

SXSW Music CLE 2015

RECORDING ARTIST / DISTRIBUTION AGREEMENTS

Recording Commitment

- What if the artist records mostly singles, rather than albums, the singles sell well and the artist wants to capitalize on that?

SAMPLE CLAUSE

Advance Payments Based on Singles

If any combination of Singles embodied on the Album Delivered in fulfillment of your Recording Commitment for the first Option Period (“**Album Two**”) (i) achieve royalty bearing sales, as reported by the Sales Reporting System, equal to one or more than the sales levels set forth below under the column entitled “Sales Threshold” by the last day of the applicable time period after the initial commercial release in the United States of Album One (“**Measuring Date**”), and (ii) sell no less than the applicable percentage set forth below (“**Momentum Percentage**”) of the applicable sales level in each of the four consecutive weeks immediately preceding the date on which the applicable sales threshold is attained, then Universal shall pay you as an additional Advance in connection with Album Two, the sum which corresponds to the applicable Sales Threshold attained as listed under the column below entitled “Additional Advance”, promptly (but not less than 30 days) after the applicable Measuring Date:

<u>Sales Threshold</u>	<u>Measuring Date</u>	<u>Momentum Percentage</u>	<u>Additional Advance</u>
1,000,000 units	18 Months	3%	\$100,000
2,000,000 units	18 Months	3%	\$100,000

Guaranteed Release Language with Reversion

- What formats/configurations constitute valid release? Is digital only acceptable?
- Where and when will the album be released?
- If the album is not timely released, how do you get the recordings back? Automatic? After notice and cure period?

SAMPLE CLAUSES

Guaranteed Release: Company agrees to commercially release the Album in the digital format no later than [DATE] and to commercially release the Album in the compact disc configuration [or the then-current configurations typically used for frontline releases of records in normal distribution channels in the United States] no later than [DATE] and to release all subsequent albums within one hundred 120 days from the date of technically and commercially satisfactory delivery to Company of the Master Recordings, along with all required artwork and reasonable documentation. With respect to each Album, a Master Recording shall be “**commercially satisfactory**” to Company if the musical works embodied in such recording are of a style that is reasonably consistent with the musical works previously delivered to Company.

Reversion After Notice & Cure, Physical Configuration Required: If Company fails to so release the Album as provided above, Artist will provide written notice to Company of such failure and Company will commercially release the record in the compact disc configuration or other comparable physical format throughout the Territory within 60 days after Company’s receipt of the notice. If Company fails to release the applicable record within that 60-day period, the Term of this Agreement shall then terminate.

Automatic Reversion, Digital Only Release: Company agrees to commercially release the Album throughout the

Territory within 6 months of the Effective Date of this Agreement. “**Commercially Release**” means that Company shall release the Album in the permanent download configuration throughout the Territory through normal retail distribution channels for sale to the general public (e.g., iTunes). If Company fails to so commercially release, this Agreement shall automatically terminate at the end of such 6-month period.

Territory by Territory Expansion: The rights granted to Company for the Album are for the world excluding the United Kingdom, the member states of the European Union and any other countries in the European geographical area that are not member states (“**Territory**”). Countries that are not part of the Territory are referred to as “**Excluded Countries**.” If, during the Term, Artist notifies Company within 30 days following Company’s commercial release of the corresponding Album in the United States that the Album will not be made available by Artist in an Excluded Country (each, a “**Subject Country**”) within 12 months from the date on which such Album was recorded by Artist and released by Company under this agreement (each a “**Subject Album**”), Company shall have the right to commercially release each Subject Album in such Subject Country within 120 days following Artist’s notice thereof to Company. Artist’s failure to send Company such notice shall not be a breach of this agreement, provided that Company shall have the right to request that Artist send Company such notice should Artist fail to do so.

Guaranteed Marketing

- What kind of \$ support is the label/distributor offering? (minimum marketing commitment if possible; caps may also be wise)
- How active can the artist be in the marketing plan? approval right or meaningful consultation?
- Can you get any tour support?

SAMPLE CLAUSES

Artist Approval of Marketing Plan: Company shall release the Album pursuant to a marketing plan and release pattern approved by Artist in writing in advance (which approval may be communicated via email for this purpose). For clarity, Artist shall have the right to approve the publicist to be hired for the Album’s marketing campaign, with the following publicist(s) deemed pre-approved: _____.

Tour Support: Provided Artist embarks on a U.S. tour consisting of at least 15 major markets within three months of the commercial release of the Album, and provided Company reasonably and in good faith approves the budget proposed by Artist in connection with such tour, Company shall provide “deficit” tour support to Artist in an amount not to exceed 150 free CDs and \$5,000. Such amounts paid to Artist shall be an Advance recoupable from Artist’s Profit Share.

No Cross-collateralization of Artist’s Recording Monies and Publishing Royalties

- Is this a co-publishing deal? If so, does the agreement allow the label to use publishing royalties to recoup recording (or other record-related) costs?
- Also confirm that label’s publishing affiliate loses rights if the label drops the artist (i.e., deal with label’s publishing affiliate should be co-terminus with the record deal)

SAMPLE CLAUSES

Co-Publishing, Co-Terminus: Artist hereby grants Company and Company hereby acquires a 50% interest in the Publisher’s share and the copyright of each Musical Composition written, owned, acquired or controlled, in whole or in part, directly or indirectly, by Artist or any Person with whom Artist is affiliated, prior to or during the Term of this Agreement, whether or not such Musical Composition is a Controlled Composition recorded by Artist for Company, as well as the exclusive, perpetual worldwide administration rights in and to the entire Compositions. In this regard, Artist agrees to execute Company’s standard form exclusive songwriter co-publishing agreement (“**Songwriter Agreement**”) simultaneously with this Agreement. For purposes of clarification, this Recording Agreement shall be co-terminus with the Songwriter Agreement.

No Cross-Collateralization: Except with respect to the indemnification provision, Company shall not have the right

to cross-collateralize Artist's royalties with Artist's music publishing royalties under this Agreement.

Limiting Impact of 360 Clause

- How can the record company's participation in ancillary revenues be limited or delayed?
- Try to avoid 360 clause kicking in until after release of first album.

SAMPLE CLAUSE

Adjusted Net Tour Revenue means Gross Tour Revenue, less only costs of collection, actual out-of pocket booking agency and other professional commissions paid by you to unrelated third parties directly related to touring services performed by you during the applicable Tour (but in no event to exceed 25% in the aggregate for all such commissions), and applicable direct, out-of-pocket third party costs actually incurred by you which are attributable to the production of the applicable Tour, e.g., so-called "sound and lights" expenses, crew expenses, production costs (including freight costs), but specifically excluding salaries, per diems or any other payments made to any member of Artist. Company shall have the right to reasonably approve costs to be incurred by Artist for his own personal benefit (e.g., without limitation, travel and lodging) during any Tour.

Limiting Implications of Exclusivity

- Will you need a waiver to perform at an event that is simulcast and/or recorded for later broadcast (e.g., for television or festivals)?
- Does exclusivity extend to your services as a side artist?
- Consider ability to offer your fans bonus materials (e.g., singles, live masters)
- Keep in mind crowdfunding contributor obligations and artist's social media strategy

SAMPLE CLAUSES

Excluding Live Masters: Artist will not re-record any of the musical compositions embodied on the Masters for exploitation in the Territory, provided, however, that such restriction will not apply to Artist's re-recording of the Masters for live performances or a live album.

Holdback on Live Album: Artist will not release any album containing live recordings of the Masters until [9 months] after the initial commercial release date of the Album.

Crowdfunding Contributor Considerations: Nothing contained in this Agreement shall be construed to prohibit Artist from meeting Artist's obligations to [the Album's Kickstarter contributors], which Company acknowledges require Artist to provide [___ physical copies / ___ digital downloads of the album].

Side Artist Services: During the Term, Artist shall be Company's exclusive recording artist in the Territory and shall not provide Artist's recording services for any other party or person in the Territory, except with respect to so-called "side artist" services.

MANAGEMENT AGREEMENTS

Option Periods / Extensions

- How long are you "married" to your manager? Does the manager decide or do you have a say?
- Automatic extension if certain benchmarks are met (e.g., record sales, income threshold, record deal)?

SAMPLE CLAUSES

Option Requiring Mutual Approval: Manager and Artist shall have [two] separate, consecutive, and mutual options to extend the term for periods of one year ("**Option(s)**"). Each Option shall be deemed exercised unless a party shall give the other party written notice to the contrary not later than 30 days prior to the otherwise applicable date of expiration of term.

Option Automatic if Certain Benchmarks are Met (e.g., secure deal with bona fide record company): Manager shall be entitled to extend the Term hereof for a period of ___ years if Artist's income exceeds \$_____ during any 12 month period or if Artist becomes a party to a term recording artist agreement with a bona fide record company. For purposes hereof, a "**bona fide record company**" means (i) one of the "major" labels, meaning a record company which is part of (either via partial or complete ownership or other investment, or through a contractual relationship, including but not limited to a distribution relationship) one of the then-existing "major" music, media and/or entertainment companies (examples of such companies currently include, but are not limited to, Sony/BMG, Warner Music, Universal, Viacom, News Corp. and Disney); or (ii) an "established independent" label, meaning a record company whose records are distributed by any nationally recognized independent record distribution company, including but not limited to RED, ADA, Caroline, Fontana, and Ryko.

Deductions from Gross Income

• What monies should be deducted from the artist's gross income for purposes of calculating the management commission?

SAMPLE CLAUSE

Notwithstanding the foregoing, Gross Income will not include, and there will be deducted therefrom, the following:

(i) actual, bona fide, recording, production and other recoupable costs, including, without limitation, fees for recording studios, musicians and singers, paid by (or on behalf of) Artist in connection with phonorecords embodying Artist's performances;

(ii) all fees, royalties and advances paid to (or on behalf of) Artist for the services of any third party producers, mixers, directors and engineers engaged by (or on behalf of) Artist, and for the interpolation of "samples" in connection with the recording and sale of phonograph records or audiovisual works subject to this Agreement;

(iii) video production costs paid by (or on behalf of) Artist in connection with audiovisual works subject to this Agreement;

(iv) appearance fees paid by (or on behalf of) Artist to any opening or support acts as part of the "all-in" fee paid to Artist in connection with any of Artist's live musical engagements; sound and lights, and third party costs incurred by Artist solely in connection with or directly related to Artist's personal appearance tours or live musical engagements;

(v) monies and other considerations paid or credited to Artist, or on Artist's behalf, and used by Artist to pay unaffiliated third party co-publishers or co-writers or their designees;

(vi) income from Artist's so-called "passive investments" (e.g., real estate investments, savings and municipal bonds, and other investments in projects or properties where Artist neither renders entertainment services nor authorizes the use of Artist's name or likeness);

(vii) "tour support" and "independent promotion" monies paid in connection with Artist's activities in the Entertainment Industry, as such terms are commonly known and understood in the music industry;

(viii) royalties used to recoup prior advances which were commissioned by Manager hereunder;

(ix) monies and other considerations paid or credited to Artist, or on Artist's behalf, and used by Artist to pay out-of-pocket audit costs and third party collection costs in connection with Gross Income hereunder, including legal costs and attorneys' fees;

(x) bona fide gifts, i.e., gifts other than those given in lieu of compensation for services in the Entertainment Industry;

(xi) the value of musical instruments and/or musical gear provided to Artist in exchange for Artist's endorsement of such product(s);

(xii) monies paid to Artist from a record company, music publishing company, television or film packaging company, or any other entity owned or controlled by Manager, or in which Manager has an income interest;

(xiii) monies paid by Artist for the design, manufacture, packaging, shipping or selling of merchandise related to Artist;

(xiv) sums paid to Artist for concert performances where the fee for such performance does not exceed \$1,000.00;

(xv) monies received by Artist from the sale of Artist's musical equipment; and

(xvi) loans and/or sums paid to a loan-out company owned by Artist as part of payroll taxes or union pension and welfare payments.

(xii) loan proceeds received by Company or Artist from third parties in consideration of a promissory note or loan agreement;

(xiii) capital contributions received by Company from third parties in consideration of membership in Company; and

(xiv) income derived from so-called "crowdfunding" campaigns (e.g. Kickstarter), except to the extent that such income is received in consideration of phonorecords or merchandise, in which case Manager shall be entitled to a Commission based upon the then-current retail price of equivalent phonorecords or merchandise made available for sale directly to consumers by Company or Artist. For the avoidance of doubt, Manager shall not be entitled to a Commission with respect to any crowdfunding income received in consideration of (a) private performances by Artist, personal meetings with Artist, public recognition or other intangible rewards, (b) clothing, props or other memorabilia, or (c) items made by-hand or personalized by Artist.

Commission on Publishing Monies

- Is your manager entitled to commission on publishing monies?
- If so, try to limit commission base to only songs that are "written, recorded, and released" during the term
- Did you have a previous manager also commissioning on publishing income?

SAMPLE CLAUSES

Only Songs Written, Recorded, and Released during the Management Term: With respect to publishing monies, the parties hereto agree that Manager shall only be entitled to commission on publishing income derived from musical compositions written, recorded, and released during the term hereof and in no event shall Manager be entitled to publishing monies earned prior to [DATE] regardless of when actually credited or received. Furthermore, it is expressly understood and agreed that Manager shall not be entitled to commission on any sums payable to unaffiliated third party writers and composers.

Former Manager Compensation: It is agreed that the Commission may be reduced solely by reason of your obligation, if any, to pay to your former manager (i.e., _____), continuing commissions on Gross Compensation that would otherwise be subject to the Commission hereunder ("**Residual Compensation**"), subject to the following: (i) any such reduction shall not apply for a period exceeding three years); (ii) any reduction of the Commission shall not reduce such percentage below 15% with respect to the applicable Gross Compensation; and (iii) you shall provide Manager with an executed copy of any and all documentation pursuant to which _____ Residual Compensation is payable to _____.] For the avoidance of doubt, Manager shall not be entitled to commission on [performing rights organization] royalties for accounting periods prior to [DATE].

Collection of Monies / Audit Rights

- Who is entitled to collect monies?
- What rights do you have to review accountings?

SAMPLE CLAUSES

Artist Collects until Business Manager: As soon as reasonably possible Artist will make every reasonable effort to engage a business manager. This agreement serves as a letter of direction for such business manager to pay Manager according to the terms herein. Until such time as a business manager is engaged, all gross monies will be payable directly from the source to Artist.

Manager Collects, Artist has Inspection/Audit Right: Manager shall maintain accurate books and records of all transactions received on behalf of Artist, which books and records may be inspected by Artist or a certified public accountant, attorney, or business manager designated by Artist upon reasonable prior written notice to such other party, at the office where such books and records are kept, during regular business hours. If such inspection discloses an underpayment in the sums which should have been paid to Artist during the period covered by such examination, then Manager shall immediately pay the full amount of such underpayment to Artist. If such underpayment is in excess of 10%, then Manager shall reimburse Artist's [reasonable out-of-pocket] costs in connection with such inspection/audit. "**Books and records**" as used herein shall include ledgers, journals, receipt books, checks and all other records concerning Artist's financial matters as they relate to Gross Compensation and Artist's entertainment career.

Key Person Clause

- Is a particular person critical to managing the artist?
- If such person is no longer involved in managing the artist, what should happen?

SAMPLE CLAUSE

Artist Can Terminate if Key Person Unavailable: It is understood and agreed that _____ ("**Smith**") shall personally supervise Artist's career in the entertainment industry on a day-to-day basis during the Term. If Smith is unable, unwilling or unavailable to perform such services, Artist may terminate the Term of this Agreement by sending written notice to Manager. As used in this sub-paragraph, the phrase "unable, unwilling or unavailable" means the failure to meaningfully respond to and act upon telephone calls, texts or emails from Artist during a consecutive period of 30 days or more.

PRODUCER / PRODUCTION AGREEMENTS

Deliverables:

- Does your music lend itself to synch licensing? Contain explicit lyrics?
- Would you benefit from having all files in order to remix/remaster?
- What format is best for you to receive (and protect) the files? Will you require Producer to keep a backup copy?

SAMPLE CLAUSES

Specific mixes (e.g., instrumental, radio edits, vocals only): Producer will deliver fully edited mixed and mastered stereophonic Masters (including instrumental mixes, vocal only mixes, and radio edits) to Artist in hard drives in a customary format that are technically satisfactory on a date to be mutually determined by Producer and Artist, but not later than [DATE] unless the delay is caused by Artist.

Catchall: The sources of all sounds that are audible on the versions of the Masters delivered by you shall be available on and embodied in such versions, along with all metadata and any other instructions (either machine or human readable, as applicable) reasonably necessary in order to create a final mix of the Masters.

Re-recording Restrictions:

- first position = reject
- fallback = limit time, exclude live recordings

SAMPLE CLAUSES

Excluding Live Masters: Artist shall not re-record and release any composition recorded by Producer under this Agreement for a period of (18 months): from the date hereof OR following the initial commercial release of a recording embodying that composition by Artist), provided, however, that such restriction will not apply to Artist's re-recording of the compositions for live performances or for exploitation on or in connection with a live album.

Holdback: Artist shall not release any album containing live recordings of the compositions recorded hereunder until the earlier of: (9 months) after the initial commercial release date of the Studio Album or (18 months) after the date hereof.

Producer Contributions:

- Does the producer have a reasonable claim to authorship of the musical compositions?
- Did the producer add any additional sounds/effects to the mix that could cause problems (e.g., loops, samples)?

SAMPLE CLAUSES

Musical Compositions: Producer hereby acknowledges that Producer has not written any part of the compositions embodied in the Master(s) and has no direct or indirect interest in any such compositions, whether in whole or in part.

Producer Reps & Warranties: Producer warrants, represents, covenants, and agrees that all selections, materials, music, and so-called samples selected or provided by Producer to Artist contained in the Masters will not violate or infringe the common law or statutory rights (including, without limitation, copyrights, trademarks, rights of privacy and publicity, and contractual rights) of any person, firm or corporation and that all such material is either original to Producer or 100% licensed by Producer for all uses contemplated herein.

Credit:

SAMPLE CLAUSE

Artist shall instruct and use reasonable efforts to cause Company to give Producer appropriate production credit on or in the labels and liner notes of the Album, and on the labels and liner notes of all other record(s) that embody the Masters in all formats and configurations (including, without limitation, so-called "new technology" records), and in all one-half page or larger paid advertisements that are placed by Company or under Company's control in so-called "nationwide" trade and consumer publications (including, without limitation, so-called "Billboard Strip Ads") in the United States and which pertain to records embodying solely a Master, to the Album only if at least 50% of the recordings embodied on the Album are Masters produced hereunder, or to any single, the "A-side" of which embodies a Master produced hereunder, provided that Producer shall have the right to remove such credit if any Master is altered by Artist, Company or any third party after delivery by Producer. All credit given to Producer pursuant to this paragraph shall be in the following form: "Produced by _____." Notwithstanding the forgoing, Producer's credit on the Album shall be of a size, type, placement and prominence no less favorable than that accorded to the other record producers who rendered services in connection with the Album (excluding any so-called "executive producer"). No inadvertent and non-repetitive failure on Artist's or Company's part to fulfill any obligations under this paragraph shall be deemed a breach of this Agreement, provided that Artist will correct any such failure, or instruct and use reasonable efforts to cause Company to correct any such failure, on future advertisements and all future manufacturing runs and other distributions of records after Artist has been notified by Producer in writing of any such failure.

Controlled Compositions

SAMPLE CLAUSE

If any selection or musical composition, or any portion thereof, recorded in any Master hereunder is written or composed by Producer, in whole or in part, alone or in collaboration with others, or is owned or controlled, in whole or in part, directly or indirectly, by Producer or any person, firm or corporation in which Producer has a direct or indirect interest, then such selection and/or musical composition shall be hereinafter referred to as a "**Producer Controlled Composition.**" Producer hereby agrees to issue or cause to be issued, as applicable, to Artist and Company, mechanical licenses (including, without limitation, any "first use" mechanical license[s]) in respect of each Producer Controlled Composition at the copyright royalty rates set forth in the Recording Agreement, which rates Artist warrants will not be less than 75% of the minimum mechanical royalty rate applicable to the use of musical compositions embodied on records under the United States Copyright Act as of the date of release of the Album in the United States. The applicable accounting provisions of this Agreement shall apply to this mechanical license, provided that statements as to mechanical copyright royalties payable by Artist or Company, together with payment therefor as reflected on such statements, shall be sent on or before 45 days after the end of each calendar quarter.

SoundExchange Royalties:

SAMPLE CLAUSE

If Artist receives or is credited with any so-called "direct monies" from third parties other than Company (e.g., monies from Sound Exchange) solely attributable to the Masters, then Artist shall pay to Producer an amount equal to ___% of such direct monies. Artist's accounting, audit and audit recovery obligations to Producer in this Agreement shall apply to such monies. Pursuant to a letter of direction in the form of Exhibit "_" attached hereto and incorporated herein by this reference, Artist shall instruct SoundExchange to account directly to Producer for such direct monies at the same time and subject to the same conditions pursuant to which it accounts to Artist.

Calculation of Net Profits:

SAMPLE CLAUSE

For the rights in the Album and Masters granted herein, Company shall pay to Artist a royalty of 50% (subject to escalations set forth below, "**Artist's Share**") of the "Net Proceeds" from sales of copies and other exploitations of the Album and the Masters (it being understood that all royalties from the Album and the Masters shall be fully cross-collateralized for accounting purposes). For the purposes of this Agreement, "**Net Proceeds**" means all sums actually received by or credited to Company in respect of sales of copies and other exploitations of the Album and the Masters [or in the event Company sells copies of the Album or the Masters through sub-licensing agreements with third parties, sums received by or credited to Company pursuant to such agreements] less only the following: (i) all third party, out-of-pocket costs actually paid by Company which are directly related to the commercial exploitation of the Album or Masters hereunder (excluding general overhead). Such costs shall include, but not be limited to, taxes actually paid or otherwise withheld at source (e.g., sales taxes for in-state mail order sales and VAT taxes for foreign sales, but not income taxes), third party distribution fees (to the extent not deducted by the third party in accounting to Company), any additional technical costs necessary to deliver a finished Master to the replication plant (including any re-mixing or re-mastering of the Masters, which will not be done without Artist's prior written approval), all out-of-pocket costs of encoding for digital distribution, actual out-of-pocket manufacturing costs paid by Company, shipping, marketing, advertising and promotion costs in respect of the Album, costs of shipping physical copies of the Album to Company and/or retail accounts, out-of-pocket cost of artwork design (if any) and printing and actual out-of-pocket cost of returns of physical copies. If Net Proceeds payable to Artist hereunder exceed \$60,000, the Artist's Share shall be increased prospectively to 52.5%. If Net Proceeds payable to Artist hereunder exceed \$80,000, the Artist's Share shall be increased prospectively to 55%. If Net Proceeds payable to Artist hereunder exceed \$100,000, the Artist's Share shall be increased prospectively to 57.5%. If Net Proceeds payable to Artist hereunder exceed \$120,000, the Artist's Share shall be increased prospectively to 60%.