

# MUSIC INDUSTRY RELATIONSHIPS AND COMPENSATION

Richard J. Greenstone  
Attorney at Law

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# *Overview*

- Work Made for Hire
- Underlying Compositions and Sound Recordings
- Music Publishing
- Record Deals—Royalties and Relationships
- Music for Motion Pictures and Television

# *Work Made for Hire*

## *General Rule*

17 U.S.C. § 201(b)

“In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.”

*Work Made for Hire*  
*Two Types from 17 U.S.C. § 101*

Type 1

“A work prepared by an employee within the scope of his or her employment.”

Typical employer-employee relationship.

# *Work Made for Hire*

## *Two Types from 17 U.S.C. § 101*

### Type 2

“A work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, ... as a compilation, ... if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.”

A contractual relationship.

# *Work Made for Hire*

## *Entertainment Industry Prefers*

If the work is created independently (or not under contract), the author is the owner of the work. The work is then assigned or licensed (*e.g.*, for use in a motion picture); that grant is subject to termination by the author 35 years after date of execution of the grant, pursuant to 17 U.S.C. § 203.

# *Copyright in Underlying Compositions and Sound Recordings*

17 U.S.C. § 102(a)

“Works of authorship include the following categories:

(2) musical works, including any accompanying words;

(7) sound recordings....”

*Underlying Compositions and Sound  
Recordings  
Scope of Rights*

17 U.S.C. § 114

Scope of exclusive rights in sound recordings

17 U.S.C. § 115

Scope of exclusive rights in nondramatic musical works: Compulsory license for making and distributing phonorecords

*Underlying Compositions and Sound  
Recordings  
Copyright Notices*

Underlying music composition (notes on a page!),  
use the familiar © notice.

Sound recording, use the ® notice.

# *Music Publishing*

## *What's It All About?*

- Functions of Music Publisher
- Sources of Revenue
- Traditional Split of Revenues
- Principal Types of Agreements
- Controls Over Music Publishers

# *Music Publishing*

## *Functions of Music Publisher*

- Works with songwriters on a creative level.
- Protecting and enforcing copyrights.
- Soliciting and negotiating licensing of songs.
- Collecting and disbursing income.

# *Music Publishing*

## *Sources of Revenue*

- Small performing rights
- Mechanical royalties
- Printed editions
- Synchronization rights
- Grand rights

# *Music Publishing*

## *Traditional Split of Revenues*

- Equally divided between the writer and publisher.
- If more than one writer, they may share a 50% pie, either equally or unequally.

# *Music Publishing*

## *Principal Types of Agreements*

- **Songwriter Agreement:** Standard agreement; a 50/50 deal.
- **Co-publishing Agreement:** Co-ownership plus administrator; writer receives his 50% plus additional income.
- **Administration Agreement:** Artist retains 100% of copyright; publisher undertakes administration functions and receives 15 to 25% of gross income.
- **Collection Agreement:** Same as administration agreement except publisher will not exploit the song.

# *Music Publishing*

## *Controls Over Music Publishers*

- No changes to title or composition except to accommodate foreign languages.
- No license of grand rights or title uses without consent.
- No synch licenses for NC-17, unrated XXX films, or political advertisements.
- In foreign subpublishing, no grant of mechanical license for a stated period after initial release of artist's work.
- Publisher issues licenses at 3/4 statutory rate for controlled compositions in recording contract to which artist/songwriter may become a party.

# *Record Deals Relationships*

- Record companies prefer work made for hire relationships.
- RIAA arranged midnight amendment to the Satellite Home Viewer Improvement Act of 1999 expressly making sound recordings works made for hire.
- Amendment repealed in October 2000.

# *Record Deals Relationships*

- Bargaining power of a new band is nil.
- Incentive is to sign any document, no matter how oppressive.
- Record companies contend sound recordings are contributions to a collective work and a compilation.

# *Record Deals Relationships*

Does a sound recording qualify as a work made for hire?

- It must be specially ordered or commissioned.
- It must fall under one of the specifically enumerated categories of works identified in the definition itself.
- The parties must agree that the work shall be a work made for hire in a signed writing.

# *Record Deals*

## *Relationships*

- It must be specially ordered or commissioned.
- The work is not prepared at the instance and expense of the record company.
- The record company may advance fees and expenses, but these are fully recoupable.
- Sheryl Crow: “I am basically left to my own devices when it comes to creating a work that best represents what it is I am trying to express in my work and in my life. Because I produce my own recordings, I am basically the captain of the ship and ultimately, the decision-maker.”

# *Record Deals Relationships*

- It must fall under one of the specifically enumerated categories of works identified in the definition itself.
- Congress specifically intended to exclude sound recordings from work made for hire status. Supported in *Community for Creative Non-Violence v. Reid*.
- Sound recordings rarely qualify as either a compilation or a contribution to a collective work.

# *Record Deals*

## *Relationships*

- The parties must agree that the work shall be a work made for hire in a signed writing.
- Many new artists will sign any contract, even one not supported by law.
- Copyright Act of 1976 effective date is January 1, 1978. 1978 + 35 years = 2013. Artists will contend that only the backup assignment (in the work made for hire provision) is in effect. They will move to terminate copyright transfers.

# *Record Deals*

## *Royalties*

- Recording agreements often have ten or more pages devoted to royalties and deductions.
- Typically (and for example purposes only) 14% royalty on the suggested retail price.
- The royalty may be “all-in” meaning the producer’s royalty is included. Thus, if the producer receives 3% SRP, then artist’s royalty will be reduced to 11%.
- Other deductions coming up.
- Royalty accounting is the subject of numerous lawsuits.

# *Record Deals*

## *Royalties*

### Hypothetical

Artist signs with Record Co. which provides a \$300,000 recording fund. From this she must pay an advance to the album producer. The album ships gold, that is, 500,000 albums, one-half of which are audio tapes, and one-half of which are CDs. 6,000 units (one-half of each) were also given away to radio stations, etc. Of those units shipped, 2 were marked “free” for every 10 that were billed.

# *Record Deals*

## *Royalties*

\$300,000 Initial Funds Used as Follows

180,000	recording cost
50,000	producer's advance
70,000	artist's advance

Based on a \$70,000 advance, don't quit your day job if the artist is actually a four member band.

# *Record Deals*

## *Royalties*

### Gross Royalty Calculation #1

500,000	tapes and CDs shipped
<u>—6,000</u>	tapes and CDs given away free
494,000	shipped, 2 free with every 10
<u>x 10/12</u>	to determine number actually “sold”
411,666	sold (205,833 each of tapes and CDs)
<u>x 90%</u>	to calculate number on which royalties are payable
370,500	on which royalties payable

# *Record Deals*

## *Royalties*

### Gross Royalty Calculation #2

Gross royalty calculations are different for CDs and tapes.

Tapes pay 14%, CDs pay 10.5%

Tapes incur a packaging deduction of 20%, CDs 25%

For purposes of this example:

\$248,420	gross tape royalties
<u>247,494</u>	gross CD royalties
\$495,914	total gross royalties

# *Record Deals*

## *Royalties*

### Deductions #1 Initial Deductions/Profit?

Don't forget our initial deductions of \$180,000 recording costs, \$50,000 producer's advance, and \$70,000 artist's advance.

\$495,914	total gross royalties
<u>300,000</u>	recording fund (to be recouped by record company)
\$195,914	profit for artist?

**NO WAY!**

# *Record Deals*

## *Royalties*

### Deductions #2

### Deductions

\$180,000	recording costs
50,000	advance to producer
70,000	advance to artist
75,000	video production costs
193,001	excess mechanicals
56,147	royalties payable to producer
<u>125,000</u>	reserve against possible returns
\$749,138	total deductions

*Record Deals*  
*Royalties*

Deductions #3  
Royalties Payable

\$495,914  
—749,138  
(\$253,224)

total gross royalties  
total deductions  
deficit

# *Record Deals*

## *Royalties*

### Negotiable Modifications

- Reserves against returns: If artist has a track record, negotiate a lower number based on hard data.
- Breakage: Historically, record companies paid royalties on 90% of records sold. CDs and tapes are not brittle compared to 78 rpm records.
- Free goods: Record companies customarily shipped 3 free singles and 2 free albums with every 10 singles and albums shipped. This can be reduced from 2 on 10 to 15 on 100.
- Video production expenses: From the record company's point of view, this is a recording cost while artist see this as an advertising and promotion expense, which is not a deduction. Record company settles for 50% of expense.
- Excess mechanicals: Negotiate for record company to pay mechanicals on all albums distributed (rather than all albums sold), apply 3/4 limitation on controlled compositions, ask record company to pay mechanicals on bonus tracks.

# *Record Deals*

## *Royalties*

### New Gross Royalty Calculation #1

500,000	tapes and CDs shipped
<u>—6,000</u>	tapes and CDs given away free
494,000	shipped, 15 free with every every 100 sold
<u>x 100/115</u>	to determine number actually “sold”
429,566	sold (214,783 each of tapes and CDs)

(Remember, no breakage calculation!)

# *Record Deals*

## *Royalties*

### New Gross Royalty Calculation #2

Gross royalty calculations are different for CDs and tapes.

Tapes pay 14%, CDs pay 10.5%

Tapes incur a packaging deduction of 20%, CDs 25%

For purposes of this example:

\$288,024	gross tape royalties
<u>286,950</u>	gross CD royalties
\$574,974	total gross royalties

(A difference of \$79,060 from the first gross royalty calculation!)

# *Record Deals*

## *Royalties*

New Deductions (based on #2 earlier)

### Deductions

\$180,000	recording costs
50,000	advance to producer
70,000	advance to artist
37,500	video production costs (1/2 the original)
0	excess mechanicals
73,069	royalties payable to producer (slightly higher)
<u>125,000</u>	reserve against possible returns
\$535,569	total deductions

# *Record Deals*

## *Royalties*

New Deductions #3  
Final Royalties Payable

\$574,974  
—535,569  
\$39,405

total gross royalties  
total deductions  
additional royalties payable to artist!

We've turned a \$253,224 deficit into a \$39,405 profit.

# *Music for Motion Pictures and Television*

## Two Scenarios

- Purchase existing music.
- Commission an original score.

# *Music for Motion Pictures and Television*

## Purchase Existing Music Several Rights Implicated

- Composer owns the copyright in the composition.
- Lyricist owns the copyright in the lyrics.
- Musicians may own the copyright in their performance.
- Record label may own the copyright to the recording.

# *Music for Motion Pictures and Television*

## Commission an Original Score

- Permission from record company if artist is under contract.
- Work made for hire, but a top songwriter may demand co-publishing.
- Spec or step deal?

# *Music for Motion Pictures and Television*

## Nature of Music Rights

- Public Performance Rights
- Synchronization Rights
- Adaptation Rights
- Dramatic Rights

# *Music for Motion Pictures and Television*

## Nature of Music Rights—Public Performance

Right to recite, play, sing, dance or broadcast a musical composition in public. ASCAP, BMI or SESAC issue blanket licenses to perform music, but, U.S. theaters do not obtain a blanket license to perform music in motion pictures. The motion picture producer/distributor will secure such rights.

# *Music for Motion Pictures and Television*

## Nature of Music Rights—Synchronization

Right to reproduce the music on the soundtrack of the movie (for non-dramatic use, *i.e.* small rights, as opposed to dramatic use, *i.e.*, grand rights, where the music tells the story) in synchronization with video or filmed images.

Note that fees are more modest for television since there is a blanket license for television.

# *Music for Motion Pictures and Television*

## Nature of Music Rights—Adaptation

Right to alter the musical composition by way of arrangement, parody, comedic use, and lyric change.

# *Music for Motion Pictures and Television*

## Nature of Music Rights—Dramatic

Right to use the title or story set forth in the song as the basis for the filmed work.

*Music for Motion Pictures and Television*  
*Studio Concerns*

- Business Viewpoint of Studios and Other Film Companies
- Limiting the Studio's Investment—Spec Writing and Step Writing Deals

# *Music for Motion Pictures and Television*

## *Studio Concerns*

### Business Viewpoint of Studios and Other Film Companies

- Stick with top composers and songwriters.
- Obtain broad exploitation rights:
  - Complete freedom of use and exploitation (including royalty-free use in other studio productions) without consultation, approval or further payment;
  - optimum duration of copyright ownership (WMFH);
  - avoidance of third party claims and controls;
  - actual profit from music revenues;
  - increased cash flow;
  - add to studios publishing catalog.

# *Music for Motion Pictures and Television*

## *Studio Concerns*

### Limiting the Studio's Investment— Spec Writing and Step Writing Deals

- **Spec Writing:** Written or reworked for the film and submitted for consideration without the studio commitment for use or payment.
- **Step or Option Deal:** Initial small payment to artist to write and “demo” with an option to buy if used.

# *Music for Motion Pictures and Television*

## *Record Label Concerns*

- Studio handles production and distribution of soundtrack (studio and record label possible related entities).
- Advance
- Royalty
- Definition of product: pop soundtrack, orchestral, or mixed.
- Promotion fund: Studio puts up matching promotion fund.
- Guarantee release: Release no later than theatrical release; single released about six weeks prior to theatrical release.
- Ownership: Studios own underlying musical compositions and the sound recording embodied on the film; record label owns sound recording embodied on the CD.

*Music for Motion Pictures and Television*  
*Artist's Concerns*

- Preexisting Term Songwriter's Agreement
- Preexisting Recording Agreement
- Deal Points

*Music for Motion Pictures and Television*  
*Artist's Concerns*

Preexisting Term Songwriter's Agreement

Exclusive agreement with publisher. Artist negotiates a fixed number of songs per year which are excluded from their term songwriting deal.

# *Music for Motion Pictures and Television*

## *Artist's Concerns*

### Preexisting Recording Agreement

- Record company will insist on an override royalty (in addition to or deducted from artist's royalty) from the studio as a condition to granting permission for the artists soundtrack services.
- Other issues:
  - Marketing fund
  - Video investment: Co-finance videos
  - Video ownership
  - Home video royalty: rarely if ever granted

# *Music for Motion Pictures and Television*

## *Artist's Concerns*

### Deal Points

- Cash creative fee or all-inclusive fund
- Song royalties: Artist still receives 50% for songwriting
- Record royalties:
  - All-in royalty: Artist's royalty inclusive of all others such as producer or record label.
  - Proration: Prorated by number of cuts.
  - LP override: Big artists receive an album override where part of the album may be orchestral filler; additional 2%.
  - Royalty allocation: If a large number of artists, studio may keep 4 to 6%, while artists share a pool of 10 to 12%.
- Song and master recording ownership: Considered a WMFH.
- Use of master on artist's label: Holdback of several months after release of soundtrack album.
- Credits: End title screen credit unless a grand right involved.

## *Additional Recommended Reading*

Donald S. Passman, *All You Need to Know About the Music Business* (Prentice Hall Press)

Sidney Shemel and M. William Krasilovsky, *This Business of Music* (Billboard Books)