

# RECORDING AGREEMENT FACT SHEET

REMEMBER TO CHECK THE RECORDING AGREEMENT CHECKLIST THAT GOES WITH THOSE FACT SHEET. THE CHECKLIST OUTLINES KEY TERMS IN A RECORDING AGREEMENT, AND THIS FACT SHEET PROVIDES MORE DETAILS ON THOSE TERMS.

## WHAT IS A RECORDING AGREEMENT?

A recording agreement is a contract between a recording Artist (either an individual or a band, for example) and a record label who is proposing to release that Artist's music commercially to the public. The agreement should cover all the matters set out in the accompanying Checklist and regulates the commercial (and sometimes the artistic) relationship between the Artist and the label. This Fact Sheet expands on some key points in the Checklist and is intended to give you an overall idea of what should be in a recording contract and the implications you'll need to consider before entering such a contract.

Traditionally, there's been substantial power imbalance between recording Artists and labels. The labels had the money and access to the market. While that equation has shifted somewhat in favour of the Artist in the digital era (because recording and distribution are now cheaper than they have ever been) the entire market has changed substantially to move from a sale-per-unit basis to a streaming subscription model, and so labels have different commercial challenges, as do Artists. That said, there is a burgeoning market for vinyl LPs, so that relevantly expensive means of production and distribution of music recordings seems to have survived the technological upheaval.

The gist of the deal is that the Artist will give a recording to a label who will sell it and pay the Artist back a royalty based on those sales. In return for that arrangement, the label will usually expect "exclusivity", that is, to be the only source of the Artists recordings for a certain period. That helps them capture the market and makes the commercial enterprise more likely to be worthwhile. Typically, the label will fund the recording process with cash advances and will insist on owning the resulting copyright in the resulting recording.

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However, in independent deals, and increasingly for online-based labels, it is possible for the Artist to negotiate to keep the Artist's copyright and recordings and instead license them to the label, so that if the label falls over or when the Term of the agreement ends, control of those recordings comes back to the Artist.

# Key Terms of a Recording Agreement

## **RECORD LABEL DETAILS**

It's important that the contract correctly identifies the label by its proper, legal name. This will assist the Artist to enforce the agreement if that becomes necessary.

## **ARTIST DETAILS**

The contract should state, for a group, whether the individual members are signing in their own rights as well as altogether, or if they're only signing for their performances as that particular group, and not otherwise.

The label will want to ensure that everyone is "on the hook" individually as well as together, to help protect their investment in the Artist.

## **TERRITORY**

Generally, labels will want to sign bands for the world, but it is sometimes possible to negotiate territory-by-territory deals. It is a question of bargaining power.

## **RANGE OF RIGHTS**

Labels almost always need the exclusive right to distribute the Artist's recordings. This is usually assured by the label insisting that it will own copyright in the recordings. But it is also possible for the parties to agree that the label will have an exclusive licence of the recording (see above). The label will likely also require the Artist not to record for anyone else without the label's permission, again, to preserve the label's investment in the Artist. The label may require the Artist to also perform exclusively for the label for video clips. This can present some issues for Artists needing to use social media and clip-sharing services for the promotion of their business and is generally negotiated on a case-by-case basis.

With the advent of digital distribution in past decades, several labels attempted to move to a "360-degree" or "270-degree" standard deal, whereby in return for funding recordings and providing tour support etc, the record label took a share in not just the recording income, but also touring, sponsorship endorsements (and possibly even

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publishing). Artists have generally resisted these attempts by labels, but it is not unusual for labels to negotiate that they can release two or three merchandise items per album, as well as take a commission on any sponsorship or endorsement agreements they manage to negotiate (subject to the artist's approval) featuring the Artist.

Labels may also seek exclusive rights to monetise the Artist's social media channels. All these matters should be addressed with caution and with proper advice by Artists who are asked to cut the labels in on these income streams or rights.

### **PRODUCT COMMITMENT AND TERM**

Labels generally want the commercial certainty of knowing what the Artist will deliver to them – is it an EP? A series of singles? A full album? What about further albums after the previous one?

Generally, recording agreements give the label a series of options to extend the deal for another album (or two or three or four...). The terms of such options can be complex to negotiate. Artists may wish to impose KPIs before such options can be exercised, escalations in advances for subsequent options and so on.

The label may also specify some minimums for what must be delivered, in terms of playing length, "acceptable" commercial quality etc. Again, these matters are closely negotiated. The label will have preferences for what formats recordings should be delivered in, and will usually insist on comprehensive metadata being supplied by the Artist as well, to maximise digital rights income and record keeping.

Typically, labels will also require Artists to agree to promotional engagement (at no fee, but with out-of-pocket costs covered). And to preserve the market exclusivity of the recordings, labels will usually insist the Artist agrees not to re-record any of the tracks that were released on the label for a period, say, 5 years.

### **INCOME**

There are two basic "flavours" for calculating royalties. The most common, mainstream deal offered by large record companies is a so-called "PPD deal" (as in Published Price to Dealer, or wholesale price) under which the Artist's royalty is a percentage of that wholesale price of the recording. On that basis, royalties range from anywhere between 15 – 25% of that income. The label keeps the rest and has to fund promotional marketing budgets, videos, etc, some or all of which costs may be recoupable in part from the Artist's royalty. The deals can get very complex, as you can imagine.

The other approach, which has been more typical of independent record labels, is to offer a "Net Receipts" deal. That is, essentially, a profit share. The label will pay the Artist 50% of what's left after certain agreed costs are taken "off the top" of income from the recording. These costs usually include production, marketing, promotion, tour support, video costs and publishing mechanical royalties.

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In the latter deal, the label essentially "fronts" the overheads and then the parties share the profit. There are many variations on this. Some labels insist on paying for some of those costs out of the Artist's share alone. Again, it is a matter of bargaining power.

For traditional PPD deals, Artists may negotiate "escalations" such that their royalty rate increases by a percentage point or two when certain sales or income generated figures are met. They essentially negotiate to get a slightly bigger piece of a bigger pie. On the other hand, labels generally insist on a lower royalty rate for various kinds of sales that are less remunerative for the label than standard price sales, such as those at mid-price, and budget price points etc. They are essentially offering the Artist a smaller piece of a smaller pie.

Some Artists, depending on the genre, find it useful to be able to acquire from the label discount stock of physical records such as vinyl, or even cassettes, to resell on the road or via their websites. This can be an important source of income.

These financial arrangements are reflected in an obligation on the label to account to the Artist for their royalty. Traditionally, these were issued on a half yearly basis to give the label time to compute all of the relevant income figures and sales as at, say, 31 December or 30 June in any given year, and then provide a royalty statement to the Artist showing the royalty income and paying the royalties then due. Some labels now have more nimble accounting practices and are able to provide quarterly accounting. Either way, the Artist needs to know what information is going to be disclosed in the accounting statements (this can provide important intelligence on what markets are working for the Artist, or which need more development).

The Artist must have a right to inspect the books of the label to make sure the royalty statements are correct. Larger acts that routinely audit every year or two and anecdotal evidence suggests these audits do generally show under-reported funds in many cases. Artists with less power may be reluctant to audit the label (for the sake of the commercial relationship) but, either way, the audit power should be set out in the contract. It is always also customary to ensure that if a mistake of a sufficient magnitude is discovered (say, 5-10% of the sum that should have been paid), the label will pay, or at least contribute to, the Artist's costs of running the audit.

## **ADVANCES**

Labels are essentially a bank for Artists or have traditionally been in that role. This is achieved by advancing sums to the Artist, as a "loan" against the Artist's royalties. Generally, this "loan" is only recoupable from the Artist's recording royalties, it's not repayable and it doesn't bear interest. From the label's point of view, advances are entirely at risk, depending on the potential commercial success of the Artist.

There are various philosophies on advances. One school of thought is that the Artist should only take advances that are sufficient for the Artist's needs at the time, such as for a specific recording project or an overhead of the band operation. Another approach is to try and

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get the biggest advance you can on the basis that it is better to have money in the Artist's pocket than the label's, and the label then has to work much harder to try and recoup its substantial outlay. There are pros and cons to both approaches.

Generally, Artists will try and negotiate that the size of the advance which they can access will increase album by album. Labels generally want some control over recording costs (the days are long gone of floating the band a large amount of money and telling them to come back with a finished album, without asking where all the money went). Accordingly, Artists will try and negotiate to increase the minimum and maximum spends for each album cycle to ensure that they can access sufficient funding to create a recording that reflects the market's expectations of quality, creative ambition, etc.

Given the economic importance to Artists of physical touring and personal appearances, Artists will often try to negotiate so-called "tour support" which can help meet the costs of being on the road. Some labels are happy to do that, considering it a species of marketing, but there is always a negotiation on the basis upon which it will be paid, how and when.

It is the label's responsibility, generally, to market and promote the Artist's recordings. In an old-school PPD deal, the cost of all that is covered by the label's larger share of the income. In indie deals, sometimes it can be delegated to an independent provider or marketing agency, who spends an agreed budget. Obviously, the Artist wants an effective and properly-funded marketing campaign. By the same token, the label might be hoping to reduce costs and put more pressure on the Artist themselves to create self-marketing initiatives, particularly on their own social media etc.

Given the potential complexities of recording contracts, they usually require extensive negotiations and competent legal representation for the Artist to reach acceptable terms. For that reason, Artists often seek an advance specifically to cover legal costs. The label will generally cap these quite severely and will want to see the lawyer's invoice before they pay it.

## **ARTISTIC CONTROL AND RESTRICTIONS ON COMPANY**

Because the label's advances are completely at risk depending on commercial success of the Artist's recordings, and because it takes a lot of effort and commercial resources to properly "work" a recording, the label has a strong interest in ensuring that what the Artist produces is marketable and acceptable to the label's idea of the Artist's audience. On the other hand, the Artist will have their own creative ideas, and an ethos they wish to present to the public. Keeping the Artist and the label aligned can be difficult, particularly if the Artist is particularly challenging, or likely to change their creative approach or style from time to time.

Because of this, the issue of who has creative control over what is recorded and whether it's acceptable to take to market, is usually very closely negotiated. Even if the Artist manages to

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get the last say on track-choice, or selection of producer or mixer etc, the label will usually insist on control over the budgets for those engagements.

Likewise with the packaging, artwork, marketing and promotion – the label is deeply commercially concerned with making something that is attractive to the consumer, but the Artist may have different ideas on the specifics. Given that the label's principal task is marketing and distributing the recording, generally, the label will need the last say on these matters but, it is often possible to negotiate quite nuanced approvals and consultation rights in favour of the Artist.

Artists will generally negotiate approval rights over the use of their music in advertising products and services and third-party media productions such as films and TV shows. The Artist may have aesthetic or ethical concerns about where their music ends up, and this is usually accepted by labels.

The Artist may also want control over what compilations their music ends up on, whether the music is sampled, and whether the label can release a "Greatest Hits" or similar release.

The label may want a say over who comes in and features or guests with the Artist, because this is obviously a commercial concern for the label should that choice be controversial.

## **MUSIC PUBLISHING**

As you will be aware from the Music Publishing Agreement Checklist and Fact Sheet, the music publishing industry runs in parallel with the sound recording industry. Labels must pay music publishers and other music copyright owners "mechanical" royalties for the right to reproduce their musical works on the sound recordings marketed by the label.

Where the Artist who has signed to the label is also the composer of the relevant music, the labels want a royalty break on that mechanical royalty overhead. Most recording contracts will include a so-called "controlled composition" clause under which the Artist who composes the songs agrees first, that the label can reproduce those songs on the recordings in the first place, and second, the label's liability to pay mechanical recordings for the use of those copyrights is capped out at agreed industry rates, or a rate set by statute (this is the case in the USA).

Artists are generally content to accept controlled composition clauses, but difficulties can arise when they co-write with someone who is not signed to the label and is not subject to the same controlled composition clause. If the Artist has promised in the recording agreement that the label will not have to pay over a certain amount in mechanical royalties, but the co-writer is not subject to any such cap, the Artist will need to make up the difference to that co-composer out of their own pocket.

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## **PROMOTION AND MARKETING**

As above regarding marketing, budgets, etc, it's also important to have a plan. It's a primary task of a label, so an Artist will need to be confident the label can execute a good marketing plan to give their recordings the best chance at commercial success.

## **RELEASE REQUIREMENTS**

It is important that the contract obliges the label to release the recording that is delivered by the Artist. That can be surprisingly absent from some recording agreements (at least in the first draft). Usually this is expressed as a period from the delivery and acceptance of the master, say 120 days. There may be negotiations about what format gets released and when – generally digital is easy to release, but vinyl has a longer lead time due to practical manufacturing and distribution constraints. The deadline might vary between the domestic market for the Artist, and international territories.

Sometimes, an Artist can negotiate that if a recording is not released in an international market in the agreed period, the Artist can secure a release with a third party that they think will do a better job. Again, these are closely negotiated because they represent substantial commercial risk to the label.

## **GROUPS**

Where the Artist is performing as a group rather than being a solo member, specific considerations arise. See the Band Partnership Checklist and Fact Sheet for more information on this. Apart from issues about who are the contracting parties – see Artist Details above – the recording agreement will usually set out provisions that governs what happens when one of the members leaves the band.

Typically, the label will still have exclusive rights to that person's recording services, so, there is generally a process whereby the leaving member must give notice to the label, and then the label decides whether it wants to keep the services of that member. Then there will be terms about whether that member makes a solo album etc. Much depends on the label's calculation about the commercial potential of that leaving member. If the label thinks that person has a promising recording career, it is unlikely to just let them go or "drop" them so they can sign with someone else.

## **ASSIGNMENT**

Labels come and go and are bought and sold. Artists have justifiable concerns about ending up on a label they do not intend to be on. Accordingly, the recording contract will need to deal with whether the label can simply assign the contract to a buyer or a third party, or even just to sign some of its rights under the agreement to another party. The parties may negotiate that such an assignment would require the consent of the Artist, but

as a commercial matter, the label will not usually be willing to accept such a constraint on dealing with its contractual assets.

If that's the case, the Artist may be able to negotiate as a fall-back that the assignment can only take place if the person who is getting the rights conveys directly to the writer that they will observe all the label's obligations under the contract. The label may also agree to be secondarily liable if the assignee fails to comply. However, most labels will be looking for a clean break when they sell their catalogue.

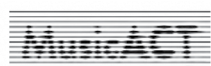
## TERMINATION RIGHTS

If things aren't going well and one of the parties is not complying with the contract, the other party should be able to get out of it, particularly with a long running and onerous contract like a recording agreement, which can define and encapsulate an Artist's entire recording career. Most properly drafted recording agreements will require the party to provide a notice of any breach before it can terminate the agreement. There will be pre-contractual negotiations about what terms will survive the termination, and what happens to the rights in recordings upon termination.

In some cases, such as a licence (see above), rights in the recordings might return immediately to the Artist on termination. On others, such as where the label owns copyright in the recordings, the label will hold onto those recordings, but continue to pay royalties under the agreement. In that case, the chief benefit to the Artist of termination is that the Artist can go and sign with another label for their ongoing recorded output.

You should never sign a recording agreement without getting competent legal advice, for obvious reasons.

*For more information, you can speak to your local Industry Association, the Arts Law Centre of Australia or a legal practitioner.*



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