



A Brief Overview of Artist Recording Contracts

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Although making and sharing music is a creative process, being an artist and making money from that art are two different things. Since recording contracts are the lifeblood of the financially driven music industry, artists should learn the basics of navigating through them.

I. Contract Basics¹

Regardless of the type of contract you are entering, there are some basic rules that always apply. First, always get something in writing. Although an agreement may be reached orally, as time goes by, the parties may remember

¹ See Michael P. McCready, Music Industry Contracts, at <http://www.music-law.com/musiccontracts.html> (last visited Nov. 3, 2005).

their obligations to the terms of the agreement differently. A writing serves as a memorial of the understanding between the parties. Additionally, courts are much more likely to enforce the terms of written contracts in the event of a dispute between the parties to an agreement.

Second, you should always understand the terms of a contract you are signing. Contracts must state what each party is going to do for the other, and what the parties are going to give to each other. Even though these terms are often discussed and negotiated before a contract is signed, the parties may have different ideas as to how these exchanges will be carried out, and it is better to have the details explicated on paper, which can save problems from arising at a later date.

It is useful to note, particularly with contracts in the music industry, that the record label will often present the terms in what it deems to be its “standard” form agreement. It is advantageous to the artist to negotiate the standard terms as the provisions often heavily favor the record company. Depending on how eager a label is to sign an artist, the bargaining power may shift enough to allow the artist to negotiate some of the provisions to a more favorable outcome. It is generally useful to review recording contracts with this in mind, and securing an attorney familiar with the music industry to assist in the negotiations is advisable.

II. Recording Artist Contract Basics²

An artist recording contract is generally a contract for the sound recording. A **sound recording** is the captured musical performance, whether this is done on a CD, digital download, ring tone, or other medium. Sound recordings do not include the actual physical material that contains the musical performance, but it does encompass the musical, spoken, and other sounds that are captured in the respective medium. It is important to distinguish agreements for the sound recording from other agreements, like publishing agreements, which are focused on the songwriter's rights in the written song.

In most recording contracts, an artist signs an **exclusive agreement**, which means that he or she will not be able to record for anyone else other than the record company during the **term** of the contract. The **territory** of most contracts is worldwide, meaning that the record company has exclusive rights to you as an artist throughout the world, for the length of the term.

Normally, the original term of a recording contract will last anywhere from one (1) to five (5) years, but will also reference a set number of albums to be released under the agreement. The record label will have the option to release the first album, and the contract will typically afford

² See Michael P. McCready, Record Contract Basics, at <http://www.music-law.com/contractbasics.html> (last visited Nov. 2, 2005); Marshall Brain, How Recording Contracts Work, at <http://entertainment.howstuffworks.com/recording-contract2.htm> (last visited Nov. 3, 2005).

the label a number of **options** that the label can exercise to activate subsequent contract periods, and additional albums. Thus, the label has the option to release as many albums as required by the contract, and depending on how many albums are envisioned in the original agreement, this could presumably last for a number of years. The label will exercise its options based on the success of the first album. If the album sells well, the label will exercise its option to record a second album, and so on. If the first album does not do well, the label may drop the artist unless the label sees enough potential to warrant another album. This structure favors the labels over the artists, as the label has a choice in exercising an option, but the artist does not. The logic behind this structure is that, if an artist does well, then the label wants to reap the benefits of their investment in that artist and share in the success over a long period of time.

A successful artist can and should to the extent possible attempt to negotiate terms that allow for flexibility and the ability to renegotiate should the artist have a successful album. The opportunity to revisit the agreement benefits the artist instead of being locked in for a longer period of time, and many labels would welcome the opportunity to re-negotiate to keep a successful artist happy.

Once an album is produced, it is the property of the label in perpetuity, absent a provision that allows the artist to recapture or purchase the masters after a number of years. Additionally, the contract will normally have some type of **lock-out clause**, which prevents an artist from re-

recording any of the songs on the album for five to ten years after the end of the contract. This essentially ensures that the recordings remain the property of the label for a *very* long time.

III. Recording Contract Details/Deal Points

A. Advance³

Typically, the larger record companies pay an artist a set amount of money during an album's development so that the artist can cover both personal and recording expenses and costs. In the past, labels would sign an artist, write an advance check as a signing bonus, and then pay the expenses to record an album. After some bands abused this by going way over budget on recording expense, labels have now rolled the recording budget *and* the advance into one fund, although the recording budget portion is not always provided to the artist in cash. The contract states that the artist gets one lump sum to record an album, and whatever isn't spent on recording becomes the artist's advance. This has proved to be a great incentive for bands to be efficient in the recording studio, but also requires the artist or band to be conscious of its spending for personal purposes. Once the artist receives the advance, it is not a great idea to spend it all on personal expenses, as this will greatly affect the budget for the album. Where possible, bands may want to ask for the

³ See Michael P. McCready, Record Contract Basics, at <http://www.music-law.com/contractbasics.html> (last visited Nov. 2, 2005); Marshall Brain, How Recording Contracts Work, at <http://entertainment.howstuffworks.com/recording-contract2.htm> (last visited Nov. 3, 2005).

advance to be paid in increments, rather than in a lump sum, to avoid uncontrolled spending.

The key thing to remember about an advance is just that: it is an advance. The label will look to be paid back, or recoup, this money before the artist is paid any royalties on actual record sales. If an artist is fortunate enough to negotiate an advance, there is much debate over how much of an advance an artist should take. It is important to note that the more money you take as an advance, the more money you have to pay back to the company (*see* “Further Deductions From Royalties” *below*) before receiving royalties. If you take a large advance and your album does not meet target sales, a label may be quicker to drop you. On the other hand, statistics show that only 5% of all records released by major labels go gold (500,000 records sold) or platinum (1 million records sold), and the advance may be the only money you actually receive from the label. In some instances, an artist may be able to negotiate a smaller advance for a higher royalty percentage. This offers the opportunity for the artist to make more money per album sold should the artist attain great success. In any event, it is wise to seek counsel on the issue of how to negotiate the artist’s advance.

B. Royalties⁴

⁴ See Michael P. McCready, Record Contract Basics, at <http://www.music-law.com/contractbasics.html> (last visited Nov. 2, 2005); Marshall Brain, How Recording Contracts Work, at <http://entertainment.howstuffworks.com/recording-contract2.htm> (last visited Nov. 3, 2005); Interview with Denzyl Feigelson, President, Artists Without A Label, at <http://musicians.about.com/library/weekly/aa042301a.htm> (last visited Nov. 3, 2005).

1. General Structure

Royalties on album sales are the main source of income yielded by a recording contract, unless the artist is also a songwriter or producer, and then there is the possibility that there will be money earned from publishing rights to the recorded songs or performances of those songs.

Publishing is a key component of making money in the record industry, but goes beyond the scope of this brief recording contract overview. In any event, for artist/songwriters, it is crucial to understand how publishing functions, as this may be the most viable stream of income for the artist.

Generally, the record label distributes albums to stores or other retailers, *i.e.*, online outfits like iTunes, and the artist gets paid a percentage of each album sold. **Points** refer to how many percentage points an artist will receive as a royalty rate. Although this is a negotiating point, it typically falls between 10% and 15% for a major label, and 9% and 12% on a smaller label.

This concept implies that, if your royalty percentage is 10%, and your CDs sell for \$15, you get \$1.50 for each CD sold. But this is not necessarily, and is most often not likely, to be the case. Most recording contracts pay royalty rates on the **wholesale price** of the album, which is the price at which an album is sold to retailers, rather than the **retail price**, which is the price at which an album is sold to consumers. Therefore, if the wholesale price of your CDs is \$7.50, you would only earn \$0.75 for each album sold. Record labels also deal in other **sales channels**, such as

record clubs and discount stores, that get even lower wholesale prices on CDs than the normal retail record store sales channels. The lower the wholesale price, the lower the artist royalty, and the less money the artist makes. To make matters worse, record companies will sometimes only pay on a fraction of the royalty rate for sales not made through normal retail channels, including in many instances overseas sales. For example, while you might get a 10% royalty rate for Sam Goody sales, you might only get 5% for Costco sales.

2. Further Deductions from Royalties

In addition to the reduced royalties received on CDs sold outside normal retail channels, there are also many deductions from the royalty rate. Some of the more common deductions are discussed here, but you may also want to refer to the recommended further reading section at the end of this overview for more guidance on these issues. Keep in mind that there are books written about the various deductions that can apply, and such deductions typically fill many pages of a recording contract.

First, there are typically no royalties paid on promotional CDs given away for free. Second, artists are routinely charged for CD packaging - something around 15% to 30% of the royalty rate. Third, royalty rates are often “all-in,” which means that the artist pays the producer out of the royalties. Fourth, it is common practice for record labels to charge the band for a variety of costs associated with producing the album, such as studio time (including

any advance you are given), marketing costs, promotion costs, tour or video production costs, etc. These are called **recoupable expenses**, and must be paid before the artist receives any royalties. For example, if a major label spends \$250,000 to record an album, the artist must make over \$250,000 in royalties before receiving a royalty check. Also keep in mind that, if the advance has not been recouped, then the artist is not likely to see any of the money derived from record royalties. It is often advantageous for an artist to negotiate for limits or caps on the amount of money the label can spend on these recoupable expenses.

Because of the huge amounts of deductions taken from royalties, you want to push for the highest royalty rate possible. When negotiating this rate, here are a few tips to remember. First, it is likely that the first number put forth is negotiable. It is common practice for labels to put a lowball figure in the contract to give itself room to negotiate. Second, the label obviously offered you a contract because they saw potentially profitable talent, and for this reason an artist should push for a deviation from the form agreement. Finally, it can't hurt to try to negotiate changes to the royalty provision and other terms.

An additional point to negotiate, as it relates to royalties, would be for royalty acceleration or "bumps," as they are commonly referred to in the industry. An artist may look to negotiate contract terms at the outset that permit an increase in the royalty rate on future albums if the artist is successful. If the label exercises the option for future

recordings, this may be a good indication that the band or artist is successful and should receive increased compensation on the next album. The logic is that the label would want to keep its artist happy, and could agree to raise the rate for subsequent albums. This would be another negotiation point to establish at the outset of the relationship.

If any money survives recoupable expenses and royalty deductions, there is still some more divvying up to be done. The band's manager and/or agent typically gets 20%; further, in the case of group collaborations, the band members must also further split the proceeds, which can raise a variety of issues, especially where the band members have not contributed equally to the final recording.⁵

Some interesting anecdotes may help solidify the impact of this earning structure:

- "A band can expect an average of \$1.00 in royalties for each full-priced (\$16.98) CD sold through normal retail channels."⁶
- "Florence Ballard from the Supremes was on welfare when she died."⁷

⁵ Members of bands may need separate agreements to govern their individual rights as members of the band. The special issues related to groups and bands have not been specifically addressed here, but it is wise to seek counsel regarding these issues. When things are going well and the band is on the verge of a record deal, it's hard to imagine what could go wrong between the respective members of the group, but nonetheless, it's important to address these issues early in the process to avoid potential conflict later.

⁶ See Michael P. McCready, Record Contract Basics, at <http://www.music-law.com/contractbasics.html> (last visited Nov. 3, 2005).

- “Country music legend Merle Haggard enjoyed a string of 37 top-ten country singles (including 23 #1 hits)...yet he never received a record royalty check until...he released an album on the indie punk-rock label Epitaph.”⁸

IV. Pitfalls to Avoid When Entering Recording Contracts

The bullet points below provide additional contract terms and provisions that may be helpful.

- **Release commitment:** Many record contracts do not require the label to release the artist’s first album under the agreement. If it can be negotiated, it is wise to negotiate a release commitment, meaning the label will be bound to actually release the first album.
- **Cross-collateralization:** Some recording contracts allow the label to recoup money from sources *other* than record sales. These other sources include things like concert performances, merchandising, and publishing. Artists should be very wary of such provisions, as these other channels typically provide a coveted stream of income that the artist gets to keep.⁹

⁷ Marshall Brain, How Recording Contracts Work, at <http://entertainment.howstuffworks.com/recording-contract3.htm> (last visited Nov. 3, 2005).

⁸ Id.

⁹ See Michael P. McCready, Record Contract Basics, at <http://www.music-law.com/contractbasics.html> (last visited Nov. 2, 2005); Marshall Brain, How Recording Contracts Work, at <http://entertainment.howstuffworks.com/recording-contract2.htm> (last visited Nov. 3, 2005).

- **Form Contracts:** There are many books out there that contain “model” contracts for the music industry. It is imperative that you understand how such a contract works before using it. These are generic agreements and may not operate the way you expect.¹⁰
- **Interviews and publicity:** Some contracts include a clause permitting the label to request, basically at any time, that the artist be available for press interviews, personal appearances, photo sessions, etc. You may wish to place some conditions on such requests.¹¹
- **Live albums:** Contracts will sometimes specify that recordings of live performances do not count toward the total number of albums stipulated in the contract. Therefore, if the label wants to release a live album, it can do so without shortening the overall number of albums the label keeps under contract.
- **Right to reject:** It is typical for a label to reserve the right to reject an album it does not like. In that event, the band has to either record another album, or the label can accept the album and never release it. If the label decides not to release the album, the lock-out (*See “Recording Contract Basics” above*) clause still applies, and therefore an artist is prevented from

¹⁰ Marshall Brain, How Recording Contracts Work, at <http://entertainment.howstuffworks.com/recording-contract6.htm> (last visited Nov. 3, 2005).

¹¹ Marshall Brain, How Recording Contracts Work, at <http://entertainment.howstuffworks.com/recording-contract6.htm> (last visited Nov. 3, 2005).

releasing the songs on that album for an extended period of time.¹²

Hopefully this introduction to recording contracts has helped you understand the basic terms and pitfalls such deals entail. One of the most important things you can do in negotiating a recording contract is to get someone knowledgeable on your side. A slight change in wording here and there can impose huge financial and time commitments on an artist, and it is best to have someone to navigate you through the process. Good Luck!

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¹² Marshall Brain, How Recording Contracts Work, at <http://entertainment.howstuffworks.com/recording-contract6.htm> (last visited Nov. 3, 2005).