

NEWSLETTER

An Entertainment Industry Organization



DAVID SPEAKS: THE TROUBLE WITH GOLIATH

Or, Why It's Cool To Be An Independent Publisher In A World Ruled By Giants

Kevin Koloff

The President's Corner

Dan Butler

Our February meeting, "From Doo-Wop To Hip-Hop" in honor of Black History Month, was a terrific evening. CCC Board members Cheryl Dickerson and James Leach moderated a superstar panel consisting of Rock and Roll Hall of Fame member George Clinton ("Parliament Funkadelic), Leon Ware (songwriter/recording artist and writer/producer of Marvin Gaye's "I Want You" album), Harvey Scales ("Disco Lady"), recording artist/songwriter Trevor Lawrence, Jr. and Verne Allison, Jr. of the Dells. These music greats from past and present discussed how classic music from the doo-wop and Motown eras continues to be integrated into today's hip-hop sounds. George Clinton had the best line of the night, saying that if you want to predict the next big trend in music to be embraced by young people, you need to listen for the musical sounds that annoy their parents. Thanks to Cheryl, James and also Debbie Dumas for helping to put together such a great panel.

Tonight's meeting, "Return of the Foreign Sub-Publishers," hosted by past CCC President Teri Nelson Carpenter, will bring us up-to-the-minute information about the state of international music publishing. Our panel consists of musical experts who are literally from around the globe.

For their help in assembling this meaty issue of the accompanying newsletter for this topic, I would like to extend special thanks to editor and CCC Board Member Kevin Koloff, past CCC President Steve Winogradsky, and John Fogarty of Minder Music for contributing informative and entertaining articles. All the best!

Tonight's panel is entitled "Return of the Foreign Independent Sub-Publishers." Being a bit of a literalist (blame it on law school), I read the title and asked myself, "Return from where? Where did they go?" Before I called our moderator, Teri Nelson Carpenter, and got set straight -- the title is simply a reference to the fact that the CCC had a panel on independents last year, and now they're back to update us -- I actually put the question to a few of the panelists. They didn't know exactly where they were coming back from either, but I got some good speculation about it, and in one or two instances my stupid misunderstanding led to some good discussion.

I spoke with Gino Olivieri of Premier Muzik International (Canada), Olivier Meulenyzer of Studio Paradiso (France), Chris Gough of Native Tongue Music Publishing (Australia/New Zealand) and Andy Budde of Budde Music, Inc. (USA/Germany). I also corresponded via e-mail with John Fogarty of Minder Music Limited (UK). I asked all of them about the state of independent publishing, with a focus on the differences between the indies and the majors. I asked them to sell me, essentially, on the concept of signing with a smaller company instead of EMI, Warner/Chappell, or any of the other behemoths on the landscape.

Their backgrounds are varied. Budde grew up in the business, first as a producer, then working with his father's publishing company; he's never worked for one of the majors. Meulenyzer, on the

other hand, spent ten years at EMI. And Olivieri was a DJ, songwriter and producer who hated the paperwork and the administration part, but eventually realized that somebody had to do it -- so now that's what he does.

Despite their different pasts, they're all, perhaps predictably, great believers in the advantages of the independent publisher. And all of them are articulate, at times passionate, defenders of the faith. Our topics of discussion tended to fall into a few categories:

1. *The Majors Can't Handle the Paperwork:* This isn't a derogatory statement about the abilities of the people who staff the big publishers; it's an observation about the ratio of number of songs in the catalog to number of people working on them. Everyone I spoke to pointed out that recent cut-backs in personnel among the majors have left them drowning in titles. Says Meulenyzer of the majors: "Departments that were ten people are now three people. They can't devote attention to the titles." According to Budde, titles at the majors often don't get properly registered in all the territories, because the paperwork is just too much for the reduced staff to handle.

Exacerbating this problem, of course, is the enormity of the catalogs carried by the majors. According to Olivieri, majors often "can't find the money" when your song is "one in a billion titles." And he emphasizes that the work of administration can be hard, and tedious. Royalty recovery, for example, involves research and a lot of forms, and "even a spelling error can cost you money." The indies, he says, work hard for their money, and

can devote considerably more attention on a title-by-title basis.

And it's Meulenyzer who thinks this is what the panel's title is about: With the recent staff reductions, the majors are going to stumble in their collections and administration, setting the stage for the indies to rise in prominence. (It's not what Teri meant, of course, but when I tell her about the theory, she likes it.)

2. *Personal Attention:* All of the publishers I spoke to made a big deal out of this. "If a writer is with an Independent it is likely that everyone in the company will know who he is," says Fogarty. He points out that with the revolving-door personnel of many majors, even if a writer establishes a relationship with someone at a big publisher, that person may be gone the next time there's a merger/take-over/mass of layoffs (pick one). "We can pay a lot more attention to individuals than the majors," agrees Gough.

According to Olivieri, many writers have taken the lure of the big advance (more on that later), signed up to a major for a long term, then watched while their only contact at the company was let go. Unless their songs catch on fire immediately, without a friend on the inside, these writers are stuck with a company that doesn't care about them.

Olivieri puts it another way: "A child can be taken care of by his mother, or put in day care. Both of them will take care of the kid, but one is clearly getting better care than the other." (As a parent, I bought into this completely.)

3. *Flexibility in Business Dealings:* The majors, say our panelists, are just too big to tailor their deals to the writer or catalog involved. "There are some great people working at the majors," says Fogarty, "but the way things have evolved with mergers and so on means that they are under various constraints with the way they are allowed to work."

Says Gough: "We own the company. We're not bound by international corporate policies. We don't have policies. We're over 21, we can do what we like."

4. *The Multi-Territorial Approach:* Budde admits that it's easy to go structure a deal with Warner/Chappell for the world -- "one contract, one statement, one check" -- but he thinks it's a mistake. Doing the heavy lifting and negotiating, say, fifteen deals with different territorial publishers brings advantages, not the least of which is

that the territories are not cross-collateralized (or, as we say in shorthand, "crossed"). If you sign a worldwide deal with EMI, you may have a song that does big business in France, but never see royalties from that territory, since your worldwide advance has to be recouped before you're paid anything. A one-off deal in France, though, lets you earn royalties despite the fact that the song hasn't set Spain or Germany on fire.

Just as importantly, if you go with indies, "you get to pick the best person in each territory," says Budde. Fogarty is a bit more blunt: "Majors may argue that they have their own offices in each territory, but they may have a good operation in one territory but not so good elsewhere."

5. *Advances:* Here, even the zealous advocates of the indies have to admit, the majors have the cash flow to have an advantage. "However," says Fogarty, "majors may be under pressure for market shares. They may enter into 20 different situations paying advances on the basis that if one hits they will recoup the monies laid out on all the others. Independents will sign a lesser number of writers and on a very selective basis." In other words, there's a price to pay for that big initial check: you're likely to get lost in the crowd, written off as one of the losses the company has to suffer to find the one writer in 20 that's going to pay off big for them.

Further, says Fogarty, "in the modern era many of the Independents are well funded and can pay reasonable advances." So maybe doing the work of making deals in each territory can get you 15 smaller advances, uncross the territories, and let you cherry-pick your publishing rep in each part of the world.

6. *What About Placement of Songs in Films and TV?* I asked each of the publishers to address the fact that majors have whole departments dedicated to getting their songs into film and TV productions. Can the indies do that? Yes and no, as it turns out.

Everyone concurs that an indie is unlikely to have the manpower to match, say, EMI's Film and TV Dept. But there are a lot of offsetting factors, they say.

For one thing, the majors' departments tend to focus on American films to the exclusion of the rest of the world; their foreign offices don't tend to have these specialty departments. "They don't have anyone in France doing this stuff," say Budde. "And the

French are French first." Meaning that if you're not a Frenchman/woman doing business with French productions, you're not likely to make much headway in that territory.

Further, says everyone I spoke to, the size of the majors' catalogs means that the advantage of TV/Film placement is limited to a select few. "If they have hundreds of thousands of songs, how will they do all their songs justice?" asks Fogarty.

Gough has a particularly strong viewpoint here: his three-year-old publishing company is an outgrowth of a twenty-year-old business, Mana Music Productions, which supervises music for film and TV in Australia and New Zealand. When he's acting as a music supervisor, and goes to the majors for songs, "they don't come back with ideas -- only the indies do. Indies are proactive." (This is a common theme among the indies I spoke to, and not just in the area of film and TV placement.)

Budde concurs: movies today, he says, are "filled with 60's, 70's and 80's music. It's what the directors grew up with, they pick their own stuff." He questions whether the placement departments in the majors do business because they're being proactive, or if it's just because they have the hits the filmmakers want. And if a director wants a particular song, he (or the studio, or the clearance person) will come to you to get it.

Finally, both Meulenyzer and Fogarty pointed out to me that in many territories, this aspect of the publishing business can be outsourced. There are people who have set up businesses specifically to pitch product to film and TV, and the independent publishers can develop relationships with these businesses and use them to the benefit of their catalogs. Many of them, says Fogarty, were "set up by people formerly employed in the synch departments of majors." In summary: It's not unexpected that the people I talked to felt so strongly about the benefits of doing business with the indies. It's their bread and butter, after all. And I, for one, would be interested in seeing a response from any of the giants out there.

Above all, I learned that these guys (and by the way, why are they all guys? No females in the indie publishing world?) are all smart, experienced, feisty, well-spoken advocates. I look forward to a great panel with the independent sub-publishers.

Wherever they're returning from.

The Global Royalty Collection System For Music Publishers and Owners of Sound Recordings

Steve Winogradsky

Administration of a copyright involves handling the business functions of a music publisher. This may involve only the collection and distribution of royalties and license fees or may include all the same activities as a music publisher, such as registering the copyright, issuing licenses and actively seeking exploitation of the work.

Several instances of the rationale behind administration are discussed above, but the most valid reason for assigning the administration of a copyright to another party is because they have the expertise and resources to properly exploit the work and the ability to enforce the rights of the copyright owner both with regard to use of the copyright and the collection of royalties. Many writers and artists do not have the background necessary to properly protect their intellectual property or to maximize its exploitation. Having an administrator look after the business aspects allows creative people the freedom to do what they do best -- create -- while someone else takes care of the details.

One form of administration is a **foreign sub-publishing agreement**. To this day, sub-publishing is unquestionably the most common arrangement a music publishing company makes for the representation of its catalog overseas. This grants a foreign publisher the right to administer a copyright (or a catalog) in their country and to collect the royalties earned in that territory. Having foreign sub-publishers is important because the policies and activities in each country are very different and having a local representative to act on your behalf can make a big difference in the timeliness and amount of royalties collected as well as the protection and enforcement of your copyright in that territory.

Sub-publishing deals are usually for a term of generally three to five years; a territory, usually a specific country or contiguous countries (such as Spain and Portugal); a royalty split, *i.e.*, the percentages of collected monies to be divided between the foreign sub-publisher and the U.S. publisher; an advance against monies to become due the U.S. publisher; and, finally, a provision for "covers," that is, a new use of a sub-published composition originating within a sub-publishing territory such as a new recording by a local artist.

Other terms in a foreign sub-publishing agreement apply to semi-annual accountings and payment to the U.S. publisher, auditing rights, print rights, the right of the sub-publisher to collect and distribute income earned during the contract term, which may or may not include the right to collect income earned during the term but paid post termination, *etc.*

In acquiring foreign administration of a copyright, the sub-publisher acts in the place of the copyright owner, making business decisions in consultation with and on behalf of the owner and handling all legal and financial matters in their territory. For these services, the sub-publisher will usually charge a fee (a negotiated percentage of the publisher's share of gross revenues) plus reimbursable expenses.

When acquiring these administration rights, the sub-publisher must notify the applicable performing and mechanical rights societies of the agreement between the parties so that royalties are paid directly to the sub-publisher. This is done, in part, through the use of the *fiche internationale*, a database link between the foreign societies for the titles that they each control.

Foreign sub-publishers perform many of the same functions as domestic administrators. They register copyrights with the local performing and mechanical rights societies, issue licenses for uses originating within their territories, collect royalties and monitor the use of your copyrights. It is important to notify them whenever a license is issued for any type of use so that if the product is distributed or broadcast in their territory, they can be sure to collect the royalties earned. Copies of music cue sheets for movies and television programs (with translated program titles and distribution schedules, if possible) should be supplied to your sub-publisher so that they may advise the local performing rights societies of the use of your copyright.

Mechanical royalties (for the sales of audio-only product, such as vinyl records, audio tapes, CDs and digital downloads) are paid by the record companies to the local mechanical collection society, who then pays them to the local sub-publisher. In today's sub-publishing agreements, the sub-publisher collects 100% of the mechanicals in their

foreign territories.

The mechanical licensing fees paid by the record companies outside the U.S. are calculated differently from the method used in the U.S., where the copyright law determines the amount paid per song on a "fixed" number of cents per copy sold (the "statutory rate"), or a negotiated percentage thereof.

In Europe, the rate is covered by an agreement between the European part of the International Federation of the Phonographic Industries (IFPI) and the Bureau International des Sociétés Gèrent Les Droits D'Enregistrement et de Reproduction Mécanique (BIEM), the international organization representing mechanical rights societies. Mechanical rights societies exist in most countries. They license the reproduction of songs (including musical, literary and dramatic works). Their members are composers, authors and publishers and their clients are record companies and other users of recorded music. They also license mechanical aspects of the downloading of music via the Internet. Members of BIEM enter into agreements to allow each of them to represent the others' repertoire. In this way, a BIEM society is able to license users for the vast majority of protected works in the world.

BIEM negotiates a standard agreement with IFPI fixing the conditions for the use of the repertoire of the societies. The standard agreement is applied by the member societies to the extent that there is no compulsory licence or statutory licence in their territory. The mechanical rate is a percentage of the record company's sales price to the record retailers. This price to the record retailers is generally referred to as the published price to dealers ("PPD"), and is approximately what we would term the wholesale price. PPD is not the actual price to the dealers but includes individual various add-ons (year-end-bonuses to dealers, *etc.*) and deductions (taxes, packaging, *etc.*). The current rate is around 9% +/- of PPD and does not allow for reductions in the rate that are common in the U.S., even if the songwriter/artist is bound by a controlled composition clause in their agreement with the record company calling for a reduced mechanical rate for songs they control.

For digital phonorecord delivery, or downloads, the same concepts apply.

The downloads are treated as a physical sale, the same way they are by the U.S. record companies, and a percentage of PPD is paid to the publisher as a mechanical royalty for each song downloaded. And, as in the U.S., royalty rates are still being determined for the streaming of music.

The sub-publisher, after receiving 100% of mechanical royalties, will deduct its share of the mechanicals for a particular song "off the top" (usually between 10% - 25% commission). The sub-publisher then accounts to the owner for the remaining share (90% - 75%) in form of a royalty statement and the respective payment(s) thereof, usually on semi-annual basis. The owner will then pay the writer(s) their share of the income received according to the agreement between the writer(s) and the owner.

Foreign sub-publishers may also try to get "cover" recordings done by artists in their native language. This would generally entitle the foreign sub-publisher to retain a higher percentage of royalties (25% - 40%), since it was their direct efforts that resulted in additional income. If a foreign lyric is created, most of the foreign countries have standards whereby the foreign lyricist participates in a share of all royalties earned by the foreign version. For mechanicals, the foreign writer takes a part of the sub-publisher's increased percentage but for performances, the foreign lyricist receives a portion of the writer's share of income.

When entering into a foreign administration deal, a publisher should try to retain approval rights over any foreign lyrics, as they may not be literal translations of the English lyric. In addition, the percentage of the performing rights income may be different that in the United States. For example, SACEM, the French society, pays two-thirds of the performing rights income to the composers and only one-third to the publisher.

Public performance royalties are collected through performance rights societies ("PROs") and, unlike the division by the U.S. PROs of 100% of the writer's share and 100% of the publisher's share, are divided into 12/12 outside the United States. The writer's share of 6/12 is paid by the local performing rights society directly to the writer's U.S. performance rights organizations (ASCAP, BMI or SESAC). The remaining 6/12 represent the owner's and sub-publisher's share of the performance income, which is paid 100% to the sub-publisher.

If there is a new lyric in the local language, the local adapter's (local lyric writer(s), arrangers, and others) share(s) of performance royalties are automatically deducted by the local societies out of U.S. writer's share of performance royalties before payment is made to the U.S.

PROs.

Keep in mind that, unlike the U.S., motion picture theatres in Europe and other countries pay public performance royalties for music played in their theatres. Historically, this has been based on a percentage of box office receipts (approximately 1%). More recently, a "flat fee" annual payment is made by the theatres to the performing rights societies.

In addition, unlike the U.S., where royalties from most concert halls, clubs, shopping malls and other public places are put into a "general fund" for distribution in the same ratio as royalties from television and radio, the foreign societies monitor these types of uses more closely and pay based upon actual performances. The various venues collect set lists from the performers and submit them to the PROs for a more accurate payout. In this way, a foreign sub-publisher can assist in making sure that the local PRO is aware that the artist performed certain songs so that royalties can be paid on those songs. The same applies to supplying music cue sheets for all television programs containing the U.S. publisher's music so each broadcast is properly logged and credited.

In some countries there is a type of income still in existence that is mostly accounted for by the sub-publisher to the owner as "**broadcast mechanical fees**". Originally, this goes back to times when radio stations recorded performances by artists/orchestras and then "duplicated" the tapes of the original recording and sold it to other radio stations, therefore creating "mechanical reproductions". The radio stations never paid an additional amount for this kind of mechanicals but it was taken out of the total monies paid by the radio stations to the performing right societies and being treated as a mechanical. This now applies to music in television programs as well and can amount to approximately 30% of the performance royalties earned. Although collected by the performing rights societies, this income is treated by the societies as mechanicals, with 100% being paid to the sub-publishers instead of to the U.S. PROs so, unlike performance royalties, it includes the writer's share(s). Domestic publishers, who don't understand this distinction and don't know how to properly decipher a royalty statement, are sometimes of the mistaken belief that they get to retain 100% of this income without paying the writer their share.

Other types of income, such as print royalties for sheet music and choral or band arrangements, or synchronization licenses for motion pictures, commercials, etc. are collected directly by the sub-publisher without any involvement of collection societies and are paid directly

to the publisher, who shares with the writer according to their agreement.

Foreign sub-publishing administration can be handled by one of the multi-national companies for the entire world (or world excluding the U.S. & Canada) or deals can be made in each territory (or group of territories) with different parties, including the local office of one of the multi-nationals. There are advantages and disadvantages to both methods.

The advantage of dealing with one multi-national company for the entire world is that the larger companies may be in a position to pay a substantial advance against recoupment of future royalties. Also, there is only one (large) royalty statement to review. The disadvantages of dealing with a large company is that your publishing interests may get lost in the shuffle and not get the attention that you think it deserves.

Conversely, dealing on a territory-by-territory basis, you can pick the administrator in each country that best suits your needs, even if it is the local office of one of the multi-nationals. But you will have many royalty statements to review, each with a different structure and format, with varying administration fees being deducted.

If a domestic publisher requests an advance, the commission of the sub-publisher will most likely increase as a cost of the money advanced. So a 90/10 or 85/15 deal becomes 80/20 or 75/25. But it is possible that the combination of advances or the total of advances and royalties you can get from a number of small companies can exceed that of a multi-national.

For example, let's say that Big Publishing Co. offers you an advance of \$500,000.00 to cover 5 territories and your earnings for those territories are as follows:

Terr. 1	\$100,000.00
Terr. 2	\$ 50,000.00
Terr. 3	\$ 50,000.00
Terr. 4	\$125,000.00
Terr. 5	\$125,000.00
	=====
Total	\$450,000.00
Advance	\$500,000.00
	=====
Balance	\$-50,000.00

As your earnings did not meet your advance, you would be obligated to continue your deal with Big Publishing Co. and would not receive any further royalties until your advances were recouped.

In contrast, let use the same earnings but assume that you received a separate advance of \$100,000.00 each from smaller publishers in the same territories. While you would be unrecouped in territories 2 and 3, territories 4 and 5

would be obligated to pay you the \$25,000.00 earned over the advance in each territory for an additional \$50,000.00.

Also, keep in mind that writers are paid on royalties earned by their songs only, not total moneys received by the publisher for the entire catalog, so until the advance begins to be recouped out of the writer's songs, the publisher gets the benefit of the money in hand before having to pay the writer.

A good sub-publishing agreement negotiated from a favorable position would probably contain the following:

- No advance or if anything, a token advance, in exchange for a smaller commission of gross revenues;
- A term of usually no more than three years, which is often the minimum term permitted by foreign societies for registration for foreign owned copyrights by a local representative.
- These deals can provide that when the term expires, collection rights to income earned during the term also expire, but the more common provision is the continuance of collecting royalties earned during the term for at least an additional year or until fully collected.

Accounting and payment procedures, approvals of translations, copyright notices, etc., would be similar to the usual provision of a domestic publishing agreement.

It is true that under the terms of some sub-publishing deal a U.S. publish-

er cannot expect much in the way of song plugging or promotion of its copyright. But you can expect the exact same professionalism that most foreign publishers apply to the administration of their own catalogs or to sub-published catalogs. For instance, where matters arise whereby a time consuming effort has to be expended by a foreign publisher on behalf of a U.S. catalogue that pays a very small collection percentage, I have always noted that this effort was forthcoming ungrudgingly. Whether it is a complicated negotiation with the local society or negotiating a major commercial, a good foreign representative acts professionally regardless of the percentage to be retained. Other important aspects of the sub-publishing deal, including the prompt and accurate registration of the U.S. compositions with the local society and an ongoing dialogue with the U.S. publisher as to the activities and uses of the U.S. catalog's copyrights in the foreign territory.

An astute publisher can mix and match the alternatives described in this article and thereby manage its catalogs overseas in the most optimum manner. The publisher can choose to apply any of the alternatives described in this article that best fits its needs on a territory-by-territory basis for good results.

Where the specialized content of a certain catalog requires that it be actively promoted in certain countries, the U.S. publisher can avail himself of the op-

portunity of a reasonable advance through a sub-publishing deal in those countries. As to other parts of the world, the other representation alternatives can be applied.

It is crucial that the arrangement be made with an experienced and reputable foreign firm. A large advance from a firm you wouldn't ordinarily deal with if you were trading baseball cards will get you exactly what you bargained for—trouble. If you do not know if a foreign company you are about to deal with is reputable or efficient, it is incumbent on you to find out. This can be accomplished by checking with other U.S. publishers or with a lawyer knowledgeable in this field. The international music publishing community lives in its own glass house. Any overseas publisher you have dealt with and whom you have some rapport with will often know the reputation (or lack of one) of publishers in other countries. Naturally, consensus is better than one opinion.

The alternatives must be considered carefully and the choice made wisely. Foreign earnings have become too important a part of the U.S. publisher's income portfolio to be dealt with in any other way.

The author gratefully acknowledges the contributions of Andreas Budde and the late Martin Cohen, Esq. to this article.

IN MY OPINION

*John Fogarty
Minder Music Limited*

In my opinion, music publishers in many of today's markets are undervaluing their copyrights. Without wishing to revoke the War of Independence, I have to say that U.S. publishers are among the guilty here. THE 3/4 RATE -- What is that all about!! "I want to use your music but only want to pay 3/4 of the going rate"! Once this situation prevailed, I believe that third party users of music gained a psychological advantage when negotiating with publishers. "We would like to use your music but we only have a limited budget -- but it will be great promotion for your music." How many times do we hear that when talking to film and TV companies? Next time that you're thinking of buying a car, go into the dealership and suggest that you pay 3/4 of the asking price. Suggest to the dealer that he should agree because when you drive the car around it will be great promotion for his

product -- check the reaction!

One of the biggest scandals of the modern era is the amount of money that the makers of electronic video games are getting away with paying, i.e., sometimes as little as \$2,500 a song for products that gross tens of millions of dollars. Last year, we were approached by a major US games manufacturer for one of our copyrights (a classic funk track from the 80's) and were offered \$2,500 for use on a video game which would gross over \$100 million. We checked some of the other works that were being considered, and decided to contact some of the other publishers. We suggested that the big companies should make a stand and not allow uses for these minimal rates -- the reaction? "If they don't use our works they will use someone else's." The argument commonly cited by the producers is their high production and

development costs. But don't we have costs? What about those songwriters you have been developing and keeping alive for years! Or don't music publishers need to eat like everyone else? (perhaps I should forget that one, judging by some of the well-fed-looking characters that I saw at Midem).

What we always need to remember is that what we have is valuable. Try making a film, commercial or indeed a video game without music. Have I been guilty of allowing a Minder Music work to be used too cheaply? -- yes! However, the past is the past for all of us. Now we are moving into a new era where the lines between the music publishing fraternity and record companies become blurred. We are all rights owners now. It is essential that deals are not made and rates set for all the new technologies that we will regret as the old income streams fall away.