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Musician's

BUSINESS
& LEGAL
GUIDE

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Music Publishing

BY NEVILLE L. JOHNSON

Professional songwriters must know the dynamics and economics of song exploitation. This chapter explores the types of income that are generated in the music publishing industry and the kinds of deals that are commonly struck between publishers and songwriters. The attributes of a good publisher are summarized, suggestions for obtaining a publisher are made, and a typical music publishing agreement is examined.

Music publishing has been the major source of revenue for songwriters since the turn of this 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 expanded with inventions such as the phonograph record, radio, motion pictures, television, videotape and compact discs. Now, digital transmission looms large on the retail horizon, and is well placed to be the dominant way by which music will hereafter be distributed. Songwriters and publishers have benefited from each of those new sources of income. As the complexity and size of the music publishing industry increases, so does the amount of money that can be earned within it. Today, one hit song can make someone a millionaire.

Music publishing is a beautiful way to make money because the record company ordinarily does the marketing and promotion of the song—the hardest part of selling music. The costs of music publishing are dwarfed by the massive manufacturing and promotion costs of selling music to the public. This is why publishing catalogs are so valuable and currently sell for 8 to 20 times their average annual income (calculated on an average, weighted basis of the preceding few years).

TYPES OF INCOME

There are four general categories of revenue in the music publishing industry: public performance, mechanical rights, print music and synchronization.

Performance Income

The copyright laws in the United States and similar laws in virtually every other country of the world require that compensation be paid to copyright owners for the public performance of their music. Performing rights organizations exist because it is impractical for copyright owners to license the right to publicly perform their compositions

to every music user separately. And it is impractical for music users to keep track of copyright owners and negotiate individual licenses to authorize the performance of each copyrighted work.

Therefore, music users throughout the world are licensed by, and make payments to, performing rights organizations. After deducting their costs of administration, these organizations distribute revenue to copyright owners and their publishers.

The United States has three performing rights organizations. ASCAP (American Society of Composers, Authors and Publishers), BMI (Broadcast Music Incorporated) and SESAC (formerly Society of European Stage Authors and Composers). These organizations perform the difficult task of collecting public performance income and distributing it in proportion to the success of each composition they license.

These organizations also license public performance rights to sister performing rights organizations that exist in other territories of the world.

The performing rights organizations divide performance income so that 50% is paid directly to the composer (writer's share) and 50% is paid to the publisher (publisher's share).

You will need to join a performing rights organization when you get your first recording or placement in a film, commercial, TV program or video. It is the publisher's job to register your compositions with your society. See the chapter, *Performing Rights Organizations: An Overview*, for more information.

Mechanical Income

Mechanical income is earned from the manufacture and sale of sound recordings. The current rate, payable for each recording of a composition that is distributed, is the greater of 7.55¢ for songs of five minutes or less or 1.45¢ per each minute or fraction thereof. The rates are set by the Copyright Royalty Tribunal and are periodically increased; future rates are as follows: January 1, 2002 to December 31, 2003, 8¢ for five minutes or less, 1.55¢ per minute for each song over five minutes; January 1, 2004 to December 31, 2005, 8.5¢ for five minutes or less, 1.65¢ per minute for songs over five minutes; January 1, 2006 to December 31, 2007 9.1¢ for songs under five minutes, 1.75¢ per song for songs over five minutes. Thus, for a recording containing 10 compositions of five minutes or less, 75.5¢ is paid in mechanical income to the publisher(s) of the compositions. If 100,000 albums are sold, \$75,500 is paid to the publisher(s) of the compositions on that album. In a typical publishing deal the songwriter as a writer will receive half this amount from the publisher, and more if the songwriter is also a copublisher.

In the United States, mechanical income is paid to the publisher of a composition by the record company that manufactures recordings of the composition pursuant to a contract between them called a mechanical license. Usually the record company is required to account to the publisher on a quarterly basis.

In most foreign countries, mechanical rights income is computed differently than in the United States. Instead of a flat rate per song, the royalty is computed on a basis that is usually 6% to 8% of the selling 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 of the world.

The entity closest to a mechanical rights society, in the United States, is the Harry Fox Agency, Inc. (www.nmpa.org/hfa.html), headquartered in New York City. Although

many American publishers issue their own mechanical licenses, most prefer to use this company, which, for a 4.5% fee, issues mechanical licenses to American record companies, and conducts audits of such companies to insure that proper payments are made. Harry Fox will also issue synchronization licenses, and collect on imported sound recordings.

Print Income

Printed music can contribute substantial earnings to a songwriter. Today the industry is concentrated in a few companies that manufacture and distribute printed music across the United States. A publisher who does not print and manufacture its own edition, but licenses such rights to another company can be paid the greater of (i) 80¢ or more per single edition sold; or (ii) 20% of the wholesale selling price, but the writer usually receives only 8¢ to 12¢ per single edition (and more if he or she is a copublisher). See discussion in the chapter, *Analysis of a Single-Song Agreement*. Electronic sheet music is now available; songwriters are usually paid on the same basis as above, with the major publishers paying low-ball royalties, however this business is as yet almost non-existent. This form of distribution will grow in importance in the years to come, but print music will still be important. The low royalties are unfair, as the costs of manufacturing and distribution are so much less. Expect these royalties to change for the better for composers as time goes by. For general folios, songwriters are generally paid 12.5% of the wholesale selling price of the edition (though some contracts pay on the retail selling price). Education and compilation editions usually bear a royalty of 10% to 12.5% of the retail selling price.

Synchronization Income

Synchronization income is the money paid by motion picture and television production companies and advertising agencies for the right to use compositions in motion pictures or in dramatic presentations on television. The "synch right" for a composition to be contained in a major motion picture can vary from nothing to \$250,000 and even more and the attendant exposure can stimulate the generation of additional revenue from those areas discussed above. Television commercials can be particularly lucrative for a songwriter, and fees of \$250,000 for the synchronization rights for the same are not uncommon.

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 a the 51st state, and U.S. publishers usually obtain 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 income.

MUSIC PUBLISHING AGREEMENTS

There are three types of contracts pertaining to songwriters: Songwriter agreements, copublishing agreements, and administration agreements.

Songwriter Agreements

These transactions come in two species—single-song agreements and long-term agreements. (See the chapters, *Analysis of a Single-Song Agreement* and *Analysis of an*

Exclusive Term Songwriter Agreement.) Under these agreements, the income is generally split as follows:

- **Mechanical Income.** Publisher collects all mechanical income and pays 50% to composer.
- **Performance Income.** Publisher receives and retains all of publisher's share of performance income. Composer is paid directly by the performing rights organization and retains all such writer's share of performance income.
- **Print Income.** Publisher collects all revenue and pays writer 8¢ to 12¢ per piano-vocal sheet music, and 50% of the publisher's receipts on folios and other multiple-composition editions where licensed to a third party.
- **Synchronization Income.** Publisher collects income and splits fifty-fifty with composer.
- **Foreign Income.** Net receipts (that amount received by or credited to publisher from subpublisher) are split fifty-fifty with composer. Most deals are now "at source" or modified receipts, meaning that the foreign share is computed as being received in the country where the revenue is earned, i.e., without additional subpublishing or other administrative charges being added.

In a single-song deal, the publisher owns the copyright in the composition for the term of its copyright, subject to the possibility of its reversion to its composer 35 years after its publication (its first commercial distribution) or 40 years after its assignment (transfer), whichever is earlier. Some long-term songwriter's agreements provide that compositions created pursuant to such agreements are works for hire for the publisher and, hence, incapable of being recaptured by the composer; however the trend over the last five years, and the majority of deals nowadays, provide that the songs will revert to the writer after a period of time, somewhere in the range of seven years. If the songwriter is not also a recording artist, then it will be difficult to negotiate reversions. Normally such agreements last for one year, with two to four one-year options being held by the publisher. The publisher owns all compositions created by the songwriter during the term. Under most such agreements, the writer is paid an advance on signing and with each option pickup, or a weekly salary (in the year 2001, \$20,000 to \$30,000 per year is the average for a fledgling writer, who receives a monthly advance against royalties). These agreements are common in Nashville, but there are very few long-term songwriter agreements these days for creators that do not also have record deals with major companies. On the other hand, those that get a deal with a major record company can virtually count on obtaining a copublishing agreement and a nice advance. Advances vary but can go as high as several hundred thousand dollars per album. Currently, there are approximately 1,000 long-term songwriter or copublishing deals in America.

Single-song agreements are entered into with or without advances paid to the songwriter: there is no common industry standard.

Under both types of agreement, the publisher administers the compositions subject to them. That is, 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.

Copublishing Agreements

Copublishing agreements differ in two material respects from the standard agreements described above. Under copublishing agreements, as in standard agreements, the publisher administers the compositions subject to such agreements. However, the songwriter not only receives the writer's share of publishing income, or roughly 50% of the gross revenues (except print revenues) of the composition, but also shares in that portion of what traditionally was the publisher's share of music publishing income. Thus, under such agreements, the songwriter is ordinarily 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.

Copublishing 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.

Administration Agreements

The most advantageous arrangement for a songwriter is an administration agreement. Under this type of agreement, the administrative activities of a songwriter's company are conducted by another publisher, which issues mechanical licenses, registers compositions with performing rights organizations, and collects its income throughout the world. The administrator collects all income but remits at least as much as a copublisher's share, and often more, to the songwriter's administered company (10% to 15% of the gross revenues is the percentage normally retained by an administrator).

Such agreements extend for three to five years, at the close of which all administrative rights to the compositions revert to the administered company. In practice, such agreements are difficult to obtain for songwriters that have no independent means of exploiting compositions that would be subject to such an arrangement. For singer-songwriters that have recording deals, or songwriters that can get their songs "covered" (recorded by others), such transactions are often the most beneficial and these are done frequently. The major music publishers do not do administration deals except for superstar writers. However, there are administrators in Los Angeles, Nashville and New York that will; the most successful is Bug Music, with offices in all three cities.

Points of Negotiation

Royalties and advances are always negotiable. A songwriter should always attempt to obtain a reversion of any composition subject to a single-song, long-term publishing or copublishing agreement when any such composition has not been commercially exploited within a specified time period. A composer should allow translations of, or the addition of new lyrics to, any composition only with his or her prior written consent (or at the very least be notified of the same), 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 and/or share in "black box" or general unattributed 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; the writer would want the opportunity to write such lyrics in any language in which he or she is fluent. Some writers are touchy about the use in commercials of their materials and would want to approve alterations that might devalue the work. A clause permitting translations, as long as there is no diminution income by the writer should be acceptable to most writers. But be careful, if the song is written "words and music" by a songwriter, and the contribution is really separate, one for music, and one for the lyrics, then the song should be registered this way as the composer of the music will not suffer if there are translations, while the lyricist may.

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.

SONGWRITER RESOURCES

Association of Independent Music
Publishers (AIMP)
(www.aimp.org)
P.O. Box 1561
Burbank, CA 91507-1561
(818) 842-6257

120 East 56th Street
New York, NY 10022
(212) 758-6157

California Copyright Conference
(www.ccc.org)
P.O. Box 1281
Burbank, CA 91507-1281
(818) 846-6783

Nashville Songwriters Association
International
(www.nashvillesongwriters.com)
1201 Nashville Avenue, Third Floor
Nashville, TN 37203
(615) 259-3354

Songwriters Guild of America (SGA)
(www.songwriters.org)
6430 Sunset Boulevard
Suite 705
Hollywood, CA 90028
(323) 462-1108

1222 16th Avenue South
Suite 25
Nashville, TN 37212
(615) 329-1782

1560 Broadway
Suite 1306
New York, NY 10036
(212) 763-7902

Songwriter Universe
(www.songwriteruniverse.com)
11684 Ventura Boulevard
Suite 975
Studio City, CA 91604

Tones
(www.tones.com)
Internet Cafe

For composers interested in and capable of properly administering and promoting the products of their artistry, self-publishing can be a viable alternative to the traditional arrangements with publishers, 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—do not transfer or lessen your rights to them without a good reason.

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, critic, cheerleader and 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 that work to get songs to record producers and their artists; and are responsive to the needs, suggestions, and questions of their writers.

Songwriters, with their advisors, should work out a strategy to find a good publisher and to enter an advantageous agreement with such. Some personal managers are capable of finding reputable publishers and subsequently obtaining satisfactory agreements. The songwriter's music attorney can often open doors to publishing companies. Representatives of ASCAP and BMI can be helpful, as can the recommendations of other songwriters. The Songwriters Guild of America, which has offices in New York, Nashville and Los Angeles, may also be helpful: they are on the side of authors. There are two publisher organizations in Los Angeles that have monthly meetings, and those interested in publishing and networking are advised to join or attend meetings of the California Copyright Conference and the Association of Independent Publishers (which also holds monthly meetings in New York).

Because music publishing agreements can be extremely technical, a music attorney should always be consulted to review any agreement a composer is requested to sign. Most importantly, composers should investigate carefully before choosing their advisors and business partners.

MECHANICAL LICENSE AGREEMENT

Date: _____

Composition Title: _____

Composer(s): _____

Gentlepersons: _____

We own or control the mechanical recording rights in the copyrighted musical composition referred to above (hereinafter referred to as the "Composition"). You have advised us that you wish to use the Composition pursuant to the terms of the Compulsory License provisions of the United States Copyright Act (Title 17) relating to the making and distribution of phonorecords. We accede to such use, upon conditions specified below.

1. You shall pay royalties and shall render detailed accounting statements quarterly, within forty-five (45) days after each March 31, June 30, September 30, and December 31 for the calendar quarter year just concluded, whether or not royalties are due and payable for such period, for phonorecords made and distributed.

2. You shall pay us at the following rate for each part embodying the Composition manufactured by you, distributed and not returned (except for promotional copies distributed without charge to radio and television stations):

_____ for a "single" recording;

_____ for a "CD" or "cassette" recording.

(NOTE: This is a tricky area. Do not get locked into a specific rate. You want to be paid the mechanical rate in effect as set by the Copyright Royalty Tribunal at the time of download or sale [and if you cannot negotiate that, then of manufacture] of the composition. Rates will always go up, and when they do, you should share in the increase. Many artists today are still locked in at the 2¢ rate that was in effect for many years.)

3. This license is limited solely to the recorded performance of the Composition on the phonorecord, which is identified as follows:

Record #: _____

Artist: _____

Label: _____

This license shall not supersede or in any way affect any prior agreements now in effect with respect to recordings of the Composition.

4. In the event that you fail to account to us and pay royalties as herein provided, we may give you written notice that, unless the default is remedied within thirty (30) days from the date of such notice, this compulsory license will be automatically terminated. Such termination shall render either the making or the distribution, or both, of all phonorecords for which royalties have not been paid, actionable as acts of infringement under, and fully subject to the remedies provided by the Copyright Act.

5. You need not serve or file the notice of intention to obtain a compulsory license required by the Copyright Act.

6. This license is specifically limited to the use of the Composition, and the sale of the recording within the United States of America, unless we grant you written permission to the contrary.

7. On the label affixed to each part manufactured by you, you will include the title of the Composition, our name as Publisher, the name of the performing rights society with which we are affiliated (_____), and the last names of the composer and lyricist.

8. You will not use or authorize the use of the title of the Composition in any manner whatsoever on the label, cover, sleeve, jacket, or box in which the recording is sold, except in a list of musical compositions contained thereon and then only in print of size, type and prominence no greater than that used for the other musical compositions contained thereon.

Very truly yours,

By: _____
(RECORD COMPANY)

We acknowledge the receipt of a copy hereof and the accuracy of the terms contained herein:

By: _____
(PUBLISHER)