FACING THE MUSIC IN DIVORCE

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This article provides the family law practitioner with a basic overview of how to identify music-related intellectual property and royalty issues in divorce. Unlike business or pension valuation and division, there is little case law on how music rights and income should be characterized, valued, and divided in a divorce. It would be routine to hire a forensic accountant to value a community business, but too often family lawyers resort to poorly drafted agreements that split music royalties. A music lawyer faced with an agreement that read, "All marital royalties shall be equally divided between the spouses" would immediately ask questions like, "Which royalties are we talking about"; "What about the ownership and administration of copyrights?"; "What about possible future interests such as copyright reversions?"; and "What do we do with income that is attributable to some copyrights created during the marriage and some that were not?" Some of these issues are unique to music and usually not familiar to non-music lawyers. Faced with similar questions, even the Court of Appeal's discussion started, "Preliminarily, we undertake a brief odyssey into the somewhat arcane domain of copyright law."[1]

In order to characterize the community's interest in music catalogs and to identify income available for support, it is important to understand the numerous ways in which musicians earn income and acquire contractual and intellectual property rights in their music.

First, while music copyright holders grant licenses or assignments of their copyright in music in exchange for royalties, ownership of the music copyright should be viewed as distinct from the right to receive royalties. Royalties usually flow from publishing and other contractual agreements, which will be discussed below. The Copyright Act protects musical works when a musical work is "fixed" in a tangible medium of expression, e.g. when a composition is reduced to a written score or recorded in a studio onto tape or hard drive.[2] Rights under copyright are not conditioned on the filing of a copyright registration with the U.S Copyright Office, although such registration is necessary to sue for copyright infringement and obtain attorney fees. *In Re Marriage of Worth*[3] established that copyright should be treated as a community property asset subject to equal division in a marital dissolution. In that case, husband and wife agreed to split *royalties* in the divorce decree but failed to address the *underlying copyright.* The court rejected husband's argument that only he should be entitled to proceeds from a copyright infringement suit because the decree only dealt with royalties. The court held that copyright was a divisible community asset and since the interlocutory decree failed to dispose of such assets, husband and wife remained co-owners of an undivided interest in the copyright.[4] A settlement that only deals with the division of royalties is omitting an important community asset. The

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issue is even further complicated by rights of termination which give the writer of a song the ability to terminate a grant of copyright thirty-five years after the initial grant was made.

Second, because a musician usually receives royalties and other income in exchange for granting licenses and assignments of their copyright, it is important to have a basic understanding of the different types of copyright because they generate different income streams. The two main distinctions are between the copyright in *recordings* (sometimes referred to in the industry as "masters," short for "master recordings"), and in *compositions*. The word "song" is sometimes used to refer to a composition that includes lyrics; however, be careful in using terminology, because colloquially, the word "song" is often used to refer to a recording (as in, "I really don't like that new Justin Bieber song").

The term "composition" refers to the music and words themselves, as opposed to the recording of the composition. For example, when Pearl Jam recorded Lennon and McCartney's Beatles classic, "You've Got To Hide Your Love Away," there were two copyrights involved: the copyright in the composition (owned by the music publisher, Sony ATV Music), and the copyright in the master, or recording (owned by Pearl Jam's record label). They are very different kinds of copyrights. Copyrights in songs have existed in this country since the ratification of the Constitution, whereas copyrights in recordings only came into being in the Copyright Act of 1976.

1. Income from *compositions* falls mostly into one of these five categories:
    a. Money paid for services rendered, as when a composer is paid to write a movie score, or a songwriter is paid to write a song.
    b. Performance royalties, for the public performance of music over the radio, television, Internet, or in live concert venues or clubs.
    c. Fees paid for the use of songs in movies, TV, and other productions, or in advertising (typically called "synch" fees).
    d. Royalties paid for sales of sheet music.
    e. Mechanical royalties, which are the royalties paid by the distributor of recordings in the physical (e.g., CDs), digital (e.g., iTunes) or streaming (e.g., Spotify) realms, to the publisher of the music (the publisher is the owner or administrator of the copyright in the composition).

In all but one of the above cases, the publisher collects the money, and pays the writer her/his share (typically 50% of net sums). The exception is public performance monies (item b. above), which are typically collected by Performing Rights Organizations (PRO's) such as ASCAP and BMI in this country, which pay one-half of the royalties to the publisher and the other half directly to the writer.

2. Income from *recordings* falls mostly into one of *these* four categories:
    a. Money paid for services rendered, as when a singer is paid to perform the lead vocal on a recording.
    b. There are limited performance royalties payable in respect of master recordings. In the U.S., no performances over radio or TV generate royalties, but on the Internet, performances generate royalties when the recording is streamed.
    c. Sales royalties paid by the distributor of recordings in the physical, digital, and streaming realms. Unlike mechanical royalties, described in 1.e. above, these are payable to the owner of the *recording* (typically a record label), which in turn distributes some of the royalties to the artist and producer of the recording. These royalties are computed *very* differently from mechanical royalties.
    d. Fees payable for using the recording in audio-visual productions (e.g., TV, movies, webisodes).

If all of this makes your head spin, don't worry. This article is intended to give you a starting point only; if substantial sums are involved, you'll need an expert (a lawyer or accountant familiar with all of these sources of income) to help you know where to look. Finding the source(s) of all of the types of income is a complicated process that may involve discovery directed at multiple third parties such as music publishers, PRO's, record labels, production companies, and agencies.

One of the interesting consequences of the composition-recording distinction is that, for a single recording of a song, it is possible for the sources of income to have two very different dates of creation. If a writer composes a song in Year 1, gets married in Year 3, and then records the song in Year 5 before the marriage ends in Year 6, the income from the composition has its origin in pre-marriage activity, whereas the income from the recording can be traced to the period during the marriage.

Sometimes it may be difficult to ascertain even when music compositions were first created. Take the case of a musician who composes for television. The creation date could be supported by any of the following categories of evidence: (i) the "fixing" of the music, as evidenced by a score, a tape, or hard drive of a recording session; (ii) the "contractual" origin of the music, as evidenced by contracts, deal memos, license agreements, etc.; (iii) the date of "delivery," as evidenced by composer delivery schedules, payment letters, etc.; (iv) the dates of "performance" evidenced by music cue sheets submitted to PRO's like ASCAP or BMI, Edit Decision Lists (EDL's), or other editing related documents, air date schedules and listings; or (v) copyright registration. Frequently, spouses will cherry pick those documents that bolster their positions, leading to a "tracing" hell. A recent unpublished case of *Douthit v. Jones* (2015) contains an interesting analysis regarding characterization of a TV development contract that could equally apply in the music context. Where one spouse is in control of such evidence, the courts should

give wide latitude to discovery requests, especially ESI evidence since music these days is frequently first "fixed" in a tangible medium of expression on a hard drive. Concerns about privacy and contractual rights can be addressed in appropriately drafted confidentiality agreements or, if necessary, by motions for protective orders.

Another important issue is the fact that, whenever royalties are payable, there is often the possibility of advances against those royalties. Almost always, depending on the terms of the contract, advances are recoupable (meaning the payer can withhold the advance from subsequent royalties) but not returnable (meaning that even if there are not enough royalties generated to cover the advance, the recipient need not pay it back). Often musician spouses seek to characterize such advances as loans and not income available for support,[5] even though the language of the contract awarding the advance does not characterize the payments as loans[6] and the musician's tax returns reflect that such advance payments were treated as taxable income. The court may characterize such advances as an asset or income, as long as there is no "double dipping." There is no logical reason why the receipt of a large cash advance should be treated any differently than the receipt of cash from the sale of a house simply because it is generated by an intangible intellectual asset instead of bricks and mortar. While a dissolution is still pending, the court, driven by practical considerations, may make pendente orders directing that the funds be placed in a joint frozen account subject to characterization and re-allocation at trial. If at the pendente level the court treats advances as income available for child support, the court can presumptively rely on the tax return treatment of such advances.[7] The court has a far wider discretion to characterize such advances as income for spousal support.[8]

Another argument often made by the musician spouse is that such advances should only be treated as income to the extent that they are recouped from post separation earnings. This is similar to the arguments put forward and rejected in *In re Marriage of Finby*, 222 Cal. App. 4th 977 (2013). In *Finby,* certain "transitional" bonuses were paid to wife and were arranged as loans to be forgiven over time. The trial court in *Finby* treated the bonuses as assets and not income. The trial court also accepted wife's argument that the only a portion of the transitional bonus "earned" during the marriage should be characterized as community. The Court of Appeal reversed. Applying an analysis based on "*Brown*" pension rights and other contractually created contingent interests,[9] the court concluded that the contractual right to the transitional bonus arose during marriage and created a community interest in the bonus even though the loan was subject to post-separation contingencies which could trigger repayment of the unearned balances. The Court of Appeal remanded the case back to the trial court to calculate the community interest in the bonuses taking into account the contingent liabilities. Since spousal support was also awarded using the bonus income, on remand the trial court was directed to adjust its support and community property calculations to avoid double dipping.[10]

Going back to our original question, how best to divide musical assets? Is it better to retain a music appraiser to value the marital catalog and to award it to one spouse with an equalizing payment or award of other assets to the other spouse, divide the music catalog, sell the catalog, or divide marital royalties and copyright?

If the matter goes to trial, the court has a broad discretion to determine the manner of division to accomplish a net equal division,[11] and to "make any orders" it considers necessary to carry out the purpose of Family Code section 2500 et seq. There is little case law on the correct approach to dividing music catalogs. They are not really fungible, so in-kind division is rarely appropriate.[12] Sale and division of the catalog may not be possible for a number of reasons. For one thing, the musician spouse may not be the full owner of all of the copyrights in the catalog, as he or she may share the catalog with various co-writers, and the disposition of the catalog may be limited by the terms of a contract between or among the owners. For another, the catalog may be owned by the musician spouse, but subject to administration by a third party under a publishing administration agreement—a common arrangement whereby a music publisher uses its contacts and expertise to maximize and collect income on behalf of the copyright owner.

In deciding on an approach to the division of music catalogs, comparisons to other assets such as a family business[13] are not particularly helpful because the value of a music catalog is inherently unpredictable. Most catalogs owned by a single spouse/writer usually are smaller than those of even a medium-size music publisher, which are usually easier to value. The court in *Worth* considered that the books in that case had a present value based upon the "ascertainable value of the underlying artistic work" and not on post-marital efforts.[14] Cases in other states have found that future royalties were largely attributable to one spouse's post-separation efforts and awarded all or a larger share of royalties to the spouse who enhanced the post-separation royalties.[15] Whereas historic income for a family business is often (but not always) a good predictor of future income, revolutions in technology (CDs, streaming, downloads, videogames) as well as the multiple ways that music rights can be exploited means that a music catalog that has little value today may be worth a fortune tomorrow. For example, the value in the Righteous Brothers "Unchained Melody" shot up when it was used in the movie *Ghost*. The same is true across the board. 2015 marked the first time in U.S history that new releases were outsold by music catalogs.[16] Also while there may be only a few things you can do with a manufactured widget, music can be exploited in multiple ways. For example, a composition may come into existence during the marriage, but its value may be

negligible unless, and until, the musician spouse records the composition, or licenses it for use in a motion picture or TV show. If that activity happens after the separation, a court may allocate most or all of the royalties generated to the musician spouse.

Where the parties are negotiating a settlement there are pros and cons to each approach. If the parties can agree on a valuation methodology and the NPS multiple (i.e., the amount by which a single year of NPS, or Net Publisher's Share, of income, is to be multiplied to determine the present value of a copyright or group of copyrights), awarding the music catalog and copyright to one spouse after a valuation always has the benefit of finality and certainty.[17] However, splitting future royalties saves the costs of hiring a music appraiser and also allows the non-managing spouse to reap the rewards of any royalty or other monetary windfalls attributable to new developments and licensing opportunities in the music industry and damages from infringement actions. If the parties are uncooperative, however, it can create a lifetime of legal and accounting conflict. Consider the unpublished case in 2009 involving Jose and Janna Feliciano, who co-wrote and produced *Feliz Navidad.* After a negotiated Judgment was entered in 1978, the parties spent the next thirty years embroiled in a contentious court battle over community property royalties.

If the parties settle by dividing royalties, any agreement on copyright should contain provisions that govern future exploitation of copyrights including the power to grant exclusive licenses. A copyright holder has rights to copy, perform, display, distribute for sale, prepare derivative works,[18] and grant licenses.[19] Absent a contractual agreement, co-owners of copyright have the right to grant licenses of all kinds, provided that (a) the income is shared with co-owners, and (b) no *exclusive* license is granted. This can be changed by agreement. Either party can agree to allow the other the exclusive right to administer a copyright, or provide that neither of them can grant a license without the other's permission. All of this must be considered, and dealt with clearly, in a divorce settlement. For example, it is one thing to grant the non-musician spouse the right to receive income from a composition or a recording. It is another to grant that spouse co-ownership or control over the disposition of the copyright. [20] An agreement might deal with issues such as: Does the recording artist or songwriter spouse have to get their ex-spouse's permission to license a song for use in a movie? Or is he or she obligated only to share the income from that license? Does the musician spouse collect royalties, and pay the other spouse his/her share, or can some of the royalties be collected directly from a third party, e.g. performance royalties from a PRO?

A different set of questions can arise if both spouses are involved in the music business, but handling different functions. Real-life examples include: (1) the spouse who writes and the spouse who sings and records (how to allocate value, especially if they continue to work together post-separation?), and (2) the spouse who makes the music, and the spouse who handles all the business matters, including the deal making, overseeing accountants and lawyers, etc.

There are many considerations that come into play when deciding whether to take the cash now, and value the catalog, or to keep some skin in the game and divide royalties and copyright. Parties have to consider their present need for assets and cash, the catalog's earnings history and future potential for growth against the "Jose and Janna Feliciano" type of problems where one spouse is always chasing the money.

A royalty share always creates an incentive for one ex-spouse to manipulate business deals to minimize the allocation of income to the other spouse. Consider the case of Jerry Lewis and Patti Lewis who divorced after thirty-five years. In the divorce, Patti reached a settlement under which she was entitled to a one-half interest in royalties from "Community Titles" over which Jerry retained control. This included *The Nutty Professor,* which was remade by Universal with Eddie Murphy. In a subsequent lawsuit, Patti alleged that Jerry structured the deal with Universal in such a way that minimized the "remake rights" (to which she was entitled to 50%) but paid him substantial personal service fees as writer and producer (which she did not share in). A good music lawyer can minimize such risks with a well-crafted agreement.

Consider a music example, where the settlement agreement grants the non-musician spouse a share of publishing royalties but omits income from the recordings. Then a motion picture studio wants to use the recording (and therefore, of course, the composition) in a movie. If the musician spouse controls the licensing, he or she could easily make the deals so that the bulk of the license fees are payable for the recording, leaving the other spouse sharing a much smaller amount.

The author dealt with a case where a musician spouse performed services as a music supervisor and composer on a motion picture. The musician was finalizing his divorce settlement, and asked if the studio would allocate a substantial amount of his fee to the rental of his studio equipment—because the bulk of the equipment had been acquired before the marriage, and so the rental fees would not have to be shared.

A music lawyer is better equipped to spot these types of shenanigans and assist with identifying issues and reaching a fair settlement.

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1 *In re Marriage of Worth*, 195 Cal App. 3d 768 (1987).
2 17 U.S.C.A § 101.
3 *Worth*, 195 Cal App. 3d 768..
4 *Id.* at 776.
5 *In re Marriage of Rocha*, 68 Cal. App. 4th 514 (1998).
6 Civil Code section 1912 provides that "[a] loan of money is a contract by which one delivers a sum of money to

another, and the latter agrees to return at a future time a sum equivalent to that which he borrowed." *See Southwest Concrete Prods. v. Gosh Constr. Corp.*, 51 Cal.3d 701, 705 (1990) ("A loan of money is the delivery of a sum of money to another under a contract to return at some future time an equivalent amount."); *cf. In re Marriage of Williamson*, 226 Cal. App. 4th 1303, 1315 (2014).

7 *In re Marriage of Loh*, 93 Cal. App. 4th 325, 332 (2001); *In re Marriage of Schulze*, 60 Cal. App. 4th 519, 529 (1997).

8 *In re Marriage of Blazer*, 176 Cal. App. 4th 1438, 1445 (2009).

9 *Finby*, 222 Cal. App. 4th at 989 (citing *In re Marriage of Brown*, 15 Cal. 3d 838, 842, 846 & n.8 (1976); *In re Marriage of Skaden*, 19 Cal. 3d 679, 687 (1977)).

10 *Id.* at 991.

11 *Marriage of Connolly*, 23 Cal. 3d 590 (1979).

12 *Marriage of Cream*, 13 Cal. App. 4th 81 (1993).

13 *Marriage of Brigden*, 80 Cal. App. 3d 380 (1978); *Marriage of Greaux & Mermin*, 223 Cal. App. 4th 1242 (2014).

14 *In re Marriage of Worth*, 195 Cal App. 3d 768, 773 (1987).

15 *E.g. Zander v. Zander*, 1999 WL 711503 (Conn. Super. Ct.); *In re Marriage of Heinze*, 257 Ill. App. 3d 782 (1994) (citing *Worth, Dunn v. Dunn*, 802 P.2d 1314 (Utah Ct. App. 1990)).

16 Nielson, 2015 U.S. Music Report.

17 Music catalogs are often valued as a multiple of the Net Publisher's Share (NPS). NPS are the amount of royalties received by the music publisher less the amount of royalties paid to writers, performers, and others who participate in the share of royalties earned. Such an income-based approach, which values the present value of a future income stream, or its expected benefits divided by risk, is the most common approach used in valuing music catalogs. Asset based and market based approaches are less common. However, developments in new media and licensing opportunities can make agreeing on an appropriate multiple difficult in the music context.

18 17 U.S.C. § 106 *et seq.*

19 *Id.* § 201 *et seq.*

20 A leading treatise warns against granting spouses co-management rights. NIMMER ON COPYRIGHT, ch. 6A Community Property ¶6.A. 04.