

THE CHALLENGING FUTURE OF ARTIST REPRESENTATION

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MODERN CHALLENGES IN ARTIST REPRESENTATION

By Dina LaPolt, Esq. of LaPolt Law, P.C.

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Introduction

LaPolt Law, P.C. is a talent based transactional law firm that specializes in music. We have clients in all musical genres, including pop, rock and heavy metal, rap and hip hop, country, and electronic and dance music (“EDM”), which gives us a bird’s eye view into current trends and areas of concern in each market. Additionally, we are very involved in legislative copyright reform efforts in Washington, D.C.

This article will seek to illustrate and explain modern challenges in artist representation from our perspective, in conjunction with the attached materials and other documents.

Record Label Consolidation and Changing Deal Structures

In the past several decades, the number of major record labels has declined dramatically. Since EMI sold its assets to Universal Music Group and Sony/ATV Music Publishing in 2011, there are only three major label groups. They are Universal Music Group (the biggest), Sony Music Entertainment, and Warner Music Group. In addition, within these groups, subsidiaries are consolidating all the time. For example: Universal owns Interscope, Geffen, A&M, Def Jam, Capitol, and Republic, which absorbed Island Records; Sony Music owns Columbia, Epic, and now RCA Records, which absorbed Arista, Jive, and J Records; and the third, Warner Music Group, has Warner Bros. Records (which owns Sire and Reprise Records), Parlophone, and Atlantic, which absorbed Electra.

With each of these mergers and consolidations come substantial layoffs, which can be very harmful to the labels’ recording artists. An artist’s success at a label sometimes depends on the strength of his or her relationship with label personnel, especially creative executives. And in general, reduced staff for larger companies means fewer resources are devoted to artist development.

Another issue with consolidations and mergers comes into play when the purchasing company does not even realize what rights it now owns. A lot of information can get lost in the shuffle; as an artist, the last thing you want is a record label not even knowing that it has the right to exploit your recordings.

The same issues come into play where publishers consolidate as well. Songwriters are often especially dependent on a point-person at their publisher to champion their songs and fight for co-writing opportunities. When that person gets laid off, the songwriter can be stranded, and his or her career can stagnate.

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Another huge challenge for artist representatives and their clients is the fact that since 2006, all recording agreements are “multiple rights” or “360” deals, encompassing nearly every aspect of an artist’s career. It is becoming increasingly important for artist representatives to focus on the *forest*, rather than get stuck in the *tree*, i.e., focus on the aspects of a recording agreement that make an artist’s career, rather than the things that don’t matter until a career is created. This is difficult because of all the rights the labels are now trying to acquire. (*See attachments, The Top Seven Major Areas of Negotiation for Record Deals on page 11, and the Redacted Recording Agreement Deal Proposal from a major label, February 2015, on page 16.*)

Issues Raised by Social Media

For the modern recording artist, it is essential to have an active social media presence, even if the artist is already a superstar! Several younger artists have built their entire careers on active fan engagement. In 2015, no one doubts that a strong Twitter and Facebook following is a powerful tool for promoting an artist’s brand.

But with this comes several challenges, and the potential for big problems if an artist misuses these sites. Social media use can backfire if an artist starts raising controversial views or doing something to offend his or her fan base. While effective social media use can be an important promotional tool, if an artist is a complete jerk, he or she might do better to steer clear from posting (unless that’s part of the artist’s appeal).

Fans are smart, so artists need to make sure their usage of social media fits into their overall “brands.” Artists with endorsement or sponsorship deals with various products or services who excessively Tweet “shout outs” about these products or services are not favorably received by fans. It is important to make sure your artist’s social media posts are *authentic* or this could backfire with the fans in a really bad way. Fans can instantly see through an inauthentic brand, reducing their trust and loyalty for an artist. However, building an artist’s brand in a correct, authentic way can have a positive effect on the artist’s overall career. (*See attachment, The Top Ten Artist Brands by Giles Fitzgerald, excerpted from Building Your Artist’s Brand as a Business, edited by Dina LaPolt, FRUKT Communications, UK, 2012, on page 23.*)

An artist can also find him or herself in legal trouble through the use of social media. An awareness of defamation law is more important now than ever, especially so for an artist with millions of followers on social media. Other legal issues can come up, including copyright infringement—even artists do not always realize that they’re not legally allowed to share that photo or song.

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It's important to counsel your artists on these issues and remind them: anything they tweet can and will be used against them, whether it's in the court of law or the court of public opinion.

Understanding Industry Customs by Genre of Music

The rise of digital technologies has heightened the need for awareness of differing industry customs. This is especially true for the most Internet-savvy of all genres, EDM. While remixes, mash-ups, and sampling are treated as derivative works in genres such as pop, hip-hop, and R&B, the custom in EDM is to treat remixes as works-for-hire for the original artists, with remixers receiving flat fees. Although these remixes are derivative works under copyright law, they are not treated as such in the EDM space. (*See attachment, Redacted Remixer Agreement [Used with Electronic and Dance Music Artists] on page 30.*) Another custom unique to EDM is the prevalence of “one-off” deals, licensing and recording agreements for single tracks instead of multiple albums. These agreements are often non-exclusive, allowing these artists to record for other labels.

Another genre-specific custom is the way co-writing collaborations are treated in country music and EDM versus other genres. In most genres of music, songwriters usually divide up copyright percentages relative to how much of the lyrics and/or music they created. Thus, generally 50% is attributed to the lyrics and 50% is attributed to the music. On the other hand, in country music, songwriters usually split co-writing percentages evenly, even if one of the songwriters did not contribute as much to the music and/or lyrics as the others. This position is consistent with the “joint authorship” definition in the U.S. Copyright Act. And in EDM, the “producer” is typically also the “artist” (e.g., deadmau5, Tiësto, Eric Prydz, Skrillex, etc.). Thus, if there is a third party “top line” vocalist on a recording, unless the vocalist is a huge star already (e.g., Rihanna, Sia, etc.), he or she will either receive a copyright interest of less than 50% or the work will be on a flat fee, work for hire basis, with no copyright percentage.

Understanding genre-specific nuances of the music business is very important when you work within multiple genres of music. An attorney can embarrass his or her client—or worse, harm the client's career—by approaching a negotiation without this understanding. An attorney whose demands don't align with industry custom will do more harm than good.

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The California Talent Agencies Act and the cases of Solis and Lindsey*

The California Talent Agencies Act (the “Act”), enacted in 1978, requires a person to obtain a talent license before “procuring, offering, promising, or attempting to procure employment or engagements for an artist or artists”. The Labor Commission has interpreted this broadly to prohibit entertainment industry professionals without talent agency licenses, such as personal managers, from taking any actions that constitute obtaining “employment” for their artists.

Under the Act, for example, a performing artist’s personal manager may not negotiate any terms whatsoever for even a single performance for the artist, even if the manager does not take a commission for his or her services. The Act has an exception, added via an amendment in 1982, allowing anyone to procure recording agreements. However, the “recording agreement exception” is outdated and may not cover modern day multiple rights deals (which technically may not covered by the exception since they encompass other rights such as publishing, merchandising, acting, sponsorships, and endorsements).

All representatives with any connection whatsoever to California are subject to the Talent Agencies Act, which has now been interpreted by the California Labor Commissioner in Solis to apply to all attorneys.

Solis v. Blancarte

In September of 2013, the California Labor Commissioner decided the case *Mario Solis v. James Blancarte*, applying the Act to attorneys for the first time. The case essentially states that an attorney violates the act by *negotiating* agreements for his or her clients, applying the same standard that managers are held to. Accordingly, under *Solis*, the Labor Commissioner has ruled that it is now against the law for transactional entertainment attorneys to negotiate any service agreement unless the client has an agent. **This ruling is an abomination.** (See *attachment, Solis v. Blancarte, TAC 27089, on page 32.*)

This decision has serious negative implication for artists. In the music business, mostly agents are only involved in the live performance sector. Sometimes they are involved in sponsorship and endorsement deals if done in conjunction with a tour or another live performance event, which is customarily referred to as “packaging”.

* This section was co-authored by Dina’s colleague and leading Talent Agencies Act expert Edwin F. McPherson, an attorney in Los Angeles, California with the law firm of McPherson Rane LLP

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Examples of service agreements that may now apply under *Solis* include publishing and exclusive songwriter agreements, composer agreements, merchandising agreements, and sponsorship and endorsement agreements. Traditionally, agents in the music business are usually not involved in these areas of the music business.

Moreover, the more successful an artist becomes, the less time any artist representative needs to “procure” employment. Instead, offers just pour in (unsolicited), usually to the manager, and the phone never stops ringing. Industry custom is that managers negotiate the material deal points and bring music lawyers in early on to advise on proper corporate deal structure and complicated intellectual property assignments.

It makes no sense, under *Solis*, if artists are now “required” to have an agent for all service agreements. The result of this ruling will potentially cost artists, producers, and/or songwriters an additional 10% commission for an agents who do not render any additional services or bring any additional skills to the table, and have never been involved in these areas of the music business to begin with.

Meanwhile, all entertainment attorneys with any connection to California (which is essentially all entertainment attorneys) are now in an uncomfortable position. Although artists should not be required to involve agents in each of these agreements, *Solis* states that it is now illegal for attorneys to negotiate them on their own without working with agents. This puts attorneys squarely at odds with the best interests of their clients. In other words, if music lawyers now insist that their clients involve agents in these areas of the music business, even though they are not needed, this only protects the attorney from future claims by the client. Accordingly, attorneys are now forced to think of themselves from the onset of negotiations rather than their clients. And an attorney who seeks to protect him- or herself to the detriment of the client is in breach of his or her fiduciary duty. This law is clearly a problem.

Lindsey v. Lisa Marie Entertainment

Another California Labor Commissioner decision came out in August 2014 that further disrupts industry practice. *Lindsey v. Lisa Marie Entertainment* held that managers cannot facilitate collaborations/agreements between record producers, artists, and songwriters without an agent. Many managers (and music attorneys) facilitate songwriting collaborations and producer sessions with their clients. This is how the industry works. Again, agents are not involved in this area of the music business. *Lindsey* held that the Act’s recording agreement exception does not protect these managers. (*See attachment, Lindsey v. Lisa Marie Entertainment, TAC 28811, on page 43.*)

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All representatives with a connection to California are subject to the Act, which has now been interpreted to apply to attorneys and anyone who facilitates songwriting and producing collaborations. Although it is California law, it applies to anyone with minimum contacts in the state, a standard that applies to nearly everyone in the entertainment industry.

Copyright Reform

Currently in Washington, D.C., four separate sections of the U.S. Government are independently reviewing copyright laws and the other laws affecting the music industry:

1. The U.S. Copyright Office (the “Office”), headed by Register of Copyrights Maria Pallante. The Office is currently part of the Library of Congress, although some are advocating for the Office to become a separate, independent government body. The Office, who is probably the most qualified government body to speak on copyright-related issues, advises Congress—the only branch of government that has the power to amend the Copyright Act—on these matters. The Office just released a report with suggestions for music licensing reform after two years of reviewing comment papers from stakeholders and facilitating roundtable discussions all over the country. (*See attachment, Copyright and the Music Marketplace: Executive Summary, on page 57. You can access the entire report at: <http://copyright.gov/docs/musiclicensingstudy/copyright-and-the-music-marketplace.pdf>.);*
2. The House Judiciary Committee (the “Committee”) and the House Judiciary Subcommittee on Courts, Intellectual Property and the Internet (the “Subcommittee”). The Committee is the group of Congress members in the U.S. House of Representatives with “jurisdiction over matters relating to the administration of justice in federal courts, administrative bodies, and law enforcement agencies”. Within this, the Subcommittee has jurisdiction over copyright matters. However, in December 2014, Committee Chairman Bob Goodlatte (R-VA) announced that going forward, copyright-related issues would be handled by the full Committee. The Committee and Subcommittee are made up of Republican and Democratic Congress members, with the majority currently in the Republican Party. They also solicit comment papers and testimony from stakeholders. They advise the rest of Congress, lobbying its members on their individual positions;
3. The U.S. Department of Justice (the “DOJ”). The DOJ enacted consent decrees in 1941 that govern the operation of BMI and ASCAP. These consent decrees have not been updated since before the iPod debuted; and lastly

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4. The U.S. Patent and Trademark Office (the “PTO”). The PTO, which falls under the Department of Commerce, advises the president directly on copyright-related matters. Many creators and music industry trade groups are upset by this, believing that the PTO should stay out of copyright issues. Attorneys from the PTO, National Telecommunications and Information Administration (the “NTIA”), the National Institute of Standards and Technology (the “NIST”), and the International Trade Administration (the “ITA”) make up the Department of Commerce Internet Policy Task Force (the “Task Force”). The Task Force issued a “green paper” in 2013 which, as discussed below, was not very friendly to music creators.

In 2013, two events jump started major copyright reform in the U.S.:

- In March, Register Pallante delivered a speech at Columbia University, followed by testimony before the Subcommittee and a Columbia Journal of Law & the Arts article entitled “The New Great Copyright Act”, calling for extensive copyright reform. The speech, testimony, and article were all forward-thinking and inspiring.
- Later that year, in July, the Task Force released its Green Paper on Copyright Policy, Creativity, and Innovation in the Digital Age (the “Green Paper”), outlining various copyright-related issues that might need consideration under such a revision. The Green Paper was perceived by the creative community as hostile, aggressive, and “tech” friendly.

Many of the issues at stake in these ongoing reform debates are discussed below.

Proposals Detracting from Creators’ Right of Approval

Unfortunately for music creators, some proposals in the Green Paper were not favorable for artists, including some that would detract from artists’ right of approval, the most important right they have. The most egregious example was its suggestion to implement a compulsory license for remixes, mash-ups, and sampling. The current law states that performing artists and songwriters must grant permission before their works can be used for these purposes, and the law needs to stay this way. A compulsory license would take this right away from the artist, allowing anyone to remix, mash up, or sample any song they choose, provided they pay a small, set royalty to do so. Artists and songwriters should have the right to decide how their music is used. This means the right to say no (or yes) and to negotiate the terms of each use. Any

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proposal that advocates for relaxing any of a creator's rights over derivative works is bad for creators.

Because most music creators feel passionately about this issue, I submitted a comment paper to the Task Force in opposition to this compulsory license. I drafted the paper with my close friend and client, Steven Tyler, and included artist support letters from Don Henley, Joe Walsh, Dr. Dre, Sting, deadmau5, Ozzy Osbourne, Mick Fleetwood, Britney Spears, Billy Joel, and the Dixie Chicks. (*See attachment, Comment Paper in Response to the Department of Commerce Internet Policy Task Force's Green Paper on Copyright Policy, Creativity, and Innovation in the Digital Economy, February 17, 2014, by Dina LaPolt and Steven Tyler with artist support letters, on page 69.*)

The Performance Royalty for Sound Recordings

Another big issue in the ongoing debates is the necessity of a sound recording public performance right for terrestrial (AM/FM) radio. In the U.S. (which makes up approximately 33% of the global music market), artists and producers do not receive public performance royalties when their recordings are played on terrestrial radio. There are only a few other countries that do not pay a sound recording public performance royalty, including China, North Korea, Rwanda, and Iran. Besides the domestic royalties denied to our recording artists, this costs the U.S. up to \$100 million in foreign revenues each year as well; because the US doesn't pay sound recording public performance royalties for terrestrial radio play to foreign artists, foreign countries do not pay these royalties to our artists.

Pre-1972 Recordings

It is also important that we bring pre-1972 sound recordings under federal copyright protection. Sound recordings were first given federal copyright protection on February 15, 1972, while pre-1972 recordings are protected under a confusing patchwork of state copyright laws. Although non-interactive digital services are required to pay sound recording public performance royalties, they do not have to pay for pre-1972 recordings under federal law. Services such as SiriusXM have been using the lack of federal protection as a perceived loophole to avoid paying artists for the use of these works. Meanwhile, great, classic recording artists (such as Sam Moore, Aretha Franklin, and Judy Collins) are forced to tour well into their 70s and 80s to support themselves, despite the fact that the composers of their songs are making millions.

Federalizing these recordings would give these artists a well-deserved income stream. The Respecting Senior Performers as Essential Cultural Treasures ("RESPECT") Act, introduced in

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the House by Representative George Holding (R-NC) in May, 2014, partially addresses this problem by requiring digital radio services to pay royalties for these works, but full federalization is a much better solution.

Issues Affecting Songwriters

Songwriters, on the other hand, are heavily restricted by government regulations that apply to 75% of their income. One highly debated issue here is the modification or elimination of the consent decrees governing ASCAP and BMI. The DOJ imposed the consent decrees in 1941 in an attempt to protect against monopolies. These concerns no longer exist, and the consent decrees are now outdated and antiquated.

The decrees regulate how ASCAP and BMI can license the public performance of compositions, and prohibit ASCAP and BMI from licensing these rights in a free market and getting fair market value. Publishers and songwriters are consistently paid significantly less than master recording owners on the exact same uses because of these decrees. For example, publishers are paid one twelfth of what record labels are paid for streaming uses. Hearing songwriters' and publishers' concerns, the DOJ began conducting an extensive review of the two consent decrees in 2014.

The rate-setting procedure for mechanical royalties is very outdated as well. The current statutory mechanical royalty rate is 9.1 cents per reproduction for songs five minutes long or less. This is a pretty low rate considering that the statutory royalty rate was first set in 1909 at 2 cents—the equivalent of 51 cents today. However, the Copyright Royalty Board (the "CRB"), which sets these rates, is not allowed to consider "fair market value" when setting these rates, so they are often setting rates in a vacuum. By the time they set certain rates, technologies have evolved and the rates are already inappropriate and outdated. The CRB plans to re-visit the current rates in 2016, and many of digital companies who use music (Google, Pandora, and others) are already arguing for decreasing the current rates.

The Songwriter Equity Act, introduced in the House by Representative Doug Collins (R-GA) in February, 2014, addresses these two issues for songwriters by removing restrictions on the evidence that the rate courts can consider, and requiring the CRB to set rates that reflect a willing buyer, willing seller standard for mechanical rate-setting proceedings. This is a great step in the right direction but still falls short of the most desirable outcome of free negotiation for all licenses.

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How to Take Action

There are many opportunities for artists, songwriters, producers and their representatives to speak out on these topics.

At the 2015 GRAMMY Awards, Neil Portnow announced the new GRAMMY Creators Alliance, a new group for recording artists, songwriters, and producers to unite on these legislative issues. The Alliance was formed because there was no national voice for creators in Washington, D.C.: the Recording Industry Association of America (the “RIAA”) represents major labels; the American Association of Independent Music (“A2IM”) represents independent labels; and the National Music Publishers Association (the “NMPA”) represents publishers. Sometimes creators are aligned with the RIAA, A2IM, and the NMPA on legislative issues, but sometimes they are not. Thus, the Alliance was formed with the following goals:

- To advise Congressional leaders as they develop legislation that will ensure fair pay for all creators on all platforms;
- To work within the industry to ensure fair royalty rates to creators on all platforms; and
- To engage the creator community and empower them to advocate for their rights.

I encourage you to urge all of your music creator clients to join the GRAMMY Creators Alliance. For more information, visit: <http://www.grammy.com/Alliance>.

We HAVE to make our voices heard on these issues so that our artists have the resources and power they need to keep producing their incredible art for everyone’s benefit.

Conclusion

While it can be difficult to keep up with the always-changing music industry, it is essential for artist representatives to understand how new developments affect their clients. Meanwhile, the ongoing legislative review of copyright and the other laws affecting the music industry provides artist representatives and their clients with a key opportunity to help the creative community.

THE MOST IMPORTANT DEAL POINTS IN A RECORDING AGREEMENT

By Dina LaPolt

DINA'S RULE-

“When negotiating any deal, pay close attention to the parts of the agreement that will help to create a career rather than those parts that will mean absolutely nothing unless a career is created”

YOU CAN ALWAYS RENEGOTIATE
IF ARTIST IS SUCCESSFUL!

Dina's Seven (7) MAJOR areas of negotiation FOR RECORD DEALS:

1. **“Firm” Album Commitments, Guaranteed Release Clause and Other Contractual Guarantees for Performance by Record Company**
 - “Firm” versus “option” albums
 - A “firm” album commitment means the record company must release that album
 - An “option” means the record company has discretion whether or not to allow the artist to record that album
 - Options only benefit the record company
 - It benefits the artist to have MORE firm albums and LESS option albums
 - Try to negotiate this (e.g., if the record deal is for 1 firm and 4 options, the artist should argue for 2 firm and 2 options)
 - The guaranteed release clause is ESSENTIAL otherwise the record company is not obligated to release the artist's records
 - If the record company agrees to the “guaranteed release clause” then they are obligated to release an album within a certain period of time (to be negotiated) after the artist “delivers” the album
 - If the record company does not release the album, the artist can terminate the agreement
 - This clause only lets the artist terminate if the record company does not release in the U.S.; for foreign territories, the artist may get the right to require the record company to license the record to a third party for release
 - Record companies are becoming reluctant to guarantee *physical* release because of the decreasing importance of physical record sales
 - The artist's genre of music (e.g., pop, rock, electronic, country, etc.) determines how hard the artist should fight for this

2. Pay or Play Clause

- In record deals, there is always a provision by which the company “allows” the artist to start recording an album
 - The record company pays the advances due to the artist under the agreement and opens up the recording fund so that recording can begin
- The “pay or play” clause essentially says that the record company has to let the artist record its music or pay the artist off
 - If the record company fails to “open the budget” then the artist can send notice to the record company (time periods are negotiated) that they elect to terminate the agreement
 - The record company also has to pay the artist a certain fee, either the difference between the recording fund and the cost of the last album or a pre-negotiated flat fee

3. Controlled Composition Clause

- This clause governs the payment of mechanical royalties for compositions written by an artist
 - Record companies usually will not agree to pay 100% of the statutory rate (currently 9.1 cents per reproduction for songs 5 minutes or less for physical and digital sales)
 - Usually, record companies will make the artist agree to 75% of the statutory rate with “song caps” (e.g., the company will pay for a maximum of 11 songs for an album, 5 for an EP, and 2 for singles)
- Outside songwriters must agree to the artist’s controlled rate as well, otherwise it comes out of the artist’s share of mechanical royalties

4. Try to Limit Multiple Rights (i.e., Merchandising, Publishing, Touring, Sponsorships, Etc.)

- All record deals are “multiple rights” or “360” deals except for A-list superstar artists, and even then record companies will “try” to acquire some additional rights outside of record rights
- These rights include:
 - Touring: the record label will ask for a percentage of gross touring revenues, paid in the same way that the artist pays its representatives
 - This usually ranges from 7.5-15% (less if the artist has bargaining power)

- Merchandising: this is approached several ways in recording agreements:
 - *Passive interest*: the record company takes a percentage (10-30%) of net income from the artist's merch sales
 - Artist keeps the rights and pays the record company
 - *First negotiation and matching right*: the record company has the right of first negotiation and/or matching right upon execution of the recording agreement or when the artist's current merch deal expires or is terminated
 - Try to get rid of the matching right
 - *Sister/affiliated merch company*: the record company will require the artist to sign to their affiliated or sister merch company (e.g., Universal/Bravado)
 - *Record company obtains merch rights*: this is the worst case scenario
 - This is where the record company has the rights and pays the artist, just like records
 - FIGHT AGAINST THIS!
- Publishing: similar to merch rights:
 - *Passive interest*: the record company takes a percentage (10-30%) of net income from the artist's publishing
 - *First negotiation and matching right*: the record company has the right of first negotiation and/or matching right upon execution of the recording agreement or when the artist's current publishing deal expires or is terminated
 - This right will be for the record company's affiliated publisher (e.g., Warner/Chappell when an artist signs to Warner Bros.)
 - Try to get rid of the matching right
 - *Record company (or affiliated publisher) obtains publishing rights*: this is the worst case scenario
 - This is where the record company (or affiliated publisher) has the rights and pays the artist, just like records
 - FIGHT AGAINST THIS!
- Other income streams:
 - *Fan clubs*: the record company will want the right to run and maintain a fan club, or a passive participation
 - *Acting, sponsorships, endorsements, and other entertainment income*: the record company will want a percentage (10-30% of net income) of all other entertainment income
- The percentage that the recording company takes is up for negotiation (e.g., argue for 5% gross income on touring instead of 10%)

- These are hard to eliminate in modern recording agreements, but the artist can argue for certain limitations; for example:
 - No ancillary participation until a single album by the artist sells 300,000 units or a single by the artist reaches the top 10 on the Billboard Top 40 chart for five consecutive weeks
 - No participation in merchandise until the artist's current third party merch deal expires or is terminated
 - No publishing because artist is subject to another publishing agreement with a third party
- Make sure there is no cross-collateralization (meaning royalties from one income stream go towards recoupment of advances from another income stream)

5. Artist Advance / Recording Fund

- These are either grouped together or separate
 - When they are separate terms, the advance goes in-pocket and the recording fund goes towards recording costs
 - An “all-in recording fund” encompasses both, meaning the artist only gets to keep whatever is left over after recording (if anything)
- At a major label, a recording fund can range from \$100,000 to \$1 million and up
 - Record companies always have approval over the Artist's budget for making an album
- Advances/recording funds for albums after the first are calculated pursuant to a formula based on royalty sales from the previous album(s) with minimums and maximums

6. Artist Royalty and Royalties Payable on Foreign Sales

- The basic U.S. royalty for an artist can start at anywhere from 13% to 20% of the wholesale price, known as the published price to dealers (PPD)
 - Royalties will rise at a certain point (e.g., if the record company exercises its first option, with another increase if record company exercises its third option)
 - Sometimes the artist can argue for escalations, (e.g., half-point increases at album sales of 500,000 and 1,000,000)
 - These escalations will only apply prospectively; the increased royalty will only apply to records sold after reaching the benchmark number
- Royalties are “all-in”, meaning the artist must pay producers, mixers, and other royalty participants out of the artist's royalties
- Foreign sales will pay out lower royalty rates (e.g., 95% of the U.S. rate in Canada; 90% in the U.K., 85% in Japan, Australia, and most of Europe; and 60% in the rest of the World)

- Streaming Income:
 - Interactive streaming royalties paid to an artist are a pro-rata share of the record company's receipts from streaming services
 - Non-interactive streaming royalties are collected by SoundExchange, and a portion is paid straight through to the artist

7. **Marketing and/or Promotion Commitment**

- Music video commitment:
 - It is hard to get the record company to contractually agree to release videos unless the artist has high bargaining power
 - Record companies are concerned about whether videos are still effective promotion tools
 - Even when they agree, the record company will say that they only have to produce videos so long as they are doing so for artists of similar stature
 - Music video costs up to the agreed-upon maximum budget will be 50% recoupable from record royalties; costs in excess of the budget will be 100% recoupable
- The record company has to commit to market and promote the album
- Radio commitment (outside promotion)
 - FM Radio is the #1 market trigger in the US!
 - Independent radio promotion by third parties is either 50% or 100% recoupable from record royalties
 - The artist should argue for 50% so that the record company has an incentive to keep costs low
- Independent publicity
 - An artist with bargaining power can obligate the record company to hire an outside publicist for the months leading up to a release
 - Independent publicity and marketing are usually 100% recoupable

SAMPLE DEAL MEMO FROM A MAJOR LABEL

February, 2015

Via email – [EMAIL ADDRESS]

Confidential and Subject to Contract

[ARTIST]

[ADDRESS]

RE: **RECORD COMPANY / “ARTIST” – Deal Proposal**

Dear ARTIST:

On behalf of RECORD COMPANY (“RECORD COMPANY”), I’m pleased to submit the below proposal for agreements regarding the recording and entertainment activities of ARTIST (“ARTIST”).

1. **Recording Services:**

A. Term / Commitment:

- (i) Initial Period: 1 new studio album.
- (ii) Option Periods: RECORD COMPANY would have 4 separate consecutive options, each to extend the term for 1 new studio album per option period. Each option would be exercisable by RECORD COMPANY before the end of the immediately preceding period, subject to RECORD COMPANY’s standard cure provisions.

B. Territory: Universe.

C. Exclusivity / Ownership: Exclusive recording services throughout the Territory for term of agreement. RECORD COMPANY would perpetually own all recordings throughout the Territory. ARTIST would be able to produce masters of other recording artists from time to time, so long as doing so does not interfere with ARTIST’s timely fulfillment of ARTIST’s obligations to RECORD COMPANY, and ARTIST’s producing credit is of size and prominence customary for producers in the recording industry.

D. Advances / Recording Costs:

- (i) Initial Album: \$_____ artist advance, payable \$_____ on execution, \$_____ on approved commencement of recording of the album, and the balance after delivery thereof. Additional \$_____ advance directed for contribution to ARTIST's legal fees payable on execution. RECORD COMPANY would also pay recording costs for the album per a mutually approved budget. A recording costs budget that does not exceed \$_____ would not be disapproved by reason of its overall amount.
- (ii) Optional Albums: In addition to budgeted mutually approved recording costs, RECORD COMPANY would pay ARTIST advances equal to __% of the lesser of USNRC top line net sales royalties from the immediately preceding committed album, or the average of such royalties from the two immediately preceding committed albums if more than one has been recorded (including a good faith estimate of pipeline royalties from all such sales), earned as of the date 12 months after initial U.S. release of the album concerned, subject to the following minimums/maximums:

	<u>Minimum</u>	<u>Maximum</u>
Album 2	\$_____	\$_____
Album 3	\$_____	\$_____
Album 4	\$_____	\$_____
Album 5	\$_____	\$_____

For each committed album, a recording costs budget that does not exceed \$_____ would not be disapproved by reason of its overall amount. All advances and other monies paid to or on behalf of ARTIST, and all recording costs, would be fully recoupable against ARTIST's record royalties.

E. Record Royalties: The following rates (inclusive of royalties to ARTIST and all third parties) computed on the applicable adjusted PPD in respect of net sales of top line albums through normal retail channels in the territory concerned:

(i) U.S.:

<u>Album</u>	<u>0-600K</u>	<u>600K-1.2M</u>	<u>1.2M+</u>
1-3	__%	__%	__%
4-5	__%	__%	__%

- (ii) X-U.S.:
 - Canada – ___% of basic U.S. rate
 - U.K. – ___% of basic U.S. rate
 - Japan, Australia, Germany, Austria, Switzerland, France, Spain, Italy, Benelux, Scandinavia – ___% of basic U.S. rate
 - ROW – ___% of basic U.S. rate

- (iii) The royalty rate for individual master download sales would be ___% of the basic royalty rate (without regard to escalations) of the album from which the master is derived, applied to the royalty base price. The royalty rate for masters exploited via streaming would be ___% of the basic royalty rate (without regard to escalations) of the album from which the master is derived, applied to RECORD COMPANY's net receipts. The royalty rate with respect to revenue received by RECORD COMPANY from Web Site Advertising on ARTIST websites would be ___% of net receipts.

- (iv) Accountings: Calendar semi-annually, within 90 days after each period.

- F. Copyright Royalties: ___% of minimum fixed statutory rate as of timely delivery on full-priced net sales of masters through normal retail channels in the United States and Canada, subject to maximum of 11x that rate for albums, 5x that rate for EPs, 3x that rate for maxi-singles, and 2x that rate for singles.

- G. Release Commitment: Subject to and in accordance with RECORD COMPANY's standard release and cure provisions, RECORD COMPANY would initially release each committed album in the United States within ___ days following delivery, in the U.K. within ___ days after the United States release, in France, Spain, Italy, Benelux, Scandinavia, Australia, and Japan within ___ days following the United States release, and in Germany, Austria, and Switzerland ("GAS") within ___ days following the United States release, with the understanding that if RECORD COMPANY has not scheduled release of the delivered committed album concerned in GAS by ___ days prior to the hereunder required release date, then ARTIST would have the right to notify RECORD COMPANY to schedule such release, and if RECORD COMPANY does not schedule such release by ___ days after ARTIST's such notice, then ARTIST will have the right to separately license for release by a third party the unreleased album concerned in the unreleased territory of GAS concerned.

- H. Intentionally deleted.

- I. Pay or Play: Subject to RECORD COMPANY's standard terms, advance to ARTIST equaling ___% of the minimum ARTIST advance for the applicable unrecorded album (less any prepayments or other in-pocket sums paid by RECORD COMPANY with respect to such unrecorded album).
 - J. Other Provisions: The delivery standard would be technically and commercially satisfactory. ARTIST and RECORD COMPANY would mutually approve the selection of recording studios, all producers, all compositions, and the creative elements of each music video if any (each master released as commercial or promotional single or emphasis track would be preapproved for video). RECORD COMPANY would have the perpetual right to use and authorize use of ARTIST's name and approved likeness in connection with RECORD COMPANY's exploitation of recordings. RECORD COMPANY would have the exclusive right during the term to establish and maintain ARTIST websites, subject to mutual approval of the "look and feel" and key creative ARTIST content thereon, and ARTIST would have the right to communicate through, and provide content for, each such ARTIST website subject to RECORD COMPANY's standard terms/customary approvals, and ARTIST would have mutual approval over the website advertising leased by RECORD COMPANY solely for ARTIST websites (as opposed to for a number of sites, so-called "run of network" advertisements, etc.).
2. **Non-Record Entertainment Activities**: RECORD COMPANY and ARTIST would enter into a separate uncrossed participation agreement concerning ARTIST's non-record entertainment activities, throughout the universe, as follows:
- A. Live Performance / Touring: For the recording agreement term plus 6 months ("Participation Term"), RECORD COMPANY would be entitled to ___% of ARTIST's gross revenues (i.e., greater of the guarantee or ARTIST's walkout, plus associated revenues) from live performances/touring activities. However, RECORD COMPANY would waive its participation on the following: (i) the initial \$_____ in ARTIST's aggregate gross revenues from the first RECORD COMPANY album touring cycle; (ii) the initial \$_____ in ARTIST's aggregate gross revenues from the tour cycle of each subsequent RECORD COMPANY album; and (iii) each live performance/show whereby ARTIST is responsible for the show or ARTIST's touring costs and ARTIST's guarantee or walkout is \$_____ or less. If RECORD COMPANY commercially releases album 5 under the recording agreement (or RECORD COMPANY doesn't due to ARTIST's delivery failure), then RECORD COMPANY would be entitled to ___% of such gross revenues for the 3 years immediately following the Participation Term.

- B. Publishing: With the understanding that ARTIST has an existing administration agreement with THIRD PARTY PUBLISHING COMPANY, RECORD COMPANY's designee AFFILIATED PUBLISHING COMPANY would have "first look" as well as matching rights with respect to ARTIST's exclusive publishing and administration rights.

- C. Other Entertainment Activities: During the Participation Term, RECORD COMPANY would be entitled to __% of net receipts (i.e., gross receipts less bona fide out-of-pocket costs and commissions) from ARTIST's Entertainment Activities. As used herein, "Entertainment Activities" refers to all of ARTIST's entertainment related activities including acting, sponsorships, endorsements, fan clubs, and merchandising, excluding fan club and merchandise rights exploited by RECORD COMPANY, excluding live performances/touring under paragraph 2A above, and excluding songwriting/music publishing. If RECORD COMPANY commercially releases album 5 under the recording agreement (or RECORD COMPANY doesn't due to ARTIST's delivery failure), then RECORD COMPANY would be entitled to __% of such net receipts for the 3 years immediately following the Participation Term.

- D. Third Party Agreements: ARTIST would meaningfully consult with RECORD COMPANY on each agreement between ARTIST and any third party with respect to ARTIST's touring and Entertainment Activities, including the material terms thereof.

3. **Fan Club**:

- A. Rights and Materials: RECORD COMPANY and ARTIST would enter into a separate uncrossed agreement whereby during the Participation Term, RECORD COMPANY would have the exclusive universewide right to create, host, and maintain a so-called "premium service" site to be ARTIST's "official" fan club website ("Fan Club Site"). The services and materials of the Fan Club Site may include but would not be limited to: early ticket purchasing opportunities; exclusive merchandise; contests; unreleased recordings; interviews; advertising; VIP packages; and other materials that may enhance the Fan Club Site experience. RECORD COMPANY and ARTIST would mutually approve the so-called "look and feel" of the Fan Club Site as well as fan club offerings and the key ARTIST related materials thereon.

- B. Fan Club Profit Split: RECORD COMPANY would accrue to a separate, uncrossed ARTIST account ___% of Fan Club Net Receipts, except that RECORD COMPANY would accrue thereo ___% of Fan Club Net Receipts attributable to RECORD COMPANY's sale of tickets and VIP Packages through the Fan Club. As used herein, "Fan Club Net Receipts" refers to RECORD COMPANY's receipts directly attributable to the Fan Club Site (including, without limitation, any so-called "subscription" fees, but excluding revenues from recordings), less RECORD COMPANY's administration fee being ___% of such receipts, and less all costs and expenses attributable to the Fan Club Site (e.g., without limitation, creation, hosting, maintenance and administration costs, credit card transaction costs and bad debt).

4. **Merchandising:**

- A. Rights: It is acknowledged that ARTIST may be subject to a merchandising agreement with THIRD PARTY MERCH COMPANY, which ARTIST has the absolute right to buy out of/terminate solely by paying THIRD PARTY MERCH COMPANY the un-recouped royalty balance thereunder (approximately \$_____). Simultaneous with termination of said THIRD PARTY MERCH COMPANY agreement (which RECORD COMPANY would have the right, without obligation, to cause ARTIST to effectuate at any time by paying the applicable buy-out sum to ARTIST or THIRD PARTY MERCH COMPANY as a recoupable ARTIST merchandising advance), RECORD COMPANY and ARTIST would automatically enter into a separate agreement whereby effective as of termination of said THIRD PARTY MERCH COMPANY agreement and thereafter during the Participation Term (plus 6-month non-exclusive sell-off period) RECORD COMPANY would have exclusive universe-wide merchandising rights with respect to ARTIST.
- B. Royalties: RECORD COMPANY would credit to an uncrossed ARTIST account merchandising royalties based on the following rates:
- (i) Men's regular t-shirts – ___% of U.S. net retail receipts / ___% of X-U.S. net retail receipts;
 - (ii) Men's "30/1" t-shirts; girl's tops; all hoodies – ___% of U.S. net retail receipts / ___% of X-U.S. net retail receipts;
 - (iii) Mid-Tier Stores (e.g., Mervyn's, J.C. Penney's, Sears) – ___% of U.S. net retail receipts / ___% of X-U.S. net retail receipts;

- (iv) Mass Market Stores (e.g., Target, Wal-Mart) – ___% of U.S. net retail receipts / ___% of X-U.S. net retail receipts;
- (v) Specialty items; headwear; other items – ___% of net retail receipts;
- (vi) Online / Direct to Consumer – ___% of net receipts;
- (vii) Licensing – ___% of net receipts; and
- (viii) Touring – Initially, RECORD COMPANY would handle on a “tour supply” basis. At RECORD COMPANY’s option and designation, RECORD COMPANY would handle tour fulfillment and for U.S. non-specialty items credit ARTIST with ___% of net profits.

5. **Other:** All other terms not specifically set forth above would be governed by the terms of RECORD COMPANY’s standard form contract provisions as negotiated in good faith by the parties.

We look forward to your response. In any event, please note that this proposal is subject to further comments, RECORD COMPANY executive approvals, and contract under RECORD COMPANY form agreements. Accordingly, I reserve all rights.

Kind regards,

ATTORNEY FOR RECORD COMPANY
Business Affairs

The Top Ten Artist Brands



Author: Giles Fitzgerald

>>Connecting with a new type of music fan

The music business has changed irrevocably over the last decade, as any artist currently attempting to exist in the complex music landscape we now find ourselves in will happily – or unhappily, in some cases – testify to. With rampant online piracy sending physical sales of music on a downward spiral, and the myriad of new digital models not yet pulling up the slack, revenues have been hit hard. Likewise, the buoyant live sector – which now acts as a crutch to the ailing recorded business – is becoming something of an unsustainable and demanding millstone, requiring acts to constantly be on tour in order to reap the financial gains.

With the rack 'em high days of selling lucrative plastic discs resigned to history and touring well into old age offering little in the way of an early retirement plan for bands, this new world now requires a new way of thinking. Relying solely on music, and the linear performance and sale of that music, is only the tip of a much larger iceberg.

It's not all bad of course; music itself is at a high in terms of demand. It's just the parameters of this demand have shifted and in order to capitalise artists need to understand what their underlying assets are and how they can best be utilised amongst their fan community.

Music's biggest fans have spent a generation as passive receivers of music. Now they want to get hands on with music,

they want to create it, de-construct it, share it, crowd source it, move it from device to device, and stand shoulder to shoulder with the very idols who created it. In short, they are crying out for more, much more than mere music. Ultimately they want a slice of the artist's lifestyle, one that assists them in imbuing their own lives with the very essence of the musicians they so admire. They want to be part of the artists' "tribe." Part of the brand.

The *Oxford Dictionary* describes a "brand" as "a particular identity or image regarded as an asset." It may come as something of a surprise to many musicians to learn that their biggest asset is not in fact their music or their back catalogue. Their biggest asset is their audience. Without whom there would be no artist brand.

Thinking like a brand

In a socially connected world, where it has now become ok to 'like' products and brands in the same way fans do artists/bands, there is virtually nothing to distinguish one from the other. Lady Gaga is as much of an identifiable household name as Coca-Cola in the eyes of the public now.

In order to build an effective brand, artists need to think like marketers rather than musicians, and to many this is no small adjustment. Where creativity comes easy, good business sense does not always follow.

Brands talk a very different language from the music industry. Music industry veterans have historically relied on gut feelings and the passions of an elite few in order to drive their business. Sometimes it works, sometimes it doesn't. For brands it's much more empirical, and hard numbers and audience insight carry far more sway than heartfelt guesswork.

In today's much changed music industry, if you want to merely play music for music's sake then there is still a place for you and you will find your niche. However, if you are concerned about paying bills, securing a musical nest egg for old age and ultimately profiting from your art, then you will need to consider your brand values far more

carefully. And in order to fully comprehend your brand you will need to get inside the minds of the people that buy into that brand.

>>The secret to a successful artist brand

The primary advice to an act starting out is naturally to focus on what they do best, making music that people want to listen to again and again. However, of equal importance in the early stages, is understanding and utilising how your overarching brand impacts upon your audience.

Understanding how your brand fits into the wider picture of your audiences' daily lives is the foundation stone from which all ancillary business decisions should be made. Uncovering just who your audience is, how old they are, what they do, what they like, where they shop, and who they themselves influence will enable you to market your own personal brand in the most effective way.

Ultimately great brands are not just about great products; they are fundamentally about the emotional values that brand elicits, the underwritten sense of promise and brand love that turns people from consumers into fans. If an artist concentrates solely on product – in this sense music – avoiding the myriad of other emotional avenues to be explored around the fringes of that product, they are not only missing out on a business opportunity, but they are also underserving their audience. An audience that is eager to infuse their lives with the overriding ethos of the artist's brand. Be that through clothing, fragrances, or supporting products and causes the artist endorses.

What fans ultimately want is an emotional connection, and this is rooted not only in the melodies and chord progressions, but in the wider reach of the artist and how that brand resonates with the broader aspects of their lives.

As will.i.am recently stated in a recent interview, the music business is now “less about selling a single and more about becoming the soundtrack to people's lives.” In order to ensure an artist is operating as an effective business that soundtrack mustn't end when the music stops.

>>The top 10 artist brands

Ask anyone to name their top ten bands/artists and the answers will all be different. Music is a deeply personal thing, and what evokes deep emotions in one will undoubtedly stir absolutely nothing in another. Equally when it comes to identifying the top ten artist brands, everyone has their own set of opinions and ideas as to what merits an effective artist brand.

In identifying our top ten we have looked at a variety of factors above and beyond individual sales figures and musical heritage, taking in to consideration factors such as reach, diversity, brand alignments and the development of ancillary products and services. We have also focused on artists currently performing today, thereby excluding some well established brands (The Beatles, Elvis, Michael Jackson, etc).

In this way we believe we have built an objective snapshot of what it means to operate as an artist brand in 2012. No one-way is definitive, as each act will need to forge their own path based on their own individual audience and values. However, there are some inherent values that clearly remain constant throughout.

>>The Black Eyed Peas

The endorsement model

The Black Eyed Peas, referred to last year by one journalist as the “most corporate band in America,” have forged more brand alignments than most emerging acts have played pub gigs. Their success is built upon an understanding of the fact that their band is a brand in its own right, and that its wide appeal has benefits they can leverage within the brand community for financial and extended audience gain.

The BEPs have a long history of product endorsements dating back to an early partnership with Snickers, through to integrated alignments with Pepsi, Target, Verizon, Motorola, Blackberry, Avon, Bacardi and Volkswagen (to name but a few).

Somehow amid a constant onslaught of often competing corporate deals, the BEPs have managed to retain a level of credibility for being unashamedly open and constant with

“In order to build an effective brand, artists need to think like marketers rather than musicians, and to many this is no small adjustment”

their brand partnerships, utilising these opportunities to further their own brands, both as a group and as individuals.

Fergie has had individual success and affiliated herself with the Candies clothing brand and the sizeable reach of a Dr Pepper Superbowl ad, whilst will.i.am is currently creative director for Intel, striking up a unique collaborative partnership with the brand that goes well beyond traditional endorsement deals.

The group has also developed The Baby Peas, an animated series, which sees the BEP brand extending its reach by enabling the band to exist as a viable group outside of their live act and across multiple digital devices (much in the same way as the Gorillaz model).

>>Jay-Z

The entrepreneur model

Jay-Z, the man who famously made the lyrical statement “I’m not a businessman, I’m a business, man” is one of the world’s most affluent hip-hop brand ambassadors and a man at ease with his own personal brand.

The American rapper and entrepreneur recently topped the Forbes Hip Hop Rich list in 2011 (a title he has held for four out of five years) with help from a string of ancillary business investments outside of his already highly successful music career. Despite having sold some 50 million albums, and with thirteen Grammy awards to his name, his personal brand extensions are what define the overarching lifestyle brand that resonates so effectively with his ardent fans.

He remains a shareholder in charge of product development, marketing and licensing at Rocawear the apparel brand he founded and sold for \$204 million in 2007, and is co-owner of the 40/40 Club sports bar and the New Jersey Nets NBA team. He also became co-brand director for Budweiser Select and is the owner of Roc Nation, a music label partnership with Live Nation (a deal reported to be in the region of \$150 million). In Jay-Z’s mind there are no lines drawn between his music and his business ventures, with his personal brand existing in both simultaneously. “My brands are an extension

of me” says the successful business mogul “It’s not like running General Motors, where there’s no emotional attachment.”

This model highlights the overriding importance in understanding that music fans have lives outside of music where lifestyle extensions, from the bars they drink in to the clothes on their backs, offer additional, and often lucrative, revenue potential.

>>KISS

The licensing model

KISS, and its outspoken figurehead Gene Simmons – a man who was once cited as saying that it was a band’s “professional duty to ensure their brand spreads” – has spent four decades building a sizable business empire that has its foundations firmly rooted in merchandise and image above and beyond music.

Famous as much for their vast array of licensed products – ranging from KISS toothbrushes and action figures through to condoms and coffins – as their iconic face paint and flamboyant stage outfits, the band has built the later part of their career around converting the band into a licensing franchise. The list of products under the KISS banner is too many to mention (spanning some 3,000 separate product categories) turning their initial musical success into a billion dollar brand. “There is nowhere we can’t go” said Simmons in relation to the brand’s potential reach. “No matter how much you love U2 or the Stones or McCartney, you’re not buying Rolling Stones condoms, or you’re not going to buy U2 comic books. But all those things, and more, you can get from KISS.”

The music is still an important element here, as the band’s 100 million plus global album sales testify to. However, from the band’s very inception the creation of a brand image has played a crucial role in their continued success. Without the introduction of make up, the creation of individual characters for the band members and over the top stage antics, the band would arguably have been just another rock and roll band.

Although the scale of the KISS brand licensing is a somewhat exaggerated example of the licensing process, it does indicate just how far fans can potentially buy into an artist's brand. Fans are followers of the brand as much as they are the music, eager to turn their everyday product experiences into clear indicators as to where their loyalties lie.

>>Lady Gaga

The community model

Stefani Germanotta's early music career saw her singing in the Stefani Germanotta Band, which had moderate success, but it was only when the clearly highly talented singer/songwriter developed the persona of Lady Gaga that her ability to achieve global success became apparent.

Lady Gaga's brand revolves around the creation of "brand Gaga," a carefully considered creation that combines, music, fashion, art and a certain element of theatre. "I consider myself to be a visionary, not just a songwriter and a singer. I am an artist," said Gaga earlier this year.

Lady Gaga has invested heavily in loyalty marketing to build her brand, starting first and foremost with the most important aspect of an artist brand, the fans. The singer constantly refers to her fans as if they are an integral component of the Lady Gaga brand, even giving them their own name "Little Monsters," thereby making them feel as if they are part of a unique, bonded club.

Her extensive use of social media also plays a key role in maintaining her close-knit fan community. Social media is not viewed as merely an additional marketing tool, but as a lifeline between her and her fans, enabling the singer to connect with a vast numbers of followers (40 million on Facebook and 11 million followers on Twitter) as individuals. Nurturing fans and building authentic relationships that blur the lines between a fan and their idols is pivotal when it comes to prolonging the staying power of the artist brand. Lady Gaga is also evident of a new type of artist that is eager to harness their own brand above and beyond the increasingly shallow financial rewards of album sales by forging deeper, more collaborative, partnerships with brands.

The singer has aligned with a variety of consumer brands, from exclusive unplugged performances in tandem with Belvedere Vodka to the string of brands – from Virgin Mobile to Miracle Whip – that appeared in the product placement funded music video for the single "Telephone."

A promotional commercial for Google's Chrome browser also saw the singer crowd sourcing content from her loyal fanbase for a music video, melding her two strongest assets, her fans and her brand pulling power. Likewise, her deal with Polaroid – whereby she was inducted as creative director of the brand – saw her assimilating an endorsement deal into her own artist brand, creating products that evoke the ethos of all things Gaga-esque.

>>Gorillaz

The innovation model

Gorillaz, a virtual band made up of cartoon characters, began life in 1998 as a collaborative project between Blur frontman Damon Albarn and comic book artist Jamie Hewlett.

Listed in the *Guinness Book Of World Records* as the world's most successful virtual band the concept was initially envisaged and developed as an antidote to the ubiquitous MTV culture of the 1990s. "If you're going to pretend to be somebody you're not – which is the whole point of being a rock star – then why not just invent fake characters and have them do it all for you?" said Hewlett during an interview in 2005. The actual musicians that comprise the band perform anonymously – until very recently when the band made a concerted effort to step out into the limelight to tour – leaving the cartoon creations to develop their own personas through a series of extensive digital activities.

The Gorillaz have consistently utilised emerging technology to extend the reach of the group and the fictitious world they inhabit. These innovation led promotions have included the 'Final Drive' and 'Escape to Plastic Beach' online games, a holographic live performance from the animated characters at the MTV awards, and even saw the band

collaborating with Microsoft in 2010 to launch the Beta version of the Windows Internet Explorer 9 browser with a fan competition to design an additional character for the band.

“Gorillaz shouldn't be denied any of the affectations of genuine rock stars just because they're cartoons. They've been very successful,” said Albarn of his virtual creations.

>>Britney Spears

The ancillary business model

The teen pop starlet who rose from being a Mickey Mouse Club Mousketeer to become a global pop phenomenon selling 100 million albums globally (37 million of them before she was 20 years-old) has captured the essence of her personal brand, turning it into a successful standalone ancillary business.

As a successful all-American brand, Britney has gained world wide acclaim and leveraged a host of endorsement deals in the process, striking partnerships with Pepsi, Toyota, Samsung and Japanese beer brand Kirin. However, it has been her ability to distil her brand essence – quite literally by bottling it up – which has seen her brand extend beyond the realms of music.

Spears has grossed over \$1.5 billion from branded fragrance sales across the globe, since developing her first perfume line 'Curious' in 2004 as part of a five year deal with Elizabeth Arden. Curious is cited as one of the best selling branded perfume lines of all time, netting \$100 million in sales in its initial year of release and continuing to sell to this day to the tune of 650 million bottles.

Britney's profile as a recording artist has seen peaks and troughs over the last few years, however her perfume business has been somewhat more resilient. A steady string of fragrances have followed, often coinciding directly with the release of a new album or additional exclusive material.

This seemingly disconnected business; with virtually no connection to the singer's musical career, proves that products which capture the spirit of the artist's brand are as powerful a revenue generator as those that require musical input.

>>Miley Cyrus/Hannah Montana

The TV expansion model

When Miley Cyrus, the teenage daughter of a country singer, hit the world's screens in 2006 in a light-hearted Disney TV show about a girl attempting to live a double life as a pop star, no one could have foreseen the artist brand juggernaut that would ensue.

The singer/actress went on to become the first Disney artist to initiate multiple deals across several aspects of the Disney company, including TV, film, music, and consumer products. At one point the cable show was broadcasting to 200 million viewers, causing one commentator to state: “If Miley's viewers were a country, they would be the fifth largest population in the world – just ahead of Brazil.” By 2008, at the height of *Hannah Montana* mania, Disney had to set up a separate department purely to deal with the exponential growth of the brand, which now had hundreds of ancillary product lines, from dolls to apparel and jewellery.

In addition, the *Hannah Montana & Miley Cyrus: Best of Both Worlds Concert* movie, became the No. 1 movie at the box office, earning \$31.1 million in three days, setting a new record for the highest box-office takings for a Super Bowl weekend. Fans flocked to the cinema, with the movie enabling fans who had failed to obtain highly sought after concert tickets, to experience the live show.

“As we have successfully seen with *High School Musical* and *Camp Rock*, which first burst onto the scene as Disney Channel programming, *Hannah Montana* has likewise gone on to spawn popular consumer products, soundtracks and a spin-off feature movie, proving that television is critical in creating a number one teen franchise,” said Nicoletta Gelli, vice-president of brand marketing for Disney Channels EMEA.

Miley Cyrus has continued to develop her own brand, above and beyond the *Hannah Montana* franchise, leading to her place as the youngest star on Forbes rich list in 2010 with annual earnings of \$30 million.

“Building authentic relationships that blur the lines between a fan and their idols is pivotal when it comes to prolonging the staying power of the artist brand”

>>Bon Jovi

The live model

“I’m the CEO of a major corporation who has been running a brand for 25 years,” said Jon Bon Jovi of the ever-popular rock band and business enterprise that bears his name.

Bon Jovi first formed in 1983, going on to build up a reputation for sell out live shows across the globe with their arena-friendly rock anthems, performing 2,600 concerts in over fifty countries for more than 34 million fans. This unprecedented demand for the Bon Jovi brand served to generate \$210 million in 2008 for the ‘Lost Highway’ tour and saw the band becoming the highest grossing live act of 2010 with the ‘Circle’ tour.

The band, which has sold around 120 million copies of their eleven studio albums, comes in second only to U2 on the Forbes rich list in 2011 with estimated earnings of \$125 million.

Like many other high profile acts a large part of this revenue is built upon a highly demanding touring schedule, but that is merely the fuel for a much broader artist brand franchise, which has seen the band’s frontman diversify into movies, charitable and political activities and take up a majority investment in American football team Philadelphia Soul. The football team is closely affiliated with music, with the team’s logo comprised of a music note containing a white football inside. The singer has also teamed up with his drummer bandmate on the Rock Star Baby brand, a series of products for infants.

The band itself has developed Facebook games inviting fans to purchase virtual branded Bon Jovi goods, and teamed up with brands such as Vodafone, Bank of America and the Saturn automotive company.

“By the time you’re forty-seven, if you haven’t learned how to run it as a business, you’re not going to make it,” said Jon Bon Jovi in relation to building an artist brand beyond catchy guitar hooks.

>>Madonna

The re-invention model

The self confessed material girl has grown from being an aspiring dancer/singer in New York to become one of America’s most astute businesswomen, maintaining a presence at the top of her industry for over three decades by constantly reinventing and reshaping her own brand.

“Part of the reason I’m successful is because I’m a good businesswoman,” Madonna was once quoted as saying. Her chameleon-like ability to keep up with current trends and strike partnership deals with key people who can further the reach of her overriding umbrella brand has made her one of the most successful female artists of all time. Her Confessions tour is credited as the highest-grossing tour ever by a female artist, generating around \$195M from sixty shows to 1.2M fans.

Her business career outside of music sees her active in the roles of actress, fashion designer, children’s book author and film director as she fronts a variety of ancillary ventures.

The singer has inked lucrative brand alignments with the likes of Pepsi, BMW, Max Factor, Versace and Gap over the years, collaborated with high-street retailer H&M on an exclusive clothing range, invested \$1.5 million in coconut water brand Vita Coco, and is currently planning to open Hard Candy Fitness Centers across ten locations in Russia, Brazil, Argentina, Europe and Asia.

Her behind-the-scenes deal cutting reach its pinnacle in 2007 when she inked a \$120 million, 10-year contract with Live Nation, the world’s largest concert-promotion company. “The paradigm in the music business has shifted and, as an artist and a business woman, I have to move with that shift,” said Madonna, getting her calculator out. “With this new partnership, the possibilities are endless.”

The subsequent release of her 2008 album *Hard Candy* saw lucrative tie-in deals with the likes of Vodafone, Fuji and Unilever, with the Vodafone deal marking the first time

an album by a mega-act had been launched via a mobile phone. The Unilever deal reportedly saw the performer picking up \$10 million for a brief appearance in a Super Bowl Sunsilk hair care commercial, effectively paying her to advertise her own personal brand to 100 million American viewers. What is noticeably here is how each of these deals saw the Queen Of Pop netting millions before any music was actually released for sale to the public, once again highlighting how the brand image can transcend the brand sound.

>>The Rolling Stones

The longevity model

The archetypical rock n roll band, formed in the 1960's yet still performing well into a pensionable age, have amassed in excess of 200 million album sales worldwide and grossed over \$2 billion since 1989.

The band has outlived many of its iconic counterparts, continuing to bring new music to its die-hard fan base across five separate decades. Although the last twenty years have produced fewer hits the band still continues to maximise their considerable back catalogue with a string of licensing and sync deals.

“(Mick Jagger's) greatest talent, besides strutting and singing, is his ability to surround himself and the band with a group of very able executives,” said former Fortune editor Andy Serwer back in 2002. “Spend time with the band's senior entourage and you quickly realize how the Stones got so market-wise.”

One clear aspect of The Rolling Stones business agenda is an attention to the finer details of overheads, going to great lengths in order to minimise tax expenditure, basing many of the band's recording and scheduling commitments to benefit from different tax laws. This is a brand that despite massive global success has been founded on a strict principal of watching the pennies in order to bring in the pounds. The Rolling Stones honed their tour franchise model in 1989 with the Steelers Wheel tour, which featured a \$6 million sponsorship deal with Budweiser and the setting up of Rolling Stones boutiques selling merchandise in retail stores such as Macy's and

J.C.Penney, turning a predicted \$90 million tour into a \$260 million record breaker. The Bigger Bang Tour in 2007, their most recent tour, grossed \$437M, again as a result of extensive tickets sales and an exploitation of their brand name to drive ancillary products and sponsorships.

“The Rolling Stones organization is a well-oiled, money making machine, and to say it resembles anything less than a Fortune 500 firm would be unjust,” said Roger Blackwell in the 2004 book *Brands that Rock*.

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Redacted Remixer Agreement (Used with Electronic and Dance Music Artists)

DATE: As of _____, 201__

The following shall set forth the agreement (the “**Agreement**”) between RECORD COMPANY (“**Company**”) and REMIXER (“**Remixer**”) in connection with Remixer’s remixing services on the master recording originally featuring the performances of ARTIST (“**Artist**”) entitled “TRACK NAME” (the “**Master**”).

1. For good and valuable consideration, in the amount of _____ (\$____) (the “**Fee**”), the receipt and sufficiency of which is hereby acknowledged, the Master remixed by Remixer hereunder (the “**Remix**”) shall be entirely Company’s property free of any claims whatsoever by Remixer or any other person, firms, or corporation. Remixer hereby expressly acknowledges, certifies and agrees that all of the results and proceeds of the services of every kind heretofore rendered by and hereafter to be rendered by Remixer in connection with the Master and/or Remix are and shall be deemed works “made-for-hire” in that (i) it is prepared within the scope of Company’s employment of Remixer hereunder and/or (ii) it constitutes a work specifically ordered by Company for use as a contribution to a collective work. Accordingly, Remixer further acknowledges, certifies and agrees that Company is and shall be deemed the author and/or exclusive owner of all of the foregoing for all purposes and the exclusive owner throughout the world of all the rights of any kind comprised in the copyright thereof, and of any and all other rights thereto, and that Company shall have the right to exploit any or all of the foregoing in any and all media, now known or hereafter devised, throughout the universe, in perpetuity, in all configurations as Company determines. Remixer hereby irrevocably and unconditionally waives any and all moral and like rights that Remixer may have in the Master and/or Remix and hereby agrees not to make any claim against Company or any party authorized by Company to exploit the Master and/or Remix based on such moral or like rights. To the extent that Remixer may be deemed the “author” of any of the Master and/or Remix or any portion thereof, Remixer will, upon request, execute, acknowledge and deliver to Company such additional documents as Company may deem necessary to evidence and effectuate Company’s rights hereunder, and Remixer hereby grants to Company the right as attorney-in-fact to execute, acknowledge, deliver and record in the U.S. Copyright Office or elsewhere any and all such documents if Remixer shall fail to execute same within five (5) days after so requested by Company. Company shall have the right to remix or otherwise revise the Master at any time without the permission of Remixer. Company may create other versions of the Master which Remixer has neither provided services in connection with nor performed on in any way whatsoever (“**Other Masters**”). Accordingly, this Agreement shall in no way prohibit Company from exploiting any Other Masters and, in connection with the foregoing, Remixer shall not receive any compensation (royalty or otherwise) with respect to said Other Masters. Remixer acknowledges that the composition embodied on the Master and/or Remix was not written by Remixer and further acknowledges that Remixer’s services under this Agreement shall not be deemed a contribution to the writing of such composition. Accordingly, Remixer will not have any copyright interest in the composition nor shall Remixer make any claim for any copyright ownership, mechanical royalties, and/or income participation percentage with respect to the composition.

2. Remixer hereby grants to Company the right to issue and authorize publicity concerning Remixer, and to use Remixer’s name, approved likeness and approved biographical data in connection with the distribution, exhibition, advertising, marketing and exploitation of the Remix in any and all manner and media. Remixer shall exercise approvals hereunder reasonably and within five (5) days after request by Remixer, or such approvals shall be deemed given.

3. Remixer hereby warrants, represents, and agrees that, with respect to Remixer's services and contributions to the Remix hereunder, Remixer is not under any disability, restriction or prohibition, whether contractual or otherwise, with respect to Remixer's right, power, and authority to enter into and perform this Agreement, to grant the rights granted herein, and to perform each and every term and provision hereof. Remixer warrants and represents that Remixer has obtained all necessary licenses, approvals, and consents from any and all third parties in connection with the Remix, including, without limitation, Remixer's record company, if any, as may be required by Company. Remixer agrees not to use or furnish any samples or interpolated compositions on the Remix. If Remixer neglects or fails to comply with the foregoing restriction, then, without limiting the rights and remedies available to Company, Remixer will be solely liable for all royalties or other monies that become due to any person or entity whose master recording(s) are sampled and/or whose composition(s) are interpolated. Company shall have the right to assign or license any of Company's rights hereunder. Remixer shall not have the right to assign any of Remixer's rights hereunder. Remixer hereby agrees to and does hereby indemnify, save, and hold Company, Artist, and any of their respective licensees, assignees, affiliates, officers, directors, employees, managers, and attorneys harmless from all damages, liabilities, costs, losses and expenses (including legal costs and reasonable attorney's fees) arising out of or connected with any claim, demand or action by a third party which is inconsistent with any of the warranties, representations, or covenants made by Remixer in this Agreement. Remixer agrees to reimburse Company, Artist, and their respective licensees, assignees, affiliates, officers, directors, employees, managers, and attorneys, on demand, for any payment made by Company at any time with respect to any such damage, liability, cost, loss or expense to which the foregoing indemnity applies. This Agreement shall be governed by the laws of the State of California applicable to contracts entered into and performed entirely within the State of California. The parties agree that any action at law or in equity arising out of or relating to this Agreement shall be filed only in the state or federal courts located in the County of Los Angeles, California, and the parties hereby consent and submit to the exclusive jurisdiction of such courts for the purposes of litigating any such action. This Agreement may be executed in one or more counterparts, each of which when taken together, will be deemed to constitute one and the same instrument. Facsimile or .PDF digital signatures on this Agreement will be deemed originals for all purposes.

Please acknowledge acceptance of the foregoing by signature below:

RECORD COMPANY

By: _____
An Authorized Signatory

AGREED AND ACCEPTED as of the date first set forth above

REMIXER

1 STATE OF CALIFORNIA
2 DEPARTMENT OF INDUSTRIAL RELATIONS
3 DIVISION OF LABOR STANDARDS ENFORCEMENT
4 William A. Reich, Esq. (SBN 51397)
5 1901 N. Rice Avenue, Suite 200
6 Oxnard, California 93030
7 Telephone No. (805) 973-1244
8 Facsimile No. (805) 973-1251

Special Hearing Officer for the Labor Commissioner

9 BEFORE THE LABOR COMMISSIONER
10 OF THE STATE OF CALIFORNIA

11 MARIO SOLIS, an individual,

12 Petitioner,

13 vs.

14 JAMES E. BLANCARTE, a
15 Professional Corporation,

16 Respondent.

CASE NO.: TAC-27089

DETERMINATION OF
CONTROVERSY

17 The above-captioned matter, a petition to determine controversy under Labor Code
18 §1700.44, came on regularly for hearing on January 10, 2013 in Los Angeles, California,
19 before the undersigned attorney for the Labor Commissioner assigned to hear this case.
20 Petitioner MARIO SOLIS (hereinafter "Petitioner") appeared personally and was
21 represented by attorney Miles J. Feldman. Respondent JAMES E. BLANCARTE
22 (hereinafter "Respondent") appeared personally and was represented by attorney Robert
23 D. Lipscomb.

24
25 This proceeding arises out of the Petition to Determine Controversy filed by
26 petitioner with the Labor Commissioner on April 30, 2012. The petition alleges that
27 respondent entered into a representation agreement with petitioner, pursuant to which
28

1 respondent agreed to act and acted as an unlicensed talent agent in violation of Labor
2 Code section 1700.5, a provision of the Talent Agencies Act (TAA), Labor Code section
3 1700 et seq. The petition seeks a declaration that the contract is void and unenforceable,
4 and that respondent is therefore barred from seeking any recovery under the terms of the
5 contract. Due consideration having been given to the evidence presented at the hearing
6 and to the documents and other papers on file in this proceeding, the Labor Commissioner
7 now renders the following decision.

8
9 **FINDINGS OF FACT**

10
11 1. Petitioner is a sports reporter and news anchor for a Los Angeles
12 television station, KNBC Channel 4. Apart from his talents and activities as a broadcast
13 journalist, petitioner's artistic pursuits include acting, script writing, voice overs, and
14 performing as an entertainer.

15
16 2. Respondent is a duly licensed attorney who is admitted by the state
17 bar to practice law in the State of California.

18
19 3. Prior to July, 2002, when the parties entered into the engagement
20 contract described below, respondent had on certain occasions provided legal services to
21 the petitioner. In addition, according to petitioner, respondent had provided management
22 type services to petitioner in connection with petitioner's interest in breaking into network
23 television; specifically, respondent advised petitioner that he would keep his eye open for
24 opportunities for petitioner to work in television.

25
26 4. Sometime prior to July 8, 2002, KNBC approached petitioner and
27 expressed an interest in hiring petitioner to work for the station as a sports reporter, news
28

1 anchor, commentator, and analyst, as well as in other roles related to the entertainment
2 programming offered by the station.

3
4 5. Following this expression of interest by KNBC, petitioner contacted
5 respondent and asked him to represent petitioner in handling the negotiation of the terms
6 of his employment with the station. Respondent was receptive to the proposal, and on
7 July 8, 2002 the parties entered into a written engagement contract set out in the form of
8 an engagement letter from respondent to petitioner. At the outset the letter states: "We
9 appreciate your asking us to represent you in connection with your broadcasting and
10 entertainment career, including without limitation, contract negotiations with KNBC
11 Channel 4."

12
13 6. The engagement contract provided that respondent would be paid a
14 five percent (5%) commission on all net monies paid to petitioner under the contract to be
15 negotiated by respondent with KNBC. According to petitioner, respondent wanted to be
16 paid a commission instead of a one-time fee because of the follow-up work he would do
17 on the contract and because he would be acting as petitioner's representative and agent.

18
19 7. At the time that respondent was brought in, there was no deal in
20 place with KNBC: neither the compensation arrangements, nor the length of the contract,
21 nor any of the other terms and conditions under which petitioner would be employed by
22 KNBC had been addressed or worked out. These were all matters that respondent had
23 been engaged to negotiate.

24
25 8. Thereafter, respondent proceeded to negotiate an employment
26 agreement for petitioner with KNBC, which was signed by both parties and became
27 effective August 5, 2002.

1 9. During the four-year period covered by petitioner's employment
2 agreement, August 5, 2002 through August 6, 2006, respondent was paid the
3 commissions due to him under the engagement contract.
4

5 10. Prior to August 7, 2006, respondent negotiated a three year renewal
6 of petitioner's employment agreement, which included an increase in annual
7 compensation for each of the three years. The agreement was signed and became
8 effective August 7, 2006.
9

10 11. During the period August 7, 2006 through the end of 2007,
11 respondent received his 5% share of petitioner's net monthly income under the
12 employment agreement, representing the commissions due pursuant to the engagement
13 contract. Thereafter, petitioner made no further commission payments to respondent.
14

15 12. Prior to June 2, 2009, respondent negotiated a two-year further
16 renewal of the employment agreement set to expire in August, 2009. Because prevailing
17 economic conditions resulted in a decrease in the compensation offered to and ultimately
18 accepted by petitioner, respondent is making no claim for commissions due under this
19 second renewal of the employment agreement.
20

21 13. At one point, apparently during the time that respondent was still
22 being paid his commissions, an opportunity arose for petitioner to go to work for ESPN.
23 Petitioner asserts that this opportunity was arranged by and presented to petitioner by
24 respondent. Respondent, on the other hand, asserts that the ESPN opportunity was
25 brought to his attention by petitioner, and that it was petitioner himself who was contacted
26 directly by ESPN.
27
28

1 14. Throughout the period encompassing respondent's asserted
2 entitlement to commissions under the engagement contract, July 8, 2002 to August 31,
3 2009, respondent was not licensed as a "talent agency" under the provisions of the TAA.
4

5 15. On December 30, 2011, respondent filed a civil action against
6 petitioner in the Los Angeles County Superior Court, Central District—Blancarte v. Solis,
7 Case No. BC476169. The complaint sought to recover the commissions due under the
8 engagement contract based on the net monies paid to petitioner between January 1, 2008
9 and August 31, 2009 pursuant to the employment agreement with KNBC.
10

11 16. After filing an answer to the complaint, which included an
12 affirmative defense based on the TAA, petitioner filed the instant petition with the Labor
13 Commissioner seeking a determination that the engagement contract was entered into is
14 violation of the TAA and was therefore void and unenforceable.
15

16 LEGAL ANALYSIS

17

18 1. Labor Code section 1700.5 provides in relevant part as follows:

19 No person shall engage in or carry on the occupation of a talent
20 agency without first procuring a license therefor from the Labor
21 Commissioner.
22

23 2. Under Labor Code section 1700.4, subdivision (a), "[t]alent agency"
24 is defined in relevant part as follows:

25 "Talent agency" means a person or corporation who engages in the
26 occupation of procuring, offering, promising, or attempting to procure
27 employment or engagements for an artist or artists, except that the activities
28 of procuring, offering, or promising to procure recording contracts for an
artist or artists shall not of itself subject a person or corporation to

1 regulation and licensing under this chapter.

2
3 3. Labor Code section 1700.4, subdivision (b) defines “[a]rtists” in part
4 as follows:

5 “Artists” means actors and actresses . . . , radio artists, . . . writers, . . . and
6 other artists and persons rendering professional services in motion picture,
7 theatrical, radio, television and other entertainment enterprises.

8
9 4. In the present case, the evidence establishes that petitioner was a
10 person rendering artistic and professional services in the medium of television for
11 purposes of entertaining the public. Thus, it is clear petitioner was an artist within the
12 meaning of section 1700.4, subdivision (b).

13
14 5. The next, and crucial question, is whether respondent was engaged in
15 the occupation of a talent agency, that is to say, whether he was engaged in procuring or
16 in offering, promising, or attempting to procure employment or engagements for
17 petitioner.

18
19 6. The principal and dominant activities that respondent performed on
20 behalf of petitioner pursuant to the engagement contract involved the negotiation of the
21 compensation and other terms of the agreements for the employment of petitioner by
22 KNBC. The Labor Commissioner has long recognized that the acts undertaken in the
23 course of negotiating an agreement for the employment of an artist constitute “procuring .
24 . . or attempting to procure employment” within the meaning of section 1700.4,
25 subdivision (a).

26 The term “procure,” as used in Labor Code §1700.4(a),
27 means “to get possession of: obtain, acquire, to cause to
28 happen or be done: bring about.” *Wachs v. Curry* (1993) 13

1 Cal.App.4th 616, 628. Thus, "procuring employment" under
2 the Talent Agencies Act is not limited to initiating discussions
3 with potential purchasers of the artist's professional services
4 or otherwise soliciting employment; rather, "procurement"
5 includes any active participation in a communication with a
6 potential purchaser of the artist's services aimed at obtaining
7 employment for the artist, regardless of who initiated the
8 communication. *Hall v. X Management* (TAC No. 19-90, pp.
9 29-31.) The Labor Commissioner has long held that
10 "procurement" includes the process of negotiating an
11 agreement for an artist's services. *Pryor v. Franklin* (TAC 17
12 MP 114). Significantly, the Talent Agencies Act specifically
13 provides that an unlicensed person may nevertheless
14 participate in negotiating an employment contract for an artist,
15 provided he or she does so "in conjunction with, and at the
16 request of a licensed talent agent." Labor Code §1700.44(d).
17 This limited exception to the licensing requirement would be
18 unnecessary if negotiating an employment contract for an
19 artist did not require a license in the first place.

20 (*Danielewski v. Agon Investment Company* (Cal.Lab.Com., October 28, 2005) TAC No.
21 41-03, pages 15-16.)

22 7. The negotiation of petitioner's employment agreements with KNBC
23 represented the bulk of the activities that respondent engaged in on behalf of petitioner
24 under the engagement contract. Indeed, the contract was entered into for the purpose of
25 having respondent conduct such negotiations, and respondent carried out the contract by
26 effectuating and accomplishing that purpose. By negotiating the KNBC agreements on
27 petitioner's behalf, respondent attempted to procure and procured employment for
28 petitioner. As a consequence, respondent engaged in and carried out the occupation of a
talent agency; because he did so without having first obtained a talent agency license
from the Labor Commissioner, respondent violated the provision of Labor Code section
1700.5.

1 8. Respondent contends that because he is a duly licensed attorney, his
2 activities in negotiating the KNBC agreements on behalf of petitioner should be treated as
3 exempt from the licensing requirements of section 1700.5. The provisions of the TAA do
4 not contain or recognize any such exemption. Moreover, respondent has provided no
5 authority that would support the propriety of applying or creating such an exemption.

6
7 9. The applicable scope of the TAA has been delineated by the
8 Supreme Court:

9
10 The Act establishes its scope through a functional, not a
11 titular, definition. It regulates *conduct*, not labels; it is the act
12 of procuring (or soliciting), not the title of one's business, that
13 qualifies one as a talent agency and subjects one to the Act's
14 licensure and related requirements. (§1700.4, subd. (a).) Any
15 person who procures employment—any individual, any
16 corporation, any manager—is a talent agency subject to
17 regulation. (§§1700.4, subd. (a).)

18 (*Marathon Entertainment, Inc. v. Blasi* (2008) 42 Cal.4th 974, 986.) As the foregoing
19 makes perfectly clear, anyone who procures or solicits engagements for an artist is
20 carrying on the occupation of a talent agency and must be licensed.

21 10. It is evident that the functional scope of the TAA admits of no
22 exceptions and encompasses the procurement activities of respondent, even though he is
23 an attorney. In this regard, it is of no moment that some of the skills respondent may have
24 brought to the negotiations on behalf of petitioner are the result of skills for which he has
25 been licensed as an attorney. As Labor Code section 1700.44 makes unequivocally clear,
26 when someone who is not licensed under the TAA wishes to bring such skills to bear on
27 the negotiation of an artist's contract, he must do so "in conjunction with, and at the
28 request of, a licensed talent agency." Here, respondent acted entirely on his own and

1 without a talent agency license; consequently, his conduct constituted a clear violation of
2 the licensure requirements of section 1700.5.

3 11. The consequences that flow from a violation of the TAA are well
4 settled. When a person contracts to act as a talent agent without first having obtained a
5 talent agency license as required by the TAA, the contract that has been entered into is
6 illegal, void, and unenforceable. "Since the clear object of the Act is to prevent improper
7 persons from becoming [talent agents] and to regulate such activity for the protection of
8 the public, a contract between an unlicensed [talent agent] and an artist is void."
9 (*Buchwald v. Superior Court* (1967) 254 Cal.App. 2d 347, 351.).

10
11 12. As recognized in *Marathon Entertainment, Inc. v. Blasi, supra*, in
12 some cases there may be a basis for severing the illegal portions of a contract violative of
13 the TAA's licensure requirements from the other parts of the contract. However, this will
14 be permissible only where there are both illegal and legal aspects to the contract and
15 where the two aspects can be properly severed in accordance with the legal standards
16 governing application of the severance doctrine.

17
18 13. There is no basis for applying the doctrine of severability in the
19 circumstances of this case. It is established law that if the central purpose of a contract is
20 illegal, the entire contract is void and will not be enforced. In the present case, the central
21 purpose of the engagement contract was to enable respondent to act as petitioners'
22 unlicensed talent agent. This illegal purpose contaminated the entire contract, and
23 rendered it void and unenforceable. (See *Marathon Entertainment, Inc. v. Blasi, supra*,
24 42 Cal.4th at pp. 997-998.) In addition, in this case respondent is seeking to preserve his
25 right to recover certain commissions under the engagement contract; the commissions that
26 he seeks to protect are based on the income that respondent generated for petitioner
27 through his illegal procurement activities. Plainly, respondent cannot capitalize on and
28

1 gain a benefit from illegal conduct under a contract; in these circumstances, the illegality
2 permeates the entire engagement contract and renders it void and unenforceable. In light
3 of these conclusions, it is unnecessary to consider whether, in rendering services under
4 the engagement contract, respondent engaged in other conduct violative of the TAA.
5

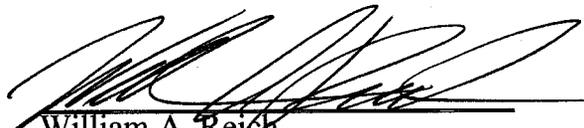
6 14. In sum, for the reasons stated above, it is determined that in entering
7 into the engagement contract with petitioner, and in performing under that contract,
8 respondent engaged in the occupation of a talent agency without having obtained a
9 license from the Labor Commissioner. Because it was pervaded by illegality, the entire
10 contract is found to be void and unenforceable.
11

12 **ORDER**

13
14 For the reasons set forth above, **IT IS HEREBY ORDERED** as follows:
15

16 The contract between petitioner and respondent is declared to be illegal,
17 void and unenforceable, and respondent is barred from enforcing or seeking to enforce
18 the contract against petitioner in any manner.
19

20 Dated: 9-30-2013

21 
22 William A. Reich
Special Hearing Officer

23 Adopted:

24
25 Dated: 9.30.2013

26 
27 Julie A. Su
28 State Labor Commissioner

DECLARATION OF SERVICE BY MAIL

Case No. TAC - 27089

Legal Case No. VE02075

I, the undersigned, say: my business address is 1901 N. Rice Ave., Suite #200, Oxnard, California
93030 I am over the age of eighteen years, not a party of the above-entitled action, and at the
time of the mailing, was employed or resided in the County where said mailing occurred. On ____
September 30, 2013 I served the within _____ **DETERMINATION OF**

CONTROVERSY

on the interested parties in the above-entitled proceeding by depositing copies thereof, enclosed in
separate, sealed envelopes, with the postage thereon fully prepaid, in the United States mail at
Oxnard, County of Ventura, California, which envelopes were addressed respectively as follows:

Robert D. Lipscomb, Esq.
1359 Spazier Ave.
Glendale, CA 91201

Miles J. Feldman, Esq.
Paul A. Kroeger, Esq.
RAINES FELDMAN LLP
9720 Wilshire Blvd., 5th Floor
Beverly Hills, CA 90212

Executed on September 30, 2013 at Oxnard, California

I declare under penalty of perjury that the foregoing is true and correct.



Sheila L. Fountain
Declarant

(CCP 1012, 1013 et seq., 2015.5)



1 STATE OF CALIFORNIA
 DEPARTMENT OF INDUSTRIAL RELATIONS
 2 DIVISION OF LABOR STANDARDS ENFORCEMENT
 David L. Gurley, Esq. (SBN 194298)
 3 300 Oceangate, Suite 850
 Long Beach, CA 90802
 4 Telephone No.: (562) 590-5461

5 Attorney for the Labor Commissioner

6
 7
 8 BEFORE THE LABOR COMMISSIONER

9 STATE OF CALIFORNIA

10
 11 STEVE LINDSEY, An Individual dba) **CASE NO.: TAC 28811**
 BLOTTER MUSIC (ASCAP) and dba LIQUID)
 12 ORANGE MUSIC (BMI), and BLOTTER,) **DETERMINATION OF**
 INC., A California Corporation,) **CONTROVERSY**

13 Petitioners,

14 vs.

15
 16 LISA MARIE, An Individual and MARIE
 MUSIC GROUP, LLC fka MOIR/MARIE
 17 ENTERTAINMENT, A California Limited
 Liability Company and DOES 1-20, Inclusive.

18 Respondents.
 19

20
 21 The above-captioned matter, a Petition to Determine Controversy under Labor
 22 Code §1700.44, came on regularly for hearing in Long Beach, California, before the
 23 undersigned attorney for the Labor Commissioner assigned to hear this case. Petitioner
 24 STEVE LINDSEY, an Individual dba BLOTTER MUSIC (ASCAP) and dba LIQUID
 25 ORANGE MUSIC (BMI), and BLOTTER, INC., A California Corporation, (hereinafter,
 26 referred to as “Lindsey” or “Petitioner”) appeared through their attorney Steven B.
 27 Stiglitz of Freedman & Taitelman, LLP. Respondents LISA MARIE AND MARIE
 28 MUSIC GROUP, LLC, f/k/a MOIR MARIE ENTERTAINMENT, LLC (“MMG”)

1 (hereinafter, “MMG” or “Respondent”), appeared through counsel James S. Cooper, of
2 Levinson Arshonsky & Kurtz, LLP.

3 Petitioner was represented by Respondent as his personal manager. The Petition
4 seeks to void the Personal Management Agreement, in whole, or, alternatively, in part, on
5 the grounds MMG’s services under that agreement violated the Talent Agencies Act,
6 California Labor Code Section 1700, et seq. (the “Act”), in that the services constituted
7 the unlawful procurement of employment without a license to conduct business as a talent
8 agency. Based on the evidence presented at this hearing and on the other papers on file in
9 this matter, the Labor Commissioner hereby adopts the following decision.

10
11 **I. FINDINGS OF FACT**

12 1. Lindsey is an artist and a record producer in the music industry whose skills
13 include record production, music composition, song writing, and musical performance.

14 2. In or about 1996, Lindsey wanted to continue working as a record producer,
15 but sought to work on more contemporary sounding albums believing this would expand
16 his opportunities. To pursue that goal, Lindsey retained MMG to act as his personal
17 management firm, with Bennett Kaufman (“Kaufman”) to act as his primary manager.
18 Lindsey and Kaufman had known each other in a professional context for many years,
19 and Lindsey trusted Kaufman to help him obtain new opportunities as a producer of
20 musical content.

21 3. On April 23, 1996, Lindsey and MMG entered into an initial
22 personal management agreement (the “Initial Personal Management Agreement”). Under
23 the Initial Personal Management Agreement, MMG contracted to perform services as
24 Lindsey’s personal manager in return for a commission of 15% of Lindsey’s gross income
25 in connection with Lindsey’s work as a record producer, arranger and songwriter.

26 **A. The Guster Deal**

27 4. After Lindsey and MMG entered into the Initial Personal Management
28 Agreement, Kaufman began searching for opportunities for Lindsey. Kaufman

1 successfully found Lindsey work as a songwriter and arranger as well as a record
2 producer. The first significant opportunity Kaufman arranged for Lindsey was securing a
3 deal for Lindsey to produce a record for the band Guster (hereinafter the “Guster Deal”).
4 As a result of Kaufman’s introduction, Lindsey ultimately produced Guster’s album and
5 wrote one of the songs on that album.

6 5. A written agreement between Lindsey and Guster Recordings, Inc. (the
7 “Guster Agreement”) memorializes that relationship. Notably, a review of the Guster
8 Agreement confirms that the only parties to the Guster Deal were Guster, the band, and
9 Lindsey, the producer. The record company, Sire Records (hereinafter company or label)
10 who distributed the album and provided royalty statements of the record’s earnings via
11 record sales, was neither a party to the Guster Deal nor a signatory to the contract. The
12 royalties or earnings promised to Lindsey under the Guster Deal were calculated “on the
13 same basis as [Guster’s] royalties are calculated, determined, adjusted and paid pursuant
14 to Guster’s agreement with Company (the ‘Recording Agreement’)”. The Recording
15 Agreement was the recording contract between Guster and Sire. In short, the Guster Deal
16 was a relationship for Lindsey to produce Guster’s record wherein Lindsey’s earnings
17 were paid as a direct percentage of Guster’s earnings under Guster’s recording contract
18 with Sire records.

19
20 **B. The Windswept Agreement**

21 6. Soon after securing the Guster Deal, Kaufman suggested Lindsey
22 explore the possibility of becoming a music publisher. Lindsey had no experience as a
23 music publisher, but Kaufman correctly ascertained that Lindsey had all of the skills
24 necessary to succeed in the field of publishing.

25 7. In furtherance of helping Lindsey obtain work as a music publisher,
26 Kaufman introduced Lindsey to Windswept Pacific Entertainment Company (hereinafter
27 Windswept). As a result of that introduction, Lindsey obtained work as a co-publisher

28 ///

1 with Windswept. The terms of the agreement are contained in the “Windswept
2 Agreement”.

3 8. Section 6 of the Windswept Agreement, which is entitled “Co-Publisher’s
4 Obligations,” contains subsection a. that provides: “As between Windswept and
5 [Lindsey], [Lindsey] shall be solely responsible for and shall use its best reasonable
6 efforts to locate publishing opportunities for the mutual benefit of [Lindsey] and
7 Windswept.” Section 7.a of the Windswept Agreement provides for certain business
8 terms of the deal. Subsection (i) provides for Windswept to pay Lindsey a salary in each
9 contract year (which is recoupable from royalties earned through musical compositions, if
10 any).

11 9. Pursuant to the Windswept Agreement, Lindsey worked virtually
12 exclusively for Windswept for a number of years. Lindsey received earnings from the
13 Windswept Agreement and paid commissions to Respondent during those years.

14
15 **C. The Amendment to the Initial Personal Management Agreement**

16 10. On April 2, 2003, Lindsey and MMG entered into an amendment to the
17 Initial Personal Management Agreement. The Initial Personal Management Agreement
18 and this amendment together constitute the entirety of the Personal Management
19 Agreement between the parties. The amendment provides, among other things, “[MMG]
20 shall also continue to be entitled to commission [for Lindsey’s] current publishing Joint
21 Venture with Windswept Music Publishing....” MMG had been commissioning
22 Lindsey’s income from the Windswept Agreement, and MMG continued to commission
23 such income thereafter.

24 **D. The Botti Deal**

25 11. Shortly after Lindsey and MMG entered into the amendment to the Initial
26 Personal Management Agreement, Kaufman again successfully sold Lindsey as a
27 songwriter as well as a record producer on an album for trumpeter and composer Chris
28 Botti. As a result of Kaufman’s introduction, Lindsey ultimately produce Botti’s album

1 and co-wrote one of the songs on that album. A written agreement between Lindsey and
2 Reverb, Inc. (The “Botti Agreement”) memorializes that relationship. Notably, a review
3 of the Botti Agreement confirms that the parties to the Botti Deal were Botti, the artist,
4 and Lindsey, the producer. The record company, Sony Music Entertainment (company
5 or label), who distributed the album and provided royalty statements for the record, was
6 not a party to the Botti Deal. The royalties or earnings promised to Lindsey under the
7 Botti Deal were “computed in the same manner as [Botti’s] royalties under [Botti’s]
8 Agreement [with Sony.]” Again, like with the Guster Deal, the Recording Agreement
9 was the recording contract between Botti and Sony. In short, the Botti Deal was a
10 personal services contract for Lindsey to produce Botti’s record wherein Lindsey’s
11 earnings were paid as a direct percentage of Botti’s earnings under Botti’s recording
12 contract with Sony, the label.

13 **E. The Termination of the Personal Management Agreement**

14 12. On March 4, 2005, Lindsey terminated the Personal Management
15 Agreement in part because of Kaufman’s departure from the firm. Sometime in 2005,
16 Lindsey sold his interest in the Windswept deal back to Windswept in four increments
17 paid to Lindsey on July 1, 2005, February 16, 2006, January 16, 2007, and July 28, 2008.

18 13. Lindsey stopped accounting for the royalties he obtained over the years
19 from the Windswept Co-Acquisition Agreement and at some point disclosed to
20 Respondent the sale of his Windswept interest back to Windswept. MMG requested the
21 unpaid commissions on the Windswept Agreement and when payment of those
22 commissions were refused, the Respondent filed a claim in Los Angeles Superior Court for
23 breach of contract. Lindsey now claims he is not required to pay any monies to
24 Respondent arguing the securing of the Windswept, Guster and Botti agreements by
25 Respondent violated the Talent Agencies Act.

26 ///

27 ///

28 ///

1 **II. ARGUMENT**

2 The two issues to be determined are as follows:

3 a. Has the Respondent acted as an unlicensed talent agency by securing a
4 publishing agreement (“The Windswept Deal”) for the Petitioner?

5 b. Does the “Recording Contracts” exemption from the Talent Agencies Act at
6 Labor Code §1700.4(a) apply to the Guster or Botti Deals?

7 14. The primary issue is whether based on the evidence presented at this
8 hearing, did the respondent operate as a “talent agency” within the meaning of Labor
9 Code §1700.4(a). Labor Code §1700.4(a) defines “talent agency” as:

10
11 “a person or corporation who engages in the occupation of procuring,
12 offering, promising, or attempting to procure employment or engagements
13 for an artist or artists.”

14 15. Petitioner is an “artist” within the meaning of Labor Code §1700.4(b).
15 Moreover, Labor Code §1700.5 provides that “no person shall engage in or carry on the
16 occupation of a talent agency without first procuring a license therefor from the Labor
17 Commissioner.” It was stipulated Respondent has never held a talent agency license.

18 **A. The Co-Acquisition Agreement with Windswept Publishing**

19 16. The Co-Acquisition Agreement or co-publishing agreement in question was
20 entered into by and between Steve Lindsey and Windswept, on or about July 21, 1998.

21 By its express terms, the purpose of the Co-Acquisition Agreement, as stated in Paragraph
22 4:

23 Shall be to engage in the worldwide acquisition and exploitation of
24 ownership rights (as contrasted to administrative rights) in copyrights of
25 musical compositions. (Windswept Agreement, ¶ 4.)

26 17. Specifically, Lindsey was a “talent finder” who was to work with
27 Windswept to locate musicians whose songs were deemed to have value and induce them
28 into signing over licensing of their publishing rights to himself and Windswept for an

1 agreed to sale price. The parties were owners of third, non-party songwriters' publishing
2 licensing rights whose ownership and profits they shared on a 50/50 basis. The
3 Windswept Co-Acquisition Agreement involves publishing, and relates to third parties
4 who are selling intangible property rights (royalties) to their musical compositions. Thus,
5 on its face this Co-Acquisition Agreement does not constitute the procurement of
6 employment or an engagement for an artist. Instead, it is simply a co-acquisition
7 agreement which represents a partnership or co-venture between Lindsey and Windswept
8 to purchase the property previously belonging to others for ownership and profit. In
9 short, these were simply investments and are outside the jurisdiction of the Talent
10 Agencies Act.

11
12 **B. The Guster and Botti Agreements**

13 18. The Petitioner entered into a series of recording producer agreements with
14 various record companies, including Sony Records, EMI Records, as well as directly with
15 some of the recording artists such as Guster and Botti. All of these agreements were to
16 secure Lindsey's services for the production of master recordings for artists. For
17 example, the Botti Agreement required Lindsey to "furnish to us your exclusive services
18 as the producer of up to 13 master recordings." Similarly, the agreement with Guster
19 required Lindsey to provide services as a record producer on certain master recordings.

20 19. Respondent argues the critical element of all these contracts was that they
21 related exclusively to the production of recordings as their end product, whether those
22 recordings were referred to as "master tapes," a film soundtrack recording, or other
23 reproduction medium. And Respondent moreover argues, the royalties paid to Mr.
24 Lindsey for these projects were royalties arising out of the sale and distribution of
25 recordings from the record companies themselves.

26 20. Thus, Respondent concludes that regardless of the services provided by Mr.
27 Lindsey, whether as a "producer," "mixer," or writer or co-writer of any songs, all these
28 activities were exclusively performed in connection with the production of recordings and

1 all royalties were paid based upon the production or the sales of the recordings.
2 Consequently, Respondent contends all of Lindsey's agreements as a producer, whether
3 made directly with a record company or directly with an artist, as with the Botti and
4 Guster agreements, fall within the purview of the Talent Agencies's recording contract
5 exemption. We disagree.

6
7 **C. The Recording Contract Exemption**

8 Labor Code §1700.4(a) provides:

9 'Talent Agency' means a person or corporation who engages in the
10 occupation of procuring, offering, promising, or attempting to
11 procure employment or engagements for an artist or artists, **except**
12 **that the activities of procuring, offering, or promising to procure**
13 **recording contracts for an artist or artist shall not of itself**
14 **subject a person or corporation to regulation and licensing**
15 **under this chapter.** Talent agencies may, in addition, counsel or
16 direct artists in the development of their professional careers.
17 [emphasis added]

18 21. The recording contract procurement exception was first placed into the
19 Labor Code in 1982 and allowed for a commission known as the California Entertainment
20 Commission (hereinafter the Commission) to study the efficacy of the exception. The
21 Commission spent two years studying the issue and whether any changes should be made
22 to it. (*Wachs v. Curry* (1993) 13 Cal.App.4th 616, 625.) In affirming the need for the
23 recording contract procurement exception, the commission provided its rationale for its
24 recommendation keeping it in place:

25 A recording contract is an employment contract of a different nature from
26 those in common usage in the industry involving personal services. The
27 purpose of the contract is to produce a permanent and re-playable showcase
28 of the talents of the artist. In the recording industry, many successful artists
retain personal managers to act as their intermediaries, and negotiations for
recording contracts are commonly conducted by a personal manager, not a
talent agency ... they may act as their intermediaries, and negotiations for
recording contracts are commonly conducted by a personal manager, not a
talent agent ... **they may act as a conduit between the artist and the**
recording company, offering suggestions about the use of the artist or
the level of effort which the recording company is expending on behalf
of the artist (*Id.* at p.625-626) [empahsis added].

1 22. Why is this important? Because based on limited legislative history it
2 appears the intent of the recording contract exemption was to exempt the act of
3 negotiating recording contracts between artists and the recording companies. Here the
4 Guster and Botti agreements are agreements made directly between a producer and the
5 artist. In short, the record company is not a party to these contracts. These contracts are
6 essentially contracts between two artists for services. And consequently, we choose not
7 to expand the purview of the Act's exemption to encompass contracts for personal
8 services between artists and producer/artists. The Act's recording contract exemption
9 was intended to exempt negotiations between a manager and record company on behalf of
10 artists. And we do not see, as the respondent fears, that this holding will "send
11 shockwaves through the industry and disturb long-held, highly developed rules and
12 territory between managers and agents, not to mention a flurry of new claims by artists or
13 non-artists involved in a recording contract." We find no evidence the exemption was
14 intended to exempt managers negotiating contracts between artists and producers that do
15 not contemplate involvement of record companies or labels other than providing royalty
16 statements. This would expand the exemption outside the intent of the legislature and the
17 findings of the Commission who studied the Act for more than two years.

18 23. The respondent's argument concludes that if the earnings paid to the
19 producer stem from advances to be offset by royalties, this fact alone determines whether
20 the managers actions on behalf of an artist falls subject to the recording contract
21 exemption. As stated by the Respondent at the hearing, the Guster contract will
22 essentially be paid by the record company via royalties even though it is between Guster
23 Recordings, a separate entity.

24 24. Finally, respondent argues that Pursuant to *Civil Code* section 2500,
25 Lindsey is a royalty recipient of a recording contract, meaning he is "a party to a contract
26 for the furnishing of services in the production of sound recordings...." Again, we
27 disagree. A review of all past Labor Commissioner determinations and relevant case law
28 does not lend support to the respondent's argument that if creative services are utilized in

1 support of a master recording and the earnings are paid via a percentage of the artists
2 royalties from a record company, the recording contract exemption *must* apply¹.

3 **D. Neither The Guster Employment Nor The Botti Employment Is Within**
4 **The Recording Contracts Exemption To The Act**

5 25. California Labor Code section 1700.4(b) exempts the activities of
6 “procuring ... recording contracts for an artist” ... from the definition of a “talent
7 agency.” “The ‘recording contract exemption’ does not, however, include contracts
8 between a producer on the one hand and artist on the other. In *Chinn v. Tobin* (1997)
9 TAC No. 17-96 at page 6, fn. 1, we concluded,

10 The Talent Agencies Act has long been construed by the
11 courts as a remedial statute intended for the protection of
12 artists. “[T]he clear object of the Act is to prevent improper
13 persons from being [talent agents] and to regulate such
14 activity for the protection of the public....’ *Buchwald v.*
15 *Superior Court* (1967) 254 Cal.App.2d 347, 351. See also
16 *Waisbren v. Peppercorn Productions* (1995) 41 Cal.App.4th
17 246. As with all remedial legislation, exemptions must be
18 narrowly construed and cannot be extended beyond their
19 express provision. To do otherwise would defeat the remedial
20 purpose of the legislation.

21 26. As a result, we are hesitant to expand the exemption for recording contracts
22 to include agreements directly between artists and producers absent an express inclusion
23 of the record company and do not have authority before us that would lead us to believe
24 the legislature intended such an expansive interpretation.

25 27. Labor Code 1700.5 requires a talent agent to procure a license from the
26 Labor Commissioner. Since the clear object of the Act is to prevent improper persons

27 ¹ The Respondent relies heavily on the hearing officer’s Order on Respondent’s Motion to
28 Dismiss granting the motion based on the fact that the negotiation of contracts between studio
mixing services and record companies fell within the recording contracts exemption. (See *Chris
and Thomas Lord Alge v. Moir/Marie Entertainment LLC, et al.*, TAC 45-05). This Order is
distinguished in that the hearing officer expressly held the exemption was applicable because
“the contracts which Petitioners allege were procured by Respondent without a talent agency
license are actual recording contracts between Petitioners and various recording companies.”
Including Maverick Recording Company and Warner Bros Records, Inc. (See Order on
Respondent’s Motion to Dismiss TAC 45-04 pg. 5 lines 10-12)

1 from becoming [talent agents] and to regulate such activity for the protection of the
2 public, a contract between an unlicensed artists' manager and an artist is void. *Buchwald*
3 *v. Superior Court, supra*, 254 Cal.App.2d 347. Consequently, MMG procured
4 engagements for an artist in the Guster and Botti deals and as a result the management
5 agreement between MMG and Lindsey is void *ab initio* and is unenforceable for all
6 purposes. *Waisbren v. Peppercorn Inc., supra*, 41 Cal.App.4th 246; *Buchwald v. Superior*
7 *Court, supra*, 254 Cal.App.2d 347.

8

9 **E. Severability**

10 28. In accord with *Marathon Entertainment v. Blasi* (2008) 42 Cal.4th 974,
11 MMG urges us to apply the doctrine of severability if we find MMG violated the Act. In
12 *Marathon*, the court recognized the Labor Commissioner may invalidate an entire
13 contract when the Act is violated. The court also left it to the discretion of the Labor
14 Commissioner to apply the doctrine of severability to preserve and enforce the lawful
15 portions of the parties' contract where the facts so warrant. As the Supreme Court
16 explained in *Marathon*:

17

18 Courts are to look to the various purposes of the contract.
19 If the central purpose of the contract is tainted with
20 illegality, then the contract as a whole cannot be
21 enforced. If the illegality is collateral to the main
22 purpose of the contract, and the illegal provision can be
23 extirpated from the contract by means of severance or
24 restriction, then such severance and restriction are
25 appropriate. [Citations omitted]. *Marathon, supra* at p.
26 996.

24

25 29. MMG urges us to simply sever those engagements we find to have been
26 procured in violation of the Act and preserve the contractual relationship between the
27 parties. As explained in this decision, we find MMG violated the Act on 2 of the 3
28 contracts identified in this case. Consequently, we find MMG engaged in substantial

1 procurement activities that are inseparable from the lawful managerial services provided
2 to MMG. Severing the two illegal engagements/contracts from the parties' contractual
3 relationship would only serve to condone such unlawful behavior and expand the
4 recording contract exemption beyond what the legislature envisioned.

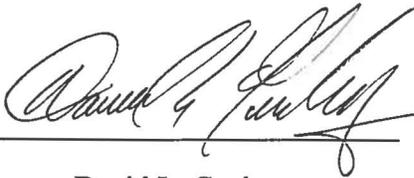
5 30. Accordingly, we exercise our discretion under *Marathon, supra*, in voiding
6 the Personal Management Agreement and conclude that severance is not appropriate
7 under these facts.

8 **III. ORDER**

9 For the reasons set forth above, IT IS HEREBY ORDERED that:

10 The Amendment to the Initial Personal Management Agreement between
11 LINDSEY and MMG is invalid and unenforceable under the Talent Agencies Act and is
12 void ab initio; MMG has no rights or entitlements to any monies arising from such
13 engagements.

14
15
16 Dated: 8/5/14



David L. Gurley
Attorney for the Labor Commissioner

17
18
19
20 ADOPTED AS THE DETERMINATION OF THE LABOR COMMISSIONER:

21
22
23 Dated: _____

Julie A. Su
State Labor Commissioner

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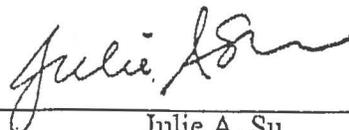
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13 engagements.

14
15
16 Dated: _____

David L. Gurley
Attorney for the Labor Commissioner

17
18
19
20 ADOPTED AS THE DETERMINATION OF THE LABOR COMMISSIONER:

21
22
23 Dated: 8.6.14


Julie A. Su
State Labor Commissioner

1 PROOF OF SERVICE

2 STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

3 I, Tina Provencio, declare and state as follows:

4 I am employed in the State of California, County of Los Angeles. I am over the age of
5 eighteen years and not a party to the within action; my business address is: MOLINA CENTER -
300 Oceangate, Suite 850, Long Beach, CA 90802.

6 On August 6, 2014, I served the foregoing document described as: **DETERMINATION OF**
7 **CONTROVERSY**, on all interested parties in this action by placing a true copy thereof enclosed
in a sealed envelope addressed as follows:

8 James S. Cooper, Esq.
9 Yoonis J. Han, Esq.
10 LEVINSON, ARSHONSKY & KURTZ, LLP
11 15303 Ventura Boulevard, Suite 1650
12 Sherman Oaks, CA 91403
13 **Attorneys for Respondents,**
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14
15 X **(BY CERTIFIED MAIL)** I caused such envelope to be deposited in the United States
16 mail at Long Beach, California. The envelope was mailed with postage thereon fully prepaid. I am
17 "readily familiar" with the firm's practice of collection and processing correspondence for mailing.
18 Under the practice it would be deposited with the U.S. postal service on that same day in the ordinary
course of business. I am aware that on motion of the party served, service is presumed invalid if
postal cancellation date or postage meter date is more than one day after date of deposit for mailing
in affidavit.

19 X **(BY EMAIL SERVICE)** I caused such document to be delivered electronically via
20 email to the email address of the addressees set forth above.

21 I declare under penalty of perjury under the laws of the State of California that the above is
true and correct.

22 Executed this 6th day of August, 2014 at Long Beach, California.

23
24 
25 Tina Provencio
26
27
28



COPYRIGHT AND THE MUSIC MARKETPLACE

A REPORT OF THE REGISTER OF COPYRIGHTS

FEBRUARY 2015

EXECUTIVE SUMMARY

Executive Summary

The United States has the most innovative and influential music culture in the world, but much of the legal framework for licensing of music dates back to the early part of the twentieth century, long before the digital revolution in music. Our licensing system is founded on a view that the music marketplace requires a unique level of government regulation, much of it reflected in statutory licensing provisions of the Copyright Act. The Copyright Office believes that the time is ripe to question the existing paradigm for the licensing of musical works and sound recordings and consider meaningful change.

There is a widespread perception that our licensing system is broken. Songwriters and recording artists are concerned that they cannot make a living under the existing structure, which raises serious and systemic concerns for the future. Music publishers and performance rights organizations are frustrated that so much of their licensing activity is subject to government control, so they are constrained in the marketplace. Record labels and digital services complain that the licensing process is burdensome and inefficient, making it difficult to innovate.

While there is general consensus that the system needs attention, there is less agreement as to what should be done. In this report, after reviewing the existing framework and stakeholders' views, the Copyright Office offers a series of guiding principles and preliminary recommendations for change. The Office's proposals are meant to be contemplated together, rather than individually. With this approach, the Office seeks to present a series of balanced tradeoffs among the interested parties to create a fairer, more efficient, and more rational system for all.

A. Guiding Principles

The Copyright Office's study revealed broad consensus among study participants on four key principles:

- Music creators should be fairly compensated for their contributions.
- The licensing process should be more efficient.
- Market participants should have access to authoritative data to identify and license sound recordings and musical works.
- Usage and payment information should be transparent and accessible to rightsowners.

In addition to the above, based on the record in the proceeding, the Office has identified several additional principles that it believes should also guide any process of reform. These are:

- Government licensing processes should aspire to treat like uses of music alike.
- Government supervision should enable voluntary transactions while still supporting collective solutions.
- Ratesetting and enforcement of antitrust laws should be separately managed and addressed.
- A single, market-oriented ratesetting standard should apply to all music uses under statutory licenses.

The Office was guided by all of the above principles in developing its recommendations, which are summarized below.

B. Licensing Parity and Fair Compensation

Questions of licensing parity and fair compensation are closely tied to the relative treatment of music rights and rightsholders under the law. The Copyright Office believes that any overhaul of our music licensing system should strive to achieve greater consistency in the way it regulates (or does not regulate) analogous platforms and uses. With that goal in mind, the Office recommends the following:

- Regulate musical works and sound recordings in a consistent manner. The Office believes that, at least in the digital realm, sound recordings and the underlying musical works should stand on more equal footing. The Copyright Office's approach would offer a free market alternative to musical work owners, in the form of an opt-out right to withdraw specific categories of rights from government oversight in key areas where sound recording owners enjoy such benefits—namely, interactive streaming uses and downloads.
- Extend the public performance right in sound recordings to terrestrial radio broadcasts. As the Copyright Office has stated repeatedly for many years, the United States should adopt a terrestrial performance right for sound recordings. Apart from being inequitable to rightsholders—including by curtailing the reciprocal flow of royalties into the United States—the exemption of terrestrial radio from royalty obligations harms competing satellite and internet radio providers who must pay for the use of sound recordings. Assuming Congress adopts a terrestrial performance right, it would seem only logical that terrestrial uses should be included under the section 112 and 114 licenses that govern internet and satellite radio.

- Fully federalize pre-1972 sound recordings. As it concluded in its 2011 report on the topic, the Copyright Office believes that pre-1972 recordings—currently protected only under state law—should be brought within the scope of federal copyright law, with the same rights, exceptions, and limitations as more recently created sound recordings. The lack of federal protection for pre-1972 sound recordings impedes a fair marketplace. Record labels and artists are not paid for performances of these works by digital services, which (at least until recent court rulings under state law) were considered free from copyright liability on the sound recording side. At the same time, the owners of the musical works embodied in these sound recordings are paid for the same uses.
- Adopt a uniform market-based ratesetting standard for all government rates. While in some cases the law provides that the ratesetting authority should attempt to emulate a free market, in other cases it imposes a more policy-oriented approach that has led to below-market rates. There is no policy justification for a standard that requires music creators to subsidize those who seek to profit from their works. Accordingly, the Office calls for adoption of a single rate standard—whether denominated “willing buyer/willing seller” or “fair market value”—that is designed to achieve rates that would be negotiated in an unconstrained market.

C. Government’s Role in Music Licensing

The government’s involvement in the music marketplace is unusual and expansive relative to other kinds of works created and disseminated under the Copyright Act. In many cases, it compels copyright owners to license their works at government-set rates. Regulation of music publishers and songwriters is particularly pervasive: the two most significant areas of their market (mechanical and performance licensing) are subject to mandatory licensing and ratesetting. Antitrust concerns have been the traditional rationale for government intervention. To be sure, where particular actors engage in anticompetitive conduct in violation of antitrust laws, that conduct should be addressed. But compulsory licensing does more than that—it removes choice and control from all copyright owners that seek to protect and maximize the value of their assets.

Regardless of the historical justifications for government intervention, the Copyright Office believes that in today’s world, certain aspects of the compulsory licensing processes can and should be relaxed. The below recommendations offer some ideas for how that might be accomplished in the various areas of the market where there is government involvement.

Performing Rights Organizations (“PROs”) and the Consent Decrees

Many important issues have been raised in the Department of Justice’s (“DOJ’s”) parallel consideration of the American Society of Composers, Authors and Publishers (“ASCAP”) and Broadcast Music, Inc. (“BMI”) consent decrees. The Office endorses that

review, and—in light of the significant impact of the decrees in today’s performance-driven music market—hopes it will result in a productive reconsideration of the 75-year-old decrees. At the same time, the Copyright Office observes that it is Congress, not the DOJ, that has the ability to address the full range of issues that encumber our music licensing system, which go far beyond the consent decrees. In the area of performance rights, the Office offers the following recommendations:

- Migrate all ratesetting to the Copyright Royalty Board (“CRB”). The Copyright Office believes that allegations of anticompetitive conduct are worthy of evaluation (and, if appropriate, remedial action) separate and apart from the determination of fair rates for musical works. Each of these two critical policy objectives merits government attention in its own right. Accordingly, the Office proposes that the function of establishing rates for the public performance of musical works—currently the province of federal district courts under the consent decrees—be migrated to the CRB. Industry ratesetting is, of course, a primary function of the CRB, and the CRB has the benefit of experience assessing a broader spectrum of rate-related questions than the federal rate courts, as well as specific expertise in copyright law and economics.
- Repeal section 114(i). Regardless of whether PRO ratesetting is migrated to the CRB, as further discussed below, the Copyright Office endorses the proposal that the prohibition in section 114(i) that currently prevents ratesetting tribunals from considering sound recording performance royalties be eliminated. Originally designed as a protective measure to benefit songwriters and publishers, it appears to be having the opposite effect.
- Streamline interim ratesetting and require immediate payment of royalties. Under the consent decrees, anyone who applies for a license has the right to perform musical works in a PRO’s repertoire—without paying the PRO any compensation—pending the completion of negotiations or rate court proceedings resulting in an interim or final fee. The problem is exacerbated by the substantial burden and expense of litigating even an interim rate in federal court. The Copyright Office believes that to the extent a licensing entity is required to grant a license upon request, there should be a streamlined mechanism to set an interim royalty rate, and that the licensee should have to start paying immediately.
- Permit opt-out from PROs for interactive streaming. The Office believes that music publishers should be able to withdraw specific categories of licensing rights from their authorizations to the PROs. At least for now, the Office believes that withdrawal of performance rights should be limited to digital rights equivalent to those that the record labels are free to negotiate outside of sections 112 and 114—essentially, interactive streaming rights for digital services. Publishers that chose to opt out would be required to provide a list of their

withdrawn works and other pertinent information to a central source, such as the general music rights organization (“GMRO”) discussed below. In addition, the Office believes that songwriters affiliated with that publisher should retain the option of receiving their writer’s share of royalties directly through their chosen licensing collective.

- Allow bundled licensing of mechanical and performance rights. Industry participants support increased bundling of rights—*i.e.*, reproduction, distribution, and performance rights—in unified licenses to facilitate greater licensing efficiency. Although bundling of sound recording rights occurs as a matter of course, various legal restrictions have prevented that same development on the musical work side. The Office believes that the government should pursue appropriate changes to the legal framework to encourage bundled licensing, which could eliminate redundant resources on the part of both licensors and licensees. This could include allowing the PROs and other entities to become music rights organizations (“MROs”), which would be authorized to license both performance and mechanical rights.

Mechanical Licensing and Section 115

Study participants highlighted the serious shortcomings of the 106-year old compulsory license for “mechanical” reproductions of musical works (*e.g.*, CDs, vinyl records and downloads) in section 115. On the copyright owner side, parties complained that the mandatory nature of the license does not permit them to control their works or seek higher royalties. On the licensee side, parties criticized section 115’s requirement of song-by-song licensing, a daunting task in a world where online providers seek licenses for millions of works. In light of these concerns, the Office offers the following recommendations:

- Permit collective licensing of mechanical rights but with an opt-out right for interactive streaming and download uses. The Office is sympathetic to music publishers’ arguments for elimination of the compulsory license in section 115 in favor of free market negotiations. But in light of the diffuse ownership of musical works, it seems clear that some sort of collective system would be necessary even in section 115’s absence. The Office thus believes that, rather than eliminating section 115 altogether, section 115 should instead become the basis of a more flexible collective licensing system that will presumptively cover all mechanical uses except to the extent individual music publishers choose to opt out. At least initially, the mechanical opt-out right would extend to interactive streaming rights and downloading activities—uses where sound recording owners operate in the free market (but not physical goods, which have somewhat distinct licensing practices). As envisioned by the Office, the collective system would include MROs (as noted, with the ability to represent both performance and mechanical rights), a GMRO (that would collect for works or shares not

represented by an MRO or covered by a direct deal), and individual publishers that choose to opt out. Licensees could thus achieve end-to-end coverage through the combination of MROs, the GMRO, and direct licensors.

- Establish blanket licensing for digital uses under section 115. To further facilitate the rights clearance process and eliminate user concerns about liability to unknown rightsowners, the Office believes that mechanical licensing, like performance licensing, should be offered on a blanket basis by those that administer it. This would mean that a licensee would need only to file a single notice with an MRO to obtain a repertoire-wide performance and mechanical license from that licensing entity. The move to a blanket system would allow marketplace entrants to launch their services—and begin paying royalties—more quickly.
- CRB ratesetting on an “as-needed” basis. The Office believes that the CRB should continue to set rates under the section 115 license, though with an important modification: as is now the case with performance rights, rather than establish rates across the board every five years, the CRB would set rates for particular uses only on an as-needed basis when an MRO and licensee were unsuccessful in reaching agreement. Other interested parties (such as other MROs and other users) could choose to join the relevant proceeding, in which case those parties would be bound by the CRB-determined rate.
- Ensure copyright owners possess audit rights. Publishers have long complained about the lack of an audit right under section 115. In that regard, section 115 is an outlier—such audit rights have been recognized under other statutory licenses. The Office believes that the mechanical licensing system should be amended to provide for an express audit right, with the particular logistics to be implemented through regulation.
- Maintain audiovisual uses in the free market. Record companies proposed extending compulsory blanket licensing to certain consumer audiovisual products—such as music videos, album cover videos, and lyric videos—uses that have traditionally required a synchronization license negotiated in the free market. The Office is sympathetic to the labels’ concerns, but cannot at this time recommend that consumer synch uses be incorporated into a government-supervised licensing regime. The Office does not perceive a market failure that justifies creation of a new compulsory license, and the market appears to be responding to licensing needs for consumer audiovisual products.

Section 112 and 114 Licenses

One of the few things that seems to be working reasonably well in our licensing system is the statutory license regime under sections 112 and 114, which permits qualifying digital services to engage in noninteractive streaming activities at a CRB-determined (or

otherwise agreed) rate. Although the differing ratesetting standards for these licenses—as well as some of the rates established under those standards—have been a source of controversy, from the record in this study, the licensing framework itself is generally well regarded. Notwithstanding the comparatively positive reviews of the section 112 and 114 licenses, there are a few relatively minor improvements that the Office believes should be considered:

- Consider ratesetting distinction between custom and noncustom radio. In 2009, the Second Circuit ruled that personalized radio services are eligible for the section 112 and 114 licenses. Although the Office has some reservations about that interpretation, there appears to be no overwhelming call to remove custom radio from the statutory regime. Nonetheless, within that regime, it may be appropriate to distinguish between custom and noncustom radio, as the substitutional effect of personalized radio on potentially competing interactive streaming services may be greater than that of services offering a completely noncustomized experience. While the issue could be addressed legislatively, this does not appear to be necessary, as the CRB has the discretion to set different rate tiers today when the record supports such an outcome.
- Allow fine-tuning of technical aspects of the license through the exercise of regulatory authority. Internet services have criticized a number of the detailed limitations that section 114 imposes on compulsory licensees. These include the so-called “sound recording performance complement,” a restriction that limits the frequency with which songs from the same album or by the same artist may be played by the service, as well as a prohibition against announcing upcoming selections. But for the fact that they appear in the statute itself, such details would seem to be more appropriately the province of regulation. As suggested more generally below, Congress may wish to commit nuances like these to administrative oversight by the Copyright Office.
- Consider permitting SoundExchange to process record producer payments. Record producers—who make valuable creative contributions to sound recordings—are not among the parties entitled by statute to direct payment by SoundExchange. In some cases, an artist may provide a letter of direction requesting SoundExchange to pay the producer’s share of income from the artist royalties collected by SoundExchange, which SoundExchange will honor. It has been suggested that this informal practice be recognized through a statutory amendment. Though it would be beneficial to hear more from artists on this issue, the Office agrees that in many instances producers are integral creators and that the proposal therefore merits consideration.
- Allow SoundExchange to terminate noncompliant licensees. Unlike section 115, sections 112 and 114 do not include a right to terminate a licensee that fails to account for and pay royalties. The Office does not see a justification for

continued licensing of a user that is not meeting its obligations, and agrees that the section 112 and 114 statutory licenses should be amended to include a termination provision akin to that in section 115.

Public Broadcaster Statutory License

- Create a unified statutory licensing scheme for public broadcasters. Public broadcasters must engage in a multitude of negotiations and ratesetting proceedings in different fora to clear rights for their over-the-air and online activities. Especially in light of the relatively low royalty rates paid by public broadcasters, Office suggests that the ratesetting processes applicable to public broadcasters be consolidated within a unified license structure under section 118 under the auspices of the CRB, where they would likely be much more efficiently resolved.

D. Licensing Efficiency and Transparency

The Office believes that accurate, comprehensive, and accessible data, and increased transparency, are essential to a better functioning music licensing system. Authoritative data would benefit all participants in the marketplace for sound recordings and musical works, and facilitate a more efficient system. In addition, it is essential to make reliable usage and payment information available to rightsholders. To achieve these twin goals, the Office offers the following recommendations:

- Establish incentives through the statutory licensing scheme for existing market players to create an authoritative public database. The Copyright Office believes that any solution to the music data problem should not be built by the government but should instead leverage existing industry resources. Accordingly, the Office recommends that the government establish incentives through the statutory licensing regime to encourage private actors to coordinate their efforts and contribute to a publicly accessible and authoritative database, including by encouraging the adoption and dissemination of universal data standards. To facilitate this process, the Copyright Office should provide regulatory oversight regarding standards and goals.
- Establish transparency in direct deals. Throughout the study, a paramount concern of songwriters and recording artists has been transparency in the reporting and payment of writer and artist shares of royalties, especially in the context of direct deals negotiated by publishers and labels outside of the PROs and SoundExchange, which may involve substantial advances or equity arrangements. These concerns should be addressed as part of any updated licensing framework, especially one that allows publishers to opt out of the statutory licensing system and pursue direct negotiations. In the case of direct deals for rights covered by an MRO or SoundExchange, the Office recommends

allowing songwriters and artists to elect to receive their shares of royalties from the licensee through their chosen licensing entity.

E. An Updated Music Licensing System

To implement the principles and recommendations laid out above, the Copyright Office is proposing an updated framework for the licensing of musical works. The basic components of this proposal are as follows:

- MROs. Under the Office’s proposal, except to the extent they chose to opt out of the blanket statutory system, publishers and songwriters would license their public performance and mechanical rights through MROs.
 - An MRO could be any entity representing the musical works of publishers and songwriters with a market share in the mechanical and/or performance market above a certain minimum threshold, for example, 5%. Existing rights organizations, such as ASCAP, BMI, HFA and others, could thus qualify as MROs.
 - Each MRO would enjoy an antitrust exemption to negotiate performance and mechanical licenses collectively on behalf of its members—as would licensee groups negotiating with the MROs—with the CRB available to establish a rate in case of a dispute. But MROs could not coordinate with one another and would be subject to at least routine antitrust oversight.
 - Each MRO would be required to supply a complete list of the publishers, works, percentage shares and rights it represented, as well as the MRO’s licensing contact information, to the GMRO, and would be obligated to keep that information current. MROs would not have to share all of their data for purposes of the public database. For example, there would be no need for an MRO to provide contact information for its members (other than those that opted out) since the MRO would be responsible for distributing royalties under the licenses it issued.
 - MROs would also be responsible for notifying the GMRO of any members that had exercised opt-out rights by providing the relevant opt-out information, including where a direct license might be sought, so potential licensees would know where to go for license authority.
- GMRO. Even though most licensing activity would be carried out by the MROs and directly licensing publishers, the hub of the new licensing structure would be the “general” MRO or GMRO. The GMRO would have certain important responsibilities:
 - First, the GMRO would be responsible for maintaining a publicly accessible database of musical works represented by each MRO, which

would incorporate data supplied by the MROs and other authoritative sources. The GMRO would actively gather missing data, reconcile conflicting data, and correct flawed data, and would also provide a process to handle competing ownership claims. In addition to musical work data, the GMRO would also incorporate sound recording data—presumably from SoundExchange—into the public database, and be responsible for developing additional data that matched sound recordings with musical works to facilitate more efficient licensing.

- Second, the GMRO would also serve as the default licensing and collection agent for musical works (or shares of works) that licensees were unable to associate with an MRO or opt-out publisher. Services with usage-based payment obligations would transmit records of use for unmatched works, along with associated payments and an administrative fee, to the GMRO. The GMRO would then attempt to identify the MRO or individual copyright owners and, if successful, pay the royalties out. If unsuccessful, the GMRO would add the usage record to a public unclaimed royalties list and hold the funds for some period of time—*e.g.*, three years—to see if a claimant came forward. As is the case with SoundExchange, after that period, the GMRO could use any remaining unclaimed funds to help offset the costs of its operations.
- GMRO funding and resources. The Copyright Office believes that both copyright owners and users should provide support for the GMRO, as both groups will benefit from its activities. Under the Office’s proposal, every MRO, as well as SoundExchange, would be required to contribute key elements of data to create and maintain a centralized music database. MROs would be responsible for allocating and distributing the vast majority of royalties. In exchange for these contributions on the part of copyright owners, the Office believes that most direct financial support for the GMRO should come from fees charged to users of the section 112, 114 and 115 licenses. Thus, although licensees would be paying royalties to MROs and individual publishers directly—and SoundExchange as well—they would have a separate obligation to pay a licensing surcharge to the GMRO. The surcharge to be paid by statutory licensees could be determined by the CRB based on the GMRO’s costs (and without consideration of royalty rates) through a separate administrative process. The surcharge would be offset by administrative fees and other sources of income for the GMRO, including any “black box” funds unclaimed by copyright owners.
- Copyright Royalty Board improvements. Under the Copyright Office’s proposal, ratesetting by the CRB would shift from a five-year cycle to a system under which the CRB would step in only as necessary when an MRO or SoundExchange and a licensee could not agree on a rate. The new model would

create opportunities for combined ratesetting proceedings for noninteractive services (*e.g.*, internet, terrestrial, and satellite radio) encompassing both sound recordings and musical works. The Office recommends other procedural adjustments to the CRB as well—including adjustments to the statutorily prescribed litigation process and its settlement procedures. It would also be worthwhile to remove unnecessary procedural details in the statute that are better left to regulation by the CRB.

- Regulatory implementation. The Copyright Office recommends that if Congress acts to restructure the music licensing system, it would be most productive for the legislation to set out the essential elements of the updated system but leave the details to be implemented through regulation by the Copyright Office and, in ratesetting matters, the CRB. Such a construct would likely be more realistic to enact than a highly detailed statutory prescription—especially in the case of music licensing, where the particulars can be overwhelming.
- Further evaluation. Should Congress choose to embark upon a series of changes to the licensing system as described above, the Office recommends that the new system be evaluated by the Copyright Office after it has been in operation for a period of several years. Assuming the new licensing framework includes an opt-out mechanism, the efficacy of that process would be of particular interest. Congress could choose to narrow or expand opt-out rights as appropriate.

February 10, 2014

Commerce Committee, Task Force
Office of Policy and External Affairs
United States Patent and Trademark Office
Mail Stop External Affairs, P.O. Box 1450
Alexandria, VA 22313-1450
Attn: Shira Perlmutter

RE: Request for Comments on Department of Commerce's Green Paper on Copyright Policy, Creativity, and Innovation in the Digital Economy

Thank you for this opportunity to submit a response to the Request for Comments on Department of Commerce's Green Paper on Copyright Policy, Creativity, and Innovation in the Digital Economy (the "Green Paper").¹ We are submitting this paper to express our opposition to the creation of a compulsory license for derivative works including remixes, mash-ups, and sampling.

I. Introduction

My name is Dina LaPolt and I am a music attorney in West Hollywood, California at the law firm of LaPolt Law, P.C. We represent creators. For more than 15 years I have represented artists, songwriters, producers, and other owners and controllers of intellectual property. I started in the music industry as a musician and songwriter. Thus, I have built my practice from the creator's perspective. I have also taught a course titled "Legal and Practical Aspects of the Music Business" for the UCLA Extension Program since 2001, and I teach and lecture all over the United States, Canada and Europe on issues that affect artists' rights. Protecting artists and songwriters and representing their interests has always been my main focus and my passion. I am submitting these comments on behalf of recording artists and songwriters, as I felt compelled to represent their interests in this ongoing debate.

Joining me in this comment paper is my client and close friend, the legendary recording artist and songwriter, Steven Tyler. Steven is one of Rolling Stone's "100 Greatest Singers" and a Rock and Roll Hall of Fame inductee with his band, Aerosmith, the sixth most certified group in music history with 21 top 40 singles on the Billboard Hot 100 charts, 150 million records sold worldwide, and 31 awards—including multiple Grammys, American Music Awards, Billboard Music Awards, and MTV Video Music Awards—from 78 nominations. Steven has written and co-written hundreds of songs, an achievement for which he received the ASCAP Founders Award and was inducted into the Songwriters Hall of Fame in 2013.

¹ 78 Fed. Reg. 61337.

The artists and songwriters' perspective should carry a lot of weight in this discussion since, ultimately, this is an issue that affects artists and songwriters first and foremost. As the Register of Copyrights, Maria A. Pallante, stated in her article, "The Next Great Copyright Act":

*"Congress has a duty to keep authors in its mind's eye, including songwriters, book authors, filmmakers, photographers, and visual artists. Indeed, '[a] rich culture demands contributions from authors and artists who devote thousands of hours to a work and a lifetime to their craft.' A law that does not provide for authors would be illogical — hardly a copyright law at all. And it would not deserve the respect of the public."*²

And in fact, in addition to Steven's support, other artists have signed letters in support of this comment paper, attached to this document as Exhibit A.

II. Our Perspective on the Legal Framework for Remixes

In this comment paper, we would like to address the Department of Commerce Task Force's questions regarding the legal framework for remixes. Specifically, we are opposed to a compulsory license for remixes, mash-ups, and sampling.

As a preface, we would like to echo the comments of The National Music Publishers' Association ("NMPA"), the Nashville Songwriters Association International ("NSAI"), SESAC, Inc. ("SESAC"), and the Church Music Publishers Association ("CMPA") regarding the Green Paper's definition of "remix".³ The Green Paper uses "remix" interchangeably to refer to what are known in the industry as remixes, mash-ups, and sampling. A more precise term would be "derivative works", as remixes are only one of the types of works that the Green Paper addresses. It is important to clarify exactly what we are talking about by using the proper industry terminology. Artists and songwriters do not usually equate "remixing" with mash-ups or sampling.

A. Recording Artists and Songwriters Want and Deserve Approval Over Uses of Their Work

Approval is by far the most important right that an artist possesses. In my experience, approvals are paramount to anything else on an artist's agenda during negotiations—the money is always

² Maria A. Pallante, *The Next Great Copyright Act*, 36 COLUMBIA J.L. & ARTS 315, 340 (2013), quoting Scott Turow, Paul Aiken, and James Shapiro, *Would the Bard Have Survived the Web?*, N.Y. TIMES at A29 (Feb. 14, 2012).

³ National Music Publishers Association et. al. Comments, http://www.ntia.doc.gov/files/ntia/national_music_publishers_association_et_al_comments.pdf.

secondary. If an artist or songwriter does not want his or her music used in a certain way, no amount of money will change his or her mind.

Artists can, and should continue to be able to, deny a use that they do not agree with. For one, an artist should be able to turn down uses in connection with messages that the artist finds objectionable. A prime example is a song mashed-up, remixed, or sampled in a way that implies endorsement of a particular cause or ideology. For instance, there have been several past instances of performing artists and songwriters expressing frustration with political uses of their music. In 2010, former Congressman Joe Walsh remixed “Walk Away”, a song written by another Joe Walsh, the well-known songwriter and guitarist for The Eagles. Congressman Walsh changed the song’s lyrics to create “Lead the Way”, a song promoting his political campaign. Walsh the songwriter took issue with Walsh the politician’s derivative work because the usage implied the songwriter’s endorsement of Congressman Walsh—a potential trademark infringement in addition to a copyright claim for an unauthorized derivative work.⁴

A compulsory license for derivative works amplifies these concerns tenfold. For example, Melissa Etheridge is a known lesbian and animal rights activist. A compulsory license would allow someone to remix or sample her music into a new work filled with homophobic epithets, and she could not say “no”. In the same way, a compulsory license would allow someone to remix or sample music by Ted Nugent, noted gun ownership advocate, for a song promoting stricter gun control without Nugent’s permission. One could imagine countless instances of compulsory licensing working to an artist’s detriment—think of a white supremacist using black artists’ music in a way that promotes the supremacist’s hateful views. These examples illustrate the potentially perverse results of a compulsory license. It is not hard to see that a compulsory license for derivative works could easily be abused in a way that negatively impacts creators.

Further, sometimes an artist simply does not want his or her music altered in any capacity. Music is very personal to the creator, so many creators staunchly oppose any derivative creations whatsoever. We saw an example of this in the first prominent litigation regarding sampling. Rapper Biz Markie was sued over his unauthorized sampling of Gilbert O’Sullivan’s “Alone Again (Naturally)”.⁵ The source material is an introspective ballad about the singer’s plans to commit suicide after being left at the altar and the death of his parents. While the song was not autobiographical, O’Sullivan objected to the use of his song which was still very personal to him.

More recently, hip hop group the Beastie Boys objected to toy company GoldieBlox’s remix of the group’s 1987 song, “Girls”, in an advertisement. The group did not disagree with the message of the GoldieBlox remix. Rather, they wanted to honor the wishes of late Beastie Boys

⁴ Daniel Kreps, *Joe Walsh Vs. Joe Walsh: Rocker Battles Politician Over "Walk Away"*, ROLLING STONE, Jan. 28, 2010, <http://www.rollingstone.com/music/news/joe-walsh-vs-joe-walsh-rocker-battles-politician-over-walk-away-20100128>.

⁵ *Grand Upright Music, Ltd v. Warner Bros. Records Inc.*, 780 F. Supp. 182 (S.D.N.Y. 1991).

member Adam Yauch, who specified in his will that his music may not be used in advertisements after his death, preserving the group’s long established ideals. Remaining Beastie Boy members Mike Diamond and Adam Horowitz issued a statement explaining that, while they were “very impressed by the creativity and the message behind [the] ad”, the video “is an advertisement that is designed to sell a product, and long ago, [they] made a conscious decision not to permit [their] music and/or name to be used in product ads”.⁶

These examples relating to derivative works that artists find objectionable have a common thread: recording artists and songwriters are at great risk of losing their right to approve uses of their works, a right that they find extremely important. In this regard, we would also like to echo the comments made by NMPA, NSAI, SESAC, CMPA, the American Society of Composers, Authors and Publishers (“ASCAP”), Broadcast Music, Inc. (“BMI”), and the Recording Industry Association of America (“RIAA”)⁷ in opposition to the expansion of fair use. Expanding the doctrine to encompass political uses or derivative works—by example, for finding such uses to be “transformative”—would devastate creators by taking away their approval. If recording artists or songwriters do not want their music associated with a cause, message, or ideology, forcing them to allow these uses would be extremely unfair and potentially harmful to their brands and reputations.

B. Requiring a Compulsory License Would Have a Chilling Effect on the Release of Music

Without a doubt, requiring a compulsory license for derivatives would discourage many artists from releasing their work in the first place. Steven and the other artists who have expressed support for our comments have stated that they probably would have withheld some of their work if they knew that one day they would be required to give up their right to approve derivative uses.

Copyright law is supposed to encourage creation. This is not for the benefit of the artist, but for the benefit of society. It is Congress’s constitutional mandate from the Copyright Clause, “[t]o promote the Progress of Science and useful Arts”.⁸ The Copyright Clause acknowledges that society benefits from the dissemination of art. As stated by Ms. Pallante:

“The issues of authors are intertwined with the interests of the public. As the first beneficiaries of the copyright law, authors are not a counterweight to the public interest

⁶ Sara Gates, *Beastie Boys vs. GoldieBlox: Viral Video Sparks Legal Battle Over Copyright Infringement*, THE HUFFINGTON POST, Nov. 25, 2013, http://www.huffingtonpost.com/2013/11/24/beastie-boys-goldieblox-girls-copyright-infringement-_n_4330583.html.

⁷ ASCAP BMI CMPA NSAI NMPA RIAA SESAC post-meeting comments, http://www.uspto.gov/ip/global/copyrights/comments/ascap_bmi_cmpa_nsai_nmpa_riaa_sesac_post-meeting_comments.pdf.

⁸ U.S. CONST. art. I, § 8, cl. 8.

*but are instead at the very center of the equation. In the words of the Supreme Court, “[t]he immediate effect of our copyright law is to secure a fair return for an “author’s” creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.”*⁹

We need to encourage artists to release their music—and the essential element is approval over how artists’ music is used. Discouraging the creation and dissemination of music would be an undeniably terrible consequence of requiring a compulsory license. And as discussed above, it would be completely adverse to Congress’s constitutional mandate.

C. The Current System Does Not Need Fixing

There is absolutely no need to impose a compulsory license to allow derivative works. The current marketplace is working—and if it ain’t broke, don’t fix it! This is a position supported by several commentators who have already submitted responses to the Green Paper, including the NMPA, NSAI, SESAC, CMPA, ASCAP, BMI, and the RIAA.¹⁰ By allowing rights holders to say “no”, both sides of a negotiation come away satisfied—as opposed to a compulsory license, which would often leave the rights holder frustrated, as discussed above.

Currently, many artists do freely allow derivative works of their music. But this is, and should remain, the artist’s prerogative to make this decision. For example, Radiohead has encouraged its fans to remix two of its recordings, releasing song “stems” (i.e. files containing each instrument in isolation) and providing a web space for users to upload their new creations.¹¹ Similarly, Trent Reznor of Nine Inch Nails released stems to the public for five of his songs from the soundtrack to the film *The Girl with the Dragon Tattoo*.¹² Further, Creative Commons allows artists to release their music under a license granting users permission to freely use works in whatever capacity the artist determines.¹³ While these are excellent methods of encouraging derivative works for artists who choose to utilize them, again, the essential element is an artist’s ability to approve how others use their work.

My firm’s clients have certainly participated in a robust, well-functioning marketplace for derivative works under the current, permission-based licensing system. When a third party wants to remix, mash-up, or sample a client’s work, and the client approves creatively of the use, there are many factors that go into the negotiation. The client will usually receive a share of the copyright ownership in the new work, a royalty for use of the master recording, and sometimes

⁹ Pallante, *supra* note 2, at 340.

¹⁰ See *supra* note 7.

¹¹ *Reckoner Re /Mix*, RADIOHEADREMIX.COM, <http://www.radioheadremix.com/information/>.

¹² Carrie Battan, *Trent Reznor Shares Stems of Songs From Dragon Tattoo*, PITCHFORK, Jan. 27, 2012, <http://pitchfork.com/news/45255-trent-reznor-shares-stems-of-songs-from-dragon-tattoo/>

¹³ *About the Licenses*, CREATIVE COMMONS, <https://creativecommons.org/licenses/>.

an advance against future royalties. These deal points are considered on a case-by-case basis, depending on the prominence of the artist whose work is being used as the basis for a derivative. A compulsory license would upset this existing balance that considers a multitude of factors and the individual needs of each artist.

In 1986, legendary hip hop group Run-D.M.C. recorded a version of Aerosmith's hit song "Walk This Way" for a genre-bending smash hit. While it may have been appropriate for Run-D.M.C. to request a compulsory "mechanical" license to create their version, instead, by involving Steven and guitarist Joe Perry directly in the recording process, they created one of the most famous derivative works of our modern times. By getting both Run-D.M.C. and Steven and Joe on the same recording, and in the same music video—in which Steven literally breaks down a wall separating the two groups—Run-D.M.C.'s "Walk This Way" figuratively broke down the wall separating hip hop from mainstream genres such as rock. The song reached number four on the Billboard Hot 100 chart¹⁴ and is often credited for helping to bring hip hop into the mainstream and establishing the "rap rock" crossover genre. Since then, as several other comment papers have discussed, the genre of hip hop has become heavily reliant on sampling and has thrived in the current, permission-based marketplace.

Steven has licensed his work for sampling purposes as well. For example, rapper Eminem sampled Aerosmith's "Dream On" for his 2003 song "Sing for the Moment", featured on the ten times platinum album "The Eminem Show".¹⁵ On the other hand, Steven has denied countless other requests for permission to create derivative works based on his songs. This is a great illustration of how the current licensing system for derivatives is already thriving—it allows someone like Steven to license his work where he thinks it is appropriate while allowing him to turn down uses he does not agree with and avoid diluting his brand.

In the realm of sampling, there are countless examples of a well-functioning marketplace working to create derivative works with the permission of rights holders. Britney Spears, who has signed a letter supporting this comment paper, sampled the Eurythmics' "Sweet Dreams (Are Made of This)" for her song "Everybody", featured as a bonus track on the Japanese release of her album "Blackout". In another example, Joel Zimmerman, professionally known as deadmau5, licensed his work "Brazil (2nd Edit)" to recording artist Alexis Jordan for her 2010 song "Happiness". Although deadmau5 does not usually agree to allow others to sample or remix his work, he approved this use. In exchange, deadmau5 was able to negotiate for a percentage of the copyright in "Happiness" in addition to a record royalty for the sampled use of his recording. The song was an international hit: it topped the Hot Dance Club Songs in the

¹⁴ *Run-D.M.C. Chart History*, BILLBOARD.COM, <http://www.billboard.com/artist/369290/run-dmc/chart>.

¹⁵ *The Eminem Show*, RIAA GOLD & PLATINUM SEARCHABLE DATABASE, <http://www.riaa.com/goldandplatinumdata.php?artist=%22The+Eminem+Show%22>.

United States,¹⁶ reached number three on the Australian Recording Industry Association Singles Chart,¹⁷ peaked at number four in the United Kingdom,¹⁸ and spent seventeen weeks in the Irish Top 50.¹⁹

Further, creating a compulsory license for derivative works would create a “slippery slope” whereby recording artists and songwriters will be at risk of losing even more approval rights. A compulsory license for derivatives could lead to an effort to implement a compulsory synchronization license, the type of license required to pair music with visual media such as scenes in movies, television and games. When Steven heard about the idea of a compulsory license for derivatives, he asked, what’s next—will they force him to allow a filmmaker to, for example, exploit his first hit “Dream On”, a song which has great personal meaning to him, over a scene that denigrates women? The possibilities are endless, and it is easy to see how a compulsory license would lead to offensive situations that could greatly impact the integrity and reputation of an artist and his or her work.

Compulsory mechanical licenses already exist for musical compositions²⁰, by which anyone can create a cover song for a nominal fee, regardless of whether or not an artist approves. This is a fair compromise which addresses free speech concerns while not impinging upon an artist’s right to approve uses of his or her actual recordings. Admittedly, this is a limited right for a cover artist, as the cover version must conform to certain requirements including that it maintain the same fundamental character as the original work. But allowing a compulsory license for remixes, mash-ups, and sampling is a step too far which surpasses the appropriate compromise reached by the compulsory mechanical license.

There is no compelling need to make the process for licensing derivative works any easier. As stated by many response papers, the system is already easy enough. Further, there is no real harm to free speech or other constitutional concerns to grant an artist the right to deny a use of their work. If an artist wants to utilize another artist’s original work for a remix, mash-up, or sampling, and is denied permission, that artist can always look for another original work and negotiate with that rights holder. There is already a robust marketplace for remixing, mash-ups, and sampling that gives these artists huge creative freedom.

¹⁶ *Dance Club Songs*, BILLBOARD.COM, Jul. 17, 2010, <http://www.billboard.com/charts/2010-07-17/dance-club-play-songs>.

¹⁷ *Alexis Jordan – Happiness (Song)*, AUSTRALIAN-CHARTS.COM, <http://australian-charts.com/showitem.asp?interpret=Alexis+Jordan&titel=Happiness&cat=s>.

¹⁸ *Top 40 Scottish Singles Archive*, OFFICIAL CHARTS COMPANY, Nov. 13, 2010, http://www.officialcharts.com/archive-chart/_/22/2010-11-13.

¹⁹ *Top 50 Singles*, IRISH MUSIC CHARTS ARCHIVE, Mar. 10, 2011, http://www.chart-track.co.uk/index.jsp?c=p%2Fmusicvideo%2Fmusic%2Farchive%2Findex_test.jsp&ct=240001&arch=t&lyr=2011&year=2011&week=10.

²⁰ 17 U.S.C. § 115.

It is also worth noting that the idea of a compulsory license for derivative works is completely absent from many countries' intellectual property laws. Moral rights laws in foreign countries give creators absolute control over derivative works and allow creators to object to others' uses of their work. For example, France²¹, the United Kingdom²², the People's Republic of China²³, Australia²⁴, and Belgium²⁵, among others, all have moral rights provisions in their intellectual property statutes.

D. Any Effort to Streamline the Licensing Process Must Maintain the Artist's Right to Approval

Some comment papers have set forth the idea that there should be a centralized intermediary to streamline the licensing process for derivative works. If such a system were created, it cannot mandate compulsory licensing—it should only be for the purpose of facilitating transactions where the artist gives permission to do so. An artist must have the right to say “no”. Further, the artist must have the right to determine the conditions under which any intermediary grants permission to use his or her work. The approval concerns set forth in this paper are amplified where an intermediary, who may not intimately know the concerns of a specific artist, is negotiating on that artist's behalf. Some deals that seem good in a vacuum are not actually in the best interest of an artist due to a multitude of factors that are individually considered by each artist during a negotiation.

Further, deals negotiated solely by intermediaries could unintentionally create bad precedent for an artist. An attorney's role in negotiations is essential because an artist's biggest bargaining chip is precedent—deal terms are affected by what an artist has previously agreed to in prior negotiations. Thus, a concession in one deal opens the door for future deals to demand this concession as well. Quite simply, we just cannot have intermediaries inadvertently creating bad precedent for artists that adversely affects their future dealings.

III. Our Perspective on the Public Performance Right for Sound Recordings

Although the Commerce Department did not solicit input on this issue, we would like to take a moment to praise the Task Force for its support of the creation of sound recording royalties for radio broadcast.

Radio stations in the United States pay royalties to songwriters but not performers. This means that a performer who does not write his or her own song does not see a penny of revenue from

²¹ Intellectual Property Code, Art. L121-1.

²² Copyright, Designs and Patents Act 1988 (C. 48), Chapter IV, Art. 80.

²³ Copyright Law of the People's Republic of China, Art. 10.

²⁴ Copyright Act 1968, s. 195AM.

²⁵ Law on Copyright and Neighboring Rights, Art. 1 (of June 30, 1994, as amended by the Law of April 3, 1995).

radio broadcasts of that song. The vast majority of countries—excluding a short list that includes Iran, North Korea, and China—do require radio stations to pay performance royalties. The end result is that American performers are doubly disadvantaged. Not only do they not receive royalties from radio stations in the US, but foreign countries do not pay out royalties to American performers either because of the lack of reciprocity. We do not pay their artists so they do not pay ours.

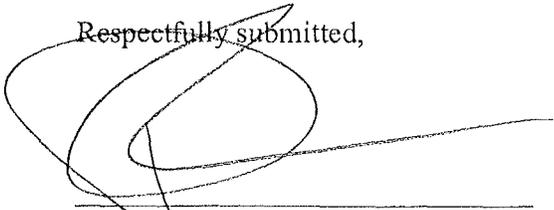
We applaud the Task Force for its support of performance royalties as set forth in the Green Paper. We hope that Congress will address this issue during the 113th United States Congress. Implementing performance royalties would put the United States on par with most of the world's nations, bringing substantial revenue to our artists and the United States economy.

IV. Conclusion

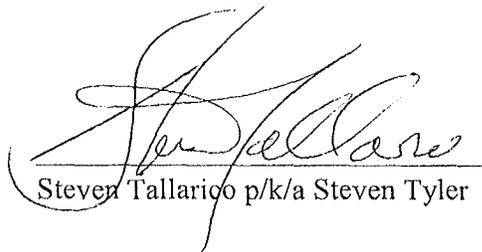
In conclusion, we urge Congress not to implement a compulsory license for remixing, mash-ups, and sampling. Approval is the most important right that a recording artist or songwriter has and they need to retain the ability to approve how their works are used. An artist should be able to deny a use where they disagree with the message of that derivative work or simply do not want their work altered. Music is very personal to the creator and the law cannot treat it as a simple commodity. Requiring a compulsory right for derivatives would discourage many artists and songwriters from releasing their music in the first place, an undeniably terrible consequence that would be at odds with Congress's constitutional mandate. Further, the current system does not need reform—the marketplace is already thriving while allowing artists to approve uses.

Thank you for your time and consideration.

Respectfully submitted,



Dina LaPolt, Esq.
c/o LaPolt Law, P.C.
9000 Sunset Blvd., Suite 800
West Hollywood, CA 90069
(310) 858-0922



Steven Tallarico p/k/a Steven Tyler

cc: Chairman Bob Goodlatte, House Judiciary Committee
Ranking Member John Conyers, Jr., House Judiciary Committee

February 3, 2014

Commerce Committee, Task Force
Office of Policy and External Affairs
United States Patent and Trademark Office

RE: Request for Comments on Department of Commerce's Green Paper on Copyright Policy, Creativity, and Innovation in the Digital Economy

To Whom It May Concern:

My name is *Don Henley*. I am a songwriter and recording artist. I am writing in support of the comments submitted by copyright stakeholders such as the Copyright Alliance, ASCAP, BMI, CMPA, NSAI, NMPA, RIAA and SESAC, the MPAA, the Association of American Publishers, the Directors Guild, the Writers Guild of America West, Dina LaPolt and Steven Tyler, among others. I am writing to give voice to just one of the subjects before the Task Force.

As a creator and copyright owner, I strongly disagree that any legislative changes to the Copyright Act governing remixes, sampling and mash-ups are necessary, and I oppose the introduction of compulsory licensing for such uses in the United States. As you are aware, this proposed addition to the U.S. Copyright Act would force me to allow anyone to remix, sample and/or make a derivative work of my music without my permission. It denies my rights under the Copyright Act to engage in fair market negotiation with respect to the exploitation of my work, to enter into private license agreements on terms acceptable to me in each instance, and to be assured of just and proper compensation for the use of my work. It would compel me by law to license my work in a manner that fundamentally alters my songs and recordings in a "one-size fits all" manner in a market that is anything but standardized.

Most importantly, it strips me of the right to say "no," and I fear it is a harbinger to the dissolution of copyright protection in the United States, rendering copyright more an economic utility rather than a true property right.

As a songwriter and recording artist, I can tell you that approval over how my music is used is very important to me and the other artists I know. Every song I write is personal and has meaning to me. A sample or a remix takes a piece of art, cuts it up, and then either re-assembles it into something different, or combines some of those pieces with another person's work. I already have to allow other artists to record my songs without permission through the current compulsory mechanical license. Allowing them to materially change my songs or recordings without my permission is taking it a step too far.

Along with losing approval over the use of remixing, sampling and mash-ups, enacting a remix right would have a chilling effect on the creation of new music. As an artist who has been recording for more than forty years, had I anticipated that, in the future, the songs and recordings I crafted so deliberately and carefully could be altered by anyone, without my express permission, in any way that diluted the integrity of my work, I question whether the creative path is one I would have chosen for myself. I also have to question, then, what impact the erosion of copyright will have on our culture.

There are many other artists who feel the same way. Why create something when, ultimately, it could be legal for somebody else to destroy it? Copyright exists to encourage artists to create – not dissuade them from doing so.

Artists and songwriters who do not mind others remixing their work are happy to give permission and work out a licensing fee or new copyright splits. But for those of us who would prefer to keep our music in its original form, or who would rather that certain individuals not remix or sample our tracks, no dollar amount can change our minds. For these reasons, I am opposed to a compulsory license for creating remixes, samples and mash ups. Thank you for your time and consideration.

Sincerely,

A handwritten signature in cursive script that reads "Don Henley". The signature is fluid and includes a long, sweeping underline that extends to the right.

DON HENLEY

February 3, 2014

Commerce Committee, Task Force
Office of Policy and External Affairs
United States Patent and Trademark Office

RE: *Request for Comments on Department of Commerce's Green Paper on Copyright Policy, Creativity, and Innovation in the Digital Economy*

To Whom It May Concern:

My name is *Joe Walsh*. I am a songwriter and recording artist. I am writing in support of the comments submitted by copyright stakeholders such as the Copyright Alliance, ASCAP, BMI, CMPA, NSAI, NMPA, RIAA and SESAC, the MPAA, the Association of American Publishers, the Directors Guild, the Writers Guild of America West, Dina LaPolt and Steven Tyler, among others. I am writing to give voice to just one of the subjects before the Task Force.

As a creator and copyright owner, I strongly disagree that any legislative changes to the Copyright Act governing remixes, sampling and mash-ups are necessary, and I oppose the introduction of compulsory licensing for such uses in the United States. As you are aware, this proposed addition to the U.S. Copyright Act would force me to allow anyone to remix, sample and/or make a derivative work of my music without my permission. It denies my rights under the Copyright Act to engage in fair market negotiation with respect to the exploitation of my work, to enter into private license agreements on terms acceptable to me in each instance, and to be assured of just and proper compensation for the use of my work. It would compel me by law to license my work in a manner that fundamentally alters my songs and recordings in a “one-size fits all” manner in a market that is anything but standardized.

Most importantly, it strips me of the right to say “no,” and I fear it is a harbinger to the dissolution of copyright protection in the United States, rendering copyright more an economic utility rather than a true property right.

As a songwriter and recording artist, I can tell you that approval over how my music is used is very important to me and the other artists I know. Every song I write is personal and has meaning to me. A sample or a remix takes a piece of art, cuts it up, and then either re-assembles it into something different, or combines some of those pieces with another person’s work. I already have to allow other artists to record my songs without permission through the current compulsory mechanical license. Allowing them to materially change my songs or recordings without my permission is taking it a step too far.

Along with losing approval over the use of remixing, sampling and mash-ups, enacting a remix right would have a chilling effect on the creation of new music. As an artist that has been recording for more than forty years, had I anticipated that, in the future, the songs and recordings I crafted so deliberately and carefully could be altered by anyone, without my express permission, in any way that diluted the integrity of my work, I question whether the creative path is one I would have chosen for myself. I also have to question, then, what impact the erosion of copyright will have on our culture. There are others that feel

the same way. Why create something when, ultimately, it could be legal for somebody else to destroy it? Copyright exists to encourage artists to create – not dissuade them from doing so.

Artists and songwriters who do not mind others remixing their work are happy to give permission and work out a licensing fee or new copyright splits. But for those of us who would prefer to keep their music in its original form, or who would rather that certain individuals not remix or sample their tracks, no dollar amount can change our minds. For these reasons, I am opposed to a compulsory license for creating remixes, samples and mash ups. Thank you for your time and consideration.

Sincerely,

A handwritten signature in black ink, appearing to read 'Joe Walsh', written in a cursive style.

JOE WALSH

February 3, 2014

Commerce Committee, Task Force
Office of Policy and External Affairs
United States Patent and Trademark Office

RE: *Request for Comments on Department of Commerce's Green Paper on Copyright Policy, Creativity, and Innovation in the Digital Economy*

To Whom It May Concern:

My name is **Andre Young**. I am a songwriter and recording artist. I am writing in support of the comments submitted by Dina LaPolt and Steven Tyler opposing compulsory licensing for remixes in the United States. As you know, this proposed addition to the U.S. Copyright Act would force me to allow anyone to remix or sample my music without my permission.

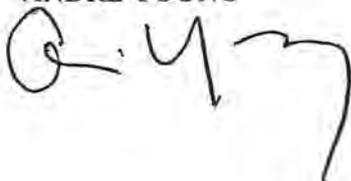
As a songwriter and recording artist, I can tell you that approval over how my music is used is very important to me and the other artists I know. Every song I write is personal and has meaning to me. A remix takes a piece of art, cuts it up, and then either re-assembles it into something different, or combines some of those pieces with another person's work. I already have to allow other artists to record my songs without permission through the compulsory mechanical license. Allowing them to materially change my songs or recordings without my permission is taking it a step too far. Further, if I approve of a remix of my music, I should be able to negotiate my own deal points, not have pre-set licensing rates govern what I am paid.

Along with losing approval over the use of remixing, sampling and mash-ups, enacting a remix right would have a chilling effect on the creation of new music. I know that I wouldn't have released some of my own songs had I known that, in the future, anyone could remix or alter them without my permission. There are others that feel the same way. Why create something when, ultimately, it could be legal for somebody else to destroy it? Copyright exists to encourage artists to create – not dissuade them from doing so.

I have the right to say "no" if someone wants to remix my music. The current law in the United States for remixes, mash-ups, and sampling does not need to be changed. Right now, I have the right to deny the use if I want to. Artists and songwriters who do not mind others remixing their work are happy to give permission and work out a licensing fee or new copyright splits. But for those of us who would prefer to keep their music in its original form, or who would rather that certain individuals not remix or sample their tracks, no dollar amount can change our minds. For these reasons, I am opposed to a compulsory license for creating remixes, samples and mash ups. Thank you for your time and consideration.

Sincerely,

ANDRE YOUNG

A handwritten signature in black ink, appearing to read 'A. Young', written over the typed name 'ANDRE YOUNG'.

February 3, 2014

Commerce Committee, Task Force
Office of Policy and External Affairs
United States Patent and Trademark Office

RE: *Request for Comments on Department of Commerce's Green Paper on Copyright Policy, Creativity, and Innovation in the Digital Economy*

To Whom It May Concern:

My name is *Sting*. I am a songwriter and recording artist. I am writing in support of the comments submitted by copyright stakeholders such as the Copyright Alliance, ASCAP, BMI, CMPA, NSAI, NMPA, RIAA and SESAC, the MPAA, the Association of American Publishers, the Directors Guild, the Writers Guild of America West, Dina LaPolt and Steven Tyler, among others. I am writing to give voice to just one of the subjects before the Task Force.

As a creator and copyright owner, I strongly disagree that any legislative changes to the Copyright Act governing remixes, sampling and mash-ups are necessary, and I oppose the introduction of compulsory licensing for such uses in the United States. As you are aware, this proposed addition to the U.S. Copyright Act would force me to allow anyone to remix, sample and/or make a derivative work of my music without my permission. It denies my rights under the Copyright Act to engage in fair market negotiation with respect to the exploitation of my work, to enter into private license agreements on terms acceptable to me in each instance, and to be assured of just and proper compensation for the use of my work. It would compel me by law to license my work in a manner that fundamentally alters my songs and recordings in a "one-size fits all" manner in a market that is anything but standardized.

Most importantly, it strips me of the right to say "no," and I fear it is a harbinger to the dissolution of copyright protection in the United States, rendering copyright more an economic utility rather than a true property right.

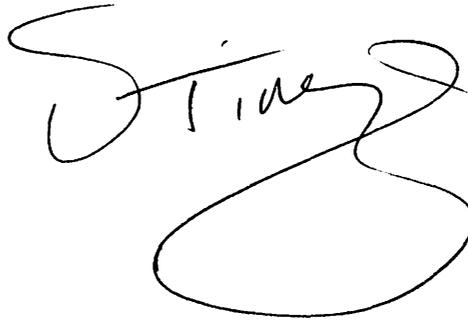
As a songwriter and recording artist, I can tell you that approval over how my music is used is very important to me and the other artists I know. Every song I write is personal and has meaning to me. A sample or a remix takes a piece of art, cuts it up, and then either re-assembles it into something different, or combines some of those pieces with another person's work. I already have to allow other artists to record my songs without permission through the current compulsory mechanical license. Allowing them to materially change my songs or recordings without my permission is taking it a step too far.

Along with losing approval over the use of remixing, sampling and mash-ups, enacting a remix right would have a chilling effect on the creation of new music. As an artist that has been recording for more than forty years, had I anticipated that, in the future, the songs and recordings I crafted so deliberately and carefully could be altered by anyone, without my express permission, in any way that diluted the integrity of my work, I question whether the creative path is one I would have chosen for myself. I also have to question, then, what impact the erosion of copyright will have on our culture. There are others that feel the same way. Why create something when, ultimately, it could be legal for somebody else to destroy it?

Copyright exists to encourage artists to create – not dissuade them from doing so.

Artists and songwriters who do not mind others remixing their work are happy to give permission and work out a licensing fee or new copyright splits. But for those of us who would prefer to keep their music in its original form, or who would rather that certain individuals not remix or sample their tracks, no dollar amount can change our minds. For these reasons, I am opposed to a compulsory license for creating remixes, samples and mash ups. Thank you for your time and consideration.

Sincerely,

A handwritten signature in black ink, appearing to read "Gordon Sumner". The signature is fluid and cursive, with the first name being more prominent.A handwritten signature in black ink, appearing to read "Sting". The signature is highly stylized and cursive, with a large, sweeping loop at the bottom.

GORDON SUMNER
p/k/a STING

February 3, 2014

Commerce Committee, Task Force
Office of Policy and External Affairs
United States Patent and Trademark Office

RE: Request for Comments on Department of Commerce's Green Paper on Copyright Policy, Creativity, and Innovation in the Digital Economy

To Whom It May Concern:

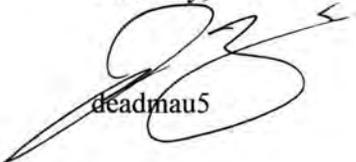
My name is Joel Zimmerman, professionally known as *deadmau5*. I am a world renowned music producer, songwriter and recording artist. I am writing in support of the comments submitted by Dina LaPolt and Steven Tyler opposing compulsory licensing for remixes in the United States. As you know, this proposed addition to the U.S. Copyright Act would force me to allow anyone to remix or sample my music without my permission.

As a songwriter, producer, and recording artist, I can tell you that approval over how my music is used is very important to me and the other artists I know. Every song I write is personal and has meaning to me. A remix takes a piece of art, cuts it up, and then either re-assembles it into something different, or combines some of those pieces with another person's work. I already have to allow other artists to record my songs without permission through the compulsory mechanical license. Allowing them to materially change my songs or recordings without my permission is taking it a step too far. Further, if I approve of a remix of my music, I should be able to negotiate my own deal points, not have pre-set licensing rates govern what I am paid.

Along with losing approval over the use of remixing, sampling and mash-ups, enacting a remix right would have a chilling effect on the creation of new music. I know that I wouldn't have released some of my own songs had I known that, in the future, anyone could remix or alter them without my permission. There are others that feel the same way. Why create something when, ultimately, it could be legal for somebody else to destroy it? Copyright exists to encourage artists to create – not dissuade them from doing so.

I have the right to say "no" if someone wants to remix my music. The current law in the United States for remixes, mash-ups, and sampling does not need to be changed. Right now, I have the right to deny the use if I want to. Artists and songwriters who do not mind others remixing their work are happy to give permission and work out a licensing fee or new copyright splits. But for those of us who would prefer to keep their music in its original form, or who would rather that certain individuals not remix or sample their tracks, no dollar amount can change our minds. For these reasons, I am opposed to a compulsory license for creating remixes, samples and mash ups. Thank you for your time and consideration.

Sincerely,



deadmau5

OZZY OSBOURNE

February 7, 2014

Commerce Committee, Task Force
Office of Policy and External Affairs
United States Patent and Trademark Office

RE: Request for Comments on Department of Commerce's Green Paper on Copyright Policy, Creativity, and Innovation in the Digital Economy

To Whom It May Concern:

My name is ***Ozzy Osbourne***. I am a songwriter and recording artist. I am writing in support of the comments submitted by Dina LaPolit and Steven Tyler opposing compulsory licensing for remixes in the United States. As you know, this proposed addition to the U.S. Copyright Act would force me to allow anyone to remix or sample my music without my permission.

As a songwriter and recording artist, I can tell you that approval over how my music is used is very important to me and the other artists I know. Every song I write is personal and has meaning to me. A remix takes a piece of art, cuts it up, and then either re-assembles it into something different, or combines some of those pieces with another person's work. I already have to allow other artists to record my songs without permission through the compulsory mechanical license. Allowing them to materially change my songs or recordings without my permission is taking it a step too far. Further, if I approve of a remix of my music, I should be able to negotiate my own deal points and not have pre-set licensing rates govern what I am paid.

Along with losing approval over the use of remixing, sampling and mash-ups, enacting a remix right would have a chilling effect on the creation of new music. I know that I wouldn't have released some of my own songs had I known that, in the future, anyone could remix or alter them without my permission. There are others that feel the same way. Why create something when, ultimately, it could be legal for somebody else to destroy it? Copyright exists to encourage artists to create – not dissuade them from doing so.

I have the right to say "no" if someone wants to remix my music. The current law in the United States for remixes, mash-ups, and sampling does not need to be changed. Right now, I have the right to deny the use if I want to. Artists and songwriters who do not mind others remixing their work are happy to give permission and work out a licensing fee or new copyright splits. But for those of us who would prefer to keep their music in its original form, or who would rather that certain individuals not remix or sample their tracks, no dollar amount can change our minds. For these reasons, I am opposed to a compulsory license for creating remixes, samples and mash ups. Thank you for your time and consideration.

Sincerely,



Ozzy Osbourne



February 3, 2014

Commerce Committee, Task Force
Office of Policy and External Affairs
United States Patent and Trademark Office

**RE: Request for Comments on Department of Commerce's Green Paper on Copyright Policy,
Creativity, and Innovation in the Digital Economy**

To Whom It May Concern:

My name is *Mick Fleetwood*. I am a recording artist and a member of the world renowned musical group, *Fleetwood Mac*. I am writing in support of the comments submitted by Dina LaPolt and Steven Tyler opposing compulsory licensing for remixes in the United States. As you know, this proposed addition to the U.S. Copyright Act would force me to allow anyone to remix or sample my music without my permission.

As a recording artist, I can tell you that approval over how my music is used is very important to me and the other artists I know. Every song I perform on is personal and has meaning to me. A remix takes a piece of art, cuts it up, and then either re-assembles it into something different, or combines some of those pieces with another person's work. Allowing people just remix, sample, or remix my recordings into a new song without my permission is taking it a step too far. Further, if I approve of a remix of my music, I should be able to negotiate my own deal points, not have pre-set licensing rates govern what I am paid.

Along with losing approval over the use of remixing, sampling and mash-ups, enacting a remix right would have a chilling effect on the creation of new music. I know that I wouldn't have released some of my own recordings had I known that, in the future, anyone could remix or alter them without my permission. There are others that feel the same way. Why create something when, ultimately, it could be legal for somebody else to destroy it? Copyright exists to encourage artists to create – not dissuade them from doing so.

I have the right to say "no" if someone wants to remix my music. The current law in the United States for remixes, mash-ups, and sampling does not need to be changed. Right now, I have the right to deny the use if I want to. Artists and songwriters who do not mind others remixing their work are happy to give permission and work out a licensing fee if they wish. But for those of us who would prefer to keep their music in its original form, or who would rather that certain individuals not remix or sample their tracks, no dollar amount can change our minds. For these reasons, I am opposed to a compulsory license for creating remixes, samples and mash ups. Thank you for your time and consideration.

Sincerely,

Mick Fleetwood



February 4, 2014

Commerce Committee, Task Force
Office of Policy and External Affairs
United States Patent and Trademark Office

RE: Request for Comments on Department of Commerce's Green Paper on Copyright Policy, Creativity, and Innovation in the Digital Economy

To Whom It May Concern:

My name is ***Britney Spears***. I am a songwriter and recording artist. I am writing in support of the comments submitted by Dina LaPolit and Steven Tyler opposing compulsory licensing for remixes in the United States. As you know, this proposed addition to the U.S. Copyright Act would force me to allow anyone to remix or sample my music without my permission.

As a songwriter and recording artist, I can tell you that approval over how my music is used is very important to me and the other artists I know. Every song I write is personal and has meaning to me. A remix takes a piece of art, cuts it up, and then either re-assembles it into something different, or combines some of those pieces with another person's work. I already have to allow other artists to record my songs without permission through the compulsory mechanical license. Allowing them to materially change my songs or recordings without my permission is taking it a step too far. Further, if I approve of a remix of my music, I should be able to negotiate my own deal points, not have pre-set licensing rates govern what I am paid.

Along with losing approval over the use of remixing, sampling and mash-ups, enacting a remix right would have a chilling effect on the creation of new music. I know that I wouldn't have released some of my own songs had I known that, in the future, anyone could remix or alter them without my permission. There are others that feel the same way. Why create something when, ultimately, it could be legal for somebody else to destroy it? Copyright exists to encourage artists to create – not dissuade them from doing so.

I have the right to say “no” if someone wants to remix my music. The current law in the United States for remixes, mash-ups, and sampling does not need to be changed. Right now, I have the right to deny the use if I want to. Artists and songwriters who do not mind others remixing their work are happy to give permission and work out a licensing fee or new copyright splits. But for those of us who would prefer to keep their music in its original form, or who would rather that certain individuals not remix or sample their tracks, no dollar amount can change our minds. For these reasons, I am opposed to a compulsory license for creating remixes, samples and mash ups. Thank you for your time and consideration.

Sincerely,



Britney Spears

February 3, 2014

Commerce Committee, Task Force
Office of Policy and External Affairs
United States Patent and Trademark Office

RE: *Request for Comments on Department of Commerce's Green Paper on Copyright Policy, Creativity, and Innovation in the Digital Economy*

To Whom It May Concern:

My name is **Billy Joel**. I am a songwriter and recording artist. I am writing in support of the comments submitted by copyright stakeholders such as the Copyright Alliance, ASCAP, BMI, CMPA, NSAI, NMPA, RIAA and SESAC, the MPAA, the Association of American Publishers, the Directors Guild, the Writers Guild of America West, Dina LaPolit and Steven Tyler, among others. I am writing to give voice to just one of the subjects before the Task Force.

As a creator and copyright owner, I strongly disagree that any legislative changes to the Copyright Act governing remixes, sampling and mash-ups are necessary, and I oppose the introduction of compulsory licensing for such uses in the United States. As you are aware, this proposed addition to the U.S. Copyright Act would force me to allow anyone to remix, sample and/or make a derivative work of my music without my permission. It denies my rights under the Copyright Act to engage in fair market negotiation with respect to the exploitation of my work, to enter into private license agreements on terms acceptable to me in each instance, and to be assured of just and proper compensation for the use of my work. It would compel me by law to license my work in a manner that fundamentally alters my songs and recordings in a "one-size fits all" manner in a market that is anything but standardized.

Most importantly, it strips me of the right to say "no," and I fear it is a harbinger to the dissolution of copyright protection in the United States, rendering copyright more an economic utility rather than a true property right.

As a songwriter and recording artist, I can tell you that approval over how my music is used is very important to me and the other artists I know. Every song I write is personal and has meaning to me. A sample or a remix takes a piece of art, cuts it up, and then either re-assembles it into something different, or combines some of those pieces with another person's work. I already have to allow other artists to record my songs without permission through the current compulsory mechanical license. Allowing them to materially change my songs or recordings without my permission is taking it a step too far.

Along with losing approval over the use of remixing, sampling and mash-ups, enacting a remix right would have a chilling effect on the creation of new music. As an artist who has been recording for more than forty years, had I anticipated that, in the future, the songs and recordings I crafted so deliberately and carefully could be altered by anyone, without my express permission, in any way that diluted the integrity of my work, I question whether the creative path is one I would have chosen for myself. I also have to question, then, what impact the erosion of copyright will have on our culture.

There are many other artists who feel the same way. Why create something when, ultimately, it could be legal for somebody else to destroy it? Copyright exists to encourage artists to create – not dissuade them from doing so.

Artists and songwriters who do not mind others remixing their work are happy to give permission and work out a licensing fee or new copyright splits. But for those of us who would prefer to keep our music in its original form, or who would rather that certain individuals not remix or sample our tracks, no dollar amount can change our minds. For these reasons, I am opposed to a compulsory license for creating remixes, samples and mash ups. Thank you for your time and consideration.

Sincerely,

A handwritten signature in cursive script that reads "Billy Joel". The signature is fluid and stylized, with the first letters of "Billy" and "Joel" being particularly prominent.

BILLY JOEL

February 19, 2014

Commerce Committee, Task Force
Office of Policy and External Affairs
United States Patent and Trademark Office

RE: Request for Comments on Department of Commerce's Green Paper on Copyright Policy, Creativity, and Innovation in the Digital Economy

To Whom It May Concern:

Our names are Natalie Maines, Martie Maguire, and Emily Robison, professionally known as the *Dixie Chicks*. We are songwriters and recording artists. I am writing in support of the comments submitted by Dina LaPolt and Steven Tyler opposing compulsory licensing for remixes in the United States. As you know, this proposed addition to the U.S. Copyright Act would force me to allow anyone to remix or sample my music without my permission.

As songwriters and recording artists, we can tell you that approval over how our music is used is very important to us and the other artists we know. Every song we write is personal and has meaning to us. A remix takes a piece of art, cuts it up, and then either re-assembles it into something different, or combines some of those pieces with another person's work. We already have to allow other artists to record our songs without permission through the compulsory mechanical license. Allowing them to materially change our songs or recordings without our permission is taking it a step too far. Further, if we approve of a remix of our music, we should be able to negotiate our own deal points, not have pre-set licensing rates govern what we are paid.

Along with losing approval over the use of remixing, sampling and mash-ups, enacting a remix right would have a chilling effect on the creation of new music. We wouldn't have released some of our own songs had we known that, in the future, anyone could remix or alter them without our permission. There are others that feel the same way. Why create something when, ultimately, it could be legal for somebody else to destroy it? Copyright exists to encourage artists to create – not dissuade them from doing so.

We have the right to say "no" if someone wants to remix our music. The current law in the United States for remixes, mash-ups, and sampling does not need to be changed. Right now, we have the right to deny the use if we want to. Artists and songwriters who do not mind others remixing their work are happy to give permission and work out a licensing fee or new copyright splits. But for those of us who would prefer to keep their music in its original form, or who would rather that certain individuals not remix or sample their tracks, no dollar amount can change our minds. For these reasons, we are opposed to a compulsory license for creating remixes, samples and mash ups. Thank you for your time and consideration.

Sincerely,

Natalie Maines, Martie Maguire, and Emily Robison
professionally known as the *Dixie Chicks*.

