



NEWSLETTER

An Entertainment Industry Organization

How to Recover Your Client's Fair Share: Enforce Contract Compliance

By Cedar Boschan, Royalty Audit Partner at Hurewitz, Boschan & Co., LLP

The President's Corner Shawn LeMone

Tonight, the California Copyright Conference is delighted to offer a unique roundtable discussion on the future of the music industry with an industry economist, executives from the world of record labels, video games and production music, as well as a successful independent artist on their strategies in navigating the challenging landscape facing all of us. I am honored to be co-moderating this panel with fellow board member, Diane Snyder-Ramirez.

I am also pleased to announce that the California Copyright Conference has a new website that will allow CCC members to more easily interface with our organization. The new website that is available now, is only the first phase of improvements planned that will provide greater resources to our friends in the music industry. I must applaud and thank our board members Diane Snyder-Ramirez, Robin Schwartz and Eric Palmquist who worked so diligently to make this new website a reality. I encourage you to visit our new website at <http://www.theccc.org>.

Upcoming Events

Digital Recognition Technologies - How Do they Work and How Are They Being Used?

Tuesday, November 9, 2010

Holiday Dinner

December (TBA) 2010

Please visit www.theccc.org for more details.

The detailed article below is the second in a three-part series of guest posts by royalty auditor Cedar Boschan, which were originally published on [SwanLegalSearch.com's](http://SwanLegalSearch.com) blog. Please note that it was written to guide attorneys in exploring strategies to achieve royalty recoveries for their clients, including IP creators and rights holders such as composers and publishers.

How to Enforce Contract Compliance

Even if contractual language is less than ideal, you can take action to ensure that licensees and business partners honor their agreements with your clients - and that your clients realize their full potential with respect to both earnings and contract renegotiation leverage:

1. **Pay attention** - Many of the claims a trusted royalty auditor makes are matters that could have been resolved without an audit. The moral: Don't assume the business manager or the client is paying attention. Here are some things to look out for:
 - a. **Track rights** that "trigger" royalty rate escalations and payments:
 - i. Did you approve a reduced royalty rate on a "most favored nations" basis for one or more hit products? If so, requisition rate analysis before your client's right to object expires.
 - ii. What contingent payments may be due your client? For example, a certain major record label frequently agrees to pay publishing fees worth hundreds of thousands of dollars upon certain criteria. Yet, many artists who are

eligible for the fees have not sought to collect them. My firm is pleased to provide this service as part of an audit, but if attorneys and accountants tracked the clauses that were triggered, clients could receive the fees years earlier.

- iii. What costs are non-recoupable? Thorough cost analysis requires a thorough auditor, but there are ways to identify problems by matching approval rights and other contractual provisions to charges on your clients' royalty statements. For example, in the video game industry, contracts may require a publisher to credit a developer's account upon its return of assets borrowed from the publisher. TIP: If the first statement of account has not been rendered yet, an attorney may wish to request a detailed cost accounting from a client's licensee upon the release of a product, or possibly sooner. This should be analyzed immediately because, by the time product sales peak, it may be too late to audit costs.
- b. **Watch the clock** if you want a shot at reducing the charges to your client's account and claiming unpaid royalties. At my audit firm Hurewitz, Boschan & Co., calls come in on a daily basis from potential clients who want to audit the royalties for a hit product... a decade after most of the sales occurred. If your client has a spike in earnings, depending on a number of factors, you could have as little as a year to audit those earnings. Further, as mentioned above, most of a project's costs may be incurred early on - before there are royalty earnings. Calendar your client's objection deadlines in connection with costs, not just earnings.
 - c. **Read the news** to know where the cash will come from tomorrow:
 - i. Follow relevant court proceedings. For example, if you represent recording artists, make sure you read the September 2010 9th Circuit opinion on appeal in the case of FBT Productions LLC v Aftermath Records, which may impact whether your clients are entitled to a royalty or half of net receipts in connection with music downloads.
 - ii. Share with clients and their accountants news of major industry settlement and license agreements if you expect that it will result in earnings for your client. Ask your client's accountant to advise you if this income goes unreported.
 - iii. When their clients' licensee is the subject of an upcoming merger or pending sale, savvy attorneys call me to discuss sending out audit notices (because the licensee might pay the client to go away, in order to look more attractive to a potential buyer).
 - iv. Join Twitter - it is a great resource for breaking IP legal and business news (follow me @Auditrix) - and read the trades for more in-depth analysis.
2. **Audit strategically** - Every client's case is different, but that doesn't stop attorneys from asking me for a rule of thumb to determine whether it makes sense to audit. Some say that if a client has \$1 million in earnings, and the account is recouped or nearing recoupment, it will make sense to audit. This may be true, but I have conducted many successful audits for clients with less than \$1 million in earnings and for reasons beyond financial recovery (i.e., to identify breaches of contract, to gain negotiation leverage).

As your client's counsel, the question you should ask is not *whether* to audit, but *how much* to audit. This is because even clients for which a full audit does not make sense may benefit greatly from a "desk audit," and/or the "Pay Attention" tips above. Therefore, you must have in your network a trusted auditor to review the circumstances of all of your clients and guide you in the cost/benefit analysis of determining the how deep to go. This will ensure the best interests of your clients are being served.

3. **Know the game:**

- a. As an attorney, the decision to advise a client to audit rests squarely on your shoulders. (Often, if an attorney does not suggest an audit, nobody will - not even a business manager, unless the business manager happens to do audits, which may present a conflict of interest, incidentally.)

- b. Don't depend on the client to initiate an audit. Many clients come to their first audit believing that their business partners would never shortchange them. Sadly, these clients couldn't be more wrong in most cases. Further, many licensees will try to make a licensor feel guilty for asking questions or initiating an audit. As a client advisor, you must understand that this is a business tactic of licensees and if you chose professional auditors, they will be respectful of maintaining your clients' business relationships.
- c. Tolling agreements are the norm. In the old days, staff employed at major companies responded to audit requests and settle an audit. Not so, today. Nowadays, the companies we audit refuse to provide more documents, while the documents that they agree to provide can take months or years to be produced. Therefore, it is often necessary to enter into tolling agreements so that the clock on the statute of limitations stops ticking while the audit is completed. Not every auditor is aware of this, so as an attorney, you need to be.
- d. Be prepared to go to court - It isn't common, but some audits don't settle until they reach "the courthouse steps," while others raise matters that land in court. This is one reason why your client's licensee or business partner must believe that your client may consider litigation. (In my experience, licensees who know your client cannot afford a lawsuit may respond to an audit by refusing to provide key information and denying your client's audit claims.) Therefore, be willing and ready to request tolling agreements and file a complaint to begin moving forward with a lawsuit if the licensee does not cooperate with your client's audit or other deadlines. This has a few implications:
 - i. When you choose an auditor, you may be choosing an expert witness as well.
 - ii. If you need your auditor to serve as an expert witness, do not engage your auditor on a contingency basis. If you do, your auditor cannot serve as an expert witness because he or she will have a financial stake in the outcome of the case.
 - iii. Plan the communication strategy and discuss with the auditor what types of work product may be discoverable. I often communicate solely with the legal counsel of my clients and not directly with the clients in order to preserve attorney-client privilege. Discuss this with your client and the auditor up-front.
 - iv. If you are a transactional attorney, is there a litigator you trust to whom you can refer your client? Your auditor may be able to refer your client to a strong litigator.

Implementing the above steps - paying attention, auditing strategically and knowing "the game" - may deliver impressive results, such as additional payments to your clients and possibly the power to renegotiate their contracts. However, you will need more than this article. Working with a trusted auditor to tailor proactive strategies to your clients' unique needs goes much further, and it will help you build a legal practice with loyal lifetime clients.



Cedar Boschan's royalty audit firm [Hurewitz, Boschan & Co. LLP](#) serves those with intellectual property rights interests. The firm focuses on royalty, participation and other contract compliance audit consulting services. It also provides litigation support (such as damage theories and expert witness testimony), administration and statement preparation, and forensic investigations. Cedar can be reached at boschan@royaltyauditors.com or (310) 882-6381. If you have music clients, follow Cedar's links to music business news on [Twitter](#) to take a first step in "paying attention" to music royalty news. Also, visit [SwanLegalSearch.com](#) for more content and services designed to help lawyers.

Snoop Is Top Dogg Of Virtual Goods Selling \$200K+ **By Bruce Houghton**

A case study that is part of a new report on the growth of virtual good sales estimates that Snoop Dogg has sold more than \$200,000 of branded virtual goods across several social networks. Snoop has generated sales across social platforms like Gaia Online, Zwinky and Viximo's network of social networking partners. On social game WeeWorld, his sales are 2.5 times more than non-branded goods.

"My virtual items are off the chain jacc! It's a world and a movement that I have been down with since day 1," says the rapper.

The report by social gamer Viximo and virtual goods platform Virtual Greats predicts that branded virtual goods (BVGs) will reach \$150 million in 2013 and \$318 million by 2015.

Branded items represent just 1% of the current \$3.1 billion virtual goods sector, but that percentage is expected to expand rapidly.

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Resnikoff's Parting Shot: The Art of Selling Out... **By Paul Resnikoff (Publisher)**

Oh, the joys of being an opulent rapper! The rags-to-riches, f-the-man narrative is so incredibly strong in hip-hop, it seems that rappers can get away with anything! Entire albums are dedicated to ridiculous, materialistic bragging – cars, women, houses, Cristal, ice – and everyone sings along. Leave the "middle class artist" idea to the indies... a middle class rapper is an oxymoron!

And that makes it so much easier to embrace overt advertising deals. 50 Cent brags about a little deal he did with some "sugar water" (ie, vitaminwater) to mint millions. Lil' Jon thanks Seagram's Gin "cause I drink it, and they're paying me for it" in "Freek-a-Leek," and everyone has a good laugh.

But step outside of that world, and the credibility equation changes a bit. The anti-branding sentiments of the 60s and 70s have subsided, and artists across all genres can join the fun. But this is a more tricky game for everyone else, including the brands themselves. John Legend and the more "conscious" Roots are streaming a performance from JFK on Vevo next week, and American Express will be branding the action. But just like Arcade Fire before them, there are limits to how strongly the Amex bull can charge.

But let's test the limits, shall we? Enter Weezer, whose 'Hurley' album involves a sponsorship by none other than – Hurley International. At first, guitarist Brian Bell explained that Hurley – the company, not the Lost character on the cover – was sponsoring the release. "[Hurley] was funding the record at the beginning of the process," Bell explained. "We actually did some sort of advertisement... I don't even know how they're tied in so much, although we got some clothes and we did a photo shoot and we were wearing these clothes, and I think we're selling these clothes in malls."

Alright! A full-blown sellout! Own it, baby. But wait. Bell later explained that this was a big mistake, and that the real inspiration for the album was the Hurley character from Lost. Then, Hurley - the company - started sponsoring a series of release parties, and...

But the outrage never really materialized. Sure, purists have decried the marriage, but do you really care? Or, would you rather see a band get paid – and paid well – for its creativity?

Actually, most artists want to get paid – and paid well – though they understandably carry some sensitivity towards commercial relationships. Enter Exhibit B – Dave Matthews. Just recently, a rep from Riazul Tequila reached out to Digital Music News to talk about an "unofficial" relationship between the singer and the brand. As in, Dave just loves this stuff on his own, and oh – here's a photo of him posing with it backstage. "If Avion Tequila has Entourage's Vincent Chase as a face, Riazul Tequila may have Dave Matthews... at least unofficially," the rep continued, while insisting that no money changed hands.

Another tale? Depends what you believe, though it looks like the art of selling out remains a tricky craft indeed, with lots of different approaches to be applied. And increasingly, this is an art that needs to be practiced in order to survive. And, as long as the fans stay on board, everyone is still in business.

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Panelist Biographies

Russell Emanuel, CEO, Extreme Music

About Russell: "Fifth Beatle" SIR GEORGE MARTIN, producing legend QUINCY JONES, superstar composer HANS ZIMMER, RODNEY "DARKCHILD" JERKINS and SNOOP DOGG are but a few of the award-winning and history-making producers, composers and artists who have deals with Russell Emanuel's Extreme Music. Known as "The Bad Boys of Production Music", Extreme is the worldwide production music library unit of Sony/ATV Music Publishing.

Kari Kimmell, Recording Artist and Songwriter

Kari's story is one of extreme hard work and intense passion. Originally from South Florida, Kari Kimmel moved to Los Angeles 5 years ago to pursue her love of music. Since then, she has done everything from writing, recording and co-producing her own music to placing her songs in over 100 film and tv shows and has also been named one of the top 50 artists on VH1.com.

Her songs and voice have been featured in over 100 film and television shows including: Shall We Dance, The Hills, White Chicks, Greek, The Gilmore Girls, 10 Things I Hate About You, WALL-E, Nights In Rodanthe, The Young and the Restless, Ella Enchanted, Grey's Anatomy, The Bold & The Beautiful, Private Practice, and Pretty Little Liars... (For more credits, check out www.karikimmel.com). Kari's vocals have been heard in the films Dreamgirls and Tinkerbell as well as the Disney show KimPossible. You can hear Kari on the following albums: Tinkerbell Soundtrack, Princess Disneymania, WALL-E & EVE, and Ella Enchanted Soundtrack as well as her solo albums A Life in the Day, Pink Balloon and her newest album Out of Focus.

Kari has performed on the Adam Corolla & Danny Bonaduce radio show, Conway & Whitman radio show, NBC Los Angeles, and has performed at Prince Edwards Prince of Wales party (guests included Sylvester Stallone, Larry King, Aaron Spelling, David Foster, Sydney Poitier and Don Rickles...) Kari also performs live with her band in Orlando for a 4th of July show every year for an audience of over 30,000. Kari's music videos have also had some great exposure. She sang the theme song and performed the music video for the movie "Ella Enchanted" seen on Radio Disney and the Ella Enchanted DVD, and her music video "Low" was used as the ad for the show Private Practice.

Kari has also had fun collaborating with other musicians such as Abe Laboriel Jr. (Paul McCartney) Rusty Anderson (Paul McCartney) David Levita (Alanis Morissette), Jon Carin (Pink Floyd), Leland Sklar (James Taylor), Matt Serletic (Collective Soul), David Rodriguez (Keith Urban), Dean Dinning (Toad The Wet Sprocket). Kari not only writes most of what she sings herself, but her songs have also been recorded by artists such as The Backstreet Boys, Ke\$ha, Joe Jonas, Demi Lovato and Gloria Gaynor.

Kari is most proud of her newest album "Out of Focus" which was released April 2010. Currently you can see the music video for one of the tracks off this album "Trouble" being featured on Oxygen and NBC Los Angeles. This album is a journey. Through a collage of epic and soaring melodies, she takes you through the extreme highs and lows of experiencing love, the tragedy of losing that love and the incredible gift of finding it again. Check it out on iTunes or visit her website www.karikimmel.com for more information.

Shawn LeMone, VP of Film/TV and Visual Media, ASCAP

Shawn LeMone is Vice President and manager of ASCAP's Film & Television Department. His responsibilities include maintaining and expanding ASCAP's market share of all music for audio-visual media, including film, television, video games and new media. Shawn maintains relationships and resolves issues for some of the society's most high profile composer members. He also regularly interfaces with industry executives across a wide range of media. In his fifteen years at ASCAP, Shawn has been instrumental in the development of cue sheet standards for the reporting of music in audio-visual programming as well as pioneering ASCAP's outreach to the video game industry. Before joining ASCAP in 1995, Shawn worked for both the Directors Guild of America (DGA) and Writers Guild of America (WGA) administering royalties from Europe on behalf of the guilds. Shawn has organized and spoken on panels for many organizations over years on a wide range of topics affecting the music industry and is currently serving as President of the California Copyright Conference.

Amanda Marks, EVP/GM, Universal Music Distribution

As Executive Vice President & General Manager, Universal Music Distribution, Amanda Marks is responsible for managing Universal Music Group's (UMG) digital and physical distribution activities, including its direct-to-consumer marketing, eCommerce, and product development. The award-winning company offers the most extensive array of personalized marketing and sales services in the industry, allowing artists and partner labels to move more seamlessly between digital and physical

retail opportunities. In her role, Ms. Marks works closely with all of UMG's labels, business partners and eLabs, the company's new media and technologies division. Previously, Ms. Marks served as Executive Vice President of eLabs, and prior to that was General Manager for Jimmy and Doug's Farmclub.com, a frontrunner of interactive convergence, melding an integrated web site, television show and record label. Jimmy and Doug's Farmclub.com was a subsidiary of Universal Music Group. Before Farmclub.com, Ms. Marks held Business and Legal Affairs positions with Universal Music Group's Business & Legal Affairs Department and Mercury Records. Before joining Mercury Records, Ms. Marks served as General Counsel for Rock-It Cargo USA, Viscount Airlines and their affiliated companies, which provided logistical services to the touring side of the music industry. Previously, Ms. Marks worked as an associate

Victor Rodriguez, Music Director, THQ Inc

Victor Rodriguez is the Music Director of THQ, one of the world's largest video game publishers. A former management executive at several music publishers and labels including Sony/BMG, he has worked extensively with the industry's top artists to provide music for hundreds of games, films and television programs. He is also a published author and has spent time in many different countries, but always manages to find his way back to Los Angeles, where he currently lives.

Victor Rodriguez is the Audio Director of THQ, one of the world's largest video game publishers. He has worked extensively to cultivate sound for hundreds of video games, films and television programs. He is also a published author and has spent time in many different countries, but always manages to find his way back to Los Angeles, where he currently lives.

Patrick A. Russo, Principal, The Salter Group

Mr. Russo is a Founding Principal based in the Los Angeles Office of The Salter Group where he co-manages the firm's overall practice and project management efforts. Since the formation of The Salter Group, Mr. Russo has overseen numerous domestic and international client relationships including The Walt Disney Company, Village Roadshow, Sony/ATV, The Shine Group, Exception Wildbunch, Discovery Communications, Kohlberg Kravis Roberts & Co. Ltd, Goldman Sachs and many others. Mr. Russo has extensive experience across a broad range of financial advisory roles including mergers and acquisitions, fairness opinions, intangible asset valuations, litigation support and strategic planning.

Mr. Russo was previously a Vice President in the Entertainment & Media Group of Houlihan Lokey Howard & Zukin. In this capacity, he focused on investment banking and financial advisory projects.

Prior to joining Houlihan Lokey, Mr. Russo was a Vice President in the Media and Entertainment Industries Group at SG Cowen Securities Corporation (and its predecessor companies Societe General Bannon, LLC and Bannon & Co.), specializing in mergers and acquisitions and capital raising. Prior to SG Cowen, Mr. Russo was an Assistant Vice President at ABN AMRO Bank, where he was responsible for all film financing transactions in North America and was a member of the bank's Global Media and Communications Finance Group.

Mr. Russo also served as a Senior Credit Analyst for Credit Suisse in Los Angeles and New York, with a focus on media and entertainment. Mr. Russo received his MBA from Fordham University and holds a BS in Business Management from Fairleigh Dickenson University. Mr. Russo is a member of Young Presidents' Organization (YPO) and the Finance Board of Advisors and the President's Council of Fordham University. He is also a frequent speaker on various entertainment and media and financial topics.

Diane Snyder-Ramirez, VP of Royalty Accounting & Administration, Royalty Review Council

Diane Snyder-Ramirez has over 15 years of experience with copyright administration and royalties. She is currently Vice President, Royalty Accounting and Administration for Royalty Review Council, an independent music royalty administration organization. Diane is responsible for managing a number of record label and music publishing royalty accounts. Prior to her current position, Diane was a music consultant as well as an advocate for digital music rights issues. She was a key team member in the development of a rights administration and royalty system for one of the largest online US music service providers. Additionally, Diane worked closely with her clientele to prepare for the Senate Judiciary Committee Hearings on digital rights presenting extensive research and documentation. Previously, Diane was Director of Member Relations for ASCAP (NY), and played a role in furthering several of the department's outreach programs, increased membership and handling high-profile clientele. She began her music career at CMJ and was responsible for the launch of CMJ Canada, the first weekly college radio trade publication in the Canadian market. A graduate of California State University, Long Beach, Diane holds a BA in radio, television and film. She is currently the Assistant Secretary & board member of the California Copyright Conference and speaks at industry events and universities.