Music Publishing

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The wise professional songwriter understands the dynamics and economics of song exploitation: failure to do so can be perilous. This chapter explores the types of income that are generated in the music publishing industry and the kinds of deals commonly struck between publishers and songwriters. The attributes of a good publisher are summarized, suggestions for obtaining a publisher are made, and typical music publishing agreements are examined.

The first thing to understand about music publishing is that the copyright for a song, or *musical composition*, is separate and distinct from the copyright for the sound recording of that song. The U.S. Copyright Office makes a distinction between a sound recording and the underlying musical composition that has been captured within the sound recording. Normally, the copyright for the sound recording is owned by the recording artist or—if the artist is signed to a recording contract—the artist's record company. The copyright for the underlying music composition is typically owned by the songwriter, also known as the *composer*, or, if the songwriter is signed to a music publishing agreement or administration agreement, the music publisher to whom the songwriter is under contract. These two copyrights can and do peacefully coexist, and the industry has different customs and standards for exploitation of these different copyrights. The details of the relationship between the recording artist and the record company are the subject of other chapters in this book.

This chapter focuses entirely on the composer, the music publisher, and the musical composition. Composers are faced with a choice: either (1) self-administer their catalog of songs by building a network of contacts to solicit uses of their works, negotiating and drafting licenses and contracts on their own, collecting monies due, and policing infringements; or (2) enter into an agreement with a music publisher to take on these tasks of administering the composer's catalog in exchange for a fee, which is normally a percentage of the catalog's revenue.

Music publishing has been the major source of revenue for songwriters since the turn of the twentieth century, when vaudeville was the primary vehicle for exploiting songs. Music publishers of that era worked to persuade entertainers to publicly perform musical compositions to stimulate the sale of printed editions and player piano rolls. Over the years, the technology for merchandising music has constantly progressed, from inventions such as the phonograph record, radio, motion pictures, television, and videotape, to CDs and DVDs, satellite radio, digital downloads, and streaming technology. Songwriters and publishers have benefited from each of these new sources of income. One hit song can make a songwriter very wealthy, but only if the songwriter knows how to look after the myriad sources of available income.

Another benefit of making money in music publishing is the company that uses the music ordinarily does the marketing and promotion—which is the hardest part of selling music. Unlike sales of sound recordings, the economics of music publishing is that the compositions in the catalog are, in a sense, promoted by the publishing company's own customers. Record companies, film and television companies, video game manufacturers, and advertising agencies dedicate large amounts of funds to promote sales of their respective products, which cannot exist without the songs they have licensed from the music publisher. However, some music publishers are starting to invest in and independently release sound recordings.

Major financial institutional investors are always on the hunt for music publishing catalogs. Songs are like oil wells; they keep pumping revenues year after year. Current copyright law protects the owners of copyrights, and music publishers have been utilizing the infringement remedies guaranteed by current copyright law to protect their copyrights and their future revenue. Hence, music publishing is one of the few healthy areas of the early twenty-first century music industry.

Music publishing has been described as the real estate of the record business. This analogy is quite apt, because, like real estate, music publishing catalogs:

- generally increase in value over time;
- generally are not affected by short-term market fluctuations;
- can be used to borrow money against the future income of the catalog (similar to a mortgage on real estate) because of the steady, predictable flow of income over time;
- have a predictable tax basis;
- can be used to make money in multiple ways at the same time; and

- have the potential to realize sudden, large gains in value due to market conditions.

One advantage of music publishing catalogs, compared with real estate, is the low maintenance costs of the catalog, once the initial purchase price has been paid. Once the music publishing company has paid the songwriter the advance cost of obtaining the rights to the song, exploitation costs for that song are rather low.

Categories of Music Publishing Income

There are eight major categories of music publishing income. The first seven categories are each referred to as *small rights*: (1) mechanical royalties, (2) performance rights, (3) samples and interpolations, (4) synchronization, (5) print rights, (6) lyric reprints, and (7) new media.

The eighth category is known as *grand rights.*

Mechanical Royalties

Record companies pay songwriters *mechanical royalties* based on the number of units sold to the public that contain songs written by those songwriters. During the heyday of the recording industry, mechanical royalties were the most valuable of the small rights. The value of this small right, however, has significantly eroded since the advent of the digital streaming revolution.

The current statutory rate for mechanicals is 9.1 cents per song or 1.75 cents per minute, whichever is greater. The U.S. Copyright Royalty Board adjusts the mechanical royalty rate every two years, with such adjustments normally rising in accordance with the rise in the cost of living. However, since the economic downturn in 2008, these rates, which were enacted on March 1, 2009 by the copyright royalty judges, have remained unchanged. In other words, if the song is longer than five minutes, the writer is entitled to more than 9.1 cents per unit sold. For example, if a song were included on a platinum album (one million units sold), the songwriter(s) would normally be entitled to $91 thousand. This royalty payment is for just one song; if, for example, the songwriter(s) wrote five songs that were included on the same platinum LP, the amount owed would be $455 thousand. This amount would be divided among the songwriters in proportion to their respective writer's shares. If a songwriter is a 50% co-writer of one of those songs, she or he would be entitled to $45,500.

Dividing Mechanical Royalties among Songwriting Teams

Since most of today's Hot 100 songs are written by songwriting teams, songwriters customarily divide mechanical royalties with co-writers. In order to avoid disputes and delays in collection of mechanical royalties, the wise legal practitioner advises songwriter clients who collaborate with other songwriters to sign a *songwriter split letter*, which details each co-writer's respective percentage share of the completed musical composition. Nearly all record companies honor properly drafted split letters, and most major label record companies insist on receiving them.

Failure to sign a split letter could easily result in (1) an inability to collect money due; (2) overclaims (when all parties' claims to royalties exceed 100%), which result in none of the co-writers receiving any money until the total co-writers' percentages of the composition equal 100% and all potential payers are notified; and (3) recriminations and disputes between otherwise successful songwriting teams, whose relationship degenerates from collaborative brilliance to petty disputes over the value of each respective co-writer's contribution to what became a hit song. The time to complete and sign a split letter is when the song is initially completed, even if that means 3:00 a.m. in a recording studio while the co-writers are packing up their instruments. That is the time when most or all of the co-writers are actually able to be found because they are together for what may be the only time, it is when the respective contributions of each co-writer will be more accurately assessed by the parties, and it is before the song becomes a "hit" and the temptation of human nature to claim credit for the song's success (and the greed that accompanies it) prevents the parties from being reasonable about the realistic level and value of their respective musical contribution to the entire composition.

Another issue, though rare, can occur when copyright infringement suits are brought against a team of co-writers, but the respective contributions of the lyricist and musician are totally different. Therefore, it makes sense for each writer to warrant the originality of his or her contribution, should claims later develop, as they often do with hit songs.

Normally, each time a new artist records a new version (*cover*) of the song, the original writers receive mechanical royalties at the full statutory rate, based on the number of sales of the new artist's recordings. All songs contained on an album garner the same amount of mechanical royalties; it does not matter whether the song is the single, music video, or "emphasis track."

Controlled Compositions

One discount to mechanical royalties, unique to North American record companies, applies when songwriters who are also recording artists or record producers grant a 25% discount from the statutory mechanical rate to their record companies

when the record company releases records containing songs written by the songwriter /artist. Songs subject to this discount are known as *controlled compositions.* The controlled composition discount generally reduces the mechanical royalty amount payable by the record company from 9.1 cents to 6.825 cents per unit sold. Further, a record company commonly sets a cap of ten or eleven on the number of controlled compositions on an album for which it will pay mechanical royalties. In cases where songwriter/artists compose all of the songs on albums subject to a 25% rate discount and an eleven-song cap, the pool of songwriter mechanical royalties is thus limited to 69 cents per record, to be divided among the record's various songwriters in accordance with their particular deal, the application of controlled composition rates, and the cap.

Also, the concept of controlled compositions is now more frequently limited to physical sales (i.e., compact discs), with digital downloads paid at full statutory rate. As the music industry goes digital, the concept of payment on albums becomes less relevant since consumers can purchase, download, and stream songs on an individual basis.

Given all of these factors, the economic reality for songwriters is far less lucrative than rumored, and the law is merely a guide to music industry custom and practice. Therefore it behooves the songwriter to retain experienced counsel to review the record company's proposed mechanical license prior to agreeing to the terms and conditions of the license. The theory behind controlled compositions is antiquated, because in today's market the primary method of consumer consumption is single song streams or download, rather than the prior normal and customary consumer consumption being the two-song single, the five-song EP or the ten or more song LP. Major labels have come to accept this fact, and they now customarily agree to pay 100% of the full statutory rate to songwriters for sales of single-song downloads.

Collection of Mechanical Royalties

Once a songwriter has signed a contract with a music publisher, the publisher takes over the responsibility of collecting all mechanical royalties due to the songwriter, either by issuing licenses and collecting royalties itself or by subcontracting the licensing right to a clearinghouse agency such as the Harry Fox Agency Inc. (HFA). In the United States, mechanical income is paid to a composition's publisher by the record company that manufactures recordings of the composition pursuant to a contract between them called a *mechanical license*. A mechanical license is granted in lieu of a statutory *compulsory license*, which can be obtained via the U.S. Copyright Office after a song is first recorded.

Typical mechanical licenses require the record company to account to the publisher on a quarterly basis, and audits are permitted. "Account" here means to render a written statement that details the amounts collected, accompanied by royalty payment to the publisher. A mechanical license grants the rights to reproduce and distribute copyrighted musical compositions for use on CDs, records, tapes, ringtones, permanent digital downloads, interactive streams, and other digital formats supporting various business models, including locker-based music services and bundled music offerings.

In most foreign countries, mechanical rights income is computed and collected very differently than in the United States. Instead of a flat rate per song (the 9.1 cents /song/unit sold rate referred to above), the royalty is computed on a percentage basis. The formula varies from nation to nation, but is usually in the range of 6% to 8% of the wholesale sales price of the recordings, usually referred to as *published price to dealers.* Mechanical income is allocated evenly among the compositions on the recording. This income is collected and distributed by mechanical rights societies, which exist in most countries. The entity closest to a mechanical rights society in the United States is HFA.

The Harry Fox Agency

The Harry Fox Agency Inc., (HFA) is a U.S. provider of rights management, licensing, and royalty services. The National Music Publishers' Association (NMPA) established the agency in 1927 to license, collect, and distribute royalties on behalf of musical copyright owners. HFA issues mechanical licenses for products manufactured and distributed in the United States. Publishers that affiliate with the agency have access to licensing, collection, distribution, and royalty compliance services, as well as various online tools, to assist with catalog administration. Affiliated publishers also can opt in to other types of licensing arrangements including lyrics, guitar tablatures, and background music services. In July 2015, the Society of European Stage Authors and Composers (SESAC), a U.S. performing rights organization (PRO), purchased HFA for a reported $20 million, to become more competitive with ASCAP and BMI, its main PRO rivals.

Performance Rights Income

The copyright laws in the United States and similar laws in almost every other country require that copyright owners be compensated for the public performance of their music. Performing rights organizations (PROs) exist because it is impractical for copyright owners to locate and license the right to publicly perform their compositions to every separate user of their music. From the perspective of a business owner wanting to use or perform that music, it is impractical to keep track of copyright owners and negotiate individual licenses to authorize the performance of each copyrighted work. PROs represent songwriters, composers, and music publishers and sometimes act with quasi-governmental authority once authorized by national legislatures. They collect license fees from businesses that use music, including television and radio stations; broadcast and cable networks; concert promoters; new media, including the Internet and mobile technologies; satellite audio services like SiriusXM; hotels, bars, restaurants, and other venues; digital jukeboxes; and live concerts. After deducting their costs of administration, PROs distribute these license fees as royalties to the songwriters, composers, and music publishers they represent.

The United States has four PROs: ASCAP, BMI, SESAC, and the recently formed Global Music Rights. These organizations collect public performance income and distribute their collections in proportion to the success of each composition they license. (SESAC and Global Music Rights are for-profit entities, while ASCAP and BMI are effectively non-profit.) Smaller nations tend to have only one PRO each. However, the landscape of royalty collection in this century is shifting daily. You can now draw up licenses and collect royalties on a pan-European basis, rather than using the old-fashioned "territory by territory" foreign subpublishing deal.

The Kobalt Music Group, the London-based startup that has built big-data technology to track and collect digital music royalties from across multiple streaming platforms, recently acquired one of the main collection agencies in the United States, the American Mechanical Rights Agency. The new organization, renamed the American Music Rights Association, will collect royalties directly for songwriters and as this goes to press is concentrating on collecting digital income earned in Europe.

PROs divide performance income so that 50% is paid directly to the composer (writer's share) and 50% to the publisher (publisher's share). PROs collect the fees, and then divide the money and distribute it directly to their member songwriters and publishers, based on the number of public performances of each particular song as discerned through a combination of census surveys—complete counts of public performances—and sample surveys.

One anomaly of the U.S. system compared to those in the rest of the world is that performance revenues are not paid for performances in motion picture theaters. This is the result of a case, *Alden-Rochelle, Inc. v. ASCAP*, 80 F. Supp. 888 (SDNY 1948), which occurred because ASCAP was found to have acted in a monopolistic fashion.

Foreign countries have their own performance rights societies, such as GEMA in Germany, JASRAC in Japan, and SACEM in France. The U.S. societies generally have reciprocal agreements with overseas societies, which allow them to collect overseas performance rights income on behalf of their members, and almost all writers receive their worldwide performance income from the one PRO the writer elects to join. Almost all domestic publishers have subpublishers—some of which are wholly owned subsidiaries—that collect performance and all other income in foreign territories. Some publishers sign directly with foreign societies, and their companies are administered by the subpublishers: they do so to obtain such benefits as unallocated income, also known as *black box* revenues, which are available only to members of the foreign collecting societies.

Songwriters generally join a PRO when they get their first recording or placement in a film, commercial, TV program, or video. It is the publisher's job to register musical compositions with the PRO. The registration process is quick, painless, and primarily done electronically.

For example, the United States' second-largest PRO, BMI, has been in operation for more than seventy years. BMI currently represents more than 700 thousand copyright owners and their more than 10.5 million musical works, and its, as well as ASCAP's annual revenue collection, exceeds $1 billion. Like other PROs, BMI licenses new media and streaming services, such as Spotify, Pandora, and satellite radio service SiriusXM.

However, PROs do not collect every use of music in electronic media. Specifically, no payment is currently made for the following types of performances:

- Cue, bridge, or background music on radio
- Partial performances of popular songs on radio
- Station IDs or public service announcements in any medium
- Promotional announcements on radio or on local broadcast, cable, or satellite TV

Another difficulty in twenty-first century music publishing is the balkanization of the myriad of new media methods of distribution and the lack of consistent, harmonized laws regarding payment and collection of revenues stemming from

new media. Songwriters receive infinitesimally small fractions of pennies for streams on services like Pandora and Spotify, meaning it takes literally thousands of streams to earn a buck. YouTube's payment scale for video plays is based on a share of advertising revenue, with the songwriter's share being extraordinarily small. One recent client was a 40% co-writer of a hit pop/rap song that was the featured single on a *Billboard* 200 no. 1 recording artist's album, and the music video for that song was played nearly 900 thousand times on YouTube. The co-writer's share of this royalty—$12.94—paid by BMI, was hardly enough to buy lunch!

Samples and Interpolations Income

Samples occur when other artists incorporate some or all of a songwriter's song into their new work by using a digital recorder/sampler. *Interpolations* occur when other artists incorporate some or all of a songwriter's song into their new work by replaying and re-recording some or all of the original work. The creator of the new work must get permission, known as *sample clearance*, from the original songwriter(s) to include a sample or interpolation. This permission is usually accompanied by a negotiated, up-front license fee and a percentage share of ownership of the new composition.

Sample and interpolation license fees can range widely, from $0 to the low six figures, depending on the depth of the use and the relative negotiating leverage of the parties. Sometimes swap arrangements are negotiated, whereby one party samples another party's music in exchange for a future IOU of another sample, musical guest performance, or producer's services to be traded back. In other words, business arrangements in sample agreements can be nearly as creative as the uses of the samples within the music. It is also customary for the party requesting the sample clearance to grant a percentage of ownership of the copyright (and a corresponding share of the new composition's future income) to the party whose composition is being sampled.

Once a songwriter has signed a contract with a music publisher, the publisher takes over the responsibility of clearing samples and interpolations. Clearance procedures consist of negotiating the sample and interpolation license fees, drafting the license agreements, and collecting all funds due. Clearance companies will do this for artists, producers, and record companies. In the world of hip hop, samples have become an everyday occurrence. Major record companies dedicate human and other resources to the investigation, research, and clearance of samples, and a cottage industry of websites, clearance companies, enforcement firms, musicologists, and litigators has grown up around these prevalent uses.

Legally, the inclusion of samples or interpolations without permission of the original copyright holder constitutes copyright infringement whether the infringing release was offered for sale or was merely a promotional giveaway effort. So it behooves record companies, recording artists, publishers, and songwriters to carefully monitor their catalog of works to ensure they are properly compensated for such uses. Conversely, the loss stemming from a copyright infringement claim resulting in a court judgment can be financially devastating. All parties involved in the release of new music are well advised to introduce procedures designed to confirm all rights in the recordings prior to release, to avoid being entangled in time-consuming and expensive litigation. Recently, several courts in the U. S. (over Madonna's song "Vogue") and overseas (concerning German

Production Libraries and Re-titling

Many composers are in stiff competition with each other for a few prized placements of their music in films, television shows, advertisements, and video games. (See the "Synchronization Income" section below.) Due to the downsizing of the music industry in the past fifteen years, many former record company, music publishing, and management personnel have reinvented themselves as music production libraries or synchronization placement services. The deal seems like a good one—these libraries offer to solicit audiovisual synchronization licenses that will place the composer's music in movies, TV, ads, or games, on a commission-payment, non-exclusive basis. The only catch is that these libraries insist on giving the composer's musical compositions a new title so that the library can track all of the payments resulting from the placement's various license rights and sources of income, to ensure that the library is commissioning the correct use of the song. The difficulty is that re-titling often ends up confusing the PROs, whose listening machines cannot differentiate between titles and only recognize the actual sound of the music. Accordingly, payments and revenue streams for re-titled compositions can turn into an accounting and payment disaster.

electronic music pioneers Kraftwerk) have issued rulings that carve out "fair use," "de minimus," and other exceptions to the general rule that all samples must be cleared. The question of whether there will be continuing erosion of sample owners' rights is expected to continue to be a hot topic in future litigation.

Synchronization Income

Synchronization income is the money users of music pay in exchange for the right to use compositions in motion pictures, dramatic presentations on television, advertising, video games, and other audiovisual presentations such as interactive websites and mobile applications. The so-called synch right for a composition to be contained in a major motion picture can vary from zero to hundreds of thousands of dollars, and the attendant exposure can stimulate the generation of additional revenue from those areas discussed above. TV commercials can be particularly lucrative for a songwriter, and fees for TV commercial synchronization rights for well-known songs can range from $50 thousand to millions.

Typically, the synchronization fee will be on a most-favored-nations (equal) basis with the master recording, which must be licensed at the same time. That is, for each synchronization license, a companion license called a *master use license* must be obtained from the owner of the copyright in the composition's sound recording. The recording artist or the artist's record company traditionally owns and controls the sound recording copyright, a separate copyright from that of the underlying musical composition. Both the synchronization and the master use licenses must be obtained simultaneously because both are needed to be used in timed accompaniment to the images in order to create the audiovisual production. One cannot exist without the other, so the producers of audiovisual productions need to obtain both licenses.

When films, television shows, multimedia CD-ROMs, video games, Internet websites, and other audiovisual media use a songwriter's music to accompany the images contained in their productions, the required permission to do so is usually accompanied by a negotiated, up-front license fee. Major film company synchronization payments are as low as $5 thousand. However, in the case of major recording stars, the synchronization fees can be in the mid six figures and more. U.S. television producers generally pay synchronization license fees in the range of $500 to $10 thousand per use. Video game synchronization fees average approximately $1 thousand to $10 thousand per use. (Note that rates change over time, so the publisher and songwriter need to keep abreast of current market conditions.)

Once a songwriter has signed a contract with a music publisher, the publisher takes over the responsibility of clearing synchronization. Clearance procedures consist of negotiating the synchronization license fees, drafting the license agreements, and collecting all funds due.

Synchronization uses invariably mean there will be performance royalties as the work is performed on television and in movie theaters outside the United States. As mechanical royalties erode due to reduced sales of physical LPs, physical singles, and permanent downloads, synchronization has become one of the most significant of the small rights. Nevertheless, film and TV music supervisors are quick to note the composition must "serve the film," meaning a so-called hit song might be passed over in favor of a more obscure composition that is a better lyrical, tempo, genre, or rhythmic fit for a particular scene.

Print Rights

Sheet music is more common in jazz, classical, and pop music genres than in hip-hop, R&B (rhythm and blues), and country and western. Once a songwriter has signed a contract with a music publisher, the publisher takes over the responsibility of soliciting and arranging for sheet music manufacturing, through agencies and other companies that specialize in this task. The publisher hires the sheet music manufacturer, negotiates the license fees, drafts the license agreement, and collects all funds due.

Printed music (or the digital equivalent thereof) can contribute substantial earnings to a songwriter. Today only a few companies manufacture and distribute printed music across the United States; they include Alfred/Warner Publications, Hal Leonard, and Music Sales.

The publisher that licenses to one of the major print outfits usually makes 20% of the suggested retail selling price (RSP) for pop single sheets. Print music is generally sold at the wholesale price of 45% to 50% of the RSP. In real-world dollars, songwriters earn approximately 12 to 80 cents per sheet sold.

A publisher that does not print and manufacture its own editions but licenses such rights to another company is customarily paid 20% of the wholesale selling price, which is divided equally with the songwriter.

For general folios, songwriters are generally paid 12.5% of the wholesale selling price of the edition (though some contracts pay on the RSP). Education and compilation editions usually bear a royalty of 10% to 12.5% of the RSP. Electronic sheet music is now readily available.

Lyric Reprints

A negotiated fee is paid to songwriters for permission to reprint song lyrics, either in album liner notes, on websites, in sheet music folios, in concert programs, and even in greeting cards, on t-shirts, and wherever else lyrics might be printed or used. Trademark applications or legal issues may apply in such uses, so it is wise for composers who self-publish their catalog to consult with expert counsel well-versed in intellectual property issues. Once a songwriter has signed a contract with a music publisher, the publisher takes over the responsibility of clearing lyric reprints. As with print rights, clearance procedures for lyric reprints consist of negotiating the reprint license fee, drafting the license agreement, and collecting all funds due.

New Media

New uses of copyrighted materials are developing at a rapid pace, and these generally digital uses can generate additional royalties and fees for copyrights owners. These new uses include, but are not limited to, items such as mobile telephone monophonic ringtones, polyphonic ringtones, ringbacks, master ringtones, digital downloads, satellite radio, and mobile apps. In some cases, U.S. publishers can collect on behalf of their songwriters for these new uses in a traditional way. For example, PROs, which have traditionally dealt with mechanical licenses and performance royalties, have also begun issuing licenses and collecting royalties for *digital licenses.*

The laws governing the World Wide Web and digital transmission of information vary widely from nation to nation, thus further complicating this category. Because these rights are still developing, and hard bargaining is occurring on a daily basis, it is too early to state with any certainty what the model will be for calculation and payment of royalties in these nascent income centers. The speed of the advance of the law has not kept pace with the speed of the technology advances, and the chances of the law catching up any time soon is slim. The explosion of new technologies has obliterated the old system of retail record distribution primarily based on physical goods, and the conversion of retail music sales from physical goods to downloads and digital streams has similarly stretched the boundaries of royalty collection from these new revenue sources.

The U.S. Congress has not authorized a major revision of the Copyright Law in four decades. When the most recent version of U.S. Copyright Law was enacted in 1976, the Internet didn't yet exist, at least publicly, mobile phones were extremely rare, and wearable communications technology was the stuff of science fiction and comic strips. Various organizations lobby Congress frequently to influence the language of a proposed reformed copyright law in their favor, making Congress' task on these complicated issues even harder. Combining this complex issue with the recent legislative landscape of governmental gridlock has further dimmed the prospect of significant copyright reform.

The publisher issues all licenses regarding musical compositions; the owner of the sound recordings licenses the sound recordings to the digital service. Many of the digital services have sought to make the sound recording licensor responsible for paying music publishing royalties. Because the methodology is still evolving, any licenses granted should be limited in time and subject to review and renegotiation should circumstances change due to technological advances.

Grand Rights

Songwriters receive a negotiated fee for permission by others to publicly perform, in whole or in part, dramatic works that combine the songwriters' musical works with dramatic settings (for example, together with staging, dialogue, costuming, special lighting, or choreography). Such works include musical comedies, operas, operettas, and ballets, in which the action depicts a definite plot and the composition's performance is woven into and progresses that plot and its accompanying action. Many successful Broadway theatrical productions based on the music and lyrics of successful songwriters have been launched; for example, *Mamma Mia!* (featuring the music of Abba); *Movin' Out* (Billy Joel); *Jersey Boys* (Frankie Valli & the Four Seasons); *Love* (the Beatles); *We Will Rock You* (Queen); and *Beautiful* (Carole King).

Once a songwriter has signed a contract with a music publisher, the publisher takes over the responsibility of clearing grand rights. As with most small rights, clearance procedures for grand rights consist of negotiating the license fees, drafting the license agreements, and collecting all funds due.

Foreign Income

The foregoing sources of income occur throughout the world. Domestic publishers enter into foreign licensing or subpublishing agreements with music publishers that operate outside the United States. (Canada is often treated as the "fifty-first state" and U.S. publishers usually obtain simultaneous Canadian rights when they obtain U.S. rights.) Shrewd and successful commercial songwriters often retain foreign rights and make their own subpublishing deals, which can provide substantial supplemental income in the form of territorial advance payments or more efficient local collection efforts.

In the past, subpublishing deals were made nation by nation, so songwriters had to cobble together foreign publishing representation through a series of territorial contracts. Today, subpublishing deals can be made in groups of nations that are often amalgamated due to their common borders or language—for example, Scandinavia (Norway, Denmark, Sweden, Iceland, Greenland, and Finland); "GAS" (Germany, Austria, and Switzerland); or the Indian subcontinent (India, Pakistan, Bangladesh, and Sri Lanka). A composer can also collect different streams of income through pan-European licensing, directly join various foreign societies, or collect via revenue type, rather than the revenue's geographical source.

Other Rights

Publishing income can also be derived from public performance of sound recordings, neighboring rights and master rights.

Sound Recording Performance Right

The *sound recording performance right* is the right to have your sound recording performed in public (as opposed to the song or underlying composition embodied on the recording). Currently this right is limited in the United States to require that certain digital services–Internet radio, satellite radio, and cable TV radio– pay a royalty for the streaming of your sound recording. Terrestrial radio is not required as of yet to pay such a royalty. The sound recording performance right also allows for performers (both the main performer and background singers/musicians) on the recording to earn a royalty when that recording is used by these digital services.

SoundExchange, www.soundexchange.com, is the organization designated to collect and distribute these royalties to recording artists and record labels. The AFM & SAG-AFTRA Intellectual Property Rights Distribution Fund, www.raroyalties.org, collects royalties on behalf of both royalty artists (background singers) and session performers.

Neighboring Rights

Neighboring rights require payment to an artist for the use of the artist's recorded performances arising out of rental and lending communication (including so-called blank tape/home copying levies), public broadcast, public performance, digital broadcast, webcast, simulcast, and satellite and cable (re) transmission of the artist's recorded performances. Neighboring rights are separate and different from music publishing royalties, income, and fees related to or arising from underlying copyrights (also discussed above as performance rights royalties collected by PROs) or from artist royalties payable by record companies or record producers.

Master Rights

Regarding *master rights* the Library of Congress' Royalty Tribunal and other governmental and quasi-governmental bodies have set rates that are more favorable to owners of master recordings than to publishers of the underlying musical compositions. These master rights may seem more valuable than others at first impression, especially when a particular recording is new and receives significant radio airplay and digital streams. However, as time goes by, the value of the copyright in the underlying musical composition often overtakes that of the original recording, especially in the current environment of covers, remixes, synch deals, and remasters.

Types of Music Publishing Contracts

Three types of contracts govern deals between songwriters and publishers: (1) full publishing deal, (2) co-publishing deal, and (3) administration deal.

Full Publishing Deal

A full publishing deal is the traditional division of income between the songwriter and publisher: a 50-50 split. If we assume there is $1 of value in a songwriter's catalog, the writer's share of income equals 50 cents, as does the publisher's share. No matter what happens, writers always keep their writer's share. A full publishing contract gives the publisher sole ownership of the copyrights contained in the songwriter's catalog, for the total length of the copyright. Full publishing deals are rare today; most songwriters' attorneys negotiate for co-publishing deals (described in "Co-publishing Deals," below).

Full publishing contract transactions come in two species—*single-song agreements* and *long-term agreements.* Under both types of such agreements, the income is generally split as follows:

- Mechanical income. Publisher collects all mechanical income and pays composer 50%.
- Performance income. Publisher receives and retains all so-called publisher's share of performance income. Composer is paid directly by PRO and retains all such writer's share of performance income.
- Print income. Publisher collects all revenue and pays writer 50% of 20% of RSP per piano-vocal sheet music and 50% of publisher's receipts on folios and other multiple-composition editions when licensed to a third party.

- Synchronization income. Publisher collects income and splits 50-50 with composer.
- Foreign income. Net receipts (amount received by or credited to publisher from subpublisher) are split 50-50 with composer. Most deals are now at-source or modified receipts, meaning foreign share is computed as being received in country where revenue is earned, that is, without additional subpublishing or other administrative charges being deducted. Subpublisher typically doesn't take more than 10% to 25% of monies earned in its country.

In *a single-song* deal, the publisher owns the composition copyright for the term of its copyright, subject to the possibility of its reversion to its composer thirty-five years after its publication (its first commercial distribution) or forty years after its assignment (transfer), whichever is earlier. Some *long-term* songwriters' agreements provide that compositions created pursuant to such agreements are *works made for hire* for the publisher and, hence, incapable of being recaptured by the composer. However, the trend over the last decade is to provide that the songs will revert to the writer after a period of time, somewhere in the range of seven to twelve years. If the songwriter is not also a recording artist, negotiating reversions can be difficult. Normally such agreements last for one year, with the publisher holding two to four one-year options. The publisher owns and controls all compositions the songwriter creates during the term.

Under most such agreements, the writer receives a cash advance on signing the deal, as well as additional cash each time the publisher exercises a subsequent renewal option. Some publishers and writers opt to have the advance paid as a weekly salary rather than a lump sum. The recent trend in deals of this type is to pay writers little, if any, advance.

Writers want these deals because they offer security and, ideally, promotion of their songs. Long-term writer deals and co-publishing deals are commonplace in Nashville, where cover recordings more commonly occur. In Nashville, typical deals for emerging writers start at $10 thousand to $15 thousand per year. Outside that locale, long-term songwriter agreements are few these days for creators who do not also have record deals with major companies or regular success getting others to record their music. Music publishers want publishing deals with writers, producers, and artists that can create *pipeline income*—getting songs regularly *placed* (recorded and released to the public).

Top producers that write or can obtain publishing rights on songs they record are also highly sought after by publishing companies. Recently, twenty-first century music publishers tend to act in a way that resembles a mortgage bank: In determining who to offer deals to or how much advance to pay, they tend to focus on the songwriter's preexisting deals, the songwriter's projected uncollected future earnings from his or her catalog's pipeline revenue, and the *net publisher's share* (*NPS*) of the songwriter's catalog—the size of the songwriter's percentage of jointly written musical compositions. This behavior is vastly different from the "good old days" when music publishers focused on developing talented songwriters, amassing a catalog of commercially viable songs, and then sending a small army of salespeople, known as *song pluggers*, to visit recording studios, recording artists, and record companies to place the compositions on albums in order to generate mechanical royalties, performance royalties, and other ancillary income. In short, it is not getting any easier to attract the attention of a major publisher, and many talented songwriters continue to labor in relative obscurity. Even if a songwriter is signed to a publishing deal, the songwriter needs to network and maximize and capitalize on personal relationships and to advocate for deals on his or her own behalf.

Songwriters may enter into single-song agreements with or without receiving advances; there is no common industry standard.

Under both types of agreements, the publisher administers the compositions subject to the terms of the agreement. *Administration* means the publisher issues all documents and contracts affecting such compositions and collects all income (other than the writer's share of performance income) earned by the compositions.

Co-publishing Deal

These days, the norm for writers is a *co-publishing deal*, under which they hold on to half of the ownership of the copyrights in their catalogs, in addition to half of the publisher's share of income (25% of the total value of the catalog), which in this example is 25 cents of each dollar. That is, the writer ends up with 75% of the pie (all of the writer's share, which is 50% of the total, plus half of the publisher's share, which is 25% of the total). The music publisher thus ends up with 25% of the total funds to be collected (half of the publisher's share).

Under co-publishing agreements, as in standard agreements, the publisher administers the compositions subject to the agreement. However, the songwriter is typically paid 75% of the mechanical income, print income, and synchronization income derived from the composition and, in addition to the writer's share of performance income, receives 50% of the publisher's share of performance income. Usually, the publisher and songwriter own copyrights to the compositions jointly—but

what really counts is who administers the composition and who has the right to collect income from that administration. Often, the publisher will charge an administration fee of 5% to 10% for services rendered, but such service fees are negotiable.

Co-publishing agreements can encompass one song, a number of stated songs, or all compositions written over a period of years as in a long-term songwriter's agreement.

Many modern co-publishing deals provide for a reversion of copyrights to the songwriter anywhere from seven to twelve years after the song is first delivered to the publisher and provided the publisher has recouped all advances to the songwriter. The advances are in the same range as discussed previously. Superstar acts and writers can get advances in the high six or even seven figures.

Administration Deal

Many songwriters enter into *administration deals*, in which the publisher does not share in ownership of the songwriter's copyrights. Therefore, the pie is not divided, and the songwriter retains 100% of the catalog. The administrator is merely responsible for negotiating contracts, collecting monies, and accounting to the writer based on these collections. Some administrators will also solicit uses of the music in the catalog—known as *pitching songs*. The administration fee generally varies from 10% to 20% of the amount collected by the administrator. Administration deals usually have terms of three to ten years. Many administration agreements provide that, if the administrator secures a cover recording, the administrator will retain administration rights for a longer period of time (which could include the life of the copyright) and obtain a higher percentage of the income generated by the cover the administrator secured.

Administration agreements are difficult to obtain for songwriters who have no independent means of exploiting compositions subject to such an arrangement. For singer-songwriters who have recording deals or songwriters who can get their songs covered, such transactions are often the most beneficial for their long-term financial prospects. The major music publishers prefer full publishing or co-publishing deals compared with administration deals. However, administrators in Los Angeles, Nashville, and New York will do so.

Points of Negotiation

Royalties and advances are always negotiable. Under any type of deal, a songwriter will commonly ask the publisher to pay an advance on the songwriter's future earnings in order to obtain the exclusive rights to administer the catalog, as described above. The advance amount a music publisher is willing to pay to obtain a catalog (or the exclusive right to publish works to be created in the future by a songwriter) depends on whether

- the songs contained in the catalog are already earning income;
- there is as yet uncollected income for previously contracted uses of the songs in the catalog (pipeline income);
- the songwriter has a proven history of writing hit songs;
- the songwriter is willing and able to collaborate with other songwriters or artists;
- the songwriter is also a recording artist, and signed to a recording contract with a major record company;
- the songwriter is also a record producer, delivering hits to various record companies on behalf of a variety of recording artists;
- the songwriter is able to write songs that can be recorded and performed by multiple artists, either on recordings or in live concert settings; and
- the publisher will take an ownership stake in the catalog and, if so, whether the stake will be a full publishing (100%) stake or a co-publishing (50%) stake.

The more "yes" answers given to the above questions and the higher a publisher's evaluation of the songwriter's future income potential, the higher the advance. The publisher is always entitled to recoup all advances, dollar for dollar, from all income derived from the songwriter's catalog. The contracts between songwriters and music publishers also allow publishers to cross-collateralize all earnings from a given songwriter's catalog against all advances to that songwriter. Therefore, a publisher's risk, which is limited to the advance paid and other promotional costs, is spread over all songs contained in a songwriter's catalog, and no further advances are due until full recoupment is achieved.

A songwriter should always attempt to obtain a rights reversion for any composition subject to a single-song, long-term publishing, or co-publishing agreement when any such composition has not been commercially exploited within a specified time period. A composer should only allow translations of, or the addition of new lyrics to, any composition with his or her prior written consent, or at the least be notified of a translation, since in some countries a translator or lyricist may register and receive income from a translation that is never performed, sold, or even recorded due to the nationalistic policies and regulations of various performing rights societies. The translator and subpublisher may receive compensation from performances of the original version or share in black-box or general unallocated income, which can be sizeable. (Italy is one notable example where this can occur.)

As to new lyrics, a writer should know the reasons for having such written and have the opportunity to write such lyrics in any language in which he or she is fluent. Some writers are touchy about their materials being used in commercials and would want to approve alterations that might devalue the work. A clause permitting translations, as long as there is no diminution of income by the writer, should be acceptable to most writers. But be careful: If the song is attributed as "words and music" by two songwriters, and the contribution of each is separate—one for music and one for the lyrics—then the song should have the two distinct contributions registered separately so the song's composer will not suffer if there are translations, even if the lyricist may. Despite the potential financial consequences, some teams prefer to retain the "words and music" attribution. When two or more people collaborate to write a song, each owns a share of the whole; it is unusual to have one co-writer allow changes or translations without the approval of all other co-writers, even if only one writer contributed lyrics.

Points in publishing contracts vary in importance among publishing companies. Similarly, songwriters differ on the priorities of the numerous issues involved in a songwriting agreement. Songwriters should have advisors, such as attorneys, personal managers, and business managers, to counsel them on the best methods of navigating the intricacies of music publishing.

Self-Publishing

Some composers are capable of creating and administering their catalogs. The music publishing industry is not so difficult that its mechanics would confound an attentive student. It is difficult, however, to obtain the commercial exploitation of compositions. For composers interested in and capable of properly administering and promoting the products of their artistry, self-publishing can be a viable alternative to traditional publisher arrangements. But in practice, few writers are successful going it alone.

When a record is released on an independent label, financed by the artist, self-publishing makes sense. Universal copyrights are valuable assets. It is inadvisable to transfer or lessen these rights without a good reason.

For most artists, however, finding a good publisher is a better bet.

Finding a Good Publisher

Music publishers play an important role in today's music industry. First, they have the best success at securing covers. Moreover, a songwriter usually needs a go-between, a critic, a cheerleader, and a business manager. Good music publishers are enthusiastic and knowledgeable about their artists and their music. They have competent royalty departments and reputations for honesty; pay for or advance money for demos; have aggressive professional managers who work to get songs to record producers and their artists; are responsive to the needs, suggestions, and questions of their writers; and deal with the foreign territories.

Finding a publisher is not an easy task for a songwriter. Generally, the songwriter must solicit publishing companies' talent scouts and garner their interest. Many industry publications have extensive listings for publishing companies, but more often than not, these companies' talent scouts are so inundated with demonstration recordings and solicitations that they will not accept material directly from songwriters they do not already know, especially if a writer's songs are not already being played on the radio, contained on a hit album, or generating thousands of downloads on an Internet site. To meet publishing company personnel and possibly develop such relationships, songwriters can attend music industry conferences and conventions such as MIDEM, South by Southwest, Millennium, NARM, ASCAP Expo, and dozens of others. But competition to be heard is stiff at these events too, and most songwriters find it difficult to persuade publishers to consider them for deals.

Accordingly, in many instances songwriters need intermediaries such as managers, booking agents, or lawyers to present material to publishing companies. The major music publishers are Universal Music Publishing Group, Warner/Chappell Music, Sony/ATV Music Publishing (which acquired EMI), Peermusic, BMG, and Ole. These are huge companies, some with over 1 million songs in their catalogues. Many smaller publishers are also very effective.

Songwriters, with their advisors, should work out a strategy to find a good publisher and to enter an advantageous agreement. Some personal managers are capable of finding reputable publishers and subsequently obtaining satisfactory agreements. The songwriter's music attorney also may be able to open doors to publishing companies. Representatives of the writer's PRO can be helpful, as can the recommendations of other songwriters.

Conclusion

Because music publishing agreements can be extremely technical, composers should always have a music attorney review any agreement *before* signing. Most importantly, composers should investigate carefully before choosing their advisors and business partners.

Resources

For Songwriters

Nashville Songwriters Association International (NSAI)
www.nashvillesongwriters.com
1710 Roy Acuff Place
Nashville, TN 37203
(615) 256-3354

We highly recommend NSAI, the world's largest not-for-profit songwriters' trade organization dedicated to the service of amateur and professional songwriters.

Songwriters Guild of America (SGA)
www.songwritersguild.com
201 Jamestown Park Road, Suite 100
Brentwood, TN 37027
(615) 742-9945

SGA is the oldest of the songwriters associations and is reinventing itself. It is not as active and vibrant as NSAI, but it is doing good work. It collects royalties for some composers.

SongwriterUniverse
www.songwriteruniverse.com
11684 Ventura Blvd. #123
Studio City, CA, 91604
(323) 656-1520

This is an interesting site with lots of good information for songwriters.

The Recording Academy
www.grammy.com
3030 Olympic Boulevard
Santa Monica, CA 90404
(310) 392-3777

The Recording Academy represents creators of all types, whether recording artists, producers, engineers, or songwriters. They advocate for legislation benefiting musicians, operate an educational foundation known as Grammy in the Schools, run a charitable wing called Musicares that benefits musicians who are victims of disaster or otherwise down on their luck, and issue the annual Grammy Awards. Members are admitted after an application and qualification process, and membership is allocated among thirteen chapters located in different regions of the United States.

For Publishers and Songwriters

Harry Fox Agency, Inc.
www.harryfox.com
40 Wall Street, 6th Floor
New York, NY 10005
(212) 834-0100
See web site for additional locations

For Publishers

The following two organizations—both recommended—have regular meetings on topics of interest to publishers.

Association of Independent Music Publishers (AIMP)
www.aimp.org
Los Angeles AIMP Office
P.O. Box 10482
Marina del Rey, CA 90295
(818) 771-7301

New York AIMP Office
485 Madison Avenue, 9th Floor
New York, NY 10022
(866) 594-6705

Nashville AIMP Office
1229 17th Avenue South
Nashville, TN 37212
(615) 828-0709

California Copyright Conference
www.theccc.org
P.O. Box 57962
Sherman Oaks, CA 91413
(818) 379-3312