

Contracts Guide

Recording Agreements

Recording agreements come in every different shape and size. What follows is a very general look at the basic terms that you can expect to find in most types of agreement. It is by no means exhaustive.

Term or Duration of Agreement

The length of most agreements tends to be linked to the recording process. An agreement will probably last for “an initial period” of one year during which the artist will be obliged to record an album or series of singles. Once the artist has recorded the album and delivered the final master to the record company with all necessary consents it will be ready for release. The record company will have a set period of time to undertake the release and measure the likely success of the album before deciding whether or not to exercise its option over the next album.

The record company will have anything between 2 and 5 options over the artist’s future albums. It is important to note that options are at the record company’s sole discretion. Accordingly, if the record company decides not to exercise an option, the artist is released from the agreement, or “dropped”, and free to record elsewhere for another record company.

Most artists will sign a recording agreement for the world. This enables the record company to exploit the artist’s material and receive income from all sources worldwide. Accordingly, an album, which for example sells well in the USA, can make up any losses that the record company suffers if the album sells poorly elsewhere. A successful artist may be able to negotiate a split territory deal so that income from sales in one territory is paid to the artist notwith-

standing that the album has sold poorly elsewhere.

Product or Minimum Commitment

This is the extent of the artist’s and the record company’s commitment to each other to record material during each period of the recording agreement. A new artist may have a “singles deal”, in which case he/she will be obliged to record, say, three singles during the initial period. If one or more of the singles is successful, the record company will probably exercise its option for an album to be recorded during the first option period (the second period of the contract after the initial period) and so on, depending on how many options the record company has.

An artist in a stronger negotiating position will have an “album deal”, thus obliging the record company to spend more money on recording costs and marketing/promotional costs and hence increasing its risk if the album fails to sell. An established artist, in a strong negotiating position, may be able to secure a “two albums firm” deal. This obliges the record company to commit to two albums irrespective of the success of the first album. This is a true test of the record company’s faith in the artist.

Advances

Usually the first thing the artist looks at. It is very difficult to give ballpark figures because every artist/record company relationship is different. In some cases, no advance is paid. In others, where superstar bands are concerned the advance could be millions of pounds. In our opinion the size of the advance should not be seen as a measure of the artist’s worth to the record

company. Small record companies and labels simply cannot afford large advances, however, they often try to make up for this in other areas of the agreement.

The most important point to note about advances is that they are “recoupable” from the artist’s royalties. Accordingly, an advance is simply a pre-payment of royalties otherwise due to the artist. The higher the advance, the more albums that need to be sold before the artist receives any royalties. Very generally, an artist with a typical contract can expect to receive royalties equal to about £1 per CD album sold. Accordingly, a £100,000 advance means that 100,000 albums must be sold before the artist receives any royalty. Furthermore, unrecouped advances paid by the record company for one album are usually carried forward and set off against royalties on a subsequent album. This is called “cross collateralisation” and can mean that the artist never receives any royalties and survives solely on advances. This can be difficult if the advance has been spent and the next advance is not due for a year. Advances are either paid “inclusive” or “exclusive” of recording costs, either way, the recording costs will be recoupable by the record company from the artist’s royalties. If the former, it is up to the artist to ensure that recording costs are kept to a minimum if there is to be any of the advance left. If the latter, the record company will have more control over the recording budget but the artist will still want some control over costs as, in due course, they will be recouped from the artist’s royalties.

Royalties

Broadly there are two types of royalties; the artist can receive either a fixed percentage of an agreed price for records sold (a “points deal”), or a share of the record company’s overall “net receipts” from the sale of the artist’s recordings. In this note we shall concentrate on the former. A net receipts type royalty is usually found in a so-called “Production Agreement” or in a recording agreement with a small record company.

The calculation and hence the value of a particular royalty rate is not straightforward. Royalties tend to be calculated on either “dealer” or “retail” price. Neither price is a genuine reflection of the price the record sells in the shops or is sold to “dealers”. It is an artificial price agreed within the industry in order to provide uniformity for, amongst other things, royalty calculations. In addition, the retail or dealer price will be reduced by “packaging deductions”. For a CD, these can be as much as 30% of the retail or dealer price. Accordingly if, for example, we assume that the current industry agreed retail price is £10 for a CD, this will be reduced by the 30% packaging deduction thereby leaving £7 as the basis for the royalty calculation. A 14% royalty on retail would therefore equate to £0.98p per CD sold.

There are many other issues in a recording agreement that will be the subject of negotiation between the artist and the record company. For example, ownership of the recordings, creative issues, leaving members and the extent of the record company’s obligations to release an album recorded by the artist.

Management Agreements

The first point to make is that management agreements tend to be very fluid and are constantly developing. Gone are the days where the manager would be entitled to 25% of an artist's gross income on everything the artist ever did for the rest of his life. Some managers will operate on a handshake and treat the need for a written contract as defeating the whole object of a relationship based on trust. Unfortunately, like marriage, the relationship can sometimes turn sour. Rather than fight it out through the courts, like a divorce, a well-drafted contract can usually ensure that in such circumstances both sides know exactly where they stand and a quick resolution can be achieved.

The following terms represent the most important matters to be agreed:

Term or Duration of the Agreement

The term, or length of time the manager and the artist will remain contractually committed to each other, will usually be for a period of 2 or 3 years. Alternatively, the term can be linked to the so-called "album cycle" so that the term lasts until the artist has released say two albums. A trial period of 6 months is often sensible if the artist is initially unsigned or the manager has no previous experience. The term can then be extended if both parties are happy with the way the relationship has developed. The trial period can also be linked to a performance clause ensuring that if the manager has not been able to secure a record deal for the artist or an agreed level of earnings then the term ends.

Manager's Role

Many agreements allow a manager's role to encompass "all the artist's activities in the entertainment industry". Care needs to be taken over the aspects of the artist's career which the manager is able to manage. Sometimes it may be appropriate to limit the manager's role to certain of the artist's activities only. For example, a successful TV soap star beginning a career in the music industry would probably want to limit a manager's activities to the furtherance of her music career and exclude her TV career from the relationship as it is already established.

Commission and Expenses

The average rate of commission is 20% of the artist's gross earnings. However, certain deductions are generally made from the gross before commission is paid. For example, recording and video costs, tour support and third party fees are generally deducted before commission is calculated. The manager would usually be entitled to recover any reasonable expenses incurred on the artist's behalf but it is advisable to be as precise as possible over the types of expenses that the manager is able to re-charge to the artist.

Duration of Commission and Post Termination Clauses

If a management relationship breaks down this is probably the most important clause of the agreement. Until the early 1980's it was usual for the manager to be entitled to commission in perpetuity. This included being able to commission income from albums recorded and songs written after the term had expired, but delivered by the

artist pursuant to an agreement originally negotiated by the manager. In those days it would not be unusual for the artist to sign a 7 or 8 album deal with a record company. Should the management relationship end before all 8 albums were delivered the manager would still be able to commission the remaining albums even though he no longer managed the artist. Needless to say, this made it extremely difficult for the artist to afford a replacement manager and hence earn a living.

Fortunately, agreements have become a lot fairer since that time and nowadays a balance can be struck ensuring that the artist is not penalised for life whilst at the same time rewarding the manager for his/her efforts over a reasonable period. A typical compromise would be to allow the manager to receive commission after the term has ended ("post termination commission") only on albums or compositions written and recorded during the term. Furthermore, the level of post termination commission would reduce from 20% to nil over a period of years.

Artist's Obligations

If the manager arranges activities on the artist's behalf he/she needs to know that the artist will turn up and in a fit state. The manager also needs to be assured that the artist does not have another manager responsible for the same activities. Likewise, because the relationship is exclusive the manager would expect to be paid commission even if he/she was not responsible for securing the particular activity in the first place.

Territory

Most managers are appointed to look after the artist throughout the world. Occasionally separate management will be appropriate for, say, the USA. Such an appointment can either be made independently of the UK manager, in which case commission will need to be split on a territory by territory basis, or as a sub-management arrangement, with the UK manager paying the US manager out of his commission.

Accounting

This can be one of the biggest sources of discontent in the relationship. Put simply, either the manager is responsible for collecting all the money and, after deducting commission and expenses, pays the artist, or the artist collects and pays the manager his/her commission and expenses. Either way, it is vital that both parties have access to the relevant accounts and that the manager's ability to incur costs and spend the artist's money is limited. A possible compromise is for the artist's accountant to collect and distribute the money. However, given the costs involved this is option is really only available for successful artists.

Publishing Agreements

As with recording agreements, publishing agreements can be long and complicated documents. Some thought should be given as to the timing of signing a publishing agreement. Publishers can be very useful to artists/writers looking for a recording deal, as the publisher will have plenty of contacts. On the other hand, the deal offered by a publisher to an “unsigned” artist will probably be less attractive than a deal offered to a “signed” artist/writer.

What follows is very much a summary of the types of terms that arise in a typical publishing agreement. These should be read in conjunction with the notes on recording agreements.

Term

As with recording agreements, the term will be for an “initial period” usually of a one year, followed by option periods of one year. During each period the writer will be obliged to write a certain number of songs which the publishing company will usually want recorded, either by the writer or a third party, and commercially released by an established record company. This is known as the “Minimum Commitment” - see below.

Minimum Commitment

A writer will be obliged to write a certain amount of new songs during each period of the agreement. If the songs are not recorded and released by a record company, the value of the songs to the publisher is minimal. Accordingly, the publisher will require that some or all the songs are recorded and released by an established record company. If for some reason some or all the songs are not recorded then the publisher might want to either extend the term for a short period or reduce the advance payable

to the writer. Alternatively, the publisher may decide not to exercise any further options on the writer’s career.

Territory

Usually the writer will sign “for the world”. As with recording agreements, a successful writer may be able to negotiate a “split territory” deal.

Advances

From a financial point of view, the main difference between a recording agreement and a publishing agreement is the cost to the company of acquiring rights from the artist or writer. In a recording agreement, the record company is paying for the recordings to be made and then incurring large marketing and promotion costs (including videos) on top. Even with a new artist signed to a “major” record company these costs could easily total £1,000,000. Accordingly, if the recordings sell badly the record company will almost certainly lose a lot of money.

Publishers on the other hand acquire copyrights in compositions (songs) as compared to the sound recordings of those compositions. It does not cost anything (other than a writer’s skill and creative energy) to write a song. Therefore, the only cost to a publisher when acquiring compositions, and therefore its only risk, is the payment of an advance to a writer.

Advances are simply a pre-payment by the publisher of the writer’s royalties. The advance is recouped from royalties otherwise due to the writer. The only exception to this is “the writer’s share” of performance income, which is usually collected by the Performing Right Society (“PRS”) and

paid to the writer direct irrespective of the recoupment position.

Royalties

There are generally speaking four types of income which the publisher will collect on the writer’s behalf. These are mechanical royalties, synchronisation fees, public performance income and sheet music sales. With the exception of sheet music sales, which usually attract a royalty of 10-12.5%, the writer can expect to receive between 55% and 90% (usually about 75%) of the publisher’s income. The most important point is the definition of “income” for this purpose. The royalty will either be calculated “at source” or on “net receipts”. The difference between each definition, in financial terms to the writer, can be enormous and the writer should seek on “at source” deal if possible.

Copyright

Most publishers will want to own the copyright in the writer’s songs for the life of copyright. So far as the writer is concerned, this means forever. Obviously if a writer is giving his songs to the publisher for life of copyright it is important that the publisher is contractually obliged to exploit the songs to their maximum potential. To a certain extent, the writer’s songs are his/her “pension” as the popularity of some songs never diminishes and others have a habit of “coming round again”. The importance of this to the writer cannot be underestimated. For this reason, lawyers have, in recent years, been able to persuade publishers to allow the copyright to “revert” to the writer after a certain period of time. Usually this is somewhere between 5 and 20 years after

the expiry of the Term. Furthermore, some publishers will agree to allow the copyright to revert if they have not been able to exploit the compositions or failed to earn the writer an agreed level of income within a specified period of time.