

Signed, Sealed, Delivered?

Recording Contracts Explained

Richard Salmon

You've written and recorded your demo, you've played some great gigs, and you can now boast a multitude of MySpace friends, from Watford to Wichita and back again. A&R guys are falling over themselves to get to you and there's now a major-label record deal on the table. What do you do? Sign?

If this is the fortunate dilemma in which you find yourself, hold fire. Before you do anything, you'll need to know what's up for grabs. If you want fame and fortune and everything that goes with it, without the pain of disillusionment and legal hassles later, you'll first need to do a little homework.

Understanding The Jargon

Because of their legal complexity, recording contracts can be quite hard to decipher. They come in different shapes and sizes, and will

often vary depending on the label, and the status of the artist involved. Even so, many of their commercial terms are

New digital methods of music delivery, such as downloads and mobile phone ringtones, should be covered by modern recording contracts.

A recording contract might seem like the Holy Grail, but record labels are not charity concerns and their contracts are not set up with your interests in mind. Our guide to contract terms, written by an entertainment lawyer, explains what it all means and what the implications are for the artist.

similar. They certainly require closer inspection in an article of this scope.

■ Purpose

Recording contracts are legally binding agreements, enabling record companies to exploit an artist's performance in a sound recording, in return for royalty payments.

Exploitation is achieved through physical sales, such as CD, vinyl and cassette; the public performance and broadcasting of works; and the sale of digital products such as downloads and mobile ringtones. The contract will define a record to include audio-visual devices as well. So 'Dualdisc', DVD and other new technologies will be caught by this definition.

■ Exclusivity

The recording contract will usually require the artist to sign to the label exclusively. This means that they can't record for another label without permission, nor can they leave the contract if they're unhappy. The label, however, remains free to sign and promote as many artists as it wishes. Record labels invest huge sums of money in breaking an act and

claim that they need this level of control in order to improve the chances of making a profit or, as is more often the case, to cut their losses. Occasionally the artist gets one over on the label. Mariah Carey described the termination of her long-term deal with EMI in 2002, as "the right decision for me". This, however, may have had something to do with



Mariah Carey came out of her 2002 split with EMI some £19m richer, but it's rare for an artist to triumph quite so impressively.

the £19m EMI had to pay her to end the relationship!

If an artist wants to make a guest appearance on another artist's record, they'll need a 'sideman' provision to cover this. Chris Martin, of Coldplay fame, recently showed up on the Nelly Furtado track 'All Good Things', albeit with his plaintive vocal somewhat obscured in the mix. Likewise, DJs and producers will sign deals under a specific alias, leaving them free to contract with other labels under a different pseudonym. Dave Lee, AKA Joey Negro, Raven Maize and Jakkata, is a case in point.

■ Territory

Major labels will normally sign the artist to a worldwide deal. Companies such as Universal and Sony/BMG have offices in all the key markets, together with the vast distribution network capable of delivering their latest offerings to a supermarket near you. Split-territory deals are less likely with major record labels, but independents may be more willing to agree to such an arrangement.

■ Term

This relates to the duration of the contract. It is calculated by reference to an initial fixed period of maybe 12 months — when you'll make your first album — followed by further option periods, also usually of 12 months, allowing the record company to extend the contract if they wish. There will be a minimum commitment within each period, requiring you to deliver a certain number of tracks, to a releasable standard, with perhaps a total of five or six albums expected under the deal.

Try to avoid wording that masters must be 'commercially acceptable' — a euphemism for 'radio hit' — as delivery and acceptance requirements may have a knock-on effect on how long the artist is tied to the deal. Where a label is only willing to accept commercial recordings, as opposed to merely technically satisfactory ones, the artist may have to rework or re-record material before the label is finally satisfied of the record's chart potential. The option period in which the album is due could thus overrun by a good few months, before the label accepts it and commits to a release date. It

will be a further 3-6 months before the label can determine the album's success, which in turn will delay the exercise of the next option, and so on. It is sensible therefore, to negotiate a 'long-stop' provision, so that the overall duration of your contract won't exceed six or seven years maximum.

■ Rights Granted

Under most exclusive recording contracts, the artist will assign copyright in the sound recordings to the record company. An assignment is a transfer of ownership for the full life of copyright. In the case of sound recordings this will be 50 years from release.

Two issues are of particular concern here. Firstly, even unreleased recordings remain the property of the label for the artist's entire career. And secondly, even once the artist has repaid all recording costs, the label will still own the masters.



Having made a lot of money for his former label, Warner Music, but still not having access to the masters of his own material, Simply Red's Mick Hucknall turned his back on what he described as an 'immoral' deal, to go his own way with simplyred.com.

This was one of the reasons why Mick Hucknall decided to part company with Warner Music in early 2000, claiming that his deal was 'immoral'. Warner made approximately £192m from the relationship, and kept all the masters, whereas Mick earned a paltry £20m! Hucknall has since taken control of his destiny, along with a greater share of the profits, releasing music on his self-financed label, simplyred.com.

In rare instances, an artist will secure a reversion of copyright clause, allowing them the return of their masters at a future date. Robbie Williams' ground-breaking 2002 deal with EMI granted him such rights — but then again, how many Robbies are there?

Other rights the label will wish to acquire include rights in the album artwork and the right to use the artist's name and likeness in connection with the sale and promotion of the records.

■ Release Commitment

The artist should aim to secure a positive release commitment from the label (at least in the UK), coupled with a minimum

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Robbie Williams, on the other hand, was able to use his considerable stature to swing a revolutionary deal that guarantees that his masters will eventually revert to him.



► marketing spend to support the release. Should the label fail to release your record, you should be able to terminate the deal, and/or buy back your recordings, so they can be licensed to another label, or perhaps self-released.

■ Key-man Provision

What if the A&R guy who signs you leaves the label, or the MD who's a big fan of your music is suddenly fired? In this situation you might be glad you'd negotiated a key-man clause in your contract, allowing you to leave the label as well. This would enable you to sign a new record deal elsewhere and avoid being left on the shelf.

■ Advances

These are sums of money paid to the artist on account of future royalties. They're paid when the artist signs to the label, and again as and when further options are exercised.

More generous advances should be negotiated for the exercise of successive options — ie. when the next album becomes due — irrespective of whether previous advances have been recouped. Recoupment is a process by which the label will first recover the advance against any artist royalty income. Care should be taken to remove any wording stating that an advance is repayable. This would have the effect of turning it into a personal debt, which you could be liable for at any time. You should only ever have to repay advances where your record sales generate sufficient royalties to cover them. Failing that, the label bears the loss.

Remember, you'll probably have to split your advance with your manager and other members of your band (if there are any), as well as with the taxman, who will also take his

cut. So even a generous advance can be eroded quite quickly.

■ Recording Costs

Advances are often provided as part of an inclusive recording fund. A certain amount will be allocated to the recording budget and any surplus goes into the pocket of the artist. The full amount is recoupable, so avoid the temptation to go and blow it all on a lost weekend with Paris Hilton, as not only will you be left with nothing to live on, you'll have no record to release either!

You must also make sure you only allow your manager commission on the non-recording portion of the fund — specifically, what's left over after the recording budget has been agreed. This is your personal advance, on which your manager will take his 20 percent.

Although the thought of large advances may get you excited, they come at a price. Often, if the advance is large there'll be more pressure on an artist to succeed immediately. Then if the first record is a flop the label may cut its losses and simply 'drop' you. If you're after a little more stability and you truly believe in yourself, you should probably opt for a smaller advance and instead aim to secure a higher royalty rate.

■ Royalties

Artists are paid royalties based on record sales. In a typical major-label deal, the artist will earn somewhere between 14 and 18 percent of the record's dealer price (PPD) which may be between £6.50 and £8.50.

Before they'll see any money, the artist will have to recoup the recording costs, advances, and usually 50 percent of all video costs. The label will make additional deductions, reducing the real royalty rate still further.

Standard deductions — or standard as far as record labels are concerned — include a packaging deduction of 20 to 25 percent on CDs, a reduced royalty rate on foreign sales, budget records and record clubs, a reduced royalty on TV-advertised albums, and often no royalty at all on free goods (records given away to retailers and the media). Because you only get paid on royalty-bearing records, you'll need a cap on free goods, otherwise you'll be in trouble.

Overall, you might only get paid on 90 percent of actual sales, since retailers are able to return records they don't sell. The record label therefore holds on to a portion of your royalties, usually 10 percent, as a reserve, until all sales are verified. You must make sure that this reserve will be liquidated (paid out) at regular intervals, and that the artist (you) receives their entitlement in full.

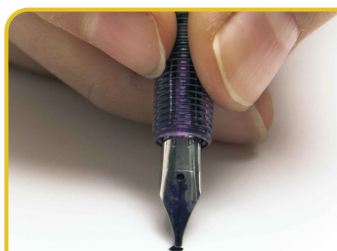


Even though volume CD packaging these days is cheap, record companies typically make a royalty deduction of 20 to 25 percent deduction for it — which might look like a bit of a rip-off...

In reality, most 'deductions' are artificial and in no way reflect the true cost to the label. Packaging on CDs manufactured in volume is cheap. Similarly, as more records are sold through digital channels, a reserve for breakages and the allocation of free digital goods ceases to make any sense at all, other than to boost the label's profits.

■ Producer Royalty

The artist is further expected to pay the producer royalty from their own royalty share. So where, for example, a producer is paid



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Touring can be expensive, especially if you like to be as over the top as legendary rockers Iron Maiden. If you go on tour to promote a record release, don't forget that the cost of tour support will be recouped by the label from your royalty, so it's a good idea to cap what can be spent.



a three percent royalty and the artist 15 percent, the artist will end up with an actual rate before deductions of 12 percent. Don't forget that the artist still has to pay their manager a percentage of earnings, recoup advances and, in the case of a band, possibly split royalty income five ways. The producer, however, will be earning a healthy three percent from the very first record sold.

It's important not to allow the record company to recoup from the artist's royalty-income advances paid to the producer. In the UK, producer advances are the responsibility of the label.

■ Secondary Income

A well-negotiated deal will ensure that the artist is entitled to a 50:50 share of any secondary income earned by the label. This could be in the form of advances paid by overseas labels licensing your record, income from compilations, or sync fees that are paid when a sound recording is used in a film or TV commercial or on a computer game.

Synchronisation exposure can sometimes provide a much-needed boost, taking the artist's career to the next level. The colourful bouncing balls commercial for Sony Bravia, delicately underscored by Jose Gonzalez' 'Heartbeats', helped propel the ringtone to the top spot on the charts and increase sales of Gonzalez' album, *Veneer*. In recent times, artists including the Subways, Dandy Warhols, Dido and '60s hippy-folk singer Vashti Bunyan — featured on T-Mobile's 'Flexible World' commercial — have also greatly benefited from advertising and movie exposure. Other times the effect has been more short-lived, but nonetheless lucrative. The popular 2003 advert for Lynx Pulse, featuring a man performing a spontaneous

dance routine with some women in a bar, catapulted the accompanying track, 'Make Luv', to the No. 1 spot when it was re-released by Room 5 featuring Oliver Cheatham.

■ Promotion

In order to raise the profile of a release, the artist will have to undertake some domestic and international promotional work. In the event that you don't follow in the footsteps of Sandi Thom, by webcasting your 'tour' from the comfort of your living room, the record company will deploy an army of radio, press, and new media marketeers to talk up your record. The considerable cost this may incur should not be recoupable from artist royalties. After all, the record label benefits whenever the record sells, and promotion is a reasonable overhead of their business. And, of course, with a likely earnings ratio of 3:1 in the label's favour, they're going to break even a lot quicker than any artist can recoup.

■ Artist Warranties

The artist will have to promise the label that they will perform their duties to the best of their ability, and that they are free to enter the agreement — ie. not currently signed to another record label. More specifically, they'll have to promise to attend interviews and undertake personal appearances and all other reasonable promotional duties. Costs incurred in connection with the latter (for example, travel and accommodation) should be borne by the label.

The artist will also have to warrant that they haven't breached copyright in another person's work in making their record. The label should be notified of any uncleared samples and all session musician consents

▶ must be obtained before the label will accept the record.

■ Tour Support

Tour support paid by the label to get the artist on the road is recoupable, so it's best to agree a limit on spend for obvious reasons.

■ Leaving Members

In the case of a group signed to a label, usually the company will reserve the right to terminate the contract should a key member of the band decide to leave. The label may also try to obtain a clause allowing them to sign any leaving member as a solo artist — and if the group break up before releasing a record, but after spending their advance, they'll probably be sued for breach of contract and return of the monies they've received!

Care should be taken not to allow the label to recoup advances paid to leaving members for solo releases against the remaining members' royalties.

■ Re-recording Restrictions

Another protection the label will ask for is a re-record restriction. This prevents the artist

from re-recording their music on another label for a certain number of years following expiry of the contract. Any restriction you agree should apply for a maximum of five years following the end of the contract, and should only ever cover records actually released.

■ Controlled Compositions

If the artist is also a songwriter and the label are releasing your music in the USA, you'll have to deal with the thorny issue of how your mechanical royalties are paid. Essentially, mechanicals are royalties paid to songwriters when their compositions are reproduced on sound carriers for sale: CDs, vinyl, DVDs, and so on. These are quite separate from public performance royalties, which performers and composers are entitled to when their works are broadcast on radio or TV.

In the UK the mechanical royalty rate is set as eight and a half percent of the dealer price on physical product and eight percent of gross revenue (excluding VAT) on downloads. In the US, however, most record companies are only willing to pay 75 percent of the fixed statutory rate for mechanicals. There is also a limit on the number of tracks the US labels

will actually pay mechanical royalties on when the artist is also the songwriter. Normally the maximum is 10 songs per album, even though the artist may have composed, say, all 14 songs on an album. In this way it could be said that the US labels control the compositions, as well as capping the total amount they will pay to artist/writers. The most successful acts are eventually able to negotiate a 100 percent rate, but it may take several hit albums before they get there.

Ultimately, the mechanical royalty issue boils down to the bargaining power of artists and the might of the North American record companies. Mechanical royalty reductions are fairly 'standard practice' over the pond, although to the uninitiated artist it looks remarkably like daylight robbery. If you want further clarification on this matter, your publisher — who administers your song rights — will be able to help.

■ Accounting

The artist only receives a royalty cheque once they've recouped. However, the label should still be sending royalty statements to the artist twice a year, detailing all relevant territories,

Creative Control & Approval Rights

If you're in a manufactured band, you'll probably be restricted in your ability to dictate terms relating to the creative control of your output — principally because, should you rock the boat, your evil svengali creator can replace you with another identikit cuprinol-coated warbler!

If you're in a 'real band', that also write their own songs, you'll be in a stronger position to negotiate and should be able to gain greater creative control over your work. It's quite hard to imagine Radiohead being coerced into a heavily choreographed dance routine, clad in trademark combat trousers!

Here's a list of some of the 'creative control' issues you'll need to address:

- **Videos:** Choice of director and control over location, storyboard and budget. Fifty percent of video expenses are recoupable from record sale royalties, and the other half from video royalties on DVD compilations and broadcast. Most record deals remain silent on the issue of division of 'VPL' income, which comes from the public performance of audio-visual works. The record companies own and control VPL [Video Performance Limited] between them, and therefore keep all its income for themselves. Performers have no legal right to a share of this money, nor do the labels feel a moral duty to pay them a share. This is in spite of the fact that the artist will have paid a sizeable amount towards the making of the video.
- **Recording budget:** As explained above, this will be recouped. The more you spend in the studio, the longer it will take — barring overnight success — until you see any royalties.
- **Producers and remixers:** Not only does the artist pay the producer royalty from his own royalty, the label may want to commission remixes for singles, or sometimes an entire album. The artist needs to be able to approve any remixing budget. You should cap costs at an agreed level and make certain there'll be no corresponding royalty reduction where a remix is commissioned.
- **Song selection:** This relates to the choice of songs you record and the order in which they will be released — ie. singles, EPs, albums, B-sides, bonus tracks, greatest hits, and so on. Manufactured acts will generally lack control over this area and instead will have to record the songs their manager or label boss decides for them. Bands who write their own material are signed precisely because the label has shown faith in their abilities. It therefore becomes easier to influence decisions around songs.
- **Name and likeness:** The artist should consent to the record label using his

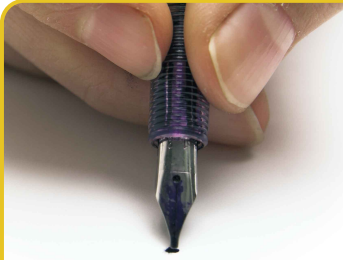
or her name and likeness in connection with the promotion of records only. Make sure you reserve all other uses of your likeness — for example, in merchandising, which is potentially a very lucrative area and entirely separate from the record deal.

- **Artwork:** This covers copyright ownership in sleeve art, and the commissioning of photographers and designers.
- **Secondary exploitation of music:** The artist will wish to retain control over whether their music is used in connection with certain advertising campaigns, films or other corporate usages that they may be opposed to.

There are several positions the artist can adopt in relation to creative control. Firstly, they can attempt to negotiate varying degrees of creative control in relation to each issue. Alternatively, they can seek to obtain a right of consultation across the board, where the label must seek their opinion before acting, but can ultimately ignore their wishes. Finally — and by far the best outcome for the artist — they can seek to negotiate a right of approval. This would mean that the label couldn't make a creative decision without the artist's permission. However, note that where the artist is dropped by the record company, or their contract has expired, the label can make all manner of creative decisions without the artist's approval.



A recording deal might seem to mean license to hire the swiftest of professional studios for your debut album — but recording costs are recoupable from your own advance, so keep an eye on the price.



“Try to avoid wording that masters must be ‘commercially acceptable’ — a euphemism for ‘radio hit’.”

tracks and earnings. For major labels, accounting normally happens 90 days following the end of the June and December periods — ie. in September and March.

To avoid headaches of the Tupac/Biggie variety, you should make sure your accountant has the right to inspect and audit the record labels' books if they believe there's been an under-payment. Normally you have to accept the statement if you haven't challenged it within two to three years from receipt. Having said that, if recent reports are to be believed, the Beatles are suing EMI over 'accounting irregularities' some 37 years after they split.

An audit can be time-consuming and costly — think what it's like just getting your bank to

send you a duplicate statement — so try to secure a provision that the label will pay the cost of the audit, in the event that it reveals an under-payment of at least 10 percent of the sum owed. And of course, you'll need to be paid your money in full, plus interest. The label may resist, and try to make the artist bear the audit cost. This may exceed any discrepancy in the artist's favour, and merely serves to dissuade the act from scrutinising payments too closely, unless they're confident a large sum is missing.

■ Termination

The contract should anticipate scenarios that could give the parties the right to terminate the agreement. There should be safeguards

where the label goes into liquidation, or fails to release the record, or where either side is in breach of contract.

If the record company does go into liquidation, you should be able to terminate the agreement and get the rights in your recordings back. Otherwise your copyrights could become the property of third-party creditors fighting over the remains of the now-defunct label. A similar provision, but much harder to obtain, is to allow the artist the right of termination where the label is sold, merged, or taken over. Don't forget: the label is still obliged to continuing paying the artist on all recordings sold, even after termination.

The Small Print

In this article we've looked briefly at some of the issues affecting exclusive recording contracts, but before signing anything you should always take the advice of an experienced music lawyer. Recording contracts can seriously affect your health — as well as your bank balance — and although opportunities for success in this industry are vast, so are the chances of getting your fingers burned! ☹

SOUND ON SOUND

The World's Best Music Recording Magazine



This article was originally published in Sound On Sound magazine, **April 2007** edition.

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