Note that the use of published recordings without permission even for presentation or testing purposes could be viewed as infringement of copyright law. Further, an infringement claim can be based upon *intent*. Intent is often determined by whether a piece of music is discoverable i.e., has been laid back to a rough cut or animatic.

This section of the AMP guidelines goes on to point out that risk is increased significantly when an inquiry has actually been made into the availability of that sound or soundtrack for use in a commercial. (If such an inquiry has been initiated with the publisher of a musical work now being cited as a musical direction, it is prudent to notify the music company assigned to the project, and to enlist the services of a musicologist to analyze relevant recordings.) To avoid unnecessary legal exposure, AMP recommends that discussions of direction be limited to musical styles or genres, that music professionals be included in the discussions, and that needle drops be kept out of the presentation process (unless licensing of the recording is intended).

The horror stories involving copyright infringement claims and resulting litigation and/or out-of-court settlements have become industry folklore. AMP stepped up its efforts to address the issue a few years ago when infringement claims had escalated significantly.



Clearly, a music house that is doing original work for a commercial should have no problem guaranteeing and taking full legal responsibility for that originality. But if the agency instead calls for trying to sound like or copycat something, then it becomes a precarious position for a music shop to indemnify the agency and client against potential liabilities, particularly with agency intent as a possible litmus test for infringement.

Nonetheless, when signing music rights agreements, commercial music houses consent to provide such indemnification and to hold harmless the agency and client from any and all claims, judgments, legal costs, etc., stemming from any actions and/or claims made against the work. This initially caused a number of music/sound design firms to carry expensive, general E&O insurance policies that hadn't been written specifically to reflect music industry practices. Conversely, other houses that considered the general E&O policies to be cost-prohibitive simply opted to have no such coverage, even though they agreed to indemnify agency and client.

Now, though, Horowitz related, Music companies finally have an alternative to scouring the insurance business for underwriters who may understand their needs and may agree to write this sort of policy. What we have here is an underwriter who agrees to partner with our industry in two ways. The first is to come into the entertainment sector at an affordable price. The second is to help educate our members and clients alike in risk management, an area sorely needed. When AMP hosted a seminar on The Risks of Temp Tracks in 2001, one of the musicologists on our panel was then involved in over four hundred cases being brought in the record industry alone nothing to do with advertising.

So, Horowitz cautioned, if we want to keep these rates, we all have to act responsibly. There isn't any insurance against risky practices.

The policy reads that it does not offer protection for any infringement of a patent or trade dress, or the knowing or willful infringement of any of the following: copyright, trademark, trade name, services mark, title or slogan. In no event will there be coverage for the use of intellectual property, including, but not limited to, original music, which has not been reviewed and deemed an original work by an expert in that field of intellectual property.

According to the policy, the term expert means a person who is an expert by reason of education and/or experience and includes, but is not limited to, a musicologist.

The insurance assigns responsibility for vetting music whether or not there were reference tracks to a recognized music expert. In some cases, at the music company's discretion, this may mean calling in a musicologist; the point is that due diligence is applied to every single track produced and therefore the policy covers claims made against both the music company and agency.

Horowitz added that E&O protection is also relevant in the production music a.k.a. stock music arena. If you want Purple Haze and you license Lavender Mist from stock people, you can be open to liability, she related. You can be sued just as easily with production music, so you must make sure you are dealing with a company that is reputable, and that the music's creators are locatable and insured. The good news is many production music producers are in the process of applying for this [E&O] policy too.

Those interested in purchasing the insurance coverage will have the opportunity to meet with representatives of the underwriter during Q&A sessions scheduled in several cities, and receive a risk management paper created in tandem with the policy. Policyholders will also receive periodic case law updates from New York Marine's counsel.



Jan Horowitz