

THE BUSINESS OF MUSIC: A Summary of Contracts Governing Music Industry Deals

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A SURVEY OF CONTRACTS GOVERNING MUSIC INDUSTRY DEALS

By Daniel M. Satorius, Esq.¹

INTRODUCTION

This outline surveys common music industry contracts. It is intended first as a reference to introduce the general practitioner to music industry contracts. Second, it is intended to provide the attorney who represents entertainment industry clients with a context in which to place the issues and matters facing his or her clients.

The practice of law in the music industry requires knowledge of the workings of the business aspects of the industry, knowledge of the process by which the creative property is created and a sense of the value of the artistic property.

The following discussion of music industry contracts is presented in the chronological order which they may be encountered by the developing artist. Treated first are the contracts common to performing and recording artists, and second, contracts common to songwriters and the music publishing industry, and third, other related music industry contracts.

1. Booking Agency Agreements.

The booking agent identifies employment opportunities for the artist, such as live performance engagements and personal appearances on television and in motion pictures. Generally, the agent is the exclusive representative of the artist with respect to securing employment for the artist's services in the entertainment industry. Some states require booking agents to be licensed. The agent is paid on gross income earned from the engagements and the usual commission rate is 10% or 15%. The duration of agency agreements is usually 3 years or less. Like the management agreement discussed below, the booking agency agreement sometimes contains a "book back" clause which provides for the agent to continue to participate in revenues received by the artist from ongoing engagements contracted for during the term of the booking agency agreement for a period thereafter.

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2. Management Agreements.

The manager acts as the artist's advisor and counselor in all aspects of the artist's career. The personal manager, by virtue of his/her contacts and knowledge of the industry, is able to advise and counsel the artist, and generally handle all of the business and personal affairs of the artist for the purpose of developing the artist's career.

The typical management agreement grants the manager the exclusive right to represent the artist concerning the artist's talents in the entertainment industry. The manager is usually paid 15% or 20% of the artist's gross income. However, income which is received by the artist, but applied to particular types of business expense, such as recording costs and touring costs, is often deducted from the artist's gross income prior to calculating the manager's commission. The duration of the management agreement is typically two to five years. The manager may have an option or options to extend the term of the agreement based on the achievement of designated events or revenue. The manager may participate in the artist's income after the expiration of the management agreement for contracts which were negotiated and signed during the term of the agreement.

3. "Shopping" and "Spec" Contracts.

An artist may contract with individuals or companies who, by virtue of their contacts in the music industry, may be able to secure a recording contract for the artist. Such agreements generally grant the shopping agent the right to exclusively represent the artist for a period of time, generally 9 months to 2 years. During this period, if the agent secures a recording contract for the artist, the artist will pay the agent a fee or a percentage of the advance and/or a portion of artist's royalties for one or more albums. Where the shopping agent is a producer, the agreement may grant the producer the right to act as the producer for the artist on one or more songs on one or more albums.

A producer or recording studio will sometimes provide recording time and production services on a "spec" basis. The producer or studio will forgo or significantly reduce their usual compensation for their services and facilities in exchange for a portion of the advance or royalties under the recording contract. This arrangement is commonly referred to as a "spec deal" and will sometimes be incorporated into a shopping agreement.

4. Recording Contracts.

The pursuit of a contract with a record company for the recording, manufacturing, and distribution of an artist's recorded performances is the all-consuming goal of many musician/artists. The recording contract tends to create or enhance the value of an artist's product in all other markets.

Recording contracts are complex and lengthy, and based on many customs and practices of the industry. Typically, the duration of a recording agreement is expressed in terms of "contract periods." A "contract period" is an indefinite length of time during which the artist must record and deliver to the record company a certain amount of recorded content, usually one album. The term of a recording contract usually runs for an initial period, plus one to seven option periods. The options are exercised by the record company (not the artist).

The artist grants his/her exclusive services as a recording artist to the record company during the term of the contract. The record company customarily owns the copyrights in the sound recordings produced under the contract. The artist also grants the record company a permanent mechanical license (discussed at 8.e. below) to manufacture copies of sound recordings derived from musical compositions written by the artist (usually at 75% of the rate set by the Copyright Act in the US).

Royalties payable to the artist based on retail list prices usually range from 12% to 16%. Royalties based on wholesale prices are approximately twice the amount of retail royalties. Alternatively, the artist may receive a percentage (e.g. 50%) of the record company's net receipts or net profits after deduction of all costs and expenses incurred by the company in recording, manufacturing, distributing and advertising the records. Royalties and the calculation of retail (or wholesale) price are reduced for sales in foreign territories and by packaging costs, "free goods", special promotions, reserves against returns, producers' fees and other elements. Record companies advance to the artist the costs of recording the albums. These advances are "recouped" (i.e., paid back to the record company) out of the artist's future royalties. These advances range from as low as a few thousand dollars for independent record companies to \$100,000 or more for major record companies.

The issues in recording contracts with independent record companies are similar to the issues in contracts with major recording companies. However, independent record companies generally do not have their own distribution systems, but rather distribute their content through major record companies or independent distribution companies (see the discussion at 11 below). Independent production companies generally distribute

regionally or nationally in a specialized sub-market such as rap, electronica, and new music genres.

Producers will sometimes contract with artists for their exclusive recording services, thereby becoming in effect the record company. Such agreements cover the same issues as recording contracts. The producer will then seek to contract with a major label concerning the manufacturing and distribution of the artist's recordings.

5. Producer Agreements.

The producer in the music industry is similar to the director in the motion picture industry. The producer works with the artist in the recording studio to shape the sound recording into a commercially salable product. There are various types of contracts between artists and producers, including the *de facto* recording contract mentioned in section 4 above, shopping contracts as discussed in section 3 above and contracts between the producer and the artist or the artist's record company to provide producing services in connection with a particular sound recording.

This third type of producer contract involves an artist signed to a recording contract where the artist is not already committed to a producer and is usually made directly between the artist and the producer. The record company, although technically not a party to the contract, will closely scrutinize that contract. The producer renders production services to the artist on a non-exclusive basis, for the agreed number of songs in exchange for a fee and/or recoupable advance plus a royalty. The fee, advance and the royalty, if any, are based on the producer's stature in the industry. Advances for an established producer run from a few thousand dollars per song to tens of thousands of dollars per song and royalties range from 1% to 4% (based on a retail royalty calculation). The producer's royalties are usually paid out of the artist's royalties. The producer is responsible for recording songs within a budget specified by the record company and is penalized for exceeding that budget. The producer's services are rendered on a work-for-hire basis and the producer does not retain any ownership interest in the recordings. The producer contract will also specify the producer's credit on the album cover and in connection with paid advertisements and promotions for the recordings.

6. Live Performance.

Live performance provides the important exposure which is necessary to launch and sustain a career and sell sound recordings. Live performance can also generate income in other areas, including merchandise sales, tour sponsorship and record sales. A tour will often coincide with the release of a new record album and promote radio play,

which further promotes the sale of the album. Because tours help sell albums, and because tours for developing artists frequently do not break even, record companies will sometime advance money to the artist to cover the deficit. The financial arrangements in live performing contracts can be complex. The artist's compensation can be based on a guaranteed flat fee, a percentage of the "gate" based on a net or gross calculation, or a combination of guaranteed flat fee plus percentage. Often the venue or the promoter must pay a deposit to the artist prior to the engagement.

a. Promoter and Artist Agreements.

A concert promoter produces and organizes live concerts. The promoter contracts with the venue and provides all the support services, such as ticketing, insurance, security and promotion. The contract between the promoter and the artist is negotiated by the artist's booking agent and is generally prepared by the agent. In some situations, individual local concert promoters contract with a tour promoter who has purchased a number of concert dates from the artist and "brokers" the dates to the concert promoters.

b. Venue Contracts.

For large venues where a promoter is involved, this contract is made between the promoter and the venue. For smaller engagements, such as live performances in bars and at colleges, a promoter is not involved and the artist will contract directly with the venue through his/her booking agency.

c. Services and Equipment Agreements.

(i) Musicians Employment Agreements.

An artist on tour sometimes engages the services of "side" musicians to form or add to the band which tours with the artist. Such musicians are either employees or independent contractors. They do not have an ownership interest in the artist/band, they do not usually have an interest in any recordings they perform on, and they are not a party to the artist's recording contract.

(ii) Lighting Production Services Agreements.

This contract concerns the lighting equipment and technicians which accompany the artist on tour. When the artist contracts for these services, the costs may be reimbursed to the artist by the promoter. Often, the concert promoter provides lighting equipment and personnel, and contracts directly with the lighting company.

(iii) Equipment and Staging Transportation Agreements.

Artists on a large concert tour frequently engage the services of trucking companies to transport their equipment and staging. Unlike sound and lighting expenses, these costs are not generally reimbursed by concert promoters.

7. Artists and Merchandisers.

The licensing of an artist's trademark, service mark, name and likeness can result in significant revenues to the artist. Trademark licensing agreements include the usual licensing terms, such as royalties and advances, minimum guarantees, accounting procedures, approvals of art work, use of the mark on products, and representations and warranties. The following is a list of the various types of trademark licenses in which a musical artist may become involved:

a. Retail Merchandising Agreements.

Manufacturer/distributors of clothing, printed goods and other merchandise items license the name and likeness of well-known artists for use on their goods for distribution to and sale by mass merchandisers. The right to use the artist's name and likeness is generally exclusive with respect to a general category of goods. The artist generally receives a royalty of 5% to 6% of the retail selling price of the merchandise or a percentage of the net receipts of the merchandising company.

b. Tour Merchandising Agreement.

The contract between the artist and the tour merchandiser is very similar to the retail merchandising contract, except the scope of the tour merchandising contract is limited to sales at the artist's concerts. Tour merchandising revenues can be considerable, as high as \$10 per concert attendee. Advances on tour merchandising contracts can range from \$5,000 to \$100,000 or more. Major artists receive advances of \$500,000 to \$2,000,000. Artist's royalties based on a percentage of the merchandiser's gross revenues range from 20% to 35%, and royalties based on a percentage of the merchandiser's net revenue range from 75% to 90%.

c. Tour Sponsorship.

Corporations will sometimes contract with a promoter or an artist to sponsor an artist's tour. Artists who are able to attract tour sponsorship contracts can expect to receive \$50,000 to \$100,000 per tour. Superstars may receive \$1,000,000 or more for a

tour. Such contracts also specify the sponsoring corporation's rights to use its logo in connection with promotions and advertising and staging of the tour, and in connection with its own and/or the group's merchandise.

d. Product Endorsement.

In these contracts the manufacturer of goods, such as amplifiers, musical instruments and athletic shoes, contracts with the artist to use the artist's name and likeness in connection with the marketing and sale of the manufacturer's products. The right to use the artist's name and likeness is generally exclusive with respect to a particular category of goods or services. Compensation to the artist from the manufacturer may vary from free use of equipment to the payments of tens of thousands of dollars or more. As with the tour sponsorship contract, the manufacturer will be particularly concerned with the manner in which its trademark is used in association with the group's live performances.

8. Contracts Involving Songwriters.

The songwriter's stock-in-trade is the copyright in his/her songs. There are a large variety of contracts concerning the exploitation of songs.

a. Songwriter Collaboration Agreements.

Songwriters will often collaborate to create a musical composition. For example, one writer may compose the music and the other, the lyrics. Where the song is composed by the writers with the intent that their contributions are merged into an inseparable whole, the composition is considered a joint work and each co-writer owns an undivided share in the whole. Consequently, except to the extent that the co-writers have agreed to the contrary, either party may exploit and grant non-exclusive licenses in the composition to third parties without the consent of the other writer, although he or she must account for and pay the co-writer their share of the profits. Also, there is a presumption under the Copyright Act that all joint authors share equally in the ownership of the copyright in the work they create. Accordingly, it is advantageous to have a written contract between the co-writers to specify their ownership shares and their rights to exploit the composition. Such a contract may also deal with the registration of the copyright, preparation of derivative works, licensing to publishing companies and distribution of revenues from the composition.

b. Publishing.

Publishing contracts deal with the exploitation of the songwriter's compositions in the various markets in which compositions earn income. There is probably no other part of the music industry which is more likely to confuse the novice, defy logic and rely on industry customs than music publishing.

"Music publishing" is something of a misnomer. The printing and distribution of sheet music has not been an important activity of the music publishing industry since the days of Tin Pan Alley. Today, the primary function of music publishing companies is to collect fees and royalties derived from the commercial exploitation of songs, auditing licensees of rights in songs, and promoting the use of songs in various media, including causing songs to be recorded by recording artists and licensing the right to synchronize songs with the visual content of films, television programs, video games and other audiovisual productions.

A songwriter may "self-publish" or secure the services of a publishing company to exploit the writer's songs. Where the songwriter contracts with a publishing company, publishing agreements tend to be (i) single song agreements or (ii) exclusive songwriter's agreements in which the publishing company controls the copyrights in all compositions written by the songwriter.

The traditional publishing contract provides that, in exchange for the payment to the writer of 50% of the revenues derived from the exploitation of the songs, the songwriter transfers 100% of the copyrights in the songs to the publishing company. However, these days many songwriters (especially artist/songwriters with a recording contract) form their own publishing company, in name only, and enter into co-publishing agreements with publishing companies, which administer all rights in their songs throughout the world.

In co-publishing agreements, the artist's publishing company generally retains 50% of the copyright ownership in the songs and the co-publishing company receives 50% of the copyright ownership. The co-publishing company administers the songs throughout the world. 75% of the net receipts from the commercial exploitation of the songs are paid to the writer's publishing company and the co-publishing company retains 25%. Generally, the co-publishing company has the right to deduct "off the top" certain out-of-pocket costs, and possibly an administration fee of 10% to 15% before dividing up the net receipts.

Publishers sometimes pay advances against future royalties under publishing contracts, which can range from a few hundred dollars for a songwriter without a

recording contract or any prior success to \$100,000 or more for an artist with a recording contract with a major record company.

The rights granted in a publishing agreement can be for a single song or the writer's entire catalog, or anything in between. Exclusive songwriter agreements grant the publishing company a songwriter's entire output during a certain period of time and generally provide for regular payments of minimum advances against royalties. Single song publishing agreements last for the life of the copyright in the song. Exclusive songwriter agreements last for an agreed upon period of years, but the songs written during the term of the contract remain the property of the publishing company after the expiration of the term of the contract. The exclusive songwriter agreement generally provides for the delivery by the writer to the publisher of a minimum number of songs per "contract period."

c. Administration Agreements.

Under an Administration Agreement, the ownership of the copyrights in the compositions is retained by the songwriter (or his/her publishing company) and the publishing company is granted the exclusive right to administer the copyrights in the compositions during a designated period of time. The publisher provides registration, collection and accounting services, and retains a portion (generally 10% to 20%) of the receipts from the exploitation of the compositions.

d. Agreements with Performing Rights Organizations (ASCAP/BMI).

One of the exclusive rights granted to a songwriter under the Copyright Act is the right to publicly perform his/her composition. Since it is impractical (and probably impossible) for a songwriter to individually contract with the many radio stations, television stations, bars, restaurants and concert halls which may perform his/her compositions, the songwriter will contract with a performing rights organization such as the American Society of Composers, Authors and Publishers (ASCAP) or Broadcast Music Incorporated (BMI) to license the performing rights in their compositions on the songwriter's behalf. Songwriters and music publishers each have separate contracts with the performing rights organization. For most songwriters, these contracts are non-negotiable and no advances are paid against future performance fees.

e. Mechanical Licenses.

A musical composition which is protected by copyright may not be recorded, manufactured, copied or distributed without the permission of the owner of the copyright or, alternatively, by complying with the compulsory licensing provisions of the

U.S. Copyright Act. Unpublished compositions require consent directly from the copyright owner. After publication, anyone wishing to make and distribute recordings has a choice. Either they can contract directly with the copyright owner or they can use the compulsory licensing provisions of the U.S. Copyright Act. Under the Copyright Act anyone who complies with the statute, including paying the statutory royalty rate, may make and distribute recorded versions of the composition. Since the requirements of the statutory compulsory license are fairly stringent, licensees (usually record companies) generally prefer to contract with the owner of the copyright in a composition via a mechanical license. The terms of a mechanical license are fairly standard and grant the licensee the non-exclusive right to make and distribute reproductions of the recorded version of the composition in exchange for a fee based on the statutory rate for compulsory licenses. The current statutory rate is \$0.091 per copy sold or \$0.0175 per minute of playing time (whichever is greater) per copy sold.

f. Synchronization Licenses.

The copyright owner of a musical composition has the exclusive right to perform the composition in synchronization with moving pictures. Motion picture and television producers, and other producers of audiovisual productions, must contract with the owner or administrator of the copyright in a composition in order to include the composition in the soundtrack of their production. (Note that to secure rights in a particular sound recording of the composition, the producer must obtain a master use license, as discussed in section 12 below.) Since there is no statutory compulsory license concerning synchronization usage, as there is for mechanical rights, the licensing rates for synchronization rights are completely negotiable and vary greatly depending on the perceived value of the composition.

g. Subpublishing and Print Licensing.

A publisher will sometimes sign contracts with third party publishing companies to exploit certain rights in the publisher's catalog of compositions. One such common contract is "subpublishing" to publishing companies in foreign territories. Under this arrangement, the domestic publisher (without contacts or influence in foreign territories) will contract with a foreign publishing company to commercially exploit the composition(s) in those foreign territories. Similarly, most publishing companies do not print sheet music or song books. Therefore, in situations where a song has gained enough popularity to warrant the printing of sheet music or inclusion in printed song books, the publishing company will contract with a specialty publisher or printing company to accomplish that task.

9. Studio Musician Contracts.

The creation of sound recordings often requires the engagement of the services of studio musicians and vocalists. In the absence of a written contract transferring the copyrights from the performer of that sound recording to the recording artist or record company, the studio musician and vocalist retains the copyright in his/her performance on that sound recording. Therefore, a relatively simple services contract is prepared in which the studio musician or vocalist is paid a one-time fee in exchange for the transfer of his/her copyright in the sound recording to the artist or the record company on a work-for-hire basis.

10. Music Video Production Contracts.

The music video production agreement is generally a contract for the production of a music video of a song selected from the artist's album. The copyright in the video resides with the record company. Music videos primarily function as marketing tools for the promotion of record albums. Since most music videos are not duplicated and sold, and therefore do not generate income, the contracts with the video producers do not usually provide for royalty payments to the production entity.

11. Distribution Agreements.

Independent record companies do not generally distribute their physical products directly to record stores. Instead, their products are distributed by major record labels/distributors or independent distribution companies. The contracts for such distribution generally apply to all the recordings which are owned or controlled by the independent record company, although they may apply only to a certain artist or album. Alternatively, or in addition to its arrangement with a major record label/distributor, an independent record company may have contractual arrangements with a number of licensees which distribute and sell the products in different markets and/or different geographic areas.

A producer who has acquired all of an artist's recording rights under a production contract will often contract with a major record label for the distribution of the artist's recordings. A distribution contract between a producer or an independent record label on one hand, and a major label on the other, often resemble artist recording contracts.

12. Master Use Licenses.

When a person or entity, such as an advertiser or motion picture or television production company, wishes to use an existing recording of a musical composition in

synchronization with an audiovisual production, a master use license must be secured from the copyright holder of the recording. This license must be secured in addition to the synchronization license for a musical composition (as discussed above at 8.f.) which grants rights in the composition only. The copyright holder of the sound recording is usually the record company.

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