

Circumventing the Value Gap: Practical Methods to Increase Revenue for Music Creators and Rights' Owners

By: Erin M. Jacobson, Esq.

Introduction

The most prevalent problem in the current music industry is making money. Music creators and rights' owners continually struggle to earn revenues proportional to the value of exploitations of their music — hence, the value gap.

While many causes of the value gap in the United States stem from the copyright law, as well as compulsory royalty rates and licensing procedures that restrict the earnings within the U.S. market, the reality is that no one creator or rights' owner will change these circumstances. There are promising legislative efforts to change these restrictions, however, this article will focus on practical methods that creators and rights' owners can incorporate into their daily operations to earn money despite circumstances beyond their control.

This article will focus primarily on songwriters as creators and music publishers as rights' owners. Examples and approaches within this article come from the author's experience representing songwriters and music publishers, as well as being an active member of the music publishing community. Other public examples will also serve as illustrations where appropriate.

Fixing Foundational Issues

Just as a building cannot stand on an unstable foundation, the foundation of a catalogue's management must be solidified by improving aspects of administration and collection before building upon that foundation to create new revenue sources. Creators and rights' owners are constantly facing issues of non-payment, but many of those issues could be mitigated with the right practices in place.

Inefficient Administration and Collection Practices

Metadata and registration data have become almost as important as the ownership of the copyrights to which that data pertains. Problems with incorrect data are often the first place to look in order to explain low revenues, and corrections in the areas described below often immediately increase revenue – if nothing else but for the fact that the money was available but wasn't being paid until the information was corrected.

Data problems that arise at the time of creation often involve co-writers who cannot agree on ownership splits and where split sheets were not completed at or near the time of creation. The likelihood of split disagreements increases as more writers are added to a composition and splits are revised. Initial data problems also arise from employees often not properly calculating, confirming, and registering split information.

One example of these problems is shown from a recent collaboration involving a client of the author. The client is a writer on a recent hit composition that received considerable radio airplay. The composition has seven writers credited, and has been in and out of split dispute four times. There were no splits sheets done at the time of writing, and splits were not finalized until over a year after the composition was written and the record had been released. Early negotiations involved parties claiming larger percentages than were warranted by their contributions, and carelessness whereby some of the parties calculated splits that did not total 100%. Initial performance rights registrations submitted by one of the publishing companies (that does not represent the client) were incorrect, with the client's share registered as another writer with a similar name and no designation listed for the client's publishing entity. The performing rights organization (hereinafter "PRO") would not correct the registration information and shifted the responsibility to the registering publisher. The publisher did not want to correct the registration because it did not represent the client, despite the fact that it submitted the initial registration. The author had to intervene and secure the cooperation of all parties to have the client's information corrected and ensure the client's payment. The client did not know how to fix this situation, and the other parties involved would not have taken action to correct the client's registration without the author's intervention.

Situations like the above can be avoided from the outset. Firstly, creators and their representatives should insist on split sheets at the time a work is created, or at least as early as possible in the process. This may seem like a commonplace and often-recommended solution, but it still fails to be implemented at the frequency in which it should. Secondly, all splits should be finalized before release. Again, it seems to be common sense, but would actually be quite novel in practice.

Thirdly, creators and rights' owners must review all registrations and promptly correct any mistakes, as well as communicate with all parties involved (including but not limited to co-publishers, record labels, and PROs) from the outset of the project. The author favors including all data in contracts and creating schedules to circulate correct data among the parties. The author also regularly assists clients in compiling and maintaining an internal, organized database of all relevant data so that song information can be verified and circulated when needed.

However, problems with data do not only arise at the time a composition is written or first registered. Data that often starts out correct can become corrupt or not properly embedded in the metadata and files. Correct metadata between publishers, labels, distributors, PROs, etc., can be compromised at each link in the distribution chain, much like playing a game of telephone where the information relayed at the beginning is vastly different from the information received at the end. Reasons for the inaccuracy of the data include but are not limited to: people or companies claiming rights they do not control, companies going out of business without a clear successor, lack of personnel updating information, and disputes between co-owners. A failure to correct mistakes at the time they occurred encourages those mistakes to multiply and the result is a disorganized catalogue with an incomplete chain of title and the loss of royalties owed.¹

An example of this situation comes from another of the author's clients. At the time the client hired the author, the client's catalogue contained mistakes that were fifty years old. There were compositions with a publisher's share registered with one PRO and a writer's share registered

with another PRO, some self-published compositions were under copyright control in foreign territories, and the writer could no longer remember the deals he signed with third-party publishers. This client was not collecting the full amount of royalties owed to him because the PROs and other organizations would not pay royalties on the compositions with incorrect information and there were several instances where potential licensees could not find the proper authority to grant licenses. Unbeknownst to the client, one publisher was holding a six-figure payout for the client. Once the author began to cleanup and oversee the client's catalogue, the publisher was happy to release the funds. That recovery was only the first of many more to come for an old catalogue that now generates substantial income.

Some argue the problem is not with the data but with the fact that the United States lacks a central database containing accurate, current, and comprehensive information of music rights. The United States has several databases, but the type and accuracy of data varies between them.² There have been past failed attempts at a centralized database³, and some new initiatives to build a database are in progress.⁴ However, a database is only as good as the data put into it, which relies on rights' owners to be meticulous about making sure data is entered correctly and remains correct as it moves through uses of said data by third parties.

These examples illustrate why data and registrations must be checked at the outset, at every stage of distribution, and again at periodic intervals to ensure accuracy. Writers and artists cannot be relied upon to maintain this data, as their job is to create. However, it is imperative that rights' owners and representatives of creators stay vigilant to prevent these situations from occurring because these cases of lost income do not only affect the creator, but also everyone that represents the creator and benefits from exploitation of the works.

Digital Exploitation Income

Even when data is correct, today's marketplace is overwhelmed with the continually multiplying sources from which to collect revenue. The digital service providers like Amazon, Apple, Google, Pandora, and Spotify (hereinafter, the "DSPs") have created an arduous task for creators and rights' owners to track collection of royalties worldwide. Again, the PROs will most often pay the performance royalty stream, but any service qualifying as interactive under U.S. law is also required to pay mechanical royalties.⁵

Many DSPs will not attempt to find rights' owners with the veracity that it should because the U.S. Copyright Law allows for lax behavior in locating rights' owners. Section 115 of the U.S. Copyright Act allows for a person wishing to obtain a compulsory license to serve a notice of intention (hereinafter "NOI") on the copyright owner.⁶ However, a potential licensee is only required to serve a notice on one owner of a co-owned composition,⁷ and due to the prevalence in which co-owners or co-writers fail to communicate or lose touch, it is unlikely that all co-owners of a work would be notified if only one owner receives an NOI. Also, if the potential licensee cannot find the copyright owner, the notice can be filed with the U.S. Copyright Office.⁸ Therefore, DSPs will continually upload bulk NOIs comprising thousands of titles to the Copyright Office, shifting the burden to the rights' owner to find the NOI and contact the DSP for payment. Luckily, searching for these NOIs has become easier recently due to some online

search databases,⁹ but the burden remains on the rights' owner to continually monitor these notices and ensure they receive payment from the DSPs.

Another issue for those in the U.S. is the collection of foreign royalties, and it has become necessary for many U.S. companies that directly collect foreign royalties to affiliate with one of many newly created collection societies in order to collect income from digital uses and Pan-European licensing, especially if not affiliated with a subpublisher.¹⁰ While the subject of collection for Pan-European licenses is beyond the scope of this article, it is important to note that foreign royalties are a valuable income stream to U.S. creators and rights' owners and these collections require yet another complex system to oversee in the already complicated world of royalty collection and publishing administration.

Mass Infringements of Works in UGC and Non-Collection for Those Uses

User Generated Content ("UGC") has become mainstream thanks to websites like YouTube. Mass infringements occur on these websites due to individuals creating and uploading videos of themselves singing songs they did not write (cover song videos) or uploading full songs or videos of which they do not own the content without obtaining permission. The sheer volume of videos uploaded daily moves too rapidly for rights' owners to keep up with, allowing for many outstanding infringements and loss of revenue for those who do not or cannot consistently manage these uses.

Previously, the preferred method of handling these infringements was sending DMCA takedown notices¹¹ to the provider, and sometimes followed by suing the infringer. However, now with YouTube's Content Management System ("CMS"), rights' owners can now flag these infringing videos, stake claims to their content, and participate in the advertising revenue from the videos without taking them down. By sending takedown notices or tracking down infringers, rights' owners may earn money from infringement settlements against unauthorized users, but must remain hypervigilant to police the new infringements consistently being uploaded. By monetizing, rights' owners can earn money from the unauthorized uses of their content by monitoring and continually claiming rights to content. Further, hiring a company specializing in YouTube collection and content management¹² to monitor and claim on a rights' owners behalf eases the management burden on the rights' owner from having to constantly stay ahead of infringements and relieves the company of the need to hire extra staff.

Lack of Co-Owner Communication

It has been a regular occurrence that co-publishers will not speak to each other when updating data or negotiating license fees, and even more common for labels and publishers to not communicate regarding compositions on an album. The communications between such co-owners tend to be on an as-needed basis only, and many of the co-owners leave the real work to the intermediary licensees or PROs.

In one example, a publisher client of the author received a license request and asked the potential licensee, "What have the other co-publishers quoted?" Situations like these would benefit from one co-publisher communicating with the other co-publishers to cooperatively agree on a 100%

rate for all parties involved. Otherwise, each publisher is quoting their own share separately and one publisher could kill a deal for all publishers by quoting a much higher fee than other co-publishers. In other cases I've seen, one publisher held out for more money and was successful, which benefitted all co-publishers on a most favored nations basis.

Co-owners must remember they are all working for a common goal – to make money from exploitations of their rights and get the highest fees possible in situations where fees are negotiable. Communication often gets projects done faster when co-owners can move forward on a united front or in some cases involve a co-owner that a licensee cannot find to get all permissions needed in a multi-stop clearance. Labels and publishers can also work together in the same manner. When all parties are on board and make a track easy to license, everyone benefits from winning the opportunity and receiving the income generated.

Education

Music publishers will benefit from taking the time to train their employees to pay attention to data and why it matters, and also to know the catalogues with which they are working. Many new employees today are younger and not familiar with older catalogues or vast genres of music. Education is especially important for legacy catalogues and new releases that aren't as popular because if the people assigned to managing those catalogues are not familiar with them, the works may not be exploited to their full potential, they may be pitched for briefs that aren't suited to them, or they may not be exploited at all. Employees of rights' owners need to understand the right market for the works they represent, which sometimes relates to the identity of the writer or artist more than song itself.

Another example from the author's clientele involves a successful independent publisher who recently signed an administration agreement with a major publisher for backend services. This independent publisher took the time to train the administrator's synchronization department how to best exploit the works in the catalogue, and this effort has generated several lucrative placements in a short time period. Without this training, the young employees at the administration company may not have taken the initiative to familiarize themselves with these compositions and their exploitation efforts would have underserved the earning potential of the compositions.

Because some catalogues or companies handle massive amounts of compositions, one strategy is to assign individual employees to certain parts of a catalogue or to specific clients, therefore each employee would be able to know a portion of the catalogue intimately, and those employees could work together to suggest songs that would fit incoming opportunities. Some independent publishers already operate in this manner and in the author's experience; these companies have provided exceptional service and personal attention to each of their clients and catalogues.

Creating New Value and Increasing Revenue

New and continuing revenue streams *are* possible despite uncertainty regarding legislation for music and copyrights. Once a solid foundation with efficient administration and collection

practices is in place, creators and rights' owners can take the initiative to create new revenue streams by exploring new technology and thinking creatively.

New Technology

New technology uses currently do not yield a high amount of revenue, but they are still worth considering because they can lead to new audiences and opportunities for both new and older catalogues.

One emerging area encompasses virtual reality (VR) and augmented reality (AR). VR is being used mainly in the live performance space where users can experience a concert without physically being at the concert or can have enhanced experiences during a concert they are attending. The related segment here is AR, which uses traditional technologies and incorporates images and sounds to "augment" those experiences. The opportunities for these uses are seemingly endless, but use of these technologies within the industry is still too new to fully grasp all usage possibilities or to have a benchmark of expected payment ranges.

Internet platforms and mobile apps are also a new technology worth exploring. Facebook is an established platform that is incorporating more uses of music and video into its user experience and acts as a great promotional tool for rights' owners to share their releases.¹³ Further, mobile apps and influencer campaigns on social media are also incorporating more uses of music. The problem with all of these avenues is that while they may have promotional value for the right audience demographics, many of these apps and usages are not being licensed and those that are licensing music still lack a proven structure for monetization. It is important to find which new technology makes sense to each catalogue, and make direct deals with or license to the parties that pay properly for uses of the music. While digital campaigns often don't pay much in royalties, there are other manners of participation such as sharing in ad revenue, or leveraging customer/fan/user data to target new audiences.

Targeting New Audiences

Introducing new compositions to an existing fan base or even older compositions to a new audience often involves tapping into the lifestyles of the target audience members and creating brand partnerships to gain new fans.

It is possible to create a partnership with a brand that will generate lyric reprint, sync, master use, mechanicals, performance, and advertising revenues by tying a product or brand to a composition and creating a media campaign around that product or brand. A rights' owner could also leverage this opportunity to generate exposure for another artist (or writer) on its roster, increasing interest and revenue for the new artist or writer's material and again creating multiple income streams for the rights' owner. Rights' owners that don't have artist clients can still partner with the artists recording their writers' compositions and interested brands in order to achieve similar results.

These arrangements are not just for new artists, but can also be used in cross-generational campaigns. For example, a new arrangement or cover of a composition can allow for new music

to appeal to older generations that have more spending power, or for older music to appeal to a younger demographic. The foundation of these deals is rooted in creativity and brainstorming how everyone involved with the music can cooperate to make the campaign happen.

Keeping Legacy Relevant: Pairing Legacy Artists with New Artists

It is equally important for legacy catalogs to stay relevant and continue earning money in today's new, and largely digital, marketplace. One way to achieve both of these goals is by pairing legacy artist with new artists.

One legacy artist who has done a great job at staying relevant is Rod Stewart. Stewart has recently been paired with both A\$AP Rocky and DNCE in different instances. A\$AP Rocky used an older song entitled "In a Broken Dream" and incorporated it into his new song, "Everyday". Stewart was the vocalist on the original version of "In a Broken Dream" by Python Lee Jackson. Stewart does not own rights to the composition or master recording, but was still able to use "Everyday" to his advantage by appearing on James Corden's Carpool Karaoke with A\$AP Rocky to increase his visibility with a younger generation of hip-hop fans. A\$AP Rocky's use of "In a Broken Dream" gave an older song new life and created an authorized derivative work that was also beneficial for the rights' owner of the composition and master recording. Situations like this benefit the music publisher who can then claim full or partial ownership of the derivative work (and potentially the master depending on the situation) adding another copyright and income-producer to the publisher's catalogue.

Stewart also collaborated with DNCE to remake his classic hit "Do Ya Think I'm Sexy?". Subsequently, Stewart and DNCE appeared together on the MTV Video Music Awards to perform the song. The performance was choreographed to showcase Stewart as rockstar royalty in which DNCE paid homage to him, and Stewart's persona translated as cool even to the young crowd in the audience, no doubt probably generating some Google searches to learn more about him and his career. Both of these examples are ways Rod Stewart has kept himself relevant and of interest to the younger generation, but one should not forget his foray into the Great American Songbook several years back that resonated with the older demographic, expanding his range to appeal to yet another, more mature generation with disposable income that still bought physical product and had money for expensive concert tickets.

Other legacy artists and writers are targeting *much* younger audiences, i.e. creating children's albums. This is a great idea if an artist is inclined towards children's music because these artists can count on their existing adult fanbases to buy the music in order to introduce it to their young children and grandchildren. These children will grow up knowing a particular artist for music they used to listen to as a child, but as they grow, they will most likely discover songs from the artist's main catalogue, which will then continue generating interest and income for older catalogue. Another way to recycle old catalogue is to record new versions of older compositions, with these new versions geared toward a young audience. Not all compositions will lend themselves to this idea, but the opportunity should be seized for compositions that will.

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Keeping Legacy Relevant: Covers by Younger Artists

Rights' owners of older compositions can also develop new income streams by commissioning cover versions by younger relevant artists. These versions can create a new market for the songs and generate mechanical, performance, and sync income. In the sync world particularly, these covers are also very attractive to music supervisors because they often provide a different feel than the original version that may be relevant to more modern scenes or ads. The masters usually license for much less than the composition, can be licensed as one-stops, and allow the music publisher who own commissioned masters to often retain the full master use fee, making the use even more profitable.

Sync Licenses

The negotiation of fees for synchronization licenses have also become far more competitive and open to a wider scope of artists/composers comprising both those more visible and lesser-known. Some publishers have realized that lesser-known compositions in a catalogue can earn money they wouldn't otherwise if those compositions are offered to music supervisors at a lower fee. In this case, when a placement requires a particular artist or sound, the same artist or catalogue can still be used even if the placement is not of one of the catalogue's most famous songs. It may not earn a creator or rights' owner as much as a placement of the catalogue's top earner, but it still puts money in the pockets of the creators and rights' owners instead of forcing the supervisor or production company to pass on the more expensive placement in favor of another creator's composition.

Derivative Works

Examples such as the Rod Stewart/A\$AP Rocky example mentioned earlier show the potential for derivative works and samples,¹⁴ but there has also been an increase in derivative works in the sync and advertising space. For these derivative works, a publisher has authorized rewrite of lyrics to fit a particular product being advertised, and then the new derivative work is recorded as a sound alike.¹⁵ Although the lifespan of these types of derivative works is shorter, it can generate substantial performance fees during the time that the ad will run (especially if the ad runs nationally), and a publisher can potentially command an upfront advance from the production company or advertising agency. The music publisher may own this new derivative work and potentially the master as well. The caution here is making sure the new work or advertising product will not dissuade other uses of the song for other products or diminish the value and reputation of the song itself, as the legacy of a song must always be protected.

Copyright Terminations (Reclaiming Rights to Negotiate More Favorable Deals and Control Future Exploitations)

An area within the United States copyright law getting a lot of attention is the copyright termination provisions for U.S. rights. These provisions allow authors and their heirs to reclaim ownership of rights granted away at various times in the past, excluding works made for hire and grants by will. Under section 304(c), an author's individual share in a grant may be terminated beginning fifty-six (56) years after the original copyright date.¹⁶ Under section 203, grants may

be terminated by a majority of authors or their heirs beginning thirty-five (35) years after the grant date.¹⁷ Both of these sections are subject to strict notice periods and other requirements and restrictions, which is broader than the scope of this article.¹⁸

Publishers typically loath receiving termination notices because they do not want to relinquish rights they own, especially rights to high-earning compositions. However, there are ways to make these terminations work to a publisher's advantage, especially on forgotten songs. When a termination notice is served, the person serving notice is obligated to negotiate exclusively with the current rights' owner until the effective date of termination.¹⁹ If no deal is reached during that time, the person reclaiming rights is free to enter into agreements with other third parties or self-administer the reclaimed rights. In these cases, the publisher can negotiate a new deal with a more creative structure, tailored to the circumstances surrounding termination and allowing the publisher to continue profiting from a work instead of sitting on asset not producing a return.

Conclusion

While value gap problems exist and there are efforts being made to improve it, there is money on the table for those who know how to get it. Uncertainty allows for opportunities to be creative, and the possibilities for revenue generation are seemingly endless. While the value gap isn't closed yet, circumventing the gap will contribute to its narrowing and make money for us all in the meantime.

About the Author

Erin M. Jacobson is a practicing attorney, experienced deal negotiator, and a seasoned advisor of intellectual property rights who protects musicians, songwriters, music publishers, and a wide variety of other music and entertainment professionals.

Ms. Jacobson's clients include Grammy and Emmy Award winners, legacy artists, and independent artists and companies. Ms. Jacobson regularly handles all types of agreements within the music industry, with an emphasis on music publishing and licensing.

Ms. Jacobson also places special emphasis on her work with legacy clients and their catalogues, as her knowledge of both classic music and current industry practices places her in a unique position to protect and maximize opportunities for older catalogues.

She is a frequent author and speaker, and has been featured in publications including Forbes and Music Connection. She also is on the Board of Directors for both the California Copyright Conference (CCC) and the Association of Independent Music Publishers (AIMP).

For more information on Ms. Jacobson can be found at www.themusicindustrylawyer.com.

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Endnotes

¹ In the case of lost royalties, either an incorrect party is getting paid (and will happily keep the money) or the royalty collection organization is holding the funds, but will only do so for a limited time. Most often, royalties outstanding for many years will not be collectible and the creator or rights' owner will only be able to recover a small portion.

² The United States has multiple databases, including but not limited to those for: the Copyright Office, ASCAP, BMI, SESAC, ISRC search, and others.

³ Cooke, Chris, *PRS confirms Global Repertoire Database "cannot" move forward, pledges to find "alternative ways"*, COMPLETE MUSIC UPDATE, July 10, 2014, <http://www.completemusicupdate.com/article/prs-confirms-global-repertoire-database-cannot-move-forward-pledges-to-find-alternative-ways/>

⁴ Schneider, Marc. *ASCAP and BMI Team Up to Launch Musical Works Database, Eyeing Increased Transparency*, BILLBOARD, July 26, 2017, <https://www.billboard.com/articles/business/7881069/ascap-bmi-joint-database-licensing-copyright>; CIS-Net Powered by FastTrack, <http://www.fasttrackdcn.net/our-products/cis-net/> (last visited March 31, 2018).

⁵ Cooke, Chris, *Spotify questions whether mechanical royalties are even due on a stream*, Sept. 1, 2017, COMPLETE MUSIC UPDATE, <http://www.completemusicupdate.com/article/spotify-questions-whether-mechanical-royalties-are-even-due-on-a-stream/>; Christman, Ed, *NMPA Claims Victory: CRB Raises Payout Rate from Music Subscription Services*, BILLBOARD, Jan. 27, 2018, <https://www.billboard.com/articles/news/8096590/copyright-royalty-board-crb-nmpa-spotify-apple-music-streaming-services>; Jacobson, Erin M., *How Spotify Has Waged War With The Music Industry*, FORBES, Sept. 22, 2017, <https://www.forbes.com/sites/legalentertainment/2017/09/22/how-spotify-has-waged-war-with-the-music-industry/#5c19a0a856d5>

⁶ 17 U.S.C. §115(b) (2010).

⁷ 37 C.F.R. §201.18 (2017).

⁸ 17 U.S.C. §115(b) (2010).

⁹ SX-Works NOI Lookup, <https://www.sx-works.com/noi-lookup> (last visited March 31, 2018).

¹⁰ Some of these collection arms include AMRA, ARESA, ARMONIA, BackOffice, Clearbox Global, IMPEL, MINT, and SOLAR.

¹¹ 17 U.S.C. 512(c)(3) (1998).

¹² Examples of YouTube collection and management companies include but are not limited to: Exploration.io, Audiam, AdRev, and AdShare.

¹³ Cohen, David, *Facebook Harmonized With Global Music Rights, HFA/Rumblefish, Kobalt Music Publishing*, ADWEEK, Jan. 12, 2018, <http://www.adweek.com/digital/facebook-global-music-rights-hfa-rumblefish-kobalt-music-publishing/>; Cohen, David, *Facebook Just Announced Another Music Licensing Deal*, ADWEEK, Feb. 21, 2018, <http://www.adweek.com/digital/facebook-just-announced-another-music-licensing-deal/>.

¹⁴ Sampling is not the windfall that it once was, but it is still a viable way to create new income streams.

¹⁵ See generally Sanders, Lisa, *Former Anti-Business Band Does P&G Commercials*, ADAGE, Aug. 13, 2003, <http://adage.com/article/news/advertising-devo-s-whip-p-g-swiffer-commercial/38166/> (Devo's "Whip It" was used for a Swiffer commercial with a lyric change to fit the product); *Burger King Spicy Nuggets TV Commercial "Turn Up the Heat"*,

<https://www.ispot.tv/ad/wDCF/burger-king-spicy-nuggets-turn-up-the-heat> (Vanilla Ice’s “Ice Ice Baby” changed to “Spice Spice Baby” for a commercial featuring Burger King’s spicy chicken nuggets). Despite the income they generated, the author feels these derivative works insulted the legacy of the original compositions.

¹⁶ 17 U.S.C. §304(c) (1992).

¹⁷ 17 U.S.C. §203 (1998).

¹⁸ 17 U.S.C. §304(c)(4) (1992); 17 U.S.C. §203(a)(4) (1998).

¹⁹ 17 U.S.C. §304(c)(6)(D) (1992); 17 U.S.C. §203(b)(4) (1998).