1-1-1995

Everything That Glitters Is Not Gold: Songwriter-Music Publisher Agreements and Disagreements

Don E. Tomlinson

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Everything That Glitters Is Not Gold:*  
Songwriter-Music Publisher Agreements and Disagreements  

by  
DON E. TOMLINSON**

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* Copyright 1985 Polygram International Music (ASCAP) and Pink Pig Music (BMI). "Everything That Glitters (Is Not Gold)" was written by Bob McDill and country singer Dan Seals and was a number one record in 1986 for Seals.

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I

Introduction

Most everyone knows what a book publisher does,1 but comparatively few understand the role of the music publisher. Not all copyright-based publishing relationships work the same way.2 Indeed, the role of the music publisher is quite different from the role of the book publisher. An agreement with a book publisher spells at least a certain level of success for an author.3 Conversely, a songwriter's agreement with a music publisher,4 while a significant step forward, is much nearer to the beginning of the road to potential success.5 It is more analogous to an author's relationship with a literary agent.6 The other major difference is that the songwriter almost always conveys the copyright to the music publisher while retaining a contractual right to royalties.7 An author, on the other hand, may retain the copyright and license certain rights to the book publisher in return for royalties.8

1. For those who do not know, book publishers (usually with a literary agent as a go-between) generally obtain book publishing rights from book authors (who often retain the copyright itself). These rights usually obligate book publishers to print, market, and distribute the book (hardcover and softcover). In return, the book author receives royalties (typically based on ten to fifteen percent of sales), with the literary agent receiving a portion (usually ten to fifteen percent) thereof. The copyright-retaining author may then grant other licenses, e.g., to a motion picture producer. There are other variations on this theme; for instance, the book publisher may obtain from the book author serialization-licensing rights. See John Vivian, The Media of Mass Communication 39-42 (3d ed. 1995).

2. This article mainly concerns the relationship between music publishing companies and non-artist songwriters who are at or near the beginning of their professional songwriting careers.

3. Generally, such agreements guarantee that a beginning author's book will be published; whether it proves to be a commercial success depends upon a variety of factors.

4. This article analyzes the long-term exclusive songwriting-music publishing agreement and, in pertinent part, is written from the non-artist songwriter's perspective rather than from the music publisher's perspective. The analysis takes this approach because music publishers write these contracts, but songwriters would benefit from an abrogation of forced adherence to them. This article then attempts to set forth such a contract from both parties' point of view. This article is not meant in any way to denigrate the herculean efforts that many music publishers engage in on behalf of songwriters.


6. Id. at 104.

7. Under 17 U.S.C. § 203(a)(3) (1994), however, the conveyance may be "terminated" later. In most situations and upon request, copyrights granted from creators to publishers or other persons or entities terminate "thirty-five years from the date of execution of the grant."

8. See Biederman et al., supra note 5, at 104-08.
A. The Fundamental Songwriting-Music Publishing *Quid Pro Quo*

From the songwriter's perspective, there are generally three initial considerations concerning a prospective music publishing contract: (1) *advances* against royalties; (2) quality *demonstration recordings* (demos) of the songwriter's songs; and (3) *exploitation*, or the active "pitching" of the demos to the producers, artists, and others who make the ultimate decisions concerning the selection of songs to be recorded and released on the major labels. As important as these matters are, especially as a songwriter is beginning her career, there are other extremely significant interests. These include royalty rates, matters of accounting, and the further exploitation or licensing of the songwriter's "cuts." Beginning professional songwriters, however, see nothing as more important than their ability to survive financially while writing and for quality demos to be prepared and pitched to the right people. However, for songwriters fortunate enough to have written one or more hit songs, back-end considerations become the principal focus of these agreements. The music publisher's greatest desire is that the songwriter write "hit" songs.

1. *Advances Against Royalties*

Virtually all songwriters come to town on a wing and a prayer. The most successful songwriters write songs virtually on a full-time


11. Compositions which have been recorded and released at least one time.


15. From the corners of the country

From the cities and the farms

Tucked up underneath their arms

They walk away from everything

Just to see a dream come true

So God bless the boys who make the noise

On Sixteenth Avenue

* * *

But then one night in some empty room

Where no curtains ever hung

Like a miracle some golden words
basis. And while commercially successful songwriters usually do not need compensation in the form of advances against royalties, almost all newly-signed songwriters do.

2. Demonstration Recordings

In most genres of music, there is a rather considerable overabundance of new songs, with supply exponentially outstripping demand. There may be a variety of ways to influence decision-makers to record and release specific songs, but the vast majority of songwriters believe the one absolutely essential tool is a quality demo. While suc-

Roll off someone's tongue
And after years of being nothing
They're all looking right at you
And then for awhile they'll go in style
On Sixteenth Avenue

THOM SCHUYLER, God Bless The Boys Who Make The Noise On Sixteenth Avenue, copyright 1982, DebDave Music, Inc. (BMI) and Briarpatch Music (BMI) (this song, represented here by only two verses, describes one view of songwriting life on Music Row in Nashville. It was written by Thom Schuyler and made popular by country singer Lacy J. Dalton).

16. "A lot of people have this idea that writers just wake up in the middle of the night inspired. Sometimes that's true, but our writers come in every day, it's a job, it's competitive." Al Caudell, Looking for Commitment and Quality: EMI Publishing is a Major World Player, AM. SONGWRITER, May/June 1994, at 25 (quoting Celia Froehlig, vice president and general manager, Nashville division, EMI Music Publishing).

17. There is also one other type of "advance against royalties." Some "[b]ankers who specialize in working with music industry customers" offer loans using projections of public performance royalties as security because they know "[u]nique cash flow problems often plague songwriters." Lisa Harless, Royalty Advance Loans, AM. SONGWRITER, Jan./Feb. 1994, at 15.


19. Such factors include the track records of the songwriters, the track record of the plugger, the storied history of the publishing company, the degree to which the song "fits" the direction of the project or the artist, etc. For a look at one facet of the relationship between songwriters and music publishers on the one hand and producers on the other, see Michael Kosser, Producers and A&R People, AM. SONGWRITER, Sept./Oct. 1995, at 24.

20. There is precious little agreement, however, on just how "produced" the demos should be. One seemingly good piece of advice on this subject comes from songwriter-producer Robert Byrne: "I'm about half and half between simple demos and using a full band. As a producer, [I think] it depends on the song. I would encourage most songwriters to produce their uptempo material. For certain ballads, the bare bones approach is okay." Al Caudell, Byrne Writes and Produces: Produces Hits and Writes Great Songs, AM. SONGWRITER, Sept./Oct. 1994, at 18 (quoting Robert Byrne). "[T]he demo is the song's wrapper. That wrapper is a major sales tool." Cliff Williamson, Emotion Is Key to a Hit Song: Lady Luck Is Not a Co-Writer, AM. SONGWRITER, July/Aug. 1993, at 16.
cessful songwriters desire this expense to be shared by the publisher, songwriters beginning their professional careers find it indispensable that publishers front or absorb this expense.

3. *Exploitation*

The one thing that probably makes songwriters, both presently or previously under contract to a music publisher, the most frustrated is "unpitched" demos. Some songwriters pitch their own material, but most beginning songwriters have little opportunity to do so because they usually have considerably less access to the decision-makers. Music publishing companies employ persons known as song "pluggers," whose jobs range from physically delivering demos to the "A&R" people at the major labels, to maintaining intimate professional associations with the successful artists and producers.

4. "Hit" Songs

For the music publisher, hit songs make the relationship worthwhile. Unfortunately, not all songwriters write hit songs. Music publishing companies spend considerable sums on advances, demos,

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21. Demos cost at least several hundred dollars each. Thus, production quickly becomes expensive—even for successful songwriters. In fairness, it also becomes expensive for music publishers.

22. A songwriter who needs a $200 per week advance against royalties to minimally make ends meet obviously cannot afford to front the cost of demo production.

23. There are several facets to this, one of which is that "a songwriter's songs are largely forgotten once the writer is no longer active with a publisher . . . ." *Nashville Songwriters Association International, The Essential Songwriter's Contract Handbook* x (1994) [hereinafter NSAI Handbook] (publication of the 4,000-plus member Nashville Songwriters Association International).


25. Id.

26. Term of art common to the sound recording industry. Simply put, pluggers pitch demos.

27. This abbreviation stands for "Artists and Repertoire." Originally, the function was that of the producer's function of today. A&R people at record companies now perform various other tasks, such as screening demos from music publishers and recommending new talent. See Marascalco v. Fantasy, Inc., No. CIV. 88-675, 1990 WL 257290 (C.D. Cal. Oct. 24, 1990).

28. The biggest complaint that songwriters seem to have about songplugging is "the fact that publishers have such vast catalogs, yet such a low ratio of songpluggers." *NSAI Handbook*, *supra* note 23, at ix-x.


30. "If it gets to the point where the writer is just not getting far enough along for us to recoup our expenses, and they're going deeper in the hole, then we would decide if it was in our best interest to renew." Caudell, *supra* note 10, at 22 (quoting Leslie Barr, creative manager, Bug Music/Nashville).
plugging activities, and general overhead for songwriters who never have an important cut.\textsuperscript{31}

\section*{B. The Songwriter-Music Publisher Contract Relationship}

So under what circumstances do a songwriter and a music publisher form a contract?\textsuperscript{32} The simple answer is that the music publisher believes in the songwriter's ability to write hit songs and is interested in signing the songwriter to a term exclusive agreement.\textsuperscript{33} Commercially, the songwriter has the creative product and the music publisher has the capital and the exploitative and administrative ability. It is entirely likely that any contract signed will have been drafted by the publisher and, historically, few of its terms have been very negotiable.\textsuperscript{34} This inequity exists because the songwriter does not have the capital to undertake the music publishing function herself. Consequently, beginning professional songwriters are at an extreme bargaining disadvantage.\textsuperscript{35} At the first opportunity, many commercially successful songwriters become their own music publishers.\textsuperscript{36}

\textsuperscript{31} Id.  
\textsuperscript{32} One view is as follows: Rarely would songwriters list copyright ownership or royalty accounting as motivations [for entering into a music publishing relationship]. They are part of the mundane business world. Copyright administration is tedious, complicated, not fun. Leave it to the music publishers . . . and music publishers have been all too happy to oblige . . . . For the opportunity to indulge their art and relinquish the responsibility of marketing and administration, songwriters have been obliging, as well, content to let music publishers define the rules and percentages. That is, until the songs become hits, the money going to the publisher becomes substantial, and the songwriter realizes he/she is no longer the owner nor controller of the work . . . . Street Education 101! NSAI Handbook, supra note 23, at viii-ix.  
\textsuperscript{33} The [term exclusive songwriter’s] agreement is commonly used when the publisher wants to establish a long-term relationship with a writer believed to have talent . . . either as a result of having had songs recorded by recording artists or because the publisher [simply] believes in the talent and future worth of the writer.  
\textsuperscript{34} “Since the [contract language] almost always emanate[s] from the publisher, publishing agreements have over the years distilled the essence of what is to the publisher’s advantage.” NSAI Handbook, supra note 23, at xi. “The relationship between writer and publisher historically [has] been slanted toward the publisher for too long and [has] inevitably led to a feeling of inequity by many a songwriter.” Id. at x.  
\textsuperscript{35} “Professional songwriters come in roughly two varieties—those who have a strong bargaining position with their publishers and those who do not.” Kosser, supra note 12, at 36.  
\textsuperscript{36} Many of them might not if the terms of their contracts were, in their view, more equitable.
There is a huge difference between contracts involving parties of relatively equal bargaining strength and those in which a decided imbalance exists. This is most pronounced where the contract is performed over a substantial period of time\(^{37}\) and the contractual relationship continues for decades beyond the expiration or termination of the agreement.\(^{38}\) The bilaterally bargained-for contract involves a true meeting of the minds,\(^{39}\) especially where it also involves genuine mutual goodwill.\(^{40}\) Because of disparities in bargaining strength, many contracts do not meet this model of perfection. This is not a new phenomenon. In a 1955 case concerning the validity of an “open-ended contract” for the sale of goods, the court wrote:

One often has the impression of a kind of running battle between draftsmen and the courts, with much shifting of ground on the part of both. Back of this development lies a problem that touches the basic philosophy of contract law. The law of contracts is founded generally on the principle that it is the business of the courts to interpret and enforce the agreements that the parties have negotiated. This theory confronts the social reality that in many cases no real negotiations take place, and the terms of the contract are in fact set by the will of one party alone. This situation... may result from a superiority of bargaining power on one side. In such situations, there seems to be a principle of law not yet frankly acknowledged which might be phrased something as follows: where one party to a contract has the power to dictate its terms, the terms of the contract are subject to judicial review and may be modified by the court if they are unduly harsh.\(^{41}\)

This article has five sections. Section I introduces the topic of unequal bargaining positions between songwriters and music publishing companies. Section II describes and analyzes the adhesion

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\(^{37}\) Executory contracts are a great deal more susceptible to problems than are contracts which have been completely performed at or near the time of contract formation.

\(^{38}\) For instance, where a songwriter receives a “cut” while under contract to a music publisher, the songwriter must look to that music publisher (or its assignee) for royalties, etc., during the entire pre-termination period even though the songwriter has not otherwise been under contract to that music publisher for years.


problems inherent in the formation of many songwriter-music publisher agreements on the basis of relative bargaining strength and judicial efforts (or lack of judicial efforts) to recognize and address such problems. Section III quotes and analyzes a “standard-form” songwriter-music publisher agreement, the various parts of which are taken from several actual or proposed contracts. This section focuses on the songwriters’ problems have with much of the language in such agreements and on case law concerning many of the individual provisions. Section IV details the author’s view of how an equitably-written songwriter-music publisher agreement might read, together with the author’s view of why this contractual relationship is more fair. Section V concludes that songwriters in disadvantageous bargaining positions should take small steps in trying to work more equitable language into future agreements and that songwriters in advantageous bargaining positions should insist on completely equitable treatment in their agreements with music publishers. Finally, this section introduces the idea that songwriters should take more control in the overall relationship.

II

The Formation of Long-Term Exclusive Songwriting-Music Publishing Agreements

A. The Bargaining Positions

Courts have no problem recognizing the problems associated with a party’s weak bargaining position in the formation of a contract. Before showing the party in the weak position any contractual mercy, courts insist that the party “show that the contract contains harsh terms which the party would not have agreed to except for his weak bargaining position.” In a music copyright case explaining

42. Examples abound: Exploiting the weak bargaining position of the mobile home owners may constitute unfair competition or unfair trade practices .... The state has an interest in protecting consumers deemed to be in an unfavorable bargaining position and in preventing future exploitation of other consumers. State v. Fonk’s Mobile Home Park & Sales, Inc., 343 N.W.2d 820, 822 (Wis. Ct. App. 1983). We recognize that parties may agree to waive applicable provisions of the law. However, such waiver may be unenforceable if public policy considerations so dictate. **** [The statutory authority the courts have to refund bond premiums to prevent unjust enrichment] ... finds support when consideration is given to the comparatively weak bargaining position one in need of a bond occupies vis-a-vis that of the surety providing the bond. People v. Walker, 665 P.2d 154, 156 (Colo. Ct. App. 1983) (citation omitted).
43. Connick v. Teachers Ins. and Annuity Ass’n of Am., 784 F.2d 1018, 1021 (9th Cir. 1986) (citing Keating v. Superior Ct., 645 P.2d 1192 (Cal. Ct. App. 1982)). “California law
why Congress added termination rights in the 1976 Copyright Act (the Act), the court recognized the “weak bargaining position” concept:

Because of the impossibility of predicting the commercial value of a work upon its creation and because of the weak bargaining position of [songwriters], they sometimes assigned their copyrights in return for very little remuneration, such as small lump-sum payments or inadequate royalty rates, and were thus prevented from sharing fairly, if at all, in the rewards from works that later became commercial successes. The termination provisions give authors an opportunity to renegotiate in the light of more knowledge as to the value of their works, and thereby obtain a fair share of the rewards from their works.

requires a party to show more than simply that a standardized legal form was used and that the party had less bargaining strength than the other contracting party.” Waggoner v. Dallaire, 649 F.2d 1362, 1367 (9th Cir. 1981).

In Croce v. Kurnit, 565 F. Supp. 884, 893 (S.D.N.Y. 1982), aff’d, 737 F.2d 229 (2d Cir. 1984), Ingrid Croce, widow of singer-songwriter Jim Croce, argued that the songwriter-music publisher contract executed by her husband at the beginning of his career was unconscionable. In concluding that the contract could not be rescinded on the basis of unconscionability, the court stated:

[T]he contract[...][was a] hard bargain[, signed by an artist without bargaining power, and favored the publishers, but as a matter of fact did not contain terms which shock the conscience or differed so grossly from industry norms as to be unconscionable by their terms. The contract . . . [was] free from fraud and although complex in nature, [its] provisions were not formulated so as to obfuscate or confuse the terms. Although Jim Croce might have thought that he retained the right to choose whether to exercise renewal options, this misconception does not establish that the contract . . . [was] unfair. Because of the uncertainty involved in the music business and the high risk of failure of new performers, the contract . . ., though favoring the defendants, [was] not unfair.

Id. at 893 (citation omitted). Just because a contract or some of its provisions comport with the “industry standard,” however, does not mean that the industry standard is “right” or “fair,” especially where one “side” of the industry has an extreme bargaining advantage over the other.

Although the [music] industry is rife with conflicts of interest, this issue is seldom litigated. When such cases do arise, American courts have routinely refrained from interfering with standard industry practices. Although all contracts are typically reviewed with reference to their commercial setting and industry norms, considering the historical exploitation and victimization of recording artists, this general rule fails to adequately protect vulnerable artists. By relying on customary practices, the courts countenance a vicious cycle of exploitation.


The termination provisions were by no means the first attempt by Congress to deal with unremunerative transfers. Such transfers have constituted an enduring problem under the copyright laws. The 1909 Act sought to protect authors from unremunerative transfers by splitting the period of copyright into an original and
B. Adhesion Contracts

Adhesion contracts exist because of disparate bargaining positions.47

In many cases of adhesion contracts, the weaker party lacks not only the opportunity to bargain but also any realistic opportunity to look elsewhere for a more favorable contract; he must either adhere to the standardized agreement or forego the needed [relationship]. . . . 48

An adhesion contract is a form contract created by the stronger of the contracting parties. It is offered on a “take it or nothing” basis. Consequently, the terms of the contract are imposed on the weaker party who has no choice but to conform. These terms unexpectedly or unconscionably limit the obligations of the drafting party. Because of these circumstances, some courts look past the wording of the contract and consider the entire transaction in order to effectuate the reasonable expectations of the parties.49

However, adhesion contracts are not inherently unenforceable or void on their face.50 “[A] contract of adhesion is fully enforceable

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47. See Todd D. Rakoff, Contracts of Adhesion: An Essay in Reconstruction, 96 HARV. L. REV. 1173 (1983). There is a considerable difference between a contract of adhesion and a standard-form contract. Where contracts of adhesion are, at least from one point of view, inherently unfair, standard-form contracts are a necessity of modern business relationships. In fact, one might classify some relationships between businesses and between businesses and consumers “standard-form relationships,” such as shipping a package on an overnight service or opening a credit-card account. These relationships simply would not justify and do not need negotiated-from-scratch agreements, especially where the industry is government regulated.


50. It would be unreasonable to suggest that the use of standard form contracts is, in itself, objectionable or unconscionable. ** * Although standard form contracts are not objectionable in the abstract, they do tend to be one-sided documents. ** * The contract may so decisively favor the stronger party that it becomes oppressive. The exact nature of the oppressive or unfair element[s] may vary greatly. ** * The common factor found . . . is the “unconscionability” of the bargain.
according to its terms unless certain other factors operate to render it otherwise. A finding of undue oppression or unconscionability may be such a factor . . . .”

C. Strict or Narrow Construction

When weak bargaining position has caused a party to enter into a contract of adhesion, that party may later receive some benefit. A court, although unwilling to void the contract on grounds of unconscionability, will construe the provisions of the contract narrowly against its drafter. For example, in a case concerning the licensing of U.S. film and television rights in South Africa, the court stated:

Because of the unequal economic positions of the parties, [the plaintiff’s] inability to bargain over the terms of the contracts, and the fine print nature of the documents which disabled [the plaintiff] from understanding the contract and caused him to rely on defendant’s representations as to the legal effect of the documents, these contracts can be described as contracts of adhesion. Provisions of adhesion contracts can rarely be understood to be the expressions of all the desires and expectations of the parties. For this reason, oral evidence should be admitted to determine the intention of the parties to these contracts, and once admitted, the contracts should be narrowly construed against the party drafting them . . . . “Where one of the parties is in a disadvantageous bargaining position because the provisions are standardized and stereotyped, such contracts should be narrowly construed against the writer.”

Are exclusive long-term songwriter-music publisher agreements ever voided on any or all of the foregoing bases? Yes. In England, courts have voided such contracts in three cases known as the “English Music Trilogy.” In A. Schroeder Music Publishing Co. v. Macaulay (Macaulay), Clifford Davis Management Ltd. v. WEA Records Ltd. (Davis), and O’ Sullivan v. Management Agency and Music Ltd. (O’Sullivan), the courts voided the contracts as unconscionable restraints of trade. The contracts were “[o]pressively one-sided and [because] the songwriters . . . were not represented by attor-
neys or advisers and lacked equality of bargaining power with the publishers." 57 Further, "[t]here was no indication in either of the [first two] English decisions that there had been substantial activity by the music publisher which resulted in the distribution and sale of successful artistic creations produced by the songwriters." 58

In Macaulay, the songwriter contracted with the music publisher to write songs for five years, but the standard-form contract contained no provision requiring the music publisher to engage in any exploitation of the songwriter's compositions. 59 While there are no cases in the United States on this precise subject, there is precedent for this proposition. In M. Witmark & Sons v. Peters, 60 a songwriter-music publisher contract was held unenforceable because the contract required so much from the songwriter and so little from the music publisher by way of exploitation obligations. 61 Nonetheless, standard-form contracts containing little or no exploitation obligation on the part of the music publisher have been the rule in the United States for many decades. 62

The Davis decision involved a suit by Clifford Davis, the former manager of Fleetwood Mac. Christine McVie and Robert Welch signed music publishing contracts with Davis when he was Fleetwood Mac's manager. 63 Davis alleged that Fleetwood Mac members Christine McVie and Robert Welch were still under music publishing contracts with him and that Fleetwood Mac could not release an album.

58. Id. at 1313. In using the language "distribution and sale of successful artistic creations produced by the songwriters," the Bonner court shows its ignorance of what music publishers should do for songwriters. Id. Had the court better understood the nature of such agreements it might, instead, have stated: "recording and release of the songwriter's compositions by artists on major labels."
59. [In his opinion, Lord Diplock] emphasized the difference between freely negotiated contracts and standard form contracts offered on a "take it or leave it" basis and suggested that in the latter there was greater need for vigilance on the part of the courts to see that these forms were not used to facilitate unconscionable bargains.
60. 149 N.Y.S. 642 (N.Y. Sup. Ct. 1914).
61. Id. at 644.
62. My advice to up and coming songwriters signing with a publisher . . . for the first time is to limit the number of songs [conveyed] as much as possible. Your bargaining power is probably at its weakest. Your first deal will probably be one-sided, against you. Avoid tying up your entire catalog, past, present and future. As you achieve success and your bargaining position strengthens, you will be able to negotiate future contracts that are more advantageous to you.
63. Id. at 536.
containing their latest songwriting efforts without his permission.\textsuperscript{64} Davis sought an injunction preventing the release of the album in England.\textsuperscript{65} In reversing the injunction granted by the trial court, the appellate court relied upon the conflict of interest inherent in Davis' position as both the group's manager, and McVie's and Welch's music publisher simultaneously, and on its view that the terms of the contracts were "manifestly unfair."\textsuperscript{66} The court based the unfairness idea on the fact that "the composers were bound for ten years while the publisher had no corresponding obligation. The court determined that the consideration for the copyright transfers was 'grossly inadequate.' As a result, the court held that the inequality of bargaining power rendered the agreements unenforceable and set aside the copyright assignments."\textsuperscript{67}

In \textit{O'Sullivan}, the issue was whether personal management, record production, and music publishing contracts should be set aside as "unreasonable restraints of trade" because of the "undue influence" of Gordon Mills, singer-songwriter Gilbert O'Sullivan's personal manager and major shareholder in the production and publishing companies.\textsuperscript{68} O'Sullivan was victorious in both the trial and appellate courts.\textsuperscript{69}

[The recording and publishing companies "knew they were dealing with a young and inexperienced man who was content to put himself entirely in their hands and relied entirely on them to give him a fair deal."\textsuperscript{70} * * * The court held the contracts voidable and ordered an accounting of profits to O'Sullivan less reasonable remuneration for work performed by the defendant companies. It also ordered the return of the master recordings and copyrights to O'Sullivan.\textsuperscript{71}

\textsuperscript{64} Gilenson, \textit{supra} note 43, at 535-36.
\textsuperscript{65} \textit{Id.}
\textsuperscript{66} \textit{Id.} at 536-37.
\textsuperscript{67} \textit{Id.} at 537. \textit{See also} Buchwald v. Katz, 503 P.2d 1376 (Cal. 1972), involving the band Jefferson Airplane. "The court ... held that the manager obtained publishing agreements from the group in violation of his fiduciary duty as he did not inform the group of other publishing offers that would have been to their advantage." Gilenson, \textit{supra} note 43, at 544 n.50.
\textsuperscript{68} Gilenson, \textit{supra} note 43, at 537-38.
\textsuperscript{69} \textit{Id.} at 538-39.
\textsuperscript{70} \textit{Id.} at 539 (footnote omitted).
\textsuperscript{71} \textit{Id.} (footnotes omitted).

[Another] example of ... economic conflict involved singer-songwriter Bob Dylan and his personal manager Albert Grossman. Dylan signed his first publishing deal, with Dutchess Music, for a $500 advance. Dissatisfied with this original deal, Grossman convinced Dylan, who had yet to achieve a significant level of success, to repurchase his publishing rights from Dutchess. Six months after entering the Dutchess agreement, Dylan repurchased the publishing rights for $500. Grossman then reached an agreement with M. Witmark & Sons Publishing, which
Sometimes, having no contract is better for the songwriter. Take the case of Essra Mohawk, who had a “change of heart” about conveying one of her songs to a publisher. In November, 1985, Mohawk wrote the words and music to *Change Of Heart*. The following January, she made a demo of that song plus a few others. On February 13, 1986, Mohawk played the demo tape for Walter Kahn, a recording studio owner in Philadelphia. Kahn expressed interest in *Change Of Heart* and, on February 14, called Mohawk and proposed to “record and shop” the song in exchange for the publishing rights. No formal agreement was reached at that time. On February 16, Mohawk and Kahn began working on a new demo of *Change Of Heart*, and Kahn told Mohawk he would send her a publishing contract on the song. He did so on February 19. Mohawk reviewed the contract and told Kahn it was unacceptable.

On February 20, Kahn informed Mohawk that he would turn the contracting matter over to his attorney, an entertainment-industry specialist, and that she could negotiate with him. Shortly thereafter, Kahn’s attorney called Mohawk and discussed her concerns. He indicated that he would send her a revised document. On February 24, Kahn told Mohawk he wanted to resolve their differences before doing further work on the *Change Of Heart* demo, but he continued to work on the production.

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paid Dylan a $1,000 advance and Grossman 25% of the publishing royalties. At the end of the three-year contract, Grossman convinced Dylan to start his own publishing company. With the formation of Dwarf Music, Dylan’s own publishing company, Grossman’s stake increased to 50% of Dylan’s total publishing income. This was in addition to his 20% managerial commission. Furthermore, the managerial commission was applied against Dylan’s own 50% interest in the publishing royalties, giving Grossman a double commission on a single source of cash flow. Grossman’s advice was largely self-serving, exploiting Dylan’s business naivete for his own benefit. Because Dylan was incensed by the exorbitant percentage taken by Grossman, he refrained from publishing songs for a five-year period to avoid sharing the income with Grossman (footnotes omitted).

*Id.* at 544 n.129.

73. *Id.*
74. *Id.* at *2.*
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.*
In early March, Kahn’s attorney notified him that he could not make the revisions to the contract without a $1,500 retainer, whereupon Kahn decided he would make the necessary revisions himself. During the first two weeks of March, Kahn and Mohawk continued to work on the demo, but Kahn did not present a revised contract to Mohawk. They did not reach an agreement, but Kahn reiterated that a contract had to be entered into before work could continue.

By April 1, the new Change Of Heart demo was complete. Mohawk asked for and received a copy of the demo. From April 7 to April 11, Kahn pitched a number of songs, including Change Of Heart, to several record companies in Los Angeles. There was some initial interest, but no one put the song on hold. Later that month, “after deciding never again to become involved in the recording of any songs without signed agreements,” Kahn moved to Los Angeles. He continued to pitch the Change Of Heart demo until June 11.

On May 7, Bonnie Ross, a friend of Mohawk’s, called Mohawk to ask if she could pitch any of Mohawk’s songs to singer-songwriter Cyndi Lauper. Ross and Mohawk met that evening, and Mohawk played Ross the Change Of Heart demo produced by Kahn.

Later that month, Ross played Change of Heart for Lauper, and Lauper expressed interest in the song. On May 27, Mohawk agreed to allow Lauper to make some changes to the lyrics and music and to assign a 50% interest in the copyright to the song to Lauper’s music publishing company in return for Lauper’s promise to record the song. The contract specified that Lauper and Mohawk would be co-publishers of the song and that Mohawk would receive 100% of the writer’s share of royalties. Five days earlier, Mohawk advised Kahn to discontinue pitching Change Of Heart because Lauper planned to record and release the song. After Mohawk executed the contract with Lauper, Mohawk executed a separate agreement assigning ten percent of all royalties she might receive from Change Of Heart to Bonnie Ross.

82. Id.
83. Id.
84. Id. at *3.
85. Id.
86. Id.
87. Id.
88. Id.
89. Id.
90. Id. at *4.
91. Id.
92. Id.
93. Id.
Upon hearing that Lauper was to record the song and that he was to receive nothing in the bargain, Kahn "strenuously objected" and advised Lauper's associates that he owned the copyright to the song.94 Apparently undaunted, Lauper released an album containing the song in September, and Change Of Heart was released as a single in November.95 On February 14, 1987, Change Of Heart reached number three on the Billboard pop chart, and this lawsuit followed.96 After the bench trial, the court found that there was no written conveyance of the copyright from Mohawk to Kahn as required by the Act.97 The court, while acknowledging that Kahn "[d]id his best to shop [the song] in both California and New York," nonetheless found that in producing and pitching the demo without a written agreement, he had acted at his peril.98 Accordingly, the court found that Mohawk owed no duty to Kahn, was not unjustly enriched, and had not acted unconscionably.99 In fact, the court stated that to require Mohawk to compensate Kahn would be "unconscionable."100

III

The Contents of a Standard-Form Long-Term Exclusive Songwriting-Music Publishing Agreement

The following analysis attempts to address various problems inherent in songwriter-music publisher contracts by intensely scrutinizing individual provisions within a contract.101

94. Id.
95. Id.
96. id.
97. id.
98. Id. at *6.
99. Id. at *7-*9.
100. Id. at *9.
101. The italicized contract clauses appearing in Section III are derived from four separate contracts (see the footnote following each quoted provision for the specific source of that provision). None of the contracts were comprehensive or well organized, in the author's view. In addition, none of them contained all of the topics found in this section, although each topic (save droit moral) included in this section was found in at least one of the four contracts. For purposes of contrast, the most one-sided of similar provisions in the four contracts was used in this section. Much of the bracketed material represents stylistic changes made by the author for purposes of stylistic consistency throughout the entire "contract."

How do you avoid being intimidated by the "standard" form? As soon as you are handed a "standard" contract and a pen to sign it with, say "thank you" and that you'll have your lawyer look it over at once. Then go out and find a competent music attorney!

Carter, supra note 62, at 5. However, not even a "competent music attorney" can improve a contract that the music publisher offers to the songwriter on a "take it or leave it" basis.
A. General Provisions

1. Nature of Agreement

Publisher hereby employs Writer to render Writer's services as a songwriter and composer and otherwise as may hereinafter be set forth. Writer hereby accepts such employment and agrees to render such services exclusively for Publisher during the term hereof and upon the terms and conditions set forth herein.  

There is no landmark or leading-case litigation at the appellate level considering this language, but it is potentially controversial because of the major effect it could have on the ultimate ownership of songs. This language could be construed to mean that the relationship between the music publisher and the songwriter is a "work made for hire:" the relationship of an "employer/employee" rather than, for example, that of a "corporation/independent contractor." If the relationship is employer/employee, the termination provisions of the Act would not come into effect. In other words, it is clear that songwriters acting as their own employer can regain their copyrights after 35 years. However, should a songwriter create works of authorship as an employee of a company, the songwriter could never own the copyrights in the first place. Such copyrights would have been the property of the music publisher from the moment of creation. In such cases, no copyright interest ever existed in the songwriter that could later be terminated.

102. MEDOW, supra note 33, § 170-3.

[This provision establishes an "employment" relationship between the parties. In many current forms, the publisher does not "employ" the writer, but merely "engages" his services. The principal reason for a publisher to choose an employment form [of contracting] for the relationship is found in the..."writer for hire" provisions of the [Act]. . . . By definition under the [Act], the copyright vests in the "author" of a work. If, however, an individual creates a work while in the employ of another and within the scope of his employment, the "author" is the employer, not the individual. *** [W]ords alone are not sufficient to create the relationship. The publisher must actually be in a position of controlling the result of the writer's activities as a songwriter in order to validate his status as an employer of a "writer for hire." *** Many publishers will insert the employment language and claim to be the employer of a "writer for hire" knowing that they do not fulfill the criteria and leaving their status as an employer for determination at a later time by the courts if the writer decides to challenge that status.]

103. See NSAI HANDBOOK, supra note 23, at 15.


105. In a 1990 dispute over part of the copyright to the 50s and 60s rock classic Good Golly Miss Molly, the court had to decide whether co-writer Robert A. Blackwell had written the song as a "work made for hire." Marascalco v. Fantasy, Inc., No. CIV. 88-675, 1990 WL 257290 (C.D. Cal. Oct. 24, 1990).

Fantasy [the eventual successor in interest to Venice, the song's original publisher] asserts that Blackwell co-wrote the Song within the course and scope of his
Given all the language in the standard-form contract concerning
songwriters conveying copyrights to music publishers, this construc-
tion might seem problematic for use by a music publisher in litigation. However, there is a somewhat logical, if duplicitous, argument in
favor of the proposition: first, that the work made for hire construc-
tion concerns only songs written during the term of the agreement;
and that second, the conveyance language concerns songs the song-
writer has written or co-written before becoming an employee of the
music publishing company and any copyrights or portions of copy-
rights the songwriter might own vis-a-vis songs written by others.

There are other problems with this language. Under current
copyright law, songs written as “works made for hire” have a copy-
right duration period of 75 years, while songs written otherwise
have a copyright life extending 50 years beyond the date of death of
the last surviving author. The music publisher is willing to trade the
shorter copyright life of the song for the extra 40 years (75 years ver-
sus termination after 35 years) of ownership that circumventing the
termination provisions of the Act would bring the publisher. Also,
ever having owned the copyright, the songwriter would have no op-
portunity to bargain on such controversial subjects as the music pub-
lisher’s “right” to change fundamental elements of a musical

employment with Venice. If this were true, then Fantasy would own the renewal
interest as Venice’s successor in interest. However, based on the evidence
presented, Blackwell co-wrote the Song as an independent songwriter, and, there-
fore, was a co-owner of the Song’s original copyright. In reaching this conclusion,
the court relies on the Standard Songwriter’s Contract ..., executed in 1956, in
which Blackwell assigned his copyright interest, as an author of the Song, to Ven-
ice, as the Song’s publisher. If Blackwell had written the Song in the scope
of his employment, he would have had nothing to assign, and the Contract, as it
relates to him, would have been meaningless.

Id. at 1. “One wonders how many songwriters have signed contracts accepting employ-
ment with publishers without understanding what they may be giving up in the process.”
NSAI HANDBOOK, supra note 23, at 17.

106. See Medow, supra note 33, §§ 170-7 to -12.

107. Id. at § 170-7(a) (first paragraph).

108. Id. at § 170-8(c) (first paragraph). While there are no cases on point, surely this
argument would fail where the songwriter had executed individual copyright conveyance
forms to the music publisher on songs created during the term of the agreement.


111. See NSAI HANDBOOK, supra note 23, at 16. Contract language alone, however,
may not determine whether the relationship is one “for hire” or whether the creator is an
independent contractor. See Community for Creative Non-Violence v. Reid, 490 U.S. 730
(1989).
composition and reduce the songwriter’s share of royalties. Songwriters should avoid the “employment” language in this provision.  

2. Definitions

For purposes of this Agreement, “party” means and refers to any individual, corporation, partnership, association or any other organized group of persons or the legal successors or representatives of the foregoing. Whenever the expression “the term of this Agreement” or words of similar connotation are used herein, they shall be deemed to

112. NSAI Handbook, supra note 23, at 19. A recent commentator indicated that the “work made for hire” provision in music publishing contracts has been in such documents since “the early years of the recording industry.” Joseph B. Anderson, The Work Made for Hire Doctrine and California Recording Contracts: A Recipe for Disaster, 17 Hastings Comm/Ent L.J. 587, 588 (1995). Music publishing contracts, the commentator stated, include “work made for hire” provisions for the following reason:

[Publishing companies ... felt they needed to own, to as large an extent as possible, the music they intended to [market]. [Outright] [o]wnership of the music gave the publishing companies the right to license it and collect on it as easily and profitably as possible ... In the case of less well-known composers, the [publishers] hired them as employees on a day-to-day basis to crank out tunes ... In the case of well-known composers, the [publishers] took ownership interests in the compositions and, in addition to flat-fee compensation, agreed to pay ... to the [composers] (the article stated “artists” but surely meant “composers”) a percentage, or royalty, of the money the [publisher] actually collected on the songs (footnote omitted).

Id. at 589.

While this may be true, Anderson’s support for his propositions was not as thoroughly documented as it might have been, and the article was further complicated by an inconsistency in places regarding whether the author was referring to songwriters or recording artists or perhaps both. If the author is asserting that “work made for hire” provisions have been there all along and that much of songwriting, historically, has been on a “work made for hire” basis, several competing ideas seem worth noting. First, simple assignment of the copyright from the songwriter to the music publisher would have given the music publisher the “right to license [the music] and collect on it.” Second, there are apparently no reported cases on the issue of “work made for hire” contract language as opposed to “copyright conveyance” contract language in the historical context of songwriter-music publisher relationships. Third, there exists a large body of case law on the subject of renewal rights under the 1909 copyright statute, a subject that seemingly would not have come up with such frequency had most songwriting been accomplished on a “work made for hire” basis where renewal would not have been under the control of the songwriters or their heirs.

Hence, while there may routinely have been “work made for hire” provisions in songwriter-music publishing contracts, the practice may largely have been discontinued in favor of copyright conveyance from songwriters to music publishers, including renewal rights, with the “work made for hire” language perhaps having been resurrected after passage of the current copyright law and its non-assignability of termination rights. At any rate, this interesting historical subject, specifically concerning songwriters as opposed to recording artists or singer-songwriters, would seem ripe for research. Otherwise, Anderson did much in the article to flesh out the duplicitousness and disingenuousness of some recording companies’ practice of engaging in employment relationships where all the advantages go to the employer record company and all the disadvantages go to the employee recording artist.
In this Agreement and any and all renewals, extensions, substitutions or replacements of this Agreement, whether expressly indicated or otherwise.113

While considerably incomplete, this provision is non-controversial.

3. Term of Agreement

The initial term of this Agreement shall commence as of (date) and shall continue through (date). Writer hereby grants to Publisher [some number of] separate and irrevocable options, each to renew this Agreement for a one (1) year term, such renewal terms to run consecutively beginning at the expiration of the initial term hereof, all upon the same terms and conditions as are applicable to the initial term except as otherwise provided herein. Each option shall be exercised only by written notice to be sent by Publisher to Writer not less than ten (10) days prior to the commencement of the renewal term for which the option is exercised.114

Here, the options belong only to the publisher, and no specific consideration is given for them. The NSAI Handbook suggests the initial term should be no less than a year and indicates that “[i]t is reasonable to expect a [music] publisher to ask for at least one 1-year option . . . .”115 The NSAI Handbook suggests songwriters should “think seriously” before entering into an agreement for more than three years original term plus publisher’s options because any publisher’s options beyond that time would “more than likely not compensate you adequately because your value to the publisher would have increased.”116

The NSAI Handbook contains another suggestion for dealing with option terms.

Asking a publisher to earn options has, to date, been rare[ly successful], but do not preclude the possibility. Whether you are an advanced or entry-level songwriter . . . , try to get a clause in your contract which requires the publisher to earn options based on the number of songs cut, the amount of songwriter income earned or, in lieu of either of those, an amount of money to purchase the option.117

113. MEDOW, supra note 33, § 170-25.
114. Id. § 170-5 to -6. “Generally, publishers attempt to secure the longest possible term of years.” Id. § 170-6.
115. NSAI HANDBOOK, supra note 23, at 12.
116. Id.
117. Id. at 13. Publishers, of course, tend to see the matter differently.

Options customarily reside solely in the publisher. Since advances are customary with an agreement of this type, a publisher who has spent time, effort and energy developing a writer will generally not be willing to allow the writer to decide whether the writer is willing to continue with the . . . contract. If the writer had the option to terminate . . . at the first possible time after the moment of success,
4. Copyright Conveyance

Writer hereby irrevocably and absolutely assigns, conveys and grants to Publisher, its successors and assigns (a) all rights and interests of every kind, nature and description in and to all original musical compositions and all original arrangements of musical compositions in the public domain which have heretofore been written, composed or created by Writer, in whole or in part, alone or in collaboration with others, including but not limited to the titles, lyrics and music thereof and all world-wide copyrights and renewals and extensions thereof under any present or future laws throughout the world, to the extent any of the foregoing shall not heretofore have been conveyed by Writer to an unrelated third party; and (b) all rights and interests of every kind, nature and description in and to the results and proceeds of Writer's services hereunder, including but not limited to the titles, lyrics and music of all original musical compositions and of all original arrangements of musical compositions in the public domain and all worldwide copyrights and renewals and extensions thereof under any present or future laws throughout the world, which shall be written, composed or created by Writer during the term hereof, in whole or in part, alone or in collaboration with others; and (c) all rights and interests of every kind, nature and description in and to all original musical compositions and all original arrangements of musical compositions in the public domain which are now directly or indirectly owned or controlled by Writer, in whole or in part, alone or with others, . . . as the employer or transferee of the writers or composers thereof or otherwise, including the titles, lyrics and music thereof and all world-wide copyrights and renewals and extensions thereof under any present or future laws throughout the world; all of which musical compositions, arrangements, rights and interests Writer hereby warrants and represents are and shall at all times be Publisher's exclusive property as the sole owner thereof, free from any adverse claims or rights therein by any other party (all such musical compositions and arrangements hereinafter being referred to as "Compositions.")

Without limiting the generality of the foregoing, Writer acknowledges that the rights and interests hereinabove set forth include Writer's irrevocable grant to Publisher, its successors and assigns, of the sole and exclusive right, license, privilege and authority throughout the entire world with respect to all Compositions, whether now in existence or whether created during the term hereof, as follows:

(a) To perform and license others to perform the Compositions publicly or privately, for profit or otherwise, by means of public or private performance, radio broadcast, television, or any and all other means of media, whether now known or hereafter conceived or developed.

(b) To substitute a new title or titles for the Compositions or any of them and to make any arrangement, adaptation, translation, dramatization or transposition of any or all of the Compositions or of the

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the writer would simply cause the [contract] to expire, thus "depriving" the publisher of the anticipated fruits of his labor in developing the writer.

Medow, supra note 33, § 170-6 to -7.
titles, lyrics or music thereof, in whole or in part, and in connection with any other musical, literary or dramatic material, and to add new lyrics to the music of any Compositions or new music to the lyrics of any Composition, all as Publisher may deem necessary or desirable in its best business judgment.

(c) To secure copyright registration and protection of the Compositions in Publisher's name or otherwise, as Publisher may desire, at Publisher's own cost and expense, and at Publisher's election, including any and all renewals and extensions of copyright under any present or future laws throughout the world, and to have and to hold said copyrights, renewals and extensions and all rights existing thereunder, for and during the full term of all said copyrights and all renewals and extensions and all rights existing thereunder, for and during the full term of all said copyrights and all renewals and extensions thereof.

(d) To make or cause to be made, and to license others to make, master records, transcriptions, soundtracks, pressings and other mechanical, electrical or other reproductions of the Compositions, in whole or in part, in such form or manner and as frequently as Publisher shall determine, including the right to synchronize the Compositions with sound motion pictures and to use, manufacture, advertise, license or sell reproductions for any and all purposes, including, without limitation private and public performances, radio broadcast, television, sound motion pictures, wired radio, phonograph records and any and all other means or devices, whether now known or hereafter conceived or developed.

(e) To print, publish and sell, and to license others to print, publish and sell, sheet music, orchestrations, arrangements and other editions of the Compositions in all forms, including, without limitation, the inclusion of any or all of the Compositions in song folios, compilations, song books, mixed folios, personality folios and lyric magazines with or without music.

(f) Any and all other rights now or hereafter existing in all Compositions under and by virtue of any common law rights and all copyrights and renewals and extensions thereof including [the grand rights and] so-called small performance rights.\[118\]

The first problem that arises from this rather long and arduous provision is in (a) (first paragraph) where the songwriter conveys to the music publisher all the songs she has ever written not previously conveyed to another music publisher. The problem with this provision is twofold: (1) the songwriter may simply be unaware of this fact; and (2) even if aware, there is no specific consideration flowing to the songwriter from the music publisher in return for what may be a decade of hard work, not to mention the thousands of dollars the songwriter may have spent on demos of these existing songs (that the songwriter may even turn over to the music publisher for the music publisher's use in exploiting such songs). The NSAI Handbook states

\[118\] Medow, supra note 33, § 170-7 to -12.
that where a songwriter is "bringing an existing catalog into a new deal, [the songwriter] should expect to be compensated,"119 whether by outright purchase, up-front advance, larger monthly advance, co-publishing, copyright conveyance per song (all or part) upon successful exploitation, some combination of the foregoing, or by some other method.120

The second problem is in (b) (first paragraph) where, for songs written pursuant to the agreement, the songwriter conveys all renewal and extension rights under "any present or future laws throughout the world." It is not a good idea, generally, to bargain away potential benefits from future domestic legislation, foreign legislation, or international treaties, at least not without some kind of specific *quid pro quo*.

The third problem is in (c) (first paragraph) where the songwriter conveys to the music publisher any musical copyrights she may own of songs she did not write, or that she wrote only a part of yet owns the copyright interests of the co-writer(s), such as where she co-wrote a song and the co-writer conveyed his half of the copyright to her in return for her subsidizing the cost of producing a demo on the song. The problem here is, again, that the songwriter may be unaware that she is conveying any such copyright interests. Even if she is aware, no specific consideration flows from the music publisher to the songwriter in return for such copyright interests.

Beginning with "Without limiting . . .," most of the remainder of this provision can be construed to be superfluous and should be avoided in the interest of a more readable document. More or less, this language grants the music publisher all the rights that copyright owners have under the Act. It is, therefore, superfluous because a simple and complete copyright conveyance automatically conveys these rights.121 However, while superfluous, the specific inclusion in this provision of lettered-paragraph (b) prompts a discussion of why songwriters should try, in conveying copyrights, not to convey the entire "bundle of rights"122 granted to copyright owners by federal law, specifically the right to prepare derivative works.123 While lettered-paragraph (b) does not use the term "derivation," the language used

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119. NSAI HANDBOOK, supra note 23, at 58.
120. Id. at 58-59.
describes how a derivation occurs. The provision states that the music publisher has the right to completely change any song concerning which the copyright has been conveyed from the songwriter to the music publisher. The publisher can substitute new lyrics, substitute a new melody, or anything in between, i.e., to "derive" a second work from the first work.

For example, a music publisher could hire another songwriter to write a somewhat different melody than contained in an original song, leaving the original songwriter's melody partly intact. This could result in a decrease of the original songwriter's royalties proportionate to the degree of change effectuated by the copyright-owning music publisher. This assumes, of course, that it is the derivation, and not the original composition, that is ultimately, or in substitution of the dormant original composition, exploited by the music publisher. The law on this point is not at all well settled. In Cortner v. Israel, 124 several songwriters co-wrote the theme to ABC's Monday Night Football, titling the composition ABC's Monday Night Football Theme, and assigning the copyright to ABC by contract. 125 In the agreement, "ABC was granted all publishing . . . rights in the [composition] as its sole and exclusive property . . . ." 126 ABC used the theme for several years and paid the songwriters royalties called for by the agreement. 127 The controversy began when ABC employed another songwriter "to write a new, similar derivative theme for future use on the same program . . . ." 128 With the copyright to the derivative work residing completely in ABC under the "work made for hire" provision of the Act, 129 ABC then began using the derivative work in place of the original composition. 130 Here is where the court's opinion becomes murky. 131

Since the creators of the original composition sued ABC, it is safe to assume that ABC, once it began using the new theme, either stopped making royalty payments to the creators altogether or reduced its royalty payments to them in relation to the degree of change contained in the derivation. If royalty payments continued but at

124. 732 F.2d 267 (2d Cir. 1984).
125. Id. at 269.
126. Id.
127. Id. at 270.
128. Id.
129. Id.
130. Id.
131. The court chastised the lawyers who prepared the conveyance documents in this case, stating that the appeal "illustrates the confusion that can occur when lawyers indiscriminately use multiple contracts (some on standard forms) in the transfer of copyright interests without giving careful consideration to the consequences of their action[s]." Id. at 268. The court's own opinion was a bit short of quality writing, as well.
some kind of proportionately reduced rate, on what logic did ABC unilaterally decide how much to reduce the creators' royalties? Further, the court does not indicate whether ABC's music publishing arm, once ABC began to use the new theme, took any one or more of the following actions: (1) Did ABC notify the creators' performing rights organization(s) that the original theme was no longer being used and that public performance royalties, therefore, should no longer be split between ABC's music publishing arm and the creators (as would be the usual situation); and (2) Did ABC then indicate that, from that point forward, all performance royalties should be paid entirely to ABC since it was using the new theme (which ABC had registered with the Copyright Office as a "work made for hire" completely owned by ABC)? This is necessary information to truly understand this case.

The court ruled that ABC, as the copyright owner, had the right "to prepare derivative works based on the copyrighted work" and to "acquire . . . the copyright to the new material in the derivative work" as a "work made for hire." The court also determined that "the derivative composition [did] not infringe the preexisting composition." Accordingly, the court found no infringement and affirmed the district court's grant of summary judgment for ABC. Viewed one way, the effect of this decision is that copyright-transferee music publishers can expunge their contractual obligations to pay royalties to the creators of the conveyed musical compositions by causing the creation of a derivative work which the publisher owns completely as a "work made for hire." This potentially devastating result, however, is based on a copyright infringement theory. Perhaps, as both the district and circuit courts acknowledged, the plaintiffs in this case may have had a valid cause of action in state court "for breach of an implied obligation not to use the musical theme in a way that would deprive [the plaintiffs] of their right to royalties." One solution, of course, is to utilize specific contract language. There is much to negotiate on this point, and there are a variety of ways to deal with the problem, including, for example, a provision that the music publisher be required to seek the original creator's permission before materially changing the original composition, such permission not to be unreasonably withheld by the original creator.

132. Id. at 271.
133. Id. at 272.
134. Id.
135. Id.
136. Id. (citing Nelson v. Mills Music, 104 N.Y.S.2d 605 (1951)).
Lettered-paragraph (c) contains the same "future laws" problem as in (b) (first paragraph) of this provision. Lettered-paragraph (d) is a problem because it grants to the music publisher all rights in uses of the compositions not yet conceived. This problem is explored later in this article.\textsuperscript{137} Paragraph (f) also contains language that a songwriter might specifically bargain to excise. Under the Act, this language is superfluous and of no consequence. However, should Congress amend current law, for instance, to remove the termination provisions and reinstitute renewal periods, the section (f) language that indicates the songwriter is conveying "all copyrights and renewals and extensions thereof . . ." could mean the songwriter is conveying more than she bargained away.\textsuperscript{138} There have been many disputes over the years concerning the renewal features of the Copyright Act of 1909.\textsuperscript{139} If current law remains the same, this should no longer be a problem, but it never hurts to be conservative in situations like this.\textsuperscript{140}

5. Existing Material

Upon the execution hereof, [Writer] shall deliver to [Publisher] manuscript copies or recordings of all existing [Compositions] now owned by [Writer] in whole or in part, together with a complete list of the titles thereof, on which all other parties having an ownership interest therein, if any, shall be identified and their interests specified.\textsuperscript{141}

This is generally non-controversial, assuming the songwriter understands that she is conveying her available previous work. One question, however, concerns whether any "recordings" being delivered to the music publisher by the songwriter means demos owned by the songwriter and, if so, whether the music publisher intends to use them for exploitation purposes and, if so, how and to what extent the songwriter should be compensated for them.

6. Material Created under this Agreement

[Writer] covenant[s], undertake[s] and agree[s] that, during the term of this [A]greement, [Writer] will make and deliver to [Publisher] completed manuscripts or recordings of each [Composition] promptly after the creation thereof.\textsuperscript{142}

\textsuperscript{137} See infra note 370 and accompanying text.
\textsuperscript{138} NSAI HANDBOOK, supra note 23, at 10.
\textsuperscript{140} Particularly if, as seems likely, Congress moves to some form of life plus 70 years.
\textsuperscript{141} Tree, supra note 121.
\textsuperscript{142} Id.
This is a non-controversial provision, assuming that the music publisher does not later want to argue that this provision means the songwriter is in breach of the contract unless she delivers a lead sheet or demo, paid for by her, to the music publisher.

7. **Individual Copyright Conveyances**

   If Publisher so desires, Publisher may request Writer to execute a separate agreement in Publisher's customary form with respect to each Composition hereunder. Upon such request, Writer shall promptly execute and deliver such separate agreement, and upon Writer's failure to do so, Publisher shall have the right, pursuant to the terms and conditions hereof, to execute such separate agreement in behalf of Writer. Such separate agreement shall supplement and not supersede this Agreement. In the event of any conflict between the provisions of such separate agreement and this Agreement, the provisions of this Agreement shall govern. The failure of either of the parties hereto to execute such separate agreement, whether such execution is requested by Publisher or not, shall not affect the rights of each of the parties hereunder, including but not limited to the rights of Publisher to all of the Compositions written, composed or acquired by Writer during the term hereof.\(^{143}\)

   This is a non-controversial provision.

8. **Exclusivity**

   During the term of this Agreement, Writer shall not write or compose, or furnish or convey, any musical compositions, titles, lyrics or music, or any rights or interests therein, nor participate in any manner with regard to same, for or to any party other than Publisher, nor permit the use of his name or likeness as the writer or co-writer of any musical composition by any party other than Publisher.\(^{144}\)

   This provision poses several problems. It prohibits the songwriter from conveying to a third party any copyright, unrelated to the agreement, that she may own. Second, it fails to take into account that the songwriter may previously have been under contract to another music publisher. It makes no sense to prohibit the songwriter from cooperating in the continuing exploitation of copyrights conveyed under a previous contract; further, the songwriter is likely legally obligated to help exploit such material. Finally, the songwriter, through her own music publishing efforts (e.g., as a sole proprietor or through a self-owned corporation), may have successfully exploited a song and still own all or part of the copyright to that song. It would be equally unfair to prohibit the songwriter from engaging in the further ex-

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144. *Id.*, § 170-12 to -13.
ploitation of such a copyright. If the music publisher wants to limit the songwriter in this way, compensation should be paid to the songwriter and probably to any relevant previous or other publishers as well.

This article concerns contracts that are inclusive of all songs written over the term of the agreement, i.e., while most of the same principles apply, single-song agreements are not covered. Obviously, songwriters need to be aware of the ramifications of the type contracts they might execute. Apparently, singer-songwriter Carly Simon was once confused on the subject. On May 15, 1968, she signed a contract with Elan Associates, Ltd., providing that for a term of years, Elan "would enjoy the exclusive right to publish and obtain copyrights on musical compositions written by Carly Simon." Unfortunately, Simon was already under an exclusive term agreement with Quackenbush Music, Ltd., a company she partly owned and that "had been formed to publish and hold copyrights in all songs which she composed."

From 1969 to 1971, Quackenbush obtained the copyrights to seven Simon compositions. In May, 1971, Simon realized that the Elan agreement, which she believed was a single-song agreement, was actually an exclusive-term agreement. Realizing her problem, Simon sued Elan in state court in New York to void the Elan contract on fraud grounds. A month later, Elan copyrighted the same seven songs and sued Quackenbush in federal court for copyright infringement. Quackenbush argued that the federal court lacked subject-matter jurisdiction because the controversy dealt with ownership of copyrights and not copyright infringement. The court agreed and dismissed the suit. Such misunderstandings need not occur if a songwriter educates herself on the different types of copyright agreements.

146. Id.
147. Id.
148. Id.
149. Id.
150. Id. at 462.
151. Id.
152. Id. Quackenbush's case against Elan in state court in New York did not result in a reported opinion. See also Peay v. Morton, 571 F. Supp. 108 (M.D. Tenn. 1983) (Close Enough to Perfect).
9. **Writer’s Name and Likeness**

Writer grants to Publisher, without any compensation other than as specified herein, the perpetual right to use and publish and to permit others to use and publish Writer’s name (including any professional name heretofore or hereafter adopted by Writer), Writer’s photograph or other likeness, or any reproduction or simulation thereof, and biographical material concerning Writer, and the titles of any and all of the Compositions, in connection with the printing, sale, advertising, performance, distribution and other exploitation of the Compositions, and for any other purposes related to the business of Publisher, its affiliated and related companies or to refrain therefrom. This right shall be exclusive during the term hereof and nonexclusive thereafter. Writer shall not authorize or permit the use of Writer’s name or likeness, or any reproduction or simulation thereof, or biographical material concerning Writer, for or in connection with any musical compositions, other than by or for Publisher. Writer grants Publisher the right to refer to Writer as Publisher’s “Exclusive Songwriter and Composer” or to use any other similar and appropriate appellation, during the term hereof.¹⁵³

First, the music publisher should not receive any “perpetual” rights from the songwriter. All the copyrights conveyed under the agreement by the songwriter to the music publisher will terminate or expire. The word “perpetual” should be deleted. The exclusivity provision presumes the songwriter has not previously conveyed any musical copyrights to any other music publisher. The sentence should be rewritten to remove the presumption. Further, the grant of rights from the songwriter to the music publisher is unnecessarily large. This can be an important issue should the songwriter ever become a recording artist. In *Kamakazi Music Corp. v. Robbins Music Corp.*,¹⁵⁴ singer-songwriter Barry Manilow sued a music publisher for, *inter alia*, using his name and likeness while continuing to sell print portfolios of his music after the expiration of its license to do so. The court ruled that since Manilow had consented to Robbins’ use of his name and likeness in the original license granted to Robbins, Robbins’ continued use of his name and likeness was not actionable in addition to the infringement claim that was the main cause of action.¹⁵⁵

10. **Droit Moral**

*Writer hereby waives the benefits of any provision of law known as the droit moral . . . and the benefits of any similar law of any country of the world. Writer further agrees not to institute, support, maintain or permit any claim, proceeding, action or lawsuit anywhere in the world on the ground [that] any publication or other use by

¹⁵⁵. *Id.* at 77-78.
Publisher or its assignees or licensees, including the full exercise of its rights under this Agreement, in any way constitutes an infringement or violation of any of Writer's droit moral, droit d'auteur or similar right or is in any way a defamation or mutilation of any . . . Composition or part thereof or contains unauthorized variations of the . . . Compositions. If, despite the provision of the immediately preceding sentence, such a proceeding and/or lawsuit is instituted, Writer specifically waives his or her right to any equitable relief including injunction, and any claim to monetary damages[.] Writer's sole remedy and recourse for the alleged infringements and violations shall be to require the removal of the Writer's name from all credits, advertising or publicity of or relating to any such version of the musical composition in question.\textsuperscript{156}

Literally translated from French, the term droit moral means "moral rights." However, "the phrase 'personal rights' more accurately translates droit moral than does 'moral rights,' and it is more suggestive of the theoretical basis that underlies the concept. Furthermore, it avoids any misleading connotations that attach in English to the word 'moral.'\textsuperscript{157}

Personal rights for works of authorship originated under Roman law and later became law in France and other European countries. These jurisdictions maintain a public policy that such rights are as important as the statutory economic rights in works of authorship.\textsuperscript{158} The United States has been hostile to any idea of "personal rights" for authors of creative works, at least until its recent accession to the Berne Convention. Article 6bis states:

Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.\textsuperscript{159}

\textsuperscript{156} NSAI Handbook, supra note 23, at 6-7.


\textsuperscript{158} Id.

[T]he work of the artist is inseparable from the artist's soul. The work is an extension of the creator, a representation of the person's inner spirit and vision and, therefore, as much a part of the artist as [her] arm or mind. It is a projection of the artist's personality and, as such, beyond and separate from the rights of ownership. By some, these rights are considered inalienable regardless of ownership.


The Berne Convention . . . is the world's oldest international agreement concerning the recognition and protection of intellectual property rights. Essentially, the purpose of the Berne Convention is to create a uniform international body of law with respect to the rights of authors in the works they create. Accordingly, mem-
Notwithstanding that article 6bis speaks to the creative works of all types of authors, the only domestic legislation enacted since America's accession to the Berne Convention and the enactment of the Berne Convention Implementation Act was in a limited and non-songwriting context. Because such legislation could operate as a limitation on the rights of copyright-owning music publishers, there is a desire on the part of music publishers, at least in the context of the quoted provision, to have songwriters contract away any "personal" rights they may acquire in the future.

160. It is generally agreed that the United States has never sought to protect the personal rights of authors, only their economic interests, through copyright law (perhaps with the exception of section 43(a) of the Lanham Act, though no one seriously believes Congress, in enacting that statute in 1946, intended to adopt any droit moral principles). The . . . Berne Convention . . . [which] opened for signature on September 9, 1886 [and was] last revised on July 24, 1971, finally was joined by the United States on March 1, 1989. Accession meant acceptance, at least in principle, of personal rights for literary and artistic works, but the implementing legislation, the Berne Convention Implementation Act of 1988 . . . did not go far enough in the minds of personal rights advocates in actually complying with article 6bis of the Berne Convention . . . (See also Berne Convention Implementation Act of 1988, Pub. L. 100-568, 102 Stat. 2854, codified in 17 U.S.C. §§ 101, et seq., specifically at §§ 101, 104, 116, 116A, 205, 301, 401-408, 411, 501, 504 and 801.)

As a result, personal rights advocates sought federal legislation, specifically in the area of visual art, resulting in the passage of the Visual Artists Rights Act of 1990 (citation omitted). It is important to note that the law extends personal rights protection only to visual art and not to the broader category of all literary and artistic works. Personal rights advocates state that even the Visual Artists Rights Act does not bring America in complete compliance with article 6bis. The act specifically protects [only] paintings, drawings, prints or sculptures [and] under certain highly limited circumstances. 17 U.S.C.A. § 101 (West Supp. 1992).

B. Songwriting

1. Writer’s Conscientiousness

Writer shall perform his required services hereunder conscientiously and solely and exclusively for and as requested by Publisher. Writer is a writer for hire hereunder, and all Compositions are acknowledged by Writer to be works made for hire.\(^1\)

This provision mirrors the language of the “nature of agreement” provision\(^1\) and leaves no doubt that the music publisher specifically desires a “work made for hire” relationship, for the reasons stated earlier, rather than an “independent contractor” relationship.\(^1\) This language should be avoided. Another problem with this provision is the “conscientiousness” language. “Conscientiousness” cannot be meaningfully defined in a legal context and has no place in a contract of this nature. “Exclusivity” is dealt with elsewhere in the agreement. Therefore, this provision should be completely eliminated.

2. Uniqueness of Services

Writer acknowledges that the services to be rendered by Writer hereunder are of a special, unique, unusual, extraordinary and intellectual character which gives them a peculiar value, the loss of which cannot be reasonably or adequately compensated in damages in an action at law, and that a breach by Writer of any of the provisions of this Agreement will cause Publisher great and irreparable injury and damage. Writer expressly agrees that Publisher shall be entitled to the remedies of injunction and other equitable relief to enforce this Agreement or . . . any provision hereof, which relief shall be in addition to any other remedies, for damages or otherwise, which may be available to Publisher.\(^1\)

The NSAI Handbook views this provision as duplicitous\(^1\) because it is incongruent and illogical that the songwriter should be willing to waive all benefits under the droit moral concept if what the songwriter is creating is “special, unique, unusual, extraordinary and intellectual.”\(^1\) Moreover, the way the “equitable relief” portion of this provision is written (“Publisher shall be entitled to the remedies of injunction and other equitable relief . . .”), it can be construed to mean that the songwriter consents to an injunction without an oppor-

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\(^1\) MEDOW, supra note 33, § 170-19.
\(^2\) See supra note 102 and accompanying text.
\(^3\) See supra notes 102-112 and accompanying text.
\(^4\) MEDOW, supra note 33, § 170-21 to -22.
\(^5\) See supra notes 156-160 and accompanying text.
\(^6\) Id.
tunity to be heard on the matter—not something any contracting party would want to do.\textsuperscript{167}

Under some circumstances, some music publishing companies will "let a songwriter out" of a contract under which she no longer wants to be bound. However, absent relevant contract language or a court order, publishers are not legally obligated to do so. By contrast, some other music publishing companies will go so far in the opposite direction as to appeal the decision of a federal district court upholding the decision of a bankruptcy court allowing the debtor to reject the remainder of an executory music publishing contract.\textsuperscript{168}

3. Minimum Commitment

During [the term hereof, Writer] shall deliver to [Publisher] no fewer than fifteen (15) new and original "Wholly Owned" Compositions or parts thereof aggregating fifteen (15) "Wholly Owned" Compositions (the "Minimum Commitment"). A "Wholly Owned" Composition shall mean a Composition which is written and composed solely by [Writer] and of which an undivided one hundred (100\%) percent of the entire right, title and interest throughout the world, including the copyright in and to that musical composition, is subject hereto as a Composition. A Wholly Owned Composition delivered in fulfillment of [Writer's] Minimum Commitment must be capable of commercial exploitation in [Publisher's] reasonable business judgment. A musical composition co-written by [Writer] and one (1) or more songwriters other than [Writer] shall be deemed to be only a fraction of a Wholly Owned Composition in partial fulfillment of [Writer's] Minimum Commitment, in proportion to the interest therein acquired by [Publisher] hereunder.\textsuperscript{169}

Assuming reasonable advances against royalties, this provision is non-controversial.

4. Collaboration

[Writer] shall not collaborate with any other person in the creation of any musical composition without advising [Publisher]. Any musical composition which is the result of such collaboration shall be subject to the terms and conditions of this contract and [Writer] warrant[s] and represent[s] that prior to the collaboration with any other person, [Writer] shall use [Writer's] best efforts to advise such other person of this exclusive contract so that all such musical compositions shall be published by [Publisher], where possible. In the event of such collaboration with any other person, [Writer] shall notify [Pub-

\textsuperscript{167.} MEDOW, supra note 33, § 170-21.


lisher] of the extent of interest that such other person may have in any such musical composition, and [Writer] shall use reasonable efforts to cause such other person to execute a separate songwriter's agreement with respect thereto, which agreement shall set forth the division of the songwriter's share of income between [Writer] and such other person, and [Publisher] shall make payment accordingly.  

There are two serious problems with this provision. First, were a songwriter to co-write a song without having obtained the required permission, it could be considered a breach of the agreement.  

The NSAI Handbook states that: [T]here is no reason for [a songwriter] to feel compelled to get written permission from [her publisher] to cowrite. We feel that all written-permission requirements in contracts should be deleted! Any such requirements are impediments to creativity! * * * It is much simpler to agree to discuss possible cowriters with your publisher. If your publisher objects to a specific cowriter, ask to know the reasons for [the] objections. They may well have merit and [the songwriter] may choose not to write with the prospective cowriter.  

Second, the songwriter breaches the agreement if she does not use “reasonable efforts” to acquire—free—her co-writer's portion of the copyright for her music publisher. This is bizarre, especially considering that the music publisher refuses to be obligated to use its reasonable efforts to exploit the copyrights conveyed under the agreement by the songwriter to the music publisher. This provision also overlooks the likelihood that the co-writer is himself under exclusive contract to a music publishing company.

5. Co-writing Trips

Any and all travel costs and related expenses incurred by [Publisher] on [Writer's] behalf in connection with so-called “co-writing trips” shall be fully recoupable by [Publisher] from any and all royalties paid to [Writer] or due to [Writer] . . . . Such costs shall be at [Publisher's] discretion and may not be incurred without [Publisher's] prior approval, which approval [Publisher] may withhold for any reason whatsoever.

170. Id. at 8-9. “A fairly onerous provision from the writer's point of view.” MEDOW, supra note 33, § 170-18.
171. Whether it is a contract breach or not, however, it is a problem in the creative sense. Imagine sitting around jamming with a friend or two when a song pops out—or even worse, suddenly having the opportunity to write with a truly major songwriter—and having to say, “Ah, you'll have to pardon me for a few minutes while I go wake up my music publisher and see if I can get permission to write with you.”
172. NSAI HANDBOOK, supra note 23, at 65.
173. See infra notes 180-185 and accompanying text.
Since any resulting royalties would benefit the music publisher just as much as the songwriter, it does not seem equitable that the songwriter should bear all the costs of such trips.

C. Publishing

1. Advances Against Royalties

Conditioned upon, and in consideration of, the full and faithful performance by Writer of all the terms and provisions hereof, Publisher shall pay to Writer the following amounts, in equal monthly installments, all of which shall be recoupable by Publisher from any and all royalties payable to Writer under this . . . [A]greement between Writer and Publisher . . . :

- (a) (amount) ($_______) during the initial term hereof.
- (b) (amount) ($_______) during the first renewal term (if any).
- (c) (amount) ($_______) during the second renewal term (if any).
- (d) (amount) ($_______) during the third renewal term (if any).
- (e) (amount) ($_______) during the fourth renewal term (if any).

The problem here lies in the introductory provision beginning with the language "[c]onditioned" and ending with "hereof" because the music publisher gives itself permission to withhold advances should it decide on its own that the songwriter has somehow not performed her side of the agreement fully and faithfully. This introductory provision should be excised and the sentence should begin simply with the word "Publisher." If the songwriter has breached the agreement, the music publisher has normal breach of contract remedies.

2. Demonstration Recording Obligations

[Publisher], in [its] sole discretion, shall reasonably make studio facilities available for [Writer] so that [Writer], subject to [Publisher's] supervision and control, may make demonstration record[ing]s of the Compositions and also for [Writer] to perform at such recording sessions. [Writer] shall not incur any liability for which [Publisher] may be responsible in connection with any demonstration record[ing] session without having first obtained [Publisher's] written approval as to the nature, extent and limit of such

175. Medow, supra note 33, §§ 170-26 to -27.
176. Publishers will generally not want to pay an entire year's advance in a lump sum to the writer at the commencement of the contract year, preferring to retain some control over the writer by having weekly or monthly monies to pay to the writer, which can be cut off if the writer is not performing in accordance with the terms of the agreement. As in any publishing deal, the relative bargaining power of the parties will determine the relative level of any advances, if any are given.

Id.
liability. In no event shall [Writer] incur any expense whatsoever on [Publisher's] behalf without first having received written authorization from [Publisher]. [Writer] shall not be entitled to any compensation (other than to such compensation as may be otherwise provided for herein or other than union scale, if applicable) with respect to services rendered in connection with such demonstration . . . recording sessions.\textsuperscript{177} All recordings and reproductions [of recordings] made at demo recording sessions [or thereafter] shall become [Publisher's] sole and exclusive property throughout the world, free of any claims whatsoever by [Writer] or any person deriving any rights from [Writer], including claims for recording fees and/or other services by [Writer].\textsuperscript{178} Publisher shall advance the costs for the production of demonstration recording[s], subject to the foregoing, and one-half (1/2) of such costs shall be deemed additional advances to Writer hereunder and shall be recouped by Publisher from royalties payable to Writer by Publisher under this Agreement . . . .\textsuperscript{179}

The words "in its sole discretion" beginning this provision render any contractual obligation to produce demos illusory. Once again, demo production is one of the foremost reasons that songwriters need music publishers. The remainder of the provision is generally non-controversial.

3. Exploitation Obligations

It shall be optional with [Publisher] as to which [Compositions] shall be published.\textsuperscript{180} Nothing contained in this Agreement shall obligate [Publisher] to exploit, in any manner, any of the rights granted to [Publisher] hereunder.\textsuperscript{181}

This is completely unacceptable language. It makes the contract illusory at best and unconscionable at worst.\textsuperscript{182} because there is no exploitation obligation on the part of the music publisher.\textsuperscript{183} The

\textsuperscript{177} Zomba, supra note 169, at 4.
\textsuperscript{178} MCA, supra note 174, at 9.
\textsuperscript{179} Medow, supra note 33, § 170-20.
\textsuperscript{180} Tree, supra note 121, at 1.
\textsuperscript{181} MCA, supra note 174, at 2.
\textsuperscript{182} See supra notes 54-71 and accompanying text.
\textsuperscript{183} See supra note 12 and accompanying text.

Under the current arrangement, songwriter contracts are better likened to indentured servitude! For this to change, we believe that, in all songwriter contracts, there must be clauses detailing the mutual responsibilities of both parties and the attending consequences should either party fail to perform. For too long, the publisher has hidden behind a smokescreen of confounding legalese and has shrunk from any accountability.

It is herewith noted that, when you fail to perform, you lose your gig and the publisher keeps the catalog. When the publisher fails to perform, you lose your gig and the publisher keeps the catalog! What is wrong with this picture? We suggest that you reread the preceding remark and take a moment to think long and hard about what you have read.

\textsuperscript{183} See supra note 12 and accompanying text.
"English Music Trilogy" cited earlier undergirds the idea that the music publisher's obligation to exploit the copyrights simply cannot be optional in a meaningful contract.

4. Royalties

Provided that Writer shall duly perform the terms, covenants and conditions of this Agreement, Publisher shall pay Writer, for the services to be rendered by Writer hereunder and for the rights acquired and to be acquired by Publisher hereunder, the following compensation based on the Compositions:

(a) [_____] cents ($.0[____]) per copy for each copy of sheet music in standard piano/vocal notation and each dance orchestration printed, published and sold in the United States and Canada by Publisher or its licensees, for which payment shall have been received by Publisher, after deduction of returns.

184. See supra notes 54-56.
185. See also Mellencamp v. Riva Music, Ltd., 698 F. Supp. 1154, 1157 (S.D.N.Y. 1988). In this case, singer-songwriter John Cougar Mellencamp, alleged, inter alia, that "defendants breached [the songwriter-music publisher contract] by failing to actively promote his songs . . . ." Id. at 1156. In its discussion of the issue, the court stated:

It is not necessary to use the magic words of "fiduciary relationship," or to hold that a "relationship of trust and confidence" was created by the contract, or to find that [the music publisher] became a "trustee" of the copyright for the benefit of the [songwriters] . . . . As Chief Judge Cardozo put it in Wood v. Lucy, Lady Duff-Gordon, 222 N.Y. 88, 91, 118 N.E. 214 (1917): "The law has outgrown its primitive stage of formalism when the precise word was the sovereign talisman, and every slip was fatal. It takes a broader view today. A promise may be lacking and yet the whole writing may be 'instinct with an obligation,' imperfectly expressed." Similarly, the special relationship here may not be specifically expressed, and yet the whole factual situation may be instinct with a duty which should be imposed by law upon the publisher.

The law implies a promise on the [music publisher's] part to endeavor to make the . . . copyright productive, since that is the very purpose of the assignment of [the copyright] and the correlative obligation to pay royalties, In re Waterson, Berlin & Snyder Co. v. Irving Trust Co., 48 F.2d 704 (2nd Cir. 1981). * * * Despite the reference to "fiduciary relationship" and "relationship of trust," it is clear, in context, that the court was talking about a publisher's implied-in-law contract obligation to use its best efforts to promote an author's work, where the publisher has exclusive rights in the work. The single case cited in the court's discussion of the "special relationship" between author and publisher, Wood v. Lucy, Lady Duff-Gordon, 222 N.Y. 88, 91, 118 N.E. 214 (1917) (Cardozo, C.J.), is the seminal authority on an exclusive licensee's implied promise to use reasonable efforts to generate profits from the license.


Songwriters have long claimed that their relationship with publishers is fiduciary in nature. Establishing a fiduciary relationship has important consequences because a breach by a fiduciary can result in punitive damages, rescission, and reversion of the copyrights to the [songwriter].

Gilenson, supra note 43, at 544 n.3 (footnote omitted).
(b) Ten percent (10%) of the wholesale selling price of each printed copy of each other arrangement and edition printed, published and sold in the United States and Canada by Publisher or its licensees, for which payment shall have been received by Publisher, after deduction of returns, except that in the event that any Compositions shall be used or caused to be used, in whole or in part, in conjunction with one or more other musical compositions in a folio, compilation, song book or other publication, Writer shall be entitled to receive that proportion of the foregoing royalty which the number of Compositions contained therein shall bear to the total number of musical compositions therein.

(c) Fifty percent (50%) of any and all net sums actually received (less any costs for collection) by Publisher in the United States from the exploitation in the United States and Canada by licensees of mechanical rights, [grand rights,] electrical transcription and reproduction rights, motion picture and television synchronization rights, dramatization rights and all other rights therein (except print rights, which are covered in (a) and (b) above, and public performance rights, which are covered in (d) below), whether or not such licensees are affiliated with, owned in whole or in part by, or controlled by Publisher.

(d) Writer shall receive his public performance royalties throughout the world directly from the performing rights society with which he is affiliated\(^\text{186}\) and shall have no claim whatsoever against Publisher for any royalties received by Publisher from any performing rights society which makes payment directly (or indirectly other than through Publisher) to writers, authors and composers. If, however, Publisher shall collect both the Writer's and Publisher's share of performance income directly and such income shall not be collected by Writer's public performance society, Publisher shall pay to Writer fifty percent (50%) of all such net sums which are received by Publisher in the United States from the exploitation of such rights in the Compositions, throughout the world.

(e) Fifty percent (50%) of any and all net sums, after deduction of foreign taxes, actually received (less any costs for collection) by Publisher in the United States from the exploitation of the Compositions in countries outside the United States and Canada (other than public performance royalties, which are covered in (d) above), whether from collection agents, licensees, subpublishers or others, and whether or not same are affiliated with, owned in whole or in part by, or controlled by Publisher.

(f) Publisher shall not be required to pay any royalties on professional or complimentary printed copies or record[ings] or on printed copies or records which are distributed gratuitously to performing artists, orchestra leaders and disc jockeys or for advertising, promotional or exploitation purposes. Furthermore, no royalties

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186. Royalties from the public performance of a songwriter's music go directly to the songwriter from the performing rights society to which that songwriter belongs (i.e., ASCAP (American Society of Composers, Authors and Publishers), BMI (Broadcast Music, Inc.), or SESAC (the letters no longer represent relevant words)). Music publishers receive their share of public performance royalties from these entities, as well.
shall be payable to Writer on consigned copies unless paid for, and not until such time as an accounting therefor can properly be made.

(g) Royalties as hereinabove specified shall be payable solely to Writer in instances where Writer is the sole author of a Composition, including the lyrics and music thereof. However, in the event that one or more other songwriters are authors together with Writer of any Composition (including songwriters employed by Publisher to add, change or translate the lyrics or to revise or change the music), the foregoing royalties shall be divided equally among Writer and the other songwriters unless another division of royalties shall be agreed upon in writing between the parties concerned and timely written notice of such division is submitted to Publisher prior to payment.

(h) Except as herein expressly provided, no other royalties or monies shall be paid to Writer.

(i) Writer agrees and acknowledges that Publisher shall have the right to withhold from the royalties payable to Writer hereunder such amount, if any, as may be required under the provisions of all applicable Federal, State and other tax laws and regulations, and Writer agrees to execute such forms and other documents as may be required in connection therewith.

(j) In no event shall Writer be entitled to share in any advance payments, guarantee payments or minimum royalty payments which Publisher shall receive in connection with any subpublishing agreement, collection agreement, licensing agreement or other agreement covering the Compositions or any of them.  

The introductory clause in this first sentence should be excised for the same reasons that the introductory clause in the “advances against royalties” provision should be deleted. There are additional significant language problems in this provision. Essentially, lettered-paragraphs (c) and (e) allow the music publisher to contract with itself for the collection of royalties. So long as any such agreements are arm’s length transactions they are not offensive. However, such transactions are often made and executed at something considerably less than arm’s length.  

In lettered-paragraph (d), the use of the term “net sums” suggests that the music publisher is going to deduct some unspecified and perhaps unjustified amount from the “gross sums” received. If possible, this should not be permitted. A lesser share of “gross” is always preferable to a greater share of “net.”
Lettered-paragraph (g) is a problem for two reasons, one of which involves poor drafting and the other of which is much more serious. This provision should state clearly, and it does not, what the songwriter is entitled to if: (1) the composition was co-written, (2) one or more of the co-writers is under contract to the same music publisher, and (3) one or more of the other co-writers is under contract to another music publisher. The far more serious concern with lettered-paragraph (g) is that it indicates that the songwriter's royalties can be reduced at the unilateral discretion of the music publisher and in a ratio likely decided by the number, ultimately, of co-writers. This would occur as a result of the music publisher's employment of another songwriter(s) to “add, change or translate the lyrics or to revise or change the music,” i.e., the creation of a derivative work.

Lettered-paragraph (i) allows the music publisher to retain some portion of the songwriter's royalties for tax purposes. This is another indication of the music publisher's desire to treat the relationship as “work made for hire.” Lettered-paragraph (j) indicates that the songwriter is not entitled to share in a variety of categories of royalty payments to the music publisher, including income from some important forms of licensing. An example is “synchronization” (or “sync”) rights, concerning the synchronization or matching of a copyrighted musical composition to, for example, a motion picture or television program. “Sync” rights are part of the bundle of rights conferred on copyright owners. Lettered-paragraph (j) is simply ludicrous and could gut much of the potential royalty income of the songwriter. Receiving income in this way and having no duty to apportion it to the songwriter means that the music publisher effectively owns part of the songwriter's royalties. Income either should not be received in this way or a reasonable method should be devised to apportion such income among the appropriate rights-holders.

In the United States, public performance royalties are normally distributed on a 50/50 basis by the performing rights organizations directly to songwriters and music publishers. In England, the Performing Rights Society distributes all such income to music publishers, who deduct a percentage of such income and then distribute the re-

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190. 17 U.S.C. § 106A(a)(1) (1988). “Reproduction” right is the technically appropriate term, but “synchronization” right is the term of common usage in the specific context of “attaching” sound recordings to (usually) audio-visual works.

mainder among the appropriate songwriters. Music publishers also receive “black box” income, which is income originally received by the Performing Rights Society from international sources without an attendant statistical basis for redistribution to music publishers. As a result, the Performing Rights Society distributes the money to music publishers “largely according to how much they earn in attributable royalties from that society.” In other words, the “black box” money is distributed to music publishers pro rata to their attributable earnings for the current reporting period. The music publishers must then try to figure out how to apportion the “black box” money among their songwriters.

In 1990, singer-songwriter Pete Townshend, formerly of the Who, and writer of such rock classics as My Generation and Pinball Wizard, sued Westminster Music, the music publishing company holding his catalog. Townshend felt he was not receiving his proportionate share of “black box” income. In Townshend’s view, Westminster “would not receive so much ‘black box’ income if it were not for his copyrights giving them a high share of attributable royalties.” Expressing the sentiments of many songwriters on the subject of music publishing contracts, Townshend said: “Just because somebody is 20 or 21 and a novice is no reason not to take them through agreements that are going to affect them for the rest of their lives.”

5. Accounting

Publisher shall compute the royalties earned by Writer pursuant to this Agreement and pursuant to any other agreement between Writer and Publisher or its affiliates, whether now in existence or entered into at any time subsequent hereto, on or before March 31st for the semiannual period ending the preceding December 31st and on or before September 30th for the semiannual period ending the preceding June 30th, and shall thereupon submit to Writer the royalty statement for each such period together with the net amount of royalties, if any, which shall be payable after deducting any and all unrecouped advances and chargeable costs under this Agreement or any such other agreement. Each statement submitted by Publisher to Writer shall be binding upon Writer and not subject to any objection by Writer for any reason unless specific written objection, stating the basis thereof, is sent by Writer to Publisher within two (2) years after the date said statement is submitted. Writer or a certified public account-

193. Id.
194. Id.
195. Id.
ant in Writer's behalf may, at Writer's expense, at reasonable intervals (but not more frequent than once each year), examine Publisher's books insofar as the same concern Writer, during Publisher's usual business hours and upon reasonable notice, for the purpose of verifying the accuracy of any statement submitted to Writer hereunder. Publisher's books relating to activities during any accounting period may only be examined as aforesaid during the two (2) year period following service by Publisher of the statement for said accounting period.¹⁹⁷

Here, the main issue is the two-year limitation on liability and inspection of records. In medical malpractice cases, the question arises whether the statute of limitation has begun to run.¹⁹⁸ Should it begin to run on the date the surgeon negligently left a sponge in the patient's abdomen, or on the date the patient reasonably did or should discover that her continuing abdominal pain was the result of a sponge negligently left inside her several years earlier in surgery?¹⁹⁹ If a court holds that the statute of limitations began to run on the date the tort first occurred, the statute may have expired, creating a complete defense to the cause of action.²⁰⁰ If, on the other hand, the statute of limitations is deemed to have begun running on the date the tort was or should reasonably have been discovered, the cause of action will not expire for a period of years subsequent to that time.²⁰¹ The analogy here is that the songwriter may very well have no reasonable basis for knowing or believing that there is a problem with royalty accounting for a period of years well in excess of the two year contract limitation. According to the provision, possible liability exists for no more than two-years from the date of the royalty statement, and inspection of the music publisher's books is limited to the two-year period following the date of the royalty statement.²⁰²

While it is likely that most music publishers reasonably comply with legitimate, contract-based requests to inspect their books, there

¹⁹⁷. MEDOW, supra note 33, §§ 170-17 to -18.
¹⁹⁹. Id. at 578-79.
²⁰⁰. Id. at 581.
²⁰¹. Id.
²⁰². Id.

In Contemporary Mission, Inc. v. Famous Music Corp., 557 F.2d 918, 925 (2d Cir. 1977), the court held that contractual provisions requiring a party to specify the nature of an alleged breach within a limited period of time or be barred from asserting it later were “hypertechnical.” The court in Contemporary Mission thus declined “to construe the notice provision as if it were a common law pleading requirement under which every slip would be fatal.”

can be tremendous problems. In *Charron v. Meaux*, the plaintiff songwriter brought an action against two music publishers to recover royalties allegedly due and owing. Despite numerous motions, court appearances, and three dishonored agreements, the music publishers refused to show plaintiff the records until the court finally forced the issue. The court, finding "a clear joint pattern of conduct by both defendants designed to and which in fact has resulted in a long-continuing and so-far successful frustration of the plaintiff's endeavor to obtain by discovery the amount of royalties due and owing [him]..." gave the defendants twenty days in which to comply and entered an order that non-compliance would automatically result in the awarding of a default judgment to the plaintiff. In describing the defendants' conduct as "willful and deliberate," the court stated:

> It is clear that defendants... are trying to wear plaintiff out by their tactics. Plaintiff, an individual, has clearly been put to substantial expense in terms of attorney's fees and accountant's fees only to find himself in a "revolving door." This practice by these defendants to cause the plaintiff to despair and perhaps abandon or compromise his suit, however, cannot be tolerated.

The court also found "particularly intolerable" the defendants' intimation that "some of the relevant records may no longer be available for inspection."

Singer-songwriter Shirley Goodman was involved in what is no doubt one of the more bizarre situations involving an accounting for royalties. Goodman sued the family of the deceased Leonard Lee, claiming that she and Lee co-wrote the rock 'n' roll classic *Let The Good Times Roll* in 1956 while the two were performing together as "Shirley & Lee." Goodman, who apparently did not know that Lee had copyrighted the song in his name alone or that the song had generated revenue through the years (over and above the money she may have made from it as a recording artist in the 1950s and perhaps beyond), did not file suit until 29 years had already passed. The circuit court determined that Goodman was the song's co-author and awarded her half of the song's publishing income from 1956 on-

204. Id. at 65-68.
205. Id. at 65.
206. Id. at 68-69.
207. Id. at 68.
208. Id.
209. Id.
211. Id. at 621.
212. Id.
On remand, the district court awarded her approximately $275,000. A similar case involved the 50s rock ‘n’ roll classic *Why Do Fools Fall In Love*. When the original copyright on the song was filed in 1956, the songwriters were listed as George Goldner and Frank Lymon. In truth, the song was co-written by Frank Lymon, Jimmy Merchant, and Herman Santiago, all members of a group called Frankie Lymon and the Teenagers. Merchant and Santiago filed suit in 1987, 31 years after the original copyright was filed. Defendants in the case were Emira Lymon (Frank Lymon’s widow), Morris Levy, Big Seven Music Corp., ABZ Music Corp., Roulette Records, Inc. (successors in interest to George Goldner), BMI (dismissed), and Windswept Pacific Entertainment Co., Inc. (successor in interest to the “Levy defendants:” Levy, Big Seven, ABZ, and Roulette). According to Santiago, when he and Merchant challenged [Goldner’s right to half the copyright], they were threatened with injury or worse. * * * Merchant recalls being so “sickened” at hearing Diana Ross’ remake of *Fools* on a 1981 album—for which neither he nor Santiago got a penny—that he switched to playing jazz stations in his cab. “The people who initially raped us as children still had the rights to our creation,” he says. In 1992, a federal jury decided that Merchant and Santiago each owned 25% of the song (Lymon’s estate had previously been found to own 50% of the copyright) and were due an accounting and payment, subject to clarification concerning which defendants were responsible and to what extent. In 1994, a federal magistrate, in a ruling essentially affirmed by the district court, held that Merchant and Santiago were due more than $200,000 plus pre-judgment interest from the Levy defendants and nearly $250,000 plus pre-judgment interest from

213. *Id.*
216. *Id.*
218. *Id.* at 168.
219. *Id.*
220. *Id.*
Windswept.\textsuperscript{222} Due to statute of limitations considerations, they were awarded nothing for the period 1956-1984.\textsuperscript{223} Not every royalty-accounting suit is won by the plaintiff, and not all plaintiffs wait 30 years to sue.\textsuperscript{224} In 1957, Valjo Music Publishing Corporation, owned by John Veliotes, a.k.a. Johnny Otis, sued Elvis Presley Music, Inc., Mike Stoller, and Jerry Leiber, claiming that Otis was co-writer, with Stoller and Leiber, of \textit{Hound Dog}, originally recorded by Willie Mae “Big Mama” Thornton but made famous by Elvis Presley.\textsuperscript{225} After a bench trial, the court found that Stoller and Leiber were the sole writers of the song.\textsuperscript{226} While the court also found that Stoller and Leiber had made Otis a one-third owner of the copyright to the song in 1952, the court concluded that Otis relinquished any copyright claim on \textit{Hound Dog} to Stoller and Leiber for $750 by written instrument in 1956.\textsuperscript{227}

In contrast to \textit{Goodman} and \textit{Merchant}, plaintiff David P. Jackson, Jr., lost his copyright ownership and royalty accounting suit against singer-songwriter Hoyt Axton concerning the 70s rock hit \textit{Joy To The World} precisely because he waited 21 years to sue (in comparison to 31 years in \textit{Goodman} and 29 years in \textit{Merchant}), with a decision on the merits consequently not having been reached.\textsuperscript{228} In 1970, Axton rented a recording studio and hired a number of musicians to produce demos on several songs, including \textit{Joy To The World}.\textsuperscript{229} Jackson, in the suit, did not dispute that Axton wrote the lyrics to \textit{Joy to the World}, but contended that he “wrote much of the music” at the demo session.\textsuperscript{230} Axton released the song on a solo album later that year, registering the copyright to the song exclusively in the name of his music publishing company, Lady Jane Music, and listing himself as the sole writer.\textsuperscript{231}

During live performances of the song following its release on the album, “Axton routinely told audiences that the song was written by

\begin{itemize}
  \item 222. \textit{Id.} at *8.
  \item 226. \textit{Id.} at 568-69.
  \item 227. \textit{Id.} at 568. The lawsuit, of course, arose after Elvis Presley’s \textit{Hound Dog} was released in 1957, selling millions of records.
  \item 228. Jackson v. Axtom, 25 F.3d 884, 889 (9th Cir. 1994).
  \item 229. \textit{Id.} at 885-86.
  \item 230. \textit{Id.} at 886.
  \item 231. \textit{Id.} The song later became a big hit for \textit{THREE DOG NIGHT}, generating considerable additional royalties.
\end{itemize}
himself and ‘D.P.J.R.,’ Axton’s nickname for Jackson,” who was a member of his band.232 During this period, Axton once asked Jackson to “sign a songwriter’s agreement conveying Jackson’s rights in the song to Lady Jane Music in exchange for royalties . . . , but Jackson refused.”233 Several years later, Jackson proposed to Axton that Axton buy Jackson’s share of the copyright for a lump sum, but this time it was Axton who refused, telling Jackson he was not a co-writer and had no rights in the song.234 In 1975, though, Axton told a magazine interviewer that Jackson co-wrote the song with him.235 Jackson said that by 1976 he had become aware that he could file suit against Axton but did not because he “respected Axton and felt Axton would eventually do the right thing.”236 For many years, Jackson and Axton no longer worked together, but in 1991 Jackson began once again to perform in Axton’s band.237

Jackson decided to sue after so many years when “Axton claimed sole authorship of another song that Jackson had clearly helped write.”238 Axton defended the suit by asserting that Jackson’s claims were barred by the doctrine of laches and, in the alternative, by the applicable statute of limitation.239 Further, Axton argued that “any work done on the song [by Jackson] was merely ‘work for hire.’”240 In granting Axton’s motion for summary judgment, the district court ruled that Jackson’s claim was barred by laches, finding that Jackson’s delay in filing suit was “presumptively prejudicial” to Axton.241 With respect to actual prejudice, the district court found that memories had faded and that relevant evidence had been destroyed.242

On appeal, Jackson cited Goodman for the proposition that “no co-ownership claim was brought until decades after composition of the work . . . at issue, yet the court [did not] dismiss . . . the claim on statute of limitations or laches grounds.”243 Affirming the district court’s grant of summary judgment to Axton, the circuit court, noting the case was one of first impression in the Ninth Circuit, agreed that reliance on Goodman was inappropriate because Goodman “ad-
dressed only subject-matter jurisdiction, not laches."244 The court held that "laches may be a defense to an action seeking a declaration of co-authorship (and resulting co-ownership) of a copyrightable work [because c]laims of ownership are traditionally subject to the defense of laches," citing several cases.245 In distinguishing between laches and statutes of limitation, the court said that, "[t]hough both laches and statutes of limitations may give defendants repose, laches, unlike a statute of limitations, is premised on a showing of prejudice."246

The court adopted Axton’s argument that he had been prejudiced by Jackson’s delay in bringing suit in four specific ways: (1) that Axton had arranged his business affairs around this copyright, having ultimately sold it to Rondor Music International, Inc., also a defendant in the case; (2) the faded memories of witnesses; (3) the unavailability of at least one witness; and (4) the loss of pertinent documentary evidence.247 The court was not impressed with Jackson’s testimony with respect to why he had waited so long to sue, to wit: (1) that Jackson was not a “litigious person;” (2) that “divine justice would be served;” and (3) that “he trusted Axton.”248

That Axton knew Jackson claimed to have helped write [Joy to the World] is irrelevant. Even if Jackson did help compose the music, a fact not yet established, Axton might have thought that Jackson’s efforts were merely work for hire, or Axton may have been mistaken and thought Jackson did little actual composition. Axton’s refusal to credit Jackson gave Jackson grounds, if any, to sue. Jackson’s delay in suing is what has prejudiced [Axton], not Axton’s actions with regard to a disputed claim.249

Application of the “innocent construction”250 principle to the court’s assertion that Axton may have “thought Jackson did little actual composition,” must involve Axton’s memory at the time of trial. It would be ludicrous to suggest that Axton, who had written many other songs by the time Joy To The World was composed,251 would not know at the time of composition whether he had written a song by

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244. Id.
245. Id. at 887-88.
246. Id.
247. Id.
248. Id. at 889.
249. Id. at 890.
250. Where there are two or more logical constructions of a writing, the “innocent construction” principle adopts the construction which conveys the better intentions of the writer, not the worse.
251. Axton’s mother, songwriter Mae Axton, co-wrote (among other songs) the 50s rock ‘n’ roll classic Heartbreak Hotel, originally recorded and made famous by Elvis Presley.
himself or whether he had co-written it with someone else.\textsuperscript{252} Because

\textsuperscript{252} Perhaps Axton wrote the melody to \textit{Joy To The World}, as well, and perhaps what Jackson did was put some chords with the melody Axton was singing to the lyrics he had written. Perhaps, too, Jackson was at the same time "arranging" the song. Whether either of these activities of Jackson (assuming, arguendo, that such was the case) should give rise to copyright ownership interests is an apparently unresolved (perhaps even judicially unasked) question of basic copyrightability. Given this court's view of Jackson having prejudiced Axton by his substantial delay in filing suit, none of these important substantive questions will be answered in this case (assuming no further appeals or any rehearings).

Does adding harmony to a song give rise to copyright ownership? That was the question in \textit{Tempo Music, Inc. v. Famous Music Corp.}, 838 F. Supp. 162 (S.D.N.Y. 1993), which involved a royalties dispute concerning the jazz classic \textit{Satin Doll}. In a case complicated by the unavailability of some of the principals due to death—and the passage of time generally—the court concluded, as a matter of law, that the addition of "harmony" to an existing copyright could be the subject of a new and derivative copyright if the harmony added was "original." The court stated:

Harmony is a derivative creation almost by definition. A composer generally creates a harmony to accompany a particular melody, as opposed to developing harmony in the abstract. That a particular work is a derivative work, such as the version of \textit{Satin Doll} in dispute, is, of course, no bar to copyrightability. Derivative works are explicitly included in the subject matter of copyright. However, this principle is subject to two important limitations . . . . First, to support a copyright, the original aspects of a derivative work must be more than trivial. Second, the scope of protection afforded a derivative work must reflect the degree to which it relies on preexisting material and must not in any way affect the scope of any copyright protection in that preexisting material.

\textit{Id.} at 167-68 (footnotes and citations omitted). One of the defendants argued that harmony could never be copyrightable because it is musically "common" and therefore incapable of the originality intended by copyright law, arguing that only melody and structure qualify as copyrightable elements of a song. \textit{Id.} at 168. This defendant claimed that harmony was but a centuries-old concept applied formulaically. \textit{Id.} To this, the court replied:

The court is not convinced that harmony is unprotectable as a matter of law. While we agree that melody generally implies a limited range of chords which can accompany it, a composer may exercise creativity in selecting among those chords. As [one expert] note[d], the choice of chords influences "the mood, feel and sound of a piece" (citation omitted). Creating a harmony may, but need not, be merely a mechanical by-product of melody. A composer may choose to respond to the tension created by a dissonance by resolving it to a consonance in accordance with "pre-established rules that have been accepted since the 17th century" and that have formed "the basis of . . . Western music." However, in contemporary music, and particularly in the jazz music genre, musicians frequently move beyond traditional rules to create a range of dissonant and innovative sounds. ** The choice of one particular harmonic relationship, such as the selection of secondary dominants in \textit{Satin Doll}, could be considered a creative choice.

\textit{Id.} (citation omitted). Notwithstanding an earlier case which stated, albeit in dicta, that "neither rhythm nor harmony can in itself be the subject of copyright," the court denied motions for summary judgment and ordered a trial on the issue of the originality of the harmony as constituting copyrightability. \textit{Northern Music Corp. v. King Record Distributing Co.}, 105 F. Supp. 393, 400 (S.D.N.Y. 1952).

We recognize the force of the argument that, in most instances, harmony is driven by the melody. We note further that where the composition of the melody is completed by one person and the harmony is thereafter furnished by another, the harmony may be less likely to reflect originality than in those instances in which
the court disposed of the case on the laches summary-judgment defense, it did not reach the statute of limitation and "work for hire" defense arguments. 253

Another court, however, used the statute of limitations doctrine to find in favor of the defendant. In Korman v. Iglesias, 254 songwriter Mimi Korman sued singer-songwriter Julio Iglesias, filing suit 12 years after Iglesias allegedly contracted with her to translate the French song J’ai Oublie de Vivre into Spanish. 255 Korman translated the song, naming the Spanish version Me Olvide de Vivir. 256 For her translation, Korman was to receive a "percentage of the royalties" from the Spanish version of the song. 257 Korman alleged that she signed a contract to that effect in 1978 and that Iglesias’ representative told her the contract had to be executed by the Iglesias side in Spain and that he would mail her a copy. Korman claimed she never saw the contract again. 258 The song, including Korman’s title and “a significant portion of her lyrics,” was released in 1979 and has been in distribution worldwide since. 259 “In most of the releases, Korman is credited as one of the authors of the song,” but she received no royalties from the song until 1992. 256

Between 1979 and 1990, Korman made innumerable inquiries concerning the royalties she felt she was owed. 256 She contacted Iglesias, Iglesias’ Spanish recording company, the Society General of Authors in Spain (SGAE), CBS, Disco CBS, The American Society of

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253. Jackson, 25 F.3d at 890.
255. Id. at 1011-12.
256. Id. at 1012.
257. Id.
258. Id.
259. Id.
260. Id.
261. Id. at 1013.
262. Id. at 1012-13.
Composers, Authors, and Publishers (ASCAP) (of which Korman had been a member since 1972), the French Society of Composers and Authors and Publishers, and the Harry Fox Agency. Despite these inquiries, Korman said, she never received any satisfactory answers as to the status of the royalties. In 1987, SGAE informed Korman that Iglesias’ Spanish recording company “had signed a sub-publishing contract with the French publisher which credited Iglesias as the sole author of the song.” Korman hired an attorney and, in 1990, filed this lawsuit in Florida. Because the case was a matter of contract rather than copyright, the applicable law was two Florida statutes of limitation, of four and five years length. Each began to run in 1980, the time Korman reasonably learned of her claim. Since the suit was not filed until 1990, the statute of limitations barred Korman’s claims.

Other cases involving, inter alia, substantial royalty and accounting problems include *Mother Bertha Music, Inc. v. Trio Music Co., Inc.*, *The Gordy Co. v. Mary Jane Girls, Inc.*, *Mellencamp v. Riva Music Ltd.*, and *Croce v. Kurnit*. *Mother Bertha* involved a dispute between songwriter-music publisher Phil Spector and songwriters-music publishers Jerry Leiber and Mike Stoller. Both sides argued that the other side was improperly accounting for royalties due on such 50s rock classics as *Chapel Of Love, Da Do Run Run,* and *Why Don’t They Let Us Fall In Love.* *Gordy* was an immensely complicated dispute between the corporate successor to Motown Record Corporation and singer-songwriter-producer Rick James. The royalty issues included improper accounting, the scope of auditing, audit documents, unreported royalties, advances against royalties, re-

263. *Id.*
264. *Id.* at 1013.
265. *Id.*
266. *Id.*
267. *Id.* at 1013-18.
268. *Id.* at 1017.
269. *Id.*
275. *Id.*
coupment, foreign taxation, and other matters.\(^{277}\) *Mellencamp* concerned allegations of royalty accounting problems, untimely royalty reports and payments, and an alleged oral agreement settling royalty and other disputes arising from the original contract.\(^ {278}\) *Croce* involved the term “net sums actually received,” the appropriate basis for calculating royalties, and whether the “catchall” royalty provision in the agreement covered sheet music sold by a licensee of the copyright-owning music publisher.\(^ {279}\)

Other notable cases involving copyright ownership and/or royalty questions include *Richcar Music Co. v. Towns*,\(^ {280}\) and *Frost Belt International Recording Enterprises, Inc. v. Cold Chillin Records*.\(^ {281}\) Jimi Hendrix’s father, James “Al” Hendrix, filed a lawsuit in Seattle in 1991 against the owners of his son’s copyrights, claiming that he unknowingly gave up the rights to the copyrights (and Jimi Hendrix’s image, etc.). He attributed this unknowing relinquishment to the improper actions of his former Los Angeles attorney, Leo Branton, Jr., who, with other entities, came to own the copyrights.\(^ {282}\) The lawsuit sought an accounting of the income generated since Jimi Hendrix’s death 23 years earlier.\(^ {283}\) In 1991, MCA offered $60 million to purchase the copyrights and other Hendrix assets.\(^ {284}\)

Singer-songwriter Mike Love of the Beach Boys ended his long-running dispute with former bandmate Brian Wilson in 1994 after Love won a jury trial on the issue of whether Love should have received songwriting credit on about three dozen Beach Boys’ 60s classics, including *Wouldn’t It Be Nice, California Girls, 409, Dance, Dance, Dance,* and *I Get Around*.\(^ {285}\) In lieu of a jury setting the amount of damages, Love and Wilson agreed to a settlement whereby Love would receive $5 million in cash and a share of future publishing royalties.\(^ {286}\) Other longstanding disputes have not been successful at reaching a resolution. The decades-old royalties battle between song-

\(^ {277}\) *Id.*


\(^ {280}\) *Richcar Music Co. v. Towns*, 385 N.Y.S.2d 778 (1976) (*You’ve Got To Change Your Evil Ways*).


\(^ {283}\) *Id.*

\(^ {284}\) *Id.*


\(^ {286}\) *Id.*
writer Eddie Holland and music publisher Berry Gordy, Jr., has "dragged on for seven years, spawned three additional, related suits, clogged the court with 996 separate items filling 25 filing-cabinet-size document drawers, and has left 57 motions still to be resolved" pre-trial.287 In dispute are royalties on such 60s classics as Baby, I Need Your Lovin'; Stop In The Name Of Love; Heat Wave; Sugar Pie, Honey Bunch; and Standing In The Shadows Of Love—altogether 270 songs are involved, including about twenty-five "Top Ten" hits.288 The songs still earn about $2 million per year, and disputes over that kind of money make for hard-ball lawsuits. Consider, for example, that "Holland’s lawyer challenged Gordy to a fistfight while taking his pre-trial statement."289

Holland . . . claims Gordy took advantage of him and his writing partners, his brother Brian Holland and Lamont Dozier, in part by using forged songwriting contracts. Holland wants Gordy and Jobete, the music publishing company that Gordy owns, to give back the rights to songs, including dozens of hits, the young men wrote in the early 1960s. He also has been underpaid, Holland claims, for songs the threesome wrote . . . for Gordy-owned companies since then.290

Gordy denies the allegations and claims that all the issues in Holland’s suit against him were settled in a 1972 case between Gordy and what had come to be known in songwriting circles—almost reverentially—as "Holland/Dozier/Holland."291 In the 1972 case, a money settlement was reached and the sides agreed to continue the royalty arrangements in place since the mid-60s.292

Then there are the three suits that have been filed against Gordy since 1988—one each by Brian Holland and Lamont Dozier and a second suit by Eddie Holland, restating some of the charges in [a] 1988 suit that had been dismissed. All seek rights and back royalties.293

No genre of popular music has been immune to songwriter-music publisher problems, including the blues. Singer-songwriter Willie Dixon, author of such blues classics as I’m Your Hoochie Coochie Man, Little Red Rooster, Back Door Man, I Just Wanna Make Love To

288. Id.
289. Id.
290. Id.
291. Id.
292. Id.
293. Id.
You, Bring It On Home, and My Babe, offers perhaps the best case in point.294

In 1994, Dixon's estate won a unanimous jury verdict finding that Dixon was overreached when he conveyed a one-third interest in the publishing income from some of his many hits to his manager in 1977.295 The manager claimed he earned the quid pro quo by going above and beyond the call of duty while helping Dixon fight the legal battle that resulted in Dixon reacquiring his songs from ARC music.296

Music royalty court fights have become increasingly common as artists and their attorneys challenge details of contracts, some signed decades ago. * * * Such disputes have been especially bitter for blues artists, many of whom maintain they were shamelessly exploited by record executives when they were young. Indeed, in 1979 Dixon founded the Blues Heaven Foundation, which helps blues artists recover their royalties and rights.297

Dixon's songs have been recorded by such artists as Mose Allison, Muddy Waters, Elvis Presley, Eric Clapton, the Doors, the Rolling Stones, Jimi Hendrix, Led Zeppelin, Lonnie Mack, the Everly Brothers, and Johnny Rivers.298 Not every situation involving royalties becomes a lawsuit. Arthur Alexander was the only songwriter to have had songs cut and made into hits by the Beatles (Anna), The Rolling Stones (You Better Move On), and Bob Dylan (Sally Sue Brown). "[L]ike many R&B songwriters of his era, [Alexander] claimed to have seen few royalties from any songs."299 Alexander, who died of heart failure in 1993 at age 53—after 15 years of general anonymity driving a bus in Cleveland (ironically, the site of the Rock 'n' Roll Hall of Fame)—long ago attained "legend" status in the R&B,
rock, and country songwriting communities.300 "In 1987, Paul McCartney said: 'If the Beatles ever wanted a sound, it was R&B . . . Arthur Alexander.'"301 However, Alexander's legendary status did not help him much in the royalties payment category.

"Gary Velletri of Bug Music, [who] oversees the Alexander catalog and [who] has been able to partially reclaim some of [Alexander's] post 28-year copyrights, says: 'Arthur was a victim of [the] cross collateralization of studio fees and poor business sense. When he was young he signed too much.'"302 By that statement, Velletri apparently meant that Alexander had signed too many one-sided music publishing and sound recording contracts he did not understand. Ironically, Alexander's other big hit as a songwriter was Everyday I Have To Cry.303 These and other songs were also recorded by such artists as Otis Redding, the Who, and the Ike & Tina Turner Revue.304 “[Alexander] never earned a penny from his hits in the 1960s and 70s and was cheated out of his songwriter’s royalties on those Beatles and Stones recordings.”305

6. Contractual Reversion

If Publisher fails to secure a cover recording of the Compositions within the term of this Agreement, [W]riter may, during the fifteen (15) days following the expiration of said term, demand the return of the Compositions in writing and if Publisher receives such notice within said fifteen (15) day time period, Publisher agrees to promptly reassign the [C]ompositions and all Publisher’s rights therein to Writer and to execute any documents necessary to effect such re-conveyance. Notwithstanding the foregoing, Publisher shall not be obliged to reassign the Compositions to Writer until such time as Writer shall repay to Publisher any advances or unrecouped demonstration recording costs chargeable to Writer.306

Fifteen days is an incredibly short period of time in general, but is perhaps unconscionably short when contrasted with the fact that the term of the expired agreement was at least one year and probably three years. The last sentence in the provision is utterly unworkable for the vast majority of songwriters. It says that the songwriter can have her unexploited copyrights back if she will return any unrecouped advances in one lump sum. Assuming the unrecouped ad-

300. Id.
301. Id.
302. Id.
303. Id.
305. Id.
306. MEDOW, supra note 33, §§ 170-32 to -33.
Advances are significant, only the most successful songwriters could accomplish such a feat. There are fairer ways to accomplish what both parties need from contractual copyright reversion. One way is to allow the music publisher to keep all the copyrights for a certain period of years from the date of conveyance of each copyright. This obviates the problem of the music publisher having to return to the songwriter, shortly after the contract has expired, the copyright to a song that was conveyed to the music publisher by the songwriter perhaps only a few months earlier.  

Curiously, this provision uses the term “cover recording” to describe the circumstances under which a composition would not be subject to reversion. The curiosity is that, in the sound recording industry, a “cover recording” is a composition that is re-recorded and re-released (or “covered”) by another artist, probably on another label and perhaps even in a different musical genre (e.g., Whitney Houston’s 1992 pop “cover” of I Will Always Love You, written and originally recorded by Dolly Parton). Use of the term “cover recording” in this provision could allow the songwriter to reacquire copyrights that had been recorded and released only once, which, given the pertinently short length of songwriter-music publisher agreements, would be a real boon to the songwriter. This result, it would seem, is not what the contract-drafting music publisher intended.

On December 16, 1971, Kingsley Rogers Rotardier assigned to Godspell Music Corporation the copyrights to an entire musical score he had written titled Every Kid You See On The Street Ain’t Bad. Among the individual songs was a composition titled Live, Laugh and Love. On August 29, 1972, Godspell reassigned all of the copyrights in the musical score to Rotardier except the copyright to Live, Laugh and Love, which Godspell retained under the condition that it would also be reassigned to Rotardier on September 1, 1973, if Godspell had “not cause[d] a commercial recording [of the song] to be released or printed music in any form to be placed on sale” by that time. On July 19, 1973, Godspell registered the copyright to Live, Laugh and Love and then published and placed sheet music on sale prior to September 1.

307. See id. § 170-33.
309. Id. at 920.
310. Id.
311. Id.
Rotardier filed suit in 1981, claiming that while the one-year time limit had been satisfied, Godspell, under the contract, could not publish the song without his consent.\textsuperscript{312} The Entertainment Company Music Group, successor to Godspell's interest in the copyright, argued that Rotardier's claim of copyright infringement had no basis and that the court did not have subject-matter jurisdiction because the controversy was contractual and not a federal claim of copyright infringement.\textsuperscript{313} The federal court agreed and dismissed the case.\textsuperscript{314}

D. Miscellany

1. Representations and Warranties

Writer hereby warrants, represents, covenants and agrees as follows: Writer has the full right, power and authority to enter into and perform this Agreement and to grant to and vest in Publisher all rights herein set forth, free and clear of any and all claims, rights and obligations whatsoever; all of the Compositions and all other results and proceeds of the services of Writer hereunder, including all of the titles, lyrics and music of the Compositions and each and every part thereof, delivered and to be delivered by Writer hereunder are and shall be new and original and capable of copyright protection throughout the entire world; no Composition shall, either in whole or in part, be an imitation or copy of, or infringe upon, any other material, or violate or infringe upon any common law or statutory rights of any party including, without limitation, contractual rights, copyrights and rights of privacy; and Writer has not sold, assigned, leased, licensed, or in any other way disposed of or encumbered any Composition, in whole or in part, or any rights herein granted to Publisher, nor shall Writer sell, assign, lease, license or in any other way dispose of or encumber any of the Compositions, in whole or in part, or any of said rights, except under the terms and conditions hereof.\textsuperscript{315}

The problem here is the "non-infringement" language. It is a promise by the songwriter that she has not and will not infringe upon any other copyright. Under this language, it is a breach of the agreement if a court rules that one of the conveyed songs infringes the copyright to another song. Rarely do songwriters intentionally commit copyright infringement. Absent willful infringement, any infringement found by a court should not constitute a breach of the agreement. Otherwise, the provision is not controversial.

2. Indemnification

Writer hereby indemnifies, saves and holds Publisher, its successors and assigns, harmless from any and all liability, claims, de-
mands, loss and damage (including counsel fees and court costs) arising out of or connected with any claim or action by a third party which is inconsistent with any of the warranties, representations or agreements made by Writer in this Agreement, and Writer shall reimburse Publisher, on demand, for any loss, cost, expense or damage to which said indemnity applies. Publisher shall give Writer prompt written notice of any claim or action covered by said indemnity, and Writer shall have the right, at Writer's expense, to participate in the defense of any such claim or action with counsel of Writer's choice. Pending the disposition of any such claim or action, Publisher shall have the right to withhold payment of such portion of any monies which may be payable by Publisher to Writer under this Agreement or under any other agreement between Writer and Publisher or its affiliates as shall be reasonably related to the amount of the claim and estimated counsel fees and costs. If Publisher shall settle or compromise any such claim or action, the foregoing indemnity shall cover only that portion (if any) of the settlement or compromise which shall have been approved in writing by Writer, and Writer hereby agrees not unreasonably to withhold any such approval. Notwithstanding the foregoing, if Writer shall withhold approval of any settlement or compromise which Publisher is willing to make upon advice of counsel and in its best business judgment, Writer shall thereupon deliver to Publisher an indemnity or surety bond, in form satisfactory to Publisher, which shall cover the amount of the claim and estimated counsel fees and costs, and if Writer shall fail to deliver such bond within ten (10) business days, Writer shall be deemed to have approved of said settlement or compromise.316

Regardless of the absence of willfulness on the part of the songwriter, the music publisher demands in this provision that the songwriter bear the entire burden of any problem arising under the copyright of any musical composition conveyed to it under the agreement. (The music publisher may also withhold royalties from the songwriter pending the outcome of the case). This is akin to "having your cake and eating it, too." The music publisher wants to own all the copyrights, thereby having complete control of everything positive, but should anything negative happen, the burden of defense falls completely upon the songwriter. This is patently ridiculous. If the music publisher wants to bear less risk, there are reasonable options. For example, it could let the songwriter retain half the copyright for shouldering half the risk.

3. Power of Attorney

Writer hereby irrevocably constitutes, authorizes, empowers and appoints Publisher or any of its officers [as] Writer's true and lawful attorney (with full power of substitution and delegation), in Writer's name, and in Writer's place and stead, or in Publisher's name, to take

316. Id. §§ 170-22 to -23.
and do such action, and to make, sign, execute, acknowledge and deliver any and all instruments or documents which Publisher from time to time may deem desirable or necessary to vest in Publisher, its successors and assigns, all of the rights or interests granted by Writer hereunder, including, without limitation, such documents as Publisher shall deem desirable or necessary to secure to Publisher, its successors and assigns, the worldwide copyrights for all Compositions for the entire term of copyright and for any and all renewals and extensions under any present or future laws throughout the world. Notwithstanding the foregoing, Writer acknowledges that he (or she) is Publisher's employee for hire, that all Compositions are and shall be works made for hire and that Publisher is accordingly the author of all Compositions for all purposes of the 1909 or 1976 Copyright Law or any succeeding Copyright law.\textsuperscript{317}

In this provision, the music publisher acquires a broader power of attorney than necessary. The provision should be changed to reflect the appropriate limitations. Normally, it is unwise to allow anyone to have a broad and perpetual power of attorney. Moreover, if, as previously indicated,\textsuperscript{318} the musical compositions are "works made for hire," then no power of attorney is necessary because the songs are the property of the employer from the time of creation. The drafter of this provision apparently felt it necessary to reiterate that even though the music publisher wants power of attorney from the songwriter (a clear indication and admission of the absence of a "work made for hire" relationship), the relationship is nonetheless employer/employee.

4. Actions

Publisher shall have the exclusive right to take such action as it deems necessary, either in Writer's name or in its own name or in both names, against any party to protect all rights and interests acquired by Publisher hereunder. Writer shall, cooperate fully with Publisher in any controversy which may arise or litigation which may be brought concerning Publisher's rights and interests acquired hereunder. Publisher shall have the right, in its discretion, to employ attorneys and to institute or defend against any claim, action or proceeding, whether for infringement of copyright or otherwise, and to take any other necessary steps to protect the right, title and interest of Publisher in and to each Composition and, in connection therewith, to settle, compromise or in any other manner dispose of any such claim, action or proceeding and to satisfy or collect on any judgment which may be rendered. If Publisher shall recover on a judgment or as a result of a settlement with respect to any claim, action or proceeding for copyright infringement initiated by Publisher, all of Publisher's expenses in connection therewith, including, without limitation, attorney's fees and other costs, shall first be deducted, and fifty

\textsuperscript{317} Id. §§ 170-13 to -14.

\textsuperscript{318} See supra text accompanying notes 102-112.
percent (50%) of the net proceeds shall be credited to Writer’s account.319

Here, the music publisher gives itself the “exclusive” right to sue for copyright infringement, effectively gutting the beneficial interest the songwriter has in the copyright. What if the music publisher chooses not to sue, even in the case of a clear copyright infringement? Under this provision, the songwriter has no clear remedy. Therefore, the right to sue should be mutual for both the music publisher and the songwriter. Having the parties “reasonably cooperate” is better than asking them to “cooperate fully.” Moreover, any party expending attorney’s fees while prosecuting a copyright infringement action should be allowed to recoup these costs prior to the distribution of any settlement or judgment. The recoupment should be for “reasonable” expenses, not “without limitation.”

5. Assignment

[Publisher] may assign any or all of [Publisher’s] rights granted hereunder to any person, firm or corporation.320

The clear intention here is that the music publisher should have the right to sell the copyrights or other rights which are the subject of the agreement and the songwriter should not. This language is grossly one-sided.

6. Right of First Refusal

[Writer] hereby agree[s] that [Writer] shall not make any transfer, sale, or assignment of [Writer’s] rights hereunder to any other person, firm, or corporation unless and until [Writer has] offered such rights to [Publisher] hereunder upon equal or more favorable terms and [Publisher] shall have refused such offer.321

As with the assignment provision, this provision is grossly one-sided and has no foundation in logic. It is simply selfish.

7. Suspension and Termination

If Writer shall fail, refuse or be unable to submit to Publisher . . . [Compositions as required by this Agreement] or shall otherwise fail, refuse or be unable to perform his material obligations hereunder, Publisher shall have the right, in addition to all its other rights and remedies at law or in equity, to suspend the term of this Agreement and its obligations hereunder by written notice to Writer, or, in the event such failure, refusal or inability shall continue for longer than six (6) months, to terminate this Agreement by written notice to Writer. Any such suspension shall continue for the duration of any

319. MEDOW, supra note 33, § 170-22.
320. MCA, supra note 174, at 6.
321. Id. at 4-5.
such failure, refusal or inability, and, unless Publisher notifies Writer to the contrary in writing, the then current term hereof shall be automatically extended by the number of days which shall equal the total number of days of suspension. During any such suspension Writer shall not render services as a songwriter and/or composer to any other party or assign, or license or convey any musical composition to any other party.\(^{322}\)

As long as the number of songs required by the minimum commitment is acceptably low, this is not a "deal killer" provision.\(^{323}\) The number of songs required under the minimum commitment is logically intertwined with the amount of advances against royalties the songwriter receives.\(^{324}\)

8. **No Partnership or Joint Venture**

   *Nothing contained herein shall be construed to constitute a joint venture or partnership between [Writer and Publisher].\(^{325}\)*

   This is a non-controversial provision.

9. **Headings**

   *The heading of clauses or other divisions hereof are inserted only for the purpose of convenient reference. Such headings shall not be deemed to govern, limit, modify or in any other manner affect the scope, meaning or intent of the provisions of this Agreement or any part thereof, nor shall they otherwise be given any legal effect.\(^{326}\)*

   This is a non-controversial provision.

10. ** Entirety of Agreement**

   *This Agreement supersedes any and all prior negotiations, understandings and agreements between the parties hereto with respect to the subject matter hereof. Each of the parties acknowledges and agrees that neither party has made any representations or promises in connection with this Agreement or the subject matter hereof not contained herein.\(^{327}\)*

   This is a non-controversial provision.

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\(^{323}\) "Writer will attempt to delete this provision or require that the number of songs required be defined at a low level." *Id.* §§ 170-25 to -26.

\(^{324}\) At a minimum, if any advances against royalties are being paid, it is safe "to say that if a set number of songs is to be required, publishers look for 12 or more complete songs in any one-year period . . . ." *Id.* § 170-26.


\(^{326}\) MEDOW, *supra* note 33, § 170-26.

\(^{327}\) *Id.* § 170-24.
11. **Modification**

This Agreement may not be cancelled, altered, modified, amended or waived, in whole or in part, in any way, except by an instrument in writing signed by the party sought to be bound.\(^{328}\)

This is a non-controversial provision.

12. **Waiver**

The waiver by either party of any breach of this Agreement in any one or more instances shall in no way be construed as a waiver of any subsequent breach of this Agreement (whether or not of a similar nature).\(^{329}\)

This is a non-controversial provision.

13. **Effect of Invalidity**

If any part of this Agreement shall be held to be void, invalid or unenforceable, it shall not affect the validity of the balance of this Agreement.\(^{330}\)

This is a non-controversial provision.

14. **Controlling Law**

This Agreement shall be deemed to have been made in the State of (name), and its validity, construction and effect shall be governed by the laws of the State of (name) applicable to agreements wholly performed therein. This Agreement shall not be binding upon Publisher until signed by Writer and countersigned by a duly authorized officer of Publisher.\(^{331}\)

This provision is non-controversial so long as the state of contracting is New York, California, or Tennessee because these courts are familiar with the dynamics of entertainment law in general and are perhaps more likely to understand the caution that should be observed in adjudicating contract provisions borne of adhesion.

15. **Notices**

Any written notices which Publisher shall desire to give to Writer hereunder, and all statements, royalties and other payments which shall be due to Writer hereunder, shall be addressed to Writer at the address set forth at the beginning of this agreement until Writer shall give Publisher written notice of a new address. All notices which Writer shall desire to give to Publisher hereunder shall be addressed to Publisher at the address set forth at the beginning of this [A]greement until Publisher shall give Writer written notice of a new address.

\(^{328}\) Id.
\(^{329}\) Id.
\(^{330}\) Id. §§ 170-24 to -25.
\(^{331}\) Id. § 170-25.
address, and a courtesy copy of all such notices shall also be given to (address). All notices shall either be served by hand (to an officer of Publisher if Publisher shall be the addressee) or by registered or certified mail, postage prepaid, or by telegraph, charges prepaid, addressed as aforesaid. The date of making personal service or of mailing or of depositing in a telegraph office, whichever shall be first, shall be deemed the date of service.\textsuperscript{332}

This is a non-controversial provision.

IV

The Contents of a Bilaterally Bargained-For Plain-Language Long-Term Exclusive Songwriting-Music Publishing Agreement\textsuperscript{333}

A. Introduction

Negotiating and drafting bilaterally bargained-for contracts based on mutual respect and a desired meeting of the minds involves several goals: (1) a hard-driven bargain that avoids the inevitable downside of a lop-sided, long-term executory contract; (2) attention to detail and anticipation of potential problems in performance of the agreement; (3) a non-complicated, “clean” or “readable” document—because it will generate much less controversy down the road; (4) recognition that it is better to give up minor benefits than to receive the benefits in such a complicated fashion as ultimately to cause complex, expensive, relationship-ending litigation; and (5) a realization that striving for mutuality and bilateral fairness are the keys to ease of enforceability and long-term contractual happiness.

B. The Ideal Agreement

The following is an agreement (“Agreement”) between \underline{[Writer]} and \underline{[Publisher]} and is entered into in consideration of the promises made in this Agreement and with the parties intending to be legally bound.

\textsuperscript{332} Id. §§ 170-23 to -24.

\textsuperscript{333} The writing contained in this section represents the author’s idea of how a bilaterally bargained-for, plain language, meeting of the minds agreement between a non-artist, early-career professional songwriter and a music publishing company might read. There are many other ways to quite rationally—and bilaterally—draft many of these provisions.
General Provisions

1. Nature of agreement. Writer is a songwriter seeking the services of a music publishing company. Publisher is a music publishing company seeking the services of a songwriter. Under this Agreement, Writer is not an employee of Publisher for "work made for hire" or other purposes; rather, Writer is an independent contractor. This is a contractual relationship between businesses.

2. Legal status and domiciliary of parties. Publisher is a corporation duly organized, validly existing, and in good standing under the laws of the State of ______ with corporate power to carry on its business as it is now being conducted. Publisher has its principal office and place of business at _________________.

   Writer is an individual and a sole proprietor. Writer is a resident of the State of _________________.

3. Definitions.
   a. "Term." Whenever the words "the term of this Agreement" or words of similar meaning are used in this Agreement, such words are referring to the initial term of this Agreement and any renewals of this Agreement.
   
   b. "Work made for hire." This phrase is defined in the Copyright Act of 1976, as amended, codified at 17 U.S.C. § 101 (1976): "A 'work made for hire' is... a work prepared by an employee within the scope of his or her employment." The second definition of this phrase in the Act concerns "specially commissioned works" and is not relevant to this Agreement.
   
   c. "Independent contractor." This is a term used in the context of this Agreement to distinguish between an employee of an employer and an individual doing business with a company.
   
   d. "Professional demonstration recording" or "demo." In the context of this Agreement, this is a recording of a musical composition on professional-quality recording equipment by professional-quality musicians and is of sufficient quality to properly and adequately pro-

334. This language puts to rest early and definitively any question concerning "work made for hire."

335. It can be important to have each party indicate its/her legal status and place of domiciliary because anything less than candor in this regard could be construed to be fraud in the formation of the agreement—potentially exposing the wrongdoer to the equitable remedy of rescission and to the tort sanction of punitive damages—or at least it could operate as a breach of the agreement. See Mother Bertha Music v. Trio Music, 717 F. Supp. 157 (S.D.N.Y. 1989).

336. All terms of art or other words or phrases not susceptible to clear self-explanation, either in general or in the context of this Agreement, should be defined near the beginning of the agreement.
mote the recorded musical composition to "artists and repertoire" employees of record companies, recording artists, producers, and other such decision-makers. In the recorded-music industry, such recordings are called "demos."

e. "Musical composition." In the context of this Agreement and in its most basic form, this is a combination of words, music, beat, and tempo. In the context of all copyrights conveyed by Writer to Publisher under this Agreement, "musical composition" includes both wholly-written and co-written musical compositions.

f. "Wholly-written musical composition." This is a musical composition written completely by a single songwriter.

g. "Part of a wholly-written musical composition." In the context of this Agreement, this assumes that the musical composition was written by more than one songwriter, each of whom wrote a "part" of it. Each songwriter's contribution can be expressed in percentage terms, each owning that portion of the copyright.

h. "Minimum commitment." This is the number of musical compositions and/or parts of musical compositions that Writer, in the aggregate, must write under this Agreement to comply with the minimum number of musical compositions called for by this Agreement.

i. "Creative control." In the context of this Agreement, this is ultimate authority over all aspects of demo production.

j. "Major label." In the context of this Agreement, this is any sound recording and releasing company which, during the calendar year preceding the date of expiration or termination of this Agreement, placed a sound recording in the "Top Ten" for any week in Billboard Magazine's Hot 100 Singles, Hot Country Singles, Hot R&B Singles, and/or Hot Adult Contemporary categories.

k. "Subpublisher." This is a third-party music publishing company, usually but not always outside the United States, which, in certain situations, collects royalties for Publisher and remits such royalties to Publisher after deducting a reasonable fee for its services. Subpublishers may or may not be owned or controlled by or affiliated with Publisher.

l. "Controlled composition." This is a song co-written by a songwriter and a recording artist, or by a songwriter and a producer, or co-written by all three (or on which the artist or producer or both are sharing in the songwriter's songwriter's royalties even where he or they did not actually participate in the writing of the song). Record companies usually contractually require their recording artists to grant the record company a reduced mechanical royalty rate (often 75% of
the current rate) on compositions “controlled” by the artist or producer.

m. “Float.” This is the interest earned by the music publisher on royalties ultimately paid to the songwriter but that sometimes sit in the music publisher’s bank account for considerable periods.

n. “Release.” This is a unit of musical compositions, e.g., a compact disc, that a record company has begun to market to the public for sale.

o. “Single.” This is a musical composition that has been released to radio stations and others by a record company for promotional purposes. Three to five of the songs on a compact disc usually are released as “singles,” which are the featured tracks of a particular compact disc, with the remaining songs being relegated to the status of “album cuts.”

4. Term of agreement.337 This Agreement begins on January 1, 1996, and ends on December 31, 1999. Publisher, at its sole discretion, may renew this Agreement by notice to Writer during September or October, 1999, and by payment to Writer of $ accompanying the notice. Such renewal extends the ending date of this Agreement to December 31, 2000. In the event Publisher extends this Agreement as specified in the previous sentences, Publisher, at its sole discretion, may renew this Agreement a second and final time by notice to Writer during September or October, 2000, and by payment to Writer of $ accompanying the notice. Such renewal extends the ending date of this Agreement to December 31, 2001. Subject to SUSPENSION AND TERMINATION, renewal beyond that point requires amending this Agreement or making a new agreement.

5. Copyright conveyance.338 Subject to Reservations and New uses of copyrighted material, Writer hereby conveys to Publisher all of

337. Under this language, the music publisher must pay the songwriter for any renewals of the agreement. After three years, if the music publisher is desirous of extending the agreement, the music publisher should be willing to pay some reasonable compensation to the songwriter for the right. There is more than one way to base a quid pro quo in this regard.

I try to make the publisher’s exercise of an option contingent on some set performance goals. For example, you might require that the publisher not be able to renew the contract unless the publisher has been able to place at least one of your songs with a major-label recording act during the previous contract period.

Carter, supra note 62, at 5.

338. This language makes it abundantly clear what the songwriter is conveying to the music publisher. Any copyrights of material written previous to the execution of the agreement must be spelled out, making it clear that the songwriter is under no obligation to the music publisher to convey to the music publisher any copyrights or parts of copyrights not specifically listed. Neither is the songwriter obligated to the music publisher concerning any copyrights the songwriter may own or acquire during the term of the agree-
Writer's copyright interests in Writer's previous musical compositions—and previous arrangements of musical compositions in the public domain—that are listed under Existing material in this Agreement. Writer specifically reserves all rights in all other of Writer's existing musical compositions and existing arrangements of musical compositions. Subject to Reservations, Writer hereby conveys to Publisher all of Writer's copyright interests in all of Writer's musical compositions—and arrangements of musical compositions in the public domain—created during the term of this Agreement. In addition to Writer's previous musical compositions—and previous arrangements of musical compositions in the public domain—not listed under Existing material in this Agreement, Writer specifically reserves and does not convey to Publisher any of Writer's interests in musical compositions—and arrangements of musical compositions in the public domain—that Writer has acquired from others or may acquire from others during the term of this Agreement.

6. Reservations. Notwithstanding Copyright conveyance, Writer hereby specifically reserves to herself those parts of the copy-

ment that do not concern musical compositions or parts of musical compositions written by the songwriter before or during the term of the agreement. In other words, unless it has to do with musical compositions or parts of musical compositions written by the songwriter, the songwriter is free to act as she may please with respect to musical copyrights, up to and including being in the music publishing business (not that such would necessarily be a normal occurrence, at least during the early stages of a songwriter's career).

339. If the songwriter's benefits under a copyright conveyed to a music publisher can be "derivatived" out of existence, the songwriter should be in control of whether the music publisher is allowed to produce a derivative and, if so (whether the songwriter voluntarily agrees or is ordered by an arbitrator to agree), what effect any such derivative would have on the songwriter's royalty position. At the absolute least, the music publisher should not be allowed to have unilateral control over the extent to which the songwriter's royalty share is diminished by any additions to and/or deletions from the subject work. On the subject of the songwriter retaining control over certain uses of the copyrights conveyed by the songwriter to the music publisher under the agreement:

Publishers resist these attempts, generally citing the investment they have in the writer and his material and the comparative expertise of the publisher and writer in determining the proper method and manner of exploiting songs. **A common compromise is to require the writer's consent to the use of songs in so-called "X" rated films and in commercials for political candidates, religious groups, alcoholic beverages, personal care products and the like.**

MEADOW, supra note 33, § 170-11. A situation involving singer-songwriter Carl Perkins and his composition Honey Don't drives home the point.

[What if a composer's song is used as background music for a scene depicting the rape of a child? While the licensing of the song Honey Don't was beyond the control of composer Carl Perkins, he would ordinarily consider its use in a film to be "great." However, says Perkins, in the context of "Prince of Tides," "people are asking me, 'Carl, why would you have a song in such a filthy place in a movie [a child molestation scene]?' They are shocked, especially since they all know I started [a] child-abuse center. I am very damaged by this and very hurt." If Per-
right bundle of rights known as the right to prepare derivative works, “synchronization” rights, and other licensing rights insofar as they pertain to reduced mechanical royalty rates for “controlled compositions.”

a. Should Publisher desire to produce a derivative work based on any musical composition the copyright to which has been conveyed by Writer to Publisher under this Agreement, Publisher shall notify Writer of the same. If Writer and Publisher cannot agree within a reasonable time concerning whether a derivative work should be produced by Publisher and the various ramifications of such action, the parties agree to submit the dispute to arbitration.

b. Should Publisher desire to issue a “synchronization” license concerning any musical composition the copyright to which has been conveyed by Writer to Publisher under this Agreement, Publisher shall notify Writer of the same. If Publisher and Writer cannot agree within a reasonable time concerning whether the license should be granted, the parties agree to submit the dispute to arbitration. Writer’s concern is that no musical composition of hers be associated in any way with any other work of authorship which is: (1) obscene or pornographic—or objectionable in any similar or related way; (2) political or religious in nature; (3) in promotion of tobacco, alcohol, or feminine hygiene products; and (4) otherwise objectionable to a reasonable person. With respect to this and the preceding paragraph, should the parties be unable to agree on the selection of an arbitrator or on any of the other particulars of any arbitration contemplated under this provision, either party may file suit for purposes of asking a court of competent jurisdiction to decide such matters. The parties agree that any such court rulings shall not be appealable. Should the arbitrator determine that either party acted unreasonably in forcing the issue to arbitration, the arbitrator may require such party to pay all or part of the reasonable cost of the unreasonably-forced arbitration, including any court action and all reasonable attorneys’ fees. Judgment upon any award rendered or on any decision in the nature of a declaratory judgment made by the arbitrator may be entered in any court of competent jurisdiction and is not appealable.

kinds were to bring suit for infringement of his integrity rights [a part of the droit moral concept] because he feels the use of his song in this context harmed his reputation, the central issue would be whether the use of “Honey Don’t” damaged his honor or reputation as a songwriter (emphasis added), not his reputation in the community as a children’s advocate. [Since droit moral for songwriters is not recognized in the U.S.,] it thus seems that Perkins could not prevail . . . .

Zabatta, supra note 159, at 1125.
c. Without Writer's express written consent, which Writer may withhold for any reason, Publisher shall not issue a mechanical license for the recording and release of any musical composition the copyright to which has been conveyed by Writer to Publisher under this Agreement in which the mechanical royalty rate is in any way reduced from the federal statutory rate in effect at the time of proposed licensing.

7. Security interest.\textsuperscript{340} With respect to the registration by Publisher in the U.S. Copyright Office of each copyright conveyed by Writer to Publisher under this Agreement, Publisher agrees to execute and file, together with the filing of the Copyright Registration application and Assignment in favor of Publisher, a Copyright Security agreement and Assignment in favor of Writer. The perfection of this security interest in Writer per copyright is in consideration of accrued and accruing but unpaid royalties as specified in this Agreement.

\textsuperscript{340} This language is unique and may or may not be appropriate. First, this is a fairly new idea in relation to songwriter-music publisher agreements. See NSAI HANDBOOK, supra note 23, at 100-01. Second, the mortgaging of copyrights in this way is not an established legal procedure. There is much confusion. The current state of the law governing security interests in intellectual property is unsatisfactory. There is uncertainty as to where and how to file, what constitutes notice of a security interest, who has priority, and what property is covered by a security interest. This area of the law is further complicated by the fact that both federal and state law impact on these issues.


Generally, the federal statutes creating intellectual property do not include clear provisions for promptly taking and perfecting security interests comparable to the arrangements set forth in UCC Article 9. At the same time, UCC Section 9-302(3) defers to federal title registration law with respect to security interests in copyrights. Alan W. Armstrong, Financing Intellectual Property, Personal Property Leases, and Some Related Issues, 171 A.L.I. 113, 116 (1990). That said, the following procedure may do the trick.

Security interests in copyright are governed by 17 U.S.C. § 205 which permits the recording of any license as well as the copyright itself or an interest in the copyright and provides that the recording in the Copyright Office "gives all persons constructive notice of the facts stated in the recorded document . . . ." The Act deals, as well, with priorities between conflicting transfers and exclusive and non-exclusive licenses. Although there is little caselaw involving copyright security interests (or "mortgages" as they are called), recording under the Act appears to be the only method available to perfect a security interest in copyrights. However, UCC filing as well may prove a useful prophylactic. * * * A Copyright Security Agreement . . . and assignment . . . filed with the Copyright Office should suffice for purposes of satisfying the federal law requirements.

\textit{Id.} at 118.
8. Existing material.\textsuperscript{341} At the time this Agreement is signed by both Writer and Publisher, and in compensation for the copyrights to Writer’s previous musical compositions—and previous arrangements of musical compositions in the public domain—that are listed in this provision, Publisher shall pay Writer the total sum of $\underline{\text{__________}}$. At the time this Agreement is signed by both Writer and Publisher, Writer shall deliver to Publisher audiotape recordings of Writer’s previous musical compositions—and previous arrangements of musical compositions in the public domain—that are listed at the end of this paragraph. For the particular audiotapes designated on the following list by Writer and Publisher as demos, Publisher shall pay Writer a total demo acquisition compensation of $\underline{\text{__________}}$, and, once paid, all rights in such demos shall belong to Publisher.

<table>
<thead>
<tr>
<th>Musical Composition[ ] or Arrangement[ ]</th>
<th>Demo Compensation Per Musical Composition or Arrangement if Applicable</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
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<td>Yes [ ] No [ ]</td>
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<td></td>
<td>Yes [ ] No [ ]</td>
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<tr>
<td></td>
<td>Yes [ ] No [ ]</td>
</tr>
</tbody>
</table>

9. Material created under this Agreement.\textsuperscript{342} During the term of this Agreement, Writer, promptly after Writer has created a musical composition—or arrangement of a musical composition in the public domain—in whole or in part, shall deliver to Publisher an audiotape recording of that musical composition.

10. Individual copyright conveyances.\textsuperscript{343} Publisher may from time to time request Writer to execute an individual copyright conveyance

\textsuperscript{341} This is clear payment for the acquisition by the music publisher of certain of the songwriter’s previous musical compositions. It also calls for clear payment to the songwriter by the music publisher for the songwriter’s previous demos that the music publisher intends to use in the exploitation of the songwriter’s previous musical compositions.

\textsuperscript{342} In this context, audiotape recordings could vary in production values from a “scratch” recording of, say, voice and guitar or voice and piano to a recording that more closely approximates an actual demo. Because the music publisher is not obligated to demo or exploit every musical composition presented to the music publisher by the songwriter, the songwriter may desire (but is certainly not obligated), at the songwriter’s own expense, to provide the music publisher with a higher production-value recording in the hope that the music publisher will, through this effort of the songwriter’s, adopt the view that the song is commercially exploitable.

\textsuperscript{343} Music publishers believe, and they are no doubt correct, that each musical composition should be registered with the U.S. Copyright Office independently of all others. The conveyance of copyrights in general and individually by the songwriter to the music publisher under the agreement constitutes an assignment from one party to another, but it does not affect registration. While copyright is technically existent at the moment of
using Publisher's standard-form agreement concerning each or any of Writer's musical compositions—or arrangements of musical compositions in the public domain—conveyed by Writer to Publisher under this Agreement. Writer agrees to do so. Individual copyright conveyances shall supplement and not supersede this Agreement. In the event of any conflict between the provisions of any individual copyright conveyance and this Agreement, this Agreement shall govern. Nothing concerning this paragraph shall negatively affect Publisher's rights to or Writer's reserved rights in the copyrights conveyed by Writer to Publisher under this Agreement. Notwithstanding any provision in this Agreement to the contrary, if any, and for purposes of this Agreement, the date of effective copyright conveyance of any musical composition conveyed by Writer to Publisher under this Agreement is the date that Writer submits to Publisher an audiotape recording of a musical composition accepted by Publisher under either Minimum commitment or Demonstration recording obligations.

11. Exclusivity.\textsuperscript{344} In reasonable connection with songwriting, Writer agrees to engage herself exclusively for the benefit of Publisher during the term of this Agreement. Writer is free to enter into other agreements, short- and/or long-term, that do not constitute a breach of this Agreement, including, but not limited to, contracts to perform as a musician or recording artist.

12. Writer’s name and likeness.\textsuperscript{345} In connection with the exploitation by Publisher of the musical compositions conveyed by fixation, the formal copyright registration of each musical composition set to begin earning royalties is simply commercially essential. For a variety of reasons, it may be necessary to know precisely when the songwriter effectively conveyed a musical composition to the music publisher. This language leaves no doubt as to the effective date. This language is not meant to conflict with the formal copyright assignment provisions of the Act; rather, it is meant to indicate when, for purposes of the agreement, equitable title has passed as between the songwriter and the music publisher.

\textsuperscript{344} Many songwriters, for purposes of additional income and otherwise for general career development, engage in non-songwriting music-related activities during the term of agreements such as this. It should be clear from the language of this provision that to do so is not a breach of the agreement.

\textsuperscript{345} There is no need for “exclusivity” under this provision. It should simply be stated that in connection with copyrights conveyed by the songwriter to the music publisher, the music publisher has the right to the reasonable use of the songwriter’s name and likeness. Nothing more. The music publisher, especially given the ease with which visual images now can be manipulated by simple computer assistance, should not be allowed to alter any visual images of the songwriter—at least without the songwriter’s permission. An old case concerning the more traditional alteration of such a visual image (in another entertainment-industry context) illustrates the point:

Plaintiff Sinclair, a movie actor, sued the defendant for invasion of privacy over the use of a photograph of him for advertising purposes. The photograph was
Writer to Publisher under this Agreement, Writer grants to Publisher and Publisher's designees the right to reasonably use and publish Writer's name (including any pseudonyms), unaltered visual image, biographical material, and relevant musical composition titles. For such use, Writer shall receive no compensation other than as specified in this Agreement under Royalties. Writer shall have the right of pre-approval of any photograph or other visual image Publisher may be desirous of using in connection with this provision.

13. Droit moral. Writer hereby waives any and all benefits under the droit moral concept inside the United States and outside the


346. Droit moral is a murky subject. Currently, such rights—in the context of songwriting—do not exist in the United States. This language, then, is a compromise between the music publisher wanting the songwriter to waive any personal rights she may have or later acquire, worldwide, and the songwriter seeking to preserve all such rights. Unless the U.S. Supreme Court rules that authors have had personal rights in the United States all along (an extremely unlikely prospect), any such rights in the United States for songwriters are in the future. The waiver by the songwriter of international personal rights would free the music publisher from having to worry about the assertion by the songwriter of such rights in far-flung places, and the specific preservation of such rights, if any and if ever, by the songwriter with respect to the United States likely would be more important to the songwriter and easier to deal with by both sides of the agreement. The absence of personal rights means that once a songwriter conveys an entire copyright to a music publisher, the music publisher may change the composition in any way the music publisher desires. “Under U.S. law, when you transfer all of the rights in your song to someone else . . . the purchaser has the right to alter the song’s music and lyrics [and even its title].” Robert R. Carter, Jr., Song Rights: Legal Aspects of Songwriting, SONGWRITER NOTES, Sept. 1994, at 4.

Most songwriters . . . are sensitive about the artistic integrity of their compositions. The creative process can be a painful catharsis, exploring and expressing the deepest personal experiences and feelings. Similarly, most lawyers . . . are sensitive about money. They don’t [or shouldn’t] want their writer-client’s share of song revenue suddenly diluted by a “co-writer” who has modified a line here and there. Publishers are understandably sensitive about having maximum flexibility in their efforts to find users for a song. Minor cosmetic changes,
United States in relation to the musical compositions conveyed by Writer to Publisher under this Agreement; however, should, in the context of songwriting, a statute enacted by the Congress of the United States or a decision of the Supreme Court of the United States adopt the concept of *droit moral*, during the term of this Agreement or at any time Publisher owns all or part of the copyright to any musical composition conveyed by Writer to Publisher under this Agreement, Writer hereby reserves and claims any and all benefits under the *droit moral* concept—but only in the United States. Should Writer claim any *droit moral* benefit under this provision and Publisher disagree either that Writer should be able to claim the benefit or concerning the manner in which Writer seeks to manifest any such claimed benefit, the parties agree to submit the dispute to arbitration. If the parties cannot agree on the selection of an arbitrator or on any of the other particulars of any arbitration contemplated under this provision, either party may file suit for purposes of asking a court of competent jurisdiction to decide such matters. The parties agree that any such court rulings shall not be appealable. Should the arbitrator determine that either party acted unreasonably in forcing the issue to arbitration, the arbitrator may require such party to pay all or part of the reasonable cost of the unreasonably-forced arbitration, including any court action and all reasonable attorneys’ fees. Judgment upon any award rendered or on any decision in the nature of a declaratory judgment made by the arbitrator may be entered in any court of competent jurisdiction and is not appealable.

**B. Songwriting**

1. **Uniqueness of services.** Writer acknowledges to Publisher that the writing of musical compositions is a unique service of an intellectual character and that this uniqueness gives the writing of musical
compositions under this Agreement by Writer a value that, when lost, cannot be reasonably or adequately compensated in damages in an action at law by Publisher and that a breach of this Agreement by Writer concerning the writing of musical compositions could cause Publisher irreparable harm. Therefore, in addition to any legal remedies which may be available to Publisher for any relevant breach of this Agreement by Writer, Writer acknowledges that Publisher shall be entitled to seek injunctive relief.

2. Minimum commitment.\(^{349}\) During each year of the term of this Agreement, Writer shall deliver to Publisher no fewer than \_

\_

new wholly-written musical compositions and/or parts of wholly-written musical compositions aggregating \_

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musical compositions, which number of musical compositions shall constitute the minimum commitment under this Agreement. To count against the minimum commitment, a musical composition, whether written in whole or in part by Writer, must, in Publisher’s reasonable business judgment, be capable of commercial exploitation.

3. Collaboration.\(^{350}\) While Publisher prefers that Writer discuss and clear co-writers with Publisher in advance of any co-writing session, Writer may co-write with anyone of Writer’s choosing, and any failure of Writer to discuss or clear any co-writer with Publisher shall not constitute a breach of this Agreement. Writer is not obligated by this Agreement to co-write with anyone, including writers of Publisher’s choosing.

4. Co-writing trips.\(^{351}\) Writer is free to travel for co-writing purposes, and Writer is responsible for all expenses incurred on any such trip. By separate agreement, Publisher may compensate Writer for some or all of such expenses, recoupable as an advance against royal-

\(^{349}\) The minimum commitment number should reflect that quality is clearly more important than quantity in songwriting. The use of the word "reasonable" in this provision makes it clear that the music publisher cannot cause a breach of the agreement simply by arbitrarily and capriciously stating that, of all the musical compositions submitted to the music publisher by the songwriter, less than the minimum commitment are commercially exploitable. See Jabara v. Songs of Manhattan Island Music Co., No. 86 CV 3412, 1989 WL 16614 (S.D.N.Y. Feb. 24, 1989).

\(^{350}\) This is one of those provisions that needs to be included in the agreement more for general understanding between the parties than for any breach that would result from any particular conduct on the part of the songwriter.

\(^{351}\) Sometimes in long-term agreements, as here, it just is not feasible to know what other agreements the parties might want or need to make relative, for example, to co-writing trips. One good way to handle such a situation is to state a flat rule and then indicate that the parties are free to make specific separate agreements on the subject. Such language illustrates feelings of mutual good will.
ties or not, but under this Agreement Publisher is under no obligation to do so.

C. Publishing

1. Advances against royalties. Beginning with Friday, January 12, 1996, and on every other Friday thereafter during the term of this Agreement, Publisher shall pay to Writer as an advance against royalties 1/26 (one twenty-sixth) of the annual amounts as listed below, all of which payments together shall be recoupable by Publisher from any and all royalties payable to Writer by Publisher under this Agreement:

   a. $_________ during the first year of this Agreement.
   b. $_________ during the second year of this Agreement.
   c. $_________ during the third year of this Agreement.
   d. $_________ during the first renewal term (if any).
   e. $_________ during the second renewal term (if any).

2. Writer's room. Publisher shall provide Writer with a commercial facility in or reasonably near Publisher's offices—including reasonable furniture, a telephone and supplies—suitable for and facilitative of the writing of musical compositions alone or with up to several co-writers. Under this Agreement, Publisher is not obligated to allow Writer access to secretarial assistance or office help, although Publisher may do so routinely or from time to time. Any such access allowed by Publisher may be withdrawn at any time and for any reason. Writer is not obligated to make regular use of such writer's room.

352. These are the principal promises a music publisher makes to the songwriter concerning how the relationship will benefit the songwriter.

353. Note that this provision is in no way conditioned on the songwriter not being in breach of the agreement in the music publisher's opinion—an entirely unworkable idea. Note also that "if you are transferring all songs previously written by you, the advance should be higher [or there should be some kind of compensation] than if you are transferring only future compositions." Robert R. Carter, Jr., Song Rights: Legal Aspects of Songwriting, SONGWRITER NOTES, June 1994, at 5.

354. Notwithstanding that the songwriter is not an employee of the music publisher, the music publisher may nonetheless want to provide the songwriters it has under contract with such facilities and amenities as a way to engage in reasonably regular consultation with them and to facilitate their writing, alone or with others. Most songwriters would appreciate the gesture, especially since not all music publishers relate to songwriters perhaps the way most once did, at least in Nashville.

[Producer/publisher [Tom] Collins says, "Now you see publishing companies who are just collection agencies. All they are [are] bankers. They aren't developing songwriters. We don't have many publishers [anymore] who say 'rewrite that third verse.' You're not hearing that a lot anymore, (but) that's what I do." Valerie V. Hansen, Ethics on 16th Avenue: As Nashville's Music Industry Grows, So Does the Potential for Unsavory Business Practices, NASHVILLE BUS. & LIFESTYLES, Mar. 1, 1991, at 62.
3. **Demonstration recording obligations.**\(^{355}\) For all of Writer's musical compositions listed under Existing material in this Agreement as having no professional demo, and for all of Writer's musical compositions created under this Agreement that Publisher has accepted under—or over and above—Minimum commitment, Publisher shall promptly produce a demo. Writer, at Publisher's sole discretion, may produce or co-produce and/or perform on such demos. Any expense incurred by Writer in connection with such demos must be approved in writing in advance by Publisher. Other than union scale, if applicable, Writer shall not be entitled to any compensation in connection with any services performed as a part of the production of such demos. All demos produced under this Agreement shall be owned by Publisher. Publisher shall have creative control in connection with the production of any demo under this Agreement.

Publisher agrees to maintain the original multi-track master recording of each and every demo produced under this Agreement from the date of original production through at least 120 days after the expiration or termination of this Agreement or after the later expiration of the applicable language in Contractual reversion. Publisher also agrees to cause a two-track DAT (digital audio tape) "safety copy" of each such demo to be made and safely stored in a location separate from the location of the original multi-track master recording. Publisher agrees to use any demos produced under this Agreement only as demos and specifically not as master recordings of Writer or anyone else to be released by Publisher or its assignees for sale or compensation of any kind. With respect to any of Writer's musical compositions not accepted by Publisher under Minimum commitment in this Agreement, Publisher shall not be obligated to produce a demo. With respect to any of Writer's musical compositions submitted to Publisher by Writer after Writer's minimum commitment has been met in any year of this Agreement and concerning which musical compositions Publisher, in its reasonable business judgment, views as not capable of commercial exploitation, Publisher shall not be obligated to produce a demo.

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\(^{355}\) This language leaves no doubt as to the music publisher's demo obligations; that is, when a demo is called for under the agreement and when it is not. It also speaks to their cost and to the songwriter's involvement in their production, *i.e.*, the songwriter has no creative control, but she has no financial obligation, either. As a practical matter, the music publisher likely will ask the songwriter to produce the demo, so, under this language, the songwriter pays nothing for demo production (at the time of production or later) yet probably gets to produce, or at least co-produce, the demo anyway.
4. Exploitation obligations. Publisher shall be obligated to use its reasonable best efforts in the exploitation of all copyrighted musical compositions conveyed by Writer to Publisher under this Agreement. The failure by Publisher to use its reasonable best efforts to exploit the musical compositions conveyed by Writer to Publisher under this Agreement shall constitute a breach of this Agreement by Publisher, such breach resulting in, at Writer's sole discretion, termination of this Agreement and cancellation of any obligation of Writer to Publisher concerning any recoupment of advances against royalties under this Agreement and the return from Publisher to Writer of the copyrights to all musical compositions conveyed by Writer to Publisher under this Agreement not, at the time of Publisher's breach, 

Some argue this is an unarticulable concept because of the relative indefinability of "reasonable best efforts" in this context. The music publisher cannot be "obligated" to place every one of the songwriter's conveyed copyrights on a major-label CD so that royalties would be generated. On the other hand, the entire contract is illusory, if not unconscionable, unless the music publisher is obligated to do something with the songwriter's songs. But obligated to do what? And for the whole catalog? Per song? Some songs? It would seem fair that the music publisher be obligated to use its "reasonable best efforts" in the exploitation of the songwriter's songs, and the least injudicious method of defining the absence of "reasonable best efforts" would seem to be on a case-by-case basis and predicated on a serious overall, but not necessarily complete, lack of effort on the music publisher's part. In the case of such a breach, the songwriter should be able to essentially rescind the agreement. Perhaps the best legal theory where the agreement is silent on this subject or expressly obligates the music publisher to do little or nothing is that the "reasonable best efforts" obligation is present nonetheless on an "implied" basis.

The NSAI Handbook offers some specific definitions of "reasonable best efforts" in the songwriter-music publisher context, among them: (1) daily communication with the songwriter concerning pitching activities and the results and particulars of such pitching; (2) facilitating the involvement of the songwriter in the music publisher's pitching activities; (3) committing to pitch each of the songwriter's demoed songs or returning unpitched songs to the songwriter so that the songwriter, at least at some point, could pitch them herself; (4) non-recoupable support for songwriting "on the road" with established recording artists; and (5) that the music publisher should commit to pitch the songwriter in addition to the song. NSAI HANDBOOK, supra note 23, at 97-99. It should be noted, of course, that some of the NSAI's suggestions in this regard would be better left to the personal relationship developed between the parties because of the difficulty, if not impossibility, of legally and meaningfully including them in the agreement itself.

The NSAI Handbook also suggests that a "bankruptcy" provision be added to songwriter-music publisher contracts that would have the effect of automatically reconveying to the songwriter all the copyrights conveyed by the songwriter to the music publisher under the agreement. Id. at 99-100. Of course, while this is an understandable and even perhaps laudable goal, any such provision, given federal bankruptcy law, likely would be invalid on its face as a matter of law. However, this suggestion by the NSAI does serve to point out quite graphically just what it is songwriters may be conveying when they convey the copyrights to their songs to music publishers—everything. Finally, the NSAI Handbook suggests that, as a hedge against being completely poured out in a bankruptcy situation, songwriters should try to negotiate contract language that would give them a perfected security interest in the copyrights conveyed by the songwriter to the music publisher under the agreement. Id. at 100-01.
having been exploited, that is, placed in a royalty-earning or royalty-accruing position. In addition to legal remedies, Writer shall be entitled to seek injunctive relief in the enforcement of this provision.

5. Publisher’s rejections. The copyrights to any of Writer’s wholly-written musical compositions rejected by Publisher under Minimum commitment or under Demonstration recording obligations shall remain the property of Writer; however, Writer shall not convey or seek to exploit any such musical compositions until the expiration or termination of this Agreement. With respect to any musical compositions written by Writer and one or more co-writers during the term of this Agreement and rejected by Publisher under either Minimum commitment or under Demonstration recording obligations, Writer’s copyright interest shall remain the property of Writer. While Writer shall not convey or seek to exploit any such musical compositions until the expiration or termination of this Agreement, Writer shall not be in breach of this Agreement should any such musical composition be successfully exploited by the co-writers and/or co-copyright owner(s) of any such musical composition.

6. Independent promotion. Publisher shall have the right, at Publisher’s sole discretion, to contract for the promotion of any one or more of Writer’s musical compositions conveyed by Writer to Publisher under this Agreement and that has been recorded and released as a single by a major label. Writer agrees that the total cost of any such promotion, up to a maximum of $ , shall be charged 50% (fifty percent) to Writer as an advance against royalties. Nothing contained in this provision shall limit Publisher’s right to cause the independent promotion of any such single release at any level of expenditure, but in no event shall Writer’s share of any such promotional expenses exceed $ , as an advance

357. Music publishers are not omniscient. As a result, they may turn down what the songwriter believes is some of her best work. When this occurs, the songwriter should not be precluded from exploiting the material herself—at least at some point. This language makes the governance of this situation very clear. It is grossly unfair, for example, for the music publisher to turn down—for demo or minimum commitment purposes—a musical composition co-written by the songwriter and then to receive royalties in connection with that musical composition upon its being successfully exploited by its other writers or publishers.

358. Recording artists, producers, and record companies are not the only ones who want their latest single release to keep climbing that Billboard chart; music publishers and songwriters have a serious interest, as well. As a result, music publishers and songwriters may, on occasion, desire to spend some money promoting the song as high as it will go on the charts. This language simply governs such undertakings and reflects, in general, the music publisher’s greater ability to expend funds and take risks.
against royalties or otherwise, without Writer’s express written consent, which consent Writer may withhold for any reason.

7. **Royalties.** In connection with the musical compositions conveyed by Writer to Publisher under this Agreement, Publisher shall pay Writer:

   a. __________ cents ($______) per copy for each copy of sheet music in standard piano/vocal notation and each dance orchestration printed, published and sold in the United States and Canada by Publisher or its licensees for which payment has been received by Publisher and after deduction of returns.

   b. __________ percent (_______%) of the wholesale selling price of each printed copy of each other arrangement and edition printed, published and sold in the United States and Canada by Publisher or its licensees for which payment has been received by Publisher and after deduction for returns. In the event that any such musical compositions shall be used, in whole or in part, in conjunction with one or more other musical compositions in a folio, compilation, song book, or other publication, Publisher shall pay Writer that proportion of the foregoing royalty which the number of Writer’s musical compositions contained in the publication shall bear to the total number of musical compositions contained in the publication.

   c. Fifty percent (50%) of all sums received—less the reasonable cost of collection, if any—by Publisher in the United States from exploitation in the United States and Canada by all licensees of all rights—except print rights and public performance rights, both of which are covered in other sections of this provision.

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359. In the vast majority of situations, sheet-music royalties constitute an almost insignificant amount of money and probably should not, therefore, be the subject of much negotiation. “[W]ith the advent of the phonograph record and other music-delivery technologies, the importance of sheet music as a . . . revenue earner has decreased dramatically.” William K. Knoedelseder, Jr., *Music Copyrights Can Be Gold Mines to Current Owners*, L.A. Times, Dec. 29, 1985, at 1. “Fifty percent” of all other exploitation proceeds collected by the music publisher is (or should be) the industry standard—and it is fair. (The payment of public performance royalties to the songwriter generally does not involve the music publisher). The percentage split of royalties paid by the music publisher, while rarely a subject of negotiation between the songwriter and the music publisher, nonetheless can be a subject of negotiation. Subpublishing agreements can be a matter of serious concern for the songwriter where the subpublisher is (or stacks of subpublishers are) owned by or in some way connected to the music publisher. If the music publisher involves enough owned or affiliated subpublishers in the collection of foreign (or even domestic) royalties, the songwriter can be subpublished all the way to the royalty poorhouse. The other sections of this provision are generally non-controversial. Whatever problems may exist with royalty calculations and payments in contracts between songwriters and music publishers, at least in this agreement the royalty payments are based on the gross revenue received by the music publisher and not the net revenue.
d. Writer shall receive public performance royalties throughout the world directly from the performing rights organization with which Writer is affiliated. In the event Publisher receives both the Writer's and Publisher's share of performance income from any source, Publisher shall pay Writer fifty percent (50%) of all sums received.

e. Fifty percent (50%) of all sums received—less the reasonable cost of collection, if any, after the payment of foreign taxes, if any, and less any reasonable payments to subpublishers, if any—by Publisher in the United States from exploitation in countries outside the United States and Canada by all licensees of all rights—except public performance rights, which are covered in another section of this provision—and regardless of the source of the revenue, type of revenue—such as advance payments, guarantee payments or minimum royalty payments—or when paid to Publisher. To the extent Writer's share of such income cannot reasonably be ascertained, Publisher shall pay Writer proportionate to Writer's ascertained or reasonably ascertainable share of all mechanical royalties received by Publisher during the relevant accounting period. Should any subpublishers making payments to Publisher be owned or otherwise affiliated with Publisher, all payments for services rendered by any such subpublisher shall be based on arm's length agreements. Any such agreements not made at arm's length shall subject this Agreement, at Writer's sole discretion, to termination, forfeiture of any unrecouped advances, and reversion of all copyrights conveyed by Writer to Publisher under this Agreement.

f. Assuming Publisher receives no tangible compensation therefore, Publisher shall not be required to pay to Writer any royalties on professional or complimentary printed copies or recordings or on printed copies or recordings distributed gratuitously for advertising, promotional, or exploitation purposes.

g. In any situation where Publisher owns more than one—or all—parts of the copyright to a co-written musical composition, a part of which was written by Writer, Publisher shall pay Writer according to the proportionate copyright interest in such musical composition conveyed by Writer to Publisher.

8. Accounting. 360 Publisher shall compute the royalties earned by Writer under this Agreement on or before July 31 for the semiannual

360. Under this language, there is no arbitrary time limit on the songwriter's ability to inspect the music publisher's books. While the contract relationship between the music publisher and the songwriter may expire in most ways at some point, the royalty and accounting provisions remain in effect for many years. Under such conditions, it is not unreasonable to expect the music publisher to maintain adequate books and records to allow
period ending the preceding June 30 and on or before January 30 for
the semiannual period ending the preceding December 31. Once
computed, Publisher shall forthwith submit to Writer a royalty state-
ment for the appropriate royalty accounting period together with the
net amount of royalties, if any, payable after deducting unrecouped
advances under this Agreement. The royalty statement submitted by
Publisher to Writer shall specify in plain language: (1) the date of issuance and amount of each “advance against royalties” which is un-
recouped as of the statement date, including the total amount of such
unrecouped advances; (2) the date(s) received, source(s), accounting

The complicated royalty calculations publishers insist on often come back to
haunt them. The provisions that were so complex you couldn’t understand them
are also so complex that the publisher’s employees will not be able to dot every i
and cross every t. Most audits reveal some technical irregularity. ** The less
time you have to inspect the books and lodge a specific written objection, the
more likely it is you will miss some irregularity and lose your right to sue. **

Accounting irregularities can be useful, not only in forcing the publisher to pay
you, but in getting out of a bad contract altogether because of the publisher’s
breach.

Carter, supra note 353, at 5. This provision obviously is one of the more important parts of
the agreement. The extent to which a musical composition earns royalties matters little to
the songwriter if the music publisher refuses to pay them over. As a result, and especially
as a result of experience, songwriters with the bargaining strength to do so may negotiate a
severe penalty for a music publisher’s non-payment or late payment of royalties. There
was such a provision in the contract between Melanie Schekeryk (better known as singer-
F.2d 837 (2d Cir. 1975). Melanie executed a songwriter-music publisher agreement with
Kama Rippa in May, 1968. Id. at 839. Sometime during the term of the agreement, the
contract was amended by the addition of the following language concerning the payment
of royalties by Kama Rippa to Melanie.

The payment of royalties when due are [sic] of the essence. Accordingly, if Pub-
lisher fails to account and pay royalties in accordance with this [provision] and
such failure and default continues following thirty (30) days written notice of such
failure and default, this agreement shall terminate and all rights in and to the
compositions theretofore covered shall revert to the Writer. This provision may
be specifically enforced.

Id. In August, 1973, Kama Rippa withheld Melanie’s royalty payments because it believed
she was in breach of a subsequent (recording) contract. Id. at 840. This litigation ensued.
Kama Rippa indicated it also believed the subsequent agreement formed a part of the
original agreement and that its obligation to pay Melanie royalties was contingent on her
performance of the subsequent agreement. Id. at 841. The court held that Kama Rippa’s
duty to pay Melanie royalties under the original agreement, as amended, was not contin-
gent upon her performance of the subsequent agreement. Id. at 842. As a result, the court
upheld the forfeiture clause, ordered Kama Rippa to return all of Melanie’s copyrights to
her, enjoined Kama Rippa from asserting that it had any remaining interest in such copy-
rights, and enjoined Kama Rippa from seeking to collect royalties on such copyrights. Id.
at 843.
period(s) reflected, and gross sum(s) received—all with respect to each copyright concerned under this Agreement on which royalties were paid to Publisher by any source during the accounting period reflected by the royalty statement, if any, including the total amount of such receipts, if any; (3) a figure reflecting Writer's share, per copyright, of the gross sums received and the total amount of Writer's share for all copyrights concerned under this Agreement on which royalties were paid to Publisher during the accounting period; and (4) a final figure reflecting either the net amount of advances against royalties remaining unrecouped or reflecting the net amount of royalties due Writer. Writer agrees that Writer is not entitled to any share of the float, and Publisher agrees that Publisher's retention of the float forms a specific part of the consideration in this Agreement flowing from Writer to Publisher. Publisher agrees that under no circumstances shall interest of any kind ever accrue in favor of Publisher regarding any advances against royalties or unrecouped advances against royalties.

Writer or a certified public accountant in Writer's behalf may, at Writer's expense, at reasonable intervals, during Publisher's usual business hours, and upon reasonable notice, examine Publisher's books and records insofar as Publisher's books and records concern Writer and for the purpose of verifying the accuracy of any royalty statement submitted to Writer under this Agreement. Publisher agrees to maintain books and records insofar as they concern Writer for the entire period Publisher is collecting royalties belonging in part to Writer, including subsequent to the expiration or termination of this Agreement. Should any audit reveal an underpayment to Writer of more than $20,000 (Twenty thousand dollars), Publisher shall reimburse Writer for the reasonable cost of the audit. Upon notice, Publisher shall immediately remit to Writer any underpayment discovered by Writer's audit, including ten percent (10%) interest per annum, commencing with the reasonable date(s) of underpayment, compounded annually.

9. Contractual reversion. If, upon the expiration or termination of this Agreement, Publisher has failed to secure a release on a

361. Mainly, this falls into the category of the frustration songwriters feel over unpitched demos. The simple truth is that the chances of a songwriter's demos being pitched after the songwriter's contract with the music publisher has expired and not been renewed are far less than when the contract was in effect and the songwriter was being paid advances against royalties. Certainly, there are exceptions, but they are just that—exceptions.

“Your publisher may resist the idea [of reversions under any circumstances]. I argue that the songs are of no value to anyone if they are merely gathering dust in the publisher's
major label of any one or more of the copyrighted musical compositions conveyed by Writer to Publisher under this Agreement, Writer may, at any time during any of the three full calendar months following the month of expiration or termination of this Agreement, request in writing the return of the copyrights to any such musical compositions. In such event, Publisher shall promptly reassign all such copyrights to Writer. Notwithstanding the language in the previous two sentences, no copyright conveyed by Writer to Publisher in the last year of the term shall revert under this provision unless and until it remains unrecorded and unreleased by a major label one (1) year after the expiration or termination of this Agreement. Writer shall have three months from that time to invoke the reversion dictates of this provision, at which time they shall otherwise expire. At the time of any reversion under this provision, should there remain any unrecouped advances, Writer shall execute a separate agreement in which Writer agrees to repay Publisher any such unrecouped advances off the top of the first royalties received by Writer from any source, until paid, on any such musical compositions. Nothing contained in this paragraph shall reduce or take away Publisher’s right to deduct unrecouped advances from royalties earned on Writer’s musical compositions successfully exploited by Publisher during the term of this Agreement. In no event, however, shall Publisher be compensated twice for any unrecouped advances.

Writer shall have the right, at Writer’s sole discretion, to purchase from Publisher the original multi-channel (e.g., 8, 16, 24 tracks) master recording and DAT “safety recordings” of any or all of Publisher’s demos of any musical compositions reassigned to Writer under this provision. Compensation shall be Publisher’s reasonable cost of production reduced by ten percent (10%) per year beginning with the first anniversary of the month of original production. If the parties cannot agree on the amount of compensation for any such demo, the issue shall be submitted to arbitration. If the parties cannot agree on the selection of an arbitrator or on any of the other particulars of any arbitration contemplated under this provision, either party may file suit for purposes of asking a court of competent jurisdiction to decide such matters. The parties agree that any such court rulings shall not be appealable. Should the arbitrator determine that either party acted unreasonably in forcing the issue to arbitration, the arbi-

office.” Carter, supra note 62, at 5. Under such a reversion, it seems only fair that since the music publisher paid the songwriter an advance to write such songs, the music publisher should be paid back. The method used here for accomplishing the “pay-back” is entirely reasonable.
trator may require such party to pay all or part of the reasonable cost of the unreasonably-forced arbitration, including any court action and all reasonable attorneys' fees. Judgment upon any award rendered or on any decision in the nature of a declaratory judgment made by the arbitrator may be entered in any court of competent jurisdiction and is not appealable.

D. Miscellany

1. Representations and warranties. To the best of Writer's current knowledge, information and belief, the copyrights to the musical compositions conveyed by Writer to Publisher under this Agreement are free and clear of any and all claims or encumbrances. In the context of contemplating the writing of musical compositions, Writer promises that Writer is not under contract to any other music publishing company and that, to the best of Writer's current knowledge, information and belief, Writer has every right to enter into and perform this Agreement. Publisher promises that, to the best of its current knowledge, information and belief, it has every right to enter into and perform this Agreement.

2. Indemnification. Neither Writer nor Publisher shall indemnify the other with respect to any claim or action brought against either or both by a third party in relation to any of the copyrights conveyed by Writer to Publisher under this Agreement. Each shall

362. These are items that seem to fit best in this category; that they are labeled "miscellaneous" is not meant to indicate any lack of importance.

363. As long as it is true that the songwriter has no reason to believe that any copyrights conveyed to the music publisher under the agreement are encumbered in any way or subject to some other third-party claim, it is unreasonable to place the songwriter in a breach position. This language avoids that. Further, both parties should promise that there is no reason they cannot enter into and perform the agreement. This language speaks to fraud in the formation of the agreement.

364. Absent willful infringement or fraud in the formation of the agreement, there is no reason the songwriter should indemnify the music publisher. If the music publisher wants less risk, the music publisher should enter into a co-publishing arrangement with the songwriter. As long as the music publisher owns the entirety of the copyright, the songwriter should not be liable to the music publisher for unforeseen events. Further, if infringement is being alleged, the plaintiff should sue the songwriter in addition to the music publisher because the plaintiff will want to recover monies paid to the songwriter under the music publishing agreement and public performance monies paid to the songwriter by the songwriter's performing rights organization. "As for ... indemnification, the first thing you should do is make the indemnification language mutual." Robert R. Carter, Jr., Song Rights: Legal Aspects of Songwriting, SONGWRITER NOTES, July/Aug. 1994, at 5. The music publisher, in appropriate circumstances, might successfully sue the songwriter for "contribution;" that is, assistance in paying a judgment. Finally, the music publisher, owning many copyrights, is far better able to financially withstand losing a copyright infringement lawsuit than the songwriter. Music publishers can buy insurance to cover this risk. The cost of such insurance to most songwriters surely would be prohibitive.
give the other reasonably prompt notice of any claim or action brought by a third party against either or both in relation to any of the copyrights conveyed by Writer to Publisher under this Agreement.

3. **Power of attorney.** To act in Writer's name and in Writer's place and stead, Writer hereby appoints Publisher and Publisher's designees as Writer's true and lawful attorney—with full power of substitution and delegation—only to take and do such action and only to make, sign, execute, acknowledge, and deliver any and all instruments or documents necessary to vest in Publisher, worldwide, the copyrights conveyed by Writer to Publisher under this Agreement.

4. **Actions.** Publisher and Writer, together or independently, shall have the mutual right to take such action as they deem necessary against any party to protect the copyrights concerned in this Agreement. Within reason, each party shall cooperate with the other in any controversy which arises or in any litigation which is brought concerning any of the copyrights concerned in this Agreement. Either party shall have the right, in its sole discretion, to employ attorneys and to institute or defend against any claim or action and to take any other necessary steps to protect the various interests in any of the copyrights concerned in this Agreement. Neither party shall have the right to settle, compromise, or in any other manner dispose of any such claim or action and to satisfy or collect on any judgment which may be rendered without the express written consent of the other, which consent shall not be unreasonably withheld. With respect to any copyrights concerned in this Agreement, should either party receive any funds in satisfaction of judgment or as a result of settlement with respect to any claim or action, all of both parties' reasonable expenses in connection with any such claim or action, including reasonable attorney's fees and reasonable costs, shall first be deducted and paid to or retained by the expending party, as the case may be, and fifty percent (50%) of the remaining proceeds shall then be paid forthwith by the receiving party to the other party.

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365. Where the songwriter's signature may be needed on an individual domestic or international copyright registration form, the music publisher needs power of attorney for that specific purpose in the event the songwriter is unavailable—by incapacity, death, or otherwise—to execute such a document when needed or should the songwriter refuse to execute such a document. No larger power of attorney is needed for any reason.

366. The first sentence in this provision is legally unnecessary, but its presence presents no harm in the agreement. Under normal circumstances, the songwriter would have every reason to cooperate with the music publisher because as the music publisher makes money on the copyright so does the songwriter. The third and fourth sentences are probably legally unnecessary, but it never hurts to spell out such provisions. The final sentence is to ensure that the music publisher does not seek to construe that this situation is not covered under the royalties provision.
5. Assignment. Subject to Right of first refusal, Publisher may assign any or all of the copyrights conveyed by Writer to Publisher under this Agreement to any person or business organization. Subject to Right of first refusal, Writer may assign any or all of Writer’s royalty rights under this Agreement to any person or business organization. Because of the personal nature of the relationships contemplated by this Agreement, and other than as indicated in the previous two sentences, neither party shall have the right to assign all or any part of this Agreement to any person or business organization.

6. Right of first refusal. Publisher hereby agrees not to assign any or all of the copyrights conveyed by Writer to Publisher under this Agreement to any person or business organization without first offering such rights to Writer upon equal or more favorable terms and Writer shall have refused such offer or failed to act within thirty (30) days of notice of Publisher’s intent to assign to a third party. Writer hereby agrees not to assign any or all of Writer’s royalty rights under this Agreement to any person or business organization without first offering such rights to Publisher upon equal or more favorable terms and Publisher shall have refused such offer or failed to act within thirty (30) days of notice of Writer’s intent to assign to a third party.

7. Suspension and termination. If Writer shall fail, refuse, or be unable to submit to Publisher musical compositions as required by this Agreement or shall otherwise fail, refuse, or be unable to perform Writer’s material obligations hereunder, Publisher shall have the right, in addition to all its other rights and remedies at law or in equity, to suspend the term of this Agreement and its obligations by written notice to Writer, or, in the event such failure, refusal, or inability shall continue for longer than six (6) months, to terminate this Agreement by written notice to Writer. Any such suspension shall continue for the duration of any such failure, refusal or inability, and, unless Publisher notifies Writer to the contrary in writing, the then current term of this Agreement shall be automatically extended by the number of days of suspension. During any such suspension, Writer shall not render services as a songwriter to any other party or assign or

367. Clearly, both parties should be able to assign or otherwise encumber the rights they own.
368. Simple mutuality.
369. This is a good provision because it automatically allows the music publisher to, in effect, extend the contract to cover any significant periods of inactivity on the songwriter’s part. In truth, any good songwriter can write a “song” any time, but there is some credence to “creative block” or “writer’s block.” The idea is to write “hit” songs. The provision also allows the music publisher a way out of the agreement should a “block” or some other disability cause the songwriter to be materially unable to perform over the longer term.
license or convey to any other party any musical composition which, but for the suspension, Writer would be obligated to convey to Publisher under this Agreement.

8. **New uses of copyrighted material.** The parties acknowledge that new uses of copyrighted material are created from time to time through, for example, the marriage of existing communication tech-

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370. "[A]s technology continues to develop, new income sources may develop as well—revenue sources that we can't even begin to imagine. You don't want to be shut out from those sources of income." Carter, supra note 353, at 5. The parties could, of course, settle such matters on their own by amending the agreement. See Repp v. F.E.L. Publications, Ltd., 688 F.2d 441 (7th Cir. 1982) (concerning the effect of a new type of licensing on the songwriter-music publisher agreement).


The first major component of AHRA concerns electronic safeguards against digital copies being made from first- and later-generation digital copies; it is called the Serial Copy Management System (SCMS). See 17 U.S.C. § 1002(a)(1) (Supp. V 1993). All home digital recording equipment imported or sold in the U.S. must contain the SCMS computer chip. *Id.* While SCMS is not a panacea (because, for example, one could theoretically make an infinite number of DAT copies from one CD), it does seem to solve the problem of exponential piracy—"perfect" digital copies being made from digital copies that are any number of generations removed from the original CD. The second major component of AHRA mandates that royalties be collected on blank digital audio recording media and on digital home audio recording equipment. *Id.* § 1004. Such royalties are to be deposited into the United States Treasury and the Copyright Royalty Tribunal is to act as the disbursing agent. *Id.* § 1005. The royalty on blank digital audio recording media is three percent (3%) of the import value or of the domestic manufacturer's FOB price to wholesalers. *Id.* § 1004. The royalty on digital home audio recording equipment is two percent (2%) of the import value or of the domestic manufacturer's FOB price to wholesalers, including a minimum royalty of one dollar ($1) and a maximum royalty of eight dollars ($8) per machine. *Id.* For digital home audio recording devices that contain, for example, dual recording decks, the maximum royalty is twelve dollars ($12). *Id.*

Once the money is collected into the royalty pool, it is distributed to approved claimants, *id.* § 1007(a)(2), as follows: record companies, 38.83%; featured recording artists, 25.59%; music publishers, 16.66%; songwriters, 16.66%; non-featured musicians, 1.75%; and non-featured vocalists, 92%. *Id.* § 1006(b). The third major component of AHRA counter-balances the royalty system by prohibiting sound-recording copyright infringement actions of a non-commercial nature. *Id.* § 1008. In other words, home tapers are free to
nologies or the invention of new communication technologies. Because the exact nature of any new uses of musical copyrights contemplated by this Agreement is not foreseeable, the parties agree that all issues arising therefrom shall be submitted to arbitration—should the parties be unable to agree on their own and within a reasonable time—including but not limited to whether such use is a “new” use falling outside the copyright conveyance by Writer to Publisher under this Agreement. Should the arbitrator rule that the use is a “new” use within the meaning of the preceding sentence, Writer agrees to convey some or all of the rights to any such “new” use to Publisher should the arbitrator so decide. Should the arbitrator determine that the use is not a “new” use, then it shall be governed as is any copyright right under this Agreement. If the parties cannot agree on the selection of an arbitrator or on any of the other particulars of any arbitration contemplated under this provision, either party may file suit for purposes of asking a court of competent jurisdiction to decide such matters. The parties agree that any such court rulings shall not be appealable. Should the arbitrator determine that either party acted unreasonably in forcing the issue to arbitration, the arbitrator may require such party to pay all or part of the reasonable cost of the unreasonably-forced arbitration, including any court action and all reasonable attorney’s fees. Judgment upon any award rendered or decision in the nature of a declaratory judgment made by the arbitrator may be entered in any court of competent jurisdiction and is not appealable.

9. Continuing force and effect.\textsuperscript{371} Notwithstanding the expiration or termination of this Agreement, the following provisions of this Agreement shall have continuing force and effect:

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\textsuperscript{371} Undoubtedly, the copyrights themselves last much longer than the term of the agreement to write songs between the songwriter and the music publisher. Consequently, it is very important to spell out exactly which provisions of the comparatively short-term contract will survive the expiration or termination of the agreement itself. Should there be a dispute decades later between, say, the estate of the songwriter and a successor in interest to the original music publisher (perhaps even several times removed), the court will look first to the initial contract between the original parties for a solution—or at least for guidance. Where the original contract is silent or unclear on whether, which and to what extent particular provisions were to survive, the parties will be at the mercy of a factually and historically ignorant judge and/or jury. Up-front certainty is much the better policy. That there are two dozen or so provisions in the agreement that need to survive the expiration or termination of the agreement is testimony to the importance of the language contained in an agreement that, assuming at least some fairly successful exploitation, will impact the songwriter for the rest of her life and her family or other heirs, successors, or assigns for at least another 50 years.

In this regard, AHRA draws no distinction between digital audio home taping and analog audio home taping. \textit{Id.}
10. No partnership or joint venture. Nothing contained in this Agreement shall be construed to constitute a joint venture or partnership between Writer and Publisher; rather, the relationship is one of contractor-independent contractor with the independent contractor retaining, inter alia, a beneficial interest in all copyrights of musical compositions conveyed under this Agreement by the independent contractor (Writer) to the contractor (Publisher).

11. Headings. The headings of the provisions of this Agreement are inserted only for the purpose of convenient reference. The language of the headings themselves shall not be deemed to govern, limit, modify, or in any other manner affect the scope, meaning, or intent of the provisions of this Agreement or any part of this Agreement, nor shall it otherwise be given any legal effect.

12. Entirety of agreement. This Agreement supersedes any and all prior negotiations, understandings, and agreements between Writer and Publisher with respect to the subject matter of this Agreement. Writer and Publisher acknowledge and agree that neither has made any representations or promises in connection with this Agreement not contained in this Agreement.

372. But neither is this relationship "work made for hire."

373. When a dispute arises concerning a contract, attorneys quite naturally look for any rational argument that will further the interests of their clients. Since the headings obviously involve fewer words than the paragraphs that follow them, it is safe to say they are more ambiguous than the paragraphs that follow them. Further, a lawyer might rationally argue that a heading is in some conflict with the paragraphs that it follows. Since it could be to one side's advantage for a heading to be ambiguous or conflicting, this language is included to remove any such opportunity for argument. At the formation of the contract, the neutrality insured by this provision inures to the benefit of both parties.

374. Often times in a contractual dispute one or both of the parties is wont to argue that the other party made a representation not actually contained in the contract that has materially affected the operation of the agreement. This language removes that opportunity. Optimally, what governs is what is in the contract; nothing more or less.
13. **Modification.**375 This Agreement may not be canceled, altered, modified, amended, or waived, in whole or in part, in any way, except by an instrument in writing signed by Writer and Publisher.

14. **Waiver.**376 The waiver by Writer or Publisher of any breach of this Agreement in any one or more instances shall in no way be construed as a waiver of any subsequent breach of this Agreement, whether or not the breach is of a similar nature.

15. **Effect of invalidity.**377 If any part of this Agreement shall be held to be void, invalid, or unenforceable, it shall not affect the validity of the balance of this Agreement.

16. **Controlling law.**378 This Agreement shall be deemed to have been made in the State of ____________, and its validity,
construction and effect shall be governed by the laws of the State of ___________ which are applicable to agreements wholly performed in the State of ___________. This Agreement shall not be binding until signed by Writer and by an officer of Publisher duly authorized to execute such contracts.

17. Attorney's fees. If any action at law or in equity, including an action for declaratory relief, is brought relating to this Agreement, the prevailing party shall be entitled to recover reasonable attorney's fees from the other party, which fees may be set by the court in the trial of such action or which may be enforced in a separate action brought for that purpose, and which fees shall be in addition to any other relief which may be awarded.

18. Multiple originals. This Agreement, and all other copies of this Agreement, insofar as they relate to the rights, duties, and remedies of the parties, shall be deemed to be one Agreement. This Agreement may be executed in one or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same Agreement.

19. Notices. Any written notices which Writer or Publisher shall desire to give to the other under this Agreement, including changes of address, and all statements, royalties and other payments which shall be due and owing to Writer from Publisher under this Agreement, shall be addressed to Writer or Publisher, as applicable, at the addresses set forth below. All notices shall be served either by hand—to any officer of Publisher if Publisher shall be the addressee—or by registered or certified mail, postage prepaid, or by telegraph.

under the agreement. It should be noted that the parties may not simply choose any state, the general rule being that the state chosen must be either the state in which the contract was formed, or the state in which the contract is to be substantially performed, or the state in which either party to the contract lives or exists as a legal fiction.

379. This provision has an advantage and a disadvantage. The advantage is that it protects against the filing and prosecution of frivolous lawsuits; for example, where the economically stronger party might want to harass the other party by filing colorable but actually non-meritorious actions, having to pay all or both sides' legal fees serves as a powerful deterrent. The disadvantage is that the economically weaker party may be disinclined to sue even where she feels she has been wronged and has a good case.

380. Since "originals" are better evidence than copies of originals, it is appropriate for both sides to want an "original." This language makes that possible.

381. This language removes any doubt on the issue of how and where the parties are to formally communicate with one another. The parties should keep each other updated on any changes of address, and the parties should make absolutely sure they have followed the appropriate communication procedures. Lawsuits can turn on the basis of following or not following one or more of each and every provision in the agreement, including the notices provision. As much care should be exercised in the operation and performance of a sophisticated, ongoing agreement as in its negotiation and drafting.
charges prepaid, addressed as indicated. The date of personal service or of mailing or of depositing in a telegraph office, whichever shall be first, shall be deemed the date of notice.

20. **Signatures.** The parties whose signatures and names appear on and under, respectively, the lines following the next sentence acknowledge that, on the date(s) indicated below, they executed this Agreement in consideration of the promises made in this Agreement and with the intention of being legally bound. This Agreement shall have no force and effect whatsoever unless both parties are in physical possession of a fully-executed original of this Agreement by on or before December __________, 1995.

<table>
<thead>
<tr>
<th>WRITER:</th>
<th>PUBLISHER:</th>
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<tbody>
<tr>
<td>Songwriter's name</td>
<td>Name of officer with authority to contract</td>
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<tr>
<td>Date</td>
<td>Title of corporate officer</td>
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<td></td>
<td>Date</td>
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**V Conclusions**

Under current circumstances, the songwriter signing her first music publishing contract will probably have done little, if any, real bargaining. The “negotiation” might go like this: the songwriter has been writing songs for a decade but has never before been signed to a major music publisher. Naturally, the songwriter is thrilled that a major music publisher wants to sign her. When the music publisher provides her with a copy of the proposed contract, she takes it to a competent music lawyer for review. Among other major revelations, her lawyer tells her that, under the proposed contract, she is conveying to the music publisher all of her previous compositions (there are a hundred or so of them which she believes could be “hits”) without being compensated for them other than through the royalty-payment provision in the contract. In addition to discussing all the other “revelations” in the contract, she discusses with her lawyer how she might be compensated for her decade of hard songwriting work.

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382. If at all possible, the parties should execute the agreement in each other’s presence because, otherwise, one party signs and delivers the document to the other side, giving that party the opportunity to hold the contract an indeterminate time and then do what is to its advantage—sign it or not sign it. This language, however, obviates that problem.
They settle on a strategy of proposing to the music publisher that, with respect to the songwriter's existing catalog, a co-publishing relationship be agreed upon whereby the songwriter would retain a 50% interest in all such copyrights. In return, the songwriter would acquiesce to all the other provisions in the proposed agreement to which she originally objected, and additionally, she would forego any specific up-front compensation for the 50% interest in the existing catalog conveyed by her to the music publisher. Although unstated, the songwriter is willing to negotiate her counter-proposal. When the counter-proposal is made to the music publisher, the reply is:

Look, there are tons of good writers out there who want to work here real bad. I'm sorry, but the contract will either be signed as prepared by our attorney, or we'll just call up the next writer on our list. This is just the way the business works. We want you, but we want our contract, too.

In this situation, most songwriters beginning professional careers would immediately stop trying to negotiate and sign the contract as is. This unequal bargaining power raises the problem of adhesion. What, if anything, can be done?

Songwriters in disadvantageous bargaining positions should try to take small steps toward more equitable language in such agreements. Under this method, however, anything even approximating contract parity would be a long time in coming, if ever. Songwriters in more advantageous bargaining positions should insist on completely equitable treatment in their agreements with music publishers. This is called bargaining strength.

Even when the songwriter-music publisher contract is not a problem, songwriters can get squeezed by artists or producers who sometimes extract half of the songwriter's songwriting royalties in return for cutting the song. Songwriters should remember to maintain a diary containing the dates and brief particulars of events that could

383. Ironically, although songwriters are viewed as perhaps the most essential component—the foundation—of the music business, their political power is equivalent to that of farmers and teachers, so the grumbling is done quietly and is largely ignored. * * * "The competition in this industry is phenomenal," comments one songwriter advocate. "I feel like the less complaining about what goes on and the better writing they do, the better chance they have."

Hansen, supra note 354, at 62.

384. Songwriters can be pressured into splitting their writer royalties [with the producer and/or the artist] if their other option is not getting the cut at all, especially if the producer works with a major artist and the writer is just starting out. The competitive factor is multiplied as there are many more talented, struggling songwriters than there are Harlan Howards, Paul Overstreets, Roger Murrah or Don Schlitzes [some of Nashville's finest].
affect the resolution of a dispute with the music publisher, e.g., dates of demo production and dates of audiotape recording presentation to the music publisher. Songwriters also should be very mindful about staying in continuous compliance with the provisions of the agreement.

That no relevant reported cases were found concerning a given provision of the “contract” discussed in Section III does not mean there have been no disputes on any such subject. First, it should be noted that virtually no one sues over a single minor dispute, e.g., the writer’s room not being furnished with “reasonable” furniture. Further, any such disputes could have been settled by the parties pre-litigation, pre-trial, during trial, post-trial, or pre-appeal. Moreover, these issues could have been subject to mediation or arbitration, or some other form of alternative dispute resolution.

With that said, it seems clear that songwriters rarely sue music publishers for reasons other than to determine authorship, to determine ownership of royalty rights, and to seek royalty accounting and payment. Why? Is it because songwriters as a group simply do not have the financial wherewithal to engage in protracted, expensive, time-consuming, emotion-draining, relationship-ending litigation? Surely, the answer is “yes.” If the stakes are high enough, a lawsuit will result, but lawsuits are a poor option for songwriters. Major music publishers, on the other hand, are able to prosecute or withstand lawsuits comparatively easily.

A final alternative for songwriters is to become “independent” of the major music publishing companies as have some recording art-

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385. That hardly anyone sues over minor disputes, of course, means that such provisions are more or less illusory. The real focus in any contract negotiation where the contract is to be performed over a significant period of time should be on the provisions of the contract that could result in a serious enough dispute to warrant the filing of a lawsuit. Minor provisions are included in contracts sometimes by contractual necessity and sometimes for other, less legalistic, reasons. Generally, they are complied with by parties who are performing the agreement in a spirit of genuine mutual goodwill.

386. Music publishers virtually never allege in a lawsuit, whether as counter-claiming defendant or as plaintiff, that the songwriter has somehow treated the music publisher unconscionably—even unfairly. Interesting.

There is never any doubt when the songwriter is in breach of contract. However, because of prevailing attitudes and; because of the way songwriter deals are written, rarely is a publisher found to have breached a contract. Aside from non-payment of royalties, suspension of a songwriter’s advance, and dissolution and/or bankruptcy of the publishing company—and not always in these cases—the publisher resides in a redoubt of time-honored tradition and, for the most part, appears to be above reproach.

NSAI HANDBOOK, supra note 23, at 93.

387. Id. at 96.
Songwriters might consider the formation of music publishing companies owned by groups of songwriters. Although this is hardly a novel idea, it is worth seriously exploring. Today's songwriters are perhaps much more educated and sophisticated than their predecessors; no doubt they could operate such organizations profitably and efficiently. Organized in some effective fashion, songwriters could effect monumental change in the recorded-music industry because the entire industry starts and stops with songs. The best alternative to any such radical course of action, however is fairness in contracting.

389. Of course, any such companies would not be trouble-free. There would be disagreements, but at least the fundamental relationship between the company and each of its contractually-affiliated songwriters would have been formed eye-to-eye.
390. An entire industry is built upon your particular talents. From the highest paid record company executive to the janitor who cleans the building that your publisher calls home, and all in between, I repeat ALL, rely upon you and all working composers and lyricists to provide the basis for their living.
