

The Recording Artist/Songwriter Dilemma: The Controlled Composition Clause—Enough Already!

By Jay Rosenthal

This article explains how recording artists are denied the ability to obtain full statutory compensation when they are talented enough to be able to create as well as perform their own musical compositions. It also describes how other contributors of creative content are constrained from obtaining full statutory compensation. What causes this restriction on potential earnings? Perhaps a primary reason is the depressing effects on earnings of the “controlled compensation” clause in recording contracts.

From a recording artist’s standpoint, there is no lack of highly controversial clauses in the record industry’s standard major label/recording artist agreement. Some of the more notable brush-ups concern the calculation of a digital download royalty—perceived as a victory for recording artists¹—and the almost universal industry adoption of the “360 degree” model, which is viewed as a setback for recording artists.²

While these conflicts are more recent and public, clearly the longest standing and most contentious contractual provision between recording artists and record labels is the “controlled composition” clause.³ Arguably, no other contractual clause engenders such emotion and long-standing resentment among artists, music publishers, songwriters, and their legal representatives. It is time to seriously consider eliminating such clauses from the standard recording agreement and/or implementing legislation mandating that these onerous provisions be unenforceable.

Two copyrights are implicated when a phonorecord (a song) is produced and released to the public. The first is the sound recording copyright (protecting the recorded performance as embodied in the sound recording) and the second is the musical composition copyright (protecting the underlying musical composition from which the sound recording was created). If the recording artist is also the songwriter or co-songwriter of a master, both copyrights are implicated. In these instances, the recording artist/songwriter generally receives two royalties—one for the sale of the sound recording and the other for the sale of a copy of the underlying musical composition.

To secure the right to use a musical work in a sound recording (the “mechanical right”)⁴, a record company must enter into a “mechanical license” with the songwriter or the songwriter’s publisher. The mechanical license serves to compensate the songwriter and songwriter’s publisher when a sale of a sound recording is made. While a record label can enter into a direct license with the songwriter or the songwriter’s publisher, a record label also has the right to use § 115 of the

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KEY TO REFERENCED MUSIC INDUSTRY TERMS

Record Labels. The terms “record label,” “label,” and “record company” are used as shorthand to refer to an entity that has ownership rights to the master recording of a sound recording, including the right to distribute reproductions. Typically, a *major* record company has many “labels,” which are subsidiaries or brands, specializing in different genres. However, for shorthand, the term “record label” is used herein to refer to both a record company and its label.

Recording Artists. Recording artists generally enter into recording contracts with record companies. If the recording artist is also a songwriter, the recording artist will often enter into a contract—as a songwriter—with a publishing company.

Music Songwriters (including Composers). Music songwriters typically assign their copyrights in the musical compositions (or songs) that they have created to music publishing companies, which exploit the composition or “work,” including collecting royalties from record labels, and share those royalties with the works’ creators.

Recording Artist/Songwriter. This is a shorthand term used to describe music songwriters and composers who perform and release recordings of their own musical works.

Copyright Act. Section 115 provides an alternative procedure to secure the “mechanical right”—a compulsory license. A compulsory license takes away the right of a copyright owner to say no, so long as the licensee abides by all the terms and requirements set forth in the statute. The other alternative, and one that is invariably used by record labels, is to secure a mechanical license from the Harry Fox Agency, a mechanical rights licensing society. The differences are slight, but the Harry Fox mechanical license is preferred because the terms and requirements are more beneficial to the licensee, while still incorporating all the terms, rules, and requirements of the § 115 compulsory license.

However, the record labels oftentimes use another tool in their arsenal of contract provisions to gain an economic advantage—the “controlled composition” clause. The clause is applied so as to negatively impact the mechanical royalty paid to a songwriter if the songwriter is also a recording artist signed to their label. The controlled composition clause is nothing more than a euphemism for a set of contractual terms in the recording agreement. Through application of the controlled composition clause, the record label reduces and restricts the aggregate mechanical royalty paid to the recording artist when he or she is also the songwriter of a musical work, as well as potentially decreasing the royalties paid to others

SAMPLE CONTROLLED COMPOSITION CLAUSE

The following is a short, generic example of a controlled composition clause. It is worth noting that the standard version used by major record labels is much longer and more complex—sometimes three to four pages long:

Mechanical Royalties—Company shall pay no more than fifty percent (50%) of the minimum statutory rate in effect at time of recording the applicable masters, without regard to playing time—capped at 2x rate for singles, 3x rate for EPs, and 10x rate for LPs to third-party writers. If Company shall pay more than the amount set forth above, then Company shall have the right to recoup the excess from royalties owed to Artist hereunder.

writing or composing with the recording artist/songwriter. Instead of paying the benchmark “statutory” compulsory royalty set by the government under § 115, or as set forth in the Harry Fox mechanical license, the controlled composition rate historically equals much less.

Generally, a “controlled composition” is defined in a standard recording agreement as a musical composition written, in whole or in part, by the recording artist, or a musical composition either owned or controlled by the recording artist or his or her publishing company. Some record labels even treat a third-party co-writer’s share as “controlled.” Record labels started to insert controlled composition clauses into recording artist agreements in the 1960s when there was a proliferation of successful recording artist/songwriters. These provisions effectively altered the terms of the traditional mechanical license in ways economically beneficial to the record labels.

The record companies rationalized this practice by claiming they needed the controlled composition clause to limit their risk in an age where they were forced to increase the

basic recording artist royalty rate, and the cost of producing, distributing, and promoting albums and singles was increasing. To the labels, this seemed a rational way to respond to the increased business costs and risks of the day. They took advantage of the recording artist/songwriter trend; and instead of the more problematic road of securing reduced mechanical royalty rates from third-party writers, they had a much easier time incorporating the label-friendly clauses into their standard recording artist agreements.

Many recording artists and songwriters universally condemn the controlled composition clause. Its application, in almost all instances, significantly lowers the economic benefit to the singer/songwriter, as is shown in the examples below. The creative and business relationships

Table 1. Comparison of the Effects of the Mechanical License and Controlled Composition Clause

	Standard Mechanical License	Controlled Composition Clause
1	100% of “statutory rate”	75% of “statutory rate”
2	100% of statutory rate payable regardless of reduction in wholesale or retail price of records distributed	75% of statutory rate further reduced by reductions
3	Statutory rate may increase every two years	Rate frozen as of date of delivery of the master sound recording
4	Royalty payable on all records “made and distributed,” whether sold or given away	Royalty only payable on records sold, i.e., records for which recording artist is entitled to recording artist royalties
5	Statutory rate increases if playing time exceeds five minutes	Rate never increases based on playing time
6	Reserves allowed, but Copyright Office regulations mandating limits and liquidation procedures are usually incorporated	Reserves typically same as recording artist royalty reserves specified in record contract, which can be as high as 50%
7	Publisher can terminate license if record company fails to account or pay, and can sue for copyright infringement if the breach is not cured	Recording artist can only sue for damages for breach of contract if record company fails to cure
8	Royalties payable for each use of song on record	No royalties for repeat uses of same song on record
9	Full royalties payable for copyrightable arrangement of public domain song	No royalties payable
10	No right granted to reprint lyrics	Free licenses granted to reprint lyrics
11	No cap on number of songs subject to full album statutory rate	Cap on number of songs subject to reduced rate; e.g., label pays no more than 10 mechanicals at a 75% rate per album, no matter how many tracks on the album
12	Limit to audio-only product	Sometimes includes a grant of non-royalty-bearing audio-visual rights

DOING THE NUMBERS

HOW THE CONTROLLED COMPOSITION CLAUSE REALLY WORKS

A Typical Clause

The controlled composition clause in a recording artist's/songwriter's recording agreement often includes the following limitations:

1. 75% of statutory rate (which equates to a mechanical royalty paid to the recording artist of less than the statutory rate⁶).
2. A cap of 10 tracks that the record company will pay royalties on.
3. If the aggregate mechanical royalties owed to third-party writers or publishers exceed the limitations above, the record label has the right to recoup the overage from the royalties of the recording artist/songwriter (as opposed to those of the noncontrolled songwriter).

Situation #1

The recording artist/songwriter writes the lyrics, and her producer writes all the music and sometimes co-writes the lyrics with her. Two tracks include digital samples and she performs one "cover version" of a song previously published.

There are 14 tracks on the album. On 10 tracks the recording artist/songwriter owns 50% of the song (since she is sole author of the lyrics), and on four tracks she owns 25% of the song (since she is a co-author of the lyrics with the producer). The producer is not restrained by the controlled composition clause.

Two of the tracks contained digital samples. Because of the popularity of the samples, she agreed to pay the publishers of the samples a 100% statutory mechanical royalty, with no reductions. She also had to pay a 100% mechanical to the publisher of the cover song.

Calculation

The 100% statutory rate at the time the album was released was 9.1 cents per song. Seventy-five percent of the statutory rate equals 6.8 cents per song. The total mechanical payment paid by the label on the album when applying the controlled composition clause is 68 cents—6.8 cents times 10 tracks (the cap as per the controlled composition clause).

The label must pay a full statutory mechanical to the publishers of the digital samples and the publisher of the cover song. This equals 27.3 cents (3 times 9.1 cents—the full statutory rate). That leaves 40.7 cents to pay the producer and singer/songwriter for 11 songs (14 total album songs minus the mechanicals paid to the digital sample

and cover version publishers).

The producer only wrote the music on 8 of the remaining 11 songs and wrote the music and co-wrote the lyrics on the remaining 3 songs. So on 8 songs the publishing interests are split 50/50. On 3 of the songs, the publishing interests are split 75% for the producer and 25% for the singer/songwriter.

Since the producer is not subject to the controlled composition clause rate reduction, the producer will receive 4.55 cents each for 8 songs (36.4 cents) and 6.8 cents each for 3 songs (20.4 cents). Overall, the producer will receive approximately 57 cents per album. The total mechanical royalties owed to the outside publishers and the producer are 86.3 cents.

Since the obligation of 86.3 cents is well over the controlled composition clause cap of 68 cents, the recording artist/songwriter will receive *no* mechanical royalties, even though the recording artist/songwriter wrote the equivalent of five and a half songs. Furthermore, the label will have the right to recoup 18.3 cents (the difference between the mechanical royalty obligation and the cap in the controlled composition clause) from the singer/songwriter's recording artist royalties.

This is a common scenario, especially in the urban music genre.

Situation #2

Recording artist/songwriter writes all songs on her album.

Calculation

Without controlled composition clause:

- 9.1 cents per song
- \$1.27 per album

With controlled composition clause:

- 4.8 cents per song
- 67 cents per album

Situation #3

Recording artist/songwriter writes half the songs, producer writes half the songs, and producer adheres to the terms of the recording artist/songwriter controlled composition clause.

Calculation

Without controlled composition clause:

- 9.1 cents per song
- 63 cents per album for each

With controlled composition clause:

- 4.8 cents per song
- 33 cents per album for each

Situation #4

Recording artist/songwriter writes half the songs, producer writes half the songs, and producer does not adhere to the terms of the recording artist/songwriter's controlled composition clause.

Calculation

Without controlled composition clause:

- 9.1 cents per song
- 63 cents per album for each

With controlled composition clause:

- 9.1 cents per song for producer
- 63 cents per album for producer
- One-half cent per song for artist
- 7 cents per album for artist

the recording artist has with others providing creative input on the sound recording are also negatively impacted because the record labels structure the controlled composition clause in a way that requires the recording artist to pressure artistic collaborators (e.g., a producer, a side artist, a nonartist co-writer, an engineer, or a digital sample licensor) to adhere to the restrictions of the recording artist's controlled composition clause.

A more detailed comparison of the effects of the industry standard mechanical license (like those issued by the Harry Fox Agency) and the generic controlled composition clause illustrates the broad negative economic impact on the recording artist/songwriter (see Table 1). The controlled composition clause essentially overrides many of the benefits a recording artist/songwriter would otherwise receive from the industry standard mechanical license.⁵

While the record companies sometimes provide minimal relief for more established recording artists/songwriters, new artists are almost always subjected to the same onerous "take it or leave it" controlled composition provisions. An established recording artist/songwriter may be able to negotiate an escalation in the royalty when certain sales levels are reached. For example, the 75% rate may increase to 100% if sales of a recorded track exceed one million. But without negotiating leverage, a new recording artist has no choice but to agree to the controlled composition provision. Arguably, this could be characterized as a "contract of adhesion."

The controlled composition clause terms set forth above may vary to a small extent label to label, but never to any meaningful degree.

Some record labels offer a modicum of relief in their respective "controlled composition" clauses if the recording artist/songwriter enters into a publishing agreement with the record label's publishing affiliate. By way of example, if a recording artist signed with a major record label, the major record label may offer beneficial "controlled composition" terms if a recording artist who is also a songwriter agrees to assign the interests in his or her songs (i.e., the underlying musical works) to the record label's affiliated publishing company.

As collaboration between artists, songwriters, producers, and other creative stakeholders increase in our technologically interdependent world, the perception in the publishing community is that the controlled composition clause is more problematic and cumbersome than ever—especially when noncontrolled songwriters (those songwriters not bound by a record company's controlled composition clause) and/or publishers are involved. Controlled composition clauses are intentionally designed to incrementally decrease the royalty owed to a recording artist/songwriter, at a time when more noncontrolled songwriters and publishers co-author and/or co-administer their musical compositions. The singer/songwriter, therefore, is not incentivized to use noncontrolled writers. This short-sighted, unwarranted intrusion on the creative process not only impacts the recording artist/songwriter's mechanical royalty revenue, but potentially harms the economic value of the musical composition and the sound recording. Sometimes, noncontrolled songwriters' contributions are a key determinant leading to overall success of a song.

As the record industry continues to atrophy, and multiple rights deals that allow record companies to take a percentage

of earnings from all of a recording artist's income-producing ventures, including ringtones, touring, and merchandising (referred to as "360 deals"), become the norm, the fear is that controlled composition provisions will be more onerous—not less. For example, songwriters and publishers traditionally grant a synchronization or "synch" license for embodiment of their musical composition on a music video for promotional use only. Recently a major record label, in an attempt to push the envelope, included in their standard controlled composition clause a waiver of a royalty for music videos, even if the label exploits the music video commercially. In the age of multimillion-dollar deals between record labels and social networking sites, this provision is worrisome.

The problem of controlled composition provisions has not been lost on Congress. In the past, Congress has recognized and taken steps to alleviate the deleterious impact of the controlled composition clause. In the Digital Performance Right in Sound Recording Act of 1995, Congress declared that a controlled composition clause shall not be enforceable for digital download delivery of sound recordings released pursuant to a contract entered into after 1995, subject to some minor exceptions.⁷ Since 1995, however, the negative impact of the controlled composition clause for physical product and pre-1995 digital sound recordings has significantly increased.

And there are some onerous provisions of the standard controlled composition clause that were not even addressed by the so-called "fix" in the 1995 Act. Examples include the application of the controlled composition clause to third party writers not in contractual privity with the record label, as well as provisions waiving compensation to controlled writers for use of videos, even if the video is producing revenue for the record label. Having already established a precedent, Congress should consider rendering all controlled composition clauses unenforceable, for both digital and physical products.

One additional problem with controlled composition clauses is that mechanical royalties are hard, if not impossible, to calculate without resolving all outstanding songwriting authorship claims among co-writers and others owning shares of copyrightable material for each song on an album. If the problem is not resolved, the record label generally retains the royalties on the entire album that would otherwise have been paid to the songwriter or publisher for songs that have been cleared. While this problem has been mitigated somewhat because of the statutory protection for newer digital downloads, as mentioned above, and new voluntary clearing practices adopted by the labels and publishers, the abolition of the controlled composition clause overall for all physical and digital records is the only real global solution to the problem. Without a doubt, licenses would be finalized sooner and recording artists/songwriters and their collaborators would get paid in a quicker and more efficient manner.⁸ ■

Endnotes

1. In the Eminem case, the court ruled the royalty clause in Eminem's producers' agreement, providing for a 50% royalty of all net revenue from third-party licenses, controls over the royalty clause providing for a royalty based on a sale. This interpretation of the recording artist agreement results in the artist (or the producer, in this case) earning much more for each digital download. *F.B.T. Prods. v. Aftermath Records*, 621 F.3d 958 (9th Cir. 2010).

2. *See generally* MULTIPLE RIGHTS DEALS IN THE MUSIC INDUSTRY (Julian Bentley et al. eds., Int'l Assn. of Entm't Law., 2009).

3. *See generally* DONALD PASSMAN, ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS 209 (Free Press 2003); RICHARD SCHULENBERG, LEGAL ASPECTS OF THE MUSIC INDUSTRY 191–201 (Billboard Books 2005); AL KOHN & BOB KOHN, KOHN ON MUSIC LICENSING, ch. 13 (4th ed. 2010).

4. PASSMAN, *supra* note 3, at 201.

5. WYATT, TARRANT, COMBS, GILBERT & MILOM, ANATOMY OF A CONTROLLED COMPOSITION CLAUSE (1991).

6. PASSMAN, *supra* note 3, at 212.

7. 17 U.S.C. § 115(c)(3)(E) (1995); Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No 104-39, 109 Stat. 336 (amending, *inter alia*, 17 U.S.C. §§ 114, 115) (enacted Nov. 1, 1995).

8. Quicker licensing may also help record labels avoid the late fee on § 115 mechanical licenses that has recently been established by the Copyright Royalty Board. *See generally* Susan Butler, *Labels & Publishers: Détente*, MUSIC CONFIDENTIAL (2009), <http://www.musicconfidential.biz/673.html>.