

## **GUIDE TO MUSIC INDUSTRY AGREEMENTS**

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**This Guide explores management contracts, recording contracts, producer contracts and music publishing contracts. The material is more practical than legalistic and should not be used as a substitute for proper legal advice. The firm accepts no liability for any errors or omissions. The material was first prepared by Lee & Thompson at the request of the Music Managers Forum (MMF) and a version (together with other useful material) is featured in the MMF's Music Management Bible which is published by Sanctuary Publishing Limited (ISBN: 1-84492-025-9).**

**The MMF represents the interests of artists and managers. For details contact [info@ukmmf.net](mailto:info@ukmmf.net), web: [www.ukmmf.net](http://www.ukmmf.net). Lee & Thompson is pleased to have been closely associated with the MMF since its inception. At the 2003 MMF Roll of Honour Awards, the MMF presented Robert Lee and Andrew Thompson with the MMF Founder's Award in recognition of the firm's efforts on its behalf.**

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# CHAPTER I

## MANAGEMENT CONTRACTS

### Introduction

The music business is just that; it is a business. In order to succeed a musician or songwriter must pursue his or her artistic aspirations within a competitive business environment. Occasionally, an artist will manage his or her own business affairs (or in the case of a band one or two members may assume this responsibility). This sometimes works well if he or she is businesslike although the artist will usually need to rely heavily upon professional help from solicitors and accountants. However, many artists are not particularly businesslike. Moreover, the logistics of organising a successful recording career are complex so that the artist does not have time to deal with the business side of things on his or her own. Also, an important part of the management function involves "selling" the artist and it is difficult for an artist to "sell" himself or herself. For most artists, therefore, perhaps the single most important decision of their careers is the choice of a manager.

In Part I of this chapter we consider how the nature of management is being affected by the seismic changes over recent years within the record industry and we look at how to find the right manager. In Part II we review the legal framework and in Part III we consider in some detail the component parts of a typical management contract.

## **Part I The Manager**

### **1.0 Finding a Manager**

#### **1.1 Why?**

For a new artist, the manager's primary task will be to help secure recognition for that artist. An initial goal is likely still to be the securing of a record deal. The manager's role in relation to a recognised artist is likely to be multi-faceted. Hence, for most artists, the involvement of a manager is crucial whatever stage the artist has reached. Indeed, in the light of recent industry changes, the manager's role, generally, is more crucial than before. The traditional "route to market" of securing a contract with a major record label is still a valid one but major record companies no longer dominate as before. They do not sign as many new artists and they do not invest so heavily in them. Increasingly, therefore, artists have to be innovative about how they market themselves and their music. If there is a record deal with a major record company the manager now often has a more important role than used to be the case. The major record companies between them now employ a fraction of the number of personnel employed before the industry was beset with its current problems. There is no longer the same level of A&R support or anything like the same level of marketing and promotion support. Previously, the record company may have sought to marginalise the manager; now the record company is more likely to rely upon the manager to help formulate and implement the marketing plan for the artist in question. Perhaps never before has the manager been more highly valued.

#### **1.2 When?**

Generally, the sooner the appointment is made the better. The manager prefers to have a clean slate to work from. It would not usually be a good idea for an artist to negotiate a record deal, for example, and then ask a manager to take matters over. The artist would typically look for a manager as the first stage towards securing a record deal. Most labels prefer to deal with managers rather than artists (at least when it comes to negotiating deals) and often the artist will benefit from the additional validity brought to his or her project by the involvement of a respected manager. Nevertheless, artists should not rush into management arrangements. It is better for the artist to wait until the right manager is found rather than engage the wrong one. The artist/manager relationship is a personal one so that as with all personal relationships the parties involved should proceed initially with some caution.

### 1.3 **How?**

Sometimes the manager will find the artist. This is likely to be the result of a tip-off although the manager may have happened upon the artist at a gig or by finding his or her way to the artist's MySpace page or website. Generally, however, the artist will need to adopt a pro-active approach. He or she should first set about compiling a short list of potential candidates. The artist should talk to all of his or her contacts in the industry. One approach is to identify other admired artists and find out about their management arrangements (although it is not necessarily sensible for an artist to be with a manager who already looks after a similar and therefore competing artist).

### 1.4 **Presentations**

It is rarely worth "cold calling" by sending out circulars and the like. The artist will need to make a personal approach to the targeted manager or find somebody who is prepared to do this on his or her behalf. The artist should put together a presentation package of some kind, i.e. a CD of a few of the artist's best songs (even if they are in rudimentary demo form). One or two photographs and a short biography together with any press cuttings would be useful. Successful managers are busy people so that it may be counter-productive for an artist to be too pushy. Most managers will have the courtesy to respond to approaches but they need to be given some time.

### 1.5 **What to Look for in a Manager**

When there is a shortlist of managers showing positive interest the artist should consider the following points:-

- 1.5.1 how experienced is the manager?
- 1.5.2 how successful has the manager been (and has that success been in a comparable field)?
- 1.5.3 how long has he or she worked in the music industry and in what different capacities?
- 1.5.4 does he or she have a good reputation and/or what are his or her reputed strengths?
- 1.5.5 is he or she primarily a business manager or a creative manager?
- 1.5.6 how long has he or she managed any other artists with whom he or she is involved (the artist should try and talk to those other artists)?
- 1.5.7 does the manager have the type of personality the artist is looking for (is he or she the aggressive type or perhaps a more diplomatic type of manager)?
- 1.5.8 where is the manager based and what back up is available and what kind of office facilities does he or she have?
- 1.5.9 how much time will the manager be able to spend on the artist's affairs?

- 1.5.10 how convinced does the manager seem of the artist's talent?
- 1.5.11 at what level are his or her contacts in the industry?
- 1.5.12 does the manager have experience of the industry outside the UK (does he or she for example have contacts in America)?
- 1.5.13 does he or she have good negotiating skills?
- 1.5.14 will the manager (or his or her staff) be able to deal efficiently with the details (i.e. returning phone calls, dealing with correspondence, maintaining proper financial records etc)?
- 1.5.15 if the artist already has a recording or publishing deal does the manager have any history of dealings with the companies concerned and if so what do the key personnel at those companies think of him or her?

## 1.6 **The Decision**

An artist should try to adopt a professional approach to the selection process but, ultimately, the artist should rely upon his or her instincts in determining whether or not the management relationship is likely to be an effective and successful one.

## 1.7 **Business Managers**

In the USA there is a fairly common practice of dividing responsibility between a general manager and a business manager. This is only rarely seen in the UK. The general manager will have responsibility for determining the overall strategy for the artist's career and for the day to day implementation of that strategy and will have some input in relation to creative and artistic matters whilst the business manager will have responsibility for financial matters. For this reason, business managers tend often to be accountants. They will often work closely with the artist's lawyer. If there is to be a division of responsibilities in this way then it is crucial for the artist that there is good communication between all three parties and that there is a good working relationship between the general manager and the business manager since otherwise there is an obvious danger that mistakes will occur and that bickering will ensue.

## 1.8 **Home Grown Managers**

The manager is often found close to home. The manager may be a close relative or, perhaps, a school friend. In such cases, the manager is unlikely to have much experience but there may be compensating benefits. If the parties are happy to work together, there is little reason why the customary industry terms should not apply (and there is just as much reason to formalise the arrangements). The position is more complicated in the case of a group of artists who decide that one member of the group should double as the manager. This often leads to arguments either over money or as a result of the imbalance of power between the manager member or members and the non-manager members. Logically, if one band member assumes all of the usual management functions, there is no reason why he or she should not be paid management commission at the same rate and in the same manner as any other manager but this inevitably leads to a significant economic imbalance between the

parties and this sometimes gives rise to resentments. Of course, in the case of a successful band, there is unlikely to be time for any one person to be both artist and manager. In other cases, where the management role is perhaps limited to basic correspondence and bookkeeping and one band member is better equipped to deal with this than the others then the group may agree to pay a modest fee. Many groups below a certain level of activity/success divide up management responsibilities between themselves. Usually, there is no payment for their services even though inevitably the contributions will be unequal.

## **2.0 Making A Commitment**

### **2.1 The Danger of Delay**

What should the artist do once he or she has found a suitable manager prepared to take an interest? Most artists (certainly those at a preliminary stage in their careers) are reluctant to enter into discussions with a new manager about the formal terms which should apply. They are particularly shy about making a long term commitment. Likewise, many managers are reluctant during the early stages to ask an artist to sign a contract for fear of giving the wrong signals. This kind of approach benefits nobody. The manager is unlikely to perform to the best of his or her ability unless he or she feels confident and secure in his or her relationship with the artist. If the artist consistently avoids any discussion over the formal terms which are to apply then the uncertainty is likely to lead to problems; either there will be a dispute as to the basis upon which the manager has been working or ill-will may develop as a result of one side feeling let down by the other. Of course, the artist (and the manager for that matter) should exercise some caution before committing to a long term arrangement. Nevertheless, this does not justify burying one's head in the sand; immediately the artist and manager begin working together efforts should be made to formalise the arrangements.

### **2.2 Procedure**

The management contract is usually prepared by the manager or his or her solicitor and presented to the artist. It is important from the artist's point of view that he or she receives expert independent advice from his or her own solicitor. Moreover, it is also important from the manager's point of view that the artist is independently advised (see Part II below). Many managers are reluctant to incur legal fees in relation to a management contract because during the preliminary stage there is usually no income being generated by the project. Artists tend to be still less inclined to incur legal fees usually for the simple reason that they can ill afford to do so. Unlike a recording or publishing agreement no money is payable to the artist upon signing a management agreement. Despite these constraints, it is important that both parties to a management contract are properly advised. There need not be protracted (and therefore expensive) negotiations between lawyers. Before the lawyers are instructed the parties should attempt to agree between themselves the basic principles which are to apply (although each party should accept that whatever is agreed will be subject to legal advice). This Guide may, of course, assist in that process.

## **Part II**

### **The Legal Framework**

#### **1.0 The Nature of the Contract**

#### **1.1 Difficulty of Enforcement**

Management contracts are essentially straightforward in their nature. They are contracts for the supply of personal services. A management contract will describe the services to be provided by the manager and will specify how he or she is to be paid for those services. The main significance of this is that a management contract cannot be specifically enforced. The obvious analogy is that of an employment contract. An employer may enter into a fixed term employment contract with an employee for say three years. If the employee leaves without good cause after one year then he or she will be in breach of the employment contract. The employer would be able to sue the employee for breach of contract. Generally, however, the only remedy available to the employer in any such legal proceedings would be for an award in damages. The employee would be compelled to pay the employer a sum of money equal to any financial loss which the employer is able to prove to the satisfaction of the court that it has actually suffered as a result of the breach of contract. The employer would not be able to obtain from the court an order for specific performance (i.e. the employee would not be made to continue to work for the employer for the remaining two years). An artist and his manager are in a similar position. If the artist walks away from the management contract before its term has expired the manager will be entitled to damages but he or she will generally be unable to compel the artist to continue to allow the manager to represent the artist.

#### **1.2 “Disguised” Management Arrangements**

For fear of being “sacked” and left only with a right to sue for damages, some managers try to protect their position by entering into alternative contractual arrangements with the artist. A "de facto" manager may prefer not to enter into a management agreement but instead to require the artist to enter into recording and publishing agreements the effect of which is that the "manager" is exclusively entitled to the artist's songwriting and recording services and owns the copyright and all other rights in the artist's songs and recordings. The "manager" then seeks recording and publishing deals for the artist but it is the "manager" (under the guise of a production company or publisher) which enters into the agreements with the third parties concerned. Sometimes, the "manager" also requires a management contract to be signed. In this way, the "manager" prevents the involvement of any other manager and secures a financial interest (by means of management commission) in any of the artist's earnings from activities other than recording and songwriting. In the worst cases, the "manager" will retain all of the recording and publishing rights, pay a royalty of some kind to the artist, and then “double dip” by claiming (under the terms of the management contract) a percentage commission on that royalty income.

“Disguised” management arrangements of this kind are properly treated with some scepticism so that when an artist is presented with a contract by a manager that contract will normally be a management contract rather than a recording and/or publishing contract. This is not to say that production contracts (i.e. a recording contract entered into with a small record production company) do not have a place in the music business. Arrangements of

this type are often justifiable in their own right but they are not appropriate when they are used to disguise what is essentially a management arrangement.

### 1.3 **Joint Ventures**

Nevertheless, there are circumstances in which a manager may be justified in seeking a greater degree of protection than is provided by a “standard” commission based management contract. In fact, those circumstances now apply more frequently than before. As noted earlier, it is a trend for record companies to do less than in happier times and for management companies to fill the gap. Management companies invariably have a more proactive role in the marketing of a record than before. This may be true if a major record label is involved and will almost certainly be true if the strategy does not involve a major record label. If the management company assumes a significant overhead in terms of staff levels in order to provide a wider “management” service and/or if the manager makes a significant financial investment in the artist (for example by paying for recording and/or video costs and/or by providing tour support or general financial assistance) then the manager may be justified in seeking a greater level of protection. In some cases, the manager may wish to take the approach described in paragraph 1.2 above (by offering a production contract and/or a publishing deal). It may be that the level of the manager’s investment and/or the true nature of the manager’s role justify an approach of this kind. An alternative, which is finding increasing favour, is for the manager to enter into a joint venture with the artist. A company (or a limited liability partnership) is usually incorporated to serve as the vehicle for any such joint venture. At the heart of this arrangement lies the fact that the company (and thus, indirectly, both parties to the joint venture) co-own any available rights. An artist should always be wary of entering into arrangements of this kind but there is certainly a trend for more and more managers to insist upon them. As the landscape of the record industry continues to change, it is likely that management companies will continue to play a wider role than before. If managers have to be more entrepreneurial than before in order to help their artists succeed then it is no surprise that they may seek to re-evaluate their own position and, in particular, to seek an element of rights ownership for themselves. This is problematic for the artist community because, as we will see in the next chapter, the record companies are also engaged in a “land grab”, often insisting upon so-called 360° deals under which they own (or at least have a financial interest in) not only the artist’s recording rights but all other available rights.

The remainder of this chapter is concerned with “proper” management agreements rather than with joint venture or other alternative arrangements.

## 2.0 **Legal Doctrines**

### 2.1 **Undue Influence**

The courts may set aside a "manifestly disadvantageous" agreement if it has been entered into in circumstances where undue influence has been brought to bear by one party to a contract against another. In the context of a management contract this does not mean that the artist has to show that he or she was taken to the pub and made to get drunk before then being pressured to sign the agreement or that a gun was held to his or her head. There is what is known as a "presumption" of undue influence if there is an existing relationship of trust and confidence. Trust and confidence lies at the very heart of any relationship between a manager and artist so that the presumption of undue influence immediately arises. If the

court is to be persuaded to enforce a management contract then the presumption of undue influence has to be "rebutted". There is an automatic assumption that the manager (often older, more experienced and more businesslike than the artist) is able to exert pressure on the artist to accept the terms of the contract in question. The only effective means by which to rebut the presumption of undue influence is for the manager to show that the artist was independently advised preferably by a lawyer with specialist knowledge of the music industry. This would normally be sufficient to enable the manager to show that there has been a genuine negotiation in relation to the terms of the contract and that its contents were properly understood by the artist or that at least the artist was given an opportunity fully to understand the implications.

## 2.2 **Restraint of Trade**

A management contract is usually exclusive in the sense that the artist may not permit any other person to represent him. This constitutes a restraint and thus most management contracts fall within the scope of the legal doctrine referred to as restraint of trade. This doctrine seeks to maintain a balance between the freedom of parties to contract upon such terms as they decide and the perceived ideal of free i.e. unrestrained trade. The court will enforce restrictions only if they are reasonable and only if they do not offend against public policy. The burden of proof in showing that any restriction is reasonable falls upon the person relying upon the restriction (a manager in the case of a management contract but these same principles also apply in the case of recording and publishing agreements which are dealt with later in this Guide). The test is whether the restriction only goes so far as to protect the legitimate interests of the party in whose favour it is granted and whether the restriction is justified as being in the interests of the party restrained, i.e. the artist. In applying this test, the court will consider the contract in the round. It will review all of the contract's provisions and all of the surrounding circumstances. In practice, in the case of management contracts, a review of this kind will focus in particular on the duration of the agreement and the financial provisions. The UK courts have taken a particular interest in the application of those provisions under which a manager continues to earn commission even after the expiry of the management contract.

## **Part III The Contract**

### **1.0 Duration**

#### **1.1 Contracts Terminable upon Notice**

Some management contracts do not run for a fixed term; rather, they continue indefinitely unless and until either party serves a given period of notice. The period of notice would normally be three months or perhaps six months although in some cases more sophisticated notice provisions apply so that, for example, the agreement may only be brought to an end once an "album cycle" has reached its conclusion.

#### **1.2 Fixed Term Contracts**

Most management contracts provide for a minimum fixed period. This would usually be between three years and five years. There is an unwritten rule that management contracts should not continue for longer than five years. The feeling is that if a manager were to insist upon a longer period then the artist may be able to challenge the validity of the agreement on the basis that it represents an unreasonable restraint of trade. However there is no black and white rule to the effect that a five year contract is enforceable but anything longer is unenforceable.

As indicated above, some management contracts run not for a specified period of years but for a given number of "album cycles", i.e. for perhaps three cycles (with a cycle being defined for this purpose as the period involved in writing, rehearsing and recording an album and then until the end of any promotional or touring activity in relation to that album).

#### **1.3 Typical Duration**

Most management agreements, however, run for three, four or perhaps five years. This would include any option period so that, for example, the agreement may run for three years but so that at the end of the initial period the manager has an option to extend for another one or two years. Sometimes the option to extend will only be available to the manager if certain targets have been achieved during the initial period (perhaps a minimum level of earnings or a given chart position).

#### **1.4 Trial Period**

Often, there may be a trial period of some kind. A typical trial period would be six months. This would usually work in one of two ways. The parties may sign a simplistic agreement on the basis that if at the end of the trial period both parties wish to continue, then both parties will negotiate the terms of a more formal longer term agreement. Alternatively, a formal agreement will be negotiated from the outset. However, whilst this may run for, say, five years there will be a provision to the effect that either party may terminate at any time during the period of, say, thirty days following the expiration of the initial six months. Managers are naturally reluctant to agree to a trial period of this kind because this might mean that a great deal of preliminary work is done on behalf of the artist only so that the artist may then walk away. A common approach is therefore instead to include a provision

to the effect that the artist will be able to terminate the management agreement after a given period (perhaps twelve months or eighteen months) in certain defined circumstances, e.g. if by then the artist has failed to enter into a recording contract.

## 1.5 **Exclusivity**

The duration of the deal represents the period during which the manager is exclusively entitled to represent the artist. The exclusivity rarely works the other way round. The artist would not expect to be exclusively entitled to the manager's services (although some management contracts specify that the manager may not manage more than a given number of other artists). In the case of a new recording career a great deal of work typically needs to be done during the early stages for relatively small award. There is often a lengthy period of hard work before the project is in good enough shape to present to the record companies. The whole process of negotiating a record deal is usually a lengthy and arduous one. After the record deal has been signed further work will need to be done in preparing rehearsing and recording the material. The record company may wish to release a single before committing to the release of an album. For all these reasons, it might easily be a year or two after signing the management contract before the first album is released. This may be followed by an extensive period of touring activity in an effort to promote the album. If the album is sufficiently successful for the record company to exercise its option for the next album there may then be another delay before suitable material is prepared and recorded. For all these reasons, a three year management contract would often fail to cover more than one album and a four year management contract might cover no more than two albums. The artist's first album would have to be unusually successful if it is to "recoup" (see Chapter II) so that royalties actually become payable. It usually takes a while for a successful artist to build a reasonable sales base. It is not difficult to envisage circumstances whereby a manager may work very hard over a period of three or four years to establish an artist only to find that the artist then decides that he or she wishes to appoint another manager (or to look after his or her own affairs) leaving the ex-manager with a commission entitlement in relation to perhaps only two albums just before the "watershed" is achieved with the third album (see para 4.0 Part III Chapter II). It is for this reason that managers seek the protection of long term exclusive management contracts. The difference between a four year contract and a five year contract may be critical in terms of the likelihood of a reasonable financial return for the manager.

## 2.0 **Scope of the Agreement**

### 2.1 **Territory**

A typical management contract will grant the manager the exclusive right to represent the artist in all areas of the entertainment industry throughout the world. Sometimes, the agreement may be territorially restricted in some way (most typically when a separate manager is engaged for America). If, for example, there are two managers (one for each of two territories - perhaps North America and the rest of the world) usually each manager will earn commission only upon earnings arising in his or her territory. However, a UK based manager, for example, would usually object to America (or any other territory) being excluded. The income from the territory to be excluded may well make the difference between financial success and failure. Also, there are practical difficulties with having two separate managers in that they may pull in different directions and each manager will have a vested interest in persuading the artist to concentrate his or her attention on the one territory

to the detriment of the other. A practical means of dealing with this is for a UK manager to insist upon world-wide rights but to agree to appoint a separate US manager. However, the US appointment will be made by the UK manager so that, effectively, the US manager reports to the UK manager. The UK manager will still expect some financial reward from the US activities so that if he or she is entitled to, say, 20% commission on world-wide earnings he or she may agree to pay perhaps 10% (i.e. one half of the entitlement) of the commissionable earnings originating in the US to the US sub-manager (so that he or she still enjoys the remaining 10%).

## 2.2 **Non music activities**

Apart from territorial restrictions the scope of the manager's appointment may be limited in other ways. Ordinarily, the manager will wish to represent the artist in relation to all of his or her activities in the entertainment industry. The artist may wish to restrict the appointment only to the artist's activities in the music industry. In the case of a new artist this would probably be unfair to the manager because in all likelihood any opportunity on the part of the artist to profit from other activities will arise only as a result of the artist's success in the music industry. For example the artist may be offered a part in a film or may decide to write a book of some kind. If an artist already has a career in another area of the entertainment industry (for example if he or she is an actor and already has a theatrical agent) then the management contract would need to recognise this. Sometimes, a manager will agree that if at some future stage the artist becomes involved in acting or literary endeavours then the manager will appoint a theatrical/film agent and/or literary agent of the artist's choice. In order that there may be one focal point the manager might insist that the appointment of agents of this kind must be made by the manager, so that the agent will be a sub-agent of the manager rather than employed direct by the artist. As with an overseas manager, the manager may agree that all or part of the sub-agent's commission is to be borne out of the manager's commission.

## 2.3 **Areas of Responsibility**

It is difficult to be too precise about the respective duties and obligations of the parties under a management contract apart from certain obvious matters (for example the manager's obligation to account to the artist for any money in the specified manner). Each artist has his or her own view of what a manager should do and how the manager should go about it. Likewise, each manager will have a different approach to his or her work and will attach different priorities to the various aspects of what a manager is required to do. Some artists expect the manager to be at the artist's beck and call day and night to sort out every problem big or small and whether that problem is a professional one or purely personal. Some managers accept that "baby-sitting" an artist is part of the job. Others do not generally take kindly to being pestered outside normal business hours (whilst accepting that in the music business "normal" does not mean 9:00am to 5:00pm). It is not really the manager's job to pay the artist's domestic bills and generally deal with any personal crises. Nevertheless, a successful (and therefore busy) artist will often expect this kind of service from his or her management company. The best answer for the manager is to provide the artist with access to a personal assistant employed by the management company but available to do the artist's bidding on the basis that the cost of employing the person involved is recoverable from the artist's earnings. Often, the personal assistant's job specification will be complex. Some of the assistant's responsibilities will be "managerial" and others will be of the "nannying"

variety so that a sensible compromise is often that part only of the assistant's salary is recoverable.

There is no recognised set of standards in terms of exactly how a manager's role is to be defined. This will probably never be achieved because so much depends upon the particular requirements of the artist and the very personal nature of the arrangements worked out between that artist and his or her manager. Whilst a formal management contract will make some attempt to specify the respective obligations of the parties, in practice the contract is likely to be of little help in this area. Sometimes an artist (if in a strong enough position to insist upon this) may require the manager to spend a minimum number of hours or a minimum percentage of the manager's overall time in relation to his or her affairs as opposed to those of any other artists represented by the manager.

## 2.4 The MMF Approach

Some years ago an MMF working party, after a process of consultation, formulated a suggested form of management contract and in this the manager's duties are specified as follows:-

- 2.4.1 to use the manager's best endeavours to advance and promote the artist's career and to ensure the artist gets paid.
- 2.4.2 to consult regularly with the artist and keep the artist informed of all substantial activity undertaken by the manager
- 2.4.3 to maintain records of all transactions affecting the artist's career and to send the artist a statement within a given number of days at the end of each calendar quarter disclosing all income, sources of income, expenses, commission and other debts and liabilities arising during the preceding three months.
- 2.4.4 to obtain the artist's approval for any expenditure over a given amount for a single cheque or over a higher given amount over a period of one month.

Separately, the artist's duties are specified as follows:-

- 2.4.5 to carry out to the best of his ability and in a punctual and sober fashion all reasonable agreements, engagements, performances and promotional activities obtained or approved by the manager.
- 2.4.6 to attend promptly all appointments and to keep the manager reasonably informed of the artist's whereabouts and availability at all times.
- 2.4.7 to reveal to the manager any income such as PRS, PPL or touring overages etc paid directly to the artist.
- 2.4.8 to accept that this is a job and that it involves hard work and a professional approach.
- 2.4.9 not to engage any other person to act as the artist's manager or representative in connection with any aspects of the artist's career.

### 3.0 **The Manager's Remuneration**

#### 3.1 **Commission**

On rare occasions, and usually only if he or she is well established the artist may engage a manager on the basis that the manager will be paid an agreed fee or salary. However, in the vast majority of cases, the manager will be paid by way of commission. This recognises that the music business is a volatile one and that success is by no means guaranteed. The manager runs the risk of working hard but failing to achieve success with the artist, in which event the manager earns little or nothing. Conversely, if success is achieved the manager may be rewarded handsomely. The obvious benefit from the artist's point of view is that the manager will not have to be paid unless there is some money to pay with. Of course, the artist usually only has one career and thus one chance of success; if the manager represents other artists the manager will have more than once chance of achieving success.

#### 3.2 **Commission Rates**

Commission rates have crept up over the years. There are sound reasons for this. Historically, the manager was nicknamed "Mr 10%". By the 1970's the most usual rate of commission was 15%. Nowadays, managers invariably charge 20%. Sometimes a manager will charge 25% although this is rarely thought to be justifiable. An enhanced rate of this kind might arguably be reasonable in the case of a powerful and successful manager putting together a "manufactured" band and/or if the manager is prepared to work exclusively for the artist involved. The principal reason why rates have increased is that, whilst originally a lesser rate of perhaps 10% or 15% might have applied, the remaining terms of the typical management contract were more onerous from the artist's perspective. For example, the manager might have expected to receive his commission on the gross income arising from any contracts entered into during the currency of the management contract. The management contract might have run for five years but, for example, if towards the end of the five years the artist were to enter into a long term recording agreement the manager would nevertheless expect his commission on all earnings under that agreement (even though a large part of those earnings may be attributable to recordings made after the expiration of the management contract). Nowadays, a manager would not usually expect to receive commission on recordings made or songs written after the expiration of the management contract (even though the manager may have negotiated the terms of the recording and publishing deals which govern those subsequent recordings and songs). Moreover, most managers now accept that commission will be calculated on the gross income only after deduction of certain expenses. Also, the manager will often have to accept that following the end of the management contract there will at some point be a reduction or even a cut off in the commission entitlement. For these reasons, the rate of commission has increased to what is now generally 20%.

The rate of commission may be affected by what is agreed with regard to the extent of the manager's involvement. A manager may wish to limit his involvement to the business side of things and may not wish to be available day and night to deal with creative issues and personal crises. If the manager is prepared to accept that he or she is offering something less than a full management service he or she may be prepared to accept a lesser rate of commission. A business manager will usually charge 5%. This will sometimes mean that the artist pays 25% in total but more often the general manager will accept 15%. On this basis, the artist may be better off because whilst he will still be paying 20% (15% to the

general manager and 5% to the business manager) there may be a saving in accountancy fees. In some cases, however, the business management services will be provided by the business management consultancy arm of an accountancy practice and whilst that consultancy will charge 5%, nevertheless an associated accountancy practice may still charge separately for bookkeeping and other accountancy services.

### **3.3 Variable Rates**

Sometimes, different rates of commission apply for different types of income. For example, an artist may argue that since the manager has little or no involvement in the songwriting process (as opposed to recording and touring activities) commission should be paid in relation to publishing income at a lesser rate. This is perhaps a spurious argument and it is rarely accepted by managers. After all, it is in part the manager's work which helps create the circumstances in which the value of the artist's publishing rights may be enhanced.

### **3.4 Commissionable Income**

Generally, the manager will be entitled to his commission calculated at the agreed percentage rate upon all of the artist's earnings from those activities which fall within the scope of the agreement to the extent that those activities are undertaken during the term of the management contract. A manager would rarely expect to receive commission upon income attributable to work done by the artist (i.e. recordings made and songs written) after the expiry of the management contract. However, the manager would usually expect to receive commission on income received during the term of the management contract from work undertaken by the artist prior to commencement of the management arrangements. This prevents, for example, a manager taking on a new band and being excluded from commission from the earnings attributable to the band's first album simply because the songs were written and perhaps the recordings made prior to the manager's involvement. If the artist is already established and there is a stream of income from past activities then the artist may wish to exclude all or part of that income for commission purposes. The manager may object to this on the basis that it will be the work done during the currency of the management contract which reactivates any back catalogue and gives rise to any current earnings from that back catalogue. Usually, the artist would concede this point although he or she may be reluctant to do so if already paying commission on that income to an ex-manager.

### **3.5 Calculation of Commission**

The old principle that the manager's commission is calculated by reference to the artist's gross earnings has been eroded in a number of respects.

#### **3.5.1 Recording Income**

The manager will usually be paid commission on the amount of recording income actually received by the artist, i.e. all advances and any royalties which are actually paid. To the extent that royalties accrue but are not paid to the artist because they are used for recoupment purposes those royalties are not commissionable. If the record company pays an advance which is inclusive of recording costs then the recording costs element is non-commissionable. Most recording contracts now provide for costs inclusive advances and this gives rise to some difficulty. If a record company

pays £200,000 inclusive of recording costs how does the manager calculate his commission when the recording costs are not yet known? The record company might pay say £50,000 initially and then pay the remaining £150,000 following completion of recording after first deducting any recording costs (which the record company usually pays on the artist's behalf). The manager would take commission on the initial £50,000 and would usually accept that commission on the balance is only payable once the album has been recorded and the actual recording costs ascertained. If the £200,000 is paid "up front" the manager should either defer the calculation and payment of commission or reach agreement with the artist for an "on account" payment. Sometimes, if the manager fears profligacy in the studio, the manager may insist upon a "cap" for recording costs (for the purposes only of calculating the commission).

### 3.5.2 **Publishing Income**

The manager will expect to be paid commission calculated by reference to the gross income paid to the artist. There are few complications involved with publishing income as there are so few expenses. Some artists try to exclude from commission any performance income received by the writer direct from the PRS. The PRS accounts direct to the writer for the writer's six twelfths share of any performance income and accounts separately to the publisher for the remaining six twelfths "publisher's share". The PRS rules are designed to protect the writer against over enthusiastic publishers but this has led to a belief on the part of some artists that they have an inalienable right to the "writer's share" of performance income. Having received this direct into his or her bank account the idea that the artist then has to pay a percentage of this by way of management commission is morally repugnant to him or her. There is little justification for this argument and, logically, there is no reason why the writer's share of performance income should not be commissionable in the same way as any other form of income. Most managers insist that they should be allowed to commission this income stream.

### 3.5.3 **Touring Income**

The major area of controversy in relation to the calculation of commission relates to earnings from live concert performances. Some managers still insist upon charging the agreed rate of commission upon the gross earnings from any tour but the majority of managers now accept that this is unfair. A concert performance (certainly a lengthy tour of concert performances) might generate substantial gross income but, of course, the costs of touring are so high that the net profits actually earned by the artist might be very small when expressed as a percentage of the gross. During the early stages of an artist's career touring activities may generate little or no profit but the artist is likely to continue with his or her efforts (perhaps with the record company underwriting any loss by way of "tour support") as a means of promotion. If a tour grosses say £1,000,000 and the expenses total say £800,000 leaving £200,000 profit then the artist is likely to be unimpressed with the suggestion that the entirety of that £200,000 (being 20% of the gross) should be paid over to his or her manager.

An increasing number of managers accept that commission should be calculated upon net touring income, i.e. only on any profits remaining after deduction of all

expenses. A prudent manager will at the very least impose some element of control over those expenses so that if the artist is profligate (by insisting upon taking suites at five star hotels and travelling everywhere by chauffeured limousine with a large entourage) this does not impact unfairly upon the management commission.

Many managers still believe that it is inappropriate for them to charge commission only upon net earnings. They take the view that the manager is heavily involved in the artist's touring activities (often having to gear up the management operation in order to cope with the level of work involved) and that the manager therefore needs to be assured of some income from this. An obvious and standard compromise is that commission is calculated upon the gross income after deduction of certain specified expenses but not all expenses. Another approach is for the commission to be calculated upon the net profits after deduction of all expenses but so that a fee of some kind is paid to the manager to defray or help defray any additional overhead expenses (with that fee then being treated as one of the expenses to be taken into account in determining the profits).

Managers sometimes make comparisons between the amount of work which has to be undertaken by the manager in relation to a particular tour and the amount of work required on the part of the booking agent. The manager may argue that it is unfair for the artist to accept that the booking agent should be paid a fee (usually 10% or 15%) calculated upon the gross income (the booking agent will always insist that this method of calculation applies) whilst the manager is expected to rely upon a share of the net profits. This argument does not take account of the fact that the booking agent does not earn from other sources (in particular from the additional record sales and merchandising income which a promotional tour is designed to achieve).

Sometimes the manager will not only mastermind the touring arrangements but will also provide day to day tour management services. If the manager or a member of his staff acts as tour manager (thus avoiding the expense of engaging a specialist) the manager may argue that he should be paid separately for those services. Alternatively, the manager may argue that the degree of involvement on the manager's part supports the assertion that the manager should be paid by reference to the gross income. Similarly, if the manager has sufficient experience to do so he or she may dispense with the booking agent and book the dates him or herself. Again, this might justify a greater financial involvement.

A reasonable compromise is that the manager should receive 10% of the gross or 20% of the net (whichever is the greater) on the basis that if 10% of the gross is payable and this gives rise to cash flow difficulties on the part of the artist then the commission entitlement is deferred so that this is only payable out of future commissionable income.

## **3.6 Post Term Commission**

### **3.6.1 Post Term Activities**

Generally a manager is not entitled to any commission in relation to income attributable to activities undertaken after the expiration of the management contract. Some managers do not entirely accept this principle and make a persuasive case to

the effect that they should earn commission (if perhaps at a reduced rate) on, say, the next album to be recorded after the end of the deal (although perhaps only if the manager negotiated the record deal under which that album is to be recorded).

### 3.6.2 **Future Commission**

Often, a manager will accept that he or she will have no entitlement in relation to activities undertaken after the end of the management contract but, in return, he or she does expect to receive full commission on all income arising from those activities undertaken during the currency of the management contract irrespective of when that income is received. For example, if a management contract runs for five years and during that period three albums are recorded then the manager would expect full commission upon the relevant earnings from those three albums whenever those earnings arise (even to the extent that the albums in question still generate income in perhaps 20, 40 or 60 years time).

### **3.6.3 Post Term Reductions**

The artist will often argue that there should be a reduction in commission at some point, i.e. perhaps commission should continue to be payable at the full rate (of perhaps 20%) for five years after the end of the management contract but this should then reduce to 10% in relation to income received over the next five years and that the entitlement then ceases altogether. The artist will advance two arguments in support of an arrangement of this kind. Firstly, there is the fact that (assuming the artist continues with his or her career) the artist will need to find a new manager and that manager will no doubt insist upon receiving commission (even if perhaps at a reduced rate) during the currency of the new management contract on earnings received from the exploitation of the artist's back catalogue. Secondly, in some part, any future income from the exploitation of the artist's past work will be generated by the artist's continuing efforts to maintain his or her profile and the direct promotion of the earlier material through concert performances and the like. The issue is controversial and many managers do not accept that their financial interest in a particular body of work should reduce with the passage of time. In many cases the point may be largely academic because if full commission continues to be paid for say five years after the end of the management contract this may catch the vast majority of the total income which is generated from the body of work in question. Again, however, the question of whether or not cut off provisions should apply rather depends upon the circumstances of each case. A manager who provides a complete service and manages the artist to the exclusion of all others is more likely to object to provisions of this kind. A post term commission entitlement is often referred to as a "pension" and in keeping with this concept there is some merit in the argument that the longer a manager is involved in the artist's career, the greater the protection he or she should have. One (very simplistic) way of dealing with the issue is to make the period during which the post term commission entitlement applies equal with the duration of the management agreement so that if the manager is in place for 3 years then he or she should continue for a further 3 years to benefit from the income which is generated from the work which was done during the initial 3 years but that, likewise, if the manager is involved for 10 years, he or she should continue to enjoy the income generated from what was done during that 10 year period for a further 10 years.

## **4.0 Expenses**

### **4.1 Out of Pocket Expenses**

A manager will invariably require reimbursement of his or her expenses. This should extend only to expenses incurred by the manager specifically on behalf of the artist. The manager's overhead costs should not be recoverable from the artist.

### **4.2 Approvals**

Some artists require a right of approval of any expenses to be incurred above a particular financial limit. This is a useful precaution during the early stages of the business relationship but tends to become unnecessary and cumbersome once the working relationship has been properly established.

### 4.3 **Reimbursement**

There is sometimes controversy over how expenses are to be reimbursed. Most managers accept (partly out of practical necessity) that expenses are recoverable only from commissionable income. Others take the view that since the expenses have been incurred specifically on the artist's behalf those expenses should in effect be treated as loans and should be repayable on demand. This gives rise to the prospect of a project failing and the management relationship coming to an end whereupon the manager presents the impecunious artist with a demand for repayment of outstanding expenses. No management contract will impose an obligation upon a manager to incur any particular expenses and most managers will readily accept that if they agree to incur a particular expense this is done at the manager's own risk in the sense that this will only be reimbursable if there is sufficient commissionable income. A compromise is that if the commissionable income is insufficient then any outstanding expenses would be repayable out of the artist's future entertainment related income (even though that income may not be commissionable because the management agreement has come to an end). If the manager insists upon this the artist might at least try to ensure that reimbursement is made only out of an agreed share of future income (in order to avoid the risk of a period during which he or she loses all of his or her earnings to the ex-manager).

### 5.0 **Accounting**

#### 5.1 **Usual Method**

Traditionally the manager always controlled the artist's income. It was seen as very much the manager's job to look after the money. The manager would be responsible for ensuring that earnings from the artist's activities are paid in full and on time. The manager would then prepare management accounts on a regular basis (perhaps semi-annually or quarterly) showing all income received and all expenses incurred. Each set of accounts would be accompanied by a cheque in favour of the artist for the amount due. This system often still applies although semi-annual accounting is now frowned upon. Most managers agree to account to their artists either quarterly or perhaps even on a monthly basis.

#### 5.2 **Alternative Method**

Many artists prefer to take control of their own money. Some artists feel that if a manager is entitled to 20% with the artist retaining the remaining 80% it is nonsense for the manager to receive 100% and account to the artist for 80%; rather it is more sensible for the artist to receive 100% and to account to the manager for 20%. Some managers are delighted if an artist wishes to adopt this approach. Looking after the money is obviously important but many managers see this as a particularly time consuming and dreary function so that if the artist is prepared to take this away and still pay the manager 20% then the manager may not complain. Other managers take the view that artists tend to be unbusinesslike and sometimes unreliable so that the manager needs to take control of the money in order to ensure that both the manager and the artist is paid. Moreover, the significance of expenses should not be underestimated. It is quite likely during the early stages of an artist's career that the aggregate of the manager's commission and any recoverable expenses will represent the lion's share of any available income.

### 5.3 **Pitfalls**

Many managers will allow the accounting function to be removed from them but only if the artist employs a reputable firm of chartered accountants to undertake the accounting function on the artist's behalf and to pay the manager's commission and expenses upon presentation of invoices. Some artists think that in this way their money will be safer. This is not necessarily true. There has been a number of well publicised cases of music business accountants acting improperly so far as their clients' money is concerned. Perhaps not all managers are trustworthy (as in any line of business) but the vast majority of them are and unless the artist has a proper degree of trust in the manager he or she should not have entered into a management relationship with that manager in the first place. It is not always efficient for payments to have to be cleared through an accountant's office. Moreover, an accountant will naturally charge for his or her services and these charges will usually be borne by the artist rather than the manager. All in all, there is perhaps more to be said for the traditional accounting arrangements coupled with some contractual safeguards for the artist (so that for example the artist's money must be paid into a separate client account held by the manager rather than be mixed with the manager's own money and so that the artist has suitable rights of audit).

## 6.0 **Termination**

### 6.1 **Termination for Breach**

In the case of a fixed long term contract both parties will usually have a contractual right of termination in certain carefully defined circumstances, e.g. if the other party is declared bankrupt or is convicted of an offence involving dishonesty or if the other party is incapacitated and unable to comply with his or her obligations due to illness or accident for an extended period. More controversially, the artist may require the right to terminate the contract in the event that the manager is in breach of any of the material terms of the agreement. This is dangerous from the manager's point of view because it enables the artist to walk away from the contract arguing that he is entitled to do so because for whatever (perhaps spurious) reason the manager has not been performing his or her obligations properly. This has the effect of muddying the contractual waters so that the manager may be less inclined to sue for breach of contract.

### 6.2 **Key-Man Clauses**

In the case of a management contract with a management company rather than with an individual an artist will usually insist that the individual concerned must be named in the contract on the basis that if he or she ceases to be available then the artist is entitled to terminate.

## **CHAPTER II**

### **RECORDING CONTRACTS**

#### **Introduction**

Despite the difficulties facing the recording industry, and the falling sales figures, the recording contract remains the principal means by which most recording artists earn their living. Many established but still active recording artists now earn more from touring than from record sales but, nevertheless, without a record deal the artist's ability to exploit his or her talent is limited. The recording contract is also the principal means by which a record company acquires its stock-in-trade. Record companies may also buy "catalogues" of recordings made by other record companies under their own recording contracts. Without recording contracts there would be few recordings and without recordings there would be limited opportunities for songwriters and music publishers to exploit their songs.

In Part I of this chapter we look briefly at how a recording artist might find a record deal, and at the different types of deal which might be available. In Part II we then look more closely at the component parts of a typical recording contract. In Part III we examine the financial aspects of recording contracts. Finally, in Part IV we deal with some of the more general considerations which apply once a recording artist has secured a record deal.

## **Part I The Deal**

### **1.0 Finding the Deal**

#### **1.1 The Team**

Few would-be recording artists are lucky enough to find worthwhile recording contracts. There is no easy way to get a deal and the downturn in the record industry has exacerbated this problem. We would all like to think that talent is the main factor. But talent alone is not enough. Good luck plays a large part although, to some extent, a recording artist can help make his or her own luck. Nor is there any right or wrong way to go about finding a deal. Artists can rarely secure a deal on their own, if only because it is difficult for artists to sell themselves. The first aim is therefore to ensure that the right team of people is in place to support the artist.

#### **1.2 The Manager**

In most cases, an artist appoints a manager before obtaining his or her first record deal. Sometimes a manager, or someone else with contacts and experience, may agree to help secure a deal whilst not wishing to remain involved beyond that. In return that person may ask for a finder's fee. This approach can be problematic. The strength of the overall team is important for the record company (more so now than before). In deciding whether or not to offer a deal the company wants to feel comfortable with the organisation of the recording project. In particular, the company must have confidence in the artist's manager. So the record company may resist dealing with someone who is merely "shopping" a deal, with no intention of following through with continuing help and support. Sometimes a company will sign an artist without a manager. In most cases, though, the company would then try to ensure that a manager is put in place.

#### **1.3 Agents**

If the artist is gigging regularly, his booking agent may help to get a deal. However, the major booking agencies are reluctant to sign artists until they have a good live following. Often, this only happens once a record deal is in place.

#### **1.4 Lawyers**

A music business lawyer can sometimes help with getting a deal. Most lawyers are only of real help once a record company has shown some interest. There is a limit to what the lawyer is able to do in securing that interest in the first place. A specialist lawyer (like anybody else working in the industry) might manage to put a demo CD on the right desks at selected record companies. He might even ensure that the CD is given proper consideration. However, distributing demo CDs is rarely enough, on its own, to get a deal.

#### **1.5 The Pitch**

Every recording project is different. Even if it is not different, it must be presented as if it is. So a "story" must be developed around the particular project before this is "pitched" to

record companies. The individual talent of the artist will always be the central feature of the story. There will be many other factors involved including the songs and perhaps the intended producer, and perhaps the past history of those involved in the project. The story takes time to develop.

## 1.6 **Publishers**

Assuming the artist writes some or all of his or her own material, there is the question of whether to sign a record deal or a publishing deal first. Some years ago, the conventional wisdom was that a record deal should be secured before a publishing deal. The theory was that the record deal would give extra value to the publishing rights. It is now more common for an artist to enter into a music publishing deal before a record deal (see chapter IV Part I para 2.0). Once a publisher is involved there is then one more member of the team who can give real help in securing the record deal. The existence of the publishing deal may give the record company added confidence.

## 1.7 **Which Company?**

Sometimes it never rains but it pours. When, finally, one record company shows interest others may follow. There is nothing more likely to awaken a record company's interest in the artist than interest from another company. If the artist is lucky enough to have a choice between companies, how should he or she choose? Firstly, look at the company's current roster of artists. Consider whether those artists and their success (or otherwise) suggests that the company will properly understand and work effectively with the artist in question. On the other hand, an artist may want to avoid a company which already has a similar artist competing in precisely the same field. This need not necessarily be a problem. However, artists must compete with others on their label for limited marketing and promotion budgets.

## 1.8 **Individual Executives**

Don't set too much store by a company's past successes. All major companies have labels of which they are rightly proud. An artist should concentrate on the label's recent track record rather than its historic success. Look carefully at the current MD, head of A&R (and any other significant A&R staff) and head of marketing. Talk to them about their careers; what they have done and what they still hope to achieve. Remember, however, that record company executives are not generally known for their loyalty. Artists may have to sign a multiple album deal but key executives change jobs frequently. Financial considerations will affect any choice. If competing deals are roughly comparable in financial terms the deciding factor should normally be the level of enthusiasm shown. You cannot always be sure that a company is as enthusiastic as it seems. The amount of money offered is a good indication of enthusiasm, but it is only one indication. Despite the risk of key executives leaving to join another label, the most important factor is the artist's relationship with the person bringing in the deal. How experienced is that person? How much power does he or she have within the organisation? How much do you trust him or her to do all of the things promised?

## 2.0 Indie or Major?

### 2.1 The Conventional Deal

Although all record companies and publishers have standard forms of contract, no two deals are ever quite the same. In Part II of this section we look more closely at the component parts of a typical record deal. For this purpose we assume that the deal is with a major. Under this type of deal, an artist signs exclusively to the company on a long term basis. The company owns **all** of the recordings made during the full length or "term" of the agreement. The artist earns royalties on record sales. Those royalty earnings are used by the company to pay off, or "recoup" any advances paid to the artist including any recording costs and certain other expenses. Within that framework there is a great deal of flexibility. Every negotiation and every contract will have a distinct flavour of its own. Whilst for many years the basic ground rules remained the same, such has been the upheaval in the industry in recent years that those rules are now in an uncertain state of flux.

### 2.2 Independent Arrangements

For many years the major record companies enjoyed a "stranglehold" over the record industry. There have been many successful independent labels but with few exceptions when independents have reached a certain level of success they have been acquired by one of the majors. A "major" was a record company which owned and controlled its own manufacturing and distribution facilities. This gave the major an insuperable advantage over an independent label. The landscape of the record industry is now more complicated. At the time of writing there are four remaining "majors" being Universal, Sony, Warner and EMI. They no longer necessarily have their own manufacturing and distribution facilities in every territory but, rather, their defining feature is that each of them has a substantial infrastructure with properly staffed offices in all of the important record markets. However, as time passes, digital distribution gains more and more ground against physical distribution and as a result the "stranglehold" of the majors continues to loosen. There have been drastic cuts in staffing levels and there has also been a reduction in the level of investment in new talent (including the amount of marketing spend). As a result, independent labels with access to a reasonable level of funding are now able to compete more easily with the majors. It is easier than before for artists to set up their own labels. If the artist has access to funding then it is now far easier to engage suitable independent consultants (who would previously have been employed by the majors) to orchestrate a comprehensive marketing campaign. However, it would be a mistake to think that there is a level playing field in terms of what a major is able to offer an artist as opposed to what that artist may hope to achieve with a self-funded label or a deal with one of the independents. If the aim is to achieve high profile success internationally then a great deal of effort will be required on the part of a great number of people. The logistics involved are complex and require extensive project management. A major label remains the more obvious choice for an ambitious artist.

### 2.3 Creative Control

An apparent advantage of signing to an indie is that the artist may retain greater creative or artistic control. Majors usually insist on a substantial degree of control over certain elements of the creative process (for example, the choice of songs, producer and studio). The major will wish to control these elements if it does not approve of the artist's plans. Indies are reputed to be more sympathetic to the artist's wishes. They will generally allow

the artist to go in whatever artistic direction the artist wants. One reason for this more sympathetic approach is that an indie usually invests significantly less in an artist than a major, in terms of "up front" money put at risk. Also, indies are usually run by people with a particular understanding of the artists they sign and their music. On the whole, they can relate better to their artists on a musical and artistic level. This is not to say that A&R managers at the majors never have this level of understanding. However, an A&R manager at a major will tend to look after several artistically different acts. The investment in those artists (which typically is more substantial than that made by an indie) will increase the pressure to secure immediate chart success rather than allowing the artist to develop more naturally and gradually. Also, the key A&R person at an indie is often the owner of the company. He or she is freer to make decisions than his or her counterpart at the major. He or she does not have to justify the company's expenditure to a managing director, chairperson or finance director when sales are not going that well. Nevertheless, there is a tendency to exaggerate a major's ability to control the artistic process. A record company cannot physically force an artist to record a particular song or work with a particular producer. Some A&R managers at the majors have immense experience and understanding. A good A&R manager will operate as a catalyst for all of the ideas and other artistic ingredients involved. Indies tend to have smaller artist rosters than the majors. The majors tend to have different priorities from time to time with the result that some artists may be neglected. Different records by different artists may be competing for a gap in the major's release schedule. Indies tend not to have these problems (or not to the same extent).

#### 2.4 **Short or Long Term**

All majors will typically expect a new artist to sign an agreement committing the artist to record probably four or five albums. An A&R manager might sign an artist to a five album deal only to join another company a year or so later. Indies generally will not demand such a long term commitment. The deal may be limited to as little as one album. Even if the indie wants options for additional albums, this may matter less to the artist because of the creative factors. Indies often allow an artist to develop at the artist's own pace, and so avoid the pressures of becoming a "mainstream" act too quickly, with the artistic compromises this may involve. An artist might start off with an indie and move to a major later. If the artist is successful and receives some critical acclaim with the indie the artist might then extract a better deal from the major over creative issues.

#### 2.5 **Territory**

All the majors generally expect to sign artists for the whole world. This applies even if their overseas associates have shown no particular interest in the artist. Indies, however, often limit their recording agreements to just a few countries (e.g. UK only, or Europe, or the World excluding North America). This allows the artist to make separate agreements with other record companies in the countries not covered by the initial deal. Artists can then choose companies which are genuinely enthusiastic about them, or which might for other reasons be "stronger" in that territory.

If the artist secures separate deals overseas, he or she will benefit by having more than one royalty stream. Even if the indie insists on a worldwide deal, the indie will have more flexibility in sub-licensing outside the UK to companies genuinely interested in the artist. Indies will sometimes agree to share with the artist any advances they receive from their overseas licensees.

## 2.6 **Royalty Rates**

A typical royalty rate on album sales for an artist signing to a major would be, say, 20% for UK sales; 18% in major countries such as Germany, France, USA and Japan; and 16% for the rest of the world. We examine more carefully what is meant by all this in Part III. The higher rate for the "home" territory (in this example 20%) is sometimes referred to as the "headline" rate of royalty. Lower rates apply outside the home territory because the company itself merely receives a royalty from its licensee and will wish to maintain a reasonable margin between the royalty received and the royalty passed to the artist. However, an artist signing to a different company in each territory will expect to obtain a "headline" rate because by signing **direct** to the overseas companies, he or she is cutting out the middle man.

## 2.7 **Share of Profit**

An artist signed to an indie will often be paid a share of profit or "net receipts" instead of a percentage of the price of each record sold. The profit share is usually 50% of the indie's net receipts. This might increase (or "escalate", in record company jargon) for later albums and perhaps for overseas income. The relationship between an artist and an indie is more like a partnership. The artist takes less money up front (sometimes none) on the basis that, if the artist succeeds, the artist and the record company share more or less equally in the fruits of success. Again, we look more carefully at this in Part III.

## 2.8 **Financial Insecurity**

However, there are considerable problems with the indie route. An indie is more likely than a major to have cash flow problems or perhaps go bust. It may not have the sophisticated structures, financial disciplines and professional management of the majors. This becomes a matter of particular concern when an artist "breaks" (whether domestically or internationally) because at that stage substantial investment and resource is needed to maintain the artist's momentum and to capitalise fully on all opportunities.

## 2.9 **International**

If there are separate deals for different territories, the artist or his or her management will become heavily involved in liaising with and co-ordinating the different distributors. Each company needs masters, information, and promotional material. Each will expect the artist to tour in its territory, and may not be very tolerant of the artist's other commitments. With a single deal with a major, many of these problems are avoided. It is for the major's International Department to manage these conflicts.

## 2.10 **Advances**

Indies do not usually pay substantial advances to their artists. Conversely, majors often do so, which gives a degree of financial security. Similarly, indies are less inclined to allow the artist to spend as much on recording costs so the indie artist is less likely to use the top studios and producers. Once an artist breaks, majors are more likely to have the resources to exploit the opportunities fully. They can fund more expensive videos and more substantial

marketing campaigns, including TV advertising. Majors can usually co-ordinate international campaigns more effectively.

## 2.11 **Strength in Depth**

Majors employ talented, creative people in specialised departments, such as A&R, Marketing, Press, Promotions and International. Many staff at majors have worked in the record industry for a long time. The personnel at the smaller indie labels may not have such wide or detailed experience of all aspects of the development of artists, and of maintaining success once it has been achieved. If an artist has creative flair, or an experienced and creative manager, then he or she will have less need to call upon a major's resources. However, few artists have these abilities and resources; they need record companies to provide guidance, advice, support, commitment and money.

## 2.12 **The Final Choice**

Some of the more interesting artists in recent years have come from indies. Other artists, signed to majors, may well have made less impact had they been on indie labels. Some bands which either have, or pretend to have, the indie mentality, get suffocated when they move to a major. In choosing between the indies and majors there are many factors to consider such as:-

2.12.1 **Current A&R relationship** - How good is the artist's relationship with his A&R manager when he or she signs the deal?;

2.12.2 **Future A&R relationship** - How likely is the A&R relationship to survive? Will it break down, for example, because the A&R manager is unable to win continued support from his colleagues at the label? Or will it end simply by the A&R manager leaving to pursue his career elsewhere?;

2.12.3 **The artist's ability** - Might his or her particular talents be stifled by the major approach? The cliché of the difficult second novel applies equally to musicians. Some artists clearly have enduring appeal, others come and go. Those that fail might blame the stifling atmosphere at a major: those that endure might well have succeeded wherever they were;

2.12.4 **The artist's management** - How competent and experienced is the artist's management team? How quickly can they adapt to the artist's changing fortunes?

2.12.5 **The artist's style** - a pop or mainstream rock artist may be better suited to a major, given its marketing machinery; an alternative rock or dance artist is arguably better off with an indie, at least during the early stages.

## 3.0 **The Proposal**

### 3.1 **False Hopes**

Typically, artists suffer a series of false starts. Record companies frequently offer encouragement, leading to misplaced optimism on the part of the artist. Too often, record companies appear keen when they have no real enthusiasm. In the worst cases (again, not

uncommon) a company may ask for more demos, or suggest other changes, without any genuine expectation of signing a deal. The artist is sometimes led down a cruel cul de sac.

### **3.2 Who Makes the First Move?**

Nevertheless, with luck, sooner or later a record company will decide to proceed. At that point, the record company will ask what deal the artist is looking for. Often, the artist's reaction is to panic, because he or she does not know what he or she is looking for. Logically, a company which has expressed interest in signing an artist should put forward its proposals for a deal. This often fails to happen in practice. The company may prefer the artist to put forward a proposal. The initial proposal is one of the most vital stages of the negotiating process. All of the team members should be involved in formulating it. However, the initial proposal should not be over complicated. It should deal with the suggested length of the deal, the territory, the product commitment, and the basic financial terms for the initial recordings. It is probably better not to complicate the initial proposal with the financial arrangements for subsequent recordings. However, the proposal should also raise features of the deal which are thought to be important but non-standard.

### **3.3 High or Low?**

The artist should take care that the proposal is pitched sensibly in terms of what the record company is likely to agree to do and to pay. The artist must avoid asking for too little but there is a danger in asking for too much. The artist therefore needs a team member (perhaps a manager, but probably a lawyer) with experience of comparable deals.

## **4.0 The Legal Framework**

### **4.1 Practicalities**

Much of what happens in the music business cannot be understood without at least outline knowledge of certain legal issues. The most important of these, in the context of recording contracts, is the doctrine of restraint of trade. Put simply, the law provides that an agreement which unreasonably restricts a person's ability to carry on his or her trade cannot be enforced. This only assumes immediate importance when there is a dispute between the parties to an agreement. When that happens, an artist may try to escape from his or her obligations under the agreement, by arguing that it is, and always has been, unreasonably in restraint of trade. No record company would make a substantial investment in an artist if it felt there is a real risk that the artist might at some stage avoid his or her obligations in this way. The issue of restraint of trade therefore has a significant impact on the obligations imposed by record companies on artists.

Many commercial agreements involve, to a greater or lesser degree, a restraint of trade. The courts will only enforce a particular agreement if persuaded that the restraints which it imposes are reasonable. A recording agreement is a restraint of trade because of the element of exclusivity. The agreement gives the record company the exclusive right to the artist's services as a recording artist. The artist may not carry on his trade for any other person or company. Any recordings made by the artist during the agreement automatically belong exclusively to the record company.

The extent of the restraint differs from agreement to agreement and from company to company. In the case of an agreement with a major a typical deal will be worldwide, for perhaps four or five albums. During the term of the agreement (and it may take ten years or more to record and deliver all of the albums), the artist is prevented from recording for anyone else. There will be other restrictions; for example, for a period of time, perhaps five years, after the end of the deal, the artist will be prevented from recording for anybody else any of the songs which were recorded during the term of the recording agreement (this is known as a "re-recording restriction").

If an artist claims in any legal proceedings against a record company that the agreement is an unreasonable restraint of trade, the court will take into account all the terms of the agreement. Restraint of trade cases involve an exhaustive consideration of evidence, as to what is, or is not, reasonable. Such cases may run for many weeks. It follows that they are expensive, which helps to explain their rarity. It is difficult to extract hard and fast rules from decided cases, because they depend so much on their particular facts. Except in extreme cases, lawyers find it difficult to give definitive advice as to whether or not a particular agreement might constitute an unreasonable restraint of trade and so be set aside. In 1990 the court set aside Holly Johnson's recording agreement with ZTT on the grounds that it constituted an unreasonable restraint of trade. Similarly, (although the facts in each case were very different), in 1993 the court set aside the Stone Roses' recording agreement with Silvertone for similar reasons. However, more recently, George Michael failed in his bid to set aside his agreement with Sony Music. The decision in George Michael's case has caused some confusion because it is difficult to square this with the decisions in the Holly Johnson and Stone Roses cases.

## 4.2 Legal Advice

One factor which prejudiced George Michael's position is that he had re-negotiated his contract several times since first entering into a recording contract (as a member of Wham!) with Sony. On each occasion George Michael had been properly advised by experienced music industry lawyers. In any restraint of trade case the court will take into account not only all of the terms of the agreement but also the circumstances in which the agreement was entered into. It is for this reason that the adequacy of any legal advice is of crucial significance. It is obviously sensible for any artist to obtain proper legal advice for his or her own benefit but, moreover, it is equally vital from the record company's perspective that the artist is seen to have been properly advised. A prudent record company will insist that there is clear evidence that the artist has been independently advised. For example, if the manager's lawyer deals with the matter on behalf of the artist the record company may wish to be satisfied that whilst the lawyer concerned also acts for the manager nevertheless so far as his or her dealings in relation to the recording contract are concerned the lawyer has taken instructions from the artist direct, or has at least explained the nature and content of the contract direct to the artist. If the record company is particularly prudent then it will strive to ensure that there is a genuine negotiation. This need not mean that the record company has to make concessions that it is unwilling to give but it does mean that the record company should avoid the approach of refusing to negotiate and of merely adopting the "take it or leave it" approach. One particularly irritating habit on the part of record companies is to refuse even to attempt to justify a particular provision but simply insist upon its inclusion in the contract on the basis that this is "company policy". The prudent record company will at least try to justify and explain why it insists upon a particular provision.

One practical ramification of all of this is that since it is quite as important for the record company as it is for the artist that the artist should be properly advised most record companies will agree to pay or at least make a contribution towards the artist's legal fees (although usually on the basis that this is to be treated as a further advance against royalties).

#### **4.3 Lessons**

Record companies have learnt many lessons from the restraint of trade cases affecting the music industry. They try to make sure that their recording agreements are as safe as possible from attack. One of the major criticisms raised against recording contracts has been their excessive duration. Whereas the majors used to ask for a total of seven or eight albums (sometimes as many as nine or ten), after the decisions in the Holly Johnson and Stone Roses cases this crept down to five or six albums. This downward trend has continued so that a six album deal is now unusual. If a record company insists on a maximum of, say, six albums, this is probably because it has been advised that to ask for more carries an unacceptable risk. If the company were confident of justifying six or seven albums it would no doubt insist upon them.

#### **5.0 Production Agreements**

##### **5.1 What is a production deal?**

A production agreement is the name usually given to a recording contract between an artist and a company which is neither a major record company nor an independent record company but which is merely in the business of making recordings which it then licenses or assigns to a record company.

##### **5.2 Why sign one?**

An artist would invariably prefer to sign a record contract with a record company rather than a production company for the obvious reason that the production company is a "middle man" with the inevitable consequence that the artist's earnings are reduced. In Chapter I, we considered the practice of "de facto" managers seeking to improve upon the strength of their position by requiring the artist to sign a production agreement rather than a management agreement. This practice is frowned upon but this is not to say that there is no place for production agreements. In fact, in recent years there has been a proliferation of "genuine" production agreements. The reason for this is that the financial crisis with which the major record companies have been grappling for some years has led to substantial cost saving measures including numerous redundancies. There has been a reduction in both the quality and quantity of A&R staff so that there has been a trend for the record companies to look more and more to outside teams of producers and writers. At the same time, recording technology is cheaper and better which has encouraged a proliferation of privately owned small scale recording studio facilities. As a result, the number of direct signings to record companies is reducing. The number of production deals has increased dramatically. Artists must realise, however, that a production deal is merely a step towards a more meaningful record deal and that only a fraction of production deals result in the production company securing a worthwhile record deal for the artist in question.

##### **5.3 Pitfalls**

The difficulty with a production deal is that typically, the intention on the part of both the artist and the production company is that ultimately they should secure the involvement of a properly funded record company. For this reason, the production company will usually insist upon acquiring all of those rights which it will need in the event that it is able to secure an appropriate record deal. Hence, the production company will typically seek options for up to four or five albums so that the artist is required to enter into what is potentially a long term commitment with a production company which cannot guarantee the involvement of a record company, has no ability by itself to release any records, and probably cannot or will not pay any advances to the artist (beyond the payment of recording costs which often is limited to the use of the production company's own limited studio facilities). The production contract will usually provide for any net profits to be divided between the production company and the artist (in much the same way as profits are commonly shared between an independent record company and the artist). Typically, there might be a 50:50 split of profits in relation to any first album but so that the artist receives a greater share in relation to subsequent albums. The production company "produces" the recordings so that often there will be no third party producer royalties. Accordingly, an artist signing direct to a major record company for a royalty of 20% of the dealer price might have a net entitlement of, say, 16% (because the 20% royalty would be inclusive of any third party producer royalties and a producer might typically receive a 4% royalty). If the record deal were entered into through a production company and the production company receives the same 20% royalty then this might be split equally (so that the artist receives only 10% rather than 16%).

The best practical protection for the artist is to have a right of approval over any record deal with a third party and the right to terminate the production deal if a suitable record deal is not found within a reasonable period.

#### 5.4 **Television talent shows**

A further example of how the major record companies rely upon outside parties is the fashion for the creation of instant high profile recording artists through televised talent contests such as X Factor and American Idol. In these cases, the agenda is dictated by the television production companies. It will be a requirement of entry into the contest that if the contestant reaches a certain stage then he or she must sign a number of contracts. The artist will be required to take legal advice on the agreements and will be entitled to withdraw if he or she wishes but for practical purposes will have no real bargaining power. The television production company will require the artist to enter into a long term recording agreement either with the television production company itself or with a specified record company (on the understanding that there will be a participation on the part of the television production company in the record company's profits). The artist will also be required to enter into merchandising and sponsorship agreements, probably a live concert performance agreement, and possibly a songwriting agreement (and sometimes also a management agreement).

## **Part II The Contract**

### **1.0 The Term**

#### **1.1 Long Term Contracts**

As explained in Part I, most UK majors ask for up to four or, perhaps, five albums when signing new artists although the trend is downwards. US record companies, when signing in the US, still tend to ask for six or seven albums. Elsewhere, for example in Germany, France and Scandinavia, less importance is attached to long term contracts. One advantage in following the indie route is that contracts are usually less demanding, particularly in terms of duration. An indie may be prepared to conclude a deal for just one record or with a very limited number of options. Generally, the artist needs the contract to last long enough to ensure that the record company is reasonably committed, but not so long that the record company can stifle the artist's career, whether artistically, or financially.

#### **1.2 Development Deals**

In many cases, the record company will not be prepared to commit immediately to recording an album. Instead, it may ask for one or two singles, with the right to call for sufficient additional material to comprise an album. This type of agreement is often called a development deal. They are generally unsatisfactory for artists. Whilst the company will not be obliged to continue beyond the singles stage it may nevertheless insist upon options for up to, say, five or six albums. Accordingly, the artist is entering into potentially a very long term commitment, despite having only a very limited commitment from the company in return. The other problem with development deals is that the artist may suffer from inordinate delays. In order to explain why these delays may occur we first need to describe how the term of a typical recording agreement is structured.

#### **1.3 Extension Periods**

In, for example, a five album deal, the artist will usually be contracted to the company for an initial contract period of one year. This is followed by five further successive option periods of one year each. The record company alone may decide in each case whether to exercise its option and so enter into each subsequent contract period. On the face of it, therefore, if all the options are exercised, the contract continues for six years. This might sometimes be referred to as a six year deal but would usually (and more accurately) be referred to as a six album deal. The reason this description is more accurate is because of the "extension" provisions. Each contract period will run for twelve months or, **if longer**, until a set period following delivery or, more usually, release of the album recorded during that contract period. In the first contract period, recording of the album usually does not begin until the agreement has been signed. The recording process is often lengthy. Once the completed album has been delivered to the record company, there will be a further delay before it is released. The majors often have crowded release schedules. Moreover, marketing and promotion campaigns have become more sophisticated. Accordingly, lead-in times, i.e. the period between delivery and release, have become longer. It may be sensible to avoid the release of an album during August (when everybody is away on holiday) or during November and December (when there is a deluge of releases competing for the Christmas

market). Generally, there may be a delay of perhaps three to six months after delivery before the album is released. The contract may provide for a further period of extension following release which may be as much as a further six months. This gives the record company time to evaluate the success of the album, before deciding whether or not to exercise the option for the next period. The problem may be worse in later option periods because recording will not begin until after the option has been exercised. Only then will money be made available for recording. The artist may still have outstanding touring commitments in relation to the promotion of the previous album, before he or she begins writing and recording the next album. For all of these reasons, a typical "album cycle" might be two years. In the case of a five album deal this might therefore take, say, ten years to fulfil.

#### 1.4 **Delays**

A development deal may be structured on the basis that during the first contract period only one single is to be delivered. The record company may have an option to enter into a further contract period during which perhaps the artist must deliver a second single. Only then might the record company be obliged to decide whether or not to commit to a third period during which the first album would be recorded. The artist might record two singles only to find that the record company does not wish to continue. In the meantime, as a result of the extension provisions there might have been a delay of perhaps a year or two. This is why, for the artist, development deals are generally to be avoided if possible. A preferable alternative is to persuade the record company to finance some high quality demonstration recordings without the benefit of a formal contract. If both sides are pleased with the result then a record deal (with a proper commitment on both sides) may be negotiated. The record company is exposed to some degree because the artist may try to use the demos to "wind-up" the deal by seeking interest from other companies. However, a pragmatic company may be prepared to adopt this approach with the confidence of knowing that it is far ahead of its competitors in terms of building a relationship with the artist.

#### 1.5 **How Many Options?**

The artist should restrict the company to as few options as possible. There may be a temptation to attach more significance to other aspects of the recording agreement, perhaps the advances and royalties. In fact, the difference between a four album and a five album deal may be very significant. In the majority of recording contracts the option for the second album is not exercised. Even when it is exercised the option for the third album may not be exercised. As a general rule, if a third album is delivered this demonstrates that the artist has achieved some real success. The artist should by then be a recognised talent with a secure sales base. In some cases, a first album will be so successful that the artist will more or less immediately achieve significant wealth and status. However, although an artist about to record his or her fourth album may be perceived as successful, and though he or she may have benefited from a number of substantial advances, nevertheless (for reasons explained in Part III), his or her royalty income might not yet have begun to flow.

He or she may wish to flex his or her muscles at around this stage and attempt to re-negotiate his or her deal. We deal with the issue of re-negotiation of recording contracts in more detail in Part IV. At the point at which a record company requires an artist to deliver a fourth album, the artist will find it more difficult to secure significant improvements if the

record company can call for a maximum of five or more albums. The task of re-negotiation would be far easier if the deal were for only four albums.

In summary, if a record deal is not going to survive beyond the first few albums then it does not matter whether the maximum number of albums allowed for is five, ten or any other number. However, if a contract survives beyond three albums (at which point the stakes are higher all round) then every extra album for the company wins the company perhaps two more years before it may have to give the artist improved terms.

## 2.0 **Product Commitment**

### 2.1 **Artistic Standards**

As we have seen, the artist may have to deliver up to four or five albums. The recording agreement will be more precise about exactly what has to be delivered. Generally, the albums must be studio recorded, rather than live recordings. The company will want to set a minimum standard. At worst (for the artist), the company will be entitled to reject any recordings which the company (in its absolute discretion) decides are **commercially** unsatisfactory, whatever that means. Ideally, for the artist, the record company's right to reject master recordings should only apply if they are **technically** unsatisfactory for records to be made from them. A suitable compromise is usually found.

### 2.2 **Additional Material**

In addition, the company may acquire the right to insist upon a minimum number of additional tracks for use as B-sides or bonus tracks. An album is generally defined as a minimum of twelve tracks (plus additional B-sides or bonus tracks if required) with a minimum playing time of perhaps forty or forty-five minutes. All of this is of particular significance for the artist if the advances to be paid are expressed to be inclusive of any recording costs (see Part IV).

### 2.3 **Two Albums Firm**

Sometimes a record company will agree (using accepted industry slang) to "two albums firm". This means that the company does not have an option for a second album but commits to it from the outset. A company will only reluctantly agree to this and usually only in the face of fierce competition to sign an artist. On the face of it, two albums firm represents a victory for the artist; it shows real commitment from the record company. It shows that the company is taking a long term view and is prepared to proceed with the second album, even if the first does not immediately bring the anticipated level of success. However, in some respects a two album firm commitment can be a double-edged sword. If the company loses interest after the first album, the artist is nevertheless exclusively contracted for a significant further period. The record company may become obstructive in recording the second album or, perhaps worse, may allow it to be recorded but then put no effort into its promotion. Arguably, the artist might have been better off had the company only committed to one album and failed to pick up its option for the second. This would leave the artist free to pursue a career elsewhere. This is less true at the present time when record deals are more than usually difficult to come by. That said, the usual outcome where the record company loses interest is a negotiated settlement of some kind. The artist is released from the contract and is paid a reduced sum of money in return for agreeing that the company no longer has to

pay the advance and recording costs for the second album. The company might also be paid an "override" (i.e. a royalty of perhaps 2% or 3% on subsequent sales of that album) by the artist's new record company. Alternately, on occasions, as part of any settlement, the artist may be given copyright in the masters for the first album.

## 2.4 **Greatest Hits and Live Albums**

Sometimes (but rarely) a greatest hits album may qualify as a product commitment album. For example, the company may agree to restrict the deal to four studio albums rather than five, on the basis that in addition to the four studio albums the company will be entitled after a given period to compile and release a greatest hits album. This would represent a victory of sorts for the artist because in reality this means that he or she only has to deliver four albums rather than five. Ordinarily, not only will the record company own all of the material but it will have unrestricted rights of exploitation. A company rarely accepts any restriction on its ability to release a greatest hits album.

Similarly (but again, rarely) a company may accept that one of the albums to be delivered will be a live album. Ordinarily, if a live album is recorded the company automatically acquires exclusive rights to it, without this counting towards the minimum product commitment, and without any obligation on the part of the company to pay any advance for it, or even to release it.

## 2.5 **Exclusions**

Recording agreements are invariably exclusive. If the artist records additional material beyond the contracted minimum product commitment, the record company will own all of the additional material. Most recording agreements contain limitations upon this exclusivity. For example, the artist may normally undertake session work (within defined limits), and may record TV and radio broadcasts, provided the TV and radio companies undertake not to exploit those recordings except by means of broadcast. Established bands may negotiate a deal which relates solely to recordings made by the band itself, leaving the individual members to pursue solo projects outside the scope of the deal. Record companies are very nervous of this arrangement. If they have to agree to important limitations of this kind, they will always insist that any solo or other work must not interfere with the band's promotional activities. Release dates must be carefully monitored.

Record contracts do not normally extend to the artist's separate activities as a record producer or engineer but given the increasing confusion between performance and production in some areas of contemporary music, provisions are in some cases included which limit the extent to which an artist may work as a record producer for third parties.

## 3.0 **Territory**

### 3.1 **Worldwide Deals**

When a major signs a new artist the company's right to manufacture and sell records will invariably extend worldwide. In special circumstances, particular territories may be excluded. For example, a non-UK artist launching his or her worldwide career from the UK may already have recording arrangements in place in his or her home territory. An artist

moving to a major from an indie may have granted rights in future recordings to overseas licensees. The territories in question are simply not available to the major.

### **3.2 Restricted Territory Deals**

Majors do not like to give up any territory. This is not only because they will lose profits from sales in the excluded territory, but also because the company will be at risk, throughout its territory, from imports of records coming from the excluded territory. In practice, the excluded territory will often be the USA and Canada. This territory accounts for more than one third of worldwide record sales. For that reason alone, most artists aspire to success there and record companies do not want to give up their rights there. An artist may wish to exclude North America because he or she thinks that the company's US affiliate is either inept or is likely to dismiss the artist's talents, and that the UK company has little or no influence over its US affiliate. If so, the artist may prefer to achieve success elsewhere before concluding a deal direct with a US-based company which likes his or her work. Split territory deals of this kind will give rise to separate income streams. If the artist recoups in one territory he or she will enjoy royalty income from that territory. If the deal were for the world, the accrued royalties from the recouped territory would be used to recoup generally. We deal with this in more detail in Part III.

### **3.3 Interaction**

Split territory deals are complex. Release dates have to be co-ordinated to reduce the problem of imports. Usually, all distributors want to use the same artwork. There would be little point in each company making its own videos. So, if the world is divided into two (or more) separate territories then, in addition to negotiating the two recording agreements, a separate agreement is needed between the artist and both the record companies regulating dealings between them. Another disadvantage is the high level of legal fees involved in setting up these arrangements.

A less attractive alternative for the artist is for him merely to have a right of approval over the identity of the record company's US licensee. Most majors would only give such an approval right as between the various US labels owned by that major. An artist has to be in an exceptional negotiating position to secure a split territory deal, and usually has to be in a strong position even to secure a right of approval over the US licensee.

## **4.0 Creative Issues**

### **4.1 Approval Rights**

The issues of most concern to the artist are usually the selection of songs, choice of producer and studios, approval of mixing and re-mixing, control over artwork and photographs, and control over videos, including the approval of any storyboard and of the director and producer involved. An artist might look for other approval rights over financial matters rather than creative issues. For example, since all recording costs and at least a proportion of promotional video costs will be recouped from the artist's royalties, it follows that the artist should ideally have a right of approval over recording and video budgets, and any other recoupable expenditure.

## 4.2 **Control**

There are four basic alternatives:-

4.2.1 the record company has complete control (i.e. what it says goes); or

4.2.2 the record company has control, subject to an obligation to consult with the artist; or

4.2.3 both parties must mutually agree upon the matters in question (perhaps on the basis that in the event of a stalemate the company and the artist have an alternate casting vote); or

4.2.4 the artist has complete control.

Most agreements contain a mixture of these four alternatives. A new artist is unlikely to achieve complete control and would normally be happy with a mix of consultation rights and, in key areas, mutual approval.

## 5.0 **The Record Company's Obligations**

### 5.1 **One Sided?**

Recording contracts issued by majors may stretch to sixty or seventy pages. About a third of the agreement is taken up with financial provisions most of which, as we will see in Part III, deal with the various means by which the artist's basic royalty is reduced. The bulk of the contract is for the company's benefit. It imposes obligations on, and extracts warranties (legally-binding promises) from, the artist. Beyond the obligation to pay an advance and possibly, at some future time, some royalties, it is difficult to find anything in the document which imposes any obligation on the company.

### 5.2 **Release Commitments**

One exception is that most recording agreements now include a release commitment of some kind. This would appear to favour the artist, but appearances can be deceptive. Record companies rarely agree to a positive commitment to release a particular record in a particular territory within a given period. A company would probably give such a commitment only for a record which has already been made, and for which there is an obvious market. In such a case, there is little benefit to the artist in securing a binding release commitment, because commercial reality will ensure the record is released in any event. The main reason for the release commitment is to satisfy the company's concern that without this there might be a stronger argument that the agreement constitutes an unreasonable restraint of trade. Courts do not look favourably upon an exclusive recording contract which does not contain an obligation to make the artist's work available to the public.

Most release commitments are not "positive" commitments. They are best described as "negative" release commitments. Typically, release obligations relate only to the UK and apply only to minimum commitment albums (and not singles) and provide that the album must be released within, say, six months of delivery. If the company fails to release within that period the artist may serve a "cure" notice. This gives the company a further period, perhaps sixty days, from its receipt of the cure notice in which to release the album. If the

company has still failed to release the album by the end of the cure period, the artist's only remedy is usually to serve a further notice on the company terminating the contract. In other words, the artist will no longer be obliged to record for the company. Since the company has persistently refused to release the album this usually would not cause the company any difficulty. Moreover, all rights in the unreleased album would still vest in the company.

### 5.3 **Reversion**

In order to make release obligations more effective, the artist should try to shorten the periods involved and to ensure that if the right of termination arises, copyright in the unreleased album should automatically revert to the artist. This is difficult to achieve, but the company may agree to it, either on repayment of all or part of the recording costs and/or in return for a small royalty (normally referred to as an "override") on any subsequent sales of the album through a third party.

### 5.4 **Overseas Releases**

In practical terms, disputes are more likely to arise over the company's failure to release a particular record overseas, especially North America. Even a successful artist may have difficulty in securing a release in the US. The US is such a large market that the costs involved in "breaking" a new artist are much greater than elsewhere. Artists have to compete both with American artists and other foreign artists for the limited promotion and marketing resources of the US affiliate. The US affiliate may not wish to prioritise the artist. The UK company, which must grant rights to its US affiliate, may have no real influence over the extent, if at all, to which the US affiliate exploits those rights.

### 5.5 **Territorial Reversions**

The artist should therefore try to secure a positive commitment of some kind for the release of records not only in the US and Canada but all other major territories. Ideally, if the company fails to release in any overseas territory, all rights for that territory should revert to the artist, i.e. not only for the unreleased album but for all future recordings. This is difficult to obtain and is in any event problematic because usually the company has secured worldwide rights on the basis that it makes and pays for all of the recordings. There is a natural reluctance to give up copies of the masters to the artist or to some other record company in another territory. This would give rise to difficulties over the appropriate contribution (if any) towards recording costs, how videos are to be dealt with, how to deal with imports and other practical matters. Often, the best that may be achieved is a provision that the artist may compel his record company to license another company in any territory in which its regular licensee is unwilling to release the album. Even this is not always possible because the internal licensing arrangements between the affiliates of a major may not easily permit the grant of a licence to anyone outside the major's own group. Moreover, if this arrangement is accepted, the company is likely to insist upon some reduction in royalties (certainly if the royalty paid by the licensee is less than the artist's royalty for sales in that territory plus a reasonable profit margin for the company).

### 5.6 **Is a Release Commitment Worth Having?**

The trend has been for release commitments to become more convoluted and of less practical relevance. Forcing a company to release a record is of questionable value.

Releasing a record is one thing, but marketing and promoting it in a positive manner is quite another. Many release provisions benefit the record company rather than the artist, by limiting its exposure in the event of non-release.

## 5.7 **Marketing and Promotion**

It is difficult to persuade any record company to give a precise commitment on marketing and promotion. Sometimes, a company will agree to use "all reasonable endeavours to exploit" but this is almost meaningless. What the artist needs (but rarely gets) is a commitment that the company will spend a minimum sum on direct marketing and promotional expenses. Sometimes a company will agree to appoint independent promoters to support a record and may commit to spending a minimum sum on this. Beyond this, a company might commit to a minimum number of promotional videos (perhaps one or two for each album) in accordance with an agreed budget. Sometimes a company will accept a contractual commitment to provide a certain amount of "tour support" i.e. to make good the shortfall of expenditure over income from an approved promotional tour. However, even if tour support is paid, the company will insist on numerous rights of approval. Tour support is normally treated as a further advance, 100% recoupable from the artist's royalties.

## 6.0 **Ownership**

### 6.1 **Copyright**

Usually, the company owns copyright in the artist's recordings for the full period of copyright, which lasts for fifty years from first release. This feature of recording agreements reflects the perhaps outdated view that an artist's work is effectively available for outright purchase. This approach was traditionally taken in music publishing. A generation or two ago it was common for writers to grant copyright in all songs to the publisher for the full life of copyright, which in the case of any song is now for the life of the composer plus a further seventy years. This is now unusual, and in turn, there is now a trend on the part of record companies to accept that perhaps the issue of copyright ownership is open on occasion to negotiation.

### 6.2 **You Pay; We Own**

The record company's insistence on copyright ownership is particularly difficult to justify when coupled with the practice of recouping all recording costs from the artist's royalty. Provided sufficient records are sold, the company is repaid its recording costs by the artist by deduction from his or her royalties. The practice of insisting upon outright ownership of copyright is seen by some as an abuse of record company power.

### 6.3 **Copyright Reversion**

In the past, some successful artists eventually succeeded in obtaining reversions of copyright but this was rarely granted by way of concession. It would normally only reluctantly be conceded in a re-negotiation. In effect, the artist has always paid a price for the reversion of copyright, usually in the form of an agreement to record more material for the company. In the new world, some of the majors are now more ready to make concessions in this area, even (in exceptional cases) for new artists.

## 6.4 **Restrictions**

The artist may succeed in imposing restrictions on how the record company's rights may be exercised. The company is more likely to grant concessions to the artist over artistic matters than marketing. We refer to artistic controls in paragraph 4.0 above (creative issues) and we deal with marketing controls below in paragraph 6.6.

## 6.5 **Artwork**

The artist will often require the right of approval over any artwork. Usually the record company will pay all artwork origination costs on a non-recoupable basis. In the absence of any agreement to the contrary, the company (as between the company and the artist) will own the artwork. The artist may nevertheless have a right of approval. In other cases, the artist will insist on the right to originate artwork, in which case the artist may own the artwork (subject to the terms of the agreement with the creator of the artwork). Sometimes the company will pay the origination costs up to an agreed budget but nevertheless accept that the artist owns any available rights. The artist will then grant the company a licence to use it for the promotion and sale of his or her recordings. This leaves the artist free to exploit the artwork for other purposes (e.g. on T-shirts and other merchandise) without having to seek approval from the record company. Record companies may sometimes refuse to allow an artist to make use of its artwork for merchandising unless the artist pays all or part of the origination costs.

If an outside designer is commissioned or freelance photographer used, a clear assignment of copyright should be obtained. If this is not done, copyright in the artwork will remain with the creator. The artist and record company will have an implied licence to use the artwork for its intended purpose on the record's packaging. Further consents may be required before the artwork may be used for merchandising or other purposes.

## 6.6 **Marketing Restrictions**

The record company may agree to seek the artist's prior written consent to certain acts. For example, for the deletion of records from the company's catalogue less than, say, two or three years after release; or release of records on a different label; or recoupling certain tracks with other recordings on compilation albums and the like; or use of recordings as premiums whereby the artist's records are given away as an incentive to purchase another product (see Part III); or the grant of any synchronisation licence to use a recording in a TV ad or film; or, perhaps more importantly, before selling albums at less than full price before, say, one or two years after initial release. Whilst some restrictions are useful, the artist should be cautious of imposing unnecessary restrictions. In theory, the record company will know best how to market the recordings. Problems often arise after an artist leaves his or her record company. His new company's carefully planned marketing campaign might be damaged by the previous record company's re-release of earlier material. Accordingly, the artist may seek to impose restrictions on the release or the frequency of release of greatest hits albums. However, these problems may be exaggerated. An artist's previous record company's activities are unlikely seriously to damage the new company's efforts. Sometimes, any increased activity in respect of the artist's earlier recordings will produce additional income for the artist at a time when he is likely to be "unrecouped" with his new company.

## 7.0 **Ancillary Rights**

## 7.1 **Promotional Services**

The record company will not only be exclusively entitled to the artist's recording services but, to protect the value of those services, will also insist upon an obligation on the part of the artist to help promote new recordings. The company will arrange press interviews and promotional appearances and will seek some comfort in the contract that the artist will cooperate.

## 7.2 **Performance Rights**

It is not enough for the company to own the recordings. In strict legal terms, the company also requires suitable performer consents in order to be able to exploit those recordings and the contract will include provisions dealing with this.

## 7.3 **The 360° Concept**

It was traditionally the case that the record company's rights would be restricted to the artist's recordings and (in order to facilitate the exploitation of those recordings) the ancillary rights described above. More recently, the record companies have shown a predatory interest in other areas of the artist's activity. This trend has been driven by the concern that in "breaking" a new artist the record company usually bears the brunt of the financial investment required. This works well for the record company if there is an acceptable level of return from record sales. However, with the general downturn in sales there is a fear that the investment is no longer justified in terms of the anticipated return so that if the same level of investment is to be made then some way has to be found of increasing the return. Some artists take the view that they cannot expect to "recoup" and thus to make money, or much money, from record sales any longer but that they need the exposure and promotion of a successful record in order to drive sales of concert tickets and merchandise. It is not surprising, therefore, that record companies have reacted by suggesting that if the company is to invest in the record then it wants a "cut" of the income from the artist's related activities. In its "pure" form the 360° concept involves the record company having an entitlement to all of the artist's services in the music business so that this would extend to live performance, songwriting, merchandising, sponsorship and so on. The weakness of the record company's position is that whilst it is a record company it is not a promoter, music publisher, or merchandiser. It is inappropriate for the record company to own and control services in relation to which it has no experience or expertise. In practice, therefore, in those (increasingly common) instances of a record company straying beyond its traditional "patch" the record company does not own or control any ancillary services and/or rights but may have an entitlement to a share of the artist's other income. There have been suggestions that, in order to survive, record companies need to broaden their activities but there seems little prospect of them being transformed into, for example, music publishers or merchandisers. Rather, any requirement for a share of ancillary income tends to be justified simply in investment terms i.e. the company will invest in a recording project only if it is given an additional incentive to do so. The majors rarely seek an interest in any music publishing income (after all, each of them has a music publishing affiliate and does not seek to compete with it) so that in practice the much talked about 360° concept seems to have come down merely to record companies seeking a share of touring and merchandising income.

## 7.4 **Touring**

The record companies have traditionally provided tour support. The company generally wants the artist to tour because this is perhaps the best form of promotion. During the early stages the artist will only be able to tour at an appropriate level (at worthwhile venues) if prepared to do so at a loss and to encourage the process the company will usually make good any shortfall. As part of the 360° debate the company may now agree to invest in a record project and provide an agreed level of tour support only if in return the company receives a share of any touring profits. In the past, tour support has generally been treated as a further advance and thus 100% recoupable from royalties. Arguably, this is unfair because tour support is in effect a marketing expense and if the full amount of any tour support is eventually to be recovered from the artist then it follows that the artist bears the full cost of a marketing exercise designed to sell records for the benefit of the record company. Nevertheless, in practice, tour support is almost invariably 100% recoupable. The contemporary twist on this is that record companies now will not only treat any tour support as fully recoupable but will also require a share of touring profits. Of course, if tour support is required then it follows that there are no profits (at least in the short term). Hence, the suggestion may be that in return for an agreed level of tour support during the initial stages of the contract the record company should receive a share of profits over a longer term period. This arrangement may apply for the full duration of the recording contract but a compromise position will be that the arrangement applies only for a limited period (perhaps two years). Alternatively, the arrangement may apply only until such time as the record company has been paid a given amount of profit (i.e. a “cap” of some kind applies). The record company may ask for a share of gross touring income but the artist should always resist this. It is more palatable to pay a modest share of net profit calculated after taking into account all expenses. A danger in this approach is that the record company is tempted to seek approvals over the touring budget which the artist will regard as inappropriate. If the record company insists upon taking a share of touring profit then the artist should try to ensure that any tour support is excluded for the purposes of calculating the profit given that the support would in any event be 100% recoupable from royalties.

## 7.5 **Merchandising Income**

If the record company insists upon a share of touring income then the likelihood is that the company will take a similar approach in relation to merchandising income. It may be possible to restrict the record company’s involvement only to a share of tour merchandising income (but so that the record company does not participate in any profits from general retail merchandising). In this case, the record company’s participation in touring income and merchandising income may be dealt with as part of the same calculation (with merchandising income being included for the purposes of calculating tour profits). In certain cases, however, the major may try to secure merchandising rights for itself rather than merely rely upon a right to receive a share of the artist’s income from the grant of merchandising right to third parties. The major may have an affiliated merchandising company and the artist may be required to enter into a separate agreement with that company. Alternatively, the major may insist upon a “matching right” so that before the artist may enter into merchandising arrangements of any kind with any third party, the principal terms of the proposed deal must first be notified to the record company and the record company given an opportunity to “match” those terms by requiring the artist to enter into a separate agreement with the major or its merchandising affiliate upon those same terms. This is far from ideal from the artist’s perspective because it is one thing for the

record company to match the terms but it does not follow that the record company or its merchandising affiliate will prove as good a merchandiser as the preferred third party.

## 7.6 **Artist Websites**

The record company will usually insist upon the right to control the artist's official website. Artists rarely resist this because the artist will not usually have the resources available to build and maintain what is required. Moreover, much of the essential content of any such website i.e. the audio and audiovisual content, will generally be owned by the record company. Hence, if the artist prefers to have control over the official website there will inevitably be issues with the record company in terms of exactly what material the label is prepared to make available and on what terms. The artist is usually satisfied with provisions in the recording agreement which afford the artist a degree of control (or at least consultation over) the key factors concerning the website such as its general "look and feel".

Increasingly, in the digital age, information and access to it is vital and the artist's advisers should give some thought to how any database is developed, maintained and used. At the end of the term of the recording agreement the artist should be able to acquire the URL of the site and (depending upon the application of the Data Protection Acts) the artist should then have the right to access the database.

Artist websites tend now to attract less attention than the artist's MySpace page. The record labels may sometimes assist the artist in the development and management of the artist's MySpace page but the artist will retain control of this. There may be reciprocal links between the MySpace page and the artist website.

## 8.0 **Group Provisions**

### 8.1 **Leaving Members**

Any group recording agreement will include leaving member provisions. These tend to be controversial because they are very restrictive, and are increasingly complex. Their basic effect is that an artist who signs a deal as a member of a group may find that even after he or she has left the group he or she is still tied to the record company. Despite their restrictive nature, record companies are confident that leaving member clauses are reasonable. No sensible company, they argue, would invest substantial sums of money in a group without protection if the group splits up. No recording agreement compels a group of artists to remain together as this would be too restrictive. If the group disbands, or a member leaves, the company insists upon the right to continue with the leaving members. The company retains complete flexibility. It may continue with the remaining members and drop the leaving member; or it may drop the remaining members and continue only with the leaving member; or it may continue with all members; or it may drop all members. If the group disbands, all members are treated as leaving members. The company may continue with all or any of them. If a band split is acrimonious and the company wants to continue with all members this may give rise to a conflict of interest on the part of the record company. Two warring factions are competing for priority in recording budgets, release schedules and promotion and marketing budgets. In practice, the record company will normally agree to release one side from the contract, usually in return for a payment of some kind. This is often financed by a new record company and may be coupled with an "override" royalty on sales of that artist's subsequent recordings.

### 8.2 **Cross Recoupment**

The artist should try to ensure that if the company exercises a leaving member option any royalties payable to the leaving member may be used to recoup only the leaving member's share of any unrecouped balance on the group's royalty account at the time of his or her departure. The leaving member will probably have to concede that his or her share of royalties from group recordings on which he or she performs may be used towards recoupment of any advance (or other recoupable sums) paid under his or her new leaving member contract.

### 8.3 **Leaving Member's Commitment**

Ordinarily, a leaving member contract will be on the same terms as the existing group contract for the balance of the commitment then outstanding. If the member leaves after three albums have been recorded under a five album deal, the leaving member contract should cover only two albums. The company may argue that as it now has to invest in a new project it needs the protection of a higher minimum number of albums, but the artist should resist this. The company may also try to insist that a lower royalty rate should apply for any leaving member. Again, whilst this used to be common practice, it is now usually successfully resisted.

### 8.4 **Solo Work**

A band member may not need to leave if he or she can work as a solo artist separately from any commitments as a member of the group. A recording agreement will rarely include

separate provisions dealing with a solo commitment unless a particular group member has a specific project in mind when the deal is being negotiated. A group member may have to leave the group if he or she is determined to pursue a particular project. This involves the risk of being dropped by the record company and then failing to secure a deal elsewhere.

## 9.0 **Controlled Compositions**

### 9.1 **Back to Basics**

Most recording agreements contain what are known as "controlled compositions" clauses. This is the part of the recording agreement which interlocks with the publishing arrangements of artists who write and compose their own material. The aim of controlled compositions clauses is to reduce the "mechanical" (i.e. publishing) royalties paid by the record company for the use of the artist's own compositions.

Before explaining controlled compositions clauses in more detail we must look at the differences between recording and publishing. Every recording contains at least two copyright works. Firstly, there is copyright in the recording itself, which is normally owned by the record company. Secondly, there are separate copyrights in the music and the lyrics of the song featured on the recording. These are owned in the first place by the writers of the music and words of the song. If the writer has entered into a publishing contract then usually under the terms of that agreement he or she assigns copyright in the words and music to the music publisher.

### 9.2 **Mechanical Licences**

Each time the record company manufactures a CD or other record it copies or "reproduces" the music and lyrics of the song. Unless that reproduction is authorised, this will amount to an infringement of copyright in the song. The record company must therefore obtain permission from the owner of the copyright in the song for it to be featured on the record. This permission is known as a "mechanical" licence, because it allows the record company to reproduce the song by mechanical means. There is a set rate for the mechanical licence, which has been negotiated between organisations representing publishers and record companies. [In most European countries the rate paid by the record company to the owner of copyright in the song (usually the music publisher) is 9.306% of the dealer price of the record although in the UK the lower rate of 8.5% applies.]

### 9.3 **Availability of Licences**

Recording agreements include a warranty (a legally-binding promise) from the artist that the publisher will grant the record company a mechanical licence on standard terms for every song used on recordings made under the agreement. The artist should take care that this warranty does not extend to songs written by other people (particularly if the record company has chosen the material).

### 9.4 **USA and Canada**

The position is more complicated for records manufactured in the USA and Canada. Outside these territories it does not matter how many songs are used on an album because the total mechanical royalty liability will be the same; the appropriate percentage of the

dealer price of the record. On a twenty track album each song will receive a payment equal to one half of what would be paid for a track on a ten track album. The record company's liability remains the same. In North America the mechanical royalty is not calculated as a percentage of the price of the record. Instead record companies pay a fixed fee per song. The US Copyright Tribunal increases the per song rate from time to time, if only to take account of inflation. The rate at the time of writing is 9.1 cents per song.

This system gives rise to two problems for record companies. Firstly, it means that an album with an unusually large number of songs will attract too high a mechanical royalty payment. The second problem for the record companies is that they perceive the US per song rate to be too high. US record companies long ago decided that they should only have to pay 75% of the "statutory" per song rate. Accordingly, US record companies use controlled compositions clauses to oblige the artist to grant mechanical licences of the artists own works at 75% of the statutory rate. These clauses also usually limit the company's liability to a maximum of ten times the reduced per song rate for any album no matter how many songs are used on that album. Although this problem only affects North America, record companies outside North America insist on controlled compositions clauses so that they can comply with their obligations to their North American licensees.

## 9.5 The Publisher

The artist's publisher (if he or she has one) must approve the controlled compositions clauses before the record deal is signed. Otherwise, if the publisher later refuses to accept them, the **artist** will be in breach of the recording agreement. This will normally give the record company the right to claw back any excess mechanical royalties from payments otherwise due to the artist. Understandably, publishers are very sensitive about controlled compositions clauses because those clauses are intended specifically to reduce their income. Of course, major publishers are affiliated to major record companies and perhaps as a result their criticisms are tempered. A ritual dance has developed whereby the artist (or his lawyer) sends the controlled compositions clauses to his publisher and asks for confirmation that the publisher will comply with them. The publisher often expresses outrage at the idea of a reduced mechanical royalty rate and seeks numerous amendments to the clauses. Depending on the flexibility or otherwise of the record company, the publisher may sometimes improve the provisions. The publisher may insist on dealing with the record company direct, but usually any dialogue between the publisher and record company will be conducted through the artist's lawyer. After all the huffing and puffing, the publisher will accept the controlled compositions clauses. No publisher will run the risk of being responsible for the failure of negotiations over a record deal. Some record companies agree, even for new artists, to pay more than 75%. Successful artists should expect to secure 100% at some stage. Some companies are more flexible than others. Sometimes a built-in escalation may be agreed so that, for example, the rate improves from 75% to 85% after a given number of sales in the USA and then perhaps to 100% when a higher level is reached. Since CD's now tend to carry more than ten tracks it is sometimes possible to agree a restriction of say twelve, rather than ten, times the per song rate. Most controlled compositions clauses attempt to set the per song rate at the rate in force at the time the master is first delivered. The publisher will wish to apply the rate in force at the time of manufacture of the record.

## **Part III Money**

### **1.0 Overview**

#### **1.1 The Basic Royalty System**

Under the system as traditionally operated by the majors, the company pays for everything and assumes all financial risk. However, certain expenses are recovered, or "recouped" from the artist's royalties. The artist never has to pay money back to the company from his own pocket. Recoupment forms a very significant part of the calculation of the payments to be made to the artist. A common misconception is that recoupment has something to do with profit. However, the point at which "recoupment" is achieved bears no relation to the point at which the company may begin to make a profit.

#### **1.2 Recoupable Expenditure**

So what is recouped from the artist's royalty and how does this work? The artist will be entitled to a royalty for each record sold. The "per unit" royalty calculation is complex (see paragraph 3.0 below). Assume the royalty for each album sold is £1. If the company sells 100,000 albums, the artist is owed £100,000 in royalties. The company will first recoup from this any advances previously paid to the artist and any other recoupable expenditure. Recording costs are always recoupable. Manufacturing and distribution expenses are not recoupable. Nor, ordinarily, are marketing and promotional expenses. However, a number of grey areas have developed.

#### **1.3 What is recoupable?**

##### **1.3.1 Recording Costs**

Recording costs are fully recoupable and the recording agreement will include a wide definition of such costs which will extend to studio costs, musicians' fees, equipment hire, travel and accommodation expenses and producers' fees and so on. The definition will also extend to "cutting" and mastering costs but where does the recording process end? One grey area is the extent to which mixing costs incurred after "delivery" of the finished master should be treated as a recoupable recording cost. Some companies (and artists) like to release many different mixes of a particular track. Arguably, this is more in the nature of a marketing exercise, so the costs involved should be borne by the company on a non-recoupable basis. An artist very rarely achieves this; the best that might be done is to restrict the company's ability to recoup re-mix costs from royalties which accrue in relation to that particular remix.

##### **1.3.2 Re-Mixing Costs**

Aside from marketing exercises of that kind, record companies often spend substantial sums on mixing and re-mixing an album, even before any of the material is released. Again, these costs are recoupable. As a limited means of protection an artist should try to secure a right of approval over the budget for any re-mixing.

### 1.3.3 Promotional video costs

As a rule, promotional costs incurred by a company are non-recoupable. However, the company will argue that promotional video costs are in the nature of recording costs, which are recoupable. The usual compromise is that 50% of video costs are recoupable from the artist's **record** royalties. The company will invariably insist that any video costs which are unrecouped (including the 50% which is not recoupable from **record** royalties) may be recouped from **video** royalties. The opportunities to profit from videos are generally limited to the release of compilation videos, video juke box payments and broadcast. The recoupment provisions ensure that most artists are unlikely ever to receive any income from the exploitation of promotional video material.

### 1.3.4 Independent promotion costs

An artist may try to persuade the company to use independent promoters. Some companies will resist this because they have their own in-house promotion teams, and will not wish to incur the expense of outside promoters but many such teams have fallen victim to the redundancy programmes which have plagued the industry over recent years so that there is a greater willingness (and sometimes a necessity) to “outsource”. Independent promotion is sometimes the only means of ensuring that a new release is given sufficient priority and is worked hard enough. The company is likely to insist that some or all of the costs must be recoupable. US companies tend not to have strong in-house promotion teams. Some cynics assume this is because it would not be seemly for a record company employee to do some of the things which promotion teams have to do in order to help break a new record. It is difficult in the US to break a new artist without liberal use of independent promoters (and US independent promoters are particularly expensive). Often, the pressure to use independent promoters tends to come from the artist or the artist's manager. The company will often turn this pressure back on the artist/manager by insisting on the right to recoup all such expenditure.

### 1.3.5 Tour Support

Likewise, there will often be pressure from the artist/manager for the company to provide tour support. Again, this is a promotional expense. The artist would not be touring at a loss (which is what gives rise to the need for tour support) except to promote record sales. At one time, tour support payments tended to be 50% recoupable but for some years the trend has been for 100% of any such payments to be recoupable and, indeed (see paragraph 7.4 of part II of this Chapter) there is a trend towards the record company participating in any eventual profit from the touring activity.

### 1.3.6 Television advertising

Most recording contracts allow the record company to decide whether or not it wishes to spend money on television advertising. However, the company claws back

all or part of the costs either by reducing the royalty payable on sales promoted by the advertising campaign (see paragraph 3.8.4 below) or by treating all or part (often only 50%) of advertising costs as recoupable.

#### 1.4 Profit Shares

The alternative to the basic royalty system is the profit sharing arrangement. No major would be interested in sharing its profits, but most indies adopt this approach. Again, the indie pays for everything and assumes all of the financial risk. However, the relationship between the indie and the artist is more in the nature of a joint venture. The artist supplies his talent, the indie provides its resources, and they split any profits, usually 50/50. This system bears no relation to the basic royalty system, so they are difficult to compare.

For example, an artist may be offered 50% of the net profits from an indie, with no advance beyond actual recording costs. A major might offer a traditional royalty deal of say 20% of the dealer price of each record sold and an advance exclusive of recording costs of £50,000. Even if the artist knows how many records the indie is likely to sell compared with the major it will not be possible in advance to work out which deal is more financially attractive. This will depend on the amount of recoupable expenditure the major spends and on the total expenses incurred by the indie. The equation would also have to take into account the cost-effectiveness of the indie's manufacturing and distribution arrangements.

In working out profits, the indie deducts all expenditure from its total receipts from the exploitation of the recordings, including recording costs, re-mixing costs, mechanical royalties, manufacturing costs, artwork origination costs, promotion, advertising, marketing costs, distribution fees and any other costs directly related to the recordings. Only the indie's own overhead costs are excluded.

#### 1.5 A Practical Example (Profit Share -v- Royalty)

Using the example in paragraph 1.4 above, and giving ourselves the benefit of hindsight, let us investigate, in relation to a particular album, which deal is financially better for the artist. We will make the following assumptions:-

- 1.5.1 Recording costs are £50,000. Indies are normally more sparing about recording costs, but for this example assume that the costs would have been £50,000 either way.
- 1.5.2 The album sells 100,000 copies. The major might argue that given its resources and more efficient distribution arrangements it would expect to sell more than the indie but, again, for the sake of simplicity, we will ignore this.
- 1.5.3 The dealer price is £7 (excluding VAT).
- 1.5.4 The royalty offered by the major after taking into account packaging allowances and other royalty mitigation provisions and after deducting any share of the royalty payable to the producer averages out at, let us say, £1 per unit (for the sake of simplicity we will ignore the fact that singles may have been released from the album which would also affect the royalty position).

- 1.5.5 The indie receives only £4 of the £7 dealer price after deduction of a £2 distribution fee and £1 manufacturing and printing costs.
- 1.5.6 The indie spends £20,000 in marketing and other allowable expenses.
- 1.5.7 The total mechanical royalties on 100,000 album sales amounts to, let us say, £50,000.
- 1.5.8 Video costs are £20,000 (ignoring the fact that the major would normally make available a bigger budget for this than the indie).

Based on these rough and ready assumptions the indie would receive the £7 dealer price less the manufacturing and distribution costs of £3, making £4 per album. On 100,000 sales total income would be £400,000. Out of this it would have to recover £140,000 of expenditure (recording costs, copyright royalties, marketing and video costs), leaving £260,000. On a 50/50 split, the artist would receive £130,000.

How would the artist fare with the major? At £1 per unit the artist would earn £100,000 royalties on 100,000 sales. This would be set against £110,000 of total recoupable expenditure (made up of the £50,000 advance 50% of the £20,000 video costs and £50,000 recording costs). The artist's royalty account would therefore still be unrecouped by £10,000.

Accordingly, in this example, the artist would eventually receive £130,000 from the indie but from the major he receives only the £50,000 "up front" advance.

This example serves to illustrate the differences between the two systems but not too much should be read into the result. The first point a major would make in relation to this example is that for a new artist seeking mainstream success the marketing and promotion costs will often be enormous. Under the traditional royalty system most of those costs would be non-recoupable, and so entirely borne by the record company; whereas, even if the indie could afford to meet costs at that level, they would all be taken into account in determining the net profits.

An established artist signed to a major would certainly expect to earn more if he were paid 50% of the company's net profits from the sale of his records than if he were paid a royalty (even a particularly high rate of royalty) under the traditional system. It should also be borne in mind that 50% of the major's net profits would probably be greater than 50% of the indie's net profits from the same sales because the indie's costs are normally far higher. For example, the major has its own distribution network. The record label will have to pay modest distribution fees to its affiliated distribution company but indies generally pay higher distribution fees to their distributors (anything between 15% and 30% of the dealer price).

A 50/50 net profits deal means, clearly, that profits are divided in the ratio 1:1. Typically, under the traditional royalty system, profits are likely to be divided in a ratio nearer 2:1 or even 3:1 in the record company's favour.

## 1.6 Who Takes What?

Let us look at the cost structure from a different angle. What happens to the money paid by the customer in the record shop? A full price CD album might sell for £14.99. The dealer has to account to HM Customs & Excise for VAT which at the rate of 17.5% is £2.62, leaving the dealer with £12.37. The PPD (published price to dealer) of the record might be £8.45 exclusive of VAT. In the case of a dealer with multiple stores (such as HMV and WH Smith) the dealer will have sufficient clout to secure a substantial discount. We will assume discounts of 10% across the board for this exercise although the discounts are often far greater. This means that, ignoring VAT, the record company receives £7.61 leaving £4.76 for the dealer.

What happens to the £7.61 received by the record company? The record company has to pay a mechanical royalty of 8.5% of the dealer price. This amounts to 64p. If the artist wrote the song a substantial part of this will find its way back to him or her under any publishing deal.

The record company is then left with £6.97. In the case of physical sales part of this is paid to the distributor as a distribution fee in return for physically putting the record in the shop. For a major, distribution will be undertaken by another company within the same group. Nevertheless, a fee (probably quite low) will have to be paid. For an indie, the distribution fee will be quite substantial. Assuming a distribution fee for the indie of 20% of the published dealer price, this amounts to £1.70 leaving the indie with £5.27. If the major only has to pay a 10% distribution fee, i.e. 85p then it is left with £6.12.

The record company has to pay the manufacturer for any printing/pressing/duplicating costs. Again, the major may pay less than the indie per unit (because of economies of scale), but for this exercise we will assume total manufacturing costs of 50p per unit both for the major and for the indie. This leaves the major with £5.62 per unit. Out of this, the major will have to account to the artist for his royalty. If we assume a rate of 20% of the dealer price (inclusive of the royalty payable to the producer) after deduction of a packaging allowance of 25% (see paragraph 3.0 below for a more detailed explanation of this) then the artist will receive £7 x 75% x 20%, i.e. £1.05. This will not begin to apply until sales are sufficient to reach recoupment so that the major will be left with £5.62 per unit for a good many sales but then reducing to £4.57 per unit. The indie would be left with £4.77 per unit (because it has to pay higher distribution fees) which is split with the artist after any other expenses have been deducted. If there is a profit sharing arrangement then it is difficult to see clearly how the unit price for a particular record might be divided. In the case of the traditional royalty system the breakdown (based upon the above example) in the case of a full price CD sold by a major (ignoring the fact that the artist royalty will be available for recoupment and remembering that the artist royalty is usually inclusive of the producer's royalty) is as follows:-

Customs & Excise	£ 2.62
Dealer	£ 4.76
Publisher	£ .64
Distributor	£ .85
Manufacturer	£ .50
Artist and Producer	£ 1.05

Record Company	£ 4.57
	-----
	£14.99

On this analysis the record company takes a little over four times the combined amount taken by the artist and producer. However, this is an over simplistic approach. After taking into account all of the marketing and promotional expenditure (but ignoring the record company's overhead costs) the profit ratio might typically be in the region of 2:1 or, perhaps 3:1 in favour of the record company. This conclusion is supported by the evidence in the George Michael case. The record companies argue, of course, that they need to retain profits in this ratio in order to support their substantial overhead costs (including all of the A&R costs written off in relation to unsuccessful artists).

## 2.0 **Advances**

### 2.1 **How Do They Work?**

An advance is a pre-payment of royalties and is recoupable from those royalties. However, the advance is non-returnable. Royalties take a long time to work through the system and often longer to reach a level sufficient to achieve recoupment. The majority of recording contracts remain "unrecouped", i.e. the artist never receives a royalty cheque. The safest approach for an artist (in terms of forward financial planning) is therefore always to approach a record deal on the basis that any income will be limited to the contractual advances (although beware of cynicism: see paragraph 4.0 below).

### 2.2 **Costs Inclusive?**

It is usually preferable for an artist's advances to be exclusive of recording costs so that the record company pays recording costs (up to an agreed budget and on a recoupable basis) in addition to the advances stated in the contract. The advantage is that the artist can plan and budget for his general expenditure. In a long term record deal part of the advance for the first album is normally paid on signature and the balance on delivery (or perhaps release) of the album. The date on which the balance of the advance is paid is therefore uncertain. Nevertheless, under a costs exclusive deal the artist can more easily make sensible financial plans than if the advance includes recording costs. Even though a recording costs budget may be set, it is notoriously difficult to keep within it. A company will often insist on a costs-inclusive deal even though when the deal is signed, and the advance agreed, neither party has a clear idea of the likely recording costs.

On the other hand, if the artist has control over the recording process and has developed a degree of skill in producing first rate recordings at a modest cost (perhaps he or she already has his or her own home recording studio) there may be an advantage in securing a costs-inclusive deal. The costs inclusive advance may be greater than the aggregate of any personal advance he or she might have obtained, together with any actual recording costs. Against this, of course, if the artist does have his or her own recording facilities, the company may use this to its own advantage by depressing the level of the advances which might otherwise have been paid.

### 2.3 **How Much?**

Historically, UK record companies paid an advance to the artist and, separately, paid all of the record costs. Most deals are now costs inclusive. In the case of an album deal the advance for the first album might fall in the range of £50,000 to £150,000. This will obviously be affected by the nature of the music and how it is to be recorded. There is from time to time the exceptional case which would fall way outside this suggested range.

Usually, the size of any advance is determined at least in part by the artist's actual financial requirements so that, for example, a solo artist might expect a lower advance than a group. However, if the artist's negotiating position is strong, the level of the advance may be determined less by actual need and more by a combination of market forces and the record company's perception of likely sales.

When negotiating an advance, figures preferably should not be plucked out of the air. The artist or the artist's manager should at least attempt to justify what is asked for. A record company does not expect to support a life of luxury for a new artist but it does have to recognise that basic living costs must be covered. Likewise, the manager has to be paid since he also has a living to earn, so his commission entitlement should be factored into the equation. Beyond this, funds may be required for equipment and/or stage clothes and/or perhaps a van to carry the equipment. Lawyers and accountants also need to be paid. Perhaps the lead vocalist would benefit from singing lessons, which will also have to be paid for.

The record company will want to know the publishing situation. If the publishing deal is in place, the record company may suggest that it is unreasonable for the record company to underwrite all of the artist's anticipated expenditure and that the artist should approach the publisher for part of the funding. If no publishing deal is in place, the record company will suggest to the artist that he or she finds one. In the case of a group with perhaps one principal songwriter there is the problem that the songwriter will (understandably) not wish to allow his or her publishing income to subsidise the group's recording activities.

## 2.4 **Cross-Recoupment**

Essentially, all royalties which accrue under an agreement will be used to recoup all advances. For example, if the first album is an expensive flop but the second album takes off, the company can use royalties from the second album to recoup the costs of the **first** album as well as the second album (and the third and later albums). This concept of cross-recoupment is sometimes referred to as cross-collateralisation. Sometimes (but rarely) the artist may be able to impose restrictions on the company's cross-recoupment rights. For example, if the company has control over the artist's back catalogue and a new deal is structured for future recordings, the company might agree that royalties from the back catalogue will be free flowing and will not be used to recoup advances paid for new recordings. As we have seen, a company may occasionally agree to recoup re-mix costs only from the re-mix in question. Sometimes, probably only after a re-negotiation, royalties from a particular territory or territories may be free flowing. Alternatively, they might be available for recoupment only of advances which are paid specifically in relation to sales in that territory. For leaving members there should be limitations on the company's cross-recoupment rights between the original agreement and any leaving member agreement (see paragraph 7.0 Part II).

## 2.5 **Associated Agreements**

None of the majors now insists that an artist must sign a publishing contract with its publishing affiliate, as a condition of entering into a recording contract. Even if by choice the artist does sign a publishing contract with an affiliated company, there would be no cross-recoupment other than in extraordinary circumstances. For example, perhaps in the context of tax planning arrangements, the record company and the publishing company might be persuaded to pay substantial advances during a particular financial year but only on condition that cross-recoupment will apply. Smaller companies still sometimes insist that an artist signs recording and publishing contracts with related companies. This should be resisted but if recording and publishing contracts are signed with the same company (or with affiliated companies) it should be made clear that there is to be no cross-recoupment between them.

## 3.0 **Royalties**

### 3.1 **Retail or Dealer Price?**

Some few years ago most UK record deals provided for the calculation of record royalties on the **retail** price of records sold. For some while most deals have provided for record royalties to be calculated on the **dealer** price. In the distant past record royalties were calculated on the wholesale or dealer price but, as some record companies also owned record shops, there was a feeling that the price might be manipulated. The artist's best protection was to have his record royalty calculated on the price at which the record was actually sold to the ultimate customer. With the abolition of retail price maintenance (many years ago) and, more recently, the increasing competitiveness of the retail sector, confusion has developed over the prices at which records are in fact sold by retailers. Even though a company may suggest a retail price there tends to be fierce discounting. Accordingly, there has been uncertainty over the accuracy of the retail prices used for royalty calculations.

Before the current mechanical royalty rate of 8.5% of dealer price was established by the Copyright Tribunal, the mechanical royalty rate was 6.25% of the retail price. In those days, in order to resolve the uncertainty over retail prices, MCPS and BPI agreed a formula to establish a **notional** retail price by multiplying the **dealer** price by a fixed percentage. This procedure is no longer necessary in the case of mechanical royalties which are now calculated on the **dealer** price (see chapter IV Part II paragraph 1.2 for an explanation of mechanical royalties). Many contracts are still in operation under which record royalties (as opposed to mechanical royalties) are calculated on the **retail** price. This is now calculated on an "uplifted" dealer price in a manner similar to that previously adopted by MCPS and BPI in relation to the calculation of mechanical royalties. The notional retail price is calculated by multiplying the dealer price by something between (usually) 125% and 132%. In some agreements, the same result is achieved by calculating royalties on dealer price but uplifting the royalty rate by a similar margin.

### 3.2 **Packaging Deductions**

Until recently, all majors insisted on perpetuating the ludicrous system under which royalties are reduced by the application of packaging deductions or allowances. Though described as packaging allowances they bear no relation to actual packaging costs. Many years ago, when packaging allowances were first introduced (at more modest rates), the companies tried to justify them by arguing that the royalty should attach to the music or the record but not its package. Few companies attempt to justify packaging allowances any more and most will candidly admit that the allowances are merely artificial reductions. For many years arguments over packaging allowances often generated ill-will between the parties. Since the companies have given up attempting to justify the allowances, artists and their advisers have been more ready to accept them. The general approach now is to accept packaging allowances with a metaphorical shrug of the shoulder and to concentrate on securing an appropriate rate of royalty, having allowed for the fact that the royalty rate will be reduced by the packaging allowances.

For example, an artist may be entitled to a royalty of say 18% of the dealer price. The record company will insist upon a packaging allowance of usually 25% for CDs and sometimes 30% for DVDs. Accordingly, in the case of a CD the 18% royalty is not 18% at all; it is 18% of 75% (i.e. the dealer price less the 25% packaging allowance). In other words, the royalty rate being offered is 13.5%. The company will not offer 13.5%. Instead the company will insist upon offering 18% of 75%. Very few people are fooled by this.

The first major to simplify its royalty calculation provisions by, in particular, abolishing packaging deductions was BMG Records (in 2002). It offered reduced rates of royalty but was able to demonstrate that its offers were at least as favourable as the offers it previously made at the higher rates under its old royalty system. Gradually, the other majors are following suit and simplifying their royalty calculation provisions. This process has been given a boost by the fact that downloads are now so widespread and there is a particular absurdity in applying a packaging deduction to a download (although there have been attempts to deal with this simply by changing the terminology and referring instead to "technical" deductions).

### 3.3 Returns and Net Sales

Royalties are not calculated on the number of records manufactured, although mechanical royalties usually are. They are payable on "net sales", i.e. records sold (rather than given away) and not returned. In some territories (notably North America), records are sold on a sale or return basis which means that the dealer can send all or any of them back to the distributor if he is unable to sell them. In the UK, records are sometimes sold on a sale or return basis but only in exceptional circumstances (e.g. where there is an expensive TV advertising campaign and the only way the distributor can persuade dealers to buy enough stocks to meet expected demand is to reassure them that they can return unsold records). However, in the UK there is what is known as a "returns privilege" under which dealers may return up to 5% of records distributed to them. A dealer might take five records each from twenty artists on the same label, totalling 100 records. Under the returns privilege he may send back a total of five records. If he chooses to return five records by one artist that artist suffers 100% returns. The dealer may in any event return faulty records.

Until recently, many companies accounted to the artist only upon 90% of net sales. Using the example of the 18% royalty the effective rate for a CD is in fact  $18\% \times 75\%$  (to allow for the 25% packaging allowance)  $\times 90\%$ , i.e. 12.15%. This practice is said to date back to the days of the old 78rpm shellac records. In those days royalties were calculated on 90% of records manufactured, on the rough and ready assumption that 10% broke. This has no relevance today. "Net sales" will in any event be defined in order to exclude faulty products or returns.

### 3.4 Royalty Base Price

In order to calculate what an 18% royalty of dealer price is worth we need to establish what is usually referred to as the royalty base price. Although we talk of "18% of dealer", in fact, the royalty is not necessarily calculated on the actual dealer price, but on an artificial price, which is arrived at by deducting the packaging allowance (if one applies) from the dealer price. In addition, the artist should be aware of the possible impact on the royalty base price of discounts. Ideally, the artist's royalty should be calculated by reference to the PPD (published price to dealers) less any packaging allowance. In some cases however, the royalty is calculated not on the PPD but upon the actual dealer price after discounts. All distributors have what they refer to as "file discounts", i.e. different discounts depending upon the category of dealer involved. HMV will command bigger discounts than the independent corner record shop. However, these discounts usually do not affect the royalty base price.

### 3.5 Free Goods

A further complication arises by virtue of what is known as the "free goods" policy. There is confusion over what is meant by "free goods". Sometimes this means records given away free for genuine promotional purposes to DJs, reviewers and the like. The artist is not paid a royalty on records given away for these promotional purposes, i.e. upon what might be called "actual" free goods.

In North America, records are distributed on the basis that for, say, every ten albums distributed nine are deemed to be sold and one given away for "promotional purposes". Sometimes two albums in ten are given away. In the case of singles, usually at least three

singles in ten are given away. These "freebies" are known not as "actual" free goods but as "automatic" free goods. Automatic free goods of course are merely a disguised discount. It would be just the same if all ten records were sold rather than nine but at a 10% discount. However, in the case of records given away free the artist receives no royalty. This is separate from the issue of the percentage of net sales which attracts a royalty. If a US company pays a 16% royalty on 90% of net sales but gives away an average of 20% of its records as free goods and applies a 25% packaging allowance then the real rate of royalty is  $16\% \times 90\% \times 80\% \times 75\%$ , i.e. 8.64%.

[ ]

### 3.6 What Rates?

#### 3.6.1 UK Rates

A new artist signing to a UK major would expect to receive between 15% and 20% of PPD (published price to dealers). However, there would usually be a number of embellishments to this. Again, let us assume a rate of 18%. This rate would apply for UK sales and is sometimes called the "headline" rate.

#### 3.6.2 Overseas Rates

The artist should try to secure the same rate of royalty for the major overseas territories but the 18% might reduce to say 16% for sales in major overseas markets, perhaps Germany, France, USA and Canada, Australia and Japan. Elsewhere, in the lesser markets, the rate might reduce to say 14%. The royalty would usually be inclusive of any royalty payable to a third party producer. We deal with producers more comprehensively in Chapter III but if we assume that the producer is paid 3% of dealer price, this would give a net rate for UK sales of 18% less 3%, making 15%. If the artist suffers territorial reductions then he should try to ensure that the producer accepts similar (pro rata) territorial reductions (so that if in the major overseas territories the artist receives a 16% rate rather than 18% then the producer should only receive 16/18ths of his UK rate for those territories).

Territorial reductions tend to be more dramatic under US contracts. If the "headline" rate for US sales under a recording contract with a US major were 16% (and US recording contracts tend to provide for marginally lower rates than would usually apply under UK recording contracts) then, very often, the rate in the major overseas territories (including the UK) might be 2/3rds of the US rate (i.e. 10.66%) and in the remaining countries of the world might be 50% of the US rate, (i.e. 8%).

#### 3.6.3 Escalations

The rates will often escalate automatically for later recordings. If the rate is 18% for the first album under a five album deal, then perhaps this will also apply for the second album but rise to 19% for the third and fourth albums and perhaps 20% for the fifth (with similar increases in relation to the overseas rates). Very often, (perhaps in addition to the automatic escalations) there may be sales-based escalations. For example, the 18% rate in the UK might increase to 19% on sales in excess of 200,000 copies and perhaps to 20% after 400,000 copies. Any escalation of this kind would normally apply only to the excess sales of that album and would

not be retrospective. In some cases the higher rate might automatically apply for all sales of the next and later albums. Escalations based on sales would normally work territory by territory with different sales targets in each case.

#### **3.6.4 Format Reductions**

There are also likely to be format reductions. Singles might be at a reduced fixed rate of perhaps 12% or 13%. Alternatively, the rate for singles might be three percentage points less than the "headline" rate. When compact discs were first introduced most record companies refused to issue records in this format unless the artist agreed to a reduced rate of royalty (usually 75% of the otherwise applicable rate). The (rather flimsy) justification given for this was that as a new format unit costs of production were high. Some companies even tried to plead a need for a "break" in view of the research and development costs but, of course, none of the record companies had to bear any of these costs (they were incurred by the hardware manufacturers). The reduced rate for CDs disappeared from most contracts some years ago although the reduced rate continues indefinitely in relation to some back catalogue items. The CD "rip off" involved a "double whammy" in that not only was the royalty rate reduced but also the packaging allowance was increased, generally to 25%. Most artists and their advisers were so relieved no longer to have to suffer a reduced rate that they accepted the 25% packaging allowance without complaint (even though compact disc duplicating costs are now minimal).

#### **3.7 Real Royalty Rate**

The onset of digital delivery and the loosening of the major's stranglehold over the industry have hastened the demise of the misleading system by which record companies sought to confuse the royalty issue. It has become common practice for artists and their advisors in discussions with record companies to talk in terms of the "real royalty rate" which helps make the charade more transparent. Contrary to popular belief, lawyers have no wish to perpetuate the old system. They would prefer to concentrate on the real issues. Moreover, more and more record company executives have expressed dismay over the old system and the trend at present is certainly for more simplicity in relation to royalty calculation provisions.

#### **3.8 Further Reductions**

Despite the progress which is being made in simplifying matters some royalty reductions are still common.

##### **3.8.1 Budget Sales**

The company will generally offer half rate royalties on records sold at less than full price. Most labels have a published full price category (which might have a published price to dealers in the case of a CD of £8.45) a separate mid-price category (which might have a published price to dealers in the case of CDs of £5.95) and a low-price or budget category (with a published price to dealers of perhaps £4.95 or less). The costs of manufacturing and distributing low-price records are the same as for the full price records, except that there may be a small saving on packaging costs. The company's margin will be considerably reduced. The company will argue that

the artist's royalty should reduce in line with the reduction in the company's profit and that this is not achieved simply by calculating the royalty on a lower sale price. The artist should investigate the company's pricing policies and ensure that the definitions of full price, mid price and budget price are sensible and do not allow room for abuse. The company will usually wish to pay half rate royalties on anything less than full price. One compromise is to accept 3/4 rate royalties on mid price sales and half rate only on genuine low price sales.

### 3.8.2 Record Clubs

A significant number, perhaps in the region of 15% to 30%, of total album sales by established artists are made through record clubs. Record club sales attract half rate royalties. Most contracts provide that, for example, no royalties are payable on records given away by the club to attract new members. However, record companies rarely conduct their own record club operations. They merely grant manufacturing licences, or sell finished records, to the record clubs and allow them to get on with it. The company will not know whether the club has given away the records or sold them. The company will generally be paid for all records supplied to the club but, owing to the volumes involved, the clubs will receive substantial discounts. The company may only have to deliver large quantities of records to the club's fulfilment centre, and will not have to worry about distributing those records to the shops. The clubs can drive a hard bargain on discounts so a reduced royalty rate may be justifiable. However, a 50% reduction almost certainly is not justifiable. Nevertheless a half rate royalty on record club sales remains fairly standard.

### 3.8.3 Compilations

The compilation album market has grown steadily over the years. Most record companies now derive a substantial part of their income from compilation sales. At one time artists and their advisers were sceptical about the benefits of compilation licensing. The concern is that if a successful track is widely available on multi-artist compilations, the public may prefer to buy a compilation featuring the recording rather than the artist's own album. The contrary view is that exposure of an artist on compilations creates a greater awareness of that artist, and stimulates sales of the artist's own recordings. At one time, there was a general feeling that the widespread availability of an artist on compilations rather "cheapened" the artist. Some still subscribe to this view.

The artist's record company may put together its own multi-artist compilation album, either entirely of its own artists or, more likely, a combination of its own artists together with repertoire licensed in from other record companies. In such cases, there is no convincing reason why the artist should not receive the full "headline" rate of royalty. This will be pro-rated between the number of tracks on the album. If the headline rate of royalty is 18% and the artist has only one of 20 tracks on the album, he or she might expect to receive one twentieth of the normal rate, i.e. 0.9%, for the album. Nevertheless, the companies' standard position is to offer only a 50% rate in relation to compilation use. Again, assuming a headline rate of 18%, compilation use would therefore attract a pro-rata share of 9%, i.e. 0.45% on a 20 track album. The artist should resist any reduction in the headline rate for compilation use on the company's own releases.

The situation is different in the case of third party compilations, which account for most compilation activity. In these cases, the company grants a licence to a compilations specialist in return for a royalty. If the royalty received by the company equates to the headline rate which it pays to its artist, the company will be left with nothing. The companies' standard position is therefore to offer the artist 50% of the headline rate. This is not necessarily fair to the artist. As we have seen, this may reduce the artist's rate to, say, 9%. At least in the case of first rate current repertoire licensed for inclusion on something like the "Now" series, the company is likely to receive, say 20% or perhaps even 25%. If the company receives 25% out of which it pays the artist 9% (which will only be paid if the artist has recouped), the company is earning nearly twice as much as the artist. The company will consider this to be entirely reasonable. After all, this means a ratio of nearly 2:1. The record company will claim that in order to support its substantial overhead costs and the various A&R costs which have to be written off in respect of unsuccessful artists it needs a ratio more in the region of 3:1 (see paragraph 1.6)

The artist may reluctantly accept the 2:1 or 3:1 ratio on full price sales (he or she has little choice), where the record company has a significant role to play, and carries significant overhead costs in order to do its job. However, different considerations should perhaps apply where the company merely licenses its rights in relation to what is often referred to as "secondary marketing" activities.

An artist will sometimes succeed in securing 50% (or more) of the company's receipts. The contract might provide that the artist receives half rate royalties or, if greater, one half of the company's receipts. Alternatively, (although this amounts to the same thing), the artist may receive the full rate of royalty or, if less, one half of the company's receipts. In extreme cases, the artist may receive a share of any advances received by the record company from the licensee.

#### 3.8.4 TV Advertising

Many years ago record companies introduced half rate royalties if the company paid for a television advertising campaign. They thought it unfair that the artist should benefit from the company effectively "buying" extra sales. As time went by, artists' advisers found more sophisticated ways of limiting the impact of this. The reduction should only apply at all if the television advertising campaign is substantial. This has led to complex definitions of what is meant by "substantial". The reduction should only apply for a limited time, usually from the start of the campaign until the end of the next accounting period following the end of the campaign, or perhaps the accounting period after that. Sometimes, the company imposes a reduced royalty on all sales during the accounting period in which the campaign starts, even if that happens several months into the accounting period. None of this solves the problem that the total reduction in royalty might work out at more than the cost of the campaign. The artist may end up paying (by way of a reduction in royalty) more than the entire cost of the campaign, with the company profiting from all the extra sales achieved. For a while, the companies argued that this was fair because television advertising campaigns are expensive and involve considerable risk. However, market research is now so sophisticated that any risks have largely been removed. The record company will usually only spend on TV advertising if it is

confident that additional sales will justify the cost. The trend is now for full royalties to be payable but for all or part of the costs of the campaign to be recoupable.

### 3.9 Performance Income

Every time a record is broadcast or played in public, the broadcaster or venue owner exercises rights controlled by two distinct music licensing companies. PRS For Music ("PRS") grants licences on behalf of writers and publishers for use of copyright in the **words and music**. PPL grants licences on behalf of record companies for use of copyright in the **sound recording**. In addition, PPL collects income for performers on sound recordings in respect of the broadcast or public performance use of their performances as included in those sound recordings. PPL represents its record company and performer members in the UK and also other territories through its bilateral agreements with overseas music licensing companies.

#### More about PPL

##### 3.9.1 PPL's Areas Of Licensing

The two main types of licences issued by PPL are Broadcast Licences and Public Performance Licences. Examples of sound recording use that would be permitted under a Broadcast Licence are radio airplay, and the incidental use of sound recordings on television. PPL also licenses certain new media uses of sound recordings, such as internet radio or the on-demand streaming of television programmes. Public Performance Licences cover the playing of sound recordings in, for example, shops, clubs and bars, factories and offices and many other UK businesses. In some cases, this also covers playing sound recordings at those premises via TV/radio (which is legally distinct from the Broadcast Licence needed to broadcast those TV/radio services in the first place).

In addition to these two main types of licensing, income is also collected by PPL for certain types of copying of PPL's sound recordings, such as that undertaken by tailor made music service providers. An up to date list of these service providers as licensed by PPL is provided on the PPL website and includes providers of exercise compilations, background music compilations and in-store radio. Certain other types of dubbing are dealt with by the rights holder directly and not through PPL.

PPL does not license library music or synchronised music for theatrical feature films or advertisements. PPL's sister company VPL licenses the public performance, broadcast and copying of music videos. Its PPL Video Store service supplies copies of music videos.

An increasingly significant PPL revenue stream is the income collected from overseas music licensing companies, with whom PPL has over 40 bilateral agreements. Through these agreements, PPL can collect overseas income on behalf of record companies and performers alike, relating to the use of their sound recordings and performances locally in overseas territories.

PPL makes its main distribution of licensing income to its record company and performer members each summer. In addition to this, where payment adjustments

are necessary, for example to reflect changes to repertoire ownership/performer line-up information, these are dealt with quarterly. International income is often distributed on a monthly basis, and always within 90 days of receipt by PPL.

### **3.9.2 Split Between Performers and Rights Holders**

PPL distributes income to both the rights holder and the performers on a sound recording. The rights holder is essentially whoever owns the rights in the sound recording and is usually a record label separate from the performers. However, exceptions exist and where a performer makes their own recording, through their own label or otherwise, and owns or exclusively controls the copyright in it then they will also be the rights holder from the PPL perspective. They would be entitled to payment from PPL as both rights holder and performer of any licensing income collected in respect of that recording.

All income collected by PPL, apart from the income for music videos and dubbing (where legally performers' rights are treated differently), is split with a 50% allocation to the rights holder and a 50% allocation to the performers on the track. The 1992 EC Commission Directive on Rental and Lending Rights and Piracy (92/100/EEC) formalised the legal right of performers to income from public performance and broadcast of sound recordings. Performers cannot assign their rights to this performance income, whether to a label or any other third party.

100% of the income for music videos collected by PPL is sent to the rights holder of the music video. 100% of the income for dubbing collected by PPL is sent to the rights holder of the sound recording.

In all cases, income is distributed by PPL less its actual running costs. There is no fee to join PPL either as a record company or performer member.

### **3.9.3 Allocations for Unregistered Performers**

PPL usually ascertain which performers performed on a sound recording (and whether their performances are legally qualifying, based on the territory in which the performance was given, or the territory in which the performer is a citizen/resident) through the information received from the rights holder and also through their own research.

PPL will allocate a percentage of the performer income to all featured and non-featured performers of which they are aware, even if those performers have not registered as members of PPL. Then, once a previously unregistered performer has registered with PPL, they will be paid the sums allocated to them, currently backdated to December 1996.

At times a featured or non-featured performer who has been accidentally omitted from PPL's records will raise a claim. If a performer has been missed out and no allocation has been made for them, they can register their claim with PPL who will investigate and allocate retrospectively what they should have received. PPL will provide a lump sum payment and distribute to them in the usual way in the future.

### 3.9.4 **Income Split Between Performers**

The performers' 50% performance income share is split between the featured performers on the track, for example the named band members, and the non-featured performers on the track, for example the session musicians. The standard initial split gives featured performers 65% and non-featured performers 35%. However, an individual non-featured performer cannot receive more than 9% and so, where there is only one featured performer and one non-featured performer, there would be a 91% - 9% split of the 50% performance income share.

While a performer may not assign their performance income, featured artists may agree between themselves to change how the featured performer share is split between them. Non-featured performers may not agree between themselves to change how their share is split. Generally, on tracks with less than 5 non-featured performers, which are deemed to be 'Line Up Complete', the overall featured share will exceed 65%.

On rare occasions, featured and non-featured performers will (independently of PPL) unanimously agree to change the 65% - 35% split. In order to formalise such arrangements a Performance Share Agreement can be signed by the relevant performers and registered with PPL. This is not a common occurrence as PPL has to be satisfied that such agreements are not harmful to performers with less bargaining power. By way of example, some featured performers may only wish to employ non-featured performers who will agree to a vastly reduced share and, potentially, such arrangements could change the split to 99% - 1% of the performance income share, which is a split that PPL would be unlikely to approve.

### 3.10 **Other Uses**

Record contracts usually contain provisions dealing with the artist's income from any use of the recordings beyond the manufacture and sale of records. Many agreements give the artist 50% of the company's net receipts from such uses. Those receipts are sometimes referred to as "flat fee receipts".

This might extend to any "premium" use, i.e. the exploitation of the recordings in connection with another commercial product or service. For example the record company may supply records to Kellogg's to give away free to anybody sending in a set number of tokens from Corn Flakes packets. Kellogg's pay for the records even though they are then given away free. The artist should not accept that no royalties are paid on premium sales. Sometimes the company offers half rate royalties on premium sales which might mean that an artist on a headline rate of 16% would receive 8% of whatever Kellogg's pays for the records. There seems to be little justification for this. A fairer system would be for the artist to receive a percentage (say 50%) of the company's receipts. As a precaution, the artist should always insist on a right of approval over premium use. This allows the artist to insist on full disclosure of the financial arrangements so that if necessary the royalty provisions may be varied before approval is granted.

The most typical example of flat fee receipts is the income generated by the grant of synchronisation licences, i.e. the use of a recording in the soundtrack of a film or in an

advertisement of some kind. Again, typically, the artist would expect to receive (or at least be credited with) 50% of the fee.

### 3.11 **New Formats**

It is now many years since the CD format was introduced but an explanation of what happened at the time provides a useful cautionary tale. The record companies looked for ways of reducing their artist royalty liabilities (see paragraph 3.6.4 above). They argued that compact discs were more expensive to manufacture than vinyl or cassette (which was probably true for a very short time when compact discs were first introduced and when they were manufactured and sold in relatively small numbers). The most common approach was to offer a royalty on compact discs equivalent in terms of "pennies per unit" to the royalty on the sale of the equivalent vinyl disc version of the same record. In the event, the public wholeheartedly accepted the compact disc format and was persuaded to pay substantially more per unit than the vinyl or cassette equivalent. Nevertheless, for several years, all new contracts included provisions for reduced rate royalties in the case of compact discs. Sometimes the rate itself was lower (perhaps three quarters of the otherwise applicable rate); sometimes the royalty was calculated on the vinyl or cassette price rather than the compact disc price; sometimes there was a higher packaging allowance. In the case of existing repertoire (which the record companies had acquired under the terms of contracts entered into before compact discs were contemplated) the record companies would usually refuse to release that repertoire in compact disc format unless and until the artist granted a royalty "break" of some kind. As a legacy of all of this, whilst full rate royalties are now paid for compact disc sales, nevertheless a 25% packaging allowance still applies. There is a trend for packaging allowances no longer to apply but when this is the case there is a compensatory reduction in royalty rate. There is a widespread feeling amongst older managers and artists that they were out manoeuvred by the record companies in relation to compact discs. For this reason, it is unlikely that the record companies will be given so easy a ride in relation to any new formats introduced in the future. Many new recording agreements still contain a definition of "new technology" and provide for reduced rate royalties. Perhaps in the hope of pulling off a similar stunt, some contracts state that if at any time records are sold in an as yet uninvented format, a reduced rate will apply. If pressed, most companies will accept that this provision should either be deleted altogether or that the reduced rate should only apply for a very limited period. This is sometimes linked to the point at which the format is no longer "new". This might be defined as the end of the accounting period during which sales in the new format first exceed a given percentage of total sales.

### 3.12 **The Digital Revolution**

All those provisions in relation to the calculation of royalties in relation to physical formats which over the years have caused so much debate are fast becoming of little more than historic interest as the digital revolution takes hold. However, for the moment, there is still much unfairness. Some historic recording contracts are worded so that any income from exploitation by means of digital transfer will fall to be dealt with under the secondary exploitation provisions so that, often, the record company will be obliged to pay one half of its receipts to the artist. The artist may argue that this is appropriate (perhaps even generous to the record company) because although traditionally the record companies have had to organise and pay for complex manufacturing and distribution arrangements no such complexities (and no such expense) arises in the case of the arrangements necessary for a

download service. On the surface, this of course is true. However, the problem for the record companies is that if they are to continue in much the same guise as before, with substantial staff levels and so that they continue to invest in new talent and if they are to market their artists effectively then, the record companies argue, they need to maintain much the same ratio of profits between the record company and the artist as before which is to say something like 3:1. Without a profit ratio of this kind there is the fear that the record companies will be unable to sustain their current overhead costs and the same level of investment in new talent. On the other hand, artists are generally unimpressed by the suggestion that most record companies increasingly have little or nothing to do in terms of the physical manufacture and distribution of records but that nevertheless only, say, 25% of any income should be paid to the artist. For the moment the majors generally offer a royalty on downloads at the headline rate (perhaps 18%) calculated upon what the company receives.

### 3.13 **Download Royalties**

After a frenetic period of panic and experimentation most labels (and in particular the majors) now account to their artists for downloads on a basis similar to that which applies for physical records. In other words, whatever royalty the artist receives on a physical record will be applied to the digital record. However, labels have managed to preserve the concept of dealer price even in the digital world in that most of the majors insist that the digital retailer must account to the label on a minimum per unit price for each download. However, in the recording agreement “dealer price” will generally be defined for digital sales as the lower of any designated or “published” dealer price and the label’s actual receipts from the sale in question. The label will usually insist that there will be excluded (for the purposes of calculating the artist royalty) credit card agency fees. The labels have slowly loosened their grip on the traditional deductions that have applied to record sales and it is generally now possible for the artist to negotiate that for the purposes of calculating the artist’s royalty the dealer price (however that may be defined) will not be subject to packaging allowances or new format deductions or a mid price deduction (by reason of the “normal” digital rate comparing unfavourably to the physical format rate).

### 3.14 **Streaming**

Streaming is where the recording may be played (these days on request) but is never owned by the user in the same way as a download. Streaming models tend to be free to the user and so rely on the (generally small) amounts of advertising revenue to provide a basis of payment. In the United Kingdom the PRS has set a minimum streaming rate of 0.22p per stream for the use of the underlying composition.

### 3.15 **Subscription Models**

Typically this will be any model where the recordings may be accessed (as a stream or even a download) during the subscription period only. With downloads, they either cease to function after the subscription period or, in some cases, the user can keep them if they were downloaded during the subscription period. Some scrutiny is required to ensure that the artist receives proper accountings. Generally this requires the label to insist that the digital retailer provides a full breakdown of the usage and to pay a pro-rata share of the subscription fees accordingly. More controversially, some labels have taken an equity stake in the start up subscription services as part of the consideration for the grant of the licences.

However, predictably, no part of the “equity” stake acquired by the label is shared in any way with the label’s artists.

### 3.16 **Breakdown of a Digital Download Sale**

At the time of writing a typical fee for a download is 79p which includes about 14p VAT and 2p credit card charges so that the “retail” price for royalty calculation purposes would be set at, say, 63p. The retailer’s gross margin (from which bandwidth and other technology costs must be paid) will be around 9p so that the “dealer” price is thus around 54p. The label must pay the mechanical royalty which will be around 5p thus leaving around 49p. The gross artist royalty (to include any producer royalty) will of course depend upon the rate of royalty which has been negotiated on behalf of the artist but this may be, say, around 10p which of course leaves a “profit” for the label of around 39p (and thus, on this example, around 4 x the entitlement of the artist/producer).

### 3.17 **Concerns Over Digital Sales**

In addition to the well publicised cases of piracy, there are other concerns about digital sales reducing the value of music. Broadly these concerns may be summarised as follows:

- the user is losing interest in owning product and could be quite content with accessing content for free through one of the ad supported streaming services;
- revenue for ad supported services is practically non-existent (at the time of writing this is less than 1% of total sales for music, by most estimates) and the more those services are used the more download sales are reduced;
- download sales do not replace, in money terms, the value of the physical record sales they replace, so whilst physical record sales are in decline, the growth of digital record sales has failed to replace the revenue. Currently digital record sales are around 20% of total sales (higher in certain genres);
- the digital retailers, now able to offer music compatible on any player given that DRM has been removed, are competing for market share by driving the price of downloads even lower.

### 3.18 **DRM (“Digital Rights Management”)**

DRM was a controversial matter concerning the use of digital downloads. DRM could control any number of aspects of the use of those downloads, from the number of plays to the number of burns to the device on which they would operate. It was the latter aspect of DRM that proved controversial, more or less guaranteeing the iTunes stores’ monopoly on selling to iPod users (since the major record labels would not sell DRM-free tracks). There has been a reverse on this during 2008/9 and now most tracks are available in MP3 format, which is DRM free.

However, the issue of DRM is likely to resurface in the context of subscription services where tracks are due to expire after a certain period of time.

## 4.0 **The Watershed**

Most recording contracts contain the potential for the artist to earn a great deal of money. It is a dreary task to argue about reduced royalties on budget sales and the like, when the artist is only concerned with getting signed and into the studio, and when recoupment is an alien concept. But there is no point in approaching negotiations over any new recording contract on the assumption that the artist will not be successful. Sooner or later, if enough records are sold, the artist will recoup. This is the “watershed”, when royalties come gushing through. Suddenly, all those boring provisions have real and dramatic impact. The unfair terms which might with greater effort have been avoided will now stand out and mock the artist and his advisers.

## 5.0 **Accounting**

### 5.1 **Accounting Periods**

The majors generally account to their recording artists twice a year. On sales for which the company is paid between 1st January and 30th June, the artist will usually receive a statement ninety days later, at the end of September. On sales for which the company is paid between 1st July and 31st December, the artist will receive a statement at the end of the following March. Some record companies account for UK sales on the basis of sales **information**. These companies include on an accounting statement any sales **notified** during an accounting period. Other companies only account for sales for which the company has actually been **paid**. The busiest month of the year for record sales is December. The record company will probably not receive payment from its distributor for December sales until the following January. If the company only accounts for sales for which it has actually been paid then those sales would not appear on an accounting statement until the end of the following September. There are more significant delays on overseas sales. Most companies receive accountings from overseas licensees every quarter. For example, for sales between 1st October and 31st December the overseas licensee might account to the UK company in February. The sales will only appear on the artist's royalty statement delivered at the end of the following September (nearly twelve months later). Some companies have even slower arrangements, partly for tax reasons. These companies might, for example, insist that all overseas licensees account to a particular group company which has a centralised accounting function. That company subsequently accounts to each of the other companies in the group.

The artist should always check with his or her record company exactly how royalties are to be routed and what delays can be expected.

## 5.2 Reserves

Most record companies insist upon provisions enabling them to make reserves against returns. Although a particular royalty statement will disclose a given number of sales the record company will hold back the royalties in relation to a proportion of those sales in case the dealer returns some of the records. In the UK and in most overseas territories dealers are not usually allowed to return records unless they are faulty. In the case of the faulty record the record company must replace this and this should not impact upon the artist's royalty. In the UK most distributors operate what is known as a 5% returns "privilege" (see paragraph 3.3). The dealer may return up to 5% of any unsold stocks. It would therefore seem unreasonable for the record company to make a reserve of more than 5% (although as explained in paragraph 3.3 it is theoretically possible for an artist to suffer returns of more than 5% under the privilege scheme). In fact, in practice, most record companies do not impose a reserve at all on account of any 5% returns privilege or similar scheme.

The issue of reserves assumes more importance in the case of records distributed on a sale or return basis. In some territories (notably the USA and Canada) most records are sold on a 100% sale or return basis. In the UK and other territories some records are distributed on this basis but usually only when there is a special campaign involved. Many companies insist upon the right to maintain a reserve of, say, 25%, but will agree that the reserve should only apply in the case of records sold on a sale or return basis. Most companies will agree that reserves should be liquidated either in the next accounting period (i.e. the reserve is then released after deducting any royalties in respect of records actually returned) or perhaps liquidated equally over two accounting periods.

Most UK record companies will accept that they may only impose reserves in respect of UK sales and that in the case of overseas sales the company will not impose any reserves beyond those imposed upon the company by its overseas licensees. It is prudent to insist upon the disclosure of the relevant details. The most important territory in this respect is the USA and Canada. The artist should ascertain what reserves the company's North American licensee may impose against the company and over what period those reserves are to be liquidated.

## 5.3 Withholding Taxes

Most recording contracts include an express provision to the effect that the company may deduct from royalties and advances due to the artist any sums which the company is obliged by law to deduct by way of withholding tax. In the case of a UK company paying royalties to a UK resident no tax is required to be withheld so that withholding is generally only obviously an issue in the case of a record company and an artist situated in different territories. If withholding tax does apply then if a double taxation treaty is in force between the two territories then the artist should be entitled to a tax credit against his own taxation liabilities. A provision should be inserted to the effect that the company must give the artist all reasonable assistance in obtaining such credit (this assistance would involve the supply of an appropriate certificate of deduction and dealing with any queries raised by the revenue authorities). Sometimes, this will not be of any use to the artist because his tax affairs may be such that he has no (or insufficient) tax liabilities against which to set off the benefit of

any tax credit. In those circumstances, if the record company has suffered withholding tax in respect of royalties received from its overseas licensees and has deducted a proportionate share of the withholding tax from the royalties payable to the artist but has then obtained the benefit of a tax credit the company should, in fairness, pay back to the artist a proportionate share of that benefit. In the case of some recording agreements, it may be worth the time and effort involved in investigating the record company's overseas licensing structure in order to ensure that the artist will not suffer unduly from withholding tax problems. At best, the artist will secure a provision to the effect that any foreign withholding tax will be ignored for the purposes of calculating the artist's royalties.

#### 5.4 **Audit Rights**

Most record companies will offer the artist a right of audit. If not, then the principle of an audit right will never be resisted if the artist asks for this. However, the record company will seek to impose certain restrictions, so that, for example, audits may not be carried out more than once every, say, twelve months and may only be carried out by a reputable firm of chartered accountants. Most UK record company audits are carried out by one of the limited number of firms of accountants specialising in music industry royalty audit work. Every audit will of course be different but in the case of a relatively successful artist auditing a UK record company in relation to sales of records over a relatively successful period of say three years then, typically, perhaps two or three auditors will be involved for perhaps a week at the offices of the record company. They will then prepare a report and then spend more time with the record company in an effort to clarify any areas of confusion. Audits are therefore expensive. The auditors will normally try to spend only that amount of time which is likely to be justified by results but, typically, an audit might cost £5,000 to £10,000 or (in the case of a particularly successful artist where there have been numerous sales and where the amounts of money involved justify the accountants spending as much time as is needed) perhaps £15,000 to £30,000.

Some record company personnel seem still to interpret a request for an audit as an allegation on the part of the artist that there has been some form of financial irregularity but, more and more, it is accepted that it is merely sensible and prudent on the part of any successful artist to carry out regular audits. As we have seen, the accounting function is a complex one and mistakes (together with disagreements over points of interpretation of the relevant contractual terms) are therefore inevitable. The more enlightened record companies welcome regular audits. A successful artist should probably audit every two or three years (perhaps after each album cycle). The contract will usually state that all accounting statements are to be deemed accepted and no longer subject to any objection unless such objection is made within a specified period from when the statement was rendered (the period is usually two, three or perhaps four years). If the artist does not carry out an audit within the prescribed objection period then he (or his lawyer or accountant) should write to the record company and secure an extension. Most record companies will readily agree to this rather than put pressure on the artist to carry out an audit before the expiry of the objection period.

Most companies will accept that in the event of a discrepancy (but usually only if the discrepancy is say 5% or perhaps 10% or more of the sums properly payable) then the record company will reimburse the reasonable costs of the audit. In most cases the auditors will find a number of arithmetical errors which the company will readily accept and will also make a number of additional claims on behalf of the artist based upon how the contract

should properly have been interpreted. Royalty auditors have a reputation for sometimes making some rather extravagant claims and, typically, the auditors will prepare a report detailing numerous separate heads of claim. The aggregate claim will usually be a substantial sum in excess of the 5% or 10% limit which may be specified in the contract as the amount of underpayment which triggers a liability on the part of the company to reimburse the audit costs. Accordingly, the report will include a claim not only for the aggregate unpaid royalties but also for the auditors' fees. This is then followed by a sometimes protracted negotiation which will invariably result in the audit being settled on the basis of a round sum payment representing a fraction of the overall amount. If the settlement is higher than the amount of the audit fees then from the artist's point of view the exercise will have been worthwhile. It usually is.

## **Part IV After The Deal**

### **1.0 Contract Administration**

#### **1.1 Filing**

A recording contract has to regulate a set of constantly changing circumstances. It tends to adapt and grow. Somebody needs to look after it. During the life of a recording contract there will usually be "side letters" adding to, or varying, the agreement. These might deal with the purchase of equipment, or tour support arrangements for various territories, or royalty breaks on campaigns in particular territories. Somebody (usually the lawyer) should be given housekeeping responsibilities. The housekeeper should maintain a file which will include the contract itself and any correspondence concerning it. In particular, it is sensible to fix to the contract all formal amendments together with copies of option notices.

#### **1.2 Dates**

Somebody has to keep an eye on any important dates. This might be the manager, the lawyer or the accountant. The main reason for carefully monitoring option dates and the like is to ensure that there is no delay in invoicing for any advance which is due. Record companies rarely pay advances unprompted. If they are late in paying they will seldom agree to pay interest. It is also worth noting option dates in case the record company mistakenly fails to exercise an option in time. Mistakes do happen. Missing an option is the only cardinal sin in a business affairs department and is likely to lead to instant dismissal. A careful note should be made of exactly when masters are delivered.

### **2.0 Re-negotiations**

#### **2.1 When?**

The more cynical type of manager relies heavily on the fact that recording contracts are probably unenforceable and in any event will always be re-negotiated in the event of success. Basically, this is nonsense. Some years ago, similar cynics were to be found in record companies. They issued recording contracts which were quite unfair and which they assumed were probably unenforceable. Following any success, and sometimes even if there was only the smell of success, they were prepared to offer improvements to keep everybody happy. The industry does not really work this way any more. If the record company is in profit, an aggressive manager can usually extract more advances on one pretext or another. However, such concessions would rarely come close to what is generally meant by a re-negotiation.

## 2.2 **How?**

A proper re-negotiation is difficult to achieve. Record companies are generally confident in the enforceability of their contracts. Whilst a record company will do what is necessary, within reason, to keep a successful artist happy, this rarely extends to giving away anything valuable. Accordingly, if a contract is to be re-negotiated it has to be a two way street; the artist has to give something in return for any improvements given.

The bulldozer or blackmailing approach to re-negotiation involves explaining to the record company that the artist is desperately unhappy for whatever reason. He or she cannot bring himself or herself to finish recording the new album until something is done to make him or her happier. It is best to leave this approach quite late, (preferably, until the album has already been scheduled for release and the record company has cleared its decks in anticipation of starting work on the album). If this tactic fails (and it usually does because the record company knows that in fact the artist is desperate to release the record) then probably the only thing the artist has to offer which the record company does not have already is the option to call for another album or two. This is why during the negotiations over the original contract so much significance attaches to the number of options. If the artist achieves success early on and is resentful about the terms of the deal, and if the company already has the right to call for another three or four albums, there is little incentive on the record company to re-negotiate. The record company will probably not feel exposed at least until the time when the penultimate album is delivered, if not the last.

If the artist can manoeuvre himself or herself into a strong enough position to re-negotiate, he or she usually looks for higher royalties, more substantial advances, (and perhaps a non-recoupable bonus payment as an additional reward for past success), the exclusion of DVD rights, perhaps the exclusion of particular territories (usually North America if the performance there has been poor), the reversion at some point of the copyright in the masters (a particularly difficult nut to crack), and perhaps, (in the case of a group) a specific solo recording commitment or the exclusion of solo recordings from the deal.

## **CHAPTER III**

### **PRODUCER CONTRACTS**

#### **Introduction**

This chapter deals with the typical agreement between a major record company and a producer in relation to the production of a given number of tracks by a particular artist. It also looks briefly at the type of arrangements which may be made when a major record company is not involved.

In terms of the legal issues a producer contract is more straightforward than a recording contract or a publishing contract. There is no exclusivity and there are no restraints. Essentially, the producer contract deals with what the producer has to do and what he should be paid. Nevertheless, in practice it is often hard to resolve these issues. It is, therefore, sometimes difficult to secure a signed contract. Whilst it is rare for a record company to put an artist in the recording studio without a signed recording contract this cannot be said of producers in that it is too often the case that producer contracts are only signed after the event.

## **Part I**

### **Producers**

#### **1.0 The Problem of Delay**

##### **1.1 Confusion**

There are several reasons for the frequent delays in concluding deals for producers. One reason is poor communication between the A&R department of the record company and its business affairs department. The business affairs person may only come to hear of the deal after the pre-production work has started. Even if he is aware of the position he may have difficulty in obtaining clear instructions from the A&R man as to what the producer is required to do and what he is to be paid. This is not necessarily due to the fault of the A&R man; there is often a reluctance on everybody's part to commit to (and define the parameters of) a particular project until the producer and the artist are seen to be able to work together effectively. The position is sometimes made worse by poor communication between the producer, the record company and the artist. The preliminary discussions will concentrate upon artistic issues. In the case of most artists (and many A&R men) there is an in-built reluctance to discuss money or anything businesslike. Many producers suffer from the same malaise and tend to be shy (particularly when talking to artists) of raising the matter of their deals. Most such producers will engage a manager and eventually there may be a businesslike discussion with the A&R man. As a result, the producer or his manager may think that he has agreed something in principle. Too often he will subsequently find that the business affairs man thinks otherwise.

##### **1.2 Inertia**

It is important that any confusion is clarified at the earliest opportunity before this degenerates into a period of inertia so far as the deal making process is concerned. The risk of inertia arises partly because nobody (and this usually includes the producer) is prepared to treat the matter of the deal as one of priority. The producer is too busy building his relationship with the artist and in any event may well be in the studio day and night. For the producer's lawyer the producer's agreement is a dull affair when set against the excitement of a recording contract or publishing deal for a "hot" artist. Similarly, the business affairs manager will view his batch of producer agreements as the most dreariest part of his workload. The record company executives may pester him as to why the latest artist has not yet signed his or her recording contract but there is unlikely to be any internal pressure to deal with a producer agreement (other than in the rare event of a much needed producer refusing to work until his deal has been properly sorted out.) Moreover, there is no incentive for the record company to hurry because generally the record company will refuse to make any final payment until there is a signed contract. We deal in Part II below with how best to overcome this inertia.

#### **2.0 The Role of the Producer**

##### **2.1 The Scapegoat**

The producer is the "translator" of the artist's ideas. The artist may think that he is the best person to decide how to approach a particular recording but in many ways an artist may be too close to his "art" to do this. There is invariably great antipathy on the part of A&R

departments towards the idea of artists producing themselves because this too often leads to over indulgence. In one sense, therefore, the producer's role is to deal with any conflict of interest between the record company's commercial motives and the artist's creativity. This will often mean that the producer is on a hiding to nothing. He cannot please both the artist and the record company and whatever goes wrong he will always be the most convenient scapegoat.

## 2.2 **Pre-Production**

Producers vary considerably in how they interpret their role and in what they actually do. Some producers may not wish to spend all day and night in the studio and may prefer to delegate some of the technical aspects of production to the technicians and engineers. This type of producer may be more interested in the process of the selection and rejection of songs and in how those songs should be arranged. He will be involved in rehearsal sessions and in the selection of the various backing musicians etc. Some producers view this whole pre-production phase as the most crucial part of their responsibilities. However, most producers will accept that they should be in charge of the whole process in a "hands on" sense and will wish to be in the studio at all times.

## 2.3 **Budgetary Control**

The record company will invariably impose upon the producer responsibility for budgetary control. More mundanely, the producer will usually be responsible for booking the studio and for all of the form filling (including the MU session forms and notifying the record company of the use of any samples).

## 2.4 **Samples**

The record companies ensure that their position in relation to the use of samples is protected as fully as possible. The artist will be required in the recording contract to give certain warranties in relation to the use of samples. Separately, the record company will require additional protection in its contract with the producer. It will generally be the producer's responsibility to notify the record company immediately in the event of the use of any samples. Sometimes, it will be the producer's responsibility to obtain clearance for the sample in question. Usually, the record company will accept responsibility for obtaining clearances. Nevertheless, the record company will invariably insist that for contractual purposes a particular master will not be deemed delivered until all necessary clearances are in place. This will often mean that the producer is in the hands of the record company in terms of when delivery is finally to be effected (if at all) so that any further advance due upon delivery may be paid. In order to overcome this difficulty producers will sometimes prepare different versions of a track i.e. one with the sample and one without

## 2.5 **Songwriting**

If the producer is crucially involved in the arrangements for a particular song so that the recorded version of that song is substantially different from the original demo prepared by the songwriter then, arguably, the final version will represent a new arrangement and the producer (as the arranger) will have an interest in the copyright. For this reason, some producers insist upon being credited as a co-writer of the musical material. Generally, this practice is frowned upon. The producer's advance and his royalty entitlement compensate

the producer for all of his work and whilst, arguably, that work may stray into the area of musical composition nevertheless it is rarely accepted that the producer's involvement is such that he should be treated not only as the record producer but also as a co-writer/composer.

Sometimes, of course, the producer may have a genuine involvement in the songwriting. Either his songs will be recorded or perhaps he will co-write the material with the artist. In those circumstances, the producer will earn separately from the exploitation of the publishing rights in his contribution to the musical material. In this event, there is one common pitfall which the producer should try to avoid. Most producer agreements contain controlled compositions clauses (see Chapter II Part II paragraph 8.0). As we have seen, the effect of controlled compositions provisions is generally to reduce a writer's income from mechanical royalties in respect of record sales in the USA and Canada. On occasions, the producer may succeed in deleting provisions of this kind but this may simply have the effect of transferring the problem to the artist in that if in the recording contract the controlled compositions provisions extend to any material written not only by the artist but also any producer then if the producer succeeds in securing full mechanical royalties for himself then the reduction will instead be applied against the artist's share of the mechanical royalties.

## 2.6 **Mixers**

Some producers are not really producers at all; instead they belong to that special breed known as "mixers". These people have little or no involvement with the artists but they are technical wizards. They take the multi-tracks and remix them by whatever means to create a better or at least a different sound. All material needs to be "mixed" so that the "mixing" is simply one of many functions generally carried out by the producer. Some producers prefer to use a specialist mixer to carry out the mixing function although usually the producer would wish to supervise this. Sometimes the record company will be unhappy with the work undertaken by the producer (and may therefore refuse to pay the advance due on delivery). Rather than start again the record company may decide to use the existing material but arrange for another producer or a specialist re-mixer to re-work the existing material. On other occasions there may be no criticism of the original producer but the record company may decide that for marketing reasons it requires a specialist re-mix of a particular track. In the case of dance music, in particular, several different re-mixes of the same basic track may be released.

## 2.7 **Delivery Standard**

Ultimately, the producer's responsibility will be to deliver finished recordings to the record company of a technically acceptable standard and, often, to a standard which is commercially acceptable to the record company. In fact, this is often the first area of controversy. Usually, all or part of the producer's advance will be deferred pending delivery of the masters. If the record company insists upon "commercially" acceptable masters then the producer will be nervous that at the end of the day the record company will decide that it does not like what it has been given and may, therefore, refuse to make payment. Many producers are not prepared to accept this but, equally, some record companies adamantly refuse to give up this protection. Some companies have a reputation for being difficult over the final payment and will refuse to make this unless and until the A&R department is completely satisfied with the work. Accordingly, the argument over this issue may continue until the work has been completed. At that point, with luck, the record company

will decide that it is happy with what has been done. An acknowledgement to this effect is then inserted in the contract which is then signed and the advance paid.

### **3.0 The Record Producer's Rights**

#### **3.1 Financial Entitlement**

The record company will usually take the convenient view that the producer has no rights in the recordings. It is precisely for this reason that the record company is rather relaxed about allowing the work to proceed despite the fact that there is no signed contract. So far as the record company is concerned the producer has no rights other than the right to be paid for his work. This entitlement will be to receive such payment as may have been agreed. If there is confusion over what has been agreed, then nevertheless the producer is entitled to be paid on what is known as a quantum meruit basis i.e. a fair and reasonable payment for the work done.

#### **3.2 The "Maker" of the Recordings**

So far as the record company is concerned, it is the "maker" of the recordings so that the record company is the owner of the copyright in those recordings. The record company does not require any performers consents from the producer because his "performance" is not (usually) featured upon the recordings. Nor has the producer (usually) contributed to the writing and/or composing of the musical material featured upon the recordings so that the producer has no interest in that material. Accordingly, the record company would argue, there is nothing the producer may do to prevent the company exploiting the material (beyond suing for payment). Any threat on the part of the producer to hold the company to ransom over his deal by threatening to make an application for an interlocutory injunction preventing the release of the recordings is likely to be ineffective.

#### **3.3 The Producer as "Maker"**

In fact, there is an argument to the effect that the producer does have an interest in the recordings so that the record company is perhaps being dangerously complacent.

Under the provisions of the Copyright Act 1956 the person owning the copyright in a recording was the person commissioning that recording. The position changed with the introduction of the Copyright Designs and Patents Act 1988 under which the owner of the copyright is the "person by whom the arrangements necessary for the making of the recording are undertaken". This is generally taken to be the record company but an arguable case may sometimes be made by the producer that he is the person making the arrangements in question.

#### **3.4 Assignment of Rights**

A prudent record company would, therefore, ensure that prior to commencement of recording the producer makes an unequivocal assignment in writing of his interest (if any) in the recordings. If the record companies were to recognise such a requirement this might introduce a note of greater urgency into the whole negotiating process.

#### 4.0 **Credit**

This is usually of great importance to the producer. The form of credit should be agreed at the outset and an obligation should be imposed on the record company to ensure that all records bear the proper credit. The company may also be persuaded to feature the credit on paid advertising material. Sometimes a record company will accept that it may not engage another producer to carry out work on the recordings without the producer's prior consent. If there is no such restriction, then the producer should insist upon being given a listening copy of any recording which features his work together with that of another producer and he should have the right to insist, at his election, that his credit be removed.

## **Part II The Contract**

### **1.0 The Parties to the Contract**

#### **1.1 UK and US Approaches**

Often, the first contact with the producer is from the A&R man rather than from the artist or the artist's manager. It is usually the record company which pays all the recording costs and, of course, the record company owns the recordings. Invariably, the form of contract is generated by the record company's business affairs person. The automatic assumption might, therefore, be that the producer will enter into a contract with the record company. However, this is not necessarily so. The American record companies invariably refuse to enter into any contract with a producer; instead they insist that the artist or the artist's production company enters into the agreement. In this way, the record company shrugs off any responsibility for the producer and neatly side steps any potential contractual difficulties. With luck, the company will even be able to persuade the artist's lawyer to deal with the paperwork. Fortunately, in the majority of cases, the UK record companies have not yet abdicated responsibility for producers in this way and are still prepared to contract with them direct.

#### **1.2 Direct Accounting**

The producer will always prefer to contract with the record company rather than the artist because this will improve his chances of being paid. This is not to suggest any dishonesty on the part of the artist; it is simply a question of cash flow and financial stability. Also, a right of audit against an artist is more or less worthless; a right of audit needs to bring with it the right to inspect the record company's books and records of account. The problem is partially solved if the producer's agreement is with the artist (or some intermediary production company) but this is coupled with suitable direct accounting arrangements. The producer should not be satisfied with a simple letter of direction from the artist to the record company requesting the company to pay the producer's royalties and to deduct them from any royalties payable to the artist. If the producer is to be properly protected there needs in effect to be a separate contract between the producer and the record company. The best solution is a tri-partite agreement in the form of an irrevocable letter of instruction from the artist to the company countersigned by the producer but in which some "consideration" is shown to move from the producer to the record company in order to create a legally binding commitment. The consideration might be the nominal sum of one pound.

#### **1.3 Standard Forms**

In the case of many well established producers a form of contract will be agreed in relation to a particular project with each record company for whom the producer often undertakes work so that (as a short cut) each time the producer undertakes work for the company in question the same form of contract will be used as a template for the new deal (although the principal terms of this will vary case by case).

## 2.0 **The Deal Memorandum**

### 2.1 **Driving the Deal**

How does the producer overcome any preliminary confusion over his deal? He needs to know with certainty what he is to be paid, when he will be paid and by whom. In order to overcome any inertia, some strong minded character has to get a grip of the deal and then needs to show some tenacity in driving that deal through. It is difficult and probably inappropriate for the producer to attempt to do this. The artist will usually be of no use. The artist's manager may go through the motions but he has no authority to make any commitment on behalf of the record company. The record company cannot be relied upon. The person to drive the deal is either the producer's manager (if he has one) or his lawyer.

### 2.2 **Paying the Lawyer**

If the task falls to the producer's lawyer then some thought should be given at the outset to the question of who pays the lawyer's fees. The record company will not contribute towards them. The producer will be liable for them in the first instance but there should perhaps be an arrangement of some kind between the producer and his manager as to who bears the costs. Arrangements between producers and their managers vary considerably. Often, the manager will charge 20% commission but will provide a complete service in the sense that the manager will not only secure the work and negotiate the principal terms but will also drive the deal through with minimal or even no involvement on the part of any outside lawyer. Other managers charge 20% but rely heavily upon a lawyer's input and agree to bear the legal fees out of the 20% commission. Others charge 10% (which is rare) or 15% but expect the producer to bear any legal fees. What is fair and reasonable in a particular case will depend entirely upon the nature of the relationship and the value to the producer of the particular services provided. However, it would generally be unfair for a manager to charge a producer 20% commission but rely heavily upon the producer's lawyer to drive through the deal on the basis that the producer has to bear the legal fees in addition to the commission. For a lawyer time is money and if the lawyer is charged with the responsibility for negotiating the principal terms and/or of then "driving" the deal (rather than simply dealing at a gentlemanly pace with the paperwork) a lot of time will be needed and this will be expensive.

### 2.3 **Distribution of the Deal Memo**

At the first available opportunity the person charged with responsibility for the deal should issue a deal memorandum. At this stage, the lines of communication will still be tangled and it is, therefore, important that everybody should be provided with a copy of the deal memorandum. A copy should be sent to the artist's manager (possibly to the artist himself) certainly to the artist's lawyer, to the head of business affairs at the record company, to the A&R person responsible and probably to the managing director of the record company for good measure. The trick is to secure agreement to the deal memorandum as quickly as possible so that based upon this the producer may commence work in the studio without undue risk. If, as is usual, the producer cannot be persuaded to hold back until there is clear agreement on all material terms before he starts work then all the more reason to keep up the pressure to secure agreement to the principal terms of the deal before work progresses too far.

## 2.4 **Contents of the Deal Memo**

For this reason, the memo should not be bogged down with detail but it should cover all of the material terms together with those aspects of the deal which often prove controversial. It should, therefore, deal with the following points (the significance of which where necessary is more fully explained below):-

- 2.4.1 The contract must be with the record company itself.
- 2.4.2 The number of tracks to be recorded.
- 2.4.3 The advance per track (or the overall advance for the entire project).
- 2.4.4 When the advances will be paid.
- 2.4.5 The rate of royalty together with any escalations in this rate and whether the royalty is to be calculated at that rate by reference to the dealer or retail price.
- 2.4.6 For clarification purposes, the royalty rate is to apply worldwide (if indeed this is the case) rather than be subject to the same pro rata territorial reductions suffered by the artist (likewise, format reductions).
- 2.4.7 The royalty is to be paid subject only to recoupment of the advance and is not to be subject to recoupment of any recording costs nor deferred pending such recoupment.
- 2.4.8 The recording budget should be specified but it should be made clear that the producer will have no responsibility for any excess costs unless those costs have been incurred by reason of wilful neglect or default on the part of the producer.
- 2.4.9 The producer will require "A"/"B" side protection.
- 2.4.10 The royalty is not to be reduced by the amount of any royalty payable to any other producer or mixer engaged in relation to the recordings in question.
- 2.4.11 The credit requirements.

## 3.0 **Urgency**

The producer may have to compromise on some of these issues but if he is to secure his position in relation to them then he has to do so quickly. It is no good arguing any of these points after the work has been completed; the record company will simply dig in its heels. When the deal memo is circulated it should be accompanied by a request for copies of the relevant extracts from the artist's recording contract showing the detailed royalty calculation and payment provisions but perhaps indicating that the producer will be willing to accept that his royalties will be calculated in the same manner provided the provisions are reasonable. It is usually a mistake to relax and wait for a response to the memo; there very often will be no response within a sensible time frame. The next stage is to hound all of those concerned. If there is both a lawyer and manager involved then they should both take part in this process.

## **Part III Money**

### **1.0 What is the Producer Worth?**

#### **1.1 Basic Concepts**

The producer is generally entitled to a royalty so that his efforts will be rewarded according to the level of success achieved. The producer will rarely have any involvement in the promotion or marketing of the record so that the level of success is not within his control. The producer will invariably require a fee for his work which will usually be treated as an advance against his royalty entitlement. Producer royalties range usually from 2% of the dealer price to 5% of the dealer price with most producers being paid 3% or 4%. Most producers (like the rest of us) think they are underpaid. Some people think that producers are generally overpaid. It is certainly true that successful producers are very wealthy but few would begrudge them their rewards. Sometimes, a producer will be persuaded to work on the basis that no royalty will be payable. This is rare and is generally restricted to the production of superstar artists. Some superstars resent having to pay a substantial proportion of their royalty income to a producer in circumstances where the reputation of the artist is already established. The superstar may notice that his royalty earnings from his last album were, let us say, four million pounds but that one million pounds of this was paid to his producer. Having a superstar's ego he or she will wonder whether the producer's input on the last album justified so high a reward. The artist may not want to pay the producer another one million pounds for spending six weeks in the studio recording the next album. The superstar may remember that the producer was paid an advance of £50,000 for the last album and may decide that on this occasion he or she will generously offer £250,000 (not bad for six weeks work) but on the basis that this represents a buy out of all rights so that no further royalties will be payable. Given that the artist is a superstar no doubt the producer is also from the top drawer. He will be insulted by the suggestion that he should work on a record and have no royalty entitlement and he will reject the proposal out of hand. If the superstar persists and if the producer needs the £250,000 badly enough (perhaps he has not made a sufficient tax reserve in relation to earnings from the last album) the superstar may succeed.

#### **1.2 Artist -v- Producer**

On balance, producers are probably valued more highly by record companies than by artists. Too often, artists end up resenting the amount the producer earns. If for example the gross artist royalty is 16% and this is inclusive of a producer royalty of 4% (an example to which we will return later in this chapter) then in the case of a solo artist that artist will earn three times more than the producer (although the artist royalty will be available for recoupment of recording costs whereas the producer's royalty probably will not). The solo artist may feel reasonably comfortable with this. However, if we look at a four member band the producer's 4% will exceed the 3% available for each of the band members. Moreover, the band's work does not end once the recordings are completed. This may be followed by perhaps two years of hard slog by the band in terms of promotional work and touring. Also, of course, the band may have time only to record one album every two or three years; a producer may have time to produce perhaps three or four albums each year. On the other hand, the producer might argue that his work helps establish the artist's reputation and the

artist is able to profit from this by the release of further material whereas the producer derives no benefit from the artist's future activities (although producers have been known in extreme cases to ask for an override royalty on the artist's next album).

### 1.3 **Remember that the Artist Pays**

The artist (or the artist's manager) should be aware of these issues and should be diligent in negotiating the producer's deal. Too often, in a wave of enthusiasm for a particular producer, percentages are agreed in haste and with little thought. Still more dangerous, is the tendency of record companies to secure the services of the producer and agree the terms of his deal with little involvement on the part of the artist. Ultimately (assuming recoupment is achieved), it is the artist's money generously being handed out by the record company to the producer. If the record company is determined to use a particular producer and that producer insists upon a royalty of say 5% then on rare occasions the artist may be able to persuade the record company to make a contribution (so that perhaps of the 5% only 3% or 4% is deductible from the artist's gross royalty).

### 1.4 **European Approach**

European record companies (outside the UK) usually adopt a different approach. Often, the producer's deal is unrelated to the artist's deal, i.e. the artist's royalty payable under the recording contract tends not to be inclusive of the producer royalty and the royalty payable to the producer tends not to be subject to recoupment of recording costs (although it seems that increasingly Germany is adopting the UK model). Nevertheless, the rates of royalty payable to producers in Europe tend to be similar to the rates which apply in the UK. European record companies generally adopt a more flexible approach than their UK counterparts and may sometimes be persuaded, for example, to allow the producer's lawyer to prepare the contract (a distinct advantage!) even (sometimes) contributing towards the legal fees.

## 2.0 **Royalties**

### 2.1 **Royalty Rates**

Most producers command 3% or 4% of the dealer price. When negotiating his royalty rate the producer should check that the royalties will be payable by reference to 100% of sales (and if not then the rate should be adjusted in order to take account of this). He should try to ensure that the agreed rate applies on all sales worldwide although he may have to suffer territorial reductions. If he is offered say 4% for UK sales and 3% elsewhere he should reject this but perhaps be prepared to compromise on the basis that he will suffer the same pro rata reduction as the artist. If, for example, the artist's UK gross rate of royalty is 16% but elsewhere is 13% then the producer might accept 4% for UK sales and 13/16ths of 4% in relation to foreign sales. The producer might also try for royalty escalations based upon sales targets of some kind (so that perhaps the 4% rate increases to 4.5% for sales in a particular territory in excess of the number of sales required in that territory to achieve perhaps gold or platinum status). As an alternative, the producer might benefit from a pro rata share of any royalty escalation enjoyed by the artist (although the record company and the artist will usually resist this).

## 2.2 **Method of Calculation**

Most producers will accept that their royalty should be calculated at the agreed rate or rates in accordance with the same royalty calculation and payment provisions as apply between the record company and the artist concerned. Some producers refuse to accept this and insist upon the negotiations extending to a full scale review of the detailed royalty calculation provisions. There is some merit in this in the case of a sought after producer engaged to produce a recent signing. The artist may not have been in a particularly strong negotiating position in relation to his recording contract. If the principle is accepted then the person driving the deal for the producer should insist that he is given relevant extracts from the recording contract as quickly as possible so that these may be reviewed. If they contain provisions which are unfair or unusual then of course the producer should object to them.

## 2.3 **"A" Side Protection**

Most producers insist upon what is known as "A" side protection so that in the case of a single record if a track by the producer is featured as the "A" side the producer suffers no pro rata reduction in his royalty even though he may not have produced the "B" side. Sometimes the record company will only accept this on the basis that no royalty is payable to the producer if he has produced the "B" side and not the "A" side. A producer is normally reluctant to accept this but may do so if this is limited to those instances where the producer of the "A" side also has "B" side protection.

## 2.4 **Secondary Exploitation**

Some record companies are careful to word their producer agreements so that the producer is only entitled to a royalty in relation to record sales (and so that nothing is payable in relation to any other form of exploitation). The producer should insist that he is also paid for any other exploitation. Usually, the producer will accept a pro rata share of whatever is payable to the artist. For example, in the case of income from synchronisation licences the record company is usually obliged to account to the artist for 50% of its receipts. Using our example of the 16% gross artist royalty and a 4% producer royalty the producer should receive a one quarter share of the 50% payable to the artist (i.e. 12.5% of the gross). The producer should ensure that his royalty entitlement extends not only to records in the usual sense but also to any DVDs or other audio-visual devices and to interactive formats. Often, the producer will accept a pro rata share of whatever is payable to the artist in relation to the exploitation of audio-visual rights. It may be argued that this is inappropriate because the producer has only been involved in the audio element and not the visual element. On this basis the producer's entitlement may be halved so that using our example, the producer would be entitled to 12.5% of whatever is payable to the artist.

## 3.0 **Advances**

### 3.1 **Successful Producers**

A successful producer may command an advance of £50,000 or £75,000 per album. Depending upon his working methods and the type of artist he works with he may be able to complete say four album projects a year. He might, therefore, earn £300,000 per annum by way of advances (although this will be inclusive of any commission he has to pay and he will have certain professional expenses, e.g. legal and accountancy fees). Of course, in

extreme cases a producer may be able to command far higher fees. A mid range producer (i.e. a producer with a reasonably strong historical track record who is still in vogue because he has had one or two successful records in the last year or two) may command say £30,000 to £40,000 per album and he may manage to complete say three album projects per year together with the odd track or two for other artists (so that he might gross perhaps £100,000 to £125,000 per annum). However, producers have to work hard for their money. They are under pressure to deliver the goods on time and within budget. Unfortunately, the creative process does not always work according to plan. They have to deal with temperamental artists and demanding A&R men and, quite likely, they will end up day and night in the studio. This partly explains why some producers have earned a great deal of money which has had to be used to finance expensive divorce settlements. Nevertheless, in most cases, once a producer is well established his ability to command hefty advances is likely only to last for a few years and there is a natural temptation to "make hay whilst the sun shines". Producers come in and out of fashion and often a producer is perceived to be only as good as the last album he produced.

### 3.2 **Less Successful Producers**

A recognised producer who is not yet in the top league may command around a £1,000 or £2,000 per track. Sometimes, a producer will be prepared to accept less than this if, for whatever reason, a limited budget is available and if the producer is particularly enthusiastic about the artist concerned.

### 3.3 **Mixers**

A specialist mixer usually charges anything between £500 and £5000 per track (usually inclusive of studio fees). High profile re-mixers have been known to command much more. A successful mixer will be offered more work than he is able to handle even though he will often complete a particular mix within the space of one day (one day and a half per mix probably being the norm). If he is sufficiently in demand he may also be able to secure a royalty entitlement. This will usually be 0.5% but might sometimes be a full 1%. A mixer brought in to mix an album would not usually secure a royalty entitlement. It is normally the specialist mixer, i.e. the club/dance re-mixers who might insist upon a royalty entitlement. This might be offered for a 12" dance version but some re-mixers will argue that their royalty entitlement should extend to any 7" version. Sometimes they will push for a co-production and/or co-publishing credit. The record company will often insist that the original producer must accept a reduction in his royalty if the record company has to pay a royalty to a third party producer or mixer. If the original producer is in a reasonably strong negotiating position he should be able to resist this. As a compromise, he may accept that his royalty will be reduced if a third party is brought in to re-work his material prior to its initial release but he may insist that any special mixes for particular marketing purposes should be entirely at the record company's expense. If the producer does have to accept a reduction he would normally seek to limit this in some way. The reduction may be limited to say one half of whatever is paid to the third party (so that the record company and the producer split the cost between them). Alternatively, the producer may accept that the entirety of the third party royalty may be deducted from his royalty provided he receives at least one half of his otherwise applicable royalty rate.

### 3.4 **Per Track Advances**

A producer will usually quote on a per track basis. For example, he may ask for £5,000 per track. In the case of an album project he may be asked to produce thirteen or fourteen tracks and the compromise may be that he is paid his "full" per track rate but he is only paid ten times his per track rate, i.e. £50,000 for the entire album irrespective of the number of tracks.

### 3.5 **Advance or Fee?**

Generally, the company will insist that the whole of any fee payable to the producer is treated as a recoupable advance. Sometimes, if the record company pleads poverty or for some other reason is not prepared to pay the producer's usual advance the company may be persuaded to treat the producer's fee (or perhaps 50% of this) as non-recoupable. This may be dressed up on the basis that the non-recoupable element is attributable perhaps to the producer's engineering services. Likewise, if the producer also plays instruments on the recordings he may be able to persuade the record company to treat part of the advance as a non-recoupable fee in respect of his playing services.

### 3.6 **Bonus Advances**

The producer may be able to secure "bonus" advances triggered perhaps by particular sales targets. This would normally simply improve the producer's cash flow in that (depending upon how the bonus is calculated) the bonus will often simply amount to an accelerated payment of royalties which may have accrued but are not yet due for payment.

### 3.7 **Payment Schedule**

Usually, one half of any agreed advance is payable on commencement of the producer's services with the balance payable upon completion. Nevertheless, most record companies refuse to make any payment until there is a signed contract. It is sometimes possible to accelerate payment of the final one half of the advance so that perhaps 50% of this is payable upon completion of recording but prior to mixing with the final balance payable only upon delivery of the finished and fully mixed masters. The producer should always resist any suggestion that part of the advance be delayed pending commercial release.

### 3.8 **Expenses**

The producer will usually expect his expenses to be reimbursed. He will often be entitled to a per diem payment of some kind to cover subsistence costs.

## 4.0 **Recoupment and Deferment**

### 4.1 **UK and US Approaches**

Most UK record companies will agree to account to the producer for his royalty subject only to recoupment of his advance. Some UK companies follow the example of the US record companies which invariably refuse to pay any producer royalties until the recording costs have been recouped. In the worst cases, the producer's royalty will actually be used towards recoupment of those costs. In most cases, however, the record company will simply agree to

a deferral so that the producer's royalties will be paid calculated from the first record sold (subject of course to recoupment of the producer's advance) but only if sales are sufficient to enable the recording costs to be recouped from the artist's royalty.

## 4.2 Example

By way of illustration let us again assume a gross artist royalty of 16% inclusive of a 4% producer's royalty. Let us assume that the producer receives an advance of £20,000 but that there are additional recording costs of £100,000. What will be the position if the 16% gross royalty generates say £100,000 of royalties? The 4% producer's royalty would be worth £25,000 so that after recoupment of his £20,000 advance the producer at this stage is due a further £5,000 in royalties. However, if the contract provides that his royalties are to be deferred pending recoupment then no producer royalties will be payable until the recording costs net of the producer's advance (i.e. £100,000 in this case) have been recouped from (usually) the net artist's royalty (i.e. 12%). In this example, the net artist royalty so far amounts to only £75,000 so that there is an unrecouped deficit of £25,000 (so that no royalties will yet be payable to the producer).

If the next royalty statement discloses aggregate royalty income (calculated at the 16% gross rate) of £200,000 so that the producer's 4% is at that stage worth £50,000 then the full £50,000 less only the £20,000 advance will then be payable because recoupment will by then have been achieved (i.e. the 12% net rate will have given rise to £150,000 which is, therefore, more than sufficient to recoup the £100,000 recording costs).

## 4.3 Pitfalls

If the producer is forced to accept deferment provisions of this nature there are various pitfalls to be avoided. Firstly, he should ensure that he does only suffer a deferment and that his royalties may not be used actually to recoup a share of the recording costs. Secondly, for this purpose recoupment should either be calculated by reference to the net recording costs (after deduction of the producer's advance) from the net artist royalty (as in the above example) or by reference to the gross recording costs (inclusive of the producer's advance) from the gross artist royalty. Also, for the purposes of calculating recoupment there should be a strict definition of recording costs. Most importantly, recoupment should not extend to any other costs which may be recoupable as between the record company and the artist (e.g. promotional video costs and tour support payments).

## 5.0 Accountings

### 5.1 Method

The producer will usually accept that he will be accounted to in the same manner and upon the same dates as the company accounts to the artist.

### 5.2 Audit Rights

The producer should ensure that he has a suitable direct right of audit against the record company. Ideally, the record company should be obliged to reimburse the audit costs in the event of a discrepancy of some kind (perhaps where there is an underpayment of say 5% or 10% of the total amount properly payable in relation to the accounting periods under

review). As we have seen (Chapter II Part III paragraph 5.4 ) more and more recording artists undertake regular audits. However, the producer usually has a lesser financial interest than the artist. Given the considerable costs involved in undertaking a proper audit producers tend to be reluctant to incur those costs (even if the contract provides that those costs are to be reimbursed in the event of a discrepancy). In practice, the most sensible course is for the producer to maintain contact with the artist and to review from time to time with the artist whether they should jointly carry out an audit with the artist and the producer contributing on a pro rata basis to the costs involved (to the extent that those costs cannot be recovered from the record company). In any event, it is worth trying for a provision to the effect that if the artist carries out an audit as a result of which a settlement of some kind is made then the producer's royalty account should automatically be adjusted on the same basis.

## **Part IV Independent Productions**

### **1.0 Independent Record Companies**

#### **1.1 Royalty or Profit Share?**

A producer may have to accept that he will be paid on a rather different basis if he undertakes work for an independent record company or for a production company. The first difficulty is that the independent companies generally do not have the same level of funding as the majors so that the producer may be squeezed harder so far as his advance is concerned. Many independent record companies have turned away from the traditional royalty system and instead pay their artists perhaps 50% of any net profits. Although there is some logic in the artist and record company taking this joint venture approach it is less logical for the producer to be tied into this. The producer will have no involvement once his work in the studio is finished and he will certainly have no control over what expenses are incurred. Usually, therefore, the producer will insist that his royalty is calculated in the normal way. In fact, if he has had to accept a reduction in his advance because of budgetary constraints he may wish his royalty to be enhanced in some way to compensate for this.

#### **1.2 What Percentage of Profit?**

If the producer is nevertheless persuaded to accept a share of net profits then what percentage should apply? Our example of the 16% royalty under the traditional system inclusive of a 4% producer royalty gives a ratio of 3:1, i.e. the artist's earnings are three times greater than the producer's earnings, (although this does not take into account the fact that the artist suffers recoupment of recording costs from his share). If the gross royalty under the traditional system were at the higher end of the scale at, say, 21%, then in the case of a producer who would normally command a royalty of, say, 3%, the ratio increases to 6:1 in favour of the artist.

If the artist is to receive 50% of net profits then logically, the producer might ask for between 1/6th and 1/3rd of the artist's 50% share. Although this does not affect the producer, the question then arises of whether the producer's share comes "off the top" leaving the balance to be split equally between the record company and the artist (which is the more usual arrangement) or whether the artist's 50% share should be inclusive of the producer's share.

### **2.0 Speculative Work**

#### **2.1 Basic Protection**

Sometimes the producer will be persuaded to carry out work on a speculative basis before an artist has even signed a record deal (the artist may have a manager or perhaps a publisher prepared to fund the costs involved). Ideally, the producer will nevertheless secure a fee of some kind although sometimes he will be persuaded that there are no funds available for this purpose. In order to protect his position he should consider imposing a contractual obligation upon the artist to ensure that any record company which may become involved will account direct to the producer for royalties at an agreed rate. The rate should be fairly

high in order to reflect the element of speculation and risk. The producer might insist that he owns the copyright in the recordings pending any record deal. Also, the producer should either impose a re-recording restriction upon the artist or make it clear that his royalty is payable not only upon the recordings which he has produced but also upon any other recordings by the artist of the same songs.

## 2.2 Studio Deals

Speculative work of this nature will often involve a studio deal of some kind. Sometimes, of course, the producer will have his own studio or at least sufficient facilities to enable some quality demonstration recordings to be made. If the producer's own studio or facilities are used then the producer will need to factor this in when calculating what should be paid to him if and when the project is successful. In other cases, the producer will carry out the work at a commercial studio but during "down time". Most commercial studios are prepared to offer a special deal of some kind for the use of their "down time", i.e. those few hours (perhaps in the middle of the night) between bookings when the studio might otherwise be idle. The deal might involve cut price rates or, very often, no guaranteed payment but a royalty of some kind in the event that the recordings are commercially released. In this situation, the producer may have to compete with the studio in protecting his own position. For example, the producer may not be able to own the copyright in the recordings because almost certainly the studio will insist upon owning the tapes (so that it may assign the copyright in the recordings to the record company when one is found in return for an agreement with that company either for the payment of an "override" royalty and/or for the reimbursement of the studio costs). Sometimes, the producer may work on a special project of this kind whilst at the same time working (in the same studio) for a fee paying record company. Arguments may then develop between the producer and the studio (and perhaps even the other artist/record company) as to whether or not the special project has made use of "down time" (which involves striking a deal of some kind with the studio) and/or whether work has been undertaken on the special project during time paid for but not used by the other artist (or the record company concerned). The first rule for the producer, if he attempts to extract maximum advantage from the use of any commercial studio in this way, is to ensure that there is no ambiguity involved and that it is clearly understood that the producer will not be liable for any studio fees. If the studio requires a deal of some kind then the producer should ensure that the studio's deal is with the artist and not with the producer. He should secure his position with the artist separately.

## CHAPTER IV

### PUBLISHING CONTRACTS

#### Introduction

Whilst the recording contract may still be the principal means by which a recording artist pursues his or her trade, if he or she writes and/or composes his or her own musical material then the publishing arrangements are of similar significance. Under the record deal the artist will earn from the exploitation of the physical recordings; separately, he or she will earn from the exploitation of the songs. By "publishing" in the context of the music industry, we mean the arrangements by which a song is exploited. When we refer to a publishing contract we usually mean the agreement under which the writer agrees to write and/or compose material for his or her publisher. This is more accurately described as a songwriting agreement or what the MCPS/PRS refers to as an "ESA" (exclusive songwriter agreement). When a publisher enters into an agreement with another publisher (perhaps for the exploitation of particular songs overseas) we usually refer to that agreement as a sub-publishing agreement.

In Part I of this Chapter we consider whether a songwriter should enter into a publishing contract and, if so, when. In Part II we analyse the different types of publishing income and look at how a particular deal may be valued. In Part III we look more closely at a typical publishing contract. In Part IV we briefly consider alternative contractual arrangements and in Part V we review those factors which need to be borne in mind even after the deal is done.

## **Part I Who Needs a Publisher?**

### **1.0 The Nature of a Publishing Contract**

#### **1.1 Copyright**

In simple terms, a publishing contract involves the writer granting rights in his or her songs to a music publisher in return for which the publisher collects all of the income from the exploitation of those songs and accounts to the writer for an agreed share of that income. Usually, the writer transfers to the publisher the copyright in the songs (although generally only for a limited period). A song is generally a precious and personal thing. Some writers have difficulty with the idea of giving their songs away. They prefer to retain ownership of their songs and make their own arrangements for the collection of any income. If the writer does not assign copyright to the publisher but merely grants a licence of some kind then the agreement probably would not be referred to as a publishing contract; it would instead be called an administration agreement or perhaps a licensing agreement. We look at these distinctions more carefully in Part IV.

#### **1.2 The Publisher's Services**

All publishers will emphasise a number of positive reasons why a writer should enter into a publishing contract. The publisher will claim that with the various systems it has in place it is better able efficiently to collect any available income than a writer operating on his or her own. Moreover, the publisher is more skilled at negotiating fees for the licensing of certain rights in the songs. The publisher will have a professional manager or a team of managers looking for additional ways in which to exploit the writer's material. The publisher may be able to offer help and guidance so far as songwriting is concerned (although this will usually be limited to suggesting potential co-writers). The publisher may have facilities which the writer may use either at a subsidised cost or no cost at all (e.g. for recording demos). The publisher may be prepared to invest in the writer's career by the payment of advances even before there is any sight of any publishing income from which to recoup those advances.

### **2.0 When Should the Deal be done?**

#### **2.1 Significance of the Record Deal**

The conventional wisdom used to be (in the case of a singer songwriter) that the publishing deal should be delayed until the record deal is in place. It is the record deal which gives value to the singer songwriter's publishing rights and there is a fear that if the writer concludes a publishing deal before signing a record contract he or she may sell the deal short. This view is no longer so common. Music publishers have become far more competitive. A publisher will often be the first to recognise (before any record company) the talent of a particular songwriter and may enthusiastically seek an involvement with the writer in the expectation of then being able to help secure a record deal. Some publishers will even finance master quality recordings for independent release with a view to building up an artist to the point where a major record deal is achievable.

## 2.2 **Funding**

Publishers are skilled at selling themselves but like all salesmen they tend sometimes to make exaggerated claims. In the majority of cases writers look to publishers for one overriding reason - money. If in the case of a particular recording project there is no difficulty in securing a record deal, then the prudent approach is probably to conclude that deal so that it may then be used to secure the best possible terms from a publisher. Otherwise, if there is no record deal in sight but reasonable terms are available from a publisher there is no reason in principle why a publishing contract should not be concluded without delay.

## 3.0 **The Publisher**

### 3.1 **Choice of Publisher**

As we saw in Chapter II Part I if there is competition between record companies for a particular artist the choice of record company may prove difficult because the quality of the label's service or "performance" and the extent of its commitment to the artist are rightly seen as crucial factors. In contrast, if there is competition between publishers for a writer, the choice (at least for singer songwriters) is more often determined simply by reference to which publisher offers the most attractive financial terms.

Some singer songwriters are reluctant to sign a publishing deal with a publisher which is affiliated to their record company. Ordinarily, the accounting statements received from the publisher serve as a useful check upon the accountings received from the record company. If the record company and publishing company are related then there is a greater risk of concealment. However, this is more of a risk when signing to smaller companies (and even then, of course, most smaller publishers are reputable). In the case of the major companies the record and publishing arms are run entirely separately from each other.

### 3.2 **Efficiency of Administration**

Before concluding any deal the writer should be satisfied that the publisher has efficient collection systems in place. Every publisher will say that its collection arrangements and accounting procedures are impeccable so that the writer should make other enquiries (perhaps of other writers signed to the publisher and certainly of the writer's professional advisers).

### 3.3 **Professional Management**

A songwriter who does not have a separate career as a recording artist and instead relies upon persuading other artists to record his or her songs and/or persuading television and film companies to commission his or her work is bound to attach more significance to the faith he or she has (or otherwise) in the particular personnel upon whom he or she relies to seek out commissions for him or her, to obtain covers and to introduce him or her to appropriate co-writers. As with every aspect of the music business, personal relationships count for a great deal.

## **Part II Publishing Income**

### **1.0 Types of Income**

#### **1.1 Performance Income**

In the UK, the Performing Right Society Limited ("PRS") has a virtual monopoly in relation to performance income i.e. the income generated by the public performance of musical works (whether on radio or television or in discotheques, restaurants or other places of entertainment or in shops or any other public place). The PRS collects substantial licence fees and after payment of its administration costs divides up whatever is available for distribution between its various members. Unless the writer is a member of PRS he cannot participate in this income and in order to be accepted as a member the writer has to assign to the PRS the performance right in all of his musical works. The PRS will then pay six twelfths of any performance income attributable to the writer's songs direct to the writer (the PRS still thinks in terms of twelfths rather than decimals) and will pay the remaining six twelfths to the publisher. If the writer does not have a publisher then the entirety of the performance income will be paid direct to him. The manner in which the PRS calculates performance income for distribution to its members is complicated but there are some specifics. At the time of writing a one minute play on Radio 1 triggers a payment of £17.68 whereas a one minute play on Capital FM triggers a payment of only £1.31. A one minute play on BBC1 at prime time (between 6pm and 12pm) triggers a payment of £55.57 and at any other time triggers a payment of £33.34. These fees may appear small but a successful single which enjoys considerable airplay will generate substantial performance income.

#### **1.2 Mechanical Royalties**

In order to manufacture records the record company requires a licence (called a mechanical licence) from the owner of the song. Under the terms of the licence mechanical royalties are payable at the statutory rate (for records manufactured in the UK) of 8.5% of the dealer price. What is the 8.5% mechanical royalty worth? In the case of a full price CD the dealer price may be say £8.89 excluding VAT so that the 8.5% royalty is worth 75p. In the case of a record which features more than one musical composition this mechanical royalty liability will be divided between those compositions (so that the more songs are featured the less income is generated per song). Generally, the mechanical royalties are collected by the Mechanical Copyright Protection Society Limited (MCPS) on behalf of its publisher members. The MCPS deducts commission at the rate of 6.25% in the case of mechanical royalties payable by the major record companies and those other record companies operating under what the MCPS refers to as its AP1 Scheme (which is intended for record companies with a proven track record) and 12.5% in all other cases.

#### **1.3 Synchronisation Fees**

The consent of the copyright owner is required for the use of a piece of music in a film. The consent is given in the form of what is called a synchronisation licence and the fees payable under the terms of that licence are referred to as synchronisation fees. Hence, a synchronisation fee is payable by an advertising agency for the use of a piece of music in a television advertisement and is payable by a television company for the use of music to be broadcast on television and is payable by a film company for the use of any music

incorporated in a film. Unlike performance income or mechanical royalty income (in relation to which neither the writer nor his or her publisher has any control over the method of calculation) synchronisation fees are freely negotiable so that the writer will rely upon his or her publisher to secure the best possible fee for each use. Even then, some uses are covered by what are known as "blanket" licence agreements including for example any background music used on television which will be covered by the general licences granted periodically by the PRS/MCPS to the broadcasters.

#### 1.4 **Print Income**

The most traditional form of music publishing is the printing of sheet music. Before records were available publishers made their money by printing sheet music (for which there was then a great demand). There has been a resurgence of sheet music sales (more for song book compilations than single sheet music) and for some writers this is a material source of income.

#### 2.0 **The Value of Publishing Income**

##### 2.1 **Past Income**

It is impossible to know (without a crystal ball) how much money is likely to be generated from any particular publishing rights. The publisher will therefore agree to account to the writer for a given percentage of whatever is actually generated. How does the publisher calculate what advances (if any) it is prepared to pay? If the deal relates to specific songs which have generated earnings in the past then it is a relatively simple task for the publisher to calculate the average annual earnings over the past few years and then decide how much to offer as an advance against anticipated future earnings. Past earnings are by no means a guarantee of future earnings (the profitability of a particular song will ordinarily decrease with the passage of time) but the publisher will make assumptions based upon what is happening in the marketplace.

##### 2.2 **Future Income**

But how does the publisher decide what to pay for a new writer i.e. perhaps a singer songwriter who has not previously released a record? The more sophisticated publisher will have the benefit of complex financial models which will be used to predict the speed and size of the publisher's financial return but those models are only marginally more useful than the crystal ball because they depend upon the accuracy of numerous assumptions. So, using a few crude rules of thumb, let us take a fanciful look at what the publishers might offer for a particular writer. We will take the example of a band which has just signed a record deal with a major record company which guarantees the release of an album. They intend only to record their own material. They do not co-write so that 100% of the publishing rights for the album will be available.

##### 2.3 **The Piggy Back Approach**

The first publishing company is familiar with the record company involved and it rates the label highly. The publishing company also knows that the record company has committed to the payment of around £150,000 inclusive of costs. It has found out that for the record company this is a priority signing and that the label intends to pull out all the stops. The

publishing company is prepared to take a financial risk calculated by reference to the risk undertaken by the record company. It reckons that the label will make at least two properly funded promotional videos and will commit to substantial independent promotion. The publishing company thinks that after taking into account the band's advance, re-mixing costs, video costs, independent promotion costs and the like the record company will be committed to a minimum level of expenditure of around £300,000. The publishing company assumes that after manufacturing and distribution costs (including mechanical royalties) the record company will make an average of £4 per unit on all UK sales (before paying artist royalties) and will receive a royalty of £1.50 per unit on overseas sales. The publishing company assumes the record company will break even on 60,000 UK sales and 40,000 overseas sales. The publishing company therefore calculates what publishing income might be expected from those sales. After the MCPS has deducted its commission the publishing company calculates that it will receive around 60p per unit for the UK sales giving rise to £36,000. After sub-publisher deductions the publishing company reckons on 50p per unit for the overseas sales so the publishing company would gross another £20,000. On top of the £56,000 gross mechanical royalties the publishing company reckons there will be a fair amount of airplay. The publishing company knows that in the case of its other comparable writers their gross performance income is around 30% of their gross mechanical income. In this case, that would mean £16,800 but the publishing company will only receive six twelfths of this. All in all, if the record company breaks even the publishing company reckons that by that stage it can expect to have received at least £60,000. In this instance, the publishing company prefers not to pay out this much by way of an advance because even if the various assumptions prove to be correct there will be a long wait for the money to come through the pipeline. Accordingly, the publishing company decides to offer the band a 75/25 deal and to pay them £45,000 as an advance but to try and stagger payment so that £15,000 is payable now, £15,000 upon UK release and £15,000 upon US release.

## 2.4 **The Scientific Approach**

The second publishing company needs to build up its market share. The company is prepared to take a risk but it has to be a calculated one. The company knows that there will be competition to sign the band because the band's lawyer is already touting the deal around town. The band signed their recent record deal in a blaze of publicity. The publishing company knows that it will have to pay at least the going rate and after consulting with the head of business affairs the managing director decides that £50,000 would be an appropriate advance. However, he has pitched in at this level for several new bands recently and each time he has lost out to competitors. He decides to offer £75,000 but he needs to get Board approval. He therefore gives the financial director some projections (which are similar to the projections made by the first publisher who is "piggy backing" on the record deal) and asks him to work some figures. The financial director spends some time on his laptop before telling the managing director that based upon the projections he has been given he thinks that the band should be offered an advance of no more than £50,000. The managing director knows that this will not secure the deal. He has lunch with the band's manager and then calls in the financial director again. He has found out more about the band and he wants to revise the projections. He doubles the anticipated sales and asks the financial director to factor in some compilation income. Also, he has heard the re-mixes and based upon what he has heard he has decided to increase the projected performance income. He also wants to include a provision for some synchronisation income because the manager has told him that Disney want to use some of the music in a new film. The financial director re-works the figures and the next day the Board gives approval for an advance of £75,000.

## 2.5 **The Maverick Approach**

The managing director of the third publishing company will kill for the band. He thinks the band will be the next big thing and anyway even if the band does not hold together the main songwriter is a genuine talent. The managing director does not care what the deal will cost. He will offer £100,000 and double it if he has to. He does not have to worry about his Board because the company has already made £1,000,000 from his last year's signings and he has just signed a new three year employment contract at a huge salary with share options and he knows that the Board will do whatever he recommends.

## **Part III The Contract**

### **1.0 The Term**

#### **1.1 Contract Periods**

Most contracts will run for a period of twelve months but then the publisher will have a number of options to extend for a number of further successive periods of twelve months. Typically, the publisher will require two or three options so that the agreement runs for a total of three or four contract periods.

#### **1.2 Extensions**

If the publisher is prepared to pay an advance (and without this there would usually be little incentive to sign a long term publishing deal) then, quite reasonably, the publisher will expect a minimum commitment of some kind from the writer (see paragraph 2.0 below). Each contract period will therefore be extended if necessary until a given period after the commitment has been met. The contract will usually enable the publisher to extend the relevant contract period until say three months after the commitment has been met (in order to give the publisher sufficient time to assess the position before deciding whether or not it wishes to exercise its option to continue into the next contract period). In order to avoid restraint of trade problems most publishers are advised to put a limit on the period of extension of perhaps two or three years. In the case of a four year deal, therefore, if there is a maximum period of extension of two years then each contract period will run for a maximum of three years so that theoretically the contract might run for a maximum of twelve years.

#### **1.3 Exclusivity**

A publishing contract will invariably be exclusive so that the publisher will be entitled to all of the songs written and composed by the writer during the term of the contract. In addition, the publisher will expect to acquire any existing material (unless, of course, rights in that material have already been granted to another publisher). Sometimes, in order to prevent a writer holding back songs towards the end of the term of the contract, the publisher may insist that the contract also extends to any songs commenced during the term but only completed subsequently.

## 2.0 **The Minimum Commitment**

### 2.1 **Delivery or Release?**

In the case of an ordinary songwriter (as opposed to a singer songwriter) the publisher may simply require a minimum number of songs to be completed and delivered. Nevertheless, if substantial advances are paid then notwithstanding the absence of a recording contract the minimum commitment may be expressed in terms of a minimum number of songs which must be commercially released. Certainly in the case of a singer songwriter the publisher will require a minimum number of songs to be released on record (and for this purpose the songs will often only qualify if they have been released by a major record company).

### 2.2 **Extent of the Commitment**

It is important that the minimum commitment is realistic, i.e. achievable. For example, in the case of a singer songwriter who co-writes all of his or her material and usually includes on each album one or two songs written by other writers the commitment should be for say 40% of an album (leaving room for him or her to write 50% of eight out of every ten songs). Sometimes the publisher may insist that the minimum commitment is only met when the minimum number of songs has been released by a major record company not only in the UK but perhaps also in one or more other specified overseas territories. Before agreeing to provisions of this nature the writer should review the record contract and assess the likelihood of his or her being able to comply with the commitment within a reasonable period.

### 2.3 **Failure to Comply**

If the commitment is not met then the extension provisions will apply. Also, the publisher may seek to reduce the writer's advance if the commitment is not met in full. For example, the contract may specify that the writer must procure the release of an album which has been written by the writer as to at least 90%. However, the contract may be structured so that the commitment will be deemed to have been met provided at least 50% of the album has been written by the writer (i.e. so that the extension provisions no longer apply) but so that the advance is reduced, i.e. if 50% of the album qualifies then five ninths of the advance would be paid and if say 70% of the album qualifies then seven ninths of the advance would be paid.

## 3.0 **Territory**

### 3.1 **Overseas Exploitation**

Most publishing agreements are world-wide so that the publisher will enjoy rights in the songs in question throughout the world. Most of the major publishers have affiliated companies in all of the important territories. The independent publishers have appropriate sub-publishing arrangements in place throughout the world. Generally, therefore, all reputable publishers are in a position to exploit songs on a world-wide basis.

### 3.2 **Limited Territory**

Some publishing agreements are restricted to a limited territory. As we have seen in Chapter II Part II paragraph 3.0 a number of practical problems arise when recording arrangements are made on a territory by territory basis. However, those practical considerations do not arise in the case of publishing arrangements.

### 3.3 **Pros and Cons**

A UK publisher may be prepared to pay higher advances for world-wide rights than the writer is able to achieve by securing individual advances for each territory. The UK publisher would then have the protection that income from all territories throughout the world will be available for recoupment purposes (which therefore spreads the publisher's risk). Conversely, the advantage for the writer of entering into territory by territory deals is that if there is particular success in one territory then once the advance for that territory has been recouped royalties will immediately begin to flow (i.e. those royalties will not be available to recoup advances paid for other territories). Another benefit is that the writer may expect to receive overseas royalties more quickly than if they were routed back through a UK publisher. On the other hand, if a number of deals are entered into rather than one world-wide deal this is likely to increase the legal fees payable by the writer and, of course, the writer (or his or her manager) will have to monitor and liaise with a number of different companies. In some overseas territories it is common practice to incentivise a record company by granting publishing rights to a publisher affiliated with the record company. Accordingly, if an artist controls his or her own recordings and licences these throughout the world on a territory by territory basis then it might make sense to deal with any available publishing rights in the same manner. However, generally, territory by territory publishing deals are unpopular and the typical UK writer (certainly a singer songwriter) prefers to conclude a world-wide deal with a UK publisher.

## 4.0 **Advances**

### 4.1 **Relevant Factors**

For many writers the advances are the most critical factor. Advances vary dramatically. A would-be recording artist struggling to find a record deal but able to attract publisher interest may be pleased to secure an advance on signing a publishing deal of £10,000 (perhaps less) since this may provide vital funding at a time when the artist is struggling to keep his or her project together. If the writer has secured a valuable recording contract he or she might expect ten times as much. Various factors will affect what the publisher is prepared to pay. We saw in Part II how publishers may vary in their approach. We looked at what we fancifully described as the piggy bank approach, the more scientific approach and what we described as the maverick approach. Of course, none of these approaches is quite real. The publisher will make an assessment of the writer's talent. If there is an element of competition for the writer then the level of any advance will largely be dictated by market forces. Otherwise, the most crucial factors are likely to be what the writer needs and what he or she is prepared to accept. The publisher will assess the entire set up including the proven abilities and track record not only of the writer but also of those close to the writer including the management team. If a record deal is not yet in place the publisher's assessment of what should be risked by way of an advance payment will largely depend upon what record deal the publisher believes may be achieved.

### 4.2 **Payment Schedule**

Having agreed an advance the publisher will try to reduce its risk by spreading payment. The suggestion may be that 25% of the advance for the first album is payable upon signature a further 25% upon commencement of recording a further 25% upon UK release and perhaps a final 25% only upon release in the US or some other specified overseas territory.

### 4.3 **Deferred Advances**

If a singer songwriter signs a publishing deal before a record deal is in place then probably there will only be a relatively modest advance upon signing. However, usually, this will be followed by a more significant advance upon signature of a record deal with a major record company (with a further advance usually payable upon release of the first album).

### 4.4 **Option Advances**

So far as any option periods are concerned typically the advance for each period will be calculated in accordance with a formula (often two thirds of the royalty earnings from the previous album) but subject to a minimum and a maximum payment. The minimum payment will usually be not less than the advance for the first album and the maximum figure is often double the minimum figure. For example, in the case of a four album deal if there is an advance of £75,000 for the first album then the advances for the subsequent albums might be calculated in accordance with a formula but subject to a minimum payment of perhaps £75,000 again for the second album (and a maximum of £150,000) with perhaps a minimum of £100,000 (maximum £200,000) for the third album and perhaps a minimum of £125,000 (maximum £250,000) for the fourth. Alternatively, the option advances are sometimes fixed amounts (rather than calculated in accordance with a royalty earnings formula) with generous increments but so that in each case the option advances may be

reduced by the amount of any unrecovered balance. On this basis, if the advance for the first album is £75,000 the publisher might agree advances of £100,000, £150,000 and £200,000 respectively for three option albums. Using this example, if the first album is disappointing and generates only £25,000 in royalties (leaving an unrecovered balance of £50,000 from the initial £75,000 advance) then the publisher might exercise its option to continue with a second album upon payment of a reduced advance (i.e. £50,000 being the £100,000 agreed for the second album less the £50,000 unrecovered balance).

## 5.0 **Royalties**

### 5.1 **Rates of Royalty**

Traditionally, publishers accounted to their writers for 50% of their income. A 50/50 split is still common in the case of television and film companies when commissioning writers to compose music for a specific use. However, generally a songwriter now expects something far better (usually falling within the range of 60% to 80%). A singer songwriter (whose own efforts will generate most of the publishing income) would expect to receive royalties at the top end of the scale usually say 75% or 80%. Royalties of 85% or 90% are sometimes payable. However, there is an obvious correlation between the royalty rate and the amount of any advance payable so that for example a publisher prepared to pay a writer an advance of £100,000 against a royalty of 75% of the publisher's receipts might be prepared to increase the 75% to say 85% or even 90% but only on the basis that perhaps no advance is payable. An 85% or 90% royalty will more often be seen in the context of administration arrangements (see Part IV below).

Under a typical publishing contract a new writer would often expect to achieve a 75/25 royalty split. The writer may be persuaded to accept a royalty of, say, 70/30 in relation to the songs delivered during the initial contract period but if the publisher exercises the first of its options then there may then be a 75/25 split. The 75/25 split might therefore apply for the second and third contract periods. If the publisher has an option for a fourth contract period then perhaps this will only be granted on the basis that at that stage the split increases to 80/20.

If the royalty rate is 75% then in the case of performance income the writer will receive 50% (or what the PRS prefers to refer to as six twelfths) direct from the PRS. The remaining six twelfths will be paid to the publisher but the writer will require 50% of this (so that overall he receives 75% of the gross performance income). However, his 50% share of the publisher's six twelfths will be available to the publisher to apply towards recoupment of any advance. So far as mechanical and synchronisation income is concerned the writer will receive 75% of what the publisher receives (although see paragraph 5.3 below for what is meant by "receipts" for this purpose). In the case of sheet music sales the publisher will generally licence sheet music rights to a third party and will simply pay the writer 75% (in this example) of its receipts pursuant to any such licence. If the publisher itself publishes the music in sheet form then the contract will usually provide that the publisher will pay the writer between 10% and 15% of the retail selling price.

### 5.2 **Reduced Royalties for Covers**

Publishers will often seek a reduction in the rate of royalty in relation to income derived from cover recordings. If we again assume that the basic split is 75/25 the publisher may

insist that a split of say 60/40 applies in the case of income from covers. This is a dubious practice but it is quite common. By a cover recording is meant a recording by an artist of somebody else's song so that in our example the writer would receive 75% of the income generated by his own recordings of his songs but perhaps only 60% of the income generated from other recordings of those songs. The task of collecting the income from a cover is no different from the task of collecting the income from the writer's own recordings so that this in itself does not justify the income being treated in a different manner. The publisher will argue that a reduction in royalty is justified because of the input of its professional manager or managers in securing the cover in question. The vast majority of covers happen because the recording artist concerned makes a unilateral decision to record a new version and the first the publisher will know about this is when the artist's record company applies for a mechanical licence. Most publishers will therefore accept that the reduced rate should only apply for covers which have been obtained as a result of the direct efforts of the publisher. Even in these cases, however, the practice of paying a reduced royalty is a questionable one. All publishing contracts will contain an express provision to the effect that the publisher must use all reasonable endeavours to exploit the songs in question. It is therefore difficult for the publisher to argue that if it achieves some success in doing what it is obliged to do then it should be more handsomely rewarded. The only logical argument in favour of the publisher (using the same example) is that the basic rate should be 60/40 but if the writer secures any exploitation himself (in particular by means of his own recordings) then in relation to those recordings the split should increase to 75/25. Obviously, this amounts to the same thing but it might be more palatable for the writer if the contract were presented in this way. What is clear is that a pure songwriter (who does not have a recording career) should not be fooled into thinking that he or she has a 75/25 deal if this provides for a 60/40 split in relation to covers. Clearly, it is a 60/40 deal.

### 5.3 Method of Calculation

Royalties are either calculated on what is known as a "receipts" basis or upon what is known as an "at source" basis. This has particular relevance in relation to overseas income. An overseas sub-publisher (whether affiliated to the UK publisher or not) will naturally be entitled to retain part of the income arising in its territory before remitting the balance to the UK publisher. Usually, the sub-publisher will be entitled to deduct 10% or 15%. However, in some cases (particularly with the smaller independent publishers) the UK publisher may have negotiated a substantial advance from the overseas sub-publisher (in which the writer will not share) in return for which the overseas sub-publisher is entitled to as much as say 25%. If we look again at our example of a publishing agreement providing for a 75/25 split then if we assume that the publisher's overseas sub-publishers are each entitled to retain 20% then it follows that the UK publisher will receive 80% of any foreign income. If the writer's publishing agreement is a receipts deal then he or she will receive 75% of 80% of foreign income i.e. 60% of the gross. If the deal is "at source" then he or she will receive 75% of the gross i.e. for every £100 arising in the territory concerned the sub-publisher will retain £20 remitting £80 back to the UK publisher who will then account to the writer for £75 retaining a margin of only £5. Most publishing contracts (certainly those with the major publishers) are now "at source" deals. Some publishers try to draw a distinction between major territories and minor territories and calculate royalties "at source" in the major territories (which might be defined as those territories where the publisher concerned has its own affiliated sub-publishers) but account for royalties only on a receipts basis in relation to the minor territories.

If the writer has to accept a "receipts" deal then a "cap" of some kind should be imposed so that, perhaps, a maximum sub-publisher deduction of, say, 15% might be imposed. In the event of a 15% "cap", if, for example, the publisher actually suffers a 25% deduction then for every £100 which arises in the territory concerned £75 will be remitted to the UK publisher but out of this the publisher will have to pay the writer 75% of £85 i.e. £63.75.

The writer should also ensure that there is no double deduction in relation to locally originated covers. What happens, for example, if the sub-publisher in France procures a local cover recording? Again, let us assume that the writer's deal is 75/25 but reducing to 60/40 in the case of income from cover recordings. If the writer's royalties are to be calculated "at source" then his or her entitlement will be clear i.e. 60% of the income arising "at source". If, however, the writer's royalties are calculated on a receipts basis then problems will arise if the foreign sub-publisher is entitled to deduct say 20% in ordinary circumstances but say 40% in the case of a locally originated cover (which is not uncommon). If there is no cap on the sub-publisher deductions then the writer would be entitled to 60% of 60% i.e. 36% of the income arising "at source". This is unfair and the writer should instead require his or her full 75% of the UK publisher's 60% share (i.e. 45% of the income arising at source) or the cover rate i.e. 60% but calculated upon deemed receipts of 80% (which would give the writer 48% of the income arising "at source").

## 6.0 Accountings

### 6.1 Statements

Most publishers will account to the writer on a semi-annual basis usually within 90 days so that for the six months period ending 30th June in each year a statement will be delivered at the end of September and for the six months period ending 31st December a statement will be delivered at the end of the following March. The writer will, of course, receive his share of performance income direct from the PRS. The PRS account quarterly although there are only two main distributions in each year.

### 6.2 Delays

We have seen (Chapter II Part III paragraph 5.0) that in the case of a record deal there may be lengthy delays before royalties (particularly in relation to foreign sales) actually come through the "pipeline". Publishing income is prone to still longer delays mainly as a result of the inefficiencies of the various collection societies. The record company in the territory concerned will pay mechanical royalties to the local mechanical copyright collection society. In turn, the local society will then pay the UK publisher's sub-publisher. The sub-publisher should then pay the UK publisher although it is important for the writer to establish that the UK publisher's sub-publishing arrangements are structured so that the UK publisher will receive accountings direct from the overseas sub-publisher (i.e. so that no unnecessary link has been added to the chain). By way of example, in relation to records sold in Germany the German record company for a record sold in December may only account to GEMA (the German collection society) in January the following year. GEMA account quarterly within thirty days so that the payment would fall within the first quarter of the year and be due for payment by GEMA to the local sub-publisher in April. If the German sub-publisher accounts to the UK publisher on a quarterly basis the money (having been received during the second quarter) will be due within say sixty days of the end of that quarter so that the UK publisher would receive payment at the end of August. If the UK publisher accounts to

the writer semi-annually then payment would not be due until the end of March the following year (a total period since the income arose of some sixteen months). Inefficiencies and delays often result in a period of perhaps two years or more before foreign royalties finally work their way through the system.

### 6.3 **Audits**

The writer should ensure that the contract contains appropriate rights of audit. An audit of a publishing company tends to be far less complicated than a record company audit but nevertheless it is prudent periodically to carry out an audit. If a writer's royalty account is unrecovered so that the audit is unlikely to give rise to any additional payment then it may be sensible to delay carrying out the audit. The writer should be careful not to fall foul of restrictions in the agreement to the effect that accounting statements are to be deemed accepted and no longer subject to any objection after a given period (usually two or three years). Generally, it is a simple matter to persuade the publisher to extend any objection period to allow any audit to be deferred.

### 7.0 **Retention Period**

Under a typical publishing contract the publisher will acquire the copyright in the songs in question. Sometimes, the writer may retain the copyright and instead grant the publisher an exclusive licence. This effectively places the publisher in no worse a position because an exclusive licensee of copyright has the same rights as the copyright owner. As a rule, however, the publisher will wish to own the copyright and be able to register the copyright in the publisher's own name.

Traditionally, the publisher insisted upon owning the copyright outright i.e. for the full period of copyright (currently the life of the writer plus a further seventy years thereafter). Some publishers still insist upon owning songs for the full period of copyright but this is generally restricted to those cases where a publisher commissions a writer to compose music for a specific purpose (i.e. for a film or television programme). In the case of a singer songwriter signing a typical publishing contract he would expect to assign the copyright in his songs to the publisher only for a limited period i.e. the term of the agreement (which as we have seen will generally be three or four years but may be extended if necessary until fulfilment of the minimum commitment) and then for a further period.

This tends to be one of the more controversial areas in any negotiation. In the past, competition for writing talent has been fierce and publishers have been persuaded to accept limited "retention periods" i.e. perhaps the term plus five years (even less in extreme cases). A retention period of the term plus seven to ten years was quite common. As the music industry has "matured" there has been a great deal of activity in the sale of various music catalogues. Many of those catalogues have been sold for very high prices. A key reason for this is that the catalogues contain successful songs or "standards" which are owned by the publisher concerned for the life of copyright and from which it is clear that income will continue to accrue for many years to come. As a result, the trend in relation to retention periods has reversed and publishers, having re-learned the lesson of the value of copyright, now fight hard for longer retention periods. The publishers have lost too much ground to be able to claw their way back to the full period of copyright but a typical new deal now will provide for a retention period of the term plus a further period of perhaps between ten and fifteen years. Sometimes, in return for the writer agreeing to a longer retention period, the

publisher may be persuaded to improve the royalties (perhaps from 75/25 to 85/15) in relation to income received after the expiration of a given number of years. The publisher might even be persuaded to pay a further advance at some point. For example, perhaps the writer will agree to a retention period of the term plus fifteen years provided that at the end of seven years after the term the publisher pays a further advance equal to perhaps three or four times the average annual royalty earnings over the preceding three years (this is not a standard formula by any means but it is one example of the many compromises which may be reached during the negotiations in relation to the retention period).

## 8.0 **Rights**

As the owner of the copyright in the songs the publisher will have the exclusive right to control their use (even to the exclusion of the writer). As we have seen, the copyright will not extend to the performing right in the work because this right will have been assigned by the writer to the PRS by virtue of his or her PRS membership. In fact, in practice the publisher will only have limited control over the songs. For example, any third party wishing to record one of the songs will be entitled to do so as of right under the terms of the compulsory mechanical licensing system which operates in a substantially similar form in all of the major territories in the world. However, so far as other forms of exploitation are concerned the writer will often wish to impose various contractual restrictions upon the publisher. The publisher will usually require the writer to waive his or her "moral rights" (i.e. the right of the writer to be identified as the author of the work together with the right to object to any derogatory treatment of the work). Nevertheless, the publisher will usually accept contractual restrictions to the effect that the writer will be given appropriate credit and that there will be no adaptations or arrangements of the songs without the writer's consent and perhaps that no synchronisation licences should be granted without the writer's approval. Sometimes, the writer may wish to impose an obligation on the publisher to grant synchronisation licences to third parties upon such terms as the writer may specify. This is designed to overcome the danger of the writer requiring his or her song to be used for a particular purpose but the publisher refusing to grant a licence (the publisher may be dissatisfied with the financial proposals and may not wish to set a precedent).

## 9.0 **Exploitation**

All publishing agreements include a provision to the effect that the publisher must use reasonable endeavours to exploit the songs. However, if the publisher fails to exploit a particular song within a particular period (perhaps prior to two years following the expiration of the term of perhaps a period of two years commencing with delivery of the song in question) then machinery will be available to the writer to require (perhaps after what is known as a "cure" period) all rights in the song in question to be re-assigned to the writer (irrespective of the duration of the retention period) so that he may seek to exploit them by other means. The primary reason for the inclusion of provisions of this nature is to protect the publisher from any claim to the effect that the agreement may be unenforceable by reason of constituting an unreasonable restraint of trade (the courts would not be prepared to enforce an agreement under which a publisher is theoretically able to hold a writer to an exclusive contract for a lengthy period but then refuse to exploit his work).

## 10.0 Warranties

Publishing contracts generally contain a number of warranties on the part of the writer. Perhaps the most significant of these is the warranty to the effect that all of the compositions will be original and will not infringe the rights of any third party. There is an increasing number of copyright disputes. Many of the disputes arise from the current fashion for "sampling" so that if a singer songwriter wishes to incorporate a sample of any kind into a recording it is vital that he or she immediately seeks advice and ensures that any necessary clearances are obtained. Given the risk of copyright disputes it may be prudent for a writer to enter into any publishing contract through a limited company so that by virtue of an employment agreement of some kind the writer assigns to his or her company the copyright in his or her songs. If disaster does occur he or she will at least be protected from personal bankruptcy. The writer should also consider taking out insurance against copyright claims.

## 11.0 Group Provisions

In the case of a group the publisher will require all of the members of the group to sign the publishing contract notwithstanding the fact that it may be anticipated that one member only of the group will be writing the songs. This is simply a security measure on the part of the publisher. Obviously, this will not be possible if one of the group members is already a party to a publishing contract of some kind but, in that event, this is bound to impact upon the financial terms of the deal. In the case of a group, the publishing contract will contain complex leaving members provisions. The important point for the writers to bear in mind is that if one of them should leave the group and if the publisher should elect to continue with that leaving member then he or she should have a separate contract which stands on its own so far as the minimum commitment is concerned (so that the duration of his contract is not governed by the fulfilment of the group commitment). Also, the leaving member provisions need to deal sensibly with the issue of cross recoupment (the same principles apply here as with any recording contract; see (Chapter II Part II paragraph 7.0).

## **Part IV**

The writer may not wish to give away his or her songs and may therefore choose not to enter into a publishing contract at all. Nevertheless, some arrangements must be made to collect the publishing income. The basic choices are, first of all, to join the PRS and the MCPS and do nothing further or, secondly, to employ somebody direct to administer the songs, thirdly, to enter into an administration agreement with a third party administrator.

### **1.0 Reliance Upon PRS/MCPS**

Both organisations have international relationships so that a writer may wonder why he or she need bother to make any other arrangements. Why not simply wait for the monies earned overseas to flow through via the appropriate organisation? There are two main problems. The first is that the system itself is not particularly efficient. Neither the PRS nor the MCPS automatically notifies its affiliated societies of its claim to royalties. They will, however, make such requests by a system of international "fiches" in response to the copyright owner's request. This system is not wholly computerised and there is some doubt about whether the overseas societies will always act on the notifications. Worse still, there may be local covers of which the copyright owner is unaware and which, therefore, are never notified. The other problem is that even if the societies manage to collect the funds in the first place there is a significant delay in the remittance of those funds. The theory is that if, instead, the writer were to be represented by a publisher in the relevant overseas territory then that overseas publisher would be charged with the responsibility of registering its interest and ensuring that the local collection society makes payment direct to that publisher. Because the local publisher has a vested interest it seems that this generally results in the funds being paid through rather more efficiently than is the case where the local society is left of its own volition to pass funds back to PRS/MCPS. Moreover, there is not necessarily so significant a saving involved in relying upon the PRS/MCPS because two sets of commission will be charged i.e. the overseas society will deduct its commission before accounting to the PRS/MCPS and the PRS/MCPS will then deduct its own commission before accounting on to the copyright owner.

### **2.0 Self Administration**

This is the process of exploiting copyright without appointing a publisher (and through that publisher various overseas sub-publishers) but instead by becoming a member of the local collection societies. In most major territories this is now a reasonably simple procedure although it is often helpful to employ an agent in the local territory to deal with the formalities.

There are significant advantages in the self-administration approach. The first is that the copyright owner will bear the commission only of the local society and will not bear additional commission of a UK collection society or sub-publisher. The second is that the copyright owner will receive any applicable funds immediately those funds are distributed by the local society and there will be no further delay whilst the funds are processed by a third party. Thirdly, membership of the local societies will normally bring with it the privilege of qualifying for a share of "black box" income. So called "black box" income is mainly comprised of income obtained by the local societies by virtue of various blanket licensing agreements under which, for example, perhaps a television company pays a

substantial fee for the privilege of performing all the musical works controlled by the society in question. Blanket licences of this kind are issued in the UK but, for example, the PRS has a reasonably sophisticated system which enables it to identify particular uses so that PRS's income may sensibly be distributed between the specific titles controlled by the PRS. Many overseas countries (most notably Italy) are far less sophisticated so that the societies end up with vast amounts of money which they are unable or unwilling to attribute to any particular song. This money (or part of it) is therefore distributed between its various publisher members (and those publisher members generally retain their share in any black box distribution for their own use and benefit without sharing this with their writers.) The publisher member's entitlement to a share of black box income often increases with the length of time the publisher has been a member.

One disadvantage of self administration is that the societies do not generally pay advances. Moreover, it is the publisher's responsibility to notify the local societies of the compositions in respect of which it wishes the society to make claims and the publisher is responsible for checking its own statements. To undertake these tasks effectively the publisher needs to have a reasonably sophisticated administrative system and thus may have to maintain a higher overhead cost than would otherwise be the case. Further, under self administered arrangements there will be no local promotion of the catalogue. One way around this would be to hire one or more people to undertake specific promotional tasks but the writer would need to assess whether the cost of doing this means that he or she is able still to justify direct membership or whether he or she would be better off paying commission to a sub-publisher.

In view of the complexities, only a very successful writer with a considerable turnover would normally consider self administration.

### **3.0 Appointing an Administrator**

Accordingly, if a writer wishes to avoid entering into a publishing contract of the traditional sort and if he or she is prepared neither simply to rely upon his PRS/MCPS membership nor make his or her own administration arrangements then the most sensible solution is to enter into an administration agreement of some kind. Administration agreements are not dissimilar to publishing agreements but the publisher will generally offer no professional management services. Instead, the publisher's responsibilities will be limited purely to administrative services i.e. registering the songs and collecting the money. Generally, no advance will be payable but the royalties will be higher i.e. perhaps an 85/15 split or even 90/10. Also, (given the absence of any advance) administration agreements tend not to be for a lengthy fixed term. Usually, they will continue at least for a year (to save the bother of the publisher setting everything up only to find that the writer then wishes to terminate the arrangements) but thereafter the arrangement would usually be terminable by either party upon reasonable notice (perhaps three months). The publisher would administer the songs in the writer's name or trading "style".

## **Part V After The Deal**

As with a recording contract, life does not come to an end once the contract has been signed. Here are some practical points for writers to bear in mind:-

### **1.0 Lead sheets/demos**

As soon as a song has been completed it should be delivered to the publisher in the form of a lead sheet or perhaps a demonstration tape or at the very least a lyric sheet. Delivery will be particularly significant if this triggers the payment of an advance or if the date of delivery impacts upon the publisher's option date. In any event, as soon as a song has been "delivered" there is immediately additional evidence of its existence which may be significant in the event of any subsequent copyright dispute.

### **2.0 Single song assignment**

Most publishing agreements impose an obligation on the writer to execute a short form assignment in relation to each particular song (the publisher may need this in certain territories for registration purposes).

### **3.0 Releases**

The writer should try to ensure that his or her publisher receives copies of all records (i.e. singles, albums, videos etc) which are released featuring any of his or her songs. This will help the publisher track the royalty income.

### **4.0 Collaborations**

If the writer co-writes this is likely to have implications under the publishing contract. The writer may be under a contractual obligation to use all reasonable endeavours to ensure that his or her co-writer assigns any interest in the song in question to the same publisher. Also, of course, co-writing will invariably have implications so far as the minimum commitment is concerned. When two or more people collaborate in writing a song this is usually on the basis that they will be deemed to have contributed to the overall musical work in equal shares. The writer should ensure that the arrangements are understood by everybody before the work begins. In the unfortunate event of a dispute over the proportionate shares the publisher may be able to assist in resolving that dispute (if not then the PRS has its own procedures for this).

### **5.0 Samples**

A writer should never make use of samples in a work without obtaining clearance (not a "nod and a wink" but a proper written clearance). The sooner the writer notifies both the record company and the publisher of the intended use the better.

## 6.0 **Group Changes**

In the case of a publishing agreement entered into by a group any change in line-up will have contractual ramifications. There will almost certainly be an obligation on the group to notify the publisher immediately any changes occur but even before doing this the writers should consult their solicitor.

## 7.0 **Likeness and Biography**

Many writers will have a right of approval over the use by the publisher of any autobiographical material and/or photographs and likenesses. In any event, the best way to deal with this in practice is for the writer to deliver approved materials from time to time.

## 8.0 **PRS**

If this has not already been done then any writer signing a publishing contract must ensure that he or she joins the PRS without delay. The publisher will be able to arrange this on the writer's behalf. As a PRS member the writer is entitled to designate whether the PRS should appoint either ASCAP or BMI (the major USA performing right societies) to represent the writer's songs in the USA. A particularly prudent writer will wish to meet the UK representatives of both organisations before making a choice. Sometimes a choice is not available because the UK publisher will insist upon nominating one or the other.

## 9.0 **Consents**

From time to time the writer may be asked by the publisher to give consent to a particular matter i.e. perhaps a synchronisation licence or an adaptation or arrangement of some kind. The writer should not give approval without first insisting upon being provided with full details of the financial implications.

## 10.0 **Exploitation**

As we have seen, the publisher is under an obligation to exploit the writer's songs. If the writer delivers a song which he does not intend to record himself then the writer should try to bring some pressure to bear upon the publisher to make an effort to find some other use for the song. Moreover, the writer should not lose sight of the machinery in the contract which enables the writer in certain circumstances to require unexploited songs to be reassigned.

## 11.0 **Accountings**

Usually, the first few accounting statements received by the writer will not be accompanied by a cheque because the writer's account will remain unrecouped (this state of affairs will often continue for an extended period and in many cases indefinitely). This does not mean that the statements may be discarded. The writer should always ensure that the publisher accounts promptly on the due date and those statements should always be checked. If the writer is unwilling to do so or does not feel adequately qualified for this purpose then the manager or lawyer should check them for any obvious errors. Statements should then be referred to the writer's accountant and the accountant should be reminded to check any objection periods in the publishing agreement to ensure that no audit rights are lost.

## 12.0 **Concert Appearances**

Every time the writer performs a concert he or she must ensure that the proper PRS returns are made. Performance fees will be payable by the promoter via the PRS. A PRS member may elect to collect performance fees in relation to his or her own live performances direct from the promoter. There are complications involved in this. The promoter is obliged to pay 3% of the gross box office receipts. In rough terms, a full house at a smaller recognised venue might trigger a payment of around £500. A full house at a stadium might trigger a payment more in the region of £100,000. Remember that one half of the performance fees will be paid direct to the writer and the balance to the writer's publisher. The PRS is able to administer these arrangements under its "fast track" procedures but it requires two standard forms to be filed with the PRS no later than thirty days after each concert (one form signed by the band or its management and the other by the promoter). Similar rules apply outside the UK.

## 13.0 **Advances**

The writer should make careful note of the provisions in the publishing contract relating to the payment of advances. Often, those provisions are complex so that some effort is required in calculating exactly when advances are due. If, as often happens, the writer fails to spot that an advance is due some publishers will delay payment. No doubt the advance will eventually be paid but the publisher is unlikely to agree to pay any interest on the late payment. One other point to bear in mind is that if the royalty account is fully recouped publishers sometimes try to accelerate payment of a particular advance so that payment is made immediately prior to the accounting date (which then enables the publisher immediately to recoup the advance from the royalties due on that accounting date).

## 14.0 **Covers**

If the writer has had to accept reduced royalties in relation to cover recordings the publisher will probably have been persuaded to exclude for this purpose any covers actually procured by the writer. In this event, if the writer has introduced one of his or her songs to another recording artist or producer (however tenuously) then he or she should ensure that the publisher is aware of this.

## 15.0 **Termination Dates**

The writer should monitor any relevant dates. For example, the writer should be aware of the last date upon which the publisher is entitled to exercise any option. The writer may wish to involve his solicitor in monitoring any relevant dates. Often, it is not a simple matter to calculate the option date and the publisher may make a mistake. If the publisher fails to exercise an option properly this will mean that the writer is free of contract (although many publishing agreements now include fail safe provisions whereby if the publisher fails to exercise an option the writer must serve an option warning notice giving the publisher a few more days in which to do so).

The writer must also monitor the expiration date of the retention period. Far too often, writers forget (or perhaps never knew in the first place) when their publishing deals expire. The effect of this is that publishers will generally continue to exploit a catalogue of songs until such time as they are told that they no longer have authority to do so. Unless there are specific provisions dealing with this in the contract the implication will be that the publisher has been allowed to "hold over" on the same terms as before. This may enable a publisher to continue to deduct a substantial commission despite the fact that if the writer were alert to the position he or she may have been able to secure an advance and/or better royalties or perhaps withdraw the songs from the publisher altogether and enter into more cost effective administration arrangements.

#### 16.0 **Extra Funding**

Some publishers are prepared (in the case of writers with recording contracts) to pay towards tour support or for independent promotion or poster campaigns and the like (although it is generally difficult to persuade publishers to do so). If a publisher is persuaded to make such payments the publisher will normally insist that those payments are fully recoupable from royalties. The writer is probably better advised to persuade the record company to bear such costs even though, likewise, the record company will want to recoup them. Publishing deals generally recoup more quickly than recording deals and for this reason it may be preferable to load as much recoupment as possible onto the record company account so that the publishing royalties begin to flow as quickly as possible. Also, in the case of a group, unless all of the group members contribute to the writing in equal shares the recoupment of what are essentially record company costs from publishing royalties will merely serve to exacerbate the complexities of recoupment (given the imbalances which will arise as between the band members) and may fan the flames of a potential dispute between the band members.

#### 17.0 **Professional Advice**

The writer must consult a solicitor at the earliest possible stage in any negotiations over a publishing contract. It would be prudent for the writer also to consult his accountant before rather than after the event.