

A COMPLETELY REVISED AND UPDATED EDITION  
OF THE DEFINITIVE GUIDE TO 'MUSIC BUSINESS'

3RD  
EDITION

# MUSIC BUSINESS

A MUSICIAN'S GUIDE TO THE AUSTRALIAN MUSIC INDUSTRY  
BY TOP AUSTRALIAN LAWYER AND DEALMAKER

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This chapter is taken from the book *Music Business* by Shane Simpson

More information can be found at  
<http://www.simpsons.com.au/musicbusinessinfo.htm>

# 9

## MUSIC PUBLISHING

**THIS CHAPTER IS AN INTRODUCTION TO THE FUNCTIONS OF THE MUSIC PUBLISHER. IT DISCUSSES THE VARIOUS SOURCES OF PUBLISHING INCOME, HOW THAT INCOME IS COLLECTED AND HOW ROYALTIES ARE CALCULATED AND DISTRIBUTED.**

Music publishing is one of the oldest branches of the music industry and is central to it. Composers, lyricists, librettists, translators and arrangers (for convenience, we will generally use the term ‘writer’) all create works that need to be administered if they are to generate money. Most writers are too busy, or have no inclination, or do not have the administrative infrastructure, to get involved in the day-to-day business of keeping track of all the ways their works are used by others, so they do deals with music publishers to do it for them in return for the publisher retaining a percentage of what it collects. This is good for the writer because the publisher has a strong commercial incentive to do the best job possible. Like any relationship, both parties have to play their part; the publisher has to be as efficient and active as possible in exploiting and protecting the works, while the writer has to deliver works as and when promised and generally be an active partner in exploiting his or her own works.

You will hear the word ‘exploit’ a lot in this business. Despite conjuring up images of grimy-faced waifs in Dickensian sweatshops, it is actually just a grab-bag word to cover the multitude of ways music and lyrics can generate income for those who own and control the copyrights. Just because publishers exploit music does not mean they exploit composers (though, as in any business, there are good and bad examples of the species, which is why

writers need good legal and business advisers). Music publishing is a business. Any writer who forgets this is likely to regret the memory lapse.

## WHAT A PUBLISHER DOES

The principal functions of a music publisher may be summarised as follows.

- Publishing sheet music or licensing others to publish it.
- Persuading artists and record companies to record the copyright material that it owns or controls.
- Persuading other users of music, such as film and television producers and advertisers, either to commission new works from its writers or use its existing works.
- Collecting fees and royalties earned by the commissioning and exploitation of music.
- Promoting the reputation of its composers so that the market for their work is enhanced.
- Protecting the work from demeaning or unauthorised uses.
- Doing all the administration involved in registering, maintaining and protecting the copyrights.
- Pitching songs to record companies, film and television production companies and advertising agencies.
- Helping writers get record deals and funding demos.
- Helping writer/artists get good management.
- Giving general career advice.
- Participating in industry associations such as APRA, AMCOS and AMPAL through which they negotiate rates for the use of their works with users, e.g. ARIA, Free TV Australia, CRA and websites.

Although it is not something they see as their function, publishers have an important secondary role in that their royalty advances are also an important source of non-bank finance in the industry.

## PUBLISHING INCOME AND COPYRIGHT

There is no purer form of copyright business than Music Publishing. All music publishing income is earned through the administration, collection and enforcement of copyright. The rights of copyright are like veins through which the money flows. If you don't own or control the vein, you don't get the sustenance.

'Publishing income' is the income flowing from the composition. It includes: mechanical royalties; sale of sheet music; commissions for new works; licensing compositions for subsidiary uses such as film, television and advertisements; licence fees for the playing and broadcasting of works in public.

## RIGHTS, USES AND MONEY

You will remember from the previous chapter that the Copyright Act gives the owner of the copyright in a musical work (the composition) and a literary work (the lyrics) a number of exclusive rights. When you read the dry legislative provision (s.31) it may be hard to see how they underlie every moneymaking mechanism in the music publishing industry. But as you will see, they do.

### THE RIGHT TO PUBLISH

The most common way of exercising this right is printing sheet music. (The Copyright Act specifically says that the right to publish does not include making records or live performance.) Many musical works are never 'published'.

Money from this source is called **print income**.

### THE RIGHT TO REPRODUCE

This is the right to capture or embody a composition in a medium that allows it to be heard later. Common reproduction media include CD, vinyl, audio-tape, video, DVD, film, hard disk, memory card.

When the reproduction is audio-only, we usually refer to the tariff for making the reproduction as **mechanical income**.

When the reproduction is audiovisual (such as film, television or other forms of combining recorded music with moving images, such income is referred to as **synchronisation (or 'synch') income**.

Both mechanical and synch income, flow from the exercise of the copyright owner's exclusive right to reproduce the work.

### THE RIGHT TO COMMUNICATE TO THE PUBLIC

This right covers all the situations in which music is communicated publicly - rather than privately. It includes live performance, radio and television broadcast, and streaming, broadband or telephone line etc. This income stream is generally called **public performance income**.

### THE RIGHT TO MAKE AN ADAPTATION

This is the right to change the work. The most common example of this is the making of arrangements or transcriptions.

If you do your own arrangement of someone else's work (unless the work is out of copyright or unless you have a contract with the rights owner) you will not earn any part of the original work's publishing income. By reworking or rearranging, you don't get any ownership of the original or its income stream.

For example, if Eric Dolphy rearranges a Mingus composition, he can record it and perform it live. Dolphy would get the box office and the record royalties - but it would be the Mingus estate that gets the publishing income.

### **COMBINATIONS OF RIGHTS**

Some uses necessarily involve the exercise of more than one of the exclusive rights, at the same time.

An example of this is the digital download: The process requires an exercise of the reproduction right and the public communication right. Accordingly when a song or ring tone is legally downloaded, the composer receives mechanical and public performance income.

### **SOURCES OF PUBLISHING INCOME**

According to the National Music Publishers Association (U.S.), the latest reported world publishing revenues during 2001 amounted to US\$6.63 billion. This is not chickenfeed. The United States generated \$1.940 billion followed by Germany with \$808 million, Japan \$702 million, U.K. \$670 million, France \$549 million and Italy \$353 million. Australia/NZ was 11th in the lists with \$99 million.

Predictably, by far the most important sources were performance income (US\$3 billion) and mechanical income (US\$2.7 billion), but synchronisation income (US\$619.2 million) and print music (US\$767.2 million) were also significant contributors.

Some countries showed huge leaps (such as Croatia where, in 2001, music publishing revenue increased a massive 674% as improvements were made in the collection mechanisms, albeit off a small base.) Generally however, the total world publishing income is barely keeping pace with inflation.

1999	\$6,429.4 (+2%)
2000	\$6,877.3 (+6.7%)
2001	\$6,626.8 (-4%)

Since then, although the figures are not available at the time of writing, it is likely that with the worldwide contraction in record sales, the related publishing income has also reduced.

It is sometimes said (inaccurately) that publishers are the banks of the music industry, but during the same period, the banks did a lot better than that.

### **SHEET MUSIC**

Although the publishing of sheet music used to be a publisher's primary activity and source of revenue, this is no longer so. The advances of technology over the last 50 years have superseded the publication of sheet

music as the primary means of distributing music to the public. However, although the sale of sheet music has been swamped by records, tapes, downloads and CDs, it remains a multi-million dollar business. US\$767.2 million ain't bad!

A large percentage of print music is sold to schools and other educational institutions. Further, sheet music is still hugely important to classical music publishers in that hundred of thousands of students and professionals learn and play this genre of music. A Messiaen quartet is not something you can learn just by listening to a record.

## **MECHANICAL RIGHTS INCOME**

These days the single most important source of income for publishers (and therefore for composers) from the reproduction of their works, is 'mechanical royalties'. Basically, the payment of mechanical royalties is the way that composers share in the income that recording artists and record companies make from the use of their material.

### **WHAT ARE MECHANICAL ROYALTIES?**

The mechanical royalty is the royalty paid to the owner of the copyright in music (or the lyric) in return for the licence to include that work on a record.

It is called a mechanical royalty because, in the days before records, the main method of reproducing songs was music boxes and later on player pianos using piano-rolls. (They truly were mechanical devices.) In the early Copyright Acts these were referred to as 'mechanical devices'. A royalty was paid to the composer for the right to put his or her music on a player piano roll. Thus the term 'mechanical royalty' was introduced and stuck. It was introduced to break the monopoly that certain piano-roll makers were getting over popular songs by securing an exclusive right to reproduce the song on piano rolls.

Although mechanical royalties were a modest source of income in the early part of last century, it was not until modern means of technological reproduction permitted truly mass distribution and sales that the mechanical income became the flow of gold that it is today. (It is ironic that mechanical income became important because the means of reproduction was in fact electronic rather than truly mechanical.)

'Mechanicals' (used in this context) is an industry term rather than a legal term and is not technology specific. After all, the CD process is a digital one, not mechanical but we still use the term to describe the right to use a composition on a CD. But what about digital downloads? Thanks to the Digital Agenda Amendments to the Copyright Act, it is now clear that

mechanical royalties are also payable in respect of digital downloads.

Now that digital downloads are an increasingly important form of distribution, it is important to note that the process of downloading involves the use of two distinct rights: the communication right (through transmission on the internet) and mechanical reproduction right. Consequently, both mechanical and performing royalties are payable.

It is not too cynical to suggest that the potential for income from mechanical royalties has been the greatest single reason for the development of the singer-songwriter in the last thirty years. The Gershwins, Rogers and Hammerstein, Cole Porter and most of the great names in popular composing between the 1920s and 1930s, made their fortunes by writing primarily for others. Virtually all of them had their songs popularised by someone else's performances. The Tin Pan Alley-style songwriter, who sat at a desk and turned out songs for others to perform and record, suffered for a while, but songwriters such as Leiber and Stoller, Goffin and King, Burt Bacharach/Hal David and others like them who all specialised in writing songs for major artists, had a revival in the 1970s and early 1980s. They made a more than comfortable living by writing songs for major artists such as Elvis Presley, Frank Sinatra, Whitney Houston, Celine Dion, Cher and John Farnham, who are not themselves composers.

## COVERS

Although only the owner of the copyright in the composition can authorise the first release of a record, when that has been released on a record provided that the mechanicals are paid, anyone can record a 'cover'. This is a right granted by the Copyright Act and it is known as the **statutory licence**.

You often hear people say that a certain musician performs 'all originals'. To the outsider, this is not particularly helpful as they might quite properly assume that all material is original to somebody. In this context, however, it simply means that the material was written by the performer. On the other hand, in the publishing business, the term 'cover' means a musician's performance of material written by somebody else. Carl Perkins (who wrote 'Blue Suede Shoes' while he was a young session musician with aspirations to fame) had a car accident on the way to the studio to record 'his' song. In hospital, he had the disconcerting experience of hearing Elvis' version hit the air before he could record his own. It was another example of the 'cover' finding the success. By the time Carl Perkins recorded the song, everyone assumed he was covering the Elvis hit. Still, in the world of music publishing, no one had cause to cry. Perkins might not have sold a lot of records but he certainly made a lot of money from the mechanicals earned from Elvis' success. (The Perkins incident is not likely to happen in Australia because the

composer has the right to make or authorise the first release of the recording. This right is given to the publisher under the publishing agreement and the publisher would move to stop the ambush release.)

A publishing agreement for a singer-songwriter must contain different terms to those for a songwriter who is not a performer. For the former, it makes sense to distinguish between songs they release and popularise and versions of those songs recorded by others, but for the latter the distinction is meaningless. If a composer does not record and release his or her own songs then, in a sense, every release is a 'cover'. To get over this, the publishing contract should not have a wide (or perhaps, any) royalty differential between 'originals' and 'covers'. (In such a case, the only important distinction in the royalty clause should be whether the cover is secured by the writer or the publisher.) However, in these cases, because the writer has no natural outlet for his or her material, the general royalty rate will usually be less generous.

Given that mechanical income is paid regardless of who is recording the work, it is clearly to the composer's advantage to have as many people as possible record that work. The more versions recorded, the more potential sales and the greater opportunity to earn mechanical royalties. If it is true that 'River Deep Mountain High' has been recorded by about 250 different artists, you can imagine that the mechanical income from that one song is a fortune.

Dolly Parton's song 'I Will Always Love You', which was a huge hit for Whitney Houston in 1993, almost certainly made Dolly more money as a 'cover' than Dolly's own version. According to industry legend, at one stage the Whitney Houston version was outselling the combined sales of the other ninety-nine records in the US Top 100 Singles Chart.

Publishers would always like to be more successful at getting recording artists to record the work of third party writers but, in Australia, the opportunity for placing a cover is restricted because the cult of the singer-songwriter is so very strong here. It is not uncommon to hear musicians speak unkindly of performers who do covers. It is (quite wrongly) perceived as some kind of indication of inferior talent even though, in recent times, the best selling Australian recording artists have been artists such as John Farnham, Jimmy Barnes, Anthony Warlow, Guy Sebastian and Kylie Minogue, to name only a few, who have mainly recorded other people's songs. Ask Joe Cocker about the value of covers - he even made a Beatles' song his own! All of these performers have attained huge sales of albums featuring material written by others, proving that a good song will always justify being recorded, no matter who writes it.

It is no wonder that when one of these artists prepares for a new album, the publishers get flushed with excitement. If they can place just one of their songs on a platinum-selling album in Australia, it is likely to be worth about

\$10,000 in mechanicals alone, not to mention the likely public performance income if it gets airplay too. If they can get a cover on the record of a best-selling international artist, the royalties from just one album track can be many times more. Even the 'B' tracks on a single are valuable, because, although they earn no performance royalties (assuming they don't get airplay), the amount of mechanical income they earn is identical to that of the feature track.

If a cover of your song is included on a 'Various Artists' compilation album you will be paid your mechanical rate, pro rata to the number of tracks on the album.

Of course, sometimes the owner of the copyright in a work does not like the cover version. There are many dire covers of fabulous works. However, provided that the cover artist pays the mechanical royalty to AMCOS, there is not much that the owner can do. The only angle is to argue that the cover is a 'debasement' of the original work and therefore not allowed under the statutory licence. In 1996 we saw Australia's most important case in this field: *Schott Music International GmbH v. Colossal Records*.

In that case, a Spanish group had done a techno version of 'O Fortuna' from the classical work 'Carmina Burana' by Carl Orff. The publishers of Carmina Burana sued on the basis that the new work was a debasement of the original and was therefore outside the terms of the statutory licence. Justice Tamberlin's judgment in the Federal Court, which was upheld on appeal, will be the benchmark for similar cases in the future. He extensively discussed the meaning of 'debasement'. Essentially, he decided that the term 'debase' calls for a value judgment based on a significant lowering in integrity, value, esteem or quality of the work. This, he decided, had to take into account the broad spectrum of taste and values of the community (not just those of the composer or a limited section of the musical industry). At the end of the day, the court had to decide whether the adaptation of the original was so extensive, detrimental or inferior, as a whole, which it amounted to a debasement. (See (1996) 36 IPR 267 at 274). He decided that the techno version was not a 'debasement' and was therefore covered by the statutory licence. The permission of the widow Orff was not required. So long as the record company paid the mechanical royalty, the record was legal.

(Although the judge was at pains to say that the case was not about Moral Rights, now that Moral Rights legislation has been introduced in Australia, we will see Justice Tamberlin's arguments once again put to the blowtorch. Given that there are no other cases on the meaning of 'debasement' in Australia, it will be of considerable importance.)

## **SYNCHRONISATION IN FILM OR TELEVISION**

All films and television programs use music on their soundtracks. To allow them to do this, the film producer must obtain what is known as the 'synchronisation rights' to the music. (This is the case whether the film is intended for theatrical or non-theatrical exhibition, transmission by cable or closed circuit, for television or whatever.) It is called the synchronisation right because the producer is synchronising the music with the moving images.

Producers have a choice; they can either use so-called 'production music' (also called 'library music' or 'mood library music'), commission a composer to write new music for the film, or license particular tracks of material which has already been released on record. Sometimes a producer may use a combination of all three.

### **USING PRODUCTION MUSIC**

Production music is basically an archive of generic material composed and recorded especially for use in film. If you want 'love music', 'earthquake music', 'battle music' or whatever, all you have to do is use the library's index. It is owned by the publisher and, because it is not available for exclusive licences, it is generally quite cheap to license. Production music, unlike other sources of music, is licensed at fixed rates for particular uses.

You select the material you want and pay for the amount you actually use. The licensing is done through AMCOS. Between 2002 and 2005, the amount of production music licensed by AMCOS increased by 75%.

### **COMMISSIONING OF ORIGINAL SOUND-TRACK MATERIAL**

The commissioning of new works for use on soundtracks is very important to the financial health of many composers. Composers are sometimes commissioned to write just one featured song, or to write the whole soundtrack, or to write the sound-track plus supply the fully leaedered and cued sound recording of the commissioned music.

If you have signed a standard term agreement with your publisher, you will probably have assigned to the publisher all rights in the works you compose during the term of the agreement. Accordingly, if a producer approaches you directly, you cannot legally commit to the deal before discussing it with your publisher and getting the publisher's approval. Not only is this legally correct (because you may not have the necessary rights to do the deal yourself), it is commercially sensible. Your publisher may be more knowledgeable about the going rates and terms for such deals and may well have greater bargaining power. For example, the publisher might be able to

offer assistance from its affiliates in other territories to help publicise the film or, in some other way, convince the producer to improve your deal. Negotiations and final agreement for film commissions must be between the publisher and the film producer, rather than with you, though you can obviously assist in the negotiations.

#### LICENSING PRE-RECORDED AND RELEASED MATERIAL

The third choice, licensing the use of material that has already been released on records, has been used for decades, particularly for use over opening and closing credits. During the last 20 years, however, there have been many hugely successful movies that have moved the music up from the background and made it the centrepiece of the film. Examples like ‘Saturday Night Fever’ (the biggest selling soundtrack of all time), ‘Titanic’, ‘Romeo + Juliet’, ‘Reservoir Dogs’, ‘The Bodyguard’ and ‘8 Mile’, show the commercial attractiveness of combining popular and familiar music with the story-telling capabilities of movies. Apart from anything else, it creates a wonderful opportunity to sell the soundtrack album, which can turn a break-even film into a commercial success.

For further discussion, see the Chapter 30, **Music in Advertising** and Chapter 31, **Music in Film**.

#### THE PROMOTION OF THIRD PARTY GOODS AND SERVICES

Those in the marketing and promotion business have for many years realised that an association with music can enhance the image of the service or product that they wish to promote. Many composers make their entire living (and a very good living too) writing jingles for radio and television advertisements and other corporate promotions.

More recently there has been a great increase in the amount of licensing of standards or hit songs from the not very distant past for this purpose. ‘I Still Call Australia Home’ has obvious appeal for a Qantas commercial and ‘Who Wants To Be A Millionaire’ was a natural for Lotto.

Classical music has become rather more popular with advertisers since the ‘Three Tenors’ video and CD was so successful. Advertising agencies love using classical works to enhance the ‘class’ of products. The fact that most classical works (though not the recording itself) are out of copyright and so can be used free is, of course, entirely incidental. A word of warning though: particular arrangements of very old classical pieces may still be in copyright, so never assume a work is out of copyright. Always check carefully first, to avoid a nasty surprise.

Until recent years, most publishers in Australia had a reactive approach to this income source. They would wait for an advertiser to approach them for permission to use a song, rather than chase the advertiser. In the last decade though, this has changed. Now, all of the major publishers have hired Licensing Managers to promote actively the use of their catalogue by advertisers. (In the US there was a species of song salesmen called ‘pluggers’ because they went from studio to studio, plugging a publisher’s songs to name artists, to get them to record the publisher’s song. That doesn’t happen any more. The business has become more sophisticated.)

Whether or not composers are prepared to allow their material to be used this way, is a matter for negotiation when entering the publishing contract. Most, quite rightly, want to maintain some control (see Chapter 13, **Common Clauses In Publishing Deals**, where it deals with artistic control).

## COMMUNICATION TO THE PUBLIC

Every time copyright music is performed in public or broadcast, a royalty is payable to the copyright owner for that use. Because it would be impractical and too expensive for individual composers to collect the fees, composers and publishers formed companies to administer the public performance and broadcast rights on their behalf.

In Australasia, the Australasian Performing Right Association (APRA) performs that role. APRA is a non-profit company, established by copyright owners (both publishers and writers) to administer public performance of music. APRA’s role is dealt with in detail in Chapter 26, **Collecting Societies** but, in brief, it operates by having its members assign to it the right to perform the composition in public and to communicate it to the public (including by way of broadcasting). That way, it can grant licences and collect fees from a wide range of public users of music such as radio and television stations, shopping arcades and venues. The money collected is then placed in revenue pools (e.g. commercial radio income, ABC concert, etc) and distributed according to each work’s share of the total performances.

Every composer should be an APRA member. To do so, you must either have had your songs performed or otherwise exploited, or have a contract with a publisher which is a member of APRA or one of the equivalent bodies overseas which are affiliated to APRA.

The rules of APRA provide that no less than 50% of the income collected is to be paid directly to the writer. Accordingly, the writer gets a minimum of 50% of the APRA income. In practice, there are very few 50/50 deals. Most publishing agreements grant the writer a greater split of the APRA income. How this is described in the agreement will vary from contract to contract but it is common for a publishing agreement to say something like the following:

*The Writer will receive 70% of the gross fees paid by the collecting society in relation to performing rights in the Compositions (it being understood that you will receive 50% of the gross directly from the collecting society and 50% will be paid to us, of which we will pay you 40%.)*

It is simpler than it looks: The gross income is 100%. The collecting society directly pays the writer the minimum 50%. It pays the publisher the other 50%. However, if we assume the contract specifies that the writer is to receive 70% of gross public performance income, the writer is still 20% short. This comes out of the 50% paid to the publisher. Given that the publisher has been paid 50% of the gross it must pay or credit the writer with 40% of that amount (40% of 50% equals 20% of the gross amount) to bring the writer's receipts up to 70%.

The 50% share paid by APRA directly to the writer is a 'minimum'. It is perfectly possible to negotiate a deal with the publisher whereby the writer is paid its full percentage directly by APRA. However, this is uncommon for two reasons:

- *First*, publishers need to recoup their advances: although they can't touch the 50% minimum paid direct to the writer, they can use the balance to recoup any outstanding advances. Using the same example as above, if the writer was unrecouped \$50,000, the publisher would not actually pay the additional 20% of gross in royalties. Instead, it would credit that amount to the recoupment of the advance.
- *Secondly*, even if there is no advance to be recouped, it means that the publisher will have the use of the money (and thus the interest on it), for several months, until the next accounting is due to the writer. (Even in this era of low interest rates, six monthly accounting means that considerable sums are earned by publishers from the interest on the writers' share of revenue.)

This means that even if you are heavily unrecouped with both your record and publishing company, if you are doing a lot of live work and you make sure you submit your APRA Returns at the end of each live performance, your APRA cheque can be quite substantial. (How this is collected, calculated and distributed is discussed in some detail in the next section.)

## **SUNDRY INCOME**

All publishing agreements have (or should have) a clause relating to sundry income - all the bits and pieces that don't fall in the major categories already discussed. This is the catch-all category.

Sundry income is derived from (say) the hiring of the orchestral parts of a full score or licensing a newspaper to publish the words of a lyric or a

clothing manufacturer to print lyrics on a T-shirt. If and when a 'recordable CD royalty' is introduced in Australia, the publishing share of that income will be classified as sundry.

## **COLLECTION, CALCULATION AND DISTRIBUTION OF PUBLISHING INCOME**

### **SHEET MUSIC**

In the popular music field, most publishers in Australia do not even publish sheet music. Most issue a print licence to other publishers such as Music Sales, Allans or Hal Leonard that have specialist skills, to manufacture and distribute it on their behalf. This is simply because of the high cost of specialist printing, administering the publication, warehousing and distribution. It makes commercial sense to minimise the overheads and license a specialist to do the task, underwrite the costs and to run the commercial risks. (Before 2001 and the intervention of the Australian Competition and Consumer Commission, two competitors in the field, Music Sales and Warner/Chappell, wished to share warehousing and distribution (the non-competitive aspect of their businesses), and compete on the input and sales area. The ACCC said no: to do so would be anti-competitive. So Warner/Chappell withdrew from all print distribution in Australia, saying that anyone could import their material from now on - provided that they bought it from Warner/Chappell Florida! So much for the effectiveness of the ACCC approach. Thank god for we consumers that purity of competition ideology has been maintained.)

Print licences can be restricted to the publication of single works, special 'mixed folios' or may encompass the whole catalogue of the publisher.

For example:

- Company A and Company B enter a print licence.
- Company A (the licensee publisher) prints, distributes and administers the sheet music and as well, collects, accounts for and pays through the royalties due to Company B (the licensor publisher).
- Company B merely supplies the compositions (and the necessary rights) and receives its share of income from Company A.
- Depending on the deal, Company B will either pay through to the writer a share of that income or may have Company A perform that function as well.

The writer's share of sheet music income is usually based on a royalty between 10% and 14% of the recommended retail price of copies sold. Where the music is included in a folio (i.e. a collection of works), the royalty is reduced

in proportion to the number of 'your' works in the edition. The publisher meets the cost of printing, distributing and promoting the material.

Although publishers usually process their sheet music sales invoices on a monthly basis they will not account separately for sheet music sales. This is not negotiable. Accounting for sheet music sales will be included in the usual six monthly royalty accounting statement.

### **MECHANICAL INCOME FROM RECORDS**

The Copyright Act 1968 (ss 54-64) provides that the mechanical royalty rate will be:

- (i) *the royalty agreed between the manufacturer of the record and the owner of the copyright in the musical work; or if no agreement can be reached,*
- (ii) *an amount determined by the Copyright Tribunal; or*
- (iii) *if no such agreement or determination is in force, 'an amount equal to 6.25% of the retail selling price of the record'.*

This is referred to as 'the statutory rate'.

In New Zealand the rate is 5.6% of the recommended selling price of the recording (excluding GST).

Although the Act sets the basic rate, the rate can be varied by contract. For many years there was in place an agreement between the Australian Mechanical Copyright Owners Society (AMCOS) and the Australian Record Industry Association (ARIA) to vary the statutory rate that applies to ARIA members. It was a complex agreement, one that was negotiated hard. Perhaps because it was so hard to come to terms, as from January 2006 the old approach was abandoned, and AMCOS has introduced its own Physical Product Licence Scheme.

The most obvious changes to the statutory scheme are that the rate is lower and more flexible and that the percentage is based not on the retail selling price (RRP) but on the PPD (the published price to dealer - the maker's listed wholesale price to dealers.) These days it is easier for both parties if the rate is calculated on the PPD because the retail price can vary so much. The current mechanical rate, calculated on PPD, is 8.25%. Where there are a number of tracks on the recording, the mechanical royalty is divided equally between each musical work. (This is referred to as 'pro rata per track' in contrast to 'pro rata by time' where the longer tracks attract larger fees than shorter ones.) If one of the tracks on the recording is a medley, each song in the medley receives a pro-rata share of that track. Therefore an album with 12 tracks where one of the tracks is a medley of three songs, the medley track receives  $\frac{1}{12}$  and each song in the medley gets  $\frac{1}{3}$  of that  $\frac{1}{12}$ .

## MECHANICAL INCOME PAYABLE IN OTHER SITUATIONS

Although the manufacture and sale of recordings is the most important, there are a huge number of different situations in which a mechanical licence is required from AMCOS. Some of these include:

- (i) **Demo/Audition:** Audio-only recordings specifically designed for submission to music publishers, record companies, artists, orchestras, bands, etc. to promote the artist and/or composer's work appearing on the recording.
- (ii) **Background Music:** Audio-only recordings made specifically for your own use as background to a performance or other event. These recordings cannot be used for advertisement purposes or for the purposes of promotion of an event or product. Background music licences are also obtained by pubs and shops and other businesses that recognise the importance of music (and in particular, the right music) to their customers and thus to their profitability
- (iii) **Educational:** Audio-only recordings made by an educational institution where the recordings are made available free of charge to the students. Where the institution intends to sell the recordings to students, such recordings come within the 'for retail sale' category. Where a person is making recordings for an educational purpose and supplying them to educational institutions or their students, again such recordings come within the 'for retail sale' category.
- (iv) **Premiums:** Where the record is going to be given away to promote a product (such as a magazine) the specific approval of the publisher will be required. AMCOS cannot grant a licence or nominate a fee. You must get the publisher's approval (see below).
- (v) **Ringtones and Downloads:** When musical works are sold as downloads or used as mobile phone ringtones, reproduction and communication rights are both being exercised. To facilitate the process, APRA and AMCOS operate joint licence schemes. The current mechanical rate is 6.25% of retail price (ie what the consumer pays for the download.) An additional 1.75% of retail price is payable for the transmission of the work to consumers. So the total publishing royalty applicable to downloads is 8% of retail price.

## THE MECHANICAL LICENCE PROCESS

Since 2001, mechanical licensing has been done electronically, replacing the old paper-based system that was so complex, inaccurate and time consuming. It uses the copyright information stored in APRA/AMCOS' extensive works

database, Copyright Management System. It works for large and small record companies alike.

## **REPORTING THE USE**

For each new release clients must submit the same information - including details of the production as a whole (title, artist, catalogue number, etc) and of each track featured on the production (track title, writers, etc). A matching algorithm processes the information submitted and either links the tracks to existing works in the database or creates new records. The results of this are checked manually and then made available to publishers to view and to make claims online.

## **CLAIMING THE WORK AND THE ROYALTY**

Any publisher who claims ownership or control of any part of the mechanical right of the work must make its claim within 10 working days and, if its permission is required, must state whether or not the intended reproduction is permitted. The publisher's permission is only relevant if recordings of the particular work have not previously been released. This is the so-called "first use" right and it applies equally to songs and instrumental works.

To explain, let's assume a publisher controls the song. (The right belongs to the composer if the work has not been assigned to a publisher.) If this recording will be the "first recording" of the song, then the publisher may withhold permission to make the recording. However, once the first recording of a particular song has been released, the Copyright Act provides a 'statutory licence' allowing anyone to make and release records of that song provided they pay the proper mechanical copyright royalty.

If two publishers claim the same piece of music (and this does happen), the publishers have to work the "Disputed Claim" out between them - the record company just has to keep accruing the proper amount of royalty for each record it sells in the meantime.

## **ISSUING THE PRESCRIBED NOTICE**

At the end of the 10 day notice period, an initial Prescribed Notice is created. The whole process takes some 12 working days, a fraction of the time taken under the paper-based inquiry system. The Prescribed Notice shows the current mechanical ownership details. As and when ownership changes to works attached to the production occur, new Prescribed Notices are generated to reflect the new position. In this way ownership information is always kept up to date, allowing accurate allocation of the mechanical royalties.

## **PAYMENT**

The major record companies - which pay mechanical royalties directly to the publishers - can upload the latest Prescribed Notices to their copyright

systems to ensure each quarter's payments are made accurately. Non-major labels - which pay via AMCOS - are informed if the "AMCOS royalty" has changed and the transparent nature of the process allows labels to check information easily.

Then, when the label supplies the sales reports, AMCOS' distribution system splits the amount under invoice and distributes to each sharer of each work according to the details on the Prescribed Notice. It even takes into account any retention allowances and maintains an historical record of sales and returns.

One of the important terms of the AMCOS licence is that the manufacturer must supply manufacturing information to AMCOS. This also applies to manufacturers of third party product. This allows AMCOS to effectively supervise the mechanical right by comparing the figures provided by the label and the manufacturer, thus making it difficult for record companies (big and small) to under-report.

## **ACCOUNTING**

The accounting will detail the title, catalogue number, royalty rate, number of units sold and amount of royalty.

Record companies have to account to the publisher on a quarterly basis, or to be precise, within 60 days from the end of each quarter. This does not mean, however, that you will be able to persuade your publisher to account to you for your mechanicals on a quarterly basis. This is not negotiable.

## **RETURNS AND RETENTIONS**

Although the Copyright Act refers to royalties being payable on records manufactured, one of the important concessions that was negotiated into the AMCOS-ARIA Agreement is that mechanicals are in fact only paid on records that are sold. ('Records sold' is the number of records delivered or invoiced to a retailer, less the number returned.)

In order to protect the record company from excess payments of mechanical royalties, the AMCOS-ARIA Agreement allowed the record companies to retain a proportion of mechanical income that would otherwise be payable, to take into account the returns. In the United States, the retentions are frequently between 50% and 75%! This crazy situation is largely due to the fact that virtually all records are sold there on 'sale or return' (meaning the retailer can return any unsold records for a full credit), but apart from that, the American record companies tend to over-ship stock to the shops, especially if the act is touring. This means (in the dreaded record industry expression) records can 'ship platinum and return gold'!

In Australia sale or return is becoming more widespread although over-shipping tends to be due to market miscalculation rather than a

marketing technique.

There are two kinds of retentions provided in the current AMCOS licence:

#### **RETENTIONS ON STANDARD WHOLESALE SALES**

On these, a record company is allowed to keep a retention of 10% calculated on the net number of units of the record delivered during that accounting period. This is permitted for each of the first four accounting periods after a record's release. Thereafter, no retention is allowed.

#### **RETENTIONS ON SALE-OR-RETURN PRODUCT**

For records that have been distributed on a sale-or-return basis (the most usual of these being records sold in conjunction with large-scale television advertising campaigns) greater retentions are permitted.

### **THE FINANCIAL RESULTS**

The mechanical royalty can mean large amounts of money for the publisher and composer, if a record is commercially successful.

On a CD with a standard PPD of \$18.60, the current statutory mechanical copyright royalty in Australia is approximately \$1.35 per unit. If the record sells 50,000 units, the gross mechanical royalties generated are about \$67,860 in Australia alone. That amount would then be split between the publisher and the writer in the proportion set down in the writer's publishing agreement. If it were a 75/25 deal, the writer would earn about \$50,000, provided all the songs were that writer's. If there were 10 tracks on the album, and a different publisher and composer controlled each track, each publisher would receive \$6,786, of which the relevant composer would get \$5,090.

### **UNITED KINGDOM PRACTICE**

In the UK, there is no statutory rate. The mechanical royalty is set by agreement between representative organisations of the record industry and the composers.

For all European Union member states except Ireland and the UK, the mechanical royalty rate is set by a contract between the *International Federation of the Phonographic Industry* (IFPI) and the *Bureau International des Sociétés Gerant les Droits d'Enregistrement et de Reproduction Mècanique* (BIEM). The current rate is 9.306% of the wholesale price of the CD or cassette. The rates in Ireland and the UK are 7.5% and 8.5% respectively. These rates are subject to national variations and certain discounts.

## UNITED STATES PRACTICE

The USA uses what is called a 'penny rate'. It is based on a fixed number of cents not a percentage figure. The mechanical royalty rate in the USA was fixed at a low 2.75 cents per track for many years. When an escalating rate came into effect, the US record companies promptly amended their standard controlled composition clause to neutralise the increase by capping the rate at 75% of the full rate, with special provisions to cover discounted records and records which are distributed but not sold for money. The royalty will continue to increase automatically: In 2002, it was 8.0 cents; in 2004, it was 8.5 cents; and in 2006 it became 9.1 cents. It is to be reviewed in 2007.

## CONTROLLED COMPOSITION CLAUSES

For a discussion of controlled composition clauses and other caps on mechanical income imposed by record contracts, see the section on Controlled Compositions in Chapter 23, **Record Royalties**.

## SYNCHRONISATION WITH FILM OR TELEVISION

As was described earlier in this chapter, when a film or TV producer needs music, there are standard sources: Production music; original, commissioned music; and sound recordings that have already been recorded and commercially released.

### PRODUCTION MUSIC

Licences for the use of production music (which used to be called library music or mood music) are issued by AMCOS on behalf of the music publishers. Most other synchronisation licences are issued directly from the publisher. This is because most publishers have to consult their writers (or the licensor, where the songs are licensed from a third party) whenever their works are to be synchronised. Good publishers will consult this way, even if the contract does not actually require it.

The cost of licensing production music is considerably less than of the cost of licensing a musical work that has already been published (excluding the cost of licensing the sound recording that embodies that work). For producers, it is the most inexpensive way of obtaining music for synchronisation.

### COMMISSIONED MATERIAL

Even though the Australian fees are much lower than in the United States, a small documentary can still attract a commission fee of \$15,000 and a film or a television series can be worth between \$40,000 for low-budget and \$150,000

for high-end productions. Of course the fees vary enormously, depending on the budget of the production and the experience and reputation of the composer.

### **PRE-RECORDED AND RELEASED MATERIAL**

The cost of licensing such music depends on the success the song has enjoyed on record, the place of intended exhibition - theatrical or non-theatrical - and the territory of the licence sought, how often the song has been used in synch before, and the type of rights sought (i.e. the producer may also want to secure cable television, free television and home video rights but not, usually, rights for the use in games). Each kind of use attracts an additional fee.

Expect the synchronisation rights for million-sellers to cost more than those for songs that stiffer, assuming comparable use in the sound-track (i.e. featured or as background). Theatrical costs more than non-theatrical and 'world' rights cost more than Australian rights. This said, as only the roughest of guides, the licence fee for world theatrical rights can be between \$1,400 and \$2,500 per 30-second grab, but the rights to 'contemporary standards' can cost a lot more than that.

Producers should ask for a quote from the publisher for each of the rights. Then, the producer can secure and pay for the rights 'as needed' at the agreed quoted rate, rather than buy them all up front. This is common when securing rights in sound recordings, but seems less common when licensing from publishers. (Note however that it is usually more expensive to buy the rights piecemeal.)

### **THE PROMOTION OF THIRD PARTY GOODS AND SERVICES**

Licences for use of songs in commercials and the like are granted by the music's publisher. Before granting such a licence, it is standard practice for the publisher to consult with the writer and obtain his or her consent to the use. Some writers object to their songs being used to promote certain types of goods. It was only a dozen years ago that any of the Lennon-McCartney songs were licensed for advertising uses.

The fee is negotiated directly with the music publisher. The rates charged will vary according to the success enjoyed by the song, the reputation of the writer, the nature of the product that wishes to associate itself with the song, the territory, the duration of the promotional usage, the intended audience, and how determined the intended user is to secure the rights. Even in Australia, national advertising campaigns have been known to attract fees well in excess of \$500,000 for a 12-month licence. In larger markets, the fees can be much greater.

## COMMUNICATION TO THE PUBLIC

Every time copyright music is performed in public or broadcast, a royalty is payable. Most 'public performance' of music is licensed by APRA (discussed briefly earlier in this chapter).

As soon as a publisher enters the contract with a writer, it will notify APRA that it controls the works of that writer and notifies it of income splits.

### LICENSING OF USERS

APRA has established a network of 'blanket' licences with the users of publicly performed music: radio stations; television stations; ring tone providers; digital service providers; webcasters; live music venues; halls; function centres; aerobic and fitness classes; film screenings; churches; schools; sports stadia; jukebox and video jukebox operators; public transport operators; cinemas; dancing schools; electrical appliance shops; dance clubs (including mobile discos); skating rinks; background music users and so on. This can amount to big money: Although the organisers tried to negotiate a voluntary licence for the inclusion of music in the Olympic Games, after difficult negotiations, the APRA fee was rumoured to be in the vicinity of \$100,000.

The manner of calculating how much will be payable to APRA for the right to publicly perform music depends on the type of use. Each type has a different formula. There is no point in detailing all of these formulae here, but generally they are based on a percentage of gross income. Some examples follow.

- **Cinemas:** A licensee will pay a fee of 0.55% of net box office receipts revenue (this rate is currently being reviewed by the Copyright Tribunal).
- **Dance Parties:** Dance Parties with a box office, i.e. ticket sales, are generally licensed on APRA's Dance Party Licence. Fees are calculated at 1.859% of gross box office receipts (1.69%+GST) or 10.791 cents per person admitted (10.89 cents +GST) whichever is greater. Licence fees are generally paid after the event, but in some cases an advance payment is required. APRA may also request a lists of the works played by each DJ on the night. The play lists are important because they allow APRA to identify the composers who should receive royalty payments. If your dance party is free to the public, you still need to take out an APRA licence to play copyright music. The licence fee is calculated at 10.791 cents per person admitted to the party with a minimum fee of \$38.50.
- **Jukeboxes:** \$119.19 per annum plus \$1.07 per additional speaker.
- **Live Musical Performances:** Either 2% of gross annual expenditure upon all performing artists or where admission fees are charged and

collected by performers or their agents, 1.5% of the gross annual sums paid for admission.

- **One-off Concerts:** 1.5% of the gross admission receipts.
- **Jingles:** Public performance royalties are paid for music used in radio and television advertisements. How they are calculated depends on whether the advertising campaign is local, state or national, frequency of play and so on.
- **Commercial TV Services** (including local stations): A negotiated, industry-wide, lump sum.
- **Commercial Radio:** a new scheme started on 1 January 2000. Monthly fees are based on a percentage of the station's gross advertising revenue which varies between 0.4% and 3.5% depending on the proportion of APRA works broadcast as a percentage of total airtime. Stations provide quarterly reports detailing songs played and number of times per quarter.
- **Subscription TV Services:** These pay a fixed rate of 28.5c per subscriber per month irrespective of number of channels per service. Commercial premises (businesses, pubs and hotels) pay a higher monthly rate. This scheme is under review too.
- **Community Radio and TV:** For these licences, fees are assessed on licensees' music usage, grant revenue and the split of their income between exempt and non-exempt sources. Stations pay a flat rate of \$150/year or 1.5% revenue if it's greater than \$25,000/year.
- **Narrowcast TV:** 0.9% of total revenue.
- **Narrowcast Radio:** the rate varies depending on amount of APRA works broadcast, from 3.5% - 0.5% of applicable revenue.

Of course these figures are varied from time to time, so they should only be treated as guidelines. The current figures can be obtained readily from APRA.

#### EXCEPTION FOR GRAND RIGHTS

APRA does not collect income earned from 'Grand Rights'. These relate to works performed in:

- A 'dramatic context' (i.e. with costume, scenery or other dramatic effects).
- Oratorios and large choral works (i.e. those over 20 minutes).
- In association with ballet. In other words, performance of ballet music by itself (e.g. in a concert) does not involve Grand Rights, while a staged ballet does.

If Grand Rights are involved, you must negotiate directly with the publisher who controls the rights (although with smaller shows APRA often acts as the publishers' agent and streamlines the process). Ask early. Do not assume that you will be given the rights. In many cases permission will be refused: an

exclusive licence may already have been granted to somebody else; the publisher may not be convinced of your ability to mount the show; or the copyright owner may simply choose not to grant the licence.

### TRACING PERFORMANCES

The validity of any system of royalty allocation demands that the right people are getting paid. This is achieved by a combination of means which are of varying precision. Some of the performance calculations are achieved by making statistical inferences from surveys, some of it is based on mere cost effectiveness, some are precisely calculated:

- **Radio:** APRA conducts 'census' logging - meaning that all broadcast featured music is logged.
- **Television:** The survey system is exemplified by the treatment of television. The music that is broadcast on television is calculated using reports supplied by the stations as to the music used over particular survey periods.

An example of pooling of income (to save unjustified administrative expenses) is the adding of money obtained from juke box licences to radio income, on the basis that what's popular on radio is probably popular on jukeboxes. (This is referred to as the 'follow the dollar' approach.)

- **Concert performances** are analysed individually, and performance royalties are allocated to the specific copyright owners involved.

### DISTRIBUTION

After deducting its expenses (generally around 13-14%), APRA allocates its income to members. The method of income calculation necessarily mirrors the method of usage calculation.

For example, station X pays its APRA licence fee and supplies census electronic logs of all music put to air. The music reported on those logs is paid out of station X's licence fees. If there are 260 commercial radio stations in Australia, there are effectively 260 commercial radio 'pools'. (In contrast, the calculation of royalties payable as a result of concert performances is done on the basis of actual works performed and reported.)

### SELF-REPORTING

APRA Returns are the method for reporting to APRA each use of your songs - even your own performances of them! A Return should be completed and sent to APRA each time you perform your own (or anyone else's) songs. By doing this whenever you perform your original material, you can earn APRA

income. Similarly, if you hear your material being broadcast you should self-report in case that particular broadcast was not part of the station's survey period.

#### **TIMING OF PAYMENTS**

The APRA royalty payments are based on six-monthly accounting periods. For the period from June to 31 December, a distribution is generally made the following May or June. For the following six months, the distribution is generally made in December (just in time for writers to have some money over Christmas).

#### **OVERSEAS INCOME**

Most Australian publishers insist on acquiring world rights when signing writers. (This is of course negotiable but is certainly the natural desire of the publisher.) In order to administer their catalogue and represent their interests in a foreign territory, all major publishers have established an international network of publishers. In the case of multinational publishing companies the sub-publisher will usually be the local office of the parent company. Independent publishers will usually do a sub-publishing deal on a territory-by-territory basis with one of the Majors or come to some arrangement with another independent company.

Similarly, the collecting societies (APRA and AMCOS) have an international network of like societies. In the United States there is no equivalent of AMCOS (except for the privately owned Harry Fox Agency) and there are three rival organisations (BMI, ASCAP and SESAC) that fulfil the APRA role.