

## **The Language of the Music Business**

By Alan S. Bergman

In any negotiation, knowing the language and being able to communicate effectively with other professionals is half the battle in getting a deal done. A music business negotiator who knows the right words to use immediately establishes his or her own creditability and conversely, not using the right term to describe something is a dead giveaway for the amateur.

This month I will list some of the basic terms used in the business with some definitions. We will start with the area of Music Publishing.

**Publishing:** This encompasses the whole area of administering and exploiting musical works, not just Print Rights, which are just that, rights that relate to the exploitation of a work in printed form like piano vocal, folios, arrangements, or orchestrations which may be accompanied by audio or audiovisual components. Mechanical Rights relates to administration of recordings. The Mechanical License is the agreement whereby the music publisher licenses the record company to record and sell copies of that work and pay a royalty which is called the Mechanical Royalty Rate. The upper limit of this negotiated rate is set by the Compulsory License Provision of the Copyright Act. As of January 1, 2002 this Statutory Rate is 8¢ per five-minute (or less) composition and 1.5¢ per minute for compositions in excess of five minutes.

Subpublishing means the administration of rights in a publishing Catalog via a license from the Original Publisher. Subpublishing usually relates to administration and exploitation outside the Original Territory of the United States. Subpublishers abroad administer those Copyrights, which is how we usually refer to the musical compositions, which are the subject of the agreement in the same manner as the original publisher in the United States administers mechanicals, performances, and Synchronization Rights. These are the rights licensed when a work is synchronized with film, videotape, or digital media, like encoding it on a website. Co-Publishing occurs when you have more than one publisher and that arises usually when there is more than one writer on a work. Each writer then has his or her own publishing company who together are Co-Publishers. This co-publishing arrangement can be on a Co-Administration

basis, whereby each half or proportion is separately administered by the owner of that portion. You can also have a Co-Publishing Deal where one of the two or more publishers is the administering publisher, thereby simplifying the process of administration.

Agreements between original publishers and subpublishers abroad can be on a Collection Deal basis, or a Subpublishing basis. In a collection deal the job of the local publisher in the foreign territory is merely to collect income, usually on the artist's own records where the writer is a recording artist too. Major artists like Neil Diamond, Bob Dylan, or Paul Simon would have collection deals since most of their income is from their own records. In this deal the collection percentage is low usually 15% but for major artist/writers like those mentioned above it can be 10% or even less. In the case of a writer who wants other artists to record his songs, a subpublishing deal is more likely. Here the subpublisher is called upon to obtain Territory Originated Recordings, which are recordings by artists in the local territory. In a subpublishing deal, the subpublisher will get a higher percentage of income than in a collection deal since it is obvious that the subpublisher contributes more to the project by actually generating recordings rather than merely collecting on the original publisher/artist's own recording when they are released in the foreign territory. Subpublisher percentages are usually 20% but can range as high as 25%. But when a territory originated recording is obtained, these agreement provide for a 50-50 split on income earned by that recording as a reward for the Subpublisher's efforts.

Subpublishing deals can be either on a Receipts basis or on an At Source basis. In a receipts basis deal you are usually dealing with a publisher who does not own its own foreign affiliates and deals with independents in each territory. This is contrasted with an at source deal made with a multinational publisher company like EMI or Warner/Chappell. In an at source deal, if the original publisher is entitled to 50% of income, that is income earned at the source in the local territory. In a receipts deal, if the local publisher keeps 50% of income earned in the territory, the remaining 50% is paid to the original publisher in the United States and the writer or co-publisher participant shares in the share coming back to the U.S. It is obvious in this case that the multinational is at an advantage because they own their foreign affiliates and therefore can afford to pay at source, thereby generating more income to the original publisher in the United States. There is however a downside in this situation when a multinational company owns its affiliates in countries or territories outside the United States. Although it can pay at source it

also can Cross-Collateralize royalties from country to country against advances paid in the original territory. This means that the original publisher can deduct these advances from earnings in any territory in the world. In the other situation, where you are an original publisher dealing with independent publishers in each territory, you may very well get advances from each of those publishers and then those advances are recoupable only from royalties payable by those publishers, since they have no relationship with the publishers in the other territories. Therefore there are pros and cons in the receipts based deal and the at source deal.

Royalty Accounting is the process whereby royalties are paid by the subpublisher to the original publisher. Historically accountings are on a Semiannual Basis meaning every six months. Be aware however that the subpublisher or any one else accounting for royalties has usually 90-120 days after the close of the semiannual period, on June 30 or December 31, to prepare the royalty statements and remit them to the original publisher.

Therefore, semiannual accountings that cover the periods ending June 30 and December 31, will not be received until April for the December 31 period and October for the June 30 period.

In the case of a subpublisher who is securing Territory Originated Recordings the agreement will probably often provide for a Period of Retention, which means that the term of the agreement (usually 3-years in the case of a subpublishing agreement) will be extended for an additional two or three years with regard to those compositions for which territory originated recordings have been secured. Again, the publisher has actually created value, obtained something didn't exist before, a local recording, and as a reward is entitled to retain control of that composition for an additional period of time before the rights revert to the original publisher.

International royalty accountings quite often involve tax ramifications to avoid Double Taxation. This means that because of a network of international reciprocal tax treaties, Income earned in the foreign territory is not subject to taxation in that territory provided that the original publisher obtains from his bank and/or the IRS (depending on the country involved) a statement indicating that the original publisher is a U.S. taxpayer. These reciprocal trade treaties promote international trade by not penalizing someone by making that person pay tax both in the foreign

country and in the United States. Obviously, this protects not only foreign payers of income, but publishers or licensors in the United States as well where the situation would be reversed.

In the short hand of music publishing contracts, countries are described in groups. Benelux means Belgium, The Netherlands, and Luxemburg. G.A.S. means Germany, Austria, Switzerland, and Scandinavia means not only Norway, Denmark, Sweden, and Finland but Iceland and Lapland too, to be complete. Those countries are grouped into these categories because the Societies who have jurisdiction cover those territories. Societies are the performing rights societies, which are the European equivalent of ASCAP and BMI, the American societies. They all have colonial origins so that SACEM, the French society, has jurisdiction not only over France, but also over those French-speaking countries of Africa, which were former colonies. Same thing for PRS, which is the English society and controls many areas where England originally ruled, including India, Hong Kong and the English speaking areas of Africa and South America.

In defining terms related to music publishing, there are terms relating to copyrights and performing rights societies, which are in common use.

Grand Rights refers to the dramatic rights in a musical composition, which usually are important in a Broadway show or even a motion picture where music is being used to advance the drama. Those rights are opposed to Small Performance Rights, which are the ordinary rights, which accrue when a recording or composition is performed or broadcast. Performing rights societies ordinarily have the right to administer small performance rights, but grand rights are almost always referred back to the original publisher.

Controlled Compositions was mentioned in my earlier article on copyright. This is a provision of the standard recording agreement, whereby the artist who is also the composer of compositions recorded under that agreement, is contractually required to license those compositions to the record company at a reduced rate, usually  $\frac{3}{4}$  of the otherwise applicable Statutory Rate. Non-Controlled Compositions are conversely those compositions that the artist records for which he/she does not control the publishing. The interplay between controlled and

non-controlled compositions is a highly complex area, which I covered in my article about the Anatomy of a Record Contract.

What happens when records are sold from one country to another? The importation of Whole Records sometimes creates a situation where double mechanical royalties are payable. When records are exported from Europe, royalties are paid in Europe since that is where they are sold. When those records are imported into the United States, the Harry Fox Agency, which controls the great majority of publishing companies in the United States, insists that mechanical royalties be paid again when records are sold in the United States. Seems unfair, but again it is a fact of economic life in the music business. The case is different when you have a Master License deal, whereby masters are actually delivered to a licensee abroad, who then presses records in that territory and sells those records locally. In that case, the mechanical royalties are paid only in Europe and the licensee then pays a royalty on the sale of records to the original master licensor in the United States. The word license connotes the transfer of a limited amount of rights as opposed to an assignment or transfer, where the entire bundle of rights is transferred. Thus you might have what is called a Master Purchase whereby a master recording and all its inherent rights are transferred to a record company, which is usually in perpetuity, in exchange for the payment of a royalty. It is also possible to have an outright sale of a master with no continuing royalty payment to the seller by the buyer, although the buyer would assume the royalty obligation to the artist. Conversely, you might have a master-lease for a limited term and possibly a limited territory.

In the United States mechanical royalties are paid at the statutory rate. In Europe and other countries of the world, mechanical royalties are calculated differently. In Europe there is an organization called BIEM, which is a semipublic mechanical collection society, which covers all of Europe. BIEM establishes a royalty rate, which is based on the PPD, which means published price to dealers. It is a constructed price somewhere between the wholesale and retail price. BIEM establishes a percentage, which now is 6½% of the PPD price. This represents the total royalty payable by the record company for all music on that record. The separate compositions are then divided up on a time basis and the 6½% royalty is allocated in that way. Comparison of

the European method with the United States method usually results in a higher royalty being payable in Europe on a per record basis.

In Europe also, the concept of returns or sales on Consignment does not exist. In the United States of course, distribution of records is on a 100% consignment basis which means that records not sold by the distributor may be returned for full credit and therefore, when records are sold and mechanical royalties are paid there is usually a Retention of Reserves. This means that a portion of the royalties are withheld because of the strong possibility (and in today's market even probability), that records which are not sold by the distributor will be returned to the manufacturer and therefore, mechanical royalties which have been paid will be an overpayment and will have to be returned to the label.

In later articles I will discuss some of the basic terms of the business dealing with independent distribution, personal management and personal appearances. Remember, using the right descriptive word is essential for the professional. Say it right and you are way ahead of the game in making a deal.

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