Recording Contracts Decoded: What Musicians Should Know Before Signing

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When it comes to protecting the rights of musicians and songwriters, the law always seems to be playing catch-up. For example, the Digital Millennium Copyright Act of 1998 tried to apply copyright law to the digital explosion of the 1990s that had already taken place. Similarly, the rights of publicity codified by each state (protecting an individual's name, portrait, picture, likeness, voice, etc.) generally depend on where the rights holder resides and offer a hodgepodge of protection on a good day.

Now, with artificial intelligence (AI), we often have to ask, Who is the defendant? And sometimes, it's even difficult to determine who the plaintiff is because of blurred lines between creators. (More about blurred lines later, as the song of that name was the center of a well-publicized copyright infringement lawsuit.)

Royalties paid by a record label to an artist signing a record contract were traditionally about 12 percent to 15 percent of what a record (remember those?) cost to purchase (and do you remember buying one?).

Then, as now, the details in the fine print can be costly. Even though an artist is already receiving only a small percentage of revenue, additional deductions are often made for the costs of marketing, promotion, recording, and any physical media that may still be manufactured (such as vinyl albums for the true fans). What do the record labels offer in return? Well, they used to provide prestige, exposure, and distribution. These days, distribution can be instantaneous, artists must generate their own exposure via social media, and few consumers would be impressed by the cache of a major label (assuming they would even recognize one). So, do you still need a record deal? More and more artists are staking a claim to fame, which is as elusive as it ever was, by selling their music directly to fans.

Let's drill down.

Copyright Basics: Who Owns What, and Why It Matters

Here are the basic rights that a copyright holder possesses:

1. **Reproduction.** The right to make copies of the work.
2. **Distribution.** The right to sell, rent, lease, or lend copies of the work to the public.
3. **Adaptation.** The right to create derivative works (adaptations) based on the original work.
4. **Performance.** The right to publicly perform the work (e.g., a play or musical composition).
5. **Display.** The right to publicly display the work (e.g., a painting or sculpture).

There are two distinct copyrights: (1) copyright in the sound recording, which, as noted, is usually owned by the entity paying for it, and (2) the underlying compositions, which are perhaps most easily understood as the words and melody of a song, regardless of who recorded it.

Trademarks: Your Band's Name Isn't Automatically Yours

Then there are rights in a band's name. Copyright doesn't offer such protection, but trademark does. A trademark is a symbol, design, or phrase legally registered to represent a company or product. It allows consumers to easily identify and distinguish a specific brand from its competitors. What about someone's given name, such as "Rich Pawelczyk"? Just because you use your name and your name is unique to you, it doesn't mean the law will grant you the exclusive right to use your name to sell your music. Several factors determine whether a surname has acquired distinctiveness:

1. **Rarity of the surname.** The more common the last name, the harder it is to claim as a trademark.
2. **Other recognized meanings.** If the surname also has a separate meaning or connotation, it may be easier to obtain trademark rights, provided the name is not generic or already used by someone else for similar goods or services.
3. **Distinctiveness of stylization.** Unique logos and designs can sometimes help a surname gain trademark status.
4. **Prior registrations.** If you own an existing registration for the same or a similar trademark for goods or related services, you can make a claim of acquired distinctiveness based on the prior registration.
5. **Five years of use in commerce.** It may be easier to acquire distinctiveness in a name that has been in substantially exclusive and continuous use in commerce for five or more years in connection with the goods or services.
6. **Actual evidence of acquired distinctiveness.** You may be asked to submit proof that the name has acquired the necessary secondary meaning to consumers, meaning that the name is recognized as the source for the goods or services, and some examples include sales figures, advertising efforts, and customer testimonials.

The Fine Print: What That Record Deal Really Says

Recording contracts are rife with fine print. Here are some basic provisions that must be scrutinized carefully because what you see and what you *hear* from a savvy executive or, dare I say, lawyer may not be what you actually get. Most examples below apply to record companies and production companies, insofar as they both pay for the recordings and thus, by default, own the recordings.

Territory

Does the contract cover only the United States, or is it worldwide? And if all digital rights are granted, there may not really be a distinction between the United States and the rest of the world, especially if the digital platforms can be accessed beyond our borders.

Term

This is often dependent on how long it takes for studio time to release, usually 12 months or so. The artist should insist on termination language in the event that there is no release.

Options

This is a de facto right of first refusal for subsequent records. These options are almost always unilaterally in the purview of the record label, not the artist.

Revenue

Traditionally, revenue was split based solely on the sound recordings. About 20 years ago, "360 deals" became more common, especially for known artists. In exchange for a bigger pile of money, artists would grant a label or a live music entity, such as Live Nation, a piece of revenue for multiple facets of an artist's career, such as songwriting, concerts, and personal appearances. The details, dare I say the fine print, are particularly important in this context.

Rights Granted

They pay for it, they own it. That's the default. And if the record company is paying royalties, as well as an advance against those royalties, they will usually have the artist locked up exclusively. But what do the record labels own? The copyright in the sound recording. They usually do not own the separate copyright in the underlying composition, which, as noted above, is the words and melody of a song, as one might see on sheet music; this copyright is owned by the songwriters.

Force Majeure Clauses

Force majeure (roughly, act of God) clauses are common throughout contracts of all kinds, including those in the music industry. The question is typically whether circumstances beyond the control of the parties prevent them from performing their respective contractual obligations. Natural disasters and severe weather are traditional examples, but we've recently gone through the surreal wormhole of the COVID-19 pandemic. Whether a contract refers to "epidemic" or "quarantine" or more generally a "government order" and/or "state of emergency," the impossibility of fulfilling the obligations of a given contract remains open to interpretation (and perhaps litigation). Moreover, the contract often states that it shall be suspended only for the duration of said force majeure event. So, with something like the most recent pandemic, it's a matter of debate (and, again, perhaps litigation) as to when any such impossibility has ended.

Termination

This leads us to the cessation of a traditional recording agreement. Typically, the recording company holds the option (or options) to send the artist back into the studio to record a new set of songs.

Who Gets Credit? The Messy Truth About Songwriting

You're playing in a band. Welcome aboard! So, a composition is written, and its creators are . . . everyone in the band? Or just the singer who wrote the lyrics and the guitarist who wrote the melody? The default is the latter (lyrics and melody), but to promote harmony and efficiency, some bands (big ones, such as U2 and R.E.M.) attribute songwriting to all members, even if technically certain members only contributed to the *sound recording* copyright (which, as noted above, has been assigned to the record label). Under these circumstances, it's no surprise that even the most successful bands don't last.

Since the record labels are benefitting from the exploitation of the composition, by law they have to pay the songwriters at the rate set by the federal government for "mechanical royalties," which is terminology steeped in history, from when mechanical player piano rolls were a dominant source of songwriting revenue. Ah, but the fine print traditionally gave the labels a 25 percent reduction in this obligation (the so-called three-quarters rate) in exchange for the "privilege" of having one's record released by said label.

Whoever the songwriters may be, they often garner additional monetary advances by signing a separate "publishing deal" (more terminology from the past, when published sheet music was a driver of revenue). On behalf of songwriters, music publishers seek to broker synchronization deals (sync rights) in TV and film so as to *synchronize* the composition with the visual media. If the TV and film production company wants to also utilize the recording of that composition, they must obtain separate permission from the owners of the sound recording (i.e., the record label). If you don't want your songs utilized in programs or commercials that you find objectionable, well, that's where the fine print is again crucial.

Airplay is another area, albeit vastly changing. Fewer and fewer of us listen to traditional radio; digital platforms such as Spotify or YouTube are increasingly taking its place. Generally speaking, everyone involved in the creation of a recording, from producer to band to studio musician, gets a piece of the digital pie. However, due to lobbying efforts by the radio industry a century ago, in the United States, only songwriters (and their music publishers) receive revenue from radio play, as well as use of the songs publicly, such as in music venues and even retail stores beyond a certain footprint and level of equipment.

Managing the Managers

Managers typically take between 15 percent and 25 percent of every bit of an artist's overall revenue, from all sources. It's a bit like the 360-deal noted above, but instead of Universal releasing an album or Live Nation booking a worldwide tour, a manager is hired to, well, *manage*. If it sounds subjective, it is. Managers should be hired for their connections, their ability to front certain costs, and their tenacity—ideally, all three. Ideally, crucial fine-print exceptions are built into management agreements, such as money technically paid but not enjoyed by an artist for touring, sound, and lights. These items should be excluded from the calculation of gross revenue that is commissionable by the manager.

AI and Music: The Robots Are Co-Writing Your Next Hit

Now let's talk about everyone's favorite topic: AI. Will AI replace our jobs? Well, in a creative area such as songwriting, the future is now, whether we like it or not.

There are multiple programs that allow someone to enter parameters for a prompt—say, the style of a particular band—and almost instantly, a song is "created" that seems very similar to the music of the band specified. But now musicians are taking control of the technology by working with AI, such as OpenAI's new product, MusicGPT, to create brand new tracks that fans of popular artists are dying to hear. Remember, rabid fans will gobble up anything and everything that an artist produces. And it's not just Taylor Swift's "Swifties" who are so inclined; even to this day, the Beatles cast a wide net across millions who need to hear every rough mix or demo, let alone a "newly created" song. One day, I may be inclined

to stop using quotation marks for said creations, but today is not that day. However, as you can probably glean from my overview above, there may be several rights-holders for a given artist, and they would be at the mercy of just one person (a stakeholder or otherwise) prompting AI to create a new song. Litigators, get your keyboards fired up, because lawsuits are a'coming.

Blurred Lines: When Inspiration Becomes a Lawsuit

Speaking of litigation, I did promise you a callback to the song "Blurred Lines." Given the highly publicized nature of the lawsuit involving the song, it's a good example of copyright infringement litigation. Below are the details:

- **The case.** Marvin Gaye's estate sued Robin Thicke and Pharrell Williams, claiming their hit song "Blurred Lines" (co-written with Clifford Joseph Harris Jr., known professionally as T.I.) infringed on Gaye's 1977 hit "Got to Give It Up."
- **The argument.** The Gaye estate argued that "Blurred Lines" had a similar "feel" and "groove" to "Got to Give It Up," even though the two songs didn't share the same melody, lyrics, or chords.
- **The verdict.** A jury in Los Angeles found in favor of the Gaye estate, ruling that "Blurred Lines" did indeed infringe on the copyright of "Got to Give It Up."
- **The damages.** The jury awarded the Gaye estate nearly $7.4 million in damages, which was later reduced to $5.3 million, along with a share of future royalties from "Blurred Lines."
- **The appeal.** The Ninth Circuit Court of Appeals upheld the jury's verdict, despite appeals from Thicke and Williams.
- **Final judgment.** In December 2018, a judge ordered Thicke and Williams to pay $4.98 million in damages, along with interest and a share of future royalties, officially closing the case.
- **Significance.** The "Blurred Lines" case raised important questions about the scope of copyright protection in music, particularly regarding the "feel" or "groove" of a song, not just its musical score.

The takeaway for artists is to stay far away from a song that even slightly resembles another song, especially one from a well-known artist.

Conclusion (of Sorts)

If I were cynical, I'd say, if ya love music, stay away from the music business. But on some days, it beats a real job. So, should you forgo a record deal if offered one? Well, if you have the ability to make sufficient income from your existing endeavors (e.g., social media and endorsements), and you have the infrastructure to grow that income, now more than ever ya may not need a record deal.

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