

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>

TYPES OF PUBLISHING CONTRACTS

THERE ARE MANY TYPES OF PUBLISHING AGREEMENT. THIS CHAPTER LOOKS AT THE CLASSIC TYPES:

WRITER FOR HIRE AGREEMENTS, SINGLE-SONG ASSIGNMENTS, TERM PUBLISHING CONTRACTS, ADMINISTRATION DEALS AND THE ALTERNATIVE OF BEING YOUR OWN PUBLISHER. SAMPLE AGREEMENTS ARE PROVIDED. THE AGREEMENTS ARE LOOKED AT FROM THE WRITER'S PERSPECTIVE, BUT ALWAYS REMEMBER THAT PUBLISHERS NEED (AND DESERVE) REASONABLE PROTECTION OF THEIR INTERESTS AND A REASONABLE RETURN FOR THEIR INVOLVEMENT AND INVESTMENT.

WRITER-FOR-HIRE AGREEMENTS

The days of Tin Pan Alley are gone. Publishing houses in Australia do not keep staff writers on salary any more. Of course there are companies that do employ composers, but the contracts are not publishing deals in the ordinary meaning of those words; e.g. advertising houses may hire jingle writers, but it is very rare for those companies to insist on owning all of their writers' work - they only want the jingles they write for the company's clients.

For modern publishers, the cost of having a writer on staff and having to supply office space, pay superannuation, holiday pay, sick leave and all the other things that are the duties of modern employers, is prohibitive. They can achieve a similar result to Tin Pan Alley-style writers, without having to take on the responsibilities of being an employer. The modern way is to sign the writer to a term deal (say three or five years) and pay periodic advances, perhaps monthly. Depending on the writer's ability to generate income, this could be in the vicinity of \$48,000 per year in 12 monthly payments of \$4,000. In return the publisher will require delivery of a minimum number of works - often 10 or 12 per year. Indeed, these days, the publisher often gives the writer various projects to work on because it is rarely productive to have writers sitting in studios writing songs that they hope someone will like someday.

In this way, the publisher gets a catalogue of works from the writer without having to meet the additional overheads which employment entails, while the writer gets a regular source of income without losing independence. The best part of the deal for the publisher is that, instead of paying salary, the money paid to the writer is all treated as a recoupable advance.

SINGLE-SONG ASSIGNMENT

Perhaps the simplest publishing deal of all is the assignment of a single song, where the songwriter transfers the copyright in a song to a publisher for an agreed period, at an agreed royalty.

Single-song assignments are usually offered by a publisher so it can acquire a particular song (or songs), though sometimes they are offered to new writers who have not yet established their reputations as songwriters but who have produced a couple of good, strong compositions. These deals can be a stepping-stone towards a long-term, more comprehensive relationship. They provide you with an opportunity to have your works ‘published’ and for the publisher to administer them, without either party having to make a long-term commitment to the other. These days, publishers rarely bother with a single-song deal unless the work is about to be recorded and likely to generate income.

Single-song assignments are also sometimes used for people such as band members, producers, arrangers, managers and anyone else who is not a writer, but who somehow or other ends up owning a share in the copyright of a song which is going to be exploited commercially. In such a case, there is an obvious advantage for the publisher to rake up all of the pieces of the copyright in the work in order to better control it.

There is an obvious benefit to the writer too, in having a publisher administer the paperwork and clearances involved when having a song recorded. The paperwork is usually fairly simple (a few pages). Given that the advances will be small, having your lawyer negotiate it is often not justified, though your lawyer can advise in general terms whether the deal is a reasonable one.

This said, if you are in the early stages of your career, be wary of the small, fringe publishers, who call themselves music publishers but who are often little more than copyright-acquisition schemes. There are many working in the country, Christian and ethnic-music genres. They usually have a contract misleadingly headed ‘Standard Music Publishing Agreement’ or something similar, so the naive will think that it’s a non-negotiable (but nonetheless fair) deal. They don’t offer advances and the royalty splits are usually 50/50. The deal usually requires the writer to spend money on material or services that

the ‘publisher’ promises to provide. Despite the individuals being charming and having a great spiel, if you sign one of these deals, you will undoubtedly learn a comprehensive lesson.

THE RIGHTS PERIOD

The total period for which the publisher owns or controls your copyrights under a single-song assignment agreement is called the rights period.

If the deal is merely for an assignment or licence of specific works, you don’t have a separate ‘term’ and retention period, merely a rights period. However, if there is an advance of any seriousness, the publisher may not use the rights period approach and may opt for a term plus a retention period. This gives the publisher more assurance that it will have the opportunity to recoup the advance.

THE ADVANCE

For the novice songwriter, the advance is often not as important as the opportunity to forge a relationship with the publisher. The fact is, few publishers will take even a single song, unless they see some commercial benefit in it (which usually translates as ‘The publisher likes it’).

The advance for a single song assignment is usually quite modest, unless the writer is established and the publisher really loves the song. It all depends upon the work’s estimated capacity to generate income. It might be \$500 or \$15,000. Whatever it is, some advance, no matter how modest, is desirable, both as a sign of faith by the publisher and as a little extra incentive for the publisher to actively ‘work’ the song. At the very least, it will help pay the cost of any legal or other professional work needed.

If the songwriter is established or the song is going to be recorded (and is therefore likely to generate mechanical income) you can expect a greater advance, based upon the song’s earning capacity.

ROYALTIES

The royalty split on single-song assignments varies from 60/40 to 80/20 in the writer’s favour. It depends on the writer, the song and the publisher. Only exceptional deals are 50/50 any more. There would have to be many other benefits for the writer for a 50/50 deal to be at all attractive.

OTHER SPECIFIC-WORKS AGREEMENTS

While the single-song assignment is usually for beginners, established writers - particularly those who are also recording artists - sometimes do a publishing deal for a larger number of specific works. These are sometimes referred to as ‘single-song’ assignments, but such deals may actually deal with more than

one song at a time. They are more accurately described as ‘specific-song’ agreements - to distinguish them from deals based on a set period of time or a yet to be recorded number of albums.

A writer often sees this as a way of getting an advance without the commitment and exclusivity of a term agreement. It is little more than a funding device for the writer, so the publisher will not agree to it unless the figures show a high likelihood of financial return. After all, in this sort of deal, the publisher’s commitment to the writer can hardly be expected to be greater than the writer’s commitment to the publisher!

In this sort of deal, the paperwork is likely to be about as long and complex as a term agreement. Because the dollars are significant and the writer is likely to be established, this kind of specific works assignment is likely to spell out the deal points in greater detail than a simple single-song assignment. These are certainly deals you will need a lawyer to negotiate, particularly if you don’t want to be thin-lipped about the industry in your old age.

SAMPLE SPECIFIC-SONG ASSIGNMENT AGREEMENT

THIS AGREEMENT is made the day of 2006

BETWEEN *publisher* (‘we/us’);

AND *composer* (‘you’);

TERMS:

DEFINITIONS

1. In this agreement, the following words in bold type will have the following meanings:
 - (a) **Composition** means the music and lyrics of the song entitled: ‘OVER THE HIGHWAY’.
 - (b) **Territory** means the world.
 - (c) **Net Royalties Received** means the total royalties arising directly and identifiably from the exploitation of the Composition which are received by or credited to us in Australia less only:
 - (i) taxes required to be and actually deducted;
 - (ii) third party collection society and APRA charges;
 - (iii) sums payable by way of remuneration to arrangers, adaptors and translators of the Composition; and

(iv) sums permitted to be retained by our sub-publishers or licensees which may not exceed per cent (%), except in the case of covers and synchronisations for which the retention may be per cent (%), of the sums arising at source and directly and identifiably from the exploitation of the Composition less only the deductions mentioned in (i) and (iii) above.

(d) **Covers** means any commercially released recording of the Composition which does not embody a performance by the Writer.

(e) **Copyright** means copyright as defined by the *Copyright Act 1968 (Cth)*.

(f) **GST Law** is defined in the *A New Tax System (Goods and Services Tax) Act 1999 (Cth)*. **GST** means a tax, levy, duty, charge or deduction, together with any related additional tax, interest, penalty, fine or other damage, imposed by or under a GST Law. The meaning of **Tax Invoice** is as defined in the GST Law.

ASSIGNMENT

2. In consideration of the advance and royalties payable to you under this agreement, you assign to us all the Copyright throughout the Territory in the Composition for a rights period of years.
3. Without prejudice to the generality of the foregoing, the rights assigned to us which will be ours, solely and exclusively, for the Territory include the following:
 - (a) The right to grant licences to communicate the Composition to the public by any and all means, subject to the rights of the Australian Performing Rights Association (APRA).
 - (b) The right, subject to our obtaining your prior written consent, to make adaptations, additions, alterations, arrangements and translations of the Composition in whole or in part.
 - (c) The right to grant mechanical licences.
 - (d) The right, subject to our obtaining your prior written consent, to grant non-exclusive synchronisation licences.
 - (e) The right to use the title of the Composition for all purposes in connection with the Composition.
 - (f) The right to publish, print and reproduce the Composition.
 - (g) The right to authorise others to exercise any of the above rights.

All other rights in the Composition are reserved by you.

PROMISES AND WARRANTIES

4. You agree that you will (if so requested by us) promptly:
 - (a) Execute or sign any other documents and do all other acts and things which may be reasonably required of you to vest in us the rights granted under this agreement.
 - (b) Deliver a lead sheet or a recording of the Composition.

- (c) Allow or obtain for us to use your name, professional name, approved photograph, likeness and approved biography and allow us to exploit the Composition.
5. You warrant and declare that:
- (a) The composition is an original work and does not and will not infringe the copyright in any other work and shall not be obscene or defamatory of any person.
 - (b) You have good right and full power to grant to us the rights set forth above.
 - (c) You indemnify us (and our successors and assigns) against all costs damages losses and expenses (including legal expenses) that we suffer because of any breach of your contractual promises provided that this breach is found proved by final order or award of a court or settled with your consent. This clause will continue to be effective after termination or expiration of this agreement.
 - (d) You will (if so requested by us) permit your name to be used as a plaintiff or party in any actions or proceedings that may be necessary for us to secure, establish or enforce the rights in the Composition. The expense of any such action or proceeding will be borne by us except that all such expenses will be recoupable from any sums obtained or derived from such action or proceeding and any residue therefrom will be dealt with pursuant to clause 7 (b) (vi).

PUBLISHER PROMISES AND WARRANTIES

6. (a) We promise to use reasonable endeavours to exploit the Composition and exploitation by our licensees will be deemed to be exploitation for the purposes of this clause.
- (b) Without prejudice to the generality of the above we will use all reasonable endeavours to:
- (i) obtain Covers of the Composition;
 - (ii) collect all income arising from the exploitation of the Composition; and
 - (iii) protect the copyright and all like rights in and to the Composition.

ROYALTIES

7. Provided that you fully perform all of your obligations hereunder we agree to pay to you:
- (a) On execution of this agreement, an advance of \$1,000 dollars, which will be recoupable only from all royalties or other income otherwise due to you under this contract; and
 - (b) The following royalties:
 - (i) mechanical income (other than from Covers): seventy per cent (70%) the Net Royalties Received;

- (ii) mechanical income arising from Covers: sixty per cent (60%) of the Net Royalties Received where such licences are procured by us and seventy per cent (70%) where such licences are procured by you;
- (iii) synchronisation licences: sixty per cent (60%) of the Net Royalties Received where such licences are procured by us and seventy per cent (70%) where such licences are procured by you;
- (iv) print: twelve per cent (12%) of the suggested retail selling price of each such copy of sheet music sold for which we receive payment or credit or sixty-five per cent (65%) of sub-licence fees received from third parties. In either case in respect of folios or other compilations, such percentage will be pro-rated according to the total number of songs contained therein;
- (v) performing rights: we acknowledge that you are entitled to be paid the so-called 'writer's share' direct by APRA. We will also pay you (or credit your unrecouped Advance account with) forty per cent (40%) of the so-called 'publisher's share' of performance income collected by APRA; and
- (vi) sundry income: seventy per cent (70%) of the Net Royalties Received.

ACCOUNTING

8. (a) Twice a year we will prepare and submit to you a statement of account showing the amount due to you under this agreement and will pay to you the amount (if any) shown to be due. Such accounting will be made within sixty days of the close of the relevant accounting period. The accounting periods will close on 30th June and 31st December in each year.
- (b) All statements of account rendered to you will be binding upon you and not subject to any objection unless you give us a written notice which states the basis of objection within three (3) years from the date of the statement.
- (c) You will have the right at your expense to appoint a chartered accountant to inspect our books of accounts at our usual place of business insofar as they relate to the exploitation of the Compositions. If the inspection reveals a discrepancy in excess of 5%, we will pay your reasonable costs of the inspection. Such right may be exercised not more than once in each calendar year nor more than once in respect of any statement, by giving reasonable notice in writing to us before any proposed inspection.
- (d) All payments will be subject to the deduction or withholding of all taxes required to be deducted or withheld under the laws of any country or territory and to the exchange control regulations of any country or territory from which those payments emanate.
- (e) All copies of the Composition in whatever form which are distributed to the trade and profession or otherwise for the purpose of exploiting or popularising the Composition and also all reproductions of the Composition or parts thereof published in any newspapers and other

periodicals, will be free of all royalty or payment to you where we receive no payment or payment below cost.

- (f) We shall make all reasonable efforts to ensure that your share of money earned overseas is remitted to Australia as promptly as is practicable.

ASSIGNMENT

9. You may not assign transfer or license any of the benefits or rights of this agreement.

TERMINATION

10. (a) If you have a receiving order in bankruptcy made against you or if we enter into liquidation (other than a voluntary liquidation for the purposes of reconstruction or amalgamation) or if either party makes any composition with that party's creditors, the other party may terminate this agreement forthwith upon giving written notice thereof.
- (b) In the event that either party breaches or is in default of its obligations hereunder, the party not in breach or default ('the innocent party') must serve notice on the other, specifying the breach or default. If the breach or default is not remedied within 21 days the innocent party may terminate the agreement forthwith by notice in writing.
- (c) Any such termination will be without prejudice to our rights in respect of the Composition to which we are entitled at the date of such termination.

ENFORCEMENT OF RIGHTS

11. You irrevocably grant us the sole right to enforce and protect all rights in and to the Composition in the Territory. We may join you or such others as we may deem advisable in any suits and proceedings and we may proceed with and dispose of proceedings or suits at our sole discretion. If any third party suit or proceeding is due to your default or the breach of any promise by you hereunder, any legal costs or disbursements incurred by us will be borne (on an indemnity basis) by you. If the suit or proceeding is not due to your breach or default the costs or disbursements incurred by us will be borne equally (on an indemnity basis) and any sums recovered by you and/or us by way of damages or otherwise (but after the payment of all legal costs or disbursements) shall be shared according to clause 7(b)(vi). We warrant we will not settle any action involving your interests without first consulting with you

PUBLISHER WARRANTIES

12. We warrant that we will at all times act in good faith and deal at arms length on a proper and customary commercial basis and without limiting the generality of the foregoing, this warranty shall apply to our dealings with our affiliates, subsidiaries, licensees and sub-licensees and any collection agencies that we may retain.

GST

13. The royalties that we pay you are calculated exclusive of GST. We will pay you the royalty plus the GST payable in respect of that amount provided that you provide us with a GST Tax Invoice for the amount of GST paid.

ENTIRE AGREEMENT

14. This agreement constitutes the entire agreement between the parties with respect to the subject matter hereof and cannot be altered, amended or modified except by an instrument in writing signed by the parties.

INDEPENDENT ADVICE

15. You warrant that you have obtained independent legal advice in respect of this agreement.

JURISDICTION

16. The laws of govern this contract and the Courts of that State have exclusive jurisdiction.

READ UNDERSTOOD AND AGREED

Signed (etc).

SCHEDULE OF COMPOSITIONS

- 1.
- 2.
- 3.

TERM PUBLISHING AGREEMENTS**DURATION**

The 'term' of a publishing agreement is the period during which you, the composer, provide your exclusive services to the publisher. The contract will usually deliver ownership or control of all of your copyrights that either come into existence or become available during the term. This will include works written by you:

- (a) During the term;
- (b) Prior to the date of agreement and not previously licensed or assigned to another publishing company;
- (c) Prior to the date of agreement and which were previously licensed or assigned to another publishing company, where the rights revert to you during the term.

So, if your deal is for a three-year term, the publishing company will own or control all of your copyrights that come into existence or become available

during that time and you cannot deal on your own behalf in respect of those works. That is the exclusive right and power of your publisher.

For obvious reasons, this sort of deal is usually referred to as a 'Term Contract'.

THE RETENTION PERIOD

A Retention Period is usually included in all term publishing agreements. It is the period immediately following the end of the term, during which the publisher will retain ownership and/or control of all the copyrights it acquired from you during the term.

To illustrate how this works, assume that the term is three years and that the Retention Period is ten years. If you write a song at the beginning of the first year of the contract, the publisher will control that song for thirteen years. If you write the song at the beginning of the third year, the publisher will control it for eleven years.

Your exclusive commitment to the publisher lasts only for as long as the term and, therefore, is over when the term expires. This means you are free to sign up with a different publisher in respect of any works you might write during the Retention Period.

GENERAL

Until the 1980s, it was commonplace for Retention Periods and rights periods in publishing deals to be for the life of copyright (i.e. for as long as the work is protected by copyright). This is no longer the market unless there are unusual circumstances that would justify such a long Retention Period. Publishers these days do not expect to control a work forever, though such deals are occasionally done if the circumstances are such that it is fair to both parties.

One school of thought amongst lawyers who represent writers is that the Retention Period should be as short as possible. Others say it doesn't matter, provided the original deal is 'fair', because continuity of control tends to minimise administrative errors that inevitably creep in whenever a catalogue or song changes hands. Administrative errors mean lost income. Sometimes the retention period will be for a much longer period than usual but with a higher royalty paid to the writer (if the publisher is recouped). There is no 'right' view. Like all important deal points, the duration of the various periods reflects the market power of the writer. As a general rule, try to keep the various periods as short as possible unless there are good reasons to do otherwise.

For a term deal, the Term will usually be between three and five years, unless there are unusual circumstances. The Retention Period will vary from two years to 20 years.

For an assignment of specific works, the period for which the publisher will control the work is rarely less than three years. Control periods can range up to 10 years or even longer, depending on the deal (though this would be unusual).

As you can see there is a certain symmetry to these figures. From the publisher's point of view, the period that it will have control of the work determines the likelihood of it making a profit from the work in particular and from the deal in general.

In cases where the song is going to be used in a film soundtrack, the assignment or licence might well be for life of copyright. The reason is simple enough - most film producers need to have the right to use the film music for as long as the film might be shown, so they can legitimately (and probably will) insist on obtaining that right for the maximum period. This is dealt with in detail in Chapter 31, **Music in Film**.

THE ADVANCE

There is no rule for determining the proper amount of an advance, except what the market will bear. Many writers have unrealistic expectations of what they can get.

One basis for setting the amount is to make a realistic estimate of the royalties that your publishing is likely to earn over a reasonable period. Obviously this is as much a guess as anything else (no-one can predict whether a song will be successful at all, let alone whether it will become a standard), but it looks nice on paper and is a starting point for negotiations. This is probably the maximum amount that you could realistically expect as an advance.

If you were paid this, you would be receiving all of the income that would be payable to you during the term, in one up-front payment. This sort of deal is described as 'front-end loaded' for obvious reasons. No publishers like this sort of deal because it leaves them very exposed. They know from unhappy experience that too many very talented writers never achieve the success they probably deserve, so only established writers with a proven track record can get deals of this kind.

If a writer cannot demonstrate a history of successful songs, the advance will be a matter of sheer guesswork. If you are a rookie with nothing more than some new songs in your bag, but your would-be publisher likes your work and sees real prospects of getting it commercially exploited, you might get an advance of \$50. Or \$500. Or \$50,000.

If you have a recording contract and are going to record an album of self-written material, you are well on the way to getting a good publishing deal because you have more bargaining power. The publisher can see the likelihood of recouping some of its risk money and will be more willing to

give ground on major deal points - such as advances. The amount of the advance is governed by factors such as whether the record company is a Major or an Independent, the amount of promotion that the record company is committing to the project and generally what the 'vibe' is for the material. In fact, there may be several publishers interested, in which case you could select not just the publisher you like best, but the most generous (though this is definitely not the best way of selecting a publisher!).

Hugely successful writers have been paid hundreds of thousands of dollars in publishing advances. Very exceptionally, even new writers who have a recording contract and the 'vibe', can receive very significant advances if the bidding war gets out of hand (\$80,000 and more) but these are very exceptional.

If you are offered a publishing contract with no advance, there has to be a reason for doing the deal, but what is it? Ask yourself, 'Why am I willing to sign this?' Remember that it is very unusual for a publishing deal to attract no advance at all. After all, the advance is the most obvious symbol (though of course, not the only one) of the publisher's expectations of your success.

On the other hand, getting a huge advance is not everything. All too often, writers insist on squeezing the last dollar out of the advance and overlook the other more important terms of the deal. An advance is only the prepayment of money that you expect to earn anyway. It can also have disadvantageous tax implications for you. It is more important to negotiate other matters, such as the royalty splits and the degree of control that you wish to retain, than using the publisher as a credit card.

It is often said that if you get a large advance the publisher can't afford to let you fail. If only it were true. Like all aphorisms, whilst it contains an element of truth, practice has proven that you can't rely on it. A publisher that has paid too much for a writer will rarely blame itself for the miscalculation. It is more likely the writer will be blamed! If the royalty account remains hugely unrecouped for too long, the managing director of the company will get the blowtorch treatment from his superiors and you will soon feel the heat of the reflected glare.

SPLIT PUBLISHING DEALS

As we have already indicated, the old 50/50 split of income is not usually a reasonable royalty division in the Australian industry and ought to be accepted only in unusual situations.

Nevertheless, you may hear the expression 'split publishing'. This is an American term, which isn't used in Australia. If you assume (as the Americans do) that the basic split is 50/50, if the writer receives, say, 60%, he or she is in fact getting 20% of the 'publisher's share'. The publisher is 'splitting' its share with the writer. Almost all term deals done in Australia are, according to the American definition, split publishing deals.

In Australia, the expression split publishing is usually used to indicate that more than one publisher has an interest in a work (e.g. two writers - each with their own publisher), rather than telling you anything about royalty splits.

RECOUPMENT

All advances paid by the publisher will be recoupable from the writer's publishing earnings. An advance, as that term is usually understood, is a pre-payment of royalties that would otherwise be payable under the contract.

Look at your contract to see what else is going to be recoupable. Many contracts state that any money paid by the publisher on behalf of the writer is deemed an advance and is therefore recoupable. The problem is in determining exactly what expenses are paid "on behalf of the writer"! Are demo costs? Contributions made by the publisher to the record company towards the promotion of your record? Demo duplication costs? The cost of preparing lead sheets or arrangements? Administrative costs? Travel? Beware!

Now you see the danger of a phrase that states that 'any money paid by the publisher on behalf of the writer is deemed an advance and is therefore recoupable'! It looks very reasonable at first blush but, if applied unscrupulously, it could work most harshly. It is quite unreasonable for a publisher to use this kind of clause to get you to contribute to basic costs of running the company. After all, the company gets its own percentage of the income earned by your works. You need to ensure that recoupable expenditure is not being incurred without your knowledge.

The only sums that should be recoupable without prior mutual agreement are advances and any amounts you have specifically asked the publisher to spend on your behalf and agreed (in writing) may be charged to your royalty account. Remember though, publishers are not in the business of spending for the sake of spending. Sometimes, they can only justify certain expenditure if it is recoupable (i.e. treated as an advance). If you do not agree to any particular expenditure being recoupable, it may not get spent at all, which could be to your detriment. The only way you can make an informed decision is by knowing what is planned and being part of the decision-making process.

Demo costs are always a subject of contract negotiation. Publishers' policies as to the recoupability of demo costs vary widely. Many will advance money for demo costs provided the advance is recoupable. Non-recoupable or partly recoupable payments are harder to get unless you have some negotiating clout.

Remember that advances are pre-payments of royalties, so they almost certainly constitute income for tax purposes and should be declared in the year you receive them. The tax laws give writers a concession by allowing income averaging, to allow for good and bad years (farmers and sports stars

have the same concession). The formula is too complex to go into here and (like most tax laws) might be changed while we are all asleep one night. See your accountant, and make sure you set up your financial affairs properly.

PRODUCTIVITY COMMITMENT

It is common for publishers to insist on the delivery of a minimum number of compositions a year. In some cases ‘product commitment’ calls for ‘recorded and released’ compositions. The publisher’s financial commitment is based on the assumption that it will get a flow of songs capable of earning income. Assuming that the writer is talented, the more songs the publisher has to exploit, the greater the chance of one being a hit.

Because of this, publishers encourage writers to create new songs. This is one reason that advances are frequently tied to the number of new songs to be delivered in any given period. Some writers can’t help themselves - they have to write. Others need a bit of encouragement.

Product Commitments are often requested where the advance is significant and the publisher has a term of (say) only three years. It wants to make sure that it is getting something for its money and something with which to work. After all, most publishers have had the unhappy experience of signing a writer to a three-year deal, paying a sizeable advance, and then getting very few works in return while the writer has either an extended holiday or a sudden and unexpected health breakdown.

Because of this, many agreements specify that unless the writer delivers a minimum number of works in a contract year, that year will be deemed to extend until the minimum commitment is delivered. This way, the publisher has a way of keeping tabs on the writer’s output. Also, a publisher can look at a three-year deal and at least calculate that it will have, say, 30 works to exploit during the Retention Period (assuming the writer performs as per the agreement).

**SAMPLE TERM PUBLISHING AGREEMENT
(AND COMMENTARY)**

THIS AGREEMENT is made the _____ day of _____ 2006

BETWEEN THE PUBLISHER PTY LIMITED, of
(hereinafter called 'we/us');

AND THE COMPOSER, of
(hereinafter called 'you');

WHEREBY IT IS AGREED AS FOLLOWS:

DEFINITIONS

1. (a) **Compositions** means: those compositions –
- (i) (including those listed in the Schedule hereto) written in whole or in part by you (whether alone or with third parties) prior to the commencement hereof and which are not presently licensed or assigned to a genuine 'third party publishing Company' (which expression does not include any company owned or controlled directly or indirectly by you);
 - (ii) written in whole or in part by you (whether alone or with third parties) during the Term;
 - (iii) the rights in and to which revert to you (or any of you) during the Term.

This clause defines which 'works' will be the subject of the agreement. The clause is intended to include all material that is already in existence and is not assigned to another publisher plus material that is assigned to another publisher at the time of signing but reverts to you during the course of the contract, and all works that you write during the term.

- (b) **Territory** means the world.

The other common territory is 'Australia and New Zealand and any of the Australasian Performing Right Association territories'. The extent of the territory depends on your commercial needs, the size of the advance required and, above all, your negotiating strength.

- (c) **Net Royalties Received** means the total royalties arising directly and identifiably from the exploitation of the Compositions and which are received by or credited to us in Australia less only:

- (i) Withholding Tax and any other taxes required to be and actually deducted;
- (ii) any third party non-affiliated collection society charges (if applicable);
- (iii) any sums payable by way of remuneration to arrangers adapters and translators of the Compositions; and
- (iv) any sums permitted to be retained by our sub-publishers or licensees which shall not exceed per cent (.....%), except in the case of covers for which the retention may be per cent (.....%), of the sums arising at source and directly and identifiably from the exploitation of the Compositions less only the like deductions mentioned in (i) and (iii) above.

This is a 'pro-writer' provision, in that it limits the amount of commission that can be deducted from the gross income before overseas royalties are remitted to Australia. It allows you to control the amount of the administration commission but still provides the overseas sub-publisher with an incentive to obtain covers.

- (d) **Covers** means any exploitation of a Composition which embodies the performance of a party other than you (or any group of which you may be a featured member) and obtained as a result of our efforts *whether or not such efforts are exclusive or non-exclusive*. In this agreement, synchronisations will be deemed to be Covers for the purpose of calculating royalties.

Notice the phrase in italics. This is to help avoid disputes between the publisher and the writer as to who got the cover. The actual extent of the parties' respective involvement in securing any particular cover is often impossible to determine.

- (e) **Copyright** means copyright (as defined by the Copyright Act 1968) throughout the territory to which that Act may now or may at any time hereafter extend together with all rights now and hereafter thereunder existing and together with all other rights of a like nature as are now conferred by the laws in force in all other territories throughout the world, including: the right to renew and extend the copyright and the ownership of such renewed and extended copyrights; and such other rights as may hereafter be conferred or created by law of international arrangement or convention in any part of the world whether by way of new or additional rights not now comprised in copyright or by way of extension of the period of then or now existing rights.

- (f) **Retention Period** means the Term (including any extension thereof) and(.....) years from the end of the Term PROVIDED that if the Retention Period does not expire on 30 June or 31 December, the Retention Period will automatically be extended to the end of the 30 June or 31 December whichever first occurs.

The retention period clause is one of the most important negotiable clauses of any publishing agreement. In earlier times, the retention period was life of copyright. Even 15 years ago, it was only top writers who could demand a retention period of 15 or 20 years. These days, a retention period of between 3 and 10 years is the market.

In this clause, the extension to 30th June or 31st December is for the publisher's ease of accounting. The extension merely moves the end of the term to the end of the publisher's normal accounting period.

- (g) **Term** meansyears calculated from 1 January but if we are unrecouped at the expiration of the said year period, the Term will automatically extend (for a period which will not exceed years) until the end of the accounting period in which you recoup.

The term is obviously important as it defines the period of direct relationship between publisher and writer. Three years is very common. Anything less is not worth the trouble.

Note that the term automatically extends until any outstanding advances are recouped. This lessens the likelihood of the publisher being burnt by a writer who gets a large advance but doesn't prove to be as productive or successful as expected. Commonly, the writer will negotiate the right to repay advances that are outstanding at the end of the term rather than just wait for the publisher to recoup, so if you wish to change publishers you might persuade your new publisher to provide the money for the buy-out. Be warned, however, it is common for the publisher to require a repayment of more than 100% of unrecouped advances if they are going to let you go. After all, if they only get back their advance, they will have not even recovered their costs, let alone made a profit.

ASSIGNMENT

- In consideration of the sum of one dollar (\$1.00) paid by us to you, you assign to us all the Copyright throughout the Territory in the Compositions for the Term.

The one dollar business is legal paranoia. It ensures that ‘consideration’ (or ‘value’) is present. This is one of the requirements of a valid contract. More importantly, by this clause, all of the rights in all your compositions are transferred to the publisher. You no longer own your works.

Writers with some clout may convince the publisher to accept an exclusive licence of the copyright rather than an assignment.

3. Without limiting the generality of the foregoing, the rights assigned to us (which will be sole and exclusive for the Territory) include:
 - (a) the right to grant licences to communicate the Compositions to the public by any and all means, subject to the rights of the Australasian Performing Right Association (‘APRA’);
 - (b) the right, subject to our obtaining your prior written consent, to make adaptations additions alterations arrangements and translations of the Compositions in whole or in part;
 - (c) the right to grant mechanical licences;
 - (d) the right, subject to our obtaining your prior written consent, to grant non-exclusive synchronisation licences;
 - (e) the right to use the titles of the Compositions for all purposes in connection with the Compositions;
 - (f) the right to publish print and reproduce the Compositions;
 - (g) the right to authorise others to exercise any of the above rights; and
 - (h) collect any other income relating to the Compositions.

This clause is in fairly standard form. It specifies the rights that the publisher will be able to exercise. If you want to withhold any rights from the deal, or put limitations on the publisher’s power to exercise certain rights, this is the place to do it. For example, you may wish to limit the right of the publisher to grant licences for the promotion of third party goods and services. (Seeing your favourite composition used to sell toilet paper may not bring joy; on the other hand, the licence fee paid by the company might ease the pain.)

COMPOSER PROMISES AND WARRANTIES

4. You agree that you will (if so requested by us):
 - (a) execute or sign any other document and do all other acts and things which may be reasonably required of you to vest in us the rights granted hereunder;
 - (b) deliver a lead sheet(s) and a recording of all Compositions;

If you don’t give the publisher a copy of the composition in an easily accessible form, it is going to be very difficult for the publisher to do anything with it. These days many composers do not (cannot) actually write out lead sheets, so writers generally deliver demonstration recordings of their material.

- (c) sign a separate agreement or assignment in respect of each or any of the Compositions; and
- (d) allow us to use your name, professional name, approved photograph likeness and approved biography to exploit the Compositions PROVIDED THAT we will at all times obtain your prior written consent before making such use in relation to any merchandising or the promotion of the goods or services of any third party.

Note the approval protections built into the paragraph.

5. You hereby warrant and declare that:
 - (a) the Compositions are original works and do not and will not infringe the Copyright in any other work and will not be obscene nor defamatory of any person;
 - (b) you have good right and full power to grant to us the rights set forth above and every one of them in the manner aforesaid;

Paragraphs (a) and (b) are central to any publishing deal. It is fundamental to the relationship that the works are original and that you have the rights you say you have. These provisions should never be treated lightly. The next paragraph shows why

- (c) you indemnify us our successors and assigns against all costs damages losses and expenses (including legal expenses) suffered by us as a result of any breach by you of the warranties and declarations on your part contained herein as are provided by final order or award of a court or settled with your consent; and

It is only fair that you 'indemnify' (i.e. reimburse) the publisher if you do not comply with the fundamental promises of the above warranties. This clause is fair when compared with some which require the writer to indemnify the publisher in respect of all third party claims made in relation to the warranties. The companies argue that, if somebody makes such a claim, it costs them considerable amounts of money to defend themselves even if they win the dispute at the end of the day. The writers argue that they should only have to indemnify the publisher for proven breaches of their (the writers) warranties. After all, you can't stop anyone from making a claim, no matter how ill-founded that claim may be. This is a point which doesn't get called upon in more than a tiny percentage of publishing relationships - but if it is, you may find that even though you win, you have to pay the difference between the amount the publisher recovers as legal costs and its actual legal costs (which are likely to be between \$30,000 and \$150,000). The difference

can be quite substantial, even if the publisher wins the case.

As a result, the risk of the writer should be limited to actual breaches of the warranties. If claims are made, and those claims are unfounded, it seems unfair for the publisher to demand that the writer pay the publisher's costs. These should be treated by both writer and publisher as a cost of being in business.

- (d) you will (if so requested by us) permit your name to be used as a Plaintiff or party in any actions or proceedings that may be necessary for us to secure establish or enforce the rights in each of the Compositions hereby assigned. The expense of any such action or proceeding will be borne by us except that all such expenses may be recouped from any sums obtained or derived from such action or proceeding.

PUBLISHER PROMISES AND WARRANTIES

6. (a) We agree to use reasonable endeavours to exploit the Compositions and exploitation by our licensees shall be deemed exploitation for the purposes of this clause.

This doesn't sound like much but it's about all most publishers promise to do. Of course, given that the industry is so speculative, it is difficult for the publisher to actually guarantee to achieve anything. The following paragraph at least attempts to put some specifics into the publisher's obligations. Good publishers will do all of these things, and more, as a matter of course, so it does no harm to include them!

- (b) Without prejudice to the generality of the above we will use all reasonable endeavours to:
- (i) (where you do not have a recording agreement) assist you in obtaining a recording agreement;
 - (ii) obtain Covers of the Compositions;
 - (iii) collect all income arising from the exploitation of the Compositions during the Retention Period; and
 - (iv) protect the copyright and all like rights in and to the Compositions.

If you have particular needs, this is the time to raise them. For example, if the publisher is expected to provide money for producing demo recordings or for living in Nashville for a spot of co-writing, these should be specified.

ROYALTIES

7. In consideration of your execution of this agreement and provided that you fully perform all of your obligations hereunder we agree to pay to you:

- (a) on execution of this agreement, an advance of dollars (\$.....), which shall be recoupable only from all royalties or other income otherwise due to you hereunder; and

Note that the advance is recoupable. There is no 'cross-collateralisation' (meaning that recoupment is only allowed from income earned pursuant to this agreement and not from any other agreement or source).

Some publishers have a reputation as having large chequebooks. Others can be tightwads. Advances vary from zero to \$500,000 or more. It all depends on the earning capacity of the copyrights and the other terms of the deal, such as royalty rates and control periods. In other words the advance is necessarily linked to the publisher's estimation of its ability to recoup (though other factors can obviously be relevant).

- (b) the following royalties:
- (i) in respect of mechanical income (other than from Covers) from exploitation of Compositions delivered hereunder per cent (.....%) of the Net Royalties Received;
 - (ii) in respect of income arising from and directly attributable to Covers and synchronisation licences we procure, per cent (.....%) of the Net Royalties Received, or per cent (.....%) where such licences are procured by you;

This clause recognises the fact that writers often find their own film and television work. Where they do, there is no justification in the publisher enjoying a bigger share of the income. After all, the greater publisher's share is designed to be an incentive for the publisher to obtain such exploitations.

- (iii) per cent (.....%) of the suggested retail selling price excluding GST of each such copy of sheet music sold for which we receive payment or credit (such percentage to be pro-rated in respect of folios or other compilations by the number of Compositions contained therein as compared to the total number of songs contained therein);
- (iv) per cent (.....%) of the gross fees paid by APRA in relation to performing rights in the Compositions (it being understood that you will receive 50% of the gross directly from APRA, and one half will be paid to us, of which we will pay you per cent (.....%) of same;
- (v) In respect of income earned overseas, per cent (.....%) of Net Royalties Received; and

This deal is based on income actually received by the publisher in Australia. It is not an 'at source' deal.

- (vi) in respect of all other income from the creation and exploitation of the Compositions delivered hereunder per cent (.....%) of the Net Royalties Received by us.

ACCOUNTING

8. (a) We will, by 30 September for the period ending the preceding 30 June and by the 31 March for the period ending the preceding 31 December in each year, prepare and submit to you a statement of account showing the amount due to you hereunder and will pay to you the amount (if any) shown to be due.

You will never improve on half-yearly accounting. This is not negotiable. The whole collection system is based on it. The accounting periods end on 30 June and 31 December. After that, there is a period required in which the publisher prepares its accounts relating to the immediately past accounting period. This is usually 60 or 90 days.

- (b) All Statements of account rendered to you hereunder will be binding upon you and not subject to any objection unless you give written notice of objection stating the basis thereof to us within two (2) years from the date rendered.

Publishing agreements limit the period within which you may query the accounting. Your lawyer will try to extend this period because, if the limitation period is two years, you are almost obliged to go to the expense and trouble of auditing the company every two years just to protect your interests. It would make sense if companies, at least during the term of the agreement, agreed to extend it to, say, six months after the expiration of the term or Retention Period. Then, one audit would be enough and both parties would be saved a lot of trouble. On the other hand, publishers want to have a definite time at which they can 'close off' their accounts and not worry about audits, which are very intrusive and interrupt normal work.

Remember that many errors, once made, are simply repeated year after year and it may be necessary to go back many years to get a true accounting of the amount actually owed.

- (c) You will have the right at your expense to appoint a chartered accountant to inspect our books of accounts at our usual place of business insofar as the same relate to the exploitation of the Compositions. If the inspection

reveals a discrepancy in excess of% of the amount properly due for the audited period but in any event greater than \$1,000, we shall pay the reasonable cost of the inspection. Such right may be exercised not more than once in each calendar year nor more than once in respect of any statement, by you giving reasonable notice in writing to us before any proposed inspection.

- (d) All payments will be subject to the deduction or withholding of all taxes required to be deducted or withheld under the laws of any country or territory and to the exchange control regulations of any country or territory from which those payments emanate.
- (e) All copies of the Compositions in whatever form which may be distributed to the trade and profession or otherwise for the purpose of exploiting or popularising the Compositions and also all reproductions of Compositions or parts thereof published in any newspapers and other periodicals will be free of all royalty or payment to you where we receive no payment or payment below cost.
- (f) We may only account for monies received by us in Australia although we do warrant that we will make all reasonable efforts to ensure that your share of money earned overseas is remitted to Australia as promptly as is practicable.

This is a 'receipts' deal, not an 'at source' deal.

LIMITATIONS ON POWER TO DEAL

- 9. (a) You may not assign transfer or license or agree to assign transfer or license any of the benefits or rights of this Agreement.
- (b) We will not assign any of the benefits or rights of this Agreement except with your prior written consent PROVIDED THAT we will at all times have the right to assign this Agreement to a related company or as an inclusion in the assignment of the whole of our catalogue.

Note that the company's right to deal with the rights is greater than yours. This is only common sense. The company must be able to license the rights because that is one of the functions of a publisher, but writers always argue that, because of the personal relationship needed with their publisher, the publisher should not be allowed to assign rights except as a part of an internal corporate rearrangement or the sale of the catalogue as a whole (and even then, many writers want prior approval rights).

TERMINATION

- 10. (a) If you have a receiving order in bankruptcy made against you or if we enter into liquidation (other than a voluntary liquidation for the purposes of reconstruction or amalgamation) or if either party makes any

composition with that party's creditors the other party will have the option to terminate this Agreement forthwith upon giving written notice thereof.

- (b) Any such termination will be without prejudice to our rights hereunder in respect of each and all of the Compositions to which we are entitled to at the date of such termination.

ENFORCEMENT OF RIGHTS

11. You irrevocably vest in us the sole right to enforce and protect all rights in and to the Compositions and the copyright therein in the Territory. We may join you or such others as we may deem advisable in any suits and proceedings and we may proceed with and dispose of proceedings or suits at our sole discretion. If any third party suit or proceeding is due to your default or the breach of any promise by you hereunder, any legal costs or disbursements incurred by us shall be borne (on an indemnity basis) by you. If the suit or proceeding is not due to your breach or default the costs or disbursements incurred by us shall be borne equally (on an indemnity basis) and any sums recovered by you and/or us by way of damages or otherwise (but after the payment of all legal costs or disbursements) shall be shared according to clause 7(b)(vi) hereof. We warrant that we shall not settle any action involving your interests without first consulting with you.

Part of the publisher's job is to protect your copyrights. It must have the right to commence proceedings and to involve you in those proceedings. It is reasonable that you grant the publisher an indemnity in the event that it is found that you have breached the terms or warranties in the agreement. The drafting of this clause is very important and complex. Just a very small change in wording can cost a lot of money if you get involved in a legal action. Beware!

PUBLISHER WARRANTIES

12. We warrant that we will at all times act in good faith and deal at arms length on a proper and customary commercial basis and without limiting the generality of the foregoing this warranty will apply to our dealings with our affiliates, subsidiaries, licensees and sub-licensees and any collection agencies that we may retain.

These may not seem much, but it is more than many publishing agreements contain! These warranties show the publisher has the right spirit.

ENTIRE AGREEMENT

13. This Agreement constitutes the entire agreement between the parties with respect to the subject matter hereof and cannot be altered amended or modified except by an instrument in writing signed by the parties hereto.

Once you have signed this agreement, nothing that was discussed before has much worth. If the publisher has made a promise that is an important reason for you agreeing to enter the deal, make sure that it is spelt out in the contract. Similarly, if the parties agree to change the terms of the deal, those changes must be put in writing and signed by both parties. If it isn't written, it may not be binding.

NOTICES

14. Any notice required to be given pursuant to this Agreement will be deemed to have been sufficiently given if sent by recorded delivery or registered post to the party to whom it is addressed at the address hereinbefore mentioned or any address of that party subsequently notified in accordance with this clause and will be deemed served on the day of posting.

Keep your publisher up to date with your various house shifts. If you don't, this clause can hurt you.

15. In the event of a material default on our part you must serve written notice to us stating the nature thereof and requiring the same to be remedied within 45 days from receipt of such notice and you will not be entitled to take any action against us unless such notice has been served on us.

It is always sensible to include a provision that requires the other side to notify you of any actual or suspected breach of the agreement and gives you an opportunity to remedy that breach. Nobody likes to be bushwhacked.

INDEPENDENT ADVICE

16. This Agreement contains important provisions relating to your career as a songwriter and you are strongly urged to seek independent legal advice from a solicitor specialising in this area of law.

There is now much case law, both here and in England, which makes it clear that one of the factors a court will take into account, when determining whether or not contracting artists and writers have been treated harshly or unfairly, is to see if they had the benefit of independent legal advice before entering the agreement. All wise companies now demand that their writers get independent legal advice.

JURISDICTION

17. This Agreement will be governed by and construed according to Australian Law and the federal courts and the courts of (New South Wales) will have exclusive jurisdiction.

This rather dull seeming clause is very important in a country that is subject to a federal system. It is also very important when you are dealing with a foreign company (or one that is multi-national). The difficulty and expense involved in fighting a case hundreds or thousands of miles from your home is hard to appreciate, unless you have been put through the nightmare.

GST

18. The royalties that we pay you are calculated exclusive of GST. We will pay you the royalty plus the GST payable in respect of that amount provided that you are registered for GST and you provide us with your ABN and a GST Tax Invoice for the amount of GST paid.

- (a) **GST Law** is defined in the *A New Tax System (Goods and Services Tax) Act 1999 (Cth)*. **GST** means a tax, levy, duty, charge or deduction, together with any related additional tax, interest, penalty, fine or other damage, imposed by or under a GST Law. The meaning of **Tax Invoice** is as defined in the GST Law.

Royalties are always calculated exclusive of GST. Provided you are registered for GST, provide your ABN and give the publisher a tax invoice (which the publisher will provide for you) it will pay the royalties plus the GST on those royalties. It is then your responsibility to forward the GST to the Australian Tax Office. If the contract doesn't specify that the publisher pays the GST, you will be liable to pay it anyway. In effect this would mean that you would be getting 10% less royalty. Not good.

SELF-PUBLISHING

Many established writers who wish to maintain control of their own catalogue, establish their own publishing company. They don't need the funding a publisher can provide and they can get their material recorded through their own contacts or simply record it themselves. To administer it, they either use a lawyer or the administrative staff of their management company. In this way they receive a greater proportion of publishing income because they earn both the writer's and the publisher's share.

If you are prepared to handle the administration yourself, fund yourself and promote your catalogue yourself, that's fine. Many prefer to take a halfway-house approach and maintain overall control but pass the day-to-day work over to a publisher, via an administration deal.

ADMINISTRATION DEALS

These deals are usually only available to writers who are established and have an attractive catalogue or to people who are in a position to acquire copyrights from other writers, such as record producers.

In an administration deal the publisher will provide the administration necessary to register the songs, grant licences, collect, account for and distribute the income and provide some finance but both parties are expected to find opportunities for exploitation of the catalogue.

LENGTH OF CONTRACT

Administration deals are usually for either three or five years. Unlike term contracts, there are no retention periods, although there is often some extension provided for in the event that the writer's advance is unrecouped at the end of the agreement.

COPYRIGHT OWNERSHIP

In an administration deal, the publisher does not acquire ownership of the copyrights. It is granted an exclusive licence for the territory, authorising it to be the only party to administer, exploit and collect on the writer's behalf.

ADVANCES

Advances paid for administration deals are generally lower than for 'term' deals. The publisher will control the rights for a quite limited period (and therefore will have a shorter earning period), so it will be disinclined to pay a huge advance - if any. (For example, as the writer is the owner of the copyrights, he or she would be expected to pay for all demo costs.) Of course there are exceptions but they only prove the rule, don't they?

INCOME SPLITS

An administration deal usually provides the writer with a greater share of income than that generally provided by a 'term' deal. A common split would be 80/20 or 85/15. Only the really top writers can demand more. After all, the publisher has to cover its costs and make a reasonable profit from their work!

You hear some of the 'great rumours of modern publishing' when some deals are whispered about. One writer is supposed to have been on a 100/0 deal by a major publisher, and Supertramp supposedly did a 105/-5 deal with its publisher. Yes, for every \$100 earned, the publisher would pay through \$105! How does this make sense? It may not! Nevertheless you can point to two factors that might have made it possible: first, the publisher was looking to sign a big name. Second, the writer/artist was selling so many records and was generating such huge volumes of income that the interest earned on that

income (while it was being held by the publisher - in between six-monthly accountings), meant that the company could anticipate making a profit out of the interest alone! Don't expect to do such a deal. They are more rare (and much more fun) than appearances of Halley's Comet.

COVERS

Because the margins are so small in an administration deal, it is usually assumed that the publisher will not be expected to actively promote the catalogue. Rather, its function will be restricted largely to simple administration. If the writer wants the publisher to be more active, it is usual for the agreement to give the publisher an incentive to look for synchronisations and covers. The incentives can include:

INCREASED ROYALTY SPLIT

The publisher will expect to retain 25%-35% instead of 15%-20% of the royalty receipts. It makes sense to give the publisher a reasonable incentive to work the material and to procure additional exploitations.

The difficulty here is whether the different rate applies to all uses of that song once it has been covered, or whether it just applies to the cover version. The publisher will pitch for the former and the writer for the latter. The publisher will quite rightly say that it is difficult (if not impossible) to clearly differentiate the public performance income earned from various versions of the same song. (Indeed in respect of public performance income, APRA cannot distinguish between different recordings of the same song.) The writer will argue for a proportion reduction of the income so the performance income is in direct proportion to the more easily calculable mechanical income. There are problems to both approaches, but there are also various solutions - though they may be imperfect.

EXTENSION OF RIGHTS PERIOD

If the rights period of the agreement is, say three years, the contract may provide that if the publisher obtains a cover, the publisher will continue to control the rights to that work for an extended period. An extra three to seven years is not uncommon.

COPYRIGHT OWNERSHIP

Some smaller publishers try to insist that they will become the owners of the copyright in the work if they get a cover of it. Sometimes this may be worth the cost but usually it is not. A publisher who wants that much flesh is probably too greedy to be safe. If you have to do this deal, make sure that there are guarantees that it will only be triggered if the cover record sells a poulitice. If you have to lose control of a work make sure that you are going to get money for it.

If the publisher is going to get extra benefits for obtaining covers, you will have to examine very carefully the definition of what constitutes a 'cover' for the purposes of the agreement. Very tight definitions are essential.