Recording Agreements (Part 1)

By: Chris Taylor, B.A., LL.B.

The views and opinions expressed in this article are not meant to substitute for legal advice which should be sought in each particular instance.

Introduction
This article is the first of a two-part article reviewing the major terms found in a typical Canadian Major Record Company recording contract. Of course, individual circumstances can vary widely depending on the bargaining power of the artist.

Major Record Company
When we use the term "Major Record Company" ("MRC") we mean one of the following companies in Canada: Warner Bros., Universal, BMG, EMI and Sony. Several other record companies in Canada including Jive, Aquarius, and Nettwerk can, on occasion, make competitive offers against MRCís. Smaller record companies may be more flexible on the length of term and creative control issues whereas MRCís are often stronger in the financial guarantees of artist advances, recording funds, video budgets, tour support, etc.

All of these terms are discussed below.

Term
Every recording agreement should explicitly outline how long the contract is for. Typically, the term is tied to a delivery commitment for a particular number of albums. In most instances a Major Recording Company will attempt to tie up the artist for as many albums as possible with the maximum being up to 8 albums. The artist (or their representatives) should attempt to reduce this requirement to as few albums as possible (3 to 6).

The MRC will commit to producing and releasing one album and will retain options to the remaining albums. It is important to remember, although a recording agreement may be for up to 8 albums the MRC will not guarantee to fund the production of all 8 albums. It is their option to decide whether or not they wish to extend the relationship with the artist beyond the first album.

Occasionally an artist may be able to have the MRC commit to a guaranteed 2 albums but rarely beyond that. The artist tries to get the MRC to commit to as many albums as possible and to reduce the overall option periods as much as possible. The reduction of option periods will, hopefully, put the artist is a better position to re-negotiate an extension of their current agreement if they enjoy success on their first 4 or 5 albums. As we know, artists rarely reach the end of their option periods with the MRC; however, it doesn't hurt to plan ahead just in case.

Advances
Normally when an artist signs a recording agreement with an MRC the artist will receive an advance of approximately \$20,000 - \$50,000 CDN. This is money for the artist to use at the artistís sole discretion. Often this money is used to pay living expenses, management commissions, legal fees, and artist debts. This money, especially if it is the sole source of income for the artist, must also provide for the artistís basic living needs (i.e. food, rent, etc.) before, during and after the recording of the first album under the

MRC agreement. Sometimes MRCís will kick in further monies when the artist is in desperate need , other times they wonít and the artist may be forced to entertain a publishing offer or work a second job prior to release of the first album.

The artist will receive further artist advances for subsequent albums under the recording agreement when, and if, the MRC elects to exercise its option(s).

[Note to reader: do not forget to address Goods and Services Tax (G.S.T.) issues under this section.]

Recording Budgets/Funds
The agreement will also guarantee a minimum amount for recording each album under the agreement. An average guaranteed recording budget for a first album would likely range between $100,000 - $200,000 depending on the anticipated recording costs for the artist. Many times recording companies will guarantee a minimum recording budget but authorise larger actual recording budgets once the process begins of recording the actual album. Very few albums are recorded for amounts lower than the recording budgets granted in the agreement.

It is important to understand the distinction between recording "Budgets" and recording "Funds" in a recording agreement. "Recording Budgets" are often bare minimums where, if the artist comes in under budget, the surplus does NOT go to the artist; whereas "Recording Funds" pay any recording money surplus, remaining after delivery of the applicable album, to the Artist. Make sure this is clarified in the agreement.

Recoupment
This issue of recoupment is important to understand. In brief, many of the costs incurred by the record company such as artist advances; recording budgets; tour support and video monies are paid back to the MRC through the artistís royalty (described below). For example, if the record company costs listed above totalled $450,000 and the artistís royalty was $1.50 per album, the artist would need to sell 300,000 copies of their album (triple platinum in Canada!) to be in a "recouped" position.

On the bright side of the equation the advances described above are only recoupable from artist royalties under the agreement and are "non-returnable" so, if you donít recoup under your agreement you do not have to repay the MRC through your personal funds. In addition, many of the MRCís costs such as marketing; promotion; and, other overhead costs are not included in the recoupable amounts.

Next Issue
Next issue we will review Royalties; Territory; Creative Control; Controlled Composition Clauses/Mechanicals; Video Budgets; and, Tour Support. Join us.

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Recording Agreements (Part 2)

By: Chris Taylor, B.A., LL.B.

The views and opinions expressed in this article are not meant to substitute for legal advice which should be sought in each particular instance.

Introduction
Welcome to part 2 of this article. Last issue we discussed Canadian Major Record Company ("MRC") agreement provisions including: Term; Advances; Recording Budgets/Funds; and the concept of recoupment. This week we will address some of the other important negotiating points found in the typical MRC deal.

Royalties
Royalties are expressed as percentage of a Base Price of either: (a) the Suggested Retail List Price of an album (i.e. $19.95); (b) as a percentage of the record company's price to their dealer (Purchase Price to Dealer, i.e. $14.75); or, (c) finally, as a percentage of a wholesale price ($11.50).

When the Base Price is based on Suggested Retail List Price the royalty will tend to range in the area of 12%-15%. When the Base Price is based on the Purchase Price To Dealer your beginning royalty will be closer to 18-24%. When the Base Price is based on a Wholesale Price the royalty can range from 28%-34%.

At the end of the day, under the various calculations, you end up at a similar so-called "penny rate" but you get there through entirely different routes. A skilled attorney should be able to walk you through these provisions and give you an approximation of how much money you will make per record sold under your recording agreement (the "penny rate"). This number will range from about $1.60 - $1.95 per album.

Many of you have probably read about packaging deductions; free goods; producer payments; CD reductions; foreign royalty reductions and other reducers that negatively impact your penny rate. If you are interested in a fuller discussion of this detailed topic I would suggest Paul Sanderson's, "Musicians and the Law in Canada, 3rd. Ed.".

Territory
Record companies will typically attempt to retain control over your masters on a worldwide, or even a "universal" basis (in case people start selling records on the moon). As an artist you would typically want to narrow down the territorial rights of the MRC. Some Canadian artists have even managed to retain portions of Canada to themselves. Artists with substantial bargaining power may be able to secure deals for "Canada only"; or, where the bargaining power is reduced, artists may grant worldwide rights to the MRC who in turn attempts to release the artist's masters in various territories within a particular time period.

It is important to remember that even though a company may be required to formally release a record in a particular territory there is normally no absolute requirement for the releasing territory to meaningfully release the record. Often, Canadian artists are focused on a guaranteed U.S. release and/or other significant territories such as the U.K., Germany or Japan.

Normally the MRC will relinquish territorial rights where the MRC fails to release two consecutive albums in a particular territory. You may be able to license single albums for non-release territories ("one-offs") and split the receipts with the MRC on a 50/50 basis.

Creative Control
Ideally an artist would secure full creative control with respect to songs on the album; singles on the album, album/single artwork; selection of producers; marketing materials; video concept and budgets, etc. Normally an artist with average bargaining power will gain a mutual consultation right to such matters with the MRC maintaining a final approval right in "the event of disagreement".

Controlled Composition Clause/Mechanicals

Record companies pay an "artist royalty" for records sold (see above). The record company is also obligated to pay a "songwriter royalty" for each record sold which is called a "mechanical royalty". This mechanical royalty is addressed in the controlled composition clause ("CCC").

The CCC limits the number of songs the MRC will pay a mechanical royalty on (for full albums: 12 songs) and the amount the MRC will pay per song (currently 7.4 cents per song). The CCC clause also typically reduces the per song rate by 25% to 5.5 cents so in effect the total payable by the MRC is 66.6 cents (12 x 5.5). If your albums contain more than 12 songs the MRC will only pay 66.6 per album. Finally, if your albums include many outside writers the MRC may pay the outside writer full rates first and only give you the surplus remaining from the 66.6 cents.

For example:

On a 14 song album:
Record obligates itself to pay: 66.6 cents per album
Outside writers are paid for writing 4 songs: 29.6 cents per album @ 7.4 cents per song
Remaining mechanicals for artist/writer: 37 cents per album 3.7 cents per song

This is a key clause because this mechanical royalty income is not cross-collateralized against unrecouped amounts; therefore, the artist/writer actually receives mechanical royalty income despite the artist/writer's recoupment account with the MRC.

Video Budget
MRC's will normally guarantee a minimum of 1 video per album at $50,000 minimum per video. Video costs are normally 50% recoupable as opposed to 100%.

Tour Support
MRC's will normally guarantee a minimum amount of tour support per album at $25,000 per album. Tour support costs are normally 100% per recoupable.

Off-Stage Sales/Equipment/Miscellaneous
There are many other items that you may want to explore in your recording agreement. Some artists are successful at maintaining their right to purchase CD's from the record company to sell off-stage. Other artists convince MRC's to provide funds for the artist to purchase recording equipment.

There are many, many other issues that will be addressed in the long form recording agreement which often runs from 50 to 100 pages such as website rights; artist name rights; leaving member clauses; marketing restrictions; accounting provisions; and standard boilerplate indemnity and representation/warranty language.

I hope these articles have provided a basis for understanding the many complex issues found in these agreements.