20 QUESTIONS FOR NEW ARTISTS

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Chris Castle Biography

Chris Castle is founder of Christian L. Castle, Attorneys in Austin, Texas. He founded the firm in 2005 with offices in Los Angeles and San Francisco, then moved the firm to Austin in 2011. He is admitted to practice in Texas and California.

Chris divides his time between advising creators in the music industry, representing innovative music tech startups on music rights issues and addressing public policy matters relating to copyright and artist rights. A recent project included negotiating music rights for episodic virtual reality programming.

Chris has testified on artist rights issues at the UK Parliament, briefed the National Association of Attorneys General on ad-sponsored piracy, spoken at Congressional seminars and lectured at universities and law schools in the US and Canada on music-tech issues and artist rights. He is a frequent speaker at professional events such as SXSW, the New York State Bar Association and the California Copyright Conference.

Most recently, Chris lectured at the American University, the Terry College of Business at the University of Georgia, the University of Texas Butler School of Music, and the UCLA Herb Alpert School of Music. He was a panelist on the recent Artist Rights Symposium at the University of Georgia, as well as the *Authors, Attribution, and Integrity: Examining Moral Rights in the United States* symposium in Washington, DC (sponsored by the U.S. Copyright Office and the Center for the Protection of Intellectual Property at the George Mason Law School). That panel resulted in that resulted in the Copyright Office's *Study on the Moral Rights of Attribution and Integrity.*

Prior to founding the firm, Chris was Senior Vice President and General Counsel at SNOCAP in San Francisco, Senior Vice President Business Affairs at Sony Music in New York, and Vice President Business & Legal Affairs at A&M Records in Hollywood.

Chris is an MBA graduate of the UCLA Anderson School of Management and a JD graduate of the UCLA School of Law where he was a member of the *UCLA Law Review* and an Olin Fellow in Law and Economics. Chris received the 2016 Texas Star Award from the State Bar of Texas.

Chris also regularly contributes to Hypebot and writes the MusicTechPolicy.com and MusicTech.Solutions blogs.

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Amy E. Mitchell is a transactional entertainment lawyer based in Austin, Texas who is dedicated to protecting creators, small business owners, and their intellectual property. From emerging artists and entrepreneurs to established professionals, Amy has served creative professionals' interests since 2004 with a focus on the music, television, and film industries.

A musician herself, Amy began her legal career focusing on music - representing talent, licensing content, and assisting with digital distribution. In 2011, she branched out into independent film and television production work and has served as production and distribution legal on more than a dozen independent feature-length films.

Amy is very active in the professional entertainment law community. At the state level, she is Past Chair for the Texas State Bar's Entertainment and Sports Law Section. On the local level, Amy spearheaded efforts to charter an Entertainment Law Section for the Austin Bar Association and recently returned as Chair. She frequently speaks and writes on entertainment law topics and maintains the educational site AskaMusicLawyer.com.

When she's not practicing law, Amy enjoys spending time with her husband and three young children and performing in several Austin ensembles.



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20 QUESTIONS FOR NEW ARTISTS

This article addressees some of the issues we have encountered that recur with artists who are just starting or are in the early years of their careers. While the issues we selected are not exhaustive, they cover a spectrum of the common issues. We have tried to write in a voice that can be understood by individual artists, songwriters, musicians and producers as well as practitioners.

1. BANK ACCOUNTS/TAX RETURNS/ACCOUNTANTS

A common mistake that bands make is to have all income paid to one band member, which usually results in unnecessarily complex adjustments at tax time not to mention general distrust should disputes arise. This can be particularly vexing if the band wants to "fire" that band member with all the bank records. Instead, we counsel bands to have the band's income and expenses paid from a neutral source. (Even though we will frequently speak in terms of bands or musical groups, solo artists should keep their business bank account separate as well.)

Check with your bank branch to find out what the bank requires in order to open a bank account in the band's name or the solo artist's stage name (usually at least a "doing business as" or "dba" filing with a local government agency of some kind).

The band should find an accountant in its geographical area who is familiar with music issues and band accounting and take a meeting with that accountant (preferably a Certified Public Accountant who will file the band's tax return). The band's accountant should be able to advise you on questions such as the tax deductibility of expenses (recording sessions, haircuts, meals and travel, cell phones, etc.); insurance and financial liability issues (not surprisingly, liability issues substantially increase as soon as the band hits the road and starts driving); whether the band should lease or buy that new band van; and how to treat various income streams such as money received from investors, royalty income, merchandise, etc., as well as payment of sales tax, withholding and income tax.

Eventually, the accountant will be responsible for administering the band's credit card, paying each band member his/her draw or salary, settling tours, and making sure any roadies or other employees are properly paid under state and federal tax laws.

2. SOUNDEXCHANGE

The United States is one of the only countries in the world that does not pay recording artists and sound recording owners for the public performance of sound recordings. However, the U.S. Copyright Act was modified in 1995 to create a limited public performance right and a statutory blanket license for sound recordings in digital formats that are "non-interactive". Examples of "non-interactive" would be webcasting and simulcasting of radio stations compared to "interactive" services like Apple Music or Spotify.

SoundExchange is the non-profit entity that administers this statutory license, collects the revenue and pays it out to featured artists (45%), non-featured artists (5%) and sound recording owners (50%). Producers may also participate in the featured artist's share of revenue through a letter of direction available on the SoundExchange website (www.soundexchange.com)

Featured recording artists and bands that own their own sound recordings can register with SoundExchange, the U.S. performing rights organization for sound recordings. Registration forms are available on the SoundExchange website (http://www.soundexchange.com/), and membership is free. It is a good idea to check the SoundExchange database (which can be done online with a simple registration) for any titles of your band's recordings to see if the recordings are already included in the database or are mis-registered under similar titles.

In addition to the "registration", artists can also become "members" of SoundExchange. This allows SoundExchange to collect performances from certain rights organizations overseas (currently 46 including UK and Europe). This requires separate authorization as a "mandate", which is explained on the company's website (currently https://www.soundexchange.com/artist-copyright-owner/registration-membership/member-benefits/).

We highly recommend that you become a member of SoundExchange.

3. PERFORMING RIGHTS SOCIETY AFFILIATION

There is a bit of strategy involved with affiliating with a performing rights society in the United States. All the societies have a creative staff. The decision to affiliate with a particular society should be made after the artist/writer has taken some meetings with the performing rights society and decided if there's more love coming from one than another.

Most of the time we like to wait until the music is fairly well formed and the band has gelled into a working unit before approaching the societies unless there's a reason to move more quickly, such as getting a film or TV license, or substantial radio/webcasting play. In more experienced bands, the writers will already have an affiliation, so it is a

good idea to know this in advance for purposes of servicing the creative staff with new music, competing for slots on compilations and festival shows, etc.

Rights and Royalties Chart

Post-digital income (Post 1995/1998)	Digital (non-interactive webcast, Simulcast)	Digital (Inter-active streams	Physical (CD, Vinyl)	US Radio/TV (OTA)	Ex US Radio/TV (OTA) For US Writer/Artist	Motion Picture/TV/Commercial
Songwriter	Yes, PRO	Yes, PRO and mechanical	Yes, mechanical from publisher	Yes, PRO	Yes, PRO	Yes, sync license from publisher
Music Publisher of Song	Yes, PRO	Yes, PRO and mechanical	Yes, mechanical	Yes, PRO	Yes, PRO	Yes, sync license
Recording Artist ("Featured")	Yes, SoundExchange	Yes, from record company	Yes, from record company	No	No (unless qualified see PPL)	Yes, master use from label
Featured Recording Artist if Sound Recording Owner	Yes, SoundExchange	Yes from DSP	Yes, from aggregator or distributor	No	No, unless qualified (see PPL)	Yes, master use (often all-in fee)
Session Musician/Vocalist	Yes, SoundExchange	If union	Yes, from union	No	No (unless qualified see PPL)	Yes from union
Record Producer	Yes, artist share from SoundExchange (if LOD)	Yes, from artist	Yes from artist	No	No (unless qualified see PPL)	Yes from artist
Record Company	Yes, SoundExchange	Yes from DSP	Yes from sales or license	No	No (unless qualified see PPL)	Yes, from master use

The major U.S. performing rights societies are the American Society of Composers, Authors and Publishers (http://www.ascap.com/), Broadcast Music, Inc. (http://www.bmi.com/), the Society of European Stage Authors and Composers (http://www.sesac.com/) and Global Music Rights (http://www.globalmusicrights.com).

There are, of course, payment differences among the societies. For detailed background we recommend reading Music, Money and Success by Jeff and Todd Brabec.

20 Questions Sidebar: The Importance of Metadata

"Metadata" is a generic term for "credits" or what is also called "label copy." It includes the song title, artist name and sound recording copyright owner for each track. The "metadata" issue comes up every time you—or someone you authorize—upload your recordings or videos to a digital service, or your song information to ASCAP or BMI or your recording information to SoundExchange. Any mistakes you make in inputting metadata potentially stand in the way of your getting paid by those services or PROs.

We can't emphasize enough how important it is that you are consistent in your metadata and that you make an extra effort to correct it if you see it is incorrect on any digital service. These are burdens of time on artists and their managers, but correcting metadata is often at the bottom of the failure of a service to account to you for your royalty. Any mistakes along the way can get magnified and may drag you into a Kafka-esque experience inside the room of mirrors in Dataland, where mistakes are always someone else's fault, everyone is understaffed and the machines rule and are considered to be infallible.

Make sure you ask your distributor for their rules for metadata, often called a "style guide." In the meantime, you should read the iTunes Style Guide which is available from Apple at this link: https://help.apple.com/itc/musicstyleguide/en.lproj/static.html

There's a lot of information there, but it is important stuff to know. Remember—your ability to get paid may depend on the tender mercies of a data input clerk working at minimum wage who you will never meet and who probably does not care as much as you do about getting your data input correctly. You need to make it as easy as possible for them to do their job right. However you may feel about poorly paid data entry clerks, empathy doesn't pay your bills.

4. INSURANCE

Many bands overlook the importance of insurance, often until it is too late. Even if you don't overlook it, many artists don't fully understand why their coverage may be lacking. It is a very good idea for the band to meet with an insurance agent experienced in music industry insurance (we often recommend Doodson) and get a report from that agent about the coverage the band has (if any) compared to what the agent recommends. In the early days, the band may not have sufficient monies to both get insurance and set up limited liability entities. We always recommend insurance in this case. At a minimum, the band should have commercial insurance on your van and sufficient coverage to protect against loss or damage to the band's musical instruments (often different policies). If feasible, the band should also seek general entertainer liability insurance, which is an umbrella policy that covers artists above and beyond the typical automobile insurance and other common coverages. (Tip: Watch out for exclusions for thrown objects.) You should also confirm which insurance programs might be available to you from your PRO membership (such as ASCAP's insurance programs.)

5. LEGAL NAMES OF MEMBERS

Each member of a group artist should provide the managing member or accountant with the member's full legal name. This will be necessary for contracts, registration of copyrights, etc. It is a good idea to have a list of each member's cell phone and email so you can give that to anyone who needs to reach the band, particularly on the road or in case of emergencies. If there are any side members (i.e., "hired hands"), list them as well. This type of information can also help the band's accountant spot red flags like the employee versus independent contractor issues.

6. DATE OF BIRTH AND NATIONALITY

It is important to know early on if any members are not of the age of majority in your state so that if someone is under age, you will be prepared for any issues in your state relating to age of consent (usually for contracts) and employment law (performing in clubs that serve alcohol, for example). If the band tours out of state, you will need to consider these issues. Often this involves having a parent or guardian available to sign off on any written agreements.

Many states have court procedures (particularly California) that can allow minors to have special rights to do business or make contracts, such as "emancipated minor" laws or "judicial ratification" of contracts. Do not assume that these laws apply to minors in your band without talking to an experienced labor lawyer familiar with your state (and any other states or countries you may be touring in).

It's also handy to have each member's date of birth available for any copyright registration applications you file (such as Form PA for musical compositions) because the U.S. Copyright Office often requires applicants to include the year of birth.

7. BAND ADMINISTRATOR/LEAVING MEMBER

It is a good idea for one band member to take responsibility for keeping track of the papers and information relating to the band's business, such as receipts, bank statements, credit cards, payments, approvals for licenses, etc. This is especially important if there is no manager involved with the band.

It's a bad idea if this "managing member" has too much latitude to go off the rails--which in this case means run up bills, take on other debt, disappear with the money. The "managing member" must keep the other band members informed, and should not be able to assume any liabilities or sign any contracts on behalf of the band without written consent of the other members and giving them a chance to read and understand what it is they are signing up to.

The duties and authority of this person need to be clearly spelled out and understood. This is the kind of thing that is addressed in a band partnership, shareholder or LLC operating agreement (and you may well be forming a "de facto" partnership as it is), so we will reiterate the importance of having the band agreement drafted by a lawyer.

Another issue that should be addressed by the band and should also be included in a band agreement is how to add and especially to remove a member and any payments or song ownership the leaving member is entitled to after leaving the band. Leaving member issues may also be addressed in recording artist agreements, management agreements and music publishing agreements.

8. SONG SPLITS AND CO-WRITER AGREEMENTS

Song splits are probably the most sensitive conversations that the band has together. Some professional songwriters take split sheets into each writing session and get all the co-writers to sign off on the split sheet and at least register the song with their PRO when the song is completed. This is another one of those discussions that is better had ***before*** the band is making money to avoid the "selective memory disease" and can help if the band (or any member-writer) is ever accused of copyright infringement in connection with a song.

Song splits become especially important if you are writing with "outside writers" such as a record producer who may bring beats or a singer who brings a top line, or even just a producer who helps to shape the song as well as the recording.

Whenever you co-write with someone not in your band (which could be a producer or another songwriter) there are some issues you have to be concerned about. Some of this may be a little too complex legally for most people to try on their own, but we will assume that if you have a record deal (which is when most of these issues come up) you will already have a lawyer or manager to help you. These are not all the issues involved, but if you cover all of them you will avoid a good deal of agitation later on. Your lawyer should be able to help you get song split agreements drafted.

A. Controlled Compositions

Record companies must license the right to sell reproductions of songs in records (or what the Copyright Act defines as "phonorecords"). This section does not typically apply to digital services like Apple, Deezer, Spotify or Tidal which rely largely on the statutory license and pay publishers directly.

The Music Modernization Act's revisions to the mechanical licensing section of the Copyright Act now treats record company mechanical licensing differently than digital music service mechanical licensing but does not change the rules applicable to controlled compositions.

Record companies (and we use the term broadly to include any distributor of phonorecords) typically will negotiate the maximum mechanical royalty rate that they must pay on records they release. These terms apply to songs written, owned or controlled by the recording artist.

These special terms are found in a clause in the recording artist agreement which is called the "controlled compositions clause." The terms typically will include a maximum cap, a reduced mechanical rate applied as a percentage of a fixed rate and a limitation on the types of records for which a mechanical is paid. For example, a maximum rate of 10 times ¾ of the minimum statutory rate on the date of delivery of the record concerned applied to sales of records for which an artist royalty is also paid would be a fairly customary (and low) controlled compositions rate. (These reductions typically do not apply to digital reproductions.)

Very often digital distributors and some indie distributors will require that gross monies paid for digital downloads or physical record sales are inclusive of mechanical royalties. This is not true of streaming, where the streamer (like Apple Music) pays the mechanical separately. The Music Modernization Act created a blanket license for streaming mechanicals and gave the streamers a retroactive safe harbor on unlicensed uses that were the subject of David Lowery

and Melissa Ferrick's class action lawsuit against Spotify and David Lowery's separate class action against Rhapsody over unlicensed songs and unpaid mechanicals.

Controlled compositions clauses do not apply to sales in the world outside of the United States and Canada, and even in the United States and Canada there have been developments that reduce the effects of certain controlled compositions clause provisions, especially for digital sales. Controlled compositions clauses must be carefully negotiated.

If you are an artist signed to a recording agreement with a controlled compositions clause, you want to be sure that your co-writer accepts all the terms that apply to you. If you are the unsigned co-writer, be sure you understand all the terms of the controlled comp clause that apply to your song. You can ask for a copy of the "redacted" clause from the artist contract (and artists who do a lot of co-writing should have a digital copy of this clause ready to send out as it is a fair request).

B. Other Sync Licenses and Pitching

Aside from music video syncs, there is a whole world of film and TV licensing as well as advertising opportunities. These often require servicing a recording of your song to the film and TV supervisors or creatives at advertising agencies.

There are people who operate these pitching services, and major labels (at least theoretically) do it themselves. If you co-write with a writer who either has a pitching deal or a record deal, you need to have an understanding of who can pitch the song and who can approve synchronization licenses. If you are the featured artist, you will want to have some control over who is pitching the song because if your co-writer pitches the song for a use you do not want to approve, that can create confusion in the film and TV licensing community and may result in you not getting considered for future syncs that you do want. (The conversation with the co-writer will go something like this: “What do you mean the artist won’t approve it? YOU PITCHED IT TO ME!”)

You will also need to have a clear understanding with any outside writers of how pitching services your co-writer has contracted are compensated. This can involve "retitling" or giving up a share of publishing. Your share of songs should not be subject to those pitching agreements unless you separately decide to accept the terms, but you must, of course, know what the terms are before the fact. We'll cover these agreements separately.

C. Creative Commons

As usual, you have to be very careful not to write with anyone who intends to make your co-written song available under any kind of a “Creative Commons” license without your prior written consent. You may wish to include a prohibition on Creative Commons licenses in your song split agreement. The “CC” licenses do not work very well for professional songwriters, mostly because the forms are very poorly drafted and it is effectively irrevocable. See “Carefully Co-Writing Without Creative Commons” (by Chris Castle), Public Licenses: The Gift that Keeps on Giving (by Prof. Jane Ginsburg), Common Understanding (by ASCAP's Joan McGivern)

9. OWNERSHIP OF RECORDINGS

Make sure you are clear about who owns the copyright in the band’s recordings including demos. Remember—there are two copyrights in each sound recording, the sound recording itself and the song that’s recorded (the song presumably would be covered by the split agreement). If you are the featured artist, you want to own 100% of the sound recording copyright. The percentage ownership of the recording and the percentage ownership of the song are two very different things and the ownership shares are independent of each other. Just because your cowriter owns 50% of a song doesn’t mean the cowriter owns 50% of the recording of the song. This will become important if you use a pitching service for film and TV placements (“syncs”) and the licensee wants to use the recording of the cowrite. If you are signed to a record company, the record company may technically own all your prior recordings including demos under your recording artist agreement (or may take the position that they do).

20 Questions for New Artists Sidebar: The Economic Reality of Streaming

Streaming is all the rage. But–it is cannibalizing higher margin goods, even digital goods. Because of the industry standard revenue share method of dividing up royalties, all artists essentially get a market share allocation of streaming service revenue based on the number of streams. Plus, with some exceptions, your royalty rate is dependent on factors you have no control over. What this means in simple math is that streaming royalties on a per-stream basis will always decline over time.

Artists' dismal streaming royalties on music subscription services are largely based on a simple calculation: A per-stream payment derived from a share of the service's revenue prorated by number of streams. Artists get a portion of a service's monthly revenue (at least the revenue the service discloses) based on a ratio of your plays to all the plays. Your plays will always be a lot smaller than the total plays. (This is essentially what Sharky Laguana referred to as the "Big Pool.")

Sounds simple, but mixed with the near-payola of Spotify's playlist culture and Pandora's "steering" deals, it's really not. Negotiating leverage allows big stakeholders to tweak the basic calculation with royalty floors, advances (aka breakage), nonrecoupable payments that help cover accounting costs, and other twists and turns to avoid a pure revenue share. All of which approximate a per-stream rate on a Rube Goldberg level, by the way, which is one thing these services seem to resist.

It's pretty safe to say that all new artists get hosed on streaming royalties. Setting aside the fact that your distributor will never get all the goodies that the big labels get in their deals, this is because even if a fan listens to your tracks only for a month, well over 90% of that fan's subscription payment is allocated to artists she didn't listen to and may not even like. Of course all these machinations happen behind the scenes. Fans are not usually not aware that their subscription pays for music they don't listen to and artists they never heard of or don't care for. Plus, it's virtually impossible for any label, digital distributor or publisher to tell an artist or songwriter what their per-stream rate is or is going to be.

Revenue share deals for big stakeholders have some bells and whistles that leverage can get you, like per-subscriber minimums, conversion goals, top up fees, limits on free trials, cutbacks on "off the top" revenue reductions, and the percentage of revenue in the pool (50%—60%-ish). Even so, the basic royalty calculation in a revenue share model is essentially this equation calculated on a monthly basis:

(Net Revenue * [Your Streams/All Streams])
Or ([Net Revenue/All Streams] * Your Streams)

In other words, all the money is shared by all the artists.

Sounds fair, right?

Wrong. First, all artists may be equal, but on streaming services, some are more equal than others. Regardless of the downside protection like per-subscriber or per-stream minima, the revenue share model has an inherent bias for the most popular getting the most money out of the "Big Pool." (This is true without taking into account the unmatched.)

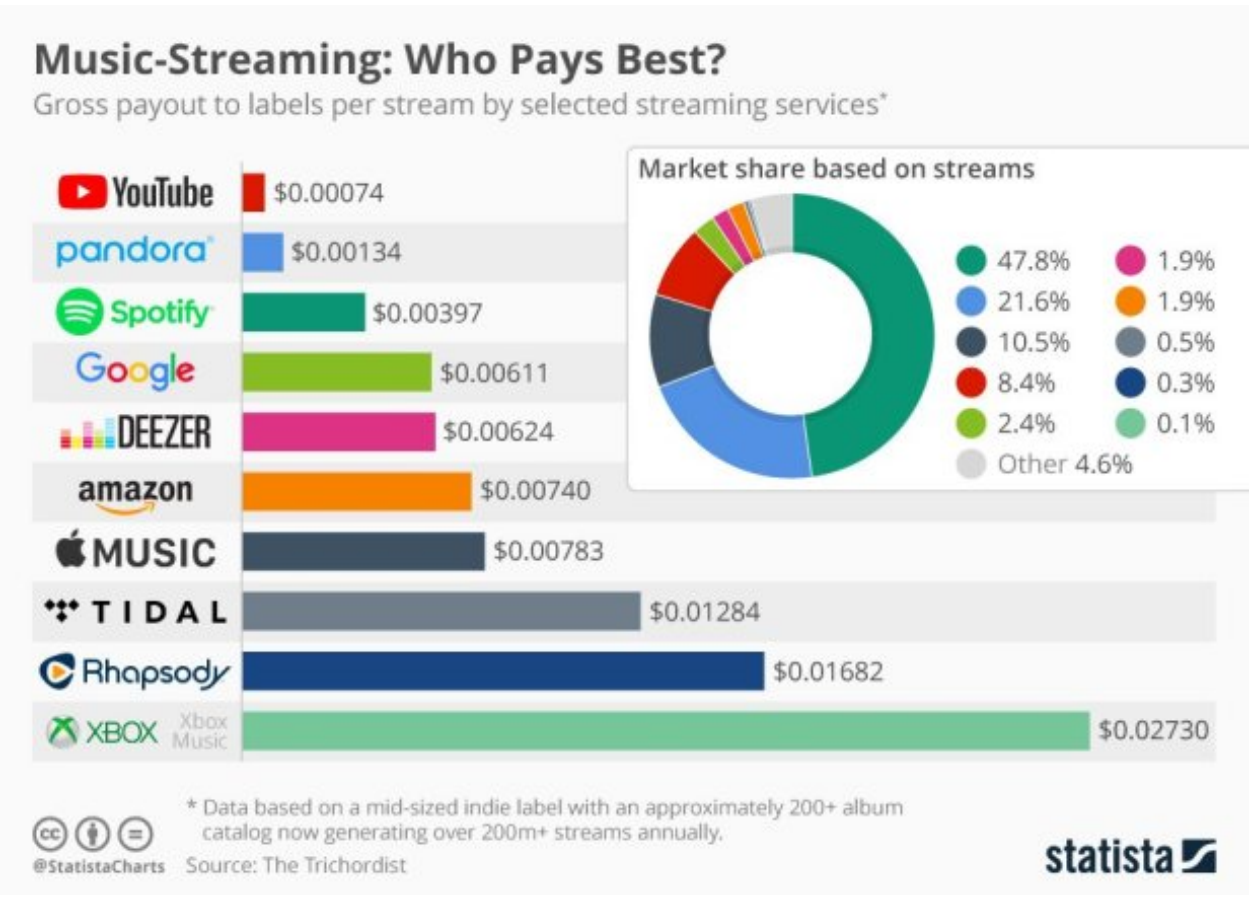
In addition, the more of those artists are signed to any one label, the bigger that label's take is of the Big Pool. So the bigger the label, the more they like streaming. Conversely, the smaller the label the lower the take. This is destructive for small labels and independent artists. That's why you see some artists complaining bitterly about a royalty rate that doesn't have a positive integer until you get three or four decimal places to the right. Why drive fans away from higher margin CDs, vinyl or permanent downloads to a revenue share disaster on streaming? Because it's all the rage.

Yet it increasingly seems that we are all stuck with the nonsensical streaming revenue share model with ever-declining per-stream rates. Why is the rate guaranteed to decline?

If the month-over-month rate of change in revenue (the numerator) is less than the month-over-month rate of change in the total number of streams or sound recordings streamed on the service (the denominator), the per-stream rate will decline over those months. This is because there will be more recordings in later months sharing a pot of money that hasn't increased as rapidly as the number of streams.

As the number of recordings released will always increase over time for a service like Spotify that licenses the total output of all major and indie labels (and independent artists), it is ***likely*** that the total number of recordings streamed will increase at a rate that exceeds the rate of change of the net revenue to be allocated. If there are more recordings, it is also ***likely*** that there will be more streams.

So streaming royalties in the Big Pool model will likely (and we would say necessarily will) decline over time. That's demonstrated by declining royalties documented in The Trichordist's "Streaming Price Bible" among other evidence.



There is a move afoot to switch to a "user-centric" model of revenue share allocation that rewards the artist with a share of everyone who listens to them. Chris has a version of that concept called the Ethical Pool.

https://musictech.solutions/2018/10/02/arithmetic-on-the-internet-the-ethical-pool-solution-to-streaming-royalty-allocation/). But the simplest approach would be to abandon the revenue share model altogether and negotiate a per-stream royalty–unfortunately, no one seems to be interested in the simplest approach.

Deezer has announced that it intends to implement a version of the user-centric model in 2020 if it can get rights holders to sign up (see https://www.musicbusinessworldwide.com/deezer-plans-2020-user-centric-payment-system-pilot-launch/).

For our purposes, just understand that regardless of what you hear about streaming saving the industry, streaming is unlikely to save you.

10. PRE-EXISTING CONTRACTS

Ask your band mates for copies of any music industry contracts the band, or any of you, have previously signed before you formed or joined the band. Whether it be a credit card, management agreement, publishing deal, previous band agreement or a production agreement, it is important to understand the band's current rights and restrictions. If any of the members are still tied to an exclusive recording agreement from a prior band, or has credit card debt from a prior band, that needs to be cleared up sooner rather than later. Extracting the artist from a prior agreement may not be quick or even possible.

11. SOUND RECORDING AGGREGATORS

An independent artist is practically required to sign up with an aggregator in order to have your works serviced to many online outlets–some aggregators service hundreds of different retailers. (So one example of a pre-existing contract under Question #10 may be a band member's contract with a sound recording aggregator.)

It is important to remember that without marketing and promotion, a new artist is simply a needle in an even bigger digital haystack. Do not expect the aggregator to do any significant marketing or promotion, much less guarantee it. This is the primary difference between a traditional distributor and an aggregator, but even traditional distributors may have a shaky ability to do marketing and promotion.

Given that there are so many potential digital outlets, it is important for an artist to be able to decide on a case by case basis whether they want to be included and preserve the right to opt-in to any retailer or to opt-out at any time.

Artists should also be able to terminate the aggregator deal on short notice for any or no reason (e.g., 30-60 days). If you are asked to sign a deal with an indie label or with a major label, these labels may well require that you give them exclusive distribution rights–including the digital rights you have already granted to the aggregator. That means that you need to have the ability to terminate your aggregator deal and transfer digital distribution to the new label, often as part of an exclusive bundle of rights. There have been instances where digital distributors tried to hold up artists from signing to a label with the previously released recordings–a problem solved by the payment of money. Keep an eye on that issue.

How the aggregator is compensated is also an issue of concern. In the traditional model, the aggregator took a percentage of sales as their compensation. This meant that the aggregator only made money if the artist made money. (This is similar to a traditional distributor model.) Some aggregators charge a flat fee on some basis (such as a per-retailer basis or an annual fee) instead of a percentage. There may also be initial setup fees.

Each model has its strong and weak points. The percentage model pays the aggregator regardless of whether they are making an effort to stimulate sales (which few of them do in any event). However, under the percentage model the aggregator only makes money if you make money, so the incentives are aligned. The percentage should be lower than the traditional 12-25% to take into account that the aggregator has lower incremental costs over time of maintaining content in their catalog.

The flat fee model has the artist pay the aggregator a fee for distribution instead of paying the distributor a percentage. While this is attractive from the point of view that the artist knows what their distribution costs will be up front, it also transfers much if not all of the financial risk of distribution to the artist.

In order to determine which is the better model, the artist should compare their most favorable percentage-based offer to the flat fee model and see what the breakeven point will be. Try using a formula like this:

[Flat Fee]/[percentage] = Gross Income Required to Equal Aggregator Payment
Gross Income/wholesale price = breakeven units

or, for example, if the flat fee charged is $100 compared to a distribution fee of 10% for the same services, a distribution fee of 10% will equal a flat fee payment of $100 if you earn $1,000 of gross income.

Said another way, the 10% model is better for the artist for the first $1,000 of income
$100/.10 = $1,000 (Gross Income)

How many units would you have to sell in order to reach $1,000 of gross income?
$1,000/$0.70 = 1428 units (rounded down) for a download.

$1,000/$0.00397 = 251,889 Spotify streams to earn back either a $100 flat fee or 10% distribution fee, or
$1,000/$0.00783 = 127,714 Apple Music streams (roughly half what it costs on Spotify).

This means at breakeven, you will be indifferent between the two deals. But it also means that if in reality you sell less than the breakeven numbers, you will be better off under the distribution fee model. If you sell more, you will be better off under the flat fee model.

From the distributor's point of view, on flat fee distribution deals they (i.e., distributors) will make more profit from artists who sell less than artists who sell more than the theoretical break even. It's essentially a perversion of the normal goal of a distributor to encourage sales because a flat fee model distributor profits the most when they simply have a lot of content (rather than "popular" content). The classic quantity over quality.

In any of these examples, you will need to use your own projections on sales, wholesale price and configurations in order to get a projection that is relevant for your own use.

Also, *the aggregator need not collect SoundExchange monies* and should not be able to list itself as the sound recording copyright owner in order to receive statutory royalties. The artist need only sign up with SoundExchange in order to collect statutory royalties. SoundExchange has an entire artist relations staff to help you with registering and becoming a member. (See Question #2 on SoundExchange).

Be aware that it may not be that obvious from the click through aggregator agreement that the company intends to collect SoundExchange royalties. Look for words like "non interactive statutory royalties" which means royalties collected by SoundExchange.

It must also be said that no digital aggregator should be able to enter into any agreements on behalf of the artist/copyright owner that allows the aggregator to waive any rights on your behalf (such as litigation rights) or to settle any claims or audits.

Another big problem with flat fee aggregators is that you have no idea what their deals with their accounts may be and you are betting on their ability to both negotiate a favorable deal and also pass those benefits along to you directly including audit recovery (especially since you may not have the right to audit them).

12. ARTIST MANAGER AGREEMENTS

New artists often think that the first person they need on their team is a "manager". They've all heard the stories of the "big" managers who can snap their fingers and make something happen for their clients.

The reality is that when an artist is just starting out, the early days are just as for the new artist using Internet-based tools to sell their records as it is for the big manager with the major label backing. When we say "sell", we mean that literally—get someone who you don't know to pay money for your record. We don't mean some promotional gimmick or getting a retailer to take some units they can later return for full refund. That's not a "sale." Real sales have always been hard, and they are just as hard in the current environment as ever, and actually given the competition for the fan's eyeballs, much harder.

So getting a manager may not be your first move in assembling your team. Let's talk about what a manager does and what a manager does not do.

A. A Manager Is Not a Personal Assistant

A manager does not walk your dog, pick up your laundry, pay your bills or tie your shoes. A manager also does not remind you to do any of the foregoing, nag you to wash your dishes, or loan you money. This person is usually called a personal assistant, kind of a cross between a gofer and a parent. Good managers will not do any of that stuff.

B. A Manager Is Not a Booking Agent

Strictly speaking, a manager does not get you work (a/k/a "procure employment"), particularly not in California or any other state that regulates talent agencies or booking agencies. However, most new bands have the expectation that if they do not have a booking agent, a manager will get them shows. This is a problem for the manager, because anyone other than a licensed booking agent (which usually means licensed by the State where they reside) and usually an agent affiliated with the unions (or "franchised") is not supposed to book shows.

Even so, it is not unusual to hear that managers are booking "pump priming" shows, usually at clubs or festivals for low or no performance fees, in order to showcase their band for agents. This can go on for a while, including after the band is signed to a major label.

Another reason a manager is not a booking agent is that most booking agents are "franchised", meaning that they have signed an agreement with the American Federation of Musicians (AFM) or possibly other unions. That franchise status is very important because without it, the agent will not be able to book union members—which is essentially all touring artists. The franchise agreement has limitations on how much commission the agent can charge, usually 10%. Managers charge more.

C. A Manager Is Not a Tour Manager or Roadie

Most managers do not go on tour with their bands, at least not for all of the shows. They do not hump gear, they do not settle or argue about the value of towels (usually), they do not drive the truck, van or bus. They may have done all those things in other lives, but they do not do those things now.

D. A Manager Gives Career Advice

Personal managers typically will say that they give career advice. Of course, they do much more than that, but given the things they don't do, you can see that if you think of "career advice" in the very broad sense and then you add in shopping a record deal, soliciting a booking agent, publishing deal, setting up co-writes, finding a producer and negotiating the deals for all of these people in concert with your booking agent or lawyer, you begin to get the idea.

The personal manager often comes up with most of the marketing plan for your band, then runs interference to make sure that all the people involved can actually execute that plan on time and in concert as a team. Bigger managers also have on-staff digital marketing teams. You could call this an "uber product manager"—a manager of managers. The better the artist's personal manager is at that, the better off the artist should be. In fact, managers should typically be expected to manage an artist's social media and assume marketing roles once the province of the record company product manager.

These are some key terms in the management agreement:

Commission Rate: 15% or 20% of Commission Base

Commission Base: Artists will want to make the "Commission Base" as close to a net number as possible, the managers will want to have it be some form of modified gross. For tour income, the typical deductions would be for the cost of sound and lights, opening acts or musicians, some tour personnel, promoter commissions, sometimes booking agency commissions. On merchandise created by the artist to be sold at shows, the artist would get to deduct the cost of merchandise, credit card fulfillment fees, hall fees. On recording funds, the artist could deduct recording costs, producer fees and royalties, mixing costs, musicians, vocalists, arrangers, engineers, vocal coaches, outboard gear, instrument rental. On songs, commission should be excluded on co-writers and any publishing that has to be given up to a third party, such as on a soundtrack where the studio takes part of the publishing.

Term: Most managers do not like to have less than a five-year term, but younger managers should expect to see that period broken down into a couple of options, usually performance-based options. The "term" is sometimes expressed in "album cycles", but this is an increasingly mushy concept as the album is less of a concept as streaming takes over the major labels.

Post Term Commissions or "Sunset Clause": Written manager agreements may include a post-term commission schedule that should apply to specific records that were created and released during the term of the management agreement and the songs in those records, any tours booked but not performed during the term, other elements that you argue about. The manager will expect to take a reduced commission for a period of time. The artist is incentivized to make that post-term period as short as possible, and these are usually expressed as a percentage of the otherwise applicable commission base. For example, a reasonable post-term deal would be 50%, 25%, 12.5% for 3 years post termination (meaning that a 15% commission would be 7.5% during post term year 1, 3.75% in year 2, 1.875% in year 3, and nothing thereafter. The commission base would be limited to product created during the term). If the band gets new management during the sunset clause for old management, make sure that the new management either doesn't commission what the old management is commissioning during the sunset or they agree to back out the sunset commissions.

Expenses: Avoid surprises on management expenses by limiting actual costs actually spent on your band, no overhead charges, no management travel expenses without prior written approval.

Audit: It is always important to be able to audit the manager once a year, and the manager will likely expect a reciprocal right to audit the artist.

Payments/Power of Attorney: Make sure that the manager cannot cash checks. Good managers do not want to touch the band's money. Also make sure that the manager does not steer the band to a business manager they essentially control and that any business manager reports directly to the artist and not to the manager. The manager does not need to sign anything on the band's behalf other than so-called "one nighter" agreements in a form approved by the AFM, or approval of publicity shots if the band members are not available personally.

13. PUBLISHING COMPANY

Do the writer members of the band have a publishing or administration deal or are they self-published? Multiple publishing deals in the same band are less frequent problems for independent artists, but it does happen and it can add a layer of complexity when shopping for a new publishing deal. Keep in mind that if the writers have affiliated with ASCAP, BMI, GMR or SESAC as a writer, your publishing company must follow the same affiliation. This is a hot issue right now with the DOJ's review of the ASCAP and BMI consent decrees.

Another wrinkle comes with writers who are affiliated with foreign societies (e.g., SOCAN, MCPS-PRS). If the band has a foreign society writer or co-writer on any songs, the members should consult with their U.S. society to determine how to handle their affiliation and registrations.

14. INSTRUMENT(S) PLAYED, BRAND AND INVENTORY

While band members will know who plays what, it's useful to have a written record of who plays what so you can give it to someone else (such as a manager). Also, having information about the instrument(s) and brand(s) that a member uses could prove useful in strategizing for sponsorship opportunities. We also recommend having the band complete an inventory of instruments for insurance purposes (including serial numbers if available), complete with photographs or video of the instruments. This visual record is especially useful with customized, rare or one-of-a-kind instruments.

15. MARITAL STATUS

Common problems arising from marriage that require planning include divorce (and the state law community property issues) and heirs (if a member dies). The band might be stuck dealing with the (sometimes resentful or surly) widow or widower who may inherit consent rights for synch or master use licenses, for example, if these approval rights are not lawfully foreclosed from descendibility in any band agreement. Make sure each band member understands the importance of discussing his/her intellectual property assets (e.g., songs and recordings) with spouses and considers taking advice for appropriate legal protections for all concerned.

16. PASSPORT/WORK PERMITS/REAL ID

If the band is planning to tour internationally—including Canada and Mexico—each member (and any crew traveling with you) must have a valid passport. You should get a photocopy of the inside pages of the passport (in case of loss or damage and for immigration forms). It may also be useful to calendar the expiration date of each passport so that you can quickly know if one member's passport is set to expire when negotiating any tour agreements outside of the United States. There are services that can turn around a passport renewal in 24-48 hours, but they are expensive. There is also an expedited passport renewal process at the Passport Office in Rockefeller Center in New York, but that, too, is an expensive process and typically requires physical presence.

The band would also be well to consult an experienced immigration lawyer before committing to any contracts for touring abroad to ensure that you have the proper work permits. Every year, international acts are accepted to festivals such as SXSW only to be turned away at the border for failing to secure the proper permits. There are even stories of bands being turned away for failing to file a tax return or convictions for driving under the influence or drug possession.

The federal Real ID Act of 2005 establishes mandatory Federal standards for state-issued driver licenses or other identity cards that will affect domestic travel in the U.S. commencing on October 1, 2020. The overwhelming majority of states and territories are compliant with the Real ID standards, so it is likely that this issue will happen in the background for you. However, you must carry a Real ID compliant identity card for domestic air travel or an approved alternative such as a U.S. passport. In Texas, for example, the Real ID enhanced driver license has a gold star on the face, California has a golden bear with a star in the middle, and New York has the word "enhanced" across the front or a black circle with a white star. If you have any questions, check your state department of motor vehicles website or the Department of Homeland Security pages on Real ID. The point is that you must have either a state issued identity card that complies with the Real ID Act or an alternative.

17. SOCIAL MEDIA AND DOMAIN NAMES

Many bands think that if you have a YouTube channel, Facebook page or an Instagram account you don't need to get a domain name, too. It is better to secure rights in the band's domain name for at least one top-level domain such as .com, even if you just have the band's domain point to a social media page for the moment. After all, no social network provider promises to stay in business forever nor do they offer the plentiful e-commerce possibilities available through an independent website.

Make sure that the social media accounts, band emails and domain names are under the password control of the artist, especially hosting accounts or any accounts that generate income.

18. TRADEMARK THE BAND NAME/LOGO

While there's nothing new under the sun, the band should do its best to come up with an original name for the band. There may be other bands using the exact same name or a different name but the same logo. Don't assume that

the other band using the same name is not important—we have heard excuses from "we've heard the other band will break up" or "the other band hasn't logged into their Facebook account in three months."

Bear in mind that U.S. trademark law protects against using "confusingly similar" names. Simply adding the word "The" in front, or adding an "s" or a punctuation mark is unlikely to avoid a claim. Plus, these minor changes will almost certainly get kicked back by the trademark examiner if you attempt to register the trademark, and the registration fees are nonrefundable.

Logos are equally important for merchandising and branding, so it is essential to have a discussion about the origin or inspiration for a logo, if any. The band should seek the advice of an experienced trademark attorney to register the band's name and logo for trademark protection.

19. UNIONS

The two principal music industry unions are the American Federation of Musicians ("AFM") for musicians and the Screen Actors Guild - American Federation of Television and Recording Artists ("SAG-AFTRA") for vocalists. Any artist who has recorded a major label album has likely already joined one or both unions. Knowing whether a musician is a union member is important because union membership carries with it various restrictions such as a minimum fee to perform at recording sessions (i.e., union scale), as well as payment of royalties such as the Music Performance Trust Fund and the Special Payments Fund.

If any band members play or sing on union sessions with any great frequency, you probably are or should be members of one or both unions. SAG-AFTRA in particular has very good health insurance available for near-free if the SAG-AFTRA member does over a certain threshold of work through the union. It is also important to know whether any "side artists" who have played on the band's recording are members of a union and were paid the appropriate rates.

20. SIDE PROJECTS

All major label deals and many independent record deals require the exclusive services of their recording artists. You should know what other recording projects, if any, the individual band members have committed to and if there are any restrictions. This issue may also come up when a musician signs an artist management contract or a merchandising deal.