

MUSIC CREATORS

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DEFINING, UNDERSTANDING AND EVALUATING THE CONCEPT OF “BUYOUTS” IN THE TRANSFER & LICENSING OF COPYRIGHTED MUSICAL WORKS

I. INTRODUCTION TO THE “BUYOUTS” ISSUE

Currently, one of the most debated topics among members of the global music creator community of composers and songwriters is the complex definition of the term “buyout” as used to describe certain copyright assignments and licensing transactions, executed with third parties such as film/video production companies, distributors and administrators of musical works.

In order to assist music creators in the process of determining the fairness and intent of any particular copyright or licensing transaction offer under consideration --and to clarify the terminology used to describe various concepts of “buyouts” as they have become generally known throughout the industry-- *the principle purpose of this briefing paper is to help define the categories of such buyout transactions and some of their key distinctions*. Our goal is simply to provide greater clarity for music creators and others in independently evaluating the advisability of any such proposal. Individual music creators, as always, are urged to consult with their legal, accounting and other advisors in order to determine which if any types of transactions (“buyout” or otherwise) will be of greatest benefit to their careers and catalogs, considering each of their unique circumstances.

Authors Rights: To begin, every music creator should be familiar with the concepts underlying the universally recognized importance of copyright protections for authors, and how such laws are organized on both an international and local basis. Although various national copyright laws have been in place for centuries to protect creators, it was not until the founding of the United Nations at the end of the Second World War that authors’ rights were finally elevated to the status of basic human rights on a global basis. In 1948, the UN adopted without a single dissenting vote the Universal Declaration of Human Rights, including the key statement in Article 27(2) that “Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which [such person] is the author.”¹ In addition, the Berne Convention, initiated in 1886 and now ratified by 178 countries around the world, provides creators with certain moral rights (as discussed below) and the means to control how their works are used, by whom, and on what terms.²

It is true that the Universal Declaration and the Berne Convention do not carry the weight of law in most jurisdictions. Consistent with the general legal and ethical principles embodied in those accords, however, nearly every nation on earth now recognizes under its own laws (as well as through other international conventions and treaties) that rights of ownership accrue to authors from the moment of a work’s creation. Moreover, there is further recognition that such protections are designed not only to provide fairness to authors, but also to enhance the quality of life and commerce within a society by promoting the progress of science, art and culture. In other words, the concept of making it economically feasible for “creators to create” is now globally recognized as a societal imperative.

¹ <https://www.un.org/en/universal-declaration-human-rights/>

² <https://www.wipo.int/treaties/en/ip/berne/>

Moral Rights/Droit Moral: It follows that the scope of copyright protections for authors included under national copyright laws are usually broadest and strongest in those nations that recognize the natural law doctrine of “moral rights” (also known as *droit moral*) such as France, Germany and other nations throughout the European Union. The copyright regimes in those countries, quite naturally, are favored by music creators over those legal frameworks that extend protections *solely* by statute. The range of a creator's moral rights may include the often *inalienable* rights to claim authorship, to receive or decline credit for the work, to prevent the work from being altered without permission, and to dictate whether and in what manner the work is performed or used.³

Evaluating Transactions: Thus, in today’s world, the primary business task for music creators has evolved into one of protecting the economic and moral rights already granted to him or her under law. That, however, is a burden that is growing more difficult with each passing year. We are currently witnessing a troubling, digital age trend among production companies, digital music distributors and other music users, who now --even more aggressively than in the past-- are seeking to acquire full ownership and control over musical works rather than simply requesting licenses for use. Whenever possible, those same music users are also striving to limit or fully eliminate obligations to pay future royalties to the music creators from whom such rights of ownership and control are secured.

Adding to the complexity of this trend is the fact that, despite their various treaty obligations, some nations still provide less stringent copyright protections for creators than others. One stark example of this reality is that while Member States of the European Union generally preserve the author’s right of initial ownership and provide (as noted above) certain other inalienable economic and moral rights to music creators through their national laws and various EU directives,⁴ the United States has on the other hand codified the so-called *Work-for-Hire* doctrine into law. That doctrine permits an employer to claim authorship in works created by employed or commissioned music creators, who may as a result be completely disenfranchised from their own creative works in exchange for a single, flat fee. Attempts to extend the concept of Work-For-Hire beyond U.S. borders are already being undertaken by music users, regardless of legal barriers in most other national territories designed to prevent such overreaching and denial of moral and other rights to authors.⁵

Consequently, the global use of the term “buyout” to describe these supposed new norms in doing business with music creators has come into vogue, but with little attention so far having been paid to determining just exactly what that word is intended to denote under a variety of vastly different circumstances and legal frameworks. Once again, it is that concerning lack of specificity that this briefing paper seeks to address.

In short, the international music creator community cannot truly begin to address the growing problem of potentially coercive and confiscatory business practices now being directed toward them --and grouped under the general heading of “buyouts”-- without actually defining the different varieties of such transactions so that each may be individually understood and evaluated.

II. DEFINING THE SCOPE OF WHAT IS MEANT BY THE TERM “BUYOUT”

An informal survey of music licensing trends indicates that there are at least *four* basic categories of copyright transactions being offered internationally to songwriters and composers that vary greatly from one another, but which are *all* currently and confusingly being described simply as “buyouts.” We endeavor below to label, define and differentiate these four scenarios, with the goal of providing a baseline understanding of terminology that will add greater clarity to future discussions between music creators and those seeking to acquire rights in their works.

The four identified “buyout” transaction categories are:

³ See, Betsy Rosenblatt, Moral Rights Basics, Harvard Law School (1998) (<https://cyber.harvard.edu/property/library/moralprimer.html>). “Under American Law, moral rights receive [some lesser level of] protection through judicial interpretation of several copyright, trademark, privacy, and defamation statutes, and through the Visual Artists Rights Act of 1990 (VARA) ([17 U.S.C. §106A](#)).” Other commentators continue to insist that American law does not protect moral rights to a standard required by the United States’ ratification of the Berne Convention.

⁴ See notably [Directive 2001/29/EC](#) and the recently adopted [Directive \(EU\) 2019/790](#). The latter provides that the provisions regarding transparency, contract adjustment mechanisms and alternative dispute resolution to the benefit of authors and performers (Article 19, 20 and 21) are of mandatory nature and that the parties’ choice of applicable law other than that of a Member State does not prejudice their application.

⁵ It is important to note, for example, that in certain other present and former British Commonwealth nations including the UK, Canada, Australia, and New Zealand, moral rights are frequently viewed as *alienable* and able to be contracted away, a legal concept that may in the future be subject to further development.

1. *Full Copyright Buyout Agreements Regarding New Works Created Under the U.S Work-For-Hire Doctrine*
2. *Limited Copyright Buyout Agreements Regarding New Works Created in the US and Elsewhere Throughout the World*
3. *Direct License Project Buyout Agreements Regarding New or Existing Works Throughout the World*
4. *Writers' Share of Copyright Buyout Agreements Regarding Existing Works and Catalogs Throughout the World*

We generally define these four types of transactions as follows:

1. FULL COPYRIGHT BUYOUT AGREEMENTS REGARDING NEW WORKS CREATED UNDER THE U.S. WORK-FOR-HIRE DOCTRINE

GENERAL DEFINITION: A FULL COPYRIGHT BUYOUT AGREEMENT REFERS TO THE ACQUISITION BY A COPYRIGHT USER OF THE ENTIRE COPYRIGHT IN A NEW MUSICAL WORK FROM A MUSIC CREATOR IN EXCHANGE FOR A ONE-TIME ONLY FEE, WITH NO FURTHER CREATOR COMPENSATION, NO CONTINUING PARTICIPATION OR CONTROL (INCLUDING MORAL RIGHTS), AND UNDER THE PROVISIONS OF U.S. WORK-FOR-HIRE LAWS, NO CHANCE FOR REVERSION OF RIGHTS BACK TO THE CREATOR.

Comments:

The U.S. Work for Hire Doctrine: The Full Copyright Buyout scenario is the most extreme example of a complete and unalterable copyright transaction, generally limited to the United States, where the so-called “Work For Hire” provisions of the U.S. Copyright Act⁶ permit agreements that transfer to audio-visual producers all rights of *authorship* in a commissioned musical work for a single, one-time fee. Such situations occur most frequently in the context of U.S.-produced films and audio-visual programs (including games), and even then, such Full Copyright Buyouts remain rare. The reason for the infrequency of such agreements --even in the U.S.-- is that in most instances, the commissioning party grants to the actual creator by contract at least the right to collect the “Writer’s Share” of income generated by *performances* of the work. That contractual right is frequently granted to the actual author in spite of the fact that in the United States, there is no clear ability for music creators to exclusively assign performing rights to PROs at the moment of a work’s inception.

In most other nations, where national laws generally vest initial ownership of creative works without exception in the actual creative authors, and provide those authors with inalienable moral and other rights (including the unencumbered ability to exclusively assign performing rights to PROs upon creation), Full Copyright Buyout transactions are theoretically not possible under any circumstances. Agreements that attempt to circumvent this principle are likely unenforceable in such jurisdictions, even if agreed upon by the parties. As noted above, however, such intended protections for creators have in recent years not prevented certain producers from attempting to secure such absolute buyout rights outside of the U.S. anyway. This is a trend that requires careful monitoring, especially in the other former and present British

⁶ Section 101 of the U.S. Copyright Act (title 17 of the *U.S. Code*) defines a “work made for hire” in two parts: (a) a work prepared by an employee within the scope of his or her employment or (b) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas --if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire. Section 201 (b) further stipulates as follows: In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.

Commonwealth Nations where moral rights are frequently not viewed as inalienable and may in many instances be contracted away.⁷

Complete transfers of rights in the Full Copyright Buyout scenario, when they occur in the U.S., are done through a written Certificate of Authorship signed by the music creator. The Certificate generally stipulates that the producer will be constructively considered the legal *author/creator* of the work (including on the US copyright registration certificate), and that the actual creator was merely engaged on a Work-For-Hire basis to follow the producer's directions and/or was acting within the scope of his or her employment.⁸ The rights assignment covers all uses of the original and subsequent derivative works, is not subject to termination in the U.S. (and potentially in other applicable termination/reversion territories), and does not provide for a guarantee of attribution or other moral rights to the actual creator unless specified by the contract.⁹ It should be noted that Full Copyright Buyout agreements are considered by some music community commentators to be *unconscionable* by definition, and potentially unenforceable in the United States, as well.¹⁰

Attempted Expansion of the Full Copyright Buyout Concept To Digital Audio Distributors: It should also be noted that the offering of Full Copyright Buyout agreements may soon arise for music creators in the global realm of audio-only electronic distribution of musical works, as well. Certain digital music distributors and streaming services are already rumored to have attempted such acquisitions of copyrights in musical works from music creators (including a flat buyout of mechanical rights for use of music on audio-only recordings), despite the fact that US law limits the concept of Work-For-Hire to audio-visual contexts only, and the laws of most other nations again prohibit Full Copyright Buyouts under any circumstances.¹¹

2. LIMITED COPYRIGHT BUYOUT AGREEMENTS REGARDING NEW WORKS

A LIMITED COPYRIGHT BUYOUT AGREEMENT REFERS TO THE ACQUISITION BY A COPYRIGHT USER OF THE ENTIRE COPYRIGHT IN A NEW MUSICAL WORK FROM A MUSIC CREATOR IN EXCHANGE FOR A ONE-TIME FEE, WITH LIMITED FURTHER COMPENSATION AS DEFINED BY CONTRACT OR THROUGH PRIOR EXCLUSIVE ASSIGNMENT OF PERFORMING RIGHTS, BUT OFTEN WITH NO CHANCE FOR REVERSION OF RIGHTS BACK TO THE MUSIC CREATOR.

Comments:

The Form of the Transfer of Rights: The Limited Copyright Buyout scenario is the less extreme example of a complete copyright assignment between an audio-visual producer and a music creator, and is frequently accomplished globally in a Non-Work-For-Hire transaction.¹²

The Terms of the Transfer of Rights: In either case, Limited Copyright Buyouts generally include: (a) a non-refundable, up-front fee that may be recoupable against future royalty earnings; (b) a right of the

⁷ Some international producers reportedly have now widely begun offering Full Copyright Buyout/Work-For-Hire agreements to non-American writers throughout the world, under the pretext that such provisions are enforceable if the contract stipulates that it is to be interpreted under and governed by U.S. law, *regardless* of prior exclusive assignment of performing rights to local PROs.

⁸ The practices of various US PROs in regard to registering an employer-for-hire as the owner of the writers' share of performance royalties may vary. So may a PRO's rules, and applicable laws or prohibitions, concerning exclusive assignment of rights to the PRO at the instant of a work's creation.

⁹ The agreement is likewise executed notwithstanding the possibility of a prior, automatic assignment by the actual creator to a U.S. performing rights organization ("PRO") of performing rights in all of his or her new works, which prior assignment is deemed ineffective.

¹⁰ Such commentators frequently base their beliefs on the principle that some form of ongoing or residual compensation is the only, reasonable safeguard a music creator has to ensure against the massive and unethical undervaluation of a work at the time of a "purchase," since the value of a new work cannot be accurately measured at the threshold of a Full Copyright Buyout/Work-For-Hire transaction. This question of unconscionability remains unsettled in the United States.

¹¹ The Full Copyright Buyout purchaser in this context would therefore need to rely entirely on a purchase agreement, subject to future termination under U.S. law and even stronger allegations of unconscionability. This situation again bears careful watching.

¹² Alternatively, it can and frequently is structured in the U.S. pursuant to the Work-For-Hire provisions of the U.S. Copyright Act if the producer is seeking to be designated as the work's "author," and/or to prevent the music creator from having the right to terminate the actual music creator's transfer of rights under U.S. law (see prior Work-For-Hire comments in Section 1, above).

creator/employee-for-hire to receive the Writer's Share of performing rights royalties directly from his or her PRO; (c) potentially the right of such creator to also share in other income streams generated by the work, or to receive bonus payments if certain "best seller" thresholds in earnings and popularity are achieved; and (d) in a Non-Work-For-Hire situation, the rights to reclaim the work after an agreed upon period or at a time stipulated by statute. Most music creators and their representatives consider the Limited Copyright Buyout scenario as far less than ideal, but better than the potentially unconscionable Full Copyright Buyout model described above in section 1.¹³

3. DIRECT LICENSE/PROJECT BUYOUT AGREEMENTS

A DIRECT LICENSE/PROJECT BUYOUT AGREEMENT REFERS TO THE ACQUISITION OF RIGHTS BY A COPYRIGHT USER FROM A MUSIC CREATOR, GENERALLY ISSUED IN PERPETUITY COVERING THE SPECIFIED USE OF A MUSICAL WORK WITHIN AN AUDIO-VISUAL OR OTHER PROJECT, IN EXCHANGE FOR A "ONE-TIME ONLY/ALL-IN" PER-PROJECT USAGE FEE. THE COPYRIGHT IN THE MUSICAL WORK IS RETAINED BY THE MUSIC CREATOR.

Comments:

Scope of the License: The Direct License/Project Buyout is a music *licensing* transaction.¹⁴ In these more narrow agreements, the hallmark benefit to the music creator is that unlike the terms of other "buyout" scenarios, he or she actually *retains copyright ownership and control* in the musical composition, and is free to license its use to other third parties for uses not specifically prohibited under the license. Issues such as the licensing fee, and the scope of present and future project uses permitted in exchange for the one-time only "buyout fee," are generally the key points of the negotiation.¹⁵ The primary benefit to the producer in such licensing scenarios is that further record keeping and payments to the music creator will not be necessary in connection with the project, unless the producer wishes to amend the license to add rights requiring additional fees and potential royalty payments.

4. WRITER'S SHARE OF COPYRIGHT BUYOUT AGREEMENTS

AN AGREEMENT ASSIGNING THE ENTIRE 50% WRITER'S SHARE IN THE COPYRIGHT OF A PRE-EXISTING AND/OR NON-COMMISSIONED MUSICAL WORK FOR A ONE-TIME ONLY FEE, WITH NO FURTHER CREATOR OR HEIR COMPENSATION, NO CONTINUING PARTICIPATION OR CONTROL BY THE CREATOR OR HEIR OTHER THAN THOSE GUARANTEED BY LAW IN REGARD TO THE WORK, AND OFTEN NO CHANCE FOR REVERSION OF RIGHTS BACK TO THE CREATOR OR HEIR.

Comments:

Assignment of Rights by Music Creators to Music Publishers: Global music industry custom and practice dictates that transactions involving the assignment to music publishers of copyright ownership in pre-existing, non-commissioned musical works should always guarantee to music creators payment of no less than 50% of all royalties generated by the work (and frequently a higher percentage normally ranging to 75% when a music creator is able to negotiate for a portion of the so-called "publishers' share" of revenues in addition to his or her 50% so-called "writers' share").¹⁶ This well-established, minimum 50% "writer's share" of the copyright in a musical composition is generally considered sacrosanct in terms of the rarity in which it is ever assigned to a third party by a music creator. There are some instances,

¹³ As with Full Copyright Buyouts, the other issues described in Section 1 may be equally applicable to the Limited Copyright Buyout scenario and need to be evaluated in the same, careful manner.

¹⁴ A direct performing rights license is sometimes but not always included among the rights granted, and such agreements may be tailored or limited in ways to ensure the creator/copyright owner receives his or her writer's share of such performing rights royalties from his or her publisher or performing rights organization. This point should be carefully negotiated.

¹⁵ The inclusion and scope of an exclusivity clause within the license will generally define prohibitions against the further licensing of the work for certain uses and situations.

¹⁶ It should be further noted that the transfer of administration rights only in a musical work without an accompanying assignment of copyright is generally subject to different contractual construction, rules, customs and practices.

however, whereby the assignment of the Writers' Share in a work or catalog of works is recognized as a viable transaction, especially if the music creator has died and the assignment is made by his or her heirs on the basis of need.¹⁷ In such instances, the assignment of the Writer's Share is often but not always done in exchange for a one-time only "buyout" fee, with no other rights of future royalty participation included.¹⁸

III. CONCLUSIONS

As these comments illustrate, the complexities involved in defining the benefits and pitfalls of so-called "buyout" agreements are numerous, and not easily explained to those unfamiliar with the arcane world of music rights and transactions. We hope the above information is helpful to those considering such transactions, and urge all music creators to seek proper professional guidance in analyzing the fairness and viability of each particular deal offered prior to moving forward. As in most instances concerning copyright transactions, proper advice tailored to individual circumstances is necessary to prevent potentially irreparable harm. New information concerning developments in these areas will inevitably be forthcoming in the near future, and interested parties are urged to keep apprised of all such matters in order to fully protect their rights.

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¹⁷ Some performing rights organizations have traditionally refused to recognize transfers of interest in the Writer's Share of performing rights in a composition except under exceptional circumstances of need, and only after a demonstration of the fairness of the transaction.

¹⁸ The transaction is also sometimes limited to a term of years, by agreement or pursuant to statutory termination rights. Because of the complexities involved (including the local PRO rules concerning the distribution of Writer's Share of performing rights royalties to third parties), when it comes to transactions involving the Writer's Share in any musical composition the parties are urged to exercise special care in procuring professional advice prior to proceeding with a Writer's Share Buyout arrangement.