

Music Publishing: A Guide to Understanding the Management of Songs by JoJo Gould (© Music Business Journal 2001-2003)

Introduction

As so much has been written about record companies and large entertainment industry firms, even those members of the general public with little direct interest in the music industry as a "business", will no doubt still be familiar with corporate household names such as Sony, Warners and Universal. However, music publishing, despite being a much longer established music business activity, remains something of a *dark art* - behind the scenes, difficult to understand, and an activity certainly not associated with the High Street consumer.

Music publishing though is a key, and expanding, income generator within the music business. It is a core function of the administration and management of music, and is also central to the underlying concept of music copyright control.

In our modern era, the majority of performing artists now write their own songs. Historically, though, it was very a different story - popular artists from the 1920's through to the 1950's generally relied on professional songwriters to write their material for them (such as the famous Tin Pan Alley hub of writers in New York). Hence, the expression A&R was invented early on in popular music industry history - *i.e.*, when record company executives would undertake the important task of matching their recording Artists with songwriters' Repertoire.

This traditional situation changed dramatically when acts such as the Beatles rose to prominence in the early 1960's - not only were they performing artists, but, importantly, they were also self-contained proficient songwriters.

Despite this blurring of traditional industry practice, a role still remains for the professional songwriter - such as prolific US-songwriter Diane Warren, who has penned successful hits for artists such as Aretha Franklin, Britney Spears, Aerosmith, Elton John, Celine Dion, Toni Braxton, LeAnn Rimes and Christina Aguilera.

Performing artists who can write their own material, however, are advantageously placed, as they are in a potential position to engage in financially rewarding relationships with both record companies and music publishers.

What follows is an explanation of the core concepts and issues that underpin music publishing, and should provide some useful advice for those seeking to establish a new music publishing company.

The Rationale for Music Publishing

To appreciate the processes involved in music publishing, one must first understand that songs are, legally, treated as entirely separate and distinct from sound recordings. The same song then could be made into 100 different sound recordings by 100 different artists (how many artists have recorded versions of the Lennon/McCartney song "Yesterday"?). This is due to the fact that the song is the intellectual property of

the songwriter(s), and not the intellectual property of the recording artist or record company.

Consequently, songs (as creative works) can be copyrighted separately from sound recordings. This notion of copyrighting songs is the fundamental concept that underpins the entire music publishing industry.

The actual term 'music publishing' is derived from the traditional business of printing sheet music. Before early sound carriers were even invented in the last quarter of the nineteenth century - such as wax cylinders - music publishers were already active in the mass production of sheet music for public consumption (printing press technology being available from the fifteenth century). For example, music publisher Michele Le Cene produced Antonio Vivaldi's popular *Il Cimento dell'Armonia e dell'Invenzione* in Amsterdam as early as 1725 (in great quantities for the time) - and there are many other examples, as well.

The generic expression 'music publishing' has continued through to the present day; although, in practice, printing sheet music is now only one (smaller) aspect of the work of the modern music publisher.

Songs differ from records in many ways of course. Unlike records, songs are not physical entities, unless they are made tangible in some form (such as print). Songs usually benefit from longer copyright control periods than records: in the UK, for example, a song is under copyright until 70 years after the death of the songwriter. Recordings, however, are only under copyright for 50 years from the end of the year of their release in most countries.

This distinction between songs and records means that songwriters can enter into publishing deals in much the same way as recording artists can sign record deals. Music publishers then manage these song 'catalogues'. In doing so, they serve to protect the songs' copyright, and to exploit the works to the benefit of both the songwriter and the publisher. Record companies, meanwhile, undertake the risk management activity of recording, manufacturing, promoting and distributing sound recordings.

Copyright legislation usually assigns certain rights to the creator of the works. These rights usually cover issues such as mechanical (duplication) rights, performance and broadcasting rights, and moral rights. Among other things, these rights mean then that the songwriter has the right to be paid for the exploitation of their works, and can also object to certain forms of exploitation - particularly if they determine a song to have been used in an unacknowledged, or a 'derogatory' way.

Legal Basis and Legitimacy

Copyright, as a commercial incentive, underlies any market economy that seeks to encourage and reward creativity. Consequently, a series of laws are now in existence to protect intellectual property rights - including that of songwriters. These laws are generally based on national legislation, within the context of wider international treaties.

The UK, for instance, has the *Copyright, Designs and Patents Act 1988*, whilst the Republic of Ireland has the more recent *Copyright Act 2001*. (Copyright law, of course, is much older, and Britain's first copyright law was enacted in 1710. For further details, see Jonathan Little's *History of Copyright* timeline, at: <http://www.musicjournal.org/01copyright.html>).

With regard to the term of copyright, the international picture is uneven. Some territories, such as Australia, have a shorter copyright duration for songs - in Australia's case, this duration is currently the lifetime of the songwriter plus 50 years (in accordance with the Berne Convention). In the US, the copyright duration for most songs was extended from lifetime plus 50 years to lifetime plus 70 years, when the *Sonny Bono Copyright Term Extension Act* of 1998 was enacted.

Copyright periods are therefore subject to change, and to local idiosyncrasies. However, the general trend across the world has been, historically, for copyright periods to be gradually extended. A full list of all key international intellectual property treaties, as codified by the World Intellectual Property Organisation (WIPO), can be found at: <http://www.wipo.org>.

As already mentioned, a song must be made tangible before it can be copyrighted. Some countries, such as the USA, have a Copyright Office where songs can be deposited for a fee (e.g., in sheet music form). US songwriters can deposit their works at the Library of Congress, Copyright Office, Washington D.C., for a standard fee of \$30.

Most countries today, though (such as the UK and Australia), have a less formal and rather arbitrary system for proving that a song is protected by copyright. The most common method is to record the song, and then post it to yourself by recorded delivery (leaving the package unopened in case it is ever needed as evidence). In practice, however, *Music Business Journal* would advise songwriters in territories with no formal registration system, to deposit their works with a third party - such as a lawyer, or a bank.

Sources of Income

Music publishing has a number of potential sources of income. These are as follows:

Mechanical Royalties from Manufacturing

A song can only be manufactured into a physical product (a CD, for example) by securing a 'mechanical licence', and on payment of a mechanical royalty to the songwriter. To simplify this process, standard rate scales are used, and collection agencies are assigned the task of collecting and distributing royalties. In the UK, for example, the current standard mechanical royalty rate is 8.5% of the published dealer price of the record (or 'phonograph'). Thus, a record with a dealer price of £7.99 will attract a mechanical royalty of 68 pence per record for the songwriter(s). This sum is then collected by the local collection society - in this case, the MCPS (Mechanical Copyright Collection Society).

In the USA, the statutory mechanical rate is currently set at 8 cents per track (for songs up to 5 minutes long) and 1.55 cents per minute (or part thereof) for songs over 5 minutes long. This money is usually gathered in by a collection body (such as the Harry Fox Agency). Due to historical circumstances - and because there is such a strong buyers' market - many songwriters are only paid three-quarters of this US rate. (Copyright law and mechanical levies in the US market involve various caveats - dependent on the length of the track and the year of record release.)

Other territories, of course, have their own local collection societies - such as AMCOS (Australia & New Zealand), CMRRA (Canada), JASRAC (Japan), NCB (Scandinavia) and GEMA (Germany). Most collection societies usually charge a fixed commission fee for their service. *Music Business Journal* has compiled a substantial list of these organisations (with hyperlinks) at <http://www.musicjournal.org/links.html>

Note that mechanical royalties are not only generated from the obvious products, such as CDs or videos, but also from other physical items, such as film reels, and even novelty items such as cakes, birthday cards, and mobile phone ringtones - indeed, any product containing copyright music.

BIEM is an important Paris-based organisation, which was set up to oversee reciprocal arrangements for the collection of music publishing mechanical royalties across international territories. Hence, most CDs now carry the small stamp, BIEM, on the actual disk itself - *e.g.*:

- **GEMA/BIEM** (means manufactured in Germany, income collected via BIEM agreements);
- **BIEM/MCPS** (means manufactured in the UK)
- **BIEM/STEMRA** (means manufactured in the Netherlands).

This appellation is useful, because the corporate groups tend to focus their manufacturing in specific territories (Sony Europe, for example, manufacture in Austria). BIEM agreements now cover 38 international territories. Further information on BIEM can be found at their official website: <http://www.biem.org>

Performance and Broadcasting Income

Performance and broadcasting income is a key source of income for the songwriter and publisher. Every time a copyrighted work is broadcast, or performed in public, it should (theoretically) generate income. Again, to simplify the collection process, standard formulas are employed, and specific collection bodies have been set up to achieve an economy of scale in collection.

In the UK, the local collection society is the Performing Right Society, or PRS. Other examples are IMRO (collecting within the Republic of Ireland), APRA (Australasia), SOCAN (Canada), SACEM (France) and STIM (Sweden). Songwriters and publishers in the USA have three main options. They can join ASCAP (the American Society of Composers, Authors and Publishers), BMI (Broadcast Music, Incorporated) or SESAC.

The world's oldest collection society for performance income is France's SACEM, which was established in 1851. Most countries have unified collection bodies for the joint collection of all mechanical, broadcasting and performance royalties.

Music Business Journal has assembled a substantial body of hyperlinks to worldwide collection bodies. This can be found at <http://www.musicjournal.org/links.html>.

As live music generates performance income, some paperwork is needed in order to monitor playlists. Where applicable, this paperwork is completed by an act's Tour Manager. Again, formulas are commonly used - in the UK, for example, this formula is 3% of gross box office receipts. Note that many unregistered venues do not generate performing right fees (particularly where performing music is, for them, an incidental activity).

Public places that play music must also pay for this performing right. 'Blanket' licences are therefore issued for this purpose. Buildings such as bars, restaurants, clubs, gyms, shopping centres and train stations must pay a set annual fee to their national performing right society. This income (known as 'black box' income) is then pooled collectively, and re-distributed on the basis of analogies from radio airplay, and other sources such as jukebox data.

Broadcasters, such as TV and radio stations, will either be sampled, or, for those with a significant audience reach, fully monitored. They will then pay a set rate per minute to a collection society. This income is, in turn, passed onto the songwriter and publisher, after administration commission is deducted.

Internet sites which play copyrighted music also require performing rights licences. The application of traditional music publishing procedures and rights to the online environment is still in its infancy. In time, however, online licences should become more structured and manageable, thus providing additional income for songwriters and publishers.

Overall, in terms of logistics, performing and broadcasting income are rather difficult to collect and administer. Mechanical royalty income is easier to collect; however, the main problem for mechanical rights societies (and record companies) is piracy and illegal duplication. Such piracy can range from large-scale operators (sometimes financing organised crime), to individuals illegally burning music onto CD-R's, at home. Over capacity in the sound carrier manufacturing sector has generally led to an increasing risk of illegal commercial-scale duplication.

Synchronisation Fees

Some publishers are better than others at securing synchronisation income. This income is generated when songs are integrated into moving images such as films, TV programmes, TV commercials, and multimedia software.

Such synchronisation agreements are individually negotiated between the publisher and the production company. The fee generated depends on the politics of the situation - how keen is the production company to use a particular song? Note that

synchronisation can be very lucrative and that some fees have generated seven figure sums for songwriters and publishers.

Sales of Sheet Music - This is the traditional activity of the music publisher. Even in our hi-tech age, a market still exists for items such as songbooks and sheet music. Note that music publishers usually take a much greater royalty rate for this activity (*e.g.*, 90%-10% in favour of the publisher) for sheet music income.

Cover Versions - These can be particularly lucrative sources of income. As the song is separate from the record, artists recording a cover version must therefore forsake the mechanical royalties for manufacturing, as well as broadcasting income from airplay, etc. Instead, these royalties are payable to the original songwriter. Note that sampling without approval is illegal. A common music industry myth is that sampling is acceptable if limited to a short excerpt. In fact, all samples require written approval from both the music publisher, and the record company (if lifted from a copyrighted sound recording).

The Printing of Lyrics - As the lyrics of a song are also subject to copyright control, the publisher can negotiate printing fees with other publishers - such as magazines - for re-producing these lyrics. Some records also contain these lyrics within the sleeve, thus generating more income for the songwriter and the publisher.

Music Publishing Contracts

After writing a song, the songwriter automatically holds a copyright in the work (once in 'fixed form') under intellectual property law in most developed countries. They may then, if they wish, assign this copyright to a third party music publisher. It is essential in most countries that such a music publishing contract be in writing. In the UK, for example, this must be done under Section 90 of the *Copyright, Designs and Patents Act 1988*.

To obtain the rights to the songs, the publisher may offer a financial incentive (an advance), and a subsequent royalty rate. The worst case scenario royalty rate for a songwriter would be 50% of income received. Note how favourable this rate is when compared to a record company contract, where the recording artist may only receive around 18% of the wholesale price (minus a substantial number of deductions - such as packaging charges).

Record companies, of course, have the potential to reach a huge audience, and to make their artists famous. But they also take significant risks and have large running costs, hence their justification (rightly or wrongly) for their royalty rates, which, traditionally, are strongly biased in the record company's favour.

The publisher, however, will recoup any advance before paying royalties to the songwriter (as a record company does with its artists). This situation becomes complex where there are certain caveats - some performing right societies, for example, will automatically pay 50% of income directly to the songwriter anyway.

In terms of income then, music publishing contracts are generally more favourable to the songwriter than the publisher. Furthermore, control of songs usually (eventually)

reverts back to the songwriters, as the publisher is often only able to exploit copyrights for an agreed and limited period of time. This means that the songwriter may sign a second publishing deal, after expiry of the first.

This situation is in sharp contrast to recording agreements, where the recordings are generally owned by the record company for the full duration of the copyright period (known as the 'phonographic copyright period' and 'in perpetuity').

Music publishing contracts should be thoroughly vetted by an experienced music industry lawyer. Key clauses will usually cover: assignment of copyright, term of copyright, territories, advances, royalties, accounting arrangements, sub-publishing arrangements, warranties and the governing laws clause.

Songwriters should ensure that their contract contains a 'reversion clause'. This clause ensures that copyright in their songs will automatically revert back to the songwriters at a specified time, due to a failure on the publisher's part to exploit their works (known as the 'cure period'), *or* in the eventuality that the publisher goes into liquidation. Note, however, that this term will usually have two components - one covering an initial songwriting period (*e.g.*, 2 years), and a much longer second period, called the 'retention period' (*e.g.*, 20 years), which outlines the additional term that the songs will remain assigned to the control of the publisher.

Most songwriters agree to assign full control of their works to music publishers. In doing so, they are surrendering a portion of their songwriting income (usually 20-40%) to the publisher. However, a good publisher can justify this assignment through the generation of further income from exploitation, enhanced copyright protection, and the provision of an efficient administration and management system.

Some publishers, of course, are better than others at managing and exploiting their catalogues. Despite this, many songwriters will still sign over their copyrights, through the incentive of a 'quick fix' in the form of a financial advance from the music publisher.

Not all music publishing agreements involve a transfer of copyright, however. Some contracts are 'administration deals' only, *i.e.*, where the publisher will receive a percentage of the income generated by the song catalogue for undertaking certain necessary tasks - such as administration, registration, monitoring and royalty collection.

Interestingly, some small music publishing companies are affiliated to small record labels. In certain cases, the songwriter may be signing to a company with little infrastructure, and little contacts for lucrative synchronisation deals. In effect, some of these publishing companies exist largely due to the fact that they allow the label to claim back some of their mechanical royalty costs (*e.g.*, via a 50:50 publishing agreement with the songwriting artist).

Some people in the music industry would advise against signing to the same recording and publishing company, regardless of the size of the operations.

A useful online overview of features of music publishing contracts can be found at: [Lee & Thompson's Music Guide](#) © Lee & Thompson Solicitors 2000.

Songwriting Members

A song usually has several components - namely, the music, the arrangement, and the lyrics. As a result, a song may be written by a number of composers and lyricists, working collaboratively. Consequently, the parties involved will have to establish a clear definition for apportioning the percentages of their income from exploitation of the works.

With regard to music publishing income, it is therefore common for the various members of an act to receive vastly different levels of income (depending on which members write the songs). This can cause tension, and often leads to internal resentment. Many acts have actually split up as a result of this financial disharmony (note the much used expression 'musical differences'). Some songwriters appease the other non-songwriting members of their act by allowing them to share (to varying extents) in their music publishing income. Artist managers are often instrumental in solving this problem (behind closed doors). Most artist managers will also seek a percentage of their songwriting act's income also.

In the US, UK and EU today, a song is under copyright until 70 years after the death of the songwriter. Where a song has several co-writers, the work will remain under copyright until 70 years after the death of the *last* remaining songwriter.

Even when the songwriter is deceased, therefore, publishing royalties will continue to flow from manufacturing and performance income for a limited time. These royalties are paid into the songwriter's estate - usually benefiting their next of kin. All songwriters should thus ensure that they have drawn up a will, as their works could continue (or even just begin) to generate income, for a substantial period after their demise (up to 70 years in many cases).

Sub-Publishing

Songwriters are advised to be very careful when signing music publishing contracts which contain sub-publishing provisions. A publisher, with little international presence, may wish to enter into sub-publishing agreements with other third-party publishers in foreign lands. The net effect may mean, though, that the songwriter is actually paying double commission, as both publishers may collect their percentage before passing the remainder onto the songwriter.

To avoid this situation, the writer should ensure that the two key words, 'at source', are included in their contracts. This means that they can receive their full royalty percentage *at source* from each publisher. The songwriter and their representatives should also be kept fully informed of all sub-publishing arrangements.

Sub-publishers can be useful, as they are better placed to monitor local exploitation of songs, as well to collect local income, where appropriate. Some songwriters, however, prefer to sign music publishing agreements with the established corporate bodies - as they already have an international presence and internal infrastructure across the key global music markets.

The Current Music Publishing Market

The music publishing market is worth several billion dollars per annum, and almost mirrors the recording industry in terms of corporate presence (although it is not as lucrative overall). All five corporate music industry groups have a strong identity in this area of the industry.

The following five music publishers are market leaders in most of the established world territories :

- EMI Music
- Universal Music
- Warner Chappell Music
- Sony/ATV Music
- BMG Music

The British-owned EMI Music is the world's largest music publisher, and controls more than one million song copyrights. Universal Music and Warner Chappell Music follow closely behind. Sony/ATV is a relatively recent company, and is still gaining momentum as, too, is BMG Music.

Thousands of independent music publishers also operate in various territories, such as Windswept Music, Chrysalis Music and Strongsongs. Certain markets have key local publishers.

Like the recording industry, the corporate groups often buy up other publishing companies in order to achieve greater market share. In this way, they assume control of a smaller publisher's catalogue. Recent acquisitions range from EMI's purchase of Hit & Run Music, and their purchase of 75% of Windswept Music's catalogue, to Universal Music's takeover of the world-famous music publishing house, Rondor Music.

The corporate publishers have different staff and organisational divisions for their various publishing activities (even though they may share premises with their record company colleagues).

Establishing a Music Publishing Company

Little has been written about setting up a new music publishing company. As publishing is considered to be a very specialised task, many people do not feel confident enough to start their own business in this area. Furthermore, some of those who do often regret it due to the workload required. Consequently, many successful songwriters still prefer to assign their works to a music publisher, rather than administer their own catalogue of songs.

The following is *Music Business Journal's* summary of points for consideration for those who do wish to establish a music publishing venture :

- ^ As music publishing is based on the management and administration of copyright assets (intellectual property), it is recommended that a music publishing firm be incorporated as a limited liability company. This will

require standard business elements and procedures (such as shareholders, Directors, a Company Secretary, constitution documents, and regular returns to the relevant authorities). Setting up a limited company may seem laborious, and rather costly, but those who manage copyrights should consider seeking the protection of limited liability in their trading. Where there is a copyright agreement, there is also the potential for legal wrangling in the courts. UK companies are registered at Companies House - see <http://www.companieshouse.co.uk> for further information.

- A music publisher, of course, requires a "catalogue" of songs. The publisher will therefore have to secure the rights to songs via publishing agreements with songwriters. As a result, the publisher will require legal advice, representation and official documentation (an in-house 'Publishing Agreement' template would be advisable).
- Some new songwriters may assign certain works for no advance; in return, though, they should expect the publisher to offer them reasonable prospects for success. Industry contacts with record labels, artist managers and producers are therefore essential (particularly in the A&R function, see [Music Business Journal's Overview of the A&R Function](#) for further background information).
- The publisher will need to formally join the relevant collection societies in their home territory - *i.e.*, those which collect mechanical, broadcasting and performance income. There is usually a fee and paperwork procedures for doing so. Note also that some collection societies have a minimum catalogue requirement for membership - for example, the UK's PRS (Performing Right Society) demand that new publisher members control the rights to a minimum of 15 works.
- The publisher will require an efficient administration system. This includes standard office functions and procedures, as well as knowledge of how to register works with the relevant collection societies. A system for monitoring the exploitation of works will also be required.
- As the publisher is likely to store and maintain records with details of individuals (e.g., their songwriter clients), they may require a data protection licence. In the UK, for example, these are issued by the Data Protection Registrar in accordance with the 1998 Data Protection Act. This licence carries a fee, a declaration of the purpose for maintaining such records and an obligation to take adequate security measures to preserve the data's integrity.
- Formal accounting is a key provision within any music publishing contract. Consequently, the publisher will require a royalty tracking system. Some specialised software packages are available for this specific purpose - such as Counterpoint's *Music Maestro* (see <http://www.counterp.com>). The publisher will also require the services of an accountant, and preferably one with a knowledge and understanding of the workings of the music industry.

- The publisher will generally seek integrative exploitation of the works. In pursuing synchronisation licensing, the publisher will rely heavily on plugging, and personal contacts with advertising, TV, film and multimedia production companies.
- The publisher will usually convert works held in copyright into sheet music format (if they presently only exist as sound recordings). Again, several software packages are available to assist in this task; their use usually being facilitated by employing the services of a professional copyist.
- Conversely, the publisher may require resources to convert songs into physical format, including demo recordings for promotional purposes. This will certainly require some financial outlay.
- The publisher must also network. By joining industry bodies - such as their national music publishers' association, a publisher may benefit from information, advice, the sharing of experiences, and indeed just by staying in touch with developments in such a complex and rapidly changing industry.
- To extend global reach, the publisher will require representation in foreign markets. As a result, he or she may wish to enter into reciprocal sub-publishing arrangements with other music publishers across the world. Industry conventions (such as MIDEM, which is held every January in France - see <http://www.midem.com>) are considered to be useful in this respect.

Setting up a music publishing company is clearly a complex task. It requires specialised knowledge and understanding of music copyright, as well as an appropriate infrastructure that will enable the successful management and administration of song catalogues.

Songwriters who have no music publishing deal, and are unwilling to set up their own firm, can still join the relevant collection societies *directly* as songwriting members. This involves some registration paperwork (and usually a joining fee), but it then allows them to benefit from the extensive services offered by the international collection societies.

Useful Links to Music Publishing Bodies - <http://www.musicjournal.org/links.html>

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