REPORT
The Los Angeles Daily Journal

October 24, 1986 — No. 86-20

Table of Contents

Page

Self-Publishing and the Songwriter-Music Publisher Agreement
By Jeffrey L. Graubart 3

Legal Ethics: A Monthly Compilation of Scholarship and Formal Opinions
The California Rules of Professional Conduct: Proposed Changes Based on the 1983 ABA Model Rules of Professional Conduct; Part Two, Rule 2-101
By Gregory L. Ogden 8

Self-Publishing and the Songwriter-Music Publisher Agreement

By Jeffrey L. Graubart

"Should I be my own music publisher?" Talented songwriters, fearing they will be making a mistake in failing to use an established music publisher to administrate their musical creations, often ask this question. Of course, there is no easy answer. Certainly, using the services of a professional has its advantages, but do the disadvantages outweigh them? This must be decided by individuals on their own, by weighing various facts unique to their own goals and desires.

A songwriter-perfomer who has no desire to delve into the business part of the music business may choose another person or firm to administer his or her musical works. This gives the creator more time to devote to creation and performing. Even if this choice is easily made, should the chosen administrator be an "established" music publisher (which will customarily charge the creator 50 percent or more for its services), or should the creator choose another (such as a manager, attorney, accountant, or other professional administrator) to undertake the task, for a charge to the creator usually no greater than 15 percent and often less than that? It should be noted that many established companies do accept catalogues solely for administration for fees ranging from 15 percent to 25 percent. However, among the uninitiated, the "pros" demand (and receive) ownership shares equal to 50 percent and more of individual songs and catalogues.

Publishers' Share

Why does the publisher potentially receive even more than 50 percent of the gross income from the creator's composition when the songwriter has been advised by the publisher, traditionally, that they are entering into an arrangement calling for an equal income split? The primary reason is that the discussion between them is usually in terms of equality, but the written agreement submitted thereafter almost invariably provides equality with respect to the split of income from mechanical royalties and synchronization royalties, but not with respect to printed music. Also, often actual expenses are charged "off the top" (or charged only to the writer) even though these expenses are part of "administration," and sometimes an additional "administration fee" of 10 percent to 15 percent in favor of the publisher is exacted.

Although the publisher typically receives close to 60 cents from the sheet music licensee (20 percent of $2.95 present retal price of sheet music), it usually agrees to pay the creator only 5 or 6 cents. The payment of 7 to 10 cents by a publisher to a writer therefore is a major victory for the creator. When questioned with respect to this practice, various legitimate publishers have defended it on the logically inadequate grounds that: (1) they never said they would be the writer's partner, or (2) it is traditionally part of the publishers' "built-in profit structure." (It should be noted that the agreements presented to songwriters in the 1940s provided for a payment of 5 cents to writers for piano copies, and the same rate was contained in the majority of songwriters' agreements presented to writers during the 1970s, although the retail price of sheet music since the 1940s has multiplied several times.)

One notable exception is the reported recent modification of its writer/publisher agrement by CBS Songs. Hopefully, based on their awareness of this revolutionary (but only equitable and highly overdue) modification, other major publishers will follow suit. The writer is advised by CBS Songs that its present standard writer/publisher agreement now calls for a 50-50 sharing of all "net" income from print royalties.

There are many factors to be considered by creators in making their choice. Creators

---

Jeffrey L. Graubart is a member of the Beverly Hills-New York firm of Strote, Graubart & Ashley. From Entertainment Law Reporter. Reprinted with permission.

must decide whether they want the services customarioy provided by a music publihser or, in the alternative, the services of another administrator. The other administrator chosen by the creator almost always provides his or her services for a period as long or as short as requested by the creator, while "established" music publishers invariably insist on controlling compositions for as long as permissible under U.S. copyright law. Potentially, this control can last the life of the creator plus 50 years.

Utilizing the services of an administrator, the creator usually contracts only on a year-to-year basis and does not, therefore, face the loss of control of his or her compositions. Why then should the creator choose the music publisher to administrate?

Publishers' Role

Publishers have been accused of no longer providing the creative, promotional, and marketing functions for which they once were famous. They also have been charged with maintaining a function that has become heavily administrative and clerical only: the same functions now performed by others for a fraction of the charge and a fraction of the required contractual time. It has been said that publishers have become largely service entities, conduits for the processing of income and paper transactions and that they do not promote as they used to, do not advertise as they used to, and do not employ field representatives as they used to, because these promotional functions have been taken over by record companies. If all of this is true, the creator's choice is clear: to employ his or her manager, attorney, accountant, or other representative to process the income and paper transactions and, in so doing, become his or her own publishing company.

What do the music publishers say in their own defense? They, of course, paint a different picture. They argue that they provide an important and creative role in discovering and encouraging new talent. This encouragement can take the form of advances, annual guarantees, or living allowances that permit the composer or lyricist to develop his or her art. An astute publisher also offers the availability of crative directors, producers, editors, and experts on the publisher's staff; the opportunity to co-write with established writers; and the conducting of workshops for new writers. Further, publisher point out that they have an important promotional role in making demonstration records to showcase the creator's songs. In doing so, they work to get not only the initial recording but the maximum number of additional recordings of each song (which, for example, may turn out to be impossible for certain "hard rock" songs, but much more likely with middle-of-the-road tunes like "Yesterday" or "Bridge Over Troubled Waters").

The offer of a substantial cash advance may be the major factor causing some new songwriters to contract with an established publisher. Another reason may be the possibility of the publisher's obtaining an additional prize seldom available from the mere administrator: the recording contract.

Once established as a recording artist, the songwriter finds less reason to maintain a relationship with the publisher because the creator no longer needs the publisher to find a vehicle to bring the creator's songs to the public. The artist-performer has his or her own vehicle. This factor, more than anything else, is the reason publishers have been willing in recent years to modify the portion of the income they traditionally split with the creator. They have been offering to slice the pie in such a way that the writer or composer ends up with more than the so-called "writer's share" (traditionally described as 50 percent of the pie but actually substantially less because of the disadvantageous provisions uniformly inserted in the agreement betweeen the parties by the publisher, as discussed above, which give the writer only a small fraction of the money received from the sale of the printed music, and, in addition, exact substantial additional amounts "off the top" for collection agents and "general overhead"). The remainder, or "publisher's share," today may be split between the publisher and the writer, but this is usually done only upon the writer's strong insistence. This arrangement for splitting the publisher's share has become known as a "co-publishing" or "split-publishing" deal.

From time to time, established music publishers are charged with being nothing more than agents for a stable of writers. If so, the tailoring of the publisher's compensation by way of the split-publishing deal does cause

them to be compensated more closely to an agent's commission than was done previously. However, the agent's term hardly ever exceeds a period of seven years, while publishers continue to demand terms ranging from 35 years to the life of the creator plus 50 years.

What about the fairness of permitting music publishers to retain creators' songs for long periods of time, without an obligation to achieve some level of success with respect to each composition? One remedy, permitted by some but certainly not all of the major publishers, is to insert in their agreements with writers a clause stating that unless a composition is recorded and commercialy released through customary industry channels or used in a motion picture or television show, or some variation thereof, the publisher must return the composition and all rights granted by the writer within a certain period of time, usually 12 to 18 months.

British Decisions

Although U.S. courts have not generally delved into the fairness of agreements between music publishers and songwriters (primarily on the basis that it wuld be an unwarranted interference with freedom of contract if they were to relieve an adult party from a bad bargain), the English courts have done so in the landmark case of *A. Schroeder Music Publishing Company Ltd. v. Tony Macaulay*, 3 All E.R. 616 (1974). There, the young songwriter-plaintiff (Macaulay) sought to repudiate the contract he had with the defendant music publisher and was successful in doing so in the trial court, in the Court of Appeal, and again in the House of Lords (equivalent to the U.S. Supreme Court).

Macaulay had signed a contract with the defendant, a worldwide organization of music publishers, by which the composer agreed to assign to the publishers all of the copyrights in his existing work and in future works composed during the subsequent five-year period. For that, the publishers agreed to pay the plaintiff an advance equivalent to abot $100. Subsequent advances of the same amount were due each time the previous advance was recouped by the publishers from the royalties due the plaintiff. As is quite common in these agreements, there was no express obligation by the defendants to exploit or even attempt to exploit any composition of the plaintiff.

The plaintiff contended that the agreement was oppresive and an unreasonable restraint of trade (because of his inability to deal with his compositions for a five-year period except with the defendant) and therefore void as being against public policy. At each level, the court agreed. The House of Lords, in affirming the judgment of the trial court which had declared the agreement to be void, made the following observations:

1. If the publisher is not bound with a "positive undertaking" to exploit a composer's work, it would be an unreasonable restraint of trade to tie the composer " . . . for this period of years so that his work will be sterilized and he can earn nothing from his abilities as a composer if the publisher chooses not to publish."

2. If the composer had the right to recover his compositions after a reasonable time of inactivity by the publisher, the agreement would not be against public policy.

3. Because the contract was not negotiated between the parties, but instead the plaintiff was offered a "take-it-or-leave-it" agreement by a party with superior bargaining power, the agreement was oppressive and did not satisfy the test of fairness, i.e., whether the restrictions are both reasonably necessary for the protection of the legitimate interests of the publisher and commensurate with the benefits secured to the songwriter.

Fleetwood Mac Case

A week later, another English court decided a case involving Fleetwood Mac's original manager, who also had a publishing agreement with members of the group, *Clifford Davis Managment Ltd. v. WEA Records, Ltd.*, All E.R. 237 (1975). The court refused to grant the manager an injunction against distribution of Fleetwood Mac records in England that embodied compositions apparently subject to his prior publishng agreement. The court, referring to "standard" clauses in the agreement, called them "amazing provisions" and cited the precedent of the *Macaulay* case as the authority for its refusal.

Two subsequent seminal cases have come to us from our U.K. brethren that also warrant noting here.

Gilbert O'Sullivan Case

In *O'Sullivan v. Management Agency*, 3 All E.R. 351 (1985), the court, citing *Macaulay*, set aside the writer/publisher agreement between songwriter Gilbert O'Sullivan and his publishing company on the following grounds:

1. In the event the publisher failed to publish any of the subject compositions during the exclusive five-year term thereof, the writer was not entitled to any compensation.

2. The royalty amounts were deemed by the court to be "restrictive of trade" based upon their size (or lack thereof).

3. The writer had no independent counsel prior to executing the agreement.

4. Undue influence between O'Sullivan and the defendants "was to be presumed because of the special relationship between them." The special relationship referred to by the court included a personal management deal and was based upon the findings of the lower court that O'Sullivan "had total confidence in Mills (defendant personal manager) and trusted him implicity."

Elton John Case

Decided subsequently to the *O'Sullivan* case was the case entitled *Elton John v. Dick James Music* (High Court of Justice, Chancery Division, Royal Courts of Justice, 1982 J. No. 15026 (1985)) which involved the internationally famous star composer, Elton John, and his almost equally well-known lyricist, Bernie Taupin, who signed writer/publisher agreements with Dick James Music when they were 20 years old and 17 years old respectively. There, armed with the *Macaulay* decision, the plaintiffs sought to set aside the publisher and recording agreements entered into with various entitities controlled by Dick James, on the grounds of undue influence and sought the return of all copyrights and master recordings.

The court refused to set aside the agreement, citing the long delay between the recognition of the validity of the agreements and the bringing of the action. However, the court did rule on behalf of the plaintiffs on a most controversial provision present in many international publishing agreements.

In such agreements, as was the case there, the publishers enters into sub-publishing agreements with local, wholly owned subsidiaries in various foreign territories, that in most instances are nothing more than paper creations having no offices, staff, or physical presence except in file cabinets. Typically, under such agreements, each such "sub-publisher" retains as much as 50 percent of all revenues generated in its own territory, remitting only the remainder to the parent music publishing company. Accordingly, when it is time to account to the writers, the parent music publishing company accounts only for the fraction "received" from its foreign territory, which, of course, is considerably less revenue than would be received if these were genuine sub-publishing agreements negotiated at arms-length with an independent thrid-party sub-publisher in each territory.

Elton John and Bernie Taupin claimed that the defendant music publisher, Dick James Music Group (DJM), had breached its fiduciary duty and that the publisher and other defendants had breached an implied warranty not to "unfairly, artificially or unjstifiably reduce" the receipts upon which royalties were payable.

Although the court found the U.S. subsidiary was, in fact, a real operating entity which had a staff justifying its retention of a 35 percent subpublisher's fee, the court did not allow the retention by the other subsidiary sub-publishers (operated solely for administration fee in each territory).

With respect to the other subsidiaries, the court ruled that the proper measure of compensation to be retained by the subsidiaries was the amount actually paid to the local publisher/administrator in each territory, stating that " . . . in addition to being under a duty to exploit the assigned copyrights only in a way it honestly considered was for the joint benefit of the parties, DJM was under a duty not to make for itself any profit not brought into account in computing the writers' royalties." In so doing, the court exhibited a good understanding of the commercial realities of the music publishing industry.

The plaintiffs also had alleged undue influence as the basis upon which to rescind their original publishing agreement. The court refused to grant recission, although in discussing the reasons for its refusal, it raised other important issues with respect to the writer/publisher agreement:

1. The court found that based on the disparity in their ages and levels of buisness acumen

and experience (the plaintiffs were minors when the agreement was executed, although it was approved by their parents) and based on the plaintiffs' reliance on Dick James' representation that the contractual terms would be fair to them and the fact that no negotiations had taken place, James indeed had *had a dominating influnece over plaintiffs*. (The court did go to pains to point out that although James did not consciously seek to obtain an unfair advantage, "one can obtain an unfair advantage by the exercise of dominating influence without intending to act unfarily.")

2. The court stated that such an undue influence, *coupled with* "a manifestly disadvantageous transaction resulting from the exercise of that influence" would be a ground to rescind the agrement. However, it held that the transaction *had not so operated* taking all circumstances (including the great monetary success enjoyed by the plaintiffs thereunder) into account.

It is not clear that other courts will be so forgiving of publishers in similar cases in the future. In any event, although the court refused to declare the agreement void, as was done in *Macaulay*, the court did comment *negatively* about the agreement, pointing out the following "unfair" aspects of it:

1. There was no provision for an increased royalty rate in the later years of the agreement, notwithstanding the potential level of success the writers' compositions might enjoy.

2. As in *Macaulay*, the copyrights were assigned for their full terms with no provision for a reversion based on the publisher's failure to exploit individual compositions.

The court also held that Dick James Music should account for any unauthorized profits made by it in the course of its *fiduciary relationship* with the plaintiffs, because royalties received are not deemed to be "trust property" under English law, "the relationship between the fiduciary and the plaintiff is that of debtor and creditor" (and not that of trustee and *cestui que* trust).

Conclusion

American law has its deep roots in English law, but as has often been pointed out, these roots were planted in the 17th and 18th centuries, and since then, the legal vines have grown in different directions in some cases. One might say that some of the American vines have failed to grow at all until very recently. One area where this is the case is the issue of recission of contracts due to inadequate consideration given by one party where the agreements are at arm's length. American courts have, in the past, been more willing than their English counterparts to *imply* a promise to use reasonable or good faith efforts, and so whether American courts will adopt the logic of *Schroeder v. Macaulay* and its progeny, and create a revolution in the U.S. music publishin industry as is already underway in that industry in England, remains to be seen. It is clear, however, that today's creators have more choices open to them than their counterparts of 20 years ago and before. It is therefore incumbent upon creators to weigh intelligently their choice of publisher versus administrator before making a hasty, uniformed, and irrevocable decision they may later regret. It is also, of course, incumbent upon their advisers to be well informed with respect to the bases on which this often critical career choice is made.