

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

SHANE SIMPSON



13

COMMON CLAUSES IN PUBLISHING DEALS

MANY OF THE MOST IMPORTANT CLAUSES IN PUBLISHING CONTRACTS WERE DISCUSSED IN THE PREVIOUS CHAPTER. HOWEVER, THERE ARE A FEW OTHER MATTERS THAT YOU MUST TAKE INTO ACCOUNT.

ASSIGNMENTS AND LICENCES

All publishing contracts involve the writer handing ownership (or at least control) of the song over to a publisher. Whether the deal is based on assignment of copyright or merely a licence, the underlying principle remains the same. The publisher must have the rights necessary to permit and encourage it to exploit and protect the work.

The publisher will always prefer to have an assignment of the copyright because this is the most absolute transfer of rights. When you assign rights you are transferring them. The assignment will usually be for a limited period but, during the period of the assignment, the rights that you have assigned are no longer yours.

In contrast, when you license rights, they remain your property; you are merely formally permitting another party to use some of those rights. That permission can either be on an exclusive or a non-exclusive basis.

Both assignments and licences can be limited in all sorts of ways. Both can be limited as to duration, territory, the rights granted and so on. Importantly, both can be terminated in similar ways and the effect of termination can be identical. In other words, both assignment and licence deals can provide similar levels of protection for each party. The answer lies in the detail of the drafting.

At the bottom of the assignment/licence debate:

1. *The publisher wants an assignment* because, if it has to sue someone for infringement, it has to establish a chain of copyright to the owner. If it is itself the owner, that chain is rather short! The assignment gives the publisher the ability to protect the work in its own name, whereas if the publisher is an exclusive licensee, it must join the writer (who would normally be the owner, unless the writer has interposed a company which owns the works) as a party to the proceedings in order to establish that chain of title.
2. *The writer wants a licence* because of the security of knowing that the writer still owns the work, even if he or she does not absolutely control it. It means that in the event of a breach of the terms of the agreement by the publisher, it is easier to argue that a mere licence has been revoked, as it does not involve transferring ownership of the rights. It is merely a matter of withdrawing a privilege.

More important than the question ‘Is it a licence or an assignment?’ are the following questions.

- As a songwriter, how long will you be tied to this publisher?
- How long will your work be tied to this publisher?
- What do you expect your publisher to achieve?
- What would your publisher expect of you?
- What controls will you maintain over your work and reputation?
- What income will you earn from your work?
- If the publisher should breach its obligations to you, how will you get back full control of your works?

PUBLISHER’S OBLIGATION TO EXPLOIT

No matter how the publisher acquires its rights, the writer has to be assured that the publisher will be active and not just be in the business of building up a catalogue as a business asset.

There is an obvious commercial incentive for a publisher to be active when an advance has been paid, but that is no guarantee. Better to have some objective yardsticks by which to measure the publisher’s performance.

Most publishing agreements now contain clauses giving the writer the right to retrieve the copyright in any works the publisher does not exploit. For example, if a particular work has not appeared on a record, been broadcast or synchronised into a film soundtrack, within (say) two years, then the writer can get the work re-assigned. Note that it is not sufficient that such a clause says that the work can be retrieved if it is not ‘published’ within a certain period. That is too low a performance criterion. It could mean merely

releasing a cheap print version of the work. Instead, such a clause should specify types of exploitation that will **earn income** such as obtaining a synchronisation or a cover.

(For more on re-assignment, see the end of this chapter.)

ROYALTY SPLITS

GENERAL

These days, no matter how inexperienced you are, you should never sign a single-song assignment for less than 60/40 of mechanical, public performance and sundry income. Publishers who ask for the old style 50/50 are not meeting the general market rate. There are always a few of these operators working the market, promising the world and delivering very little. Avoid them and their 50/50 deals.

The most normal rates are 70/30 to 75/25. The absolute maximum rate is 80/20, unless you are in superstar-writer class. Above 80/20, you cannot expect the publisher to do much for you because the margin just isn't there (unless, of course, your works are generating huge amounts of money). All the publisher will do is administer the catalogue, collect income and account.

SYNCHRONISATIONS AND COVERS

The royalty rate for income from covers may, in some deals, be lower than the basic royalty rate for mechanical, public performance and sundry income. The cover rate paid to the writer for these forms of exploitation is commonly 10% to 20% less than the basic royalty rate (e.g. the basic rate may be 70/30, but on covers, 60/40). Some publishers also reduce the rate on synchronisation licences (e.g. licensing the work for use in a film sound track or a television commercial).

There are several theories (or, as some would put it, justifications) for this difference between the two rates. One theory is that the reduction is an additional reward to publishers who go to the trouble and expense of looking for covers and opportunities for synchronisation licences.

The cynical theory is that publishers will be more inclined to work a song from which they are going to get a bigger percentage of the gross. The theory goes that, if a publisher has a choice between pitching a song from which it will earn 10% and a song from which it will earn 40%, it will pitch the one with the better margin. Right? Well, maybe. Publishing is rarely that simple or predictable. Publishers would prefer all their hits were on 60/40, but the fact is, a hit is a hit and any publisher will be grateful for a hit, even at 90/10. In most cases, the people in the publishing company who are pitching the song may not even know the comparative royalty rates and probably wouldn't care, even if they did know.

To avoid this problem your lawyer will usually negotiate a different split depending on whether it is the publisher or the writer that secures the cover or synchronisation.

All this is perhaps somewhat theoretical if you only have a single song assignment (unless it is a real zinger of a song, with hit written all over it) because the publisher is not very likely to go out looking for synchronisations and covers for an orphan song. It is more likely to try and get these exploitations for its longer-term writers.

SHEET MUSIC INCOME

The writer's share of sheet music income is usually based on a royalty between 10% and 15% (commonly 12.5%) of the retail selling price of sold copies. (In the United States this royalty is calculated in cents rather than percentages: five cents to seven cents per copy is common unless the writer has negotiating clout.)

In Australia, the rates paid for sheet music and for folios is the same. (In the United States, sheet royalties are calculated on retail and folio income is often calculated on wholesale.)

Where a composition is included in a folio, the royalty is reduced in proportion to the total number of works in the folio (this calculation is usually referred to as being pro rated). So, if you are on a royalty of 10% of the retail selling price and there are 20 works in the book of which one work is yours, for every \$100 of net sales you will get $\$10 \div 20 = 50$ cents.

It is important that the contract specifies that the pro-rating takes into account only works that are still in copyright (which can include new arrangements of traditional works), otherwise your earnings will be reduced by the inclusion of those works on which the publisher is not paying any royalties anyway. The larger the denominator in the fraction, the smaller each share will be, so it makes sense for the writer to exclude all non-copyright works.

PUBLIC PERFORMANCE AND COMMUNICATION INCOME

All writers should join the Australian Performing Right Association (APRA). APRA pays a minimum of 50% (the writer's share) of the income it collects, direct to its member writers and the balance to the relevant publisher. If there is more than one writer (i.e. the copyright is split between several writers), APRA will divide it in the proportions as notified by the writers or their publishers.

If the writer should by chance not be an APRA member, APRA will still only pay 50% to the publisher. The writer can then claim the writer's share from APRA in the usual way by joining it, or one of its affiliates. If no publisher is involved with a particular work, 100% will be paid directly to the writer.

Most publishing agreements provide for the publisher to pay through a

proportion of the publisher's share to the writer. This is usually the difference between the standard writer's share (50%) of APRA fees, and the percentage payable to the writer (under the contract) of the publisher's income from other sources. For example, if the usual split is 75/25 under the contract, then on public performance income, the writer should receive 50% of the publisher's share (i.e. 25% of the total paid out by APRA for the particular song) in addition to the 50% paid directly as the writer's share.

There is an alternative method sometimes used: APRA is advised that the writer's share is (say) 75%, so APRA pays 75% of performance fees directly to the writer. This method disadvantages the publisher because, if the writer is unrecouped, recoupment will be even slower since the publisher cannot treat 50% of the publisher's share as part of the writer's royalty and apply it towards recoupment.

Let's apply this to a simple example: Assume that APRA collects \$100. Unless the publishing agreement specifies that the full \$75 be paid to the writer, APRA will pay \$50 to the writer and \$50 to the publisher. Out of its share, the publisher will pay or credit the writer, \$25. The writer gets \$75 and the publisher ends up with \$25.

OVERSEAS INCOME

THE SUB-PUBLISHER'S COMMISSION

The division of overseas income is always detailed in the publishing agreement and you must take particular care to make sure that you are getting your fair share.

Sub-publishers are third-party publishers who are licensed by your publisher to administer and exploit your works in that sub-publisher's 'territory'. As the sub-publisher is working in its own backyard, the theory is that it will better know its local industry and will therefore more effectively exploit your works. The territory may be one country or several. The licence may also allow the sub-publisher to appoint sub-publishers (sub-sub-publishers) or it may administer the whole territory itself. Sub-sub-publishers are not desirable, as they are just another party taking a percentage of the fees before you get them.

All sub-publishers charge a commission for administering your copyrights. That is, after all, how they make their money. The commission is usually between 10% and 15% of the total royalty income collected by that sub-publisher (the gross), depending on the terms of the sub-licence. If the sub-publisher makes a special effort to procure a cover of your song, it will usually expect a greater commission in return for its additional work.

The commission on covers usually increases to about 20% of the gross,

but can be as much as 50% in really exceptional circumstances. This greater commission is a reward for or an incentive to the sub-publisher to obtain a cover of your song.

NET RECEIPTS V. AT SOURCE

Great care must be taken in working out the basis upon which overseas income will be divided between the writer and the writer's publisher. There are two basic methods: "net receipts" and "at source".

NET RECEIPTS

In essence, net receipts deals work on the basis that your royalty is calculated as a percentage of the money actually received by your publisher in Australia. The term 'receipts' should, of course, include any royalty **credits** that the publisher might earn. The net receipts figure, at least in the case of royalties earned outside Australia, is reached after deduction of the sub-publisher's commission from the total amount of income earned in its territory.

For example, say your song earns mechanical royalties of US\$100 in the United States. Your publisher has a sub-publisher in the United States and given it the right to collect royalties on your songs and retain commission of 10% of the gross in its territory.

The sub-publisher will retain US\$10, deduct any withholding tax required under United States' law (say, another 10% of the original US\$100) and remit the balance to your publisher.

	<u>US\$</u>
Gross earned in United States	100
less withholding tax @10%	10
less sub-publisher's commission	10
Net receipts in Australia	80

To calculate your royalty your publisher will multiply the net receipts by the percentage in the publishing agreement, after converting the net receipts to Australian currency. Conversion will increase or decrease the total, depending on the exchange rate. Let's assume US\$80 equals \$A160. On a 75/25 deal, your royalty account will be credited with \$A120.

Most publishers prefer to work on a net receipts basis. They are usually unwilling to work on an at source basis though, in the final analysis, a comparable result can be achieved for both parties provided the writer's royalty is calculated at a rate which gives the publisher sufficient margin to allow for the sub-publisher's commission on the gross earnings. In effect, the royalty rate has to be set at a low enough rate to leave the publisher with sufficient margin for both it, and its sub-publisher, to make a reasonable commission. As an alternative, the sub-publisher's commission can be capped

to a set percentage. This way, no matter what the sub-publisher actually retains under its deal with your publisher (as they could always agree between themselves to vary the sub-publisher's commission), your net receipts will be worked out using the capped rate.

Net receipts deals are simple enough, but the system fell into disrepute some time ago when some publishers abused it. The scam went like this (slightly exaggerated, to highlight the trick): The (say) United States publisher obtained world rights; it sub-licensed its Canadian affiliate which in turn sub-licensed its English affiliate, which sub-licensed its French affiliate; which sub-licensed its German affiliate; which sub-licensed the Swedish affiliate... All of them worked on a net receipts basis and each of them could retain (say) 15% of those receipts as its commission. You don't have to be very bright to work out that, by the time the royalties from Sweden have gone through the chain, they will have been whittled away to almost nothing.

To avoid this, make sure that the contract specifies that only one bite can be taken out of the overseas income before it is remitted to Australia, irrespective of the number of hands that it passes through. Fortunately, most publishers need to make a profit in their own home territories, and it is not in their interests to do the old 'sub-publisher run around' (quite apart from the horrible publicity this kind of sharp practice would generate, if done today). That said, it certainly pays to ask how things are done by each particular publisher. If your publisher is accounted to at source by its sub-publishers, then the receipts in Australia will be the gross royalties generated in the sub-publisher's territory, less only the sub-publisher's administration charges and any taxes. After that, it is only a matter of limiting the permitted sub-publisher's commission so that you can be assured that the royalty return will be fair to you.

The alternative method is to calculate income at source.

AT SOURCE

If your overseas income is calculated at source, it means that your percentage is based on the gross receipts in the overseas territory, only allowing specifically nominated deductions (e.g. withholding or other taxes the foreign government might apply).

True at source accounting provides for your royalty to be calculated on virtually 100% of the gross generated in the sub-publisher's territory and disregards the sub-publisher's percentage. To maintain the dollar value of the royalty your publisher will have to pay you, the royalty rate in your publishing contract has to be adjusted, e.g. assuming the sub-publisher is retaining 10% of the gross in its territory, a 75/25 net receipts deal is about the same as a 67/33 at source deal.

Using the same assumptions as were used above and assuming the

definition of at source allows deduction of local taxes:

	<u>US\$</u>
Gross earned in United States	100
less withholding tax @10%	10
at source	90

To calculate your royalty, your publisher will multiply the at source amount by the percentage in the publishing agreement, after converting the amount to Australian currency. Let's assume US\$90 equals \$A180. Then the calculation would be \$A180 x 75 % = \$135. As you can immediately see, it is better than a receipts deal.

The advantage of at source accounting is that you know what deductions your publisher may apply before the division of income is made. With a net receipts deal (unless the clauses are properly negotiated), you may have less knowledge of, or control over, any amounts which will be deducted before the money gets back to Australia.

Not many writers have the negotiating strength to demand a pure at source deal. All publishers resist it and most simply refuse it.

But beware! There is a surprising number of publishing agreements around which use the phrase "at source" but actually mean no such thing. These agreements use a definition of at source that changes the usual meaning of the phrase so that it actually means net receipts! It is just a ruse to catch the poorly advised writer who, seeing the magic phrase, assumes that he or she has the optimum protection. It is a feel-good-now, feel-awful-later definition.

MECHANICAL ROYALTY REDUCTIONS IN THE UNITED STATES AND CANADA

Controlled compositions and reduced mechanical copyright royalty rates are dealt with in detail in Chapter 23, **Record Royalties**, so we will deal with them only briefly here. They are relevant to performer-songwriters because they reduce the mechanical royalties that can be earned in the territories where the clauses apply. If you are a performer-songwriter with publishing and recording contracts, these clauses will affect both you and your publisher. In some publishing agreements, the publishers try to get themselves a more favourable commission rate on mechanical royalties earned in countries where controlled composition clauses apply.

The custom in the United States and Canada is that record companies demand special conditions on the way mechanical royalties will be paid on records which contain works written or otherwise controlled by that artist (controlled compositions). These are generally defined as being works owned or controlled by the recording artist. Some record companies try to expand the definition to include songs the recording artist does not own or control.

Works already assigned to a publisher (including those not yet written, but which must be assigned as they are created) should never be treated as controlled compositions. Your lawyer should try to knock these expansions out.

Why do artists agree to these terms? Because they have a choice: do the deal that way, or not do a deal at all. Mega stars might (emphasise might) get to negotiate minimum concessions, but for everyone else, the terms are non-negotiable in the sense that you will never get rid of them completely.

Essentially, they affect the otherwise applicable mechanical copyright rate by:

- limiting the royalty to only three-quarters of the otherwise applicable statutory rate;
- paying on no more than 10 tracks (even if the album has, say, 12 tracks). A similar cap is often applied to singles, etc.
- paying no royalties on 'free goods' (the term is usually widely defined).

As far as anyone can tell, all Australian artists who have had releases in the United States have had to suffer this diminished rate and there is nothing to make anyone think that situation will change (but that's no reason not to negotiate hard, to get the best deal you can!).

There is a rationale for the provisions (as you will see in the detailed study), but they have too often been abused and blatantly used as a way of reducing the record companies' royalty expenses. They argue that they shouldn't have to be paying their own recording artists to record their own material, though they (conveniently) overlook the fact that recording music and writing it are different skills AND DIFFERENT RIGHTS and are properly the subject of separate remuneration. If a corporate analogy may be drawn, if a company makes both compact discs and CD players, no-one suggests that if you buy the company's hardware, you get a 50% reduction on their discs. (Perhaps it should be suggested!)

No matter how good your lawyer is, on sales of your record in the United States and Canada you will suffer a reduction in mechanical royalties payable in respect of controlled compositions. Your lawyer's knowledge and ability will be important, however, in limiting the scope of the definition in your particular record contract.

(For further discussion of controlled composition clauses and mechanical royalty caps, see the last section of Chapter 23, **Record Royalties**.)

GST

Publishing income is subject to the Goods and Services Tax. As this tax is designed to be an 'end-user' tax, publishing contracts must make it clear that any GST payable in respect of the writer's royalty, will be actually paid by the publisher. Various publishers adopt different procedures but essentially they

should all be variants on the following process.

- The royalty payable is calculated in the normal way.
- Then the GST payable on that amount is calculated.
- If the composer is registered for GST purposes, he or she will be advised by the publisher of the royalty payable and the amount of any associated GST.
- The composer then invoices the publisher for the royalty plus the GST payable.
- On receipt, the composer pays the GST with the publisher's money (or has the publisher pay it on his or her behalf).
- The publisher then claims the GST payment as an input credit and off-sets the amount against any other tax that it would otherwise have to pay.

If the composer is not registered for GST purposes, he or she will not have a tax liability in respect of the royalty. The composer doesn't invoice the publisher for the GST payable. None is payable. That's the theory but you only have a choice of registering or not if your income is under the \$50000 threshold. Given that everyone wants to earn more than that (and the publisher funds the GST payment), why wouldn't you register for GST and set yourself up on the basis that you are going to be successful?

ACCOUNTING

Publishers account to their writers on a six-monthly basis. The accounting periods traditionally run from 1 January to 30 June and 1 July to 31 December. This does not mean that you will get your cheque on 30 June and 31 December. These are the close-off dates for the accounts. You will actually receive the royalty statement between 60 and 90 days after the close-off date. This gives the publisher's accounts department a chance to make all the necessary calculations and prepare all of the individual statements for its writers.

The publisher has an absolute obligation to account to the writer. Many a writer has terminated a publishing agreement for a breach of this fundamental duty. Failing to account can be grounds for immediate termination of the contract, depending on the terms of the contract. The reality is, though, that termination is not usually the most appropriate response unless the writer already wants to be out of the contract for other reasons. Often, the writer is quite happy with the publisher in all other respects: the writer just wants the royalties. Immediately.

The accounting clause can limit your right to challenge the accounting statement and your right to commence action in respect of that statement. Most contracts state that, if you wish to make any objection to a statement, you must do so within (say) two years of receiving it and must commence any

legal proceedings within three years. The justification given by publishers is that they have to be able to rule their books off at some stage, send them out to storage and eventually destroy them. They argue that it is reasonable to force a writer to verify the accounts promptly and make any complaints without undue delay.

There is truth in this, but two points should be borne in mind:

1. The limitation forces successful writers to audit their publisher more often than would otherwise be necessary. This is inconvenient and expensive for both parties and therefore it should be in the interests of both to extend the limitation period to three or even five years.
2. The limitation can operate very unfairly. For example, mistakes, defaults or frauds may have gone on for years (and across many accountings) without being detected. It would be a brave (or foolhardy) publisher who, in such circumstances, refused the writer's auditors access to the earlier figures on the ground of this contractual limitation. The publisher always has a duty to account honestly and accurately for money that does not rightfully belong to it and it is unlikely that Australian courts will let such a limitation clause operate unjustly.

CREATIVE CONTROL

All writer agreements have clauses giving the publisher some right to alter the works, add new lyrics, translate them into other languages, license them for others to use and so on. The publishers quite correctly say that these are rights they need, to maximise the financial potential of the work. The writers also correctly state that their professional reputation is inherently intertwined with their work and that some alterations and uses can detrimentally affect their professional reputation.

Almost all publishers in Australia will agree to include clauses protecting the works' integrity, but you have to ask for them. As usual, how readily (and to what extent) these requests will be met will be influenced by your bargaining power. Most publishers, as a matter of course, consult their writers before varying a work or authorising new words or music to be written.

Perhaps the most contentious of these creative controls is the right to license the work for synchronisation, both with film and television programs and into commercials. Most publishers resist giving the writer absolute control over the licensing of their works. They argue that this is really the publisher's role in the relationship and it is in the publisher's interest, as much as the writer's, to ensure that the licensing is done in such a way as to protect the integrity (and therefore the value) of the work.

On the other hand, the writers ask, 'where did all those terrible films and

television programs get their music from if publishers were looking after the greater interests of their writers?

In practice, it is very rare that a writer refuses permission for a synchronisation licence. Why would you? Synchronisation income is an important part of a writer's income flow. The common exceptions are commercials and X-rated movies. This all becomes very idiosyncratic, because no two writers will have the same attitudes to, and standards in, these matters. For some, the use of their song in a beer commercial is acceptable but a cigarette advertisement is not. For others it's sex, violence, politics and who knows what. One publisher was approached for permission to use a song in a commercial for sliced bread. When the composer was asked if he consented, after much turmoil, he eventually refused. He could not stand the thought of waking up every morning and hearing his favourite composition being used to sell sliced bread. No logic, and it cost him the average Australian wage, but it was important to him. What is more, his publisher understood and accepted his decision. That is one terrific publisher.

All reasonable publishers are prepared to give the writer certain power of control over these uses. The degree of control depends very much on the trust that the writer has for the publisher and the respect that the publisher has for the writer.

WRITER'S WARRANTIES

All publishing contracts have a section in which the writer has to promise the publisher that a whole array of things are true. They may seem to have little in common, but the thread running through them all is that they are all fundamental to the publisher's authority and ability to exploit and protect the work.

Most warranty clauses make the writer promise that:

- each of the compositions will be original and not infringe the copyright in any other work and is not to be obscene nor defamatory;
- the writer has the right and power to enter the agreement and to grant the publisher the rights granted in the agreement;
- the writer will indemnify the publisher against all losses it may suffer as a result of any breach of the agreement or the warranties; and
- the writer will assist the publisher in various ways in any actions or proceedings which may be necessary for it to secure, establish or enforce the rights in the work.

As you can see, in principle they are commercially necessary. Your lawyer will make sure that the clauses do not expose you to unreasonable risk.

PUBLISHER WARRANTIES

Contracts drafted by publishers rarely put much of a burden on them. This is understandable because the publisher's lawyers drafted the contract.

It is reasonable to expect the publisher to promise to try to exploit your compositions, collect all income arising from the exploitation of the compositions and to protect them.

They can't promise to get covers and synchronisations but they can promise to try. On the other hand, the collection of income and the protection of the copyrights is a fundamental obligation.

REVERSION OF COPYRIGHT

Reversion of copyright is relevant to the Term and Retention Period of the contract. As already noted, contracts that transfer the copyright in a work to a publisher for the duration of copyright, have (largely) been relegated to the scrapbooks as an unfortunate historical anomaly. Mind you, sell enough songs and you'll get rich even in a 50/50 deal. It will take a lot longer though. As a general rule, don't do them.

Lovers of fables will recall that, when the clock struck midnight, Cinderella's fairy godmother took back her magic. Writers should always have the option to take back the copyright in their works at the end of a publishing deal. A writer may decide to leave them there (after all, continuity of administration is a valuable thing) or decide there is more to be made by shifting control to another publisher. This is one of the great incentives for a publisher to keep doing the right thing.

Fortunately, most publishers do not expect life of copyright deals now. It's swings and roundabouts for them - they might lose one writer's catalogue at the end of the retention period, but pick up another writer's catalogue that had been controlled by a competitor until the retention period had similarly expired.

Most publishing deals give the writer the explicit right to require the works (which were assigned to the publisher during the deal) to be reassigned to the writer at the end of a specified time. The usual way of doing this is to have an appropriate clause in the section setting out the period during which the publisher may control the works. This may involve executing specific documents, though this can be avoided by careful drafting.

There is some debate over the Capital Gains Tax (CGT) implications of re-assignments and these need to be considered on a case-by-case basis. A recent amendment to the law probably catches such reassignments. The real problem is how to value the works. This is an area of law that is still developing. Keep it in mind though that CGT is one of the fairer taxes, because it deducts the effects of inflation before the 'capital gain' in value is calculated.