

PUBLISHING AGREEMENT FACT SHEET

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

WHAT IS A MUSIC PUBLISHER?

Composers and lyricists (let's call them 'writers') create works that need to be administered if they are going to make money. Writers might be too busy or lack the right skills to do this themselves. So, many writers use music publishers to administer the copyright in their compositions and to seek and collect income from their use. The publishers receive a split of that income (the "publisher's share"), so they are incentivised to maximise the income (so they get more money as their share).

Music publishers do a range of things for writers, including:

- Administration and collection – collecting fees and royalties; maintaining and protecting copyright; participating in industry associations like APRA and AMCOS; and policing or preventing unauthorised uses of the works.
- Licensing – negotiating licences to use the music, and persuading content creators such as film and television producers or advertisers to use a writer's works; publishing sheet music and other graphic and online uses of the music; and licensing the use of music in connection with advertisements and promotions.
- Creative – connecting writers with other writers or recording artists who might make recordings of their songs; helping writers get record deals and good management; and giving general career advice.

HOW ARE MUSIC PUBLISHERS DIFFERENT FROM RECORD LABELS?

Music publishers and record labels have different functions and use different copyrights. But they have complementary functions. The basis for these different functions is that labels generally only have rights to the copyright in the sound recording of a song; publishers only have rights to the copyright in the song itself. For more information, see Arts Law's Information Sheet on Music Copyright and Publishing for Bands and Musicians.

WHEN DO YOU NEED A PUBLISHING AGREEMENT?

If you decide that a music publisher will be better able than you to promote your work, track where it's used, collect income, and find licensing opportunities, then you might seek out a publisher. Or, you might need some money and a music publisher offers you a royalty advance in return for you giving the music publisher control over some or all of your songs or compositions.

Key Terms of a Publishing Agreement

TERRITORY

Usually, a publisher will look after a writer's catalogue of compositions within a specific territory. It's common for large publishing houses to require that writers give them rights in their catalogue all around the world. Before you agree to the world as the "Territory" in your publishing agreement, you should do your research on the publisher to make sure they have the expertise and networks to promote your material worldwide. Some writers negotiate territory by territory.

RIGHTS OF PUBLISHER

LICENCE OR ASSIGNMENT OF COPYRIGHT

It is important to understand if the agreement is a licence or an assignment. An assignment is a complete transfer of copyright ownership in the works to the publisher, while a licence is just a specific permission for the publisher to use/exploit the works. With a licence, the writer retains copyright and can continue to use any rights that are not exclusively licensed to the publisher. Where possible, writers should try to negotiate a licence rather than an assignment.

The publishing agreement will usually say that at the end of the 'Term' and the 'Retention Period' (explained below) the rights granted to the publisher will revert back to the writer (either assigned back or on expiry of the licence). Note that if there is no reversion of the rights granted to the publisher, the publisher will own these rights indefinitely (writers should avoid this outcome, unless they are being paid enough – which can be hard to negotiate unless you are an established writer).

TERM DEAL OR SPECIFIC WORKS DEAL

Many publishers require that they get rights in every composition a writer creates during the term of the agreement (this is called a 'Term Deal'). In a Term Deal, the publisher will usually require that the artist is exclusive to them – so the writer cannot provide their songwriting services to other publishers during the 'Term'. Publishers require exclusivity because they spend time and resources promoting the writer's songs and do not want to see others profiting from that hard work. Exclusivity does not mean that writers cannot play or perform with others – it just means only the publisher controls their works.

Sometimes, a well-established writer may be able to negotiate for rights only in specific songs to be granted to the publisher (this is called a 'Specific Works Deal'). This allows that writer to engage with other publishers at the same time (for their other existing or new songs).

SCOPE OF RIGHTS

It is important to ensure that the rights granted in the publishing agreement reflect what services the publisher is going to provide (and can provide effectively). If a publisher is only going to administer the writer's copyright and collect income on their behalf, the rights granted should reflect that. But if a publisher plans to also promote and license the writer's work in a wider variety of ways – e.g. to film and television productions – then the rights granted should be broader (and it might be appropriate for the writer to give the publisher complete control of copyright). If a publisher is promising these extended services to you as a writer, you should do your research on the expertise and networks of the publisher. If they don't have a strong track record of securing opportunities in a wide variety of areas (across film and television, gaming, advertising, and so on), then you might want to negotiate for a more limited grant of rights.

TERM AND MINIMUM COMMITMENT

INITIAL TERM AND TIMETABLE

A publishing agreement should say how long the publisher holds the rights (this is the "Term").

Commonly, the publisher's rights extend to anything written before the Term as well as during the Term. Often, publishers will require a writer to produce a minimum number

of release-quality works every year of the Term (this is often called the “minimum delivery commitment” or “minimum commitment”). For example, there could be a timetable where the writer must produce 3 songs per year over 3 years. From a publisher’s perspective, this guarantees a flow of commercially useful songs during the Term.

Writers often collaborate with other songwriters (and this usually means that copyright in the music and lyrics may be split between the collaborators). A publisher only benefits from the percentage that its writer owns — so most publishing agreements will address how these percentages count towards the minimum commitment. It might state a minimum percentage for the works to count. Or it might state that percentages can be aggregated (so if a writer writes/owns 50% of a song, then that will count as half a song towards the minimum commitment). Sometimes a writer will negotiate that if the minimum commitment is, say, ten songs per year of which the writer controls at least 75%, then fifteen 50/50 co-writes would still qualify.

OPTIONS

Publishing agreements may also contain an ‘option’ for the publisher to extend the term for fixed periods. Some writers can negotiate that higher royalty rates or advances will apply for option periods (because they would only choose to extend the term if the writer’s work has been successful).

RETENTION PERIOD

In ‘Term Deals’, the publisher usually has a ‘Retention Period’ under which even though the Term has expired (and so the writer is free to write music for another publisher), the songs already written by the writer will remain with the original publisher for a period. The reason for including retention periods is to reward the publisher for investing in the writer.

COMPENSATION

ROYALTIES

Royalty clauses state the percentage of income the writer will receive from a variety of sources. These sources include:

- Print – physical print like in notated music books or digital graphic representations;
- Mechanical royalties – for reproducing the compositions on recordings, sales and streaming income;
- Flat fee licensing – for synchronisations with media productions like advertisements;
- Performance and communication – collected by APRA and paid 50/50 to the writer and the publisher directly, but publishers often agree to pay part of the ‘publisher’s share’ to writers (altering that 50/50 split); and
- Sundry/general – anything not covered by the above, e.g. merchandise.

The royalty rate for each of these sources can, and often does, vary. There may also be 'escalations' (an increase in the writer's royalty rate) if certain sales or income targets are met.

THE ROYALTY BASE

It is important for the publishing agreement to set out how royalties will be calculated (i.e. what pool of money the writer's percentage will be taken from). Often royalties will be calculated based on "net receipts" — and it is important for "net receipts" to be defined in the agreement (e.g. all royalties arising directly from exploitation of the works which are received or credited to Australia in the Territory).

DEDUCTIONS

The definition of "net receipts" may include a list of "deductions" that the publisher is entitled to deduct from the pool of gross income before calculating the writer's royalty. These deductions are usually costs of promoting and selling the works like taxes, collecting society charges, or amounts retained by sub-publishers or licensees. For this last category, it is helpful for writers if the percentage that sub-publishers can keep is capped. It is important that writers carefully scrutinise the list of deductions to ensure they are specific and fair.

ACCOUNTING

There should be clear terms in the publishing agreement about how often the publisher has to provide statements to the writer, and what those statements must include. The writer should also have the right to inspect the books and records of the publisher to make sure that the royalties are being paid correctly — and this inspection right should be included in the agreement. Usually, the agreement will include a fixed period for you to be able to query the accounts at your own cost (or the publisher's cost if an underpayment of a certain amount is revealed).

ADVANCES

Many publishers offer artists a one-off payment upon signing the initial contract — this is known as an "advance". In some instances, publishers provide advances in the form of non-cash benefits — such as studio time or musical equipment.

Artists should note, however, that this is not free money and should be viewed a bit like a bank loan — i.e. you will have to pay it back but only from your royalties in most cases. The publishing agreement will state that any royalties earned by the artist must first go to paying off the advance. The writer will start earning royalties only once the publisher earns back its advance — this is the concept of recoupment.

Publishers will usually have the right to automatically extend the term if the advance has not yet been recouped at its end. If you are a writer, it is helpful to negotiate for the right to pay out unrecouped advances so that the term does not have to be extended. Publishers may charge an extra margin on top of the unrecouped amount where the writer repays to avoid the Term extended.

ARTISTIC CONTROL AND RESTRICTION ON PUBLISHER

It is common for the publishing agreement to state that the publisher must first obtain the consent of the writer before they allow a song to be used in certain ways — such as synchronisation licences (see our Synchronisation Licence Fact Sheet and Checklist) on compilation albums and in television shows. This is to ensure that the writer has creative control over how their music is used and marketed, and to make sure that the songs are not used in any ways or contexts to which the writer objects. Because lucrative synchronisation licence opportunities can require a fast turnover, sometimes publishing agreements state that if the writer doesn't get back to the publisher in time with a 'no', their consent is deemed to have been given, so that the publisher can secure the opportunity to earn the licence fee.

TERMINATION RIGHTS

CURE PERIOD

To avoid a surprise termination for breach, the publishing agreement will usually state that before terminating, a party must notify the other of the breach, after which the notified party will have an agreed period of days to rectify the problem. If the breaching party doesn't cure the breach within the 30 days, the contract can be terminated.

ADVANCES REPAYABLE

Writers should be aware that if the publisher terminates an agreement for the writer's breach, the writer may be obliged to pay back any unrecouped advances.

RIGHTS AFTER TERMINATION

In some publishing agreements, the publisher's rights are not affected by termination except for new compositions created by the writer (after termination). For example, things like confidentiality obligations and warranties might survive. The assignment may also not revert in some Term Deals (see Rights of Publisher above).

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



This checklist is an initiative of the Australian Music Industry Network. For more information visit www.amin.org.au.