

Music Copublishing and the Mysterious 'Writer's Share'

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The concepts of "writer" and "publisher" shares, as well as their origins, remain a mystery in music publishing, even to many music industry and entertainment law professionals. The key to unlocking this mystery stems from recognizing and understanding the basic principle that music publishing rights initially attach to the copyright holder of the musical composition. The U.S. Copyright Act grants the following exclusive rights in a work to the copyright owner:¹

- reproduction in copies or phonorecords;
- derivative works;
- distribution;
- public performance; and
- public display.

With respect to musical works and publishing income, the most important of these rights are the reproduction, distribution and public performance rights, which are the sources of the four publishing income streams payable to the copyright owner for the various uses of the work.

There is a difference between the copyright in a musical composition (the composition) and the copyright in the master recording embodying such musical composition (the sound recording). U.S. copyright law protects both. All of the exclusive rights vest in the owners of both compositions and sound recordings.²

However, music publishing rights belong only to the owner of the copyright in the composition. Initially and unless the composition is written as a work for hire,³ the writer of the composition owns the copyright in the composition and is its sole publisher. The

writer/copyright owner may then, if he or she desires, enter into an agreement with a third-party publisher in which the copyright and some or all rights that accompany it are assigned, in whole or in part, to such third-party publisher. Generally, a writer/copyright owner will want to take this step in order to have another more experienced party handle the collection, accounting and distribution of publishing income (or the "administration," as this article will later discuss). Additionally, the writer/copyright owner will usually receive a cash advance from the third-party publisher for the assignment of these rights.

The sound recording, on the other hand, is owned by the creative contributors (musicians) who perform on the

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sound recording or by those, such as record companies, who purchase or finance the performance embodied in the sound recording as a work-for-hire. This article examines the exploitation of the composition only, how the world of music publishing views the "publisher" and "writer" shares and the "copublishing" relationship between a writer and his or her third-party music publisher.

Music publishing income is derived from four separate sources. Royalties or fees are payable to the copyright owner in exchange for the copyright owner's grant to a third party of a specific publishing right held under the Copyright Act. These income sources are generated from the exploitation of the composition in print, public performances, mechanical recordings and synchronizations.

Print, mechanical and synchronization rights are all related to the copyright owner's right under the Copyright Act to "reproduce the copyrighted work in

copies or phonorecords"⁴ and to "distribute" such copies or phonorecords to the public.⁵ Print rights refer to the right to reproduce and distribute the words and music of a musical composition in sheet music and song folios. Mechanical rights allow reproduction and distribution in phonorecords (including digital downloads) and synchronization rights allow a song to be combined with a visual image, reproduced and distributed as part of a motion picture, television production, video or DVD. Public performance rights in musical compositions are specifically granted in the Copyright Act⁶ and refer to the copyright owner's exclusive right to broadcast a musical composition, whether by radio, television or the Internet. In addition, the right applies to the live public performance of the composition.

In the late 1800s and early 1900s, before records and radio existed, sheet music was the dominant royalty-producing revenue source for writers. Early mechanical royalties were paid to writers and publishers on player piano roll sales. The concept of a mechanical royalty for the reproduction of a musical work in records came into being with the 1909 Copyright Act.

Public performance royalties did not become a meaningful source of publishing income until well after 1914, when ASCAP was formed by a group of writers and publishers for the specific purpose of collecting income for the performance of their music. In 1921, ASCAP made its first royalty distribution to writers and publishers. In 1923, ASCAP began licensing radio stations. The situation has completely shifted in the 21st century. Sheet music is now the smallest revenue-producing source, while mechanicals and public performance income vie for top positions on the earnings scale.

The calculation of royalties for each of the publishing exploitations and income sources is generally calculated following standards within the industry. Domestic print royalties are usually calculated as a flat penny rate, per copy sold, with a higher per-copy rate for folios or, in some instances, a percentage of net print receipts. With respect to foreign print royalties or copies sold by licensees of the publisher, the royalty rate is usually a percentage of net print receipts.

Mechanical rates are dictated by the U.S. Copyright Act⁷ and equal a fixed penny rate per song per record made and distributed (with per-minute increases for songs more than five minutes in length); these rates have been continually increased biannually by the U.S. Copyright Office.

The Copyright Act also incorporates newly enacted provisions to encompass, within compulsory mechanical licensing schemes, the copyright owner's right to distribute phonorecords embodying the underlying copyrighted work by digital transmission.⁸ Royalty rates for such digital transmissions after December 31, 1997, have not yet been finally determined.

Synchronization royalties are generally a flat fee for the use of the composition. The "synch fee" varies, depending on the amount of the composition used, its popularity and the writer's clout.

Writers began to demand a larger share of the publishing pie.

Calculating public performance royalties is a bit more complicated. ASCAP, BMI and SESAC, the three U.S. public performance societies, negotiate license fees and issue licenses, typically "blanket licenses" (for which one fee allows access to all compositions licensed by the society), to the users of music (that is, radio, television, cable, Internet sites, bars, clubs, restaurants, shopping malls, concert halls, airlines, orchestras, etc.). A blanket license grants the licensee, for an annual fee, the right to broadcast unlimited nondramatic performances of the entire catalog of the particular society's musical works.

The societies then use elaborate data, polls and surveys to determine what songs are being performed and to distribute the license fees collected from the licensees to the respective writer and publisher members whose works were performed. The value of each performance is determined by several factors, including the amount of license fees

collected in a medium, the type and significance of the performance and the amount of the license fee paid to the society. The general arrangement is for each performance dollar payable by the society for a particular work to be paid half to the writer member and half to the publisher member.

It was, in fact, the early concept of a 50/50 sharing of publishing income between a writer and publisher that is mostly responsible for the latter-day confusion. Early songwriters entered into agreements with third-party publishing companies to print sheet music and player piano rolls under a partnership theory, whereby publishing income was equally split between the two "partners" - the writer who created the work and the publisher who printed it, distributed it, promoted it, secured its success and collected any publishing revenues generated by the work.

The 50 percent share payable to the writer under such agreements became known as the "writer's share," while the other half retained by the publisher for his or her efforts was known as the "publisher's share." The responsibility for the collection, accounting and distribution of income became known as "administration."

ASCAP furthered the 50/50 income-sharing/partnership approach. Formed in 1914 in New York, by a group of writers, publishers and New York lawyer Nathan Burkan, ASCAP sought to protect copyright interests and to collect fees for the performance of music written by its members. The ASCAP board of directors was, and continues to be, composed of 12 writers (elected by the writer members) and 12 publishers (elected by the publisher members). The board elects a president and chairman (who has traditionally been a writer member).

The writer's share of public performance income was the half payable to the writer(s), while the publisher's share was the half payable to the publisher(s). ASCAP's reasoning behind carving out a specific writer's share was more than simply an extension of the writer/publisher partnership concept. It was a protection for writers from overreaching publishing contracts, which provided for a writer member to be paid his or her share of public performance royalties directly, with no interference from the publisher.

In fact, until approximately 1990, the writer's share of public performance royalties was nonassignable under any circumstances. ASCAP now allows assignment by the writer, with ASCAP's written approval, but only under certain very specific conditions: (i) to repay a sum certain (loan or advance) to another ASCAP writer or publisher member or to a bank or lending institution; or (ii) to make an assignment to a writer's own corporation (must be at least 95 percent owned by the writer). In any case, the assignment is revocable at any time by the writer.

Early publishing agreements, although based on the 50/50 income-sharing/partnership theory, generally required writers to assign 100 percent of the copyrights in their compositions, as well as full exploitation and administration rights, to the publisher, in exchange for a 50 percent writer's share of the publishing income collected, which is generally described as a full publishing agreement. As the industry evolved, however, hybrid deals became more widely accepted.

Depending on the extent of the copyright and administration rights assigned to the publisher, the new agreements were structured either as a copublishing/administration or copublishing/coadministration arrangement, as opposed to a full publishing and full administration agreement. Most hybrid agreements required the writer to assign to the publisher at least 50 percent, but not all, of the copyright ownership, together with complete control of the exploitation and administration rights.

As publishing income increased and as bands began to write and record their own music, the publisher's function of placing music with performers became less important. Writers began to demand a larger share of the publishing pie. As discussed earlier, the standard publishing agreement had been previously based on the 50/50 income-sharing/partnership concept, where 50 percent of the net publishing income (gross monies collected less expenses) was paid to the writer (writer's share) and 50 percent of the net publishing income was retained by the publisher (publisher's share). Because public performance income was already divided into 50/50 writer and publisher shares by the performance societies, the writer collected the writer's share of public performance

income directly and the publisher collected and retained the entire publisher's share.

More recently, however, no matter how the copyright control and administration issues have been handled, publishing agreements commonly have begun to allocate a greater share of the net publishing receipts, commonly 75 percent, to writers.

As a result, a host of agreement-drafting challenges have ensued. Those parties that seek to maintain the traditional 50/50 partnership theory have couched their writer-royalty language in terms of a writer's share (or "songwriter royalties") of 50 percent of gross publishing income collected plus copublishing royalties equal to an additional 50 percent of net publishing income collected (defined as gross publishing income less expenses and the writer's share paid to the writer). The result is that a total of 75 percent of publishing income collected by the publisher is paid to the writer. With respect to public performance royalties, the agreements typically provide for the writer's share to be paid directly to the writer by the public performance society and the "publisher's share" to be split 50/50 between the writer and publisher. The result is that a total of 75 percent of public performance royalties collected is paid to the writer (that is, 50 percent [writer's share] + 1/2 of 50 percent [publisher's share] = 50 percent + 25 percent = 75 percent).

A more modern method of articulating the new standards for dividing the publishing pie is to structure the writer-royalty language in terms of a straight 75 percent of net publishing income (gross less expenses) collected by the publisher. Public performance royalties paid to the writer, however, have remained as the sum of the writer's share (paid directly) and 50 percent of the publisher's share collected by the publisher.

An even more basic drafting approach is exemplified by the simplest form of publishing deal: a straight-net-income-division formula or a pure administration agreement. Publishers most often enter into this type of agreement when a song or writer has been successful, where there is considerable publishing income in the pipeline and where the writer simply needs a publishing entity to collect it on his or her behalf. For such services, the publisher is paid a nominal

administration fee of 10 percent to 20 percent of net publishing income collected.

The writer still may be required to assign at least 50 percent of the copyright in the work to allow the publisher to administer it, but the publisher's power to control, license and/or exploit the song is severely limited. As in other

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situations, the writer's share of public performance income is paid directly to the writer while the publisher retains only the 10 percent to 20 percent (as negotiated) of the publisher's share of public performance income collected.

By way of example, a recent major music publisher's 75/25 co-publishing agreement drafted in accordance with the old theory of the 50/50 writer/publisher income-sharing/partnership separates royalties into two sections as follows:

Traditionally drafted 75/25 copublishing agreement

Writer royalties

Publisher shall credit writer's royalty account with an amount equal to the following royalties for the actual reproduction and all other exploitations of the compositions:

- Fifty percent (50 percent) of any and all net sums received for each copy of sheet music in standard piano/vocal notation and each dance orchestration printed, published and sold by publisher or publisher's affiliates or licensees, for which payment is received by publisher in the United States, after deduction of returns;

- Fifty percent (50 percent) of any and all net sums received from each

printed copy of each other arrangement and edition printed, published and sold by publisher or publisher's affiliates for which payment is received by publisher in the United States, after deduction of returns;

- Fifty percent (50 percent) of any and all net sums received (less any costs for collection) by publisher in the United States from the exploitation by licensees of mechanical rights, "grand" performance rights, electrical transcription and reproduction rights, motion picture and television synchronization rights, dramatization rights, print rights and all other rights therein (except the print rights referred to above and the public performance rights referred to below), whether or not such licensees are affiliated with, owned or controlled by publisher, in whole or in part;

- Writer shall receive writer's public performance royalties throughout the world directly from the performing rights society with which writer is affiliated or of which writer is a member and shall have no claim whatsoever against publisher for any royalties received by publisher from any performing rights society which makes payment directly (or indirectly other than through publisher) to writers, authors and composers except if publisher receives the so-called songwriter's share of performance income, it shall be remitted to writer without any offset in the next regularly scheduled accounting.

Copublishing royalties

In addition to the royalties payable to writer above, publisher shall account for and pay to writer's publishing designee royalties in an amount equal to fifty percent (50 percent) of publisher's "net receipts." The term "gross receipts" shall mean the aggregate amount of monies received by publisher in the United States (or credited to publisher's account) from the actual reproduction or other exploitation of the composition(s) under this agreement. The term "net receipts" shall mean gross receipts, less the following:

- Royalties credited to writer's royalty account under this agreement pursuant to the paragraph above and royalties payable to any other person, firm or corporation having an interest in the composition(s) concerned on reproductions and exploitations; and

- Actual expenses paid or incurred by publisher to administer and exploit the composition(s), including, without limitation, copyright registration fees, approved advertising and promotion costs related to the composition(s) or promotion of writer, reasonable and customary costs of transcribing the composition(s) on lead sheets, and the costs of producing demos of the composition(s), to the extent those costs are not recoupable from writer's royalties.

This language illustrates the division of writer and publisher shares with a 50 percent "writer royalty" paid to the writer in addition to a 50 percent "co-publishing royalty" (that is, 100 percent of the publishing income collected, less expenses and the 50 percent "writer royalty"). The writer receives 50 percent + 1/2 of 50 percent (25 percent), for a total of 75 percent of the publishing income collected by the publisher.

Regarding public performance royalties, the agreement provides for the "writer's share" to be paid directly to the writer by the appropriate public performance society, while the "publisher's share" becomes a "co-publishing royalty," split 50/50 between the writer and the publisher, for a total of 50 percent ("writer's share") + 25 percent (1/2 of "publisher's share") or 75 percent of public performance royalties, to be paid to the writer.

The modern version of the 75/25 copublishing agreement makes no distinction between songwriter royalties and copublishing royalties. It bases all royalties on net publishing income, as is demonstrated by the following language from another major music publisher's recent copublishing agreement:

The modern version of the 75/25 copublishing agreement

Royalties

Provided that you have fully complied with all of your material warranties, representations and obligations provided for in this agreement, following recoupment of advances hereunder, publisher shall credit your royalty account with the following royalties with respect to its exploitation of the compositions throughout the territory.

- *Mechanical income.* 75 percent of net income derived from publisher's exploitation of the compositions for use in

phonograph records (except that publisher shall pay you 60 percent of such net income derived from cover recordings).

- *Synchronization and commercials income and video uses.* 75 percent of net income derived from publisher's exploitation of the compositions in commercials, motion pictures, television programs, videos and other audiovisual works.

- *Public performance income.* 50 percent of net income derived from the publisher's share of public performance income collected by publisher with respect to performances of the compositions.

- *Other income.* 75 percent of net income derived from publisher's exploitation of the compositions not specifically referred to in this paragraph, including, but not limited to, print income.

The elements to which a copyright interest in a musical composition may be claimed are lyrics and melody in equal parts.

This agreement provides for a straight-percentage payment to the writer from all net publishing income collected by the publisher. It splits the "publisher's share" of public performance royalties 50/50 between the writer and publisher but does not address the direct payment of the "writer's share" of public performance royalties to the writer by the applicable public performance society. Instead, it creates an exclusion in the section that grants administration rights to the publisher:

Administration

With respect to the compositions, publisher and its licensees will have the

sole and exclusive right and license during the term and retention period throughout the territory to

- Collect all monies payable during the term and the retention period with respect to the compositions and all performance royalties payable to you with respect to the compositions by ASCAP, BMI or any other applicable performing rights society, but excluding any songwriter share of public performance income.

Further simplification is apparent in the pure administration agreement, although in such cases the publisher's function is generally limited to that of a collection agent. The following excerpt from another recent major music publisher's administration agreement provides streamlined royalty payment language:

Royalties

Provided that you have fully complied with all of your material warranties, representations and obligations provided for in this agreement, publisher shall credit your royalty account with the royalties specified in this paragraph with respect to its exploitation of the compositions throughout the territory.

- *Public performance income.* 90 percent of net income derived from the publisher's share of public performance income collected by publisher with respect to performances of the compositions.

- *Mechanical income.* 90 percent of net income derived from publisher's exploitation of the compositions for use in phonograph records.

- *Synchronization and commercials income and video uses.* 90 percent of net income derived from publisher's exploitation of the compositions in commercials, motion pictures, television programs, videos and other audiovisual works.

- *Other income.* 90 percent of net income derived from publisher's exploitation of the compositions not specifically referred to in this paragraph, including, but not limited to, print income.

Much like the modern 75/25 copublishing agreement, the direct payment of the writer's share of public performance royalties to the writer by the applicable

public performance society is not mentioned and the publisher's right to collect it is excluded:

Administration

With respect to the compositions, publisher and its licensees will have the sole and exclusive right and license during the term and retention period throughout the territory to

- Collect all monies derived from any source whatsoever during the retention period with respect to the compositions, but excluding any songwriter share of public performance income.

Resolving the dilemma

The elements to which a copyright interest in a musical composition may be claimed are lyrics and melody in equal parts. A practical issue often arises where multiple songwriters (as well as nonwriters) collaborate in business (such as rock bands). A fair and reasonable arrangement to split publishing income among them needs to be devised.

This dilemma may be creatively resolved in several ways. First, publishing income, regardless of the source, can be equally divided among the band members. If the contribution to writing is not equal, this option may not be acceptable. A solution in such a case may be to recommend that nonwriters or nonsubstantial writers receive a predetermined flat percentage (anywhere from 5 percent to 20 percent) of all publishing income, other than the writer's share of public performance income and that the major writers take a larger share of the remainder. The writer's share of performance income would be paid only to the actual writer(s) of the compositions, in the true percentages of authorship.

Other bands may prefer that performance royalties as a whole (that is, both writer and publisher shares) be paid only to the actual songwriters. Finally, in the case where a band is formed and run by a strong singer/songwriter, the remaining band members may receive no share of the publishing income unless they actually write. This is an option (and most often the choice) in situations where the other band members are viewed as employees ("side-men") and are just paid a salary.

Of course, anything can be negotiated or renegotiated. Publishing shares may

be increased and former nonwriter members may begin to write. If the band is successful and the founding members want to keep the rest of the band content, they will often increase the benefits by enlarging their shares of the publishing pie. Additionally, one must keep in mind that, if a publishing agreement has been entered into with a third-party publisher, there will be considerably less publishing income to divide.

Because the concepts of a writer's share and publisher's share have developed more through custom and less by way of statutes and precedent, the nature of their application in an aggressively evolving, entrepreneurially and technically fueled industry makes a basic understanding of these concepts even more vital.

Endnotes

1. 17 U.S.C. § 106.
2. 17 U.S.C. § 102.
3. 17 U.S.C. § 201(a)-(b).

4. 17 U.S.C. § 106(1).
5. 17 U.S.C. § 106(3).
6. 17 U.S.C. § 106(4). Although not addressed here, 17 U.S.C. § 106(6) (as amended) now grants to the copyright owner of a sound recording the exclusive right to publicly perform such sound recording by means of a digital audio transmission.
7. 17 U.S.C. § 115(c).
8. 17 U.S.C. § 115(c)(3). The Digital Performance Right in Sound Recordings Act of 1995 (codified as amended at 17 U.S.C. §§ 106(6), 114, and 115) grants exclusive performance rights to copyright owners of sound recordings that are digitally transmitted and provides certain limitations of such exclusive rights, as well as licensing procedures and provisions for the allocation of royalty proceeds from digital transmission licensing.

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The Lighter Side



GREGORY

"As your attorney, I must strongly advise you against bringing the high heat."

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