

Independent Label Management

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Introduction

This work discusses copyright ownership and acquisition in the music industry and possible strategies based on the authors position. Furthering this the interests of various parties and the manners in which they operate are covered in an attempt to outline the income streams within the industry. These streams are then discussed in relation to the authors scenario where strengths, weaknesses, opportunities and threats are identified and compared in order to distinguish the best potential outcome.

Undoubtedly situations can change from one minute to another and a degree of adaptation will be needed; to this end the document aims to demonstrate an understanding of the financial repercussions that may be incurred due misguided timing or a lack of situational analysis. It also aims to state the importance and benefits of considering the interests of any party involved in such a risks for rights trade and facilitate the agreements being made to ensure a positive outcome.

Copyright ownership

Copyright comes into existence as soon a piece of intellectual property [work] is created, so in the first instance and relating this to music it is the ownership of a song [intellectual property] by the songwriter/producer. In this situation the author has written the lyrics, melodies, chord sequences and structures meaning that the exclusive rights are self controlled (WiseGEEK 2012). These rights include the mechanical copyright which allows the owner to grant license for mechanical¹ transferal of the work; this is assigned to the writer(s) because without the song, subsequent copyrights could never exist.

Sound recording rights - including master use - are the copyright to a recorded performance and are separate from mechanical copyright which refers to control over reproducing the composition. The recording rights are usually owned by whoever funds the recording (e.g. a record label), however the writer/publisher can still earn from mechanical rights collected by MCPS (PRS for music 2012).

There are numerous types of license available - covering a scope of uses - but typically for independent record labels, the license paid for CD duplication is referred to as an AP2 and requires the licensee [label] to pay the license rate upfront for the total number of discs manufactured which goes to the writer (Flint 2002). Alternatively there is an AP1 license which requires quarterly reporting on record sales and is subject to much stricter license conditions, however these are typically out of reach for most independent labels due to the credit check (*Ibid*).

Like mechanical rights, performance rights of a song are collected through PRS for music who must be notified of new songs through a "Writers Joint Notification (Works) Form" in which the legal status of the song and the writing contributions are outlined.² Phonographic Performance Limited (PPL) then collect for use of a recorded performance and distribute

¹ A now defunct throwback that essentially means any copying of the song which does not require a new performance

² For example there is a box to mark the song as a "Dramatico-musical work" which if ticked means a compulsory mechanical license can't later be applied for (Passman ebook).

50% to the recording rights holder and 50% to the performers split according to their Performer Allocation Policy (PPL 2012).³

According to Kent (2012) The Copyright, Designs and Patents Act of 1988 granted performers several new rights: “*a reproduction right (the right to authorise or prohibit the making of a copy of a recording of the whole or part of a performance); a distribution right (the right to authorise or prohibit the issue of copies of such recordings to the public), and a rental and lending right (the right to authorise or prohibit the rental or lending to the public of copies of such recordings)*”. These may be assigned any way a performer chooses and would normally be discussed in contract. Kent also states that in 2006 performers were granted moral rights “*to be identified as the performer whenever a performance takes place or is broadcast or released as a recording; and the right to object to derogatory treatment of a performance*” though these rights - he explains - do not apply to performances made before 01/02/06 (Ibid).

Depending on who wishes to exploit which given copyright, its important to understand the interests of both parties in order to reach comfortable agreements.

Critical analysis

Labels and their incentives

Depending on the type of label operating, the difference between one and another is a matter of their ethos towards generating revenue in the music industry. They all exist to earn - as is the nature of business - but the balance of commitment to an artist can drastically range. To get an idea of this its first worth exploring the extremities of potential contractual relationships.

According to David Byrne (2007) there are several forms of working relationship that artists can enter into and its a matter of balancing control with label interest and overall income. At one end of the spectrum Byrne explains that an equity deal essentially grants labels a greater degree of control and larger percentage on every aspect of an artists career, which is exchanged for significant investment into the artists development as a ‘brand’. A labels reach can extend through funding/organising the recording, manufacturing the product, distributing it, marketing it, loaning advances, managing/advising careers and taking care of the accounts. Dependent on the act some artists may want to outsource or control some of these services either partially or completely until we reach the polar opposite end of the spectrum known as the DIY approach (Ibid).

The more an artist does themselves in terms of recording, manufacturing and marketing a product the more they make from the various streams of revenue but the smaller the advance they are likely to see (Rutter 2011). Certainly the writer retains the most rights in a DIY scheme but this also deprives labels of their exploitable revenue streams. While discussing ‘the license deal’, Byrne clearly states “The flip side is that because the label doesn’t own the master, it may invest less in making the release a success.” While more tellingly he states about Manufacturing and Distribution deals that “*given the numbers, [big labels] don’t stand to make as much, so their incentive here is limited*” (Byrne 2007).

³ In the authors scenario the recording wouldn’t have been made without the the goodwill of its performers and as such it would seem fair to list all as Featured Performers to ensure even splits. Before this can happen rights assigned to the performers under the 1988 Copyright and Patent Act and moral rights must also be granted.

Contracts

From the above we see that there will be trade offs for an artist that requires the additional resources of a label to properly capitalise on their career growth. In a nutshell the more income streams a label can earn from the more they will typically invest in an artist. When contractual proceedings are underway an A&R agent will typically present an artist with a deal point memo which outlines the contract. As Steve Albini (1993) puts it “the spookiest thing about this harmless sounding little memo, is that it is, for all legal purposes, a binding document”. This illustrates his later explanation in that anything left uncovered by the memo can be leveraged by the label by potentially holding an artist in limbo and unable to sign a more promising deal (Ibid).

Following this any rights assigned or licensed to a label will be done so for a term set out in the contract; in many cases for twelve months, with options of further twelve month successions and a minimum commitment to each. This undertaking would usually specify a certain amount of tracks to a given standard - the wording of which should be questioned - and will usually ask for exclusivity from the artist. A provision may be set in-place for guest appearances or release under a separate alias (Salmon 2007).

In terms of promotion and marketing costs Salmon explains that they should not be recoupable as it is a reasonable business expense to the label because the label benefits every time a record sells so it is within their interests to promote the product (Ibid). Although he reiterates that “*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*”, it does not stop this from happening in practice (Ibid).

A music video may also be specified which is in many cases recoupable by 50% (Music For London 2012). A thought on this is that unless specified a music video may constitute a feature length concert which should require further discussion on terms. Further more the relevance of a video should be carefully considered by the artist as the situation may not call for one.

Territory is another commitment that must be addressed and in respect to independent labels, the fairness of asking for worldwide rights seems proportional with their ability to deliver effective marketing and distribution throughout the territory (Salmon 2007). Classically a label would also typically ask for re-recording restrictions to be set in place in order to stop an artist from remaking the music for a competing label; however where relevant it should not be for longer than five years after contract termination (Ibid). An artist warranty would also be set in place stating that they will comply with the contract to the best of their abilities and they are free to enter into such an agreement. This puts in writing that an acknowledgement from the artist that they are liable for losses due to already signing another prohibiting contract (Ibid).

Another right needed to ensure fair play is the right to audit a label's accounts. As the Future of Music Coalition (2001) explains, this can be expensive so neither party will want to bear the cost and the remedy is usually a discrepancy clause; incorrect by a defined percentage and the label will pay the audit's full cost, otherwise the artist will (Ibid). This area is murky and can consist of many loopholes which may bias the bearing of cost towards the artist in order to dissuade them; such examples could consist of home court choice inconveniencing the due to timing/travel, limitations on when and how long an artist may audit the company as well as the rules for back claiming (Ibid).

Situational progression

If the author was to approach a label there are two potential avenues that could make sense given the recordings have already been self funded; a licensing deal or profit sharing deal. Licensing the recordings would let the label benefit from synchronisation of the master recordings so the benefits would need to be worthwhile in terms of exposure, advance and support.

A profit-sharing deal constitutes some form of arrangement where the profits of recording sales are split. Potentially there is a minimal advance paid by the label who markets and manufactures the recording while the artist supplies a recording after which they “share” profits (*Ibid*). On the subject of a 50-50 net profit deal, its worth noting Donnellys (2004) criticism *“that [net-profits] are only 50/50 when it serves the record company’s interest”*, where he illustrates that an artist who has paid to make a recording cannot recoup that cost although the labels advance and perhaps unjustified services/administration fees will be recouped against future artist royalties.

In terms of a tangible physical release a Manufacturing and Distribution deal would not realistically be an option without an established fanbase and DIY infrastructure (Byrne 2007). Although DIY is a longer term investment requiring more time and effort to earn an income from it presently seems the most lucrative route in the authors scenario; this is because - barring the recorded performances - all copyright is self controlled. Holding on to this copyright means that if the recordings were used for film or TV, the author would derive revenue from both the synchronisation licence and the master use licence (Audio Network 2011). However, before we look at these interests a DIY release shall first be discussed.

Independent Label Set-up

To start an independent label a legal status must first be decided on, this could be either as a sole trader or limited liability company (Ltd.). In essence a sole trader is responsible for any company debt but only has to file his tax returns, while a Ltd. company is subject to stricter accounting regulations but pays less tax and is considered a separate entity from its owners (Nasa Consulting 2013). Its the authors opinion that a limited company is the route to take as taxes on manufacture and other expenses can be claimed against tax. If accounting is stringent then it should prove manageable with a little research, while the subjective credibility of a limited company may in future be useful.

The label should register with relevant industry bodies like PPL and the songs/recordings should registered. The songs were previously registered through the Writers Joint Notification Form but can now done through the ‘PRS for Music’ website which will notify PRS and MCPS of the repertoire and the splits (Harrison 2008: 85). This process identifies copyrights, relevant song information and denotes writer splits to both societies; MCPS denoted in percent and PRS in fractions of twelve (Flint 2002).⁴

To clarify the authors scenario song lyrics and music were self-written, but contributions in the form of demoing structures and transitions came from a peer. As such and in the spirit of encouraging such collaboration a split of the songwriting has been arranged.

⁴ Its interesting that there are separate royalty splits for song performance (PRS) and mechanical (MCPS) copyrights as this seems to defy logic, but this may perhaps prove useful in balancing the conflicting interests of co-writers under respective contractual obligations.

AP2 License

Now operating as a label an AP2 licence needs to be obtained from the MCPS which is required to produce and manufacture a physical product e.g. CDs and Vinyl. When submitting for such a licence, the label is required to fill out a PPL Repertoire Registration Form supplying recording details such as dates, performers, locations, samples, runtime and other identifying details such as catalogue number and International Recording Sort Code (IRSC). The catalogue number is specified by the label and can be an arbitrary system, while the IRSC is a standard which must be obtained from PPL.

The IRSC uniquely identifies songs released from around the world in an AA-BBB-CC-DDDD format; the first field identifies the country of the member, the second identifies the recording rights first registrant, the third identifies the year the code was issued and the characters of the fourth field are chosen by the recording rights holder (PPL 2013). For example releasing in 2013 under the label 'Play Records' in the UK the IRSC might look similar to GB-PLY-13-00001, which would be encoded on all copies of the disc. A universal product code (UPC) should also be obtained to sell though retailers or register with the official charts company, the unique numeric of which is originally bought through GS1, after which the graphic can be generated free. If selling through a company such as CDBaby then they may supply one.

Because this is a self-release where the author is both the label and writer, a loop forms in regards to MCPS licence fees; there is no point in asking the society to collect for a licence which will go back to the same person. For this reason MCPS have a "Non-sales Agreement Record Companies" exclusion clause which allows the licence fee to be waived in these circumstances (PRS for Music 2013).

In the AP2 licence a label details the performers on the recording so their copyrights can be collected, however if the label is not registered with PPL no royalties will be distributed to anyone until they do so (PPL 2013). This bias towards the label rather than performer is quite noteworthy and when reading through the PPL rules one will notice that if in doubt the label will generally be assigned rights; for instance the royalties of any non-qualifying performer will be not be redistributed amongst the qualifying performers - as seems fair - but will supplement the labels income instead (PPL 2013). A qualifying performer is someone that is a citizen or resident in a country with a reciprocal copyright protection agreement to the UK (Kent 2012).

Marketing

This is vital in the success or failure of nearly every release regardless of being major label or independent. Its also certainly true that the internet has become a great promotional tool that costs significantly less than traditional channels allowing independents a foothold in the market. Despite this however its worth noting that the majors will have the advantage in terms of their promotional ability provided that the music listening public remain passive in their consumption of music (Rutter 2010). This is because the majors are just as equipped as the independents - if not more so - to make use of the internets promotional capabilities, while they also dominate traditional media channels like radio.

Regardless of this a marketing plan needs to be created and will typically take a few months lead time. In the DIY sector this plan is generally 'Direct To Fan' and revolves around the cultivation of an artists website, their branding, the artist-fan relationship and the collection of engaged e-mail addresses for direct marketing (Berger 2011). A host of companies now exist to provide promotional platforms to operate from who supply easily embeddable widgets such as the Topspin 'E4M (email for media) widget'. They may also

take the form of Facebook (FB) applications from services like BandPage which allows marketers to synchronise promotional media across multiple sites.

As many music marketers such as White (2010) will point out, there are various optimisation strategies that can be employed across the web - particularly Facebook - which employ statistical targeting to minimise their total spend. The strategy he details is to start with several ads with variations on picture and text, set to maximum cost per click with a small daily spend to gather a sample size decide on the most effective in terms of cost per click (*Ibid*). These can link internally within Facebook to the bands page or can take them off to a landing page on the bands website depending on the goal. In the authors scenario it would seem most productive to engage with potential fans on a regular basis by connecting through a Facebook instead of bypassing this stage to capture an e-mail straight away. Through fan engagement Porterfield (2011) explains we build more committed fans, the type likely to actually purchase a product and potentially promote the artists to others - in the authors opinion a prime example is the John Butler Trios official website (John Butler Trio 2012).⁵

Production

With the MCPS licence granted and promotion underway the label can start to manufacture and distribute product; this is potentially a hurdle for an independent release as like promotion its a significant cost. In the case of a larger low risk act such as the John Butler Trio or The Waifs, a manufacturing and distribution deal can be secured with a major label such as MGM (Stevens 2013). However as previously mentioned this is only realistically an option with larger established acts and so releasing as an independent label production expenses would have to be accounted for in cash-flow predictions.

Typically there are many manufactures willing to press discs for a price and several will allow custom packaging options such as ACD Sleeve. In direct-to-fan marketing Spitz (2011) considers adding value to a product - above that of the music, such as unique packaging - to be a major driving force in most fans purchasing decisions. Bearing this in mind and balancing the packaging costs can complicate matters somewhat; especially as the label will also need to estimate copies as constraint budgets leave little room for error.

A possible way of estimating the copies required would be to firstly set up a pre-order campaign and use it to help forecast growth in tandem with using fan metrics collected from the artists website, Facebook, Twitter, Youtube and other social platforms. Depending on the projects scope a platform such as BuzzDeck which amalgamates these 'fanalytics' may also prove useful in identifying an acts market and forecasting its size at the time of retail. Merchandise is another cost which needs to be considered especially as it can be more profitable than selling actual recordings. Again attention should be paid to the metrics in order to estimate quantities (Gotez 2012).

In terms of distribution a DIY release is unlikely to find its way into a major retailer which is why the model is also often termed direct-to-fan; it is distributed directly to the purchaser. In most cases the digital marketing will lead to a web-store where the fan purchases items directly from the artist/indie label, which are sent by mail. An artist/label can do this directly by posting items themselves or they can send the products to a fulfilment plant for distribution. Some platforms like Topspin allow automation of the web-store distribution

⁵ Note the 'eco-conscious' style branding playing on the word trio with its targeted logo portraying three trees in a circle (Three Trees-O) which solidifies the artist image with their audience. <http://johnbutlertrio.com/2012/>

process through an API used by compatible companies, while also allowing the user tidy access the metrics (Topspin 2011).

Publishing

As mentioned before this is perhaps the most lucrative sector given the controlled rights. The recordings are potentially suited to synchronisation in film as there are also surround masters available for exploitation, all of which are self owned. This means that aside from PRS public performance royalties and the negotiable sync licence, the author could also benefit from the fees paid for the PPL master use licence.

Publishing can be handled independently with smart career handling, however if the publisher were proactively trying to find song placements they may prove beneficial. If also self-releasing as a label it would be within the authors interests to secure a provision with the publisher that they only earn from work they've generated (Harrison 2008). For an unknown writer, such as in the authors scenario, the main benefits of signing a publishing agreement is that the publisher should actively be using its resources to get the song used (Ibid).

In terms of cash flow it may prove wise to set up a publishing company and then sub-publish on similar terms to the above deals. This is because MCPS and PRS royalties go to the primary publisher first - otherwise known as the songwriter - and then payments are made out to the sub-publisher (Passman 2010). In terms of publishing deals there are several common scenarios; single song assignment, a sub-publishing deal and an exclusive publishing deal (Harrison 2008).

Publishing terms

The single song assignment is where the copyrights of individual songs are assigned (not licensed) to a publisher for either life or a retention period. The publishers fee is usually around 20-25% which is more than some other agreements, but as Harrison (2008) states: “[this is] because the publisher controls the copyright in the song, it's in its interests to get as many other uses for the work as possible”. The downside is that less control is retained over a song because copyrights are assigned to the publisher instead of licensed and the advance - if any - is likely to be quite small (Ibid).

In the authors case, future prospects need careful consideration; if any degree of success is achieved in a more mainstream market, for instance as an act, then it leaves options open to sign a more exclusive publishing deal in the future while possessing a better bargaining position. This has potential cons as in a sense the writer is betting the publishing value of their current catalogue, against their own potential earning value as an upcoming writer. If the songs are expected to go big, for instance after a successful first single, then the writer may loose out; however its an arrangement that may propel a writer/ artists career from public exposure this arrangement could serve as a stop gap solution to exploit current material while maintaining freedom.

A sub-publishing deal sub-licences various copyrights in a catalogue to a publisher rather than assigns the rights. The sub-publisher therefore has a more material to generate revenue from but less control over the copyrights, which will revert back to the writer after an agreed period (Harrison 2008). The sub-publishing fee would typically be less than a single song assignment (15-20%) and an extra worth of a catalogue may also warrant a small advance (Ibid).

Finally we have an exclusive deal which is the most restrictive but under good terms is also the most lucrative. This type of contract is essentially an investment in a writers long term catalogue and closely resembles a record deal, whereby an advance is paid to sign the writer for a term with option periods and a minimum commitment is described. Most likely a number of rights will also be licensed; often in respect to the writers past catalogue and future works. Many aspects are up for negotiation here all of which will effect the advance and publishers fee - typically 20-25% (Ibid). At such an early stage the author feels this kind of deal would probably not be within long term interests.

From the potential deals realistically available a sub-publishing agreement seems most suited to the authors situation. There would be less available in terms of an advance but as previously mentioned the value of the copyright may increase in time; as such it would be ideal to retain them while the agreement would still allow the publisher to generate a revenue stream in the interim. In terms of releasing as an act, publishing an agreement should be made not to collect from the authors own label.

Summary

Interpreting the information above it would seem within the authors best interests to release independently for the time being. Given that the recordings are slightly off mainstream it would be most productive to build a fanbase at the same time as trying to secure a sub-publishing deal. If use in film/advertising were to generate exposure then the publisher who secured would deserve continued exploitation of the songs while they are recognised, while future song rights are still maintained by the author. If the publisher does not gain the songs much exposure, but still manages to bring in a small income in licence fees then they are doing their part and in the interim efforts can be focused on the self-release and writing new catalogue.

Conclusion

As we see from the critical analysis there are numerous opportunities and pitfalls when it comes to self-release and publishing. Its also quite clear that a resourceful songwriter can earn a living if they balance their interests and capitalise on their strengths/opportunities with an awareness of potential risks their weaknesses. Being mindful of these a music industry entrepreneur can learn to understand their own bargaining position before leveraging it to reach a suitable agreement.

Noteworthy is also the importance of lead times in an independent-release or otherwise. With a recording complete its still necessary to set up an infrastructure to manufacture, promote and distribute a product, all of which then have to coincide successfully for a structured release. The knock on effect of this is that cash-flow needs to be carefully monitored because delays in any part of a release can drastically effect the other aspects resulting in unnecessary losses of both money and time.

In terms of outsourcing work it seems best practice err on the side of caution and minimise assigning or licensing rights for longer periods of time unless a deal is particularly appealing. In this respect long term thinking again plays a critical part in establishing and maintaining the revenue streams that are a writers livelihood and as such it would be wise to think in this respect in order to ensure maximum earning potential. Rights aside production would have to be outsourced, while marketing and distribution could be self-fulfilled until cost vs. income allows expansion.

Before taking this module the music industry looked pretty bleak; in general it seemed nobody was paying for music anymore and that earning a living from such a pleasurable task would be near impossible. This opinion has thankfully changed and so long as we continue to consume music there will always be opportunity; when one market shrinks its simply out of the box thinking thats needed to derive income from other sources to ensure personal survival.

Word Count: 4379

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