Record Producer Agreements, a practical guide

by Chris Castle*

Your record producer is one of the most important members of your creative team. Good record producers understand the physics of sound, but also understand the dynamic of performance and the craft of songwriting.

Your record producer is in many ways a member of your band, and is essentially the creative partner in your recordings. A good producer helps you understand when you are "ready" to go into the studio both in terms of the preparation of your own performance as a musician or vocalist and whether your creative direction and songs are "ready." Meaning you are about to spend a fair amount of money and the producer is about to spend a fair amount of time capturing your performance in a recording so you want to be sure that your recording is not premature. For your own sake financially as well as creatively, there's not much point in taking that step unless you have a good idea of what your plan is and how you are going to accomplish your goals with the tools you have. Your producer helps you get there.

For further reading, try Pensado's Place (https://www.pensadosplace.tv), Mix With the Masters (https://mixwiththemasters.com), *Mix Magazine (*http://mixonline.com*)*, and *Tape Op (http://tapeop.com)*.

Like anyone else on your team, you need to legally engage the producer and this article will focus on the major deal points in record producer agreements from the artist's perspective. Some math will be required and remember—producer deals are like mini-record deals for a single album. I will highlight the deal points and give you some narrative on what I think should go into each one. This article is written from the point of view of the artist (hence the "you" references, but can also be read from the producer's point of view.

1. Scope of Engagement: Depending on genre, you may engage a producer for one or two tracks or engage a producer for an entire "album" project. For producers who also are songwriters, you may co-write with the producer or record songs written by the producer. "Album" is a concept that is undergoing some renovation, but usually you would expect to

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engage an album producer to record about 11-15 songs, not all of which may get released on the album.

Sometimes you will have the budget to "over cut" meaning that you will record more songs than you really need (or are sonically able to use if you are releasing in the CD or vinyl formats) to complete a full-length vinyl disc. Tracks that don't make the commercial release may still be used for streaming, teasers, fan playlists and other promotional purposes where unreleased material is needed. You may put those unused tracks in "the vault", meaning that you will keep them for bonus material of various kinds later or where you might want to add some value for your fans. This also requires that you have the luxury of extra good songs, and depending on how prolific you are, you may find that "extra" songs worth recording are a luxury. (We're not going to discuss intermediate playlists or a remix playlist that are not intended to be released as an album and only have a digital existence, but if you hire a producer for the recordings in those playlists, it's essentially the same process.)

The producer should also represent that she is free to enter into the agreement and render services without any third-party consents. This would include the obvious representations like no contractual restrictions such as a reproducing prohibition on a track the producer previously recorded for another artist of the same song (regardless of whether the prior track was actually released), rerecording restrictions (which can come in sideways if the producer is also an artist and performs on your record), no uncleared or undisclosed samples or any other consents of a third party.

2. Preproduction and Post Production: You may want to engage the producer to work with you at rehearsal while you prepare your album. Depending on the stature of the producer, this may or may not be feasible—the busier the producer is, the less likely they are to want to spend weeks in preproduction, unless of course you are able to pay them well. Every producer expects to spend at least a few days with the artist before they go into the studio. This is generally time well spent if for no other reason than you want to find out that the bass drum pedal squeaks or the favorite guitar needs refretting *before* you go into the studio.

After the record is completed (including mixes), you probably will want the producer to be available to accompany you to the mastering studio and perhaps do a couple of other mixes or redos depending on the genre.

3. Recording Budget and Recording Costs: You should always prepare a recording budget and have a good handle on what your record is costing as you make it. The producer may have his own studio and lots of plugins or outboard gear, as well as a "protégé" who is often an engineer. The producer or the commercial studio may also have keyboards, special or rare microphones or instruments (like a Mellotron), food services, messengers and other goodies. Make sure you know before you start recording how much of this you are being charged separately for, especially rental fees. You would expect to pay for hard drives, but you might not expect to pay a rental fee for plugins or outboard gear. The recording budget becomes part of your producer agreement with the producer promising to stay on budget and being accountable if recording costs exceed the budget.

4. Recording Fund or Recording Budget and Advance: Producers have "fixed" and "contingent" compensation. "Fixed" compensation refers to an advance against royalties or a nonrecoupable payment, and "contingent compensation" is a royalty (or more accurately, a share of your royalties) on sales or license fees of the recordings they produce. It's called "fixed" because the advance is a fixed amount you pay "up front", and it's called "contingent" because the royalty is contingent on sales or license fees. Remember, an "advance" is just another word for a pre-payment of future royalties and "nonrecoupable" means you can't recoup from the producer but your record company can usually recoup it from you or reduce your album advance.

There are generally two ways a producer receives cash compensation, remembering that the recording budget (exclusive of the producer advance) is the payment of out of pocket costs and is not typically compensatory to the producer. (When you use the producer's own studio this becomes a little blurred, but we will discuss this further below.)

The first way is that you decide on a budget with the producer and pay that money separately. This exposes you to the dreaded overbudget payments, but if you have good controls over the costs, you may decide to go this route. Some record labels like this approach. In addition to the budget for "out of pocket" recording costs, you will also pay the producer an advance.

Another way to get to the same place with less risk to you is the "recording fund." This is a "keep the change" arrangement with the producer where you say no matter what happens, the most I am paying for my record is $X, and if the record costs less than $X, the producer can "keep the change." You should still have a budget in this scenario, but it is more of a guideline.

So let's say that you have a recording budget of $30,000. You might offer the producer a recording fund of $50,000. If the record really did cost $30,000, then there would be $20,000 left over. The producer would then "keep the change" and put $20,000 in his pocket as his fixed compensation. You would negotiate with the producer how much of the recording fund was "deemed" to be an advance against producer royalties, and how much would be recouped as a recording cost.

The advantage to the recording fund is that you know that the record—probably—is not going to cost you more than $50,000. This happy result is most likely to occur if:

–you have budgeted well for the recording costs and you haven't forced the producer to accept an unrealistically low recording fund so that the producer has too low a margin;

–the producer is using his own studio and staff;

–there is little likelihood of "trainwreck events" like illness, members quitting, unprofessional behavior, or the producer deciding to take a more lucrative project and make you wait;

–you win the inevitable arguments about who is responsible for unforeseen overbudget amounts.

5. Recoupable vs. Nonrecoupable Payments: Before the producer royalty is payable, you have to agree with the producer what payments are recoupable and from where. (For a primer on recoupment, see the Artist Glossary.) Remember—if it's an advance, it's recoupable from somebody's money. One way or another, if you're the artist and there's an advance, it's usually recoupable from you.

Also remember that one of the biggest differences between the artist's deal with the label and the producer's deal with the artist is that the artist's deal will "cross-collateralize" the recording costs of albums; the producer's deal is a one-off where recoupment calculations are limited to the one album being produced (or tracks from one album). This distinction requires a bit of contractual tap dancing on the royalty and accounting clauses between the producer's deal and the artist's deal.

In the case of producer royalties (as opposed to *determining when* producer royalties are payable), there's usually only two kinds of payments that get recouped: advances and also what I call the "Four Horsemen" (discussed below), such as unexcused overbudget, indemnity claims

(like for uncleared samples) or union penalties for late or no filing of session reports if you are recording under the AFM or SAG-AFTRA collective bargaining agreements.

Artists need to confirm with their labels what other costs they will expect to recoup before paying the producer, which may include some portion of video costs or other expenses recoupable from the artist, sometimes called “stand behind” costs in producer deals. Producers will resist standing behind anything other than audio recording costs for the tracks they produce.

So leaving aside the Four Horsemen, the producer royalty will only be payable after the artist has earned enough money to recoup recording costs and the producer has earned enough money to recoup their advance. But when do you start counting the producer royalty to apply against the advance? This will be discussed in the producer royalty section below, but remember I said math was required.

In the recording budget plus advance model, it’s easy to tell what the advance is because it will be defined in the producer contract. If you are paying a recording fund, i.e., a “keep the change” deal, it’s not so obvious.

In the example we used of the $50,000 recording fund, we anticipated that the recording budget will be $30,000 leaving the producer with $20,000 “in pocket” (note you still prepare a budget regardless of whether it’s a budget-plus-advance or a keep-the-change recording fund deal so you know when overbudget occurs).

Using these assumptions, for purposes of recouping the producer advance you will agree with the producer that of the $50,000 there will be a “deemed” advance of part of the “fund,” say $20,000. Note that there is only a theoretical connection to how much of the fund is allocated to recording costs and how much is an advance, so you can also agree with the producer that regardless of how much the producer spends on recording costs, $20,000 of the $50,000 recording fund is a “deemed” advance. So the more accurate you are with your recording budget the more likely you are to have the “deemed” advance be fair or slightly overstated.

The reciprocal of the “deemed” advance is the “deemed” recording budget—the other part of the recording fund. You need to know the “deemed” recording budget to calculate when the producer royalty is payable under the producer agreement.

Be careful that your producer is not attempting to exclude items from their budget to game the recoupment point. It is important that the total amount being recouped before the producer royalty is payable is at least the same amount that is being recouped from artist royalties under the artist's recording agreement. For example, some producers may try to exclude outside musicians, orchestrators, union payments, and mastering, but all those costs will be recoupable under the artist's recording agreement. That means that the producer will be recouped before the artist recoups recording costs for the album (or recordings) concerned. If there is any difference between what is recoupable from the artist by the label and what is recoupable from the producer by the artist, the artist may have to come out of pocket to pay the producer unless the label not only agrees to pay the producer's royalty but to pay it under the producer's definition in her contract.

6. Producer Royalty Rates, All-In Royalty Rates and Net Artist Rates:

In this section we will distinguish the producer royalty rate from the artist royalty rate. Prior to the mid 1970s or so, record companies typically engaged the producer or the producer worked as an employee of the record company (also called "staff producers"). By 1980 or so, there were very few staff producers. While you run into the occasional staff producer in the contemporary music business, they are increasingly rare, because producers are typically hired by the artist.

Producers became "independent" meaning that they were not an employee on the record company payroll (and entitled to employee benefits) and were hired on a project basis by the artist. When staff producers worked for the record company, the label paid the producer both fixed and contingent compensation. The label would also pay the artist a royalty, but the two royalty rates were not combined. This meant that the producer royalty and the artist royalty were both typically lower than those rates have been since about 1980.

However, just like the "recording fund" is an "all in" concept, the artist royalty is also an "all in" rate, meaning that it is inclusive of the producer royalty, and that the record company limits its royalty exposure by capping the artist royalty rate. The formula is:

All in rate = Net Artist Rate + Producer Rate

Net Artist Rate = All in rate – Producer Rate

Producer rate as percentage of flat fee or net royalty = Producer Rate ÷ All in rate

For example, if the "all in" artist royalty rate is 15% and the producer royalty rate is 4%, the "net artist rate" is 15 – 4 = 11%. The "all-in" rate is found in the artist agreement. If you look at the artist's recording agreement, you probably won't see a reference to the "net artist rate" as a general rule, only a reference to a gross royalty rate which you can assume to be the "all in" royalty rate.

Since the all-in rate is in the artist agreement, the artist is unlikely to just hand over a copy of their entire recording agreement, but they will expect to disclose the all-in rate in order to calculate the flat fee percentage payable to the producer. The artist will also expect to disclose the royalty and accounting paragraphs that will tell the producer how the rate is calculated for ex-US territories, mid price, etc.

Remember that the "all in" royalty rates most frequently apply to what could be called royalty base price sales, meaning a sale for which the record company designates a wholesale price, like a compact disc or a digital download. (Whether a digital download has a wholesale price or a wholesale prices set by the record company is controversial, but that controversy is beyond the scope of this article.)

If a recording is licensed in a motion picture or NFT, that income is not derived from a royalty base price sale—at least not for our purposes–because the license fee is negotiated for a master use license. In these instances, the producer receives a percentage of the artist's share of income for the license fee determined by the proportionate share of the producer royalty rate to the all-in artist royalty rate.

Note that NFT proceeds should be treated like flat fee income so the producer should receive a share. It is possible that NFT proceeds could come either through the record company or through the artist directly. If the producer receives a share, it is likely to be because the NFT includes the sound recording or music video of the sound recording, or other derivative work of the sound recording. If the NFT is treated like merchandising of the artist's name and likeness, then it is unlikely that the producer will have a basis for claiming a share of revenue. Either way, if the producer is entitled to receive a share, it will be the flat fee percentage and it is worth it for the producer to add language to this effect to the producer agreement (as it almost certainly will not otherwise be in the forms).

In our example of a producer royalty of 4% and an all-in artist royalty of 15%, the producer's share of license fees would be 4/15ths of the artist's share of the fee, or 26-2/3%.

So another way of looking at the producer royalty is that it is based on a percentage of the artist's share of income, in this case 26-2/3%. You could just as easily say that the producer always gets that share of the artist's income from recordings (as opposed to publishing, merchandising or touring), but by convention and industry practice we do it the other way around and say that the producer gets a producer royalty rate of 4%, the all-in rate is 15% and the net artist rate is 11%.

Artists may negotiate sales-based increases in their royalty rate called "bumps" or "escalations". If an artist renegotiates their deal with a label she may be able to negotiate better terms than she had previously in the Kabuki dance of what you can and can't have based on "precedent" and the like. These new terms are sometimes called "betterments". A producer may ask for a share of escalations or a cash bonus based on chart position or some other metric. They may also seek to have their royalty calculated at the betterment rate, which is sometimes expressed as the producer paid at the "then current" artist's calculation. "Then current" means the royalty rates in effect at the time the statement is rendered in the future, not the rates in effect on the effective date of the producer agreement. Artists frequently refuse to grant these additional terms.

7. Recoupment to Record One

Producer royalties are typically payable after the recording costs for the tracks that the producer works on are recouped by the record company (or the independent artist). This is because the recording costs are an advance by the record company to the artist, or the artist has raised the money some other way such as through the artist's own funds. Let's stay with the record company example because most producer agreements are based on that model. (We'll go over some new ideas below, but you should know what the standard deal is.)

Producers want to be paid on every record sold. Fair enough, they did the work, they should get paid. But—if the producer is paid out of the artist's royalties, and the recording costs are also recouped from the artist royalties, then how do you allocate the artist royalty income to recoupment of costs *and* pay the producer?

There are probably several ways that this could have been done, but the way that the industry typically does it is to create an artificial recoupment rate net of producer royalty obligations until the recording costs are recouped, and then calculate the producer's royalty retroactively to the first record sold (or "record one"). So you hear this catechism: The producer royalty is

payable retroactively to record one after recoupment of recording costs at the net artist rate, subject to recoupment of the producer advance and prospectively thereafter.

So what does this really mean? (This is where the math comes in.)

Let's say that each royalty point is equal to 10¢ and use our 4% producer royalty rate, 15% all-in artist royalty rate and 11% net artist rate example. We will also assume this is physical album-only sales at one price point for purposes of illustration.

All-in artist rate = $1.50 (15 points at 10¢ per point)

Producer rate = $0.40 (4% at 10¢ per point)

Net artist rate = $1.10 ($1.50 - $0.40)

Recording Costs = $30,000

Producer Advance = $20,000

Units to recoup recording costs at net artist rate: $30,000 ÷ $1.10 = 27,273 units

The album will recoup $30,000 of recording costs at 27,273 units. So far, the producer has not been paid a royalty, but his royalty is accruing and will only become payable, if ever, at 27,274 units. If the record sells fewer units or is cut out and is not licensed, i.e., never earns another penny, the producer will never be paid a royalty (but got the advance regardless).

Because the producer is paid retroactively to record one, the producer will then be due a royalty payment on 27,273 units, or $10,909.20. Because the producer has already received $20,000 as a deemed advance in our example, the producer's account starts with a negative balance of -$20,000 before the retroactive payment is applied. When the producer is credited with $10,909.20, the producer is still unrecouped by the difference, or -$9,090.80.

8. Where Do Producer Royalties Come From?

You probably noticed that in a typical record company agreement, it is highly likely that the artist royalty account will still be unrecouped when the record producer is payable even if the recoupment point is artificially delayed by recoupment at the net artist rate (as opposed to the all-in rate). It is important for the artist to have an understanding with the label that the label

will pay the producer royalty even if the artist account is unrecouped overall. That producer royalty payment will be an "additional advance" that makes the artist more unrecouped. Most labels will refuse to agree this in writing but will do it in practice.

9. SoundExchange Royalties; Pre-1995 Producer Royalties

Although producers are not entitled to a share of the featured artist royalty for the public performance of sound recordings paid to artists by SoundExchange (in the US), it has become fairly customary for producers to request a share of performance royalties for their sound recordings pursuant to a contractual letter of direction to SoundExchange. (Note that this requires *two* letters of direction in the producer agreement—one to the label for royalties they pay and a separate one to SoundExchange. These are separate LODs and neither has anything to do with the other.)

While the producer may not be entitled to a share of these artist royalties under the Copyright Act, the law may be changed in the future and was amended in 2018 by the CLASSICS Act to allow for certain producers to receive performance royalties on recordings "fixed" before November 1, 1995 based either on a letter of direction from the artist, or if the artist cannot be found or is nonresponsive, a copy of the original producer agreement. The producer royalty for artists who are unavailable is 2% of 100% of royalties for the recording, deducted from the featured artist share. If you are in this category, consult the SoundExchange website for details as it's a bit more complex. Producers should get their house in order so that they are able to receive statutory royalties.

In our example, the producer would request 26-2/3% of the featured artist share of performance royalties. That's quite a bit more than 2%, obviously, so getting a letter of direction is the more desirable way to go.

This payment is given effect by the artist sending a letter of direction to SoundExchange which SoundExchange typically will accept. SoundExchange posts a form of letter of direction on the SoundExchange website. No one can know how a statutory share of performance royalties would be given effect in the future for other streams of income like broadcast radio, but it would probably be administered by SoundExchange the same way that the featured artist share of royalties is currently administered.

Pre-1995 Recordings

The CLASSICS Act (part of the Music Modernization Act of 2018) included a provision relating to producers, mixers and engineers receiving a portion of SoundExchange royalties without a contractual letter of direction for recordings "fixed" before November 1, 1995. (The definition of "fixed" is in 17 USC §101: "A work is "fixed" in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.")

Pre-95 recordings will probably include both staff producers and producers engaged by the artist. No letter of direction is required, but compliance with a statutory procedure is mandatory in lieu of a written LOD. In theory, you would probably receive a higher percentage of revenue if you went the traditional LOD route, but if the artist is someone whom you may not have spoken to in years or who has passed, a band that has broken up and scattered with members who have passed, or any combination of unreachability, the statutory route is available.

10. Proration

It is important to understand that the producer royalty we have discussed is intended to be prorated based on the number of recordings that are produced by a particular producer on a record or a "bundle". So if the producer gets a 4% royalty rate, that rate is prorated based on the number of tracks in the carrier that generates the revenue.

In the example we gave, the producer produced 12 out of 12 recordings on an album bundle. If the producer produced 6 out of 12, then the producer would get a 4% royalty rate, but the rate as applied to the bundle would be prorated by multiplying the royalty rate by a fraction, the numerator of which would be the number of recordings produced by the particular producer (or 6 in this example) and the denominator of which would be the total number of recordings on the record including those tracks (or 12 in this example). So the producer royalty would be prorated by 6 ÷ 12 or 50%.

This can get complicated if different producers have different deal terms for the same recording.

If you engaged multiple producers for your record, each producer may have a different rate, but all would be prorated. So if there were 3 producers in our example and one produced 4 tracks for a 3% producer royalty, one produced 2 tracks for a 5% royalty, and one produced 6 tracks for a 4% royalty, then the math would look like this assuming each royalty point was worth 10¢:

Producer	Album Rate	Tracks	Proration	Prorated Royalty Per Album
1	3%	4	4/12	10¢
2	5%	2	2/12	8-1/3¢
3	4%	6	6/12	20¢

So instead of a total producer royalty rate of 40¢, you now have a total producer royalty rate of 38-1/3¢. There is no magic to the tracks, rates and prorations that we have chosen, as you can see if you play around with the numbers, the total producer royalty rate (or "royalty load" as it is sometimes called) can be higher or lower.

11. Subsequent Producer or Mixer Royalties

If the producer is fired or if a subsequent producer is brought in for another reason, you may end up paying two different producers for the same recording. Even if the producer renders satisfactory services on time and on budget, this is also potentially true of post-delivery mixers or remixers who receive a royalty for mixing a track where the underlying producer also gets a royalty. (Whenever I say "mixers", I intend to include "remixers" for this article so I don't keep repeating myself.)

In this situation (a common one for mixers and a less common one for subsequent producers), the artist will want to reduce the producer royalty by whatever royalty that the artist has to pay the subsequent producer or mixer. The producer will not want this, so there will be tension on the issue. Very often the compromise is that the producer royalty can be reduced by a fixed amount, usually the lesser of 50% of the producer's royalty rate or one royalty point.

So if a producer is getting a 4% royalty and a mixer is getting a 1% royalty, then the producer can be reduced by the mixer's royalty. That means the artist still only has to pay a 4% royalty, not a 5% royalty.

If the producer is fired, however, the producer may expect to forfeit his royalty altogether, but if any of his work is used (often the case unless the entire track is scrapped), the producer may want his 50% rate. This is negotiable.

For very high end producers, no reduction is acceptable, so expect a fight in your negotiation.

12. Accounting and Letters of Direction

Producers will not want to rely on the artist for payment. But because of the semi-fiction that the producer is hired by the artist and not the label, the agreement technically does not bind the label to pay the producer directly. So the producer will try to come as near as possible to forcing the artist to make the label obligated to pay the producer directly (which the artist usually would love to do and the label will refuse). But the artist cannot usually force the label to do anything, so this effort usually begins and ends with the artist agreeing to ask/really try hard to ask/try exceedingly hard to ask—but still just ask—the label to pay the producer pursuant to a revocable letter of direction as an accommodation to the artist with no direct obligation to the producer.

However, the artist still has to go on the hook for accounting and paying the producer directly if the label fails to honor the letter of direction. Accounting and payment is truly a pain for the average artist to accomplish, but it is part of the cost of doing business. We will come back to this issue in the section on independent artists hiring producers.

These provisions should be drafted carefully so that the artist is only obligated to pay if the artist gets paid (see above regarding paying the producer royalty regardless of whether the artist is recouped), provide that the artist can rely 100% on the artist's own statements from the labels, and if audited all the artist has to do is provide the producer's royalty auditor with copies of the label's royalty statements to the artist for the recordings that the producer receives a royalty.

If the artist is directly accounting to the producer, the artist should be careful that the artist only has to render statements a reasonable period of time after the artist receives her own statements and payments from her record company (or distributor). "A reasonable period of time" is usually 45 to 90 days. This may seem like a long time, but unless the artist has a business manager or bookkeeper who can spit out producer statements quickly, it's actually not much time to prepare and send out producer statements. The producer often complains that if the artist gets paid semiannually 90 days after the close of the period and then has another 90

days to account and pay the producer, that will be a total of six months after the close of the period which is too long. The answer is that is why they have letters of direction to get paid by the record company—if the letter of direction isn't a possibility, it's a pain for everyone.

It is rare for a producer to audit an artist, largely because an audit is viewed as something of a hostile act and the producer wants to preserve the relationship with the artist and vice versa. The more typical result is that if the artist audits the label, the producer will participate prorata in the recovery, if any, payable for the producer's masters.

There is a lot of energy expended by lawyers negotiating these clauses to questionable effect. If two lawyers spend a lot of time negotiating these clauses, they will probably bill their clients more than will ever be made as a result of their work. Obviously, for superstar artists and producers this is not the case, but even then it is rare for a producer to actually audit an artist particularly if streaming is the dominant configuration. For those contracts, it is my view that it is more important for the artist to know that the artist can lay off part of the cost of the audit onto the producer's recovery, and for the producer to be sure that if he produced the only hit the artist ever had that he's not in effect bearing the cost of auditing 5 LPs when there was only one that made any money.

Like with any other proration calculation, the parties ought to agree on prorated based on what. In the case of uneven income streams from multiple sources, such as an artist who audits for multiple albums but a producer who only worked on one of those albums, proration should be based on an easy-to-understand model such as either (A) [cost of audit] x [producer album in audit ÷ all albums in audit] or (B) [cost of audit] x [producer audit recovery ÷ total album recovery] or (C) [cost of audit] x [producer album revenue audited ÷ total album revenue audited], or some other formula that more accurately reflects the burden and benefit of the audit than all the costs deducted off the top of all the recovery.

It is also well to remember that in streaming audits, the producer gets a share of an already miniscule per-stream royalty which is calculated based on a formula that itself is subject to a non-disclosure agreement between the record company and the digital store such as Spotify or Apple. This basically means that you can never know exactly how your royalty is calculated because it is a secret. This is beyond the customary major label practice of giving you just enough information on your royalty statement that you can only guess at whether you've been paid property so you audit; even if you audit streaming they won't tell you because of non-

disclosure agreements that you are not a party to. This practice may eventually change, but it is often the case as of this writing.

13. Credits

Artists who are signed to record companies can promise producers any credits they want as long as the credit provision says something like "subject to the record company's producer credit policies". Realistically, the producer can expect credit in "label copy" which usually means the liner notes on a physical disc, advertising of certain kinds such as print ads of a minimum size (such as a quarter page), Billboard front cover "strip ads" or the digital equivalent, and sometimes the "label" on a physical carrier. Since the producer is usually responsible to deliver credits along with the recordings, the producer is in control of collecting credits to a certain extent, although what happens to credits once delivered is out of the producer's control. Ultimately the responsibility lies with a combination of artist manager, A&R administration, graphics, production and product managers to make sure that credits follow the track all the way through the process from recording studio to fan.

With the advent of digital distribution and online advertising, this starts to get more complex. Producers are typically not credited on iTunes, Spotify or other digital retailers, even on the "Get Info" panel. If the producer is credited, it is invariably because two events coincide: First, the artist's record company has delivered producer credits for the particular track to the digital store, and second, the digital store is able to display producer credits and has displayed those credits for the track concerned.

This is something of a tree-ring ageing process. If the recording is catalog that was delivered to the services before 2018 or so (regardless of release) it is less likely to have complete (or any) producer credits unless a re-release was subsequently serviced such as for a re-mastered version. This assumes further that when the re-release was serviced the label also serviced label copy metadata with producer credits.

Realize that prior to about 2018, the digital stores like iTunes, Spotify and Amazon did not have a place to store and display certain label copy beyond artist name and track name, sometimes also legal lines, i.e., copyright owner of the sound recording. (Also realize that digital distributors like The Orchard and Tunecore frequently put their own name in metadata as copyright owners even though they have no copyright ownership.)

The default for most digital stores is still artist name/track title and any other credits or song lyrics are a bit of a hunt often only to find an empty box. And of course, user generated content or covers very likely comes with no credits at all to the underlying track or original song being covered, such as practically call music on Facebook. Even though compliance is spotty at best, it is still a good idea for producer representatives to request that the producer credit be included in track metadata. It is outside the scope of this article, but query if failing to accord credit or create the appearance that someone other than the actual producer produced the track is not a violation of various laws relating to attribution.

Online advertising should probably not be treated any differently than the customary producer credits—meaning an ad that is not so small that it becomes burdensome to get the credit into the advertising copy, but it might make sense to include the producer credit in Facebook ads in proportion to the "artwork title" of the record, such as a size of type that is 20% of the artwork title, or what you are comfortable with and what the producer will agree.

If the artist is not signed to a record company, the artist needs to be specific about where the producer will be credited and what obligations the artist is undertaking including delivery of proper metadata. At a minimum, the artist should expect to credit the producer on the back cover of a physical carrier, in print advertising of a quarter page or more, and to deliver proper metadata to the record company and request that the record company deliver that metadata to the digital store.

One other thing to keep in mind is that if you are going to have a mixer, that mixer will likely want credit which is typically subordinate to the producer credit. The mixer will want advertising credit, too, so that should typically be limited to advertising for a single track that he mixed of a minimum threshold size and the Billboard strip ads.

Some mixers, especially remixers, ask for a credit of "Additional Production and Remix". Artists will need to be careful about that credit being interpreted as a breach of the producer's credit provisions by crediting someone else as a producer of the same track that the producer worked on. Of course, if you try to clear this up front, you run the risk of the producer's lawyer having a hissy fit over the idea of someone getting credited as a producer—even if they replace every single track on the album version except the vocals.

Producer lawyers will often ask that the producer has the right to remove their credit if a version of their recording is created after the producer completes their services and the track is

accepted. This situation arises if a subsequent producer is engaged for creative reasons—not because the first producer gets fired and someone else has to be hired to save the recording.

This request is in the nature of "moral rights" in copyright laws such as the Berne Convention, which provides that independent of the author's economic rights, and even after the transfer of those rights, the author shall have the right to object to any modification of their work, if the modification would be "prejudicial to the author's honor or reputation". As long as the removal of the credit is prospective—meaning that it applies only to physical devices manufactured or metadata delivered after the producer makes their request—and that the producer waives any injunctive relief or monetary damages, the producer's request is reasonable. And frankly hard to argue against.

14. Grant of Rights-Joint Authorship Issues

There are good reasons for U.S. based artists to engage the producer to render services as an independent contractor creating a "work made for hire" under the U.S. Copyright Act. (If you live outside the U.S., you should consult your national laws.) This is an important distinction for a couple of reasons: first, the U.S. copyright law distinguishes between works made by authors that authors may license or assign, and works that are from inception created under an employment relationship or under a "special commission". The work for hire status has some benefits and requires some special drafting in order to capture the rights. U.S. Copyright Office "circular" Number 9 on this subject is well written in simple language (a Copyright Office "circular" is a short handout from the Copyright Office that is designed to educate the public about particular issues in the U.S. Copyright Act.)

For reasons that frankly escape me, some artists have an issue with referring to anyone as their employee and view everyone involved in a recording project as a "partner." Of all the words that one could choose to use in this context, "partner" is a very unfortunate choice from a legal point of view, because "partner" has an actual legal meaning. A simple example–was it your intention to allow your "partner" to incur debts in your name? Another and more apt—was it your intention to co-own your recordings—the ones you paid for and perform on—with your producer?

This raises the issue of joint authorship. Here's an example of why an artist would want to avoid an implication that the producer is a joint author:

A producer developed an artist for a period of years and had a rudimentary written agreement that provided that the producer was to be paid a bonus if the artist was signed using the producer's recordings. The band acknowledged that the producer was actively participating in the creation of the sound recordings and co-wrote the songs. The producer's share of the songs was not disputed.

The band signed to a major record company (and actually became a multiplatinum artist). No one told the producer that the band was signed until he read it in Billboard. The band's lawyer refused to pay the signing bonus. She was from New York.

The producer attempted several times to be paid and was rebuffed. This was probably due to a simple reason: When the masters were sold to the record company, the artist's lawyer failed to disclose the producer as a joint author. Not only would the artist's lawyer not deal with the producer, but the artist's record company also would not deal with the producer and referred him to the artist's lawyer who would not deal with him. In other words, El Runaround.

The producer found a lawyer who suggested it would be a good idea to send copies of the producer's recordings to leading producer management companies. Particularly to one producer management company that also did artist management and to which the artist was being presented by the record company.

This drew a letter, copied to the record company, from the artist's lawyer that accused the lawyer—the lawyer—of copyright infringement for distributing copies of these jointly owned recordings. And that's the punchline. If the recordings are co-owned, which these recordings more than arguably were, the artist and producer can both issue non-exclusive licenses in the whole of the recording and each have all the rights of a copyright owner.

The producer's lawyer responded with his own letter (cc The Known Universe) reminding the artist's lawyer that the producer had the right as a joint author to distribute copies on a nonexclusive basis as one of the rights of a copyright owner of a sound recording. Evidence was the artist's lawyer's own failure to take care of proper payment and quiet rights, if that was the intention. In other words, the truth was in the stiffing.

Within minutes after sending that letter, the producer's lawyer received a call from the label president apologizing and wanting to know how to make this go away. The producer's lawyer suggested a possible solution was the payment of money. That day.

The artist was then forced by its label to sign a release with the producer that included a withdrawal of the claim for copyright infringement against the producer's lawyer "as though it had never been sent" and transferred all rights from the producer to the artist.

So if instead of being in this situation—or the rather asinine treatment of the producer's lawyer by the unknowledgeable artist lawyer who may have been "cool" but had no idea what they were doing when it came to copyright—wouldn't it have been better to avoid the situation altogether by having a work for hire agreement in the first place? And maybe if your producer is not clamoring for it because his last line of defense from being taken advantage of is pulling that card?

The moral of the story is clear up that joint authorship issue and pay your bills.

15. Grant of Rights—Producer Songwriters

Artists often collaborate on songs with their producers, and in many cases a producer's songwriting achievements are a significant factor in the decision to work with that producer. In the pop or urban side of the house, the producer/songwriter may bring a fully recorded track to the artist that only requires vocals and mixing, with minimal additional production. Just because the track is completed and ready for the "top liners" does not at all mean that the song splits are decided.

The question immediately arises as to who—if anyone--is going to get to control decision-making about licenses for the song and who will administer the entire song. As the average number of songwriters grows, the importance of a clear understanding about decision-making on licensing and other administrator decisions shared among the writers of a song also grows in importance. If you own something with others but the administrative process is slow and burdensome, it is inevitable that opportunities will be missed.

Splits

A threshold issue, of course, is how much of the song does each writer own, or their "contributory share" or "split." It is important to have a clear understanding about the splits as early as possible in the recording process, and certainly at the time of delivery. While there is no rule of thumb, I have seen bands labor over this issue and come up with odd results.

For purposes of the authorship of the song, I use the rule of thumb that the difference between the song and the arrangement of the song is the difference between the lyric and melody (which I would say is what constitutes the song) and the way the lyric and melody are presented to the listener, which has more to do with the arrangement.

Another threshold issue is the distinction between the recording of the song and the song itself, each of which are separate works of authorship.

So I have heard this kind of conversation among members of the band: Andy wrote the lyric, Bobby wrote the music, and Charlie wrote the intro drum lick. Andy and Bobby wrote the lyric and music separately and brought the lyric and music to rehearsal, where Charlie wrote the intro drum lick while he arranged the lyric and music that Andy and Bobby wrote.

In this real-world example, Charlie is not really entitled to a share of the copyright in the song. Charlie may be entitled to one-third of the copyright in the sound recording when it is made, depending on how the band has agreed that ownership should be decided. It is unlikely that Charlie has any share of the *song*, however.

So the ownership of the song in this example is probably going to be 50% Andy and 50% Bobby.

Let's say that Andy, Bobby and Charlie now bring in Danny the producer who writes a new subchorus and rewrites the bridge while recording the song. Now what?

This is going to depend on the deal among the writers about bringing in the new writer, Danny. Assuming that Andy and Bobby have dealt with Charlie's issue and co-own the song equally, and also assuming that Andy and Bobby are still in the band and talking to each other, Andy and Bobby can agree among themselves that Danny should get a share of the song.

How much should Danny get? That will be a process of negotiation. Andy and Bobby will probably feel better about giving Danny a 25% share than a 33-1/3% share. But Danny may say, you aren't paying me much to produce this record, so I think I want 50% and by the way I also want to get 20% of what you are getting—which 20% bears a striking resemblance to what Danny has to pay his manager in commissions.

Andy and Bobby may say that they are already paying Danny as a producer, so why should they give him anything as a songwriter. This will depend on what Danny's producer agreement says

about the services that Danny is to deliver and if songwriting is expressly excluded from the services definition.

So you can see that it is important to get these things tied down early on, both with your band members and with the producer.

Administration

The "administration" rights for a song essentially boil down to who controls the song from a legal perspective regardless of ownership share. For example, if a television music supervisor has a use for the recording of the song by the band that the band thinks is really cool, but only pays $1,000 "all-in", whoever administers 100% of the song can make that decision to license the track.

The tendency is to say that each writer administers their own share, which of course sounds very fair at the beginning. But taking our example, let's say that Danny got a one-third share of the song and has a publishing deal with a big music publishing company.

The first question is what does an "all-in" sync fee actually mean? It usually means that the total license fee for both the recording and the song is $1,000. The music supervisor could care less how it is allocated between the two, but usually wants a quick answer. Typically, the allocation is 50/50 song and sound recording, sometimes called the "master". So now the songwriters are dividing $500 among them, and the band is dividing $500 among them and probably their record company if they are signed.

The big music publishing company is going to be looking at $167 as their share of the fee, from which they will probably take 25% as a co-publisher and maybe an administration fee—about $60 altogether. You would think that they would say, go with God let's make it easy.

That's where you are probably wrong. They will more likely say, we are the professionals and you are not, we can get you more money. Or better yet—the big publisher's "policy" is that they do not license "their" songs for less than $x (fill in the blank, but more than what you are getting).

If the reason the artist is doing the deal is not because of the money—we all know the sync fee is small potatoes—but because of the platform and maybe the reputational value for getting the price up on future licenses, then you don't really want these people screwing it up.

So now you are looking at an argument that may blow an opportunity—even though the big publisher only has one-third of the song and is arguing about the difference between their making $60 and maybe $160. Or zero. Because some of these people would rather make zero—and have you also make zero—than bend their "policy".

Another situation with big publishers is that they will refuse to grant a gratis or promotional license for their share of a song. This can get in the way of a promotional use that the artist wants to help sell records (which the publisher also participates in). This is actually likely to happen to you at some point the more frequently you deal with big publishers.

This is why you have to control the administration of your songs if at all possible, and definitely control the administration of *your recordings* of your own songs. I would not leave this issue off the table when negotiating a producer agreement.

Controlled Compositions/Maximum Mechanical Royalties

Artists will eventually have a contract presented to them that provides for special reduced mechanical royalty rates for the artist's record company on at least physical records and downloads sold in the U.S. and Canada on *all* songs they record, not just the songs written by the artist. This is called the "controlled compositions" clause and it sets maximum aggregate royalties that your record company will pay.

You will have some flexibility on these terms, but not much. You should get your producer to agree to take the terms of your controlled compositions or maximum mechanical royalty provisions for any songs he writes or co-writes with you because the rates are going to apply, regardless. If the producer is signed to a big publisher, that publisher may say they only license at full statutory which will be a direct hit to your mechanical royalties.

This is another place where the big publishing company administrator can screw things up for the band. It's going to be especially true of the royalty free uses that you would be thrilled to get. If you don't have this tied down, though, the big publisher could blow these opportunities for you because of their "policy" about no free licenses, for example.

Yes, we all know free is bad, yes we all know money is tight, but no that doesn't mean you *never* give it away to build an audience. It also doesn't mean that you should take a reduction in your mechanical royalties for the privilege of working with a particular producer.

The Vault

It is pretty common for pop or urban producers to come to an artist with a nearly completed track of a song that the producer has previously written. If the artist accepts the song and recording, then the artist may start working on the track or complete it. For whatever reason, the artist may not include that track in their initial releases.

The question then arises as to what happens to that track if it is not released in a certain time, and also what happens to the song. The producer may have a different artist who wants to record the track and would like to replace the vocals (and perhaps the topline) with the new artist who will release the recording.

We will deal with the recording side of what happens in this situation later in this article, but from the songwriting perspective, the artist has to be careful that any songwriting contribution is documented. For example, the producer may bring the track with no lyric, some lyric, or complete lyric that the artist rewrites either slightly or a lot. Like other things, you can't be "slightly" a writer, so if the artist contributes anything to that song—as opposed to the recording of the song—that contribution can live on regardless of whether the artist's recording is ever released.

The typical use of a vault track involves wiping the prior artist's performance and starting over with a new vocal—the question is, starting over with *which version of the song*.

16. Grant of Rights: Consent Rights and Music Publishing

Consent Rights

If you decide to agree that songwriters (including producers) of songs you record have any approval rights over exploitations of songs on sound recordings you perform, you should also try to get clarity on what approval means as a practical matter. For example, no one is usually thinking of getting approval from the songwriter's *heirs* at the time the song is written.

It may sound a little over the top to be worried about it, but if you have ever been through a situation where a writer has unfortunately passed away and you suddenly find yourself trying to extract approvals from someone you never met, are not themselves a songwriter, and may have a tenuous claim on reality, much less the share of the song that they seek to control—you

will understand what I mean. When the statutory copyright heirs produce a new "partner" for you whom you never chose and who has, shall we say, decision making challenges depending on the time of day, this can be a Kafka-esque experience. Particularly when it involves control over one of your most important assets.

So one solution would be to provide that any approvals or consents be personal to the writer and must be given personally. Just to be clear—I'm *not* suggesting that the heirs do not participate financially, get paid less, or give up any ownership rights that they inherit. They definitely should keep the income stream they are entitled to. But what they should not be able to do is make your life difficult.

Producer Music Publishing Administration

When you are not in a position to pay a producer their customary fees, you will have to make up the shortfall in creative ways. One is to give up some additional publishing interest to them on songs they did not write, or for songs they co-wrote. If you are fortunate enough to have a successful producer work with you for far less than the normal fee, you should not look a gift horse in the mouth and ask to see its molars. But neither should you throw caution to the winds.

This is another situation to tread carefully. Sometimes you just don't have the leverage to get any beneficial concessions, but there are a few points to understand. We will use an example to better see what is going on.

Let's say Andy and Betsy, the artists, co-write a song with Paulette their producer with equal splits:

Writer:	Andy	Betsy	Paulette
Writer's Share:	33-1/3	33-1/3	33-1/3
Publisher's Share:	33-1/3	33-1/3	33-1/3
Copyright Ownership:	33-1/3	33-1/3	33-1/3

Remember, the "writer's share" and the "publisher's share" refers to *income* not *ownership*. Songwriting income is split 50% to the writer and 50% to the publisher by custom and practice, not based on anything in the Copyright Act. This is true een if there is one songwriter who otherwise owns 100% of the song copyright.

The most important aspect of this comes with public performance royalties because writer's royalties are paid directly to writers and the publisher's share of royalties is paid directly to publishers. (Public performance royalties are those collected and paid in the U.S. by ASCAP, BMI, GMR and SESAC.)

Your publisher can either be a publishing company you set up on your own to collect earnings, or it could be a third party publisher (such as a major publisher) who will pay you an advance that is recouped in part from the publisher's share of revenues.

Remember this: The amount of the advance is going to be calculated based on how much of the publisher's share the publisher can collect. This is because an "advance" is the prepayment of royalties, *so if the total splits are lower the advance will be lower*. The royalties can be lower because you don't earn, but it can also be lower because you have given away an additional percentage of the publisher's share. (Also realize that the performing rights societies will typically not pay the writer's share to a publisher, so it is not included in recoupment of the writer's advance.)

Let's say Paulette the producer asks for a percentage of "publishing" to compensate her for taking a lower producer fee. This additional percentage would be in addition to the percentage she is entitled to as a co-writer. Let's say that Paulette would normally get $2,500 a track to produce, but she has agreed to take $1,000 a track plus an additional 10% of the "publishing". Here are a few things to consider:

(a) Have a clear understanding of what "publishing" means in your particular situation. Usually it means the publisher's share, but you need to tie this down because it could also mean 10% of the entire song. A 50% difference.

(b) This is a financial deal—so if the publishing is intended to compensate for a reduction in her fee, you should know what that reduction is and ideally the additional benefit should end when that reduction is repaid to Paulette out of the additional percentage of publishing she is taking in compensation. We know that Paulette is taking a $1,500 per track reduction. One way to accomplish this is to have the producer and the writers sign an agreement that 100% of the co-writers publisher's share will be paid to Andy and Betsy but the two of them will pay the additional 10% of "publishing" until that 10% is equal to $1,500. (Note: this could mean that if Paulette produces more than one track, the recoupment of the $1,500 reduction may occur at different times on different songs).

Paulette's lawyer is probably not going to like this, and will want Paulette paid "at the source" meaning that the society will reflect Paulette's publisher share as 10% higher than it otherwise would be. There will need to be a "springing" contract to reduce Paulette in the future. This will get a little complicated and may be more trouble than it's worth.

(c) Andy and Betsy have to decide how they are going to bear the additional 10% to Paulette in terms of reducing the publisher's share for Andy and Betsy. Typically, this would be an equal reduction.

So to revisit our chart after giving up the additional 10% of the publisher's share, the splits would look like this; notice we are just giving Paulette an addition 10% financial interest, not copyright interest:

Writer:	Andy	Betsy	Paulette
Writer's Share:	33-1/3	33-1/3	33-1/3 (Based on 50%)
Publisher's Share:	28-1/3	28-1/3	43-1/3 (Based on 50%)
Copyright Ownership:	33-1/3	33-1/3	33-1/3

Notice that copyright ownership did not change with the adjustment to the financial interest. Also notice that giving Paulette an additional 10% of the publisher's share results in a 5% increase overall, because the publisher's share is 50% of 100% of the income.

If your intention is to give the producer a 10% financial interest in the song, i.e., 10% of 100%, you would still do it by adjusting the publisher's share by 20%, not the writer's share, so the splits would look like this:

Writer:	Andy	Betsy	Paulette
Writer's Share:	33-1/3	33-1/3	33-1/3 (Based on 50%)
Publisher's Share:	23-1/3	23-1/3	53-1/3 (Based on 50%)
Copyright Ownership:	33-1/3	33-1/3	33-1/3

Producer Publishing Administration

With more accomplished producers, you may encounter a demand to give up your publishing administration to the producer as a condition of the producer *even listening to your band*.

If that feels greedy, that's because it is. Do not do this.

If the producer wants to administer your songs to cut demos, be careful about giving up blocking rights. If you are not paying the producer for studio time and services, you should expect to have to barter something away, and that something is usually publishing.

Avoid giving up copyright, and also try to create a legal scenario where you are able to get the rights back, particularly when the producer is not a writer at all.

17. "Must Have" Indemnity Terms: The Four Horsemen of the Apocalypse

Contracts have paragraphs that deal with what happens if it turns out that the contracting parties lied to each other about promises made in the contract, or lied a little bit, and the non-lying party suffered losses. It also covers situations where one party breaches the agreement and the other has losses. The non-breaching party is able to get back the amount of their losses from the breaching party. That recovery can be by offsetting the loss against otherwise payable monies or satisfying a judgement by executing on the producer's other assets.

There are four key points—what I call the Four Horsemen of the Apocalypse—that you want to have a clear right to recover or offset in your producer agreement because you will feel absolutely nasty about having to pay the producer while you pay these losses and you wait for your final nonappealable judgment. All of these claims should be immediately offset from "all monies" otherwise payable to the producer or the producer's publisher—advances, royalties, mechanicals, the works. Plus, you and your attorney should review your artist agreement with your distributor and determine when you must reciprocally indemnify the label and which of those indemnity provisions could be triggered by your producer's breach of your agreement. Then make sure there's some connection between the two.

(a) Overbudget: You need a clause in your agreement that makes your producer responsible for staying on budget, particularly in a recording fund situation. If the producer goes overbudget, then the producer has to pay that overbudget amount, or you can deduct it from any money you otherwise have to pay the producer. This payment may require the producer to come out of pocket. The producer's lawyer will not like such a cut and dried overbudget definition, so there will be some back and forth about fault—but just remember that you don't want to have to prove what someone's mind set or intention was at the time they caused you to go over budget. But you can think of this as "unexcused overbudget".

(b) Union Penalties: The producer is typically responsible for filing union session reports and paying (out of the budget) session fees, pension and welfare payments and other sums. Those reports have to be filed within a certain time and if they are late you (or your label) will have to pay a penalty. If the producer is responsible for filing the reports or providing the information to the contractor or label A&R in order for them to file the reports, the producer should be responsible for fees you incur because the producer filed late.

(c) Uncleared Samples: If the producer is responsible for clearing samples and fails to do so, then you should be able to offset losses from having to do it yourself. Realize that in many cases the producer is the only one who really knows what was and wasn't sampled particularly in close cases.

(d) Indemnity Claims: If you are subject to an indemnity claim, and the producer fails to fulfill the indemnity obligations (especially to defend you), then you should be able to offset these costs against other payments to the producer.

If it turns out that you offset these sums incorrectly, then you should expect to have to recredit the producer's account.

But here's your guide: First, would it make you sick to your stomach to have to pay the producer's royalties when the producer was breaching their agreement with you?

Second, do you have an obligation to someone else—such as a record company or music publisher—that allows them to offset the same kind of sums from *your monies* in which the producer participates. If you don't have a mirror image off-set right against the producer that the source of these royalties has against you, you may find that you have to make a payment to the producer for which a share of these monies that you have not been paid due to the source offsetting against you a claim that ultimately comes down to the fault of the producer.

Because the source has a contract with you and you have a contract with the producer, the source does not have the ability to distinguish between your money and the producer's share of your money so they will squeeze you. If you get squeezed, you should be able to squeeze the cause of the problem, too. Hence, the Four Horsemen of the Apocalypse.

18. Contingency Funds It is not uncommon to build a "pad" into your budget for unforeseen costs or if you need a little extra money to make the record better. This is not a way to hide

money or to inflate costs, or it shouldn't be. Even if your producer is working on a recording fund basis it is a good idea to have a contingency built into the recording budget to give you some flexibility. The typical contingency is 10% of the budget, but could be higher or lower depending on circumstances.

19. "Fan Funded" Projects: Producer Budgets If you decide to use fan-funding for your record and you also plan to use a producer, remember you are on your own as with any "DIY" effort. You will not have the structure of the record company to protect you on enforcing terms so it would probably be a very, very good idea to have at least a signed deal memo with your producer that grants you the rights in the recording—see the discussion of the joint authorship problem in this article.

Also remember that if you go overbudget with fan funding, there's no record company to advance you more money. So what that means as a practical matter is that you are operating under the "advance plus budget scenario" for recording cost purposes discussed in this article, except that you have more reason than ever to hold back a portion of the producer's advance until satisfactory completion of the recordings. This is because you have raised a specific amount of money from your fans to record your tracks and you will have to put up your own money or raise more money if you go over budget. If the producer causes you to go over budget on a fan funded record, you will want to be particularly careful about having a contingency to invade if necessary before you go after the producer's delivery payment—which in theory you will only be able to invade if the producer actually caused the overbudget through no fault of yours. These are always awkward conversations to have, so take advantage of your contingency.

Before you ever ask your fans for a contribution, you should have been through your budget thoroughly so you don't have these surprises. It's one thing to fight with your record company about money—they *sell* your records. It's another thing to fight about money with the precious few people who show you enough respect to *buy* your records.

20. "Fan Funded" Projects: Recoupment We spent a fair amount of time on recoupment issues in this article. With "fan funded" projects, there is no recoupment, at least not for the fan funded part of the costs. Those will not be the only costs, however, Another thing to remember is that if you produce a record on a fan funded basis and it is successful, you may find that a label wants to "buy it", meaning pay you for the record in what will become a term recording artist agreement.

And we know that the only money that record companies pay to artists is *payable* royalties, right? Meaning royalties that are payable after recoupment. In fact, it's fair to say that record labels don't really "pay" artists, rather they debit and credit the artist's royalty account.

So if you have a fan funded record for $15,000 and you pay your producer $3,000, but because of your touring and other hard work you are able to have a major label "pick up" that record for $500,000, what happens? If the label advances you $500,000 can you put all of money in your pocket? Great payday, right?

But what about your producer agreement? For example–if your producer agreement for your fan funded record doesn't take into account at least the potential for an advance at some point in the future, then are you going to owe the producer a royalty on those records it takes to recoup that $500,000? Probably. And where are you going to get that money from? Hopefully your producer agreement will tell you how to do that.

Following is a producer deal memo checklist that you may find useful in consultation with your attorney. Remember, the basic rule of thumb is that the producer must be obligated to delivery or perform relevant obligations that the artist has to the label, including deliverables, delivery standard, representations and warranties and indemnification. Any greater obligation from artist to label leaves artist exposed.

PRODUCER DEAL MEMO CHECKLIST

Producer Name/Loanout Corp:

Artist Name and Project Title:

Recording Budget: Number of Tracks: ___
Recoupable: ___%
Non-recoupable: ___%

Timing of Payments: Start Date: _____ Commencement ___% (WFH Certificate)
Mixing ___%
Delivery or execution of producer agreement ___%

Delivery Standard: [Technically/technically and commercially, take from artist agreement]

Deliverables: Schedule label/distributor delivery requirements (take from artist agreement)

Royalty: Producer Royalty rate: ____% (All-in Artist Rate: ___%) Retro to record one ___
Revenue Share: ___% A-Side Protection/B-Side Reduction __ Mixer/Remixer Reduction: 1%

Computed as artist (attach redacted royalty and accounting terms w/definitions)

Label Letter of Direction and Producer Declaration (attach)

SoundExchange Letter of Direction: ___% of featured artist share (attach LOD)

Songwriting: (schedule splits if applicable)

Mechanical Rate: Controlled compositions clause (attach)

Credit: Per label policy or list (failure to accord credit not a breach, no injunctive relief)

Registration Right: Right to register sound recording with Copyright Office or song with PRO

No Samples, Rerecording or Reproducing Restrictions, Third Party Consents: