

## **Digital Age Shifts Roles of Labels, Music Publishers**

The digital-music era has resulted in many shifts in the music business. A major one has been the creative and economic repositioning of record labels and music publishers. In the following interview, coordinated by *Entertainment Law & Finance* Editor-in-Chief Stan Soocher, **Keith C. Hauprich** and **Bob Donnelly** discuss this repositioning and related issues from the publisher's perspective as well as the artist attorney's perspective. Hauprich is Vice President, Business & Legal Affairs for Cherry Lane Music Publishing Co. Inc. New York attorney Donnelly is a partner with the law firm of Lommen, Abdo, Cole, King & Stageberg P.A., with whom he recently merged his practice after serving as a sole practitioner specializing in music matters for 30 years.

**EL&F:** As the music industry continues to experience the traumas and triumphs of moving into the digital age, the future of music publishing is seen as more robust than that of record labels. What are some of the reasons for this observation?

**Hauprich:** Historically, record labels have developed and promoted artists through financing the creation and distribution of artists' recordings, while music publishers have exploited the rights in and to musical composition. Given the precipitous decline in sales of prerecorded music, the rules of engagement have changed. Entities like record labels that rely on one form of distribution and high-profit margins such as from CDs will have to re-think their business model or disappear. Unlike labels, music publishers aren't beholden to the sale of prerecorded music and are better suited to handle the changing ways in which consumers choose to get their music. Music publishers collect revenue from sources that include public performance, synchronization of songs (in connection with audiovisual works), so-called "print rights" and mechanical reproduction of songs on CDs and by means of digital downloads.

In fact, new players are getting into music publishing every day ranging from private-equity funds to record companies because publishing is perceived as being more insulated against the changing marketplace due to its diverse streams of revenue.

It has been said that labels and publishers are becoming "music companies" as opposed to two separate entities with different roles. Record labels are grasping at sources of revenue from their recording artists through "360-degree" or "multiple-rights" agreements that allow labels to share in artist touring, merchandise and product-endorsement revenues, and, at times, music-publishing revenues. For music publishers, as new channels of distribution have arisen and technology has allowed for the creation of less-expensive, high-quality recordings, the stranglehold of records labels has considerably weakened. Publishers now find themselves willing to develop and promote artists. Clearly this isn't a novel concept. However, it's cheaper to put an artist in a studio while the ever-expanding channels of distribution allow publishers to get right to music users. Given these factors, the frequency with which music publishers attempt to break new artists has increased.

**Donnelly:** I agree with Keith that the traditional business of selling hard goods CDs is no longer a viable model for record labels. For most of my 30 years in the music business, we have been an industry which treated singles sales as loss leaders in favor of selling the very profitable album configuration. However, if the Napster revolution should have taught us anything, it's that record buyers no longer want to be shackled to buying a full album when only one or two tracks suits their interests. The music-publishing business has never been constrained by the album model. Publishers make the same amount of mechanical income if a song is sold as a single or if it's sold as one track on an album. In fact, you could make the case that music publishers are actually better off with the new digital-sales model, which emphasizes singles sales, because they are not forced to suffer the loss of those mechanical-royalty monies, which would not be paid by a record company if the album exceeded its 10 to 12 song "cap rate."

Another reason I believe that the future is brighter for publishing companies is that most artists regard their publisher as a friendly member of their team. I don't know many artists who would say that about their record labels. For the past few decades, record companies have been perceived as always trying to find ways to limit the artist's share of income, while expanding their own share. As a result, many artists seem to be rooting for labels to fail, reasoning that whatever replaces the current business paradigm can't possibly treat artists any worse than the current model. To a certain extent this is true.

Today it is not uncommon for an artist who has been dropped by a label to go into a studio and re-record that artist's hits (provided of course that the artist is not constrained by the re-recording restrictions in the artist's record contract). If a movie, television show or commercial wishes to use one of these songs, the artist is now able to offer it at a considerably lower license fee than the artist's former label (and keep the full 100% of the master-use fee as opposed to receiving 50% if the artist's account is in a recouped position). Music publishers are unaffected by this change because they are still able to charge the same fees for a synch license regardless of which version of the master is actually used. Another change fostered by the digital revolution is that some artists have decided to start their own labels. In this scenario it is not uncommon for artists to discover that they can sell one-third the number of CD's as they did on a major label and still net the same amount of royalties. Some independent labels have tried to fill the void by offering artists so-called "net profits deals." While I don't believe these are the panacea, they certainly allow the artists to get a larger share of royalties if they are lucky enough to score a hit.

As music publishers start to diversify and perform traditional record-company functions, there is a danger that they could lose their favored status among the artist community. One thing that has always been sacrosanct is the notion that mechanical royalties should never be allowed to be cross-collateralized against unrecouped record-royalty advances. In fact, music publishers have traditionally been the artists' greatest advocate when it comes to preventing record companies from encroaching into this area. As publishers start to become investors in an artist's record career, I can't help but worry

that this fire-wall will start to be eroded when it is no longer in the best interests of the publisher to prevent cross-collateralization.

**EL&F:** Many artists in the digital age believe their future is in the D.I.Y. opportunities that the Internet offers for reaching potential fans. Why would a songwriter who could operate through his or her own website need a music-publishing company today?

**Hauprich:** For writers there may be a perception that they can exploit their works primarily through the Internet, music-search engines and viral-video sites. That's only part of the equation. There's simply no substitute for hard work. At the end of the day, you still need: to register copyrights around the world (with the U.S. Copyright Office), the performing-rights societies and mechanical-licensing organizations); to create and preserve song files that include the proper chain of title; to negotiate, draft and issue all third-party licenses; to collect monies due and owing from the use and exploitation of one's music (around the world); to review royalty statements and payments received from performing-rights societies, mechanical-licensing organizations, sub-publishers, direct licensees, record labels and co-publishers; and to account to third parties, as necessary.

**Donnelly:** I don't think anyone would argue that music-publishing advances have been decreasing for the past few years. *Billboard* asked several music business professionals, including myself, to put a number on this phenomenon. I suggested that advances were down by 25 percent. Of the several people interviewed for that article, my estimate was the most conservative. Smaller advances have been in part responsible for another phenomenon, which is that an increasing number of artists are choosing not to "sell" their music-publishing rights and are opting instead to do administration deals.

These so called "admin deals" really make a lot of sense for the artists for whom the advance money is not the difference between continuing their music career on a full-time basis or having to take a part-time job at Jiffy Lube. In an admin-deal scenario, the artist gets far less money on the front end, but this is more than off-set by a smaller deduction paid to the administrative publisher, and by the fact that the artist owns and controls his or her own music-publishing catalog. Because there are so many idiosyncrasies attached to the collection of music-publishing royalties in the various foreign territories, it is absolutely imperative that every songwriter associate with an experienced music publisher (whether through a co-pub deal, admin deal or other deal) in order to be certain that they are collecting all of the royalties to which they are entitled.

**EL&F:** What are the most common music-publishing agreements with songwriters?

**Hauprich:** In this climate, I don't think that there is one dominant model. Rather each publisher/songwriter relationship must be based upon the nuances and reasonable expectations of those parties. Over the past two years, I've drafted full-publishing agreements, co-publishing agreements, administration agreements and numerous hybrid agreements that featured elements of various types of agreements. If it makes sense for a publisher and a songwriter to work together, the proper agreement — which sets out the responsibilities, obligations and reasonable expectations of both parties — can be inked.

**Donnelly:** In addition to a trend toward admin deals, it is now more common than ever for co-pub deals to contain a reversion clause. Previously, reversion clauses in which the artist's share of publishing is returned to the artist (in whole or in part) after a certain period of time (typically 5 to 20 years) were granted only to those artists who were the subject of a bidding war. As an artist's attorney, I'm happy to say that this concession is now granted more frequently. This helps to justify why artists might be encouraged to accept a co-publishing deal. Another concession that publishers are often willing to make is to include "benchmark payments." For example, there might be an additional payment if an artist is signed to a record deal, a larger payment if the artist is signed to a record deal on a major label or if the artist sales hit certain benchmark numbers and so on.

One discouraging trend is the insistence on the part of music publishers that artists have a delivery requirement of a certain number of songs that they have written and are released by a major label. While this clause is generally no problem while the artist is under contract to a major label, it becomes a major dilemma once that artist has been dropped by the major label. I discourage my artists from doing co-pub deals that do not have a specific exit strategy in the event that this occurs.

**ELF:** How has the industry's transition into digital music affected agreements with songwriters?

**Hauptprich:** In today's songwriter agreements, you're going to find that music publishers are more likely to help finance and further the career of writers. For example, a publisher may agree to commit a budget to help the writer travel to work with co-writers or to get into a studio and make demo recordings. This often takes the form of an advance against writer royalties.

For certain types of exploitation, publishers are securing songwriters prior approval and/or offering more favorable royalty splits. These concessions allow both parties to explore the tremendous opportunities for music and for licensing music that often lead to new ancillary streams of revenue.

**Donnelly:** Another thing that the digital revolution has taught us is how little we know about uses to which music will be put in the future. Only a few years ago, I did virtually no ringtones/ringback agreements. Today, they are a significant part of the music-publishing marketplace. Likewise, I believe we have only begun to see the tip of the iceberg that will form the market for the streaming of music online. The fact that there are so many possibilities for music-publishing income in the future is why I encourage my clients to retain rights or to do deals that have reversion rights or limited terms.