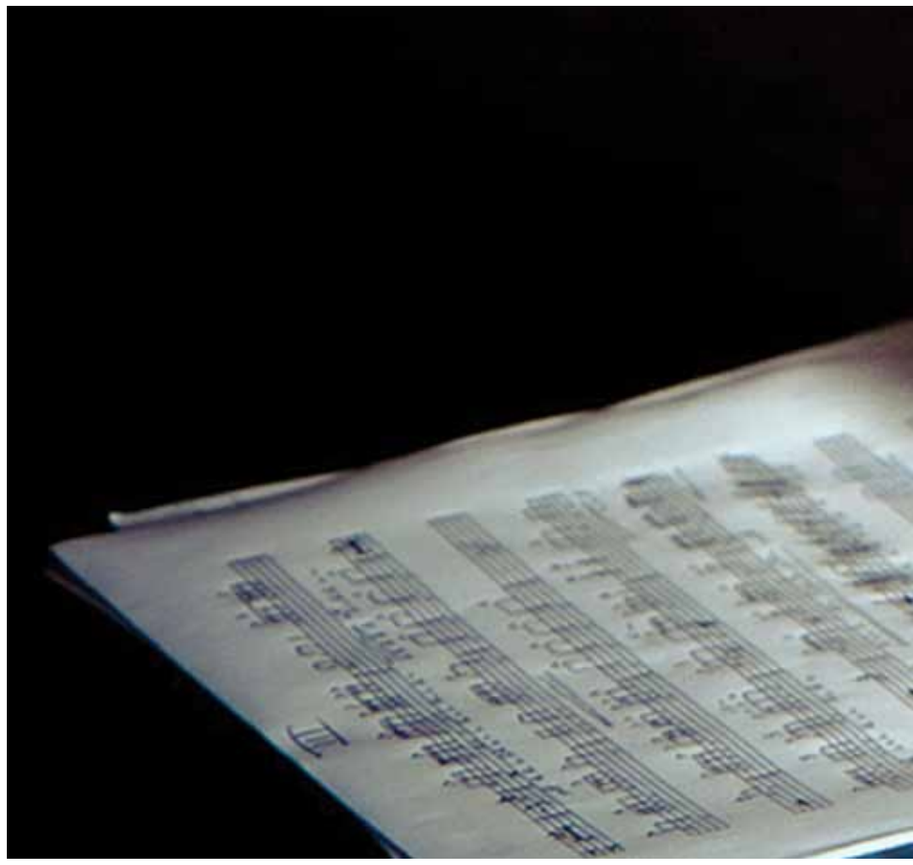
# 'DUDE, WHERE'S THE MELODY!'

## *What does working "on spec" mean for musicians, and what happens when an arrangement causes a meltdown?*



**LEGAL CORNER**

**HARVEY MARS, ESQ.**

Harvey Mars is counsel to Local 802. Legal questions from members are welcome. E-mail them to **HsmLaborLaw@HarveyMarsAttorney.com**. Harvey Mars's previous articles in this series are archived at **www.HarveyMarsAttorney.com**. (Click on "Publications & Articles" from the top menu.) Nothing here or in previous articles should be construed as formal legal advice given in the context of an attorney-client relationship.

**A YOUNG COMPOSER IS** asked to prepare swing arrangements of several popular rock tunes for a prominent big band. No specific economic terms are discussed but the band leader makes it clear that if she likes the tunes, she'll pay top dollar for them. The composer spends hours and hours preparing the arrangements, making sure they are absolutely perfect. He then agrees to conduct the band while the new arrangements are rehearsed. The rehearsal proceeds, but right after the first arrangement is run through, the bandleader informs the composer that she can't hear the melody and that the arrangements sound nothing like the original songs. The composer retorts that he was instructed to prepare swing arrangements and that is what he did. She ushers the composer out of the rehearsal and in a rage screams that the arrangements are horrible and cannot be used. She sends him packing without paying him one dime. Does our aspiring composer have a legal claim? Unfortunately not.

The terms of the composer's employment were "on spec," meaning that payment would only be made if the work were utilized. Spec work is any kind of creative work that is rendered to a prospective client before any binding commitment to pay an equitable fee is made. In our hypothetical situation, the arranger was working on spec. Thus he bore all the risk and essentially worked without any assurance that he would be compensated. Spec work is common in many industries. For instance, many professional photographers work on spec. If their photographs are published, they will be compensated. The photographs are basically made in anticipation of obtaining work. If no work is found, the photographs have no monetary value.

Spec work is also common in other artistic fields, like graphic design. Unpaid internships are also a kind of spec work: you work for free in hopes you'll get hired. A third kind of spec work is a "contingency fee arrangement" with an attorney. That's where your lawyer is only paid if you win the case and are able to recover money.

In some respects, spec work is much like an audition. You present your best art in anticipation of obtaining a job.

Obviously, there is great risk involved in working on spec. Once the work is prepared and turned over to the prospective employer, the creator risks losing control and ownership of the work, even if it is not used. Further, considerable time and effort will be expended, with the strong likelihood that no compensation will be received.

It would be an understatement to say that this is a difficult way to make a living. Many believe that requiring a creative artist to work on spec is immoral.

Musicians may be asked to work on spec, but the union doesn't recommend it. At least two of Local 802's agreements explicitly forbid spec work: our music prep contract, and our master Broadway agreement with the League.

I was recently involved in litigation that demonstrates that musicians should be aware of what spec work is and how to avoid it. I was retained to defend David Berger, an acclaimed composer/arranger who specializes in swing, against a breach of contract claim brought by a prominent bandleader and drummer, whom we'll call "Mr. X."

David had for some time been preparing arrangements and transcriptions for a swing band that Mr. X had put together. David and Mr. X had a written contractual arrangement that provided that David would be compensated for the arrangements he prepared. The contract had expired, but they both agreed that it would control any future arrangements or transcriptions prepared by David. All was well between the two of them for a considerable period of time. However, things soured when Mr. X asked David to prepare swing arrangements for several Bruce Springsteen tunes for Mr. X's big band. (The project was called "Big Band Boss.") For this assignment, David received payment up front before the arrangements were performed.

Prior to the assignment, David had pointed out to Mr. X that this was going to be tricky. The Springsteen tunes in

PHOTO: ROCKMIXER VIA FLICKR.COM. THE ARTIST HAS GIVEN PERMISSION FOR OTHERS TO REPRODUCE THIS WORK.

question were relatively simple, and the challenge was how to make the melodies interesting for a 16-piece big band. Also, of course, Bruce Springsteen's voice is so distinctive, and it would be missing from this context. Mr. X's reply was to "be creative" with the assignment.

So David wrote the arrangments. At the first rehearsal, David agreed to conduct the band while Mr. X played drums. This is where things broke down. Right away, Mr. X complained that the arrangements were not usable because the melody was indiscernible.

Unfortunately, the argument escalated into a lawsuit. I represented David in New Jersey Superior Court.

(Interesting side note: even though I am not licensed to practice law in New Jersey, it is a simple task to obtain a court order for permission to handle a particular suit.)

During his deposition, Mr. X acknowledged that he did not consider David to be working on spec. However, he explained that the work was not usable for its intended purposes and that a whole segment of his concert had been compromised.

While in many circumstances, production of "non-conforming goods" would lead to a breach of contract liability, this was not one of them. At a court-ordered arbitration hearing, the arbitrator dismissed the suit, finding that the contract was not on spec and that David was entitled to be compensated. Since Mr. X has not appealed the arbitrator's decision, the case has been formally dismissed.

(Another interesting side note: careful readers of my column might remember when I wrote in the past that most arbitration awards cannot be appealed. This was not the case here, since the arbitration in question was ordered by the court and not voluntarily initiated by both sides.)

A key component in achieving the dismissal was educating the arbitrator as to what the concept of "on spec" meant and distinguishing it from the contractual arrangement that guided David and Mr. X's relationship. Had David agreed to be paid after the work was performed – instead of before – the outcome might have been very different. Performers must be aware of the dangers of performing spec work. Always insist on a written contract that requires payment up front, as David wisely did.

### NEW RIGHTS FOR PREGNANT WOMEN

Pregnant women have new rights in New York City. On Oct. 2, New York City enacted legislation extending to pregnant women the same "reasonable accommodation" requirement that the Americans with Disabilities Act already affords to disabled employees.

Up until now, the Pregnancy Discrimination Act has been the main protection for pregnant women at work. But although the law prohibits discrimination against pregnant women, it does not require employers to accommodate them at work in any special way.

The Americans with Disabilities Act does require employers to reasonably accommodate disabled workers, but pregnancy is not considered a covered disability. Thus under the ADA, pregnant women are not entitled to be "reasonably accommodated" by their employers, unless the pregnancy has itself has caused a disabling medical condition such as pre-eclampsia.

Under this new section of the NYC administrative code (it can be found in Section 8-107 [22]), employers must now "reasonably accommodate" pregnant women by providing them with – among other things – additional bathroom breaks, increased periodic rest breaks, leave for childbirth, and more. NYC's new law is similar to the ADA in that an employer may assert that a proposed accommodation cannot be provided because it creates an "undue hardship" for the employer. (The burden of proving undue hardship falls upon the employer.)

Employers will be required to provide written notification to employees of their rights under the new legislation. New York City will be publishing specific language that employers must post at the workplace.

This legislation will become effective 120 days after the date of its enactment, which means it will be effective around April 2, 2014. Employers in New York City must abide by this law if they employ four or more individuals, including independent contractors.