THE ARTISTE AND HIS RECORDING CONTRACT

By Olukayode Dada

The Nigerian entertainment industry has experienced a huge boom in recent times. Perhaps, a prominent beneficiary of the boom is the Nigerian music industry. The successes recorded by certain Nigerian singers have propelled other young men and women with similar talents to seek their fortunes in the music industry.

Perhaps, the most important thing to a musician is the music he creates. He spends quality time developing a distinctive sound and style, after which he must then seek a record company under which label he records his songs. The relationship between an artiste and his record company is usually embodied in a legal document called *The Recording Contract*.

A recording contract is an agreement which creates corresponding rights and obligations between a record company and an artiste under its label. A recording contract is a legally binding agreement between both parties. A recording contract is different from a production contract, the latter being an agreement between an artiste and his producer, although a recording contract may also contain production agreement where a record company or any of its agents also doubles as the artiste's producer.

Most musicians think they want a record deal but they have little or most often than not, no knowledge about the ominous 80 -100 page, single-spaced typewritten recording contracts. For the record companies, they merely copy precedents from all manner of jurisdictions without any attempt to find out if such precedents are suitable to our local circumstances and are adaptable as such.

A musician possesses copyright in his work. Simply put, copyright is the right a creator of a work (artistic, literary, musical, cinematograph, sound recording or broadcast) has in the product of his work. In the case of musical work, it is the exclusive right of an artiste to reproduce the work in any material form, publish the work, perform the work in public, translate the work, make any cinematograph film or record in respect of the work, distribute the work for commercial purposes, broadcast the work or make an adaptation of the work. It is illegal for anyone to do any of the above acts in relation to the artiste's work without the artiste's permission or license.

Copyright determines who has the right to control the exploitation of a work and most importantly, who gets the money. Copyright is a business. In the copyright business, money flows from RIGHTS. You can acquire the right by creating the copyright or you can gain the right buying it or borrowing it under a license from its owner.

Under a recording contract, an artiste transfers some or all of his rights under his copyright to the record company. Record companies are run by businessmen, businessmen whose major interest is profit. When a record label signs an act to a recording contract, it expects to make a substantial return on the financial investment it has made in the act. Thus in most cases, it includes several self-serving terms in the recording contract which an unwary artiste signs and by so doing, mortgages his business, career, talent and most times, future to the record company for a Lazarus' portion.

Promising musical careers have plummeted by obnoxious, selfish and inauspicious recording contracts. The artistes either did not seek legal advice at all or were ill-advised before signing such recording contracts. Record companies should know that they do not need to enslave or impoverish artistes through unfair recording contracts before they get returns on their investments. It is my experience that a recording contract which balances both the interest of the record company and that of the artiste yields better fruits than the one which seeks to stifle the artiste.

In view of the foregoing, it is very important that both the record company and the artiste understand the nature of a recording contract and its standard terms and seek quality legal services before finalising the recording contract and signing same.

The provisions of all music-related agreements are negotiable, but are largely dependent on the clout of each of the parties. The following, according to L. E. Feldman are the key issues that should be addressed and negotiated in a recording contract:

(1) Term: "Term" is the length the recording artiste is required to provide personal service contract. The artiste should watch out for the "open-ended" term provisions, which allows record companies to define a "year" as "8 months after delivery of the minimum recording obligation, whichever is later" or similar language. The artiste should attempt to limit the initial fixed term to 12 (not 18) months.

(2) Artist's Recording Commitment: This is the provision specifying how long an artiste must exclusively record for a certain record label. It obligates the artist to record and deliver a certain number of masters to the record company. If a long term and substantial albums are sought by the record company, the artiste with sufficient clout should ask for "promotional" provisions, such as guaranteed release, promotional budget, advertising, support, publicity, and/or video. The artiste should also try to limit the delivery commitment to one or two albums per five-year term. If the artiste cannot limit the recording commitment to a comfortable number, ask the record company for broad and favorable "suspension" terms.

(3) Record Companies Commitments: The artiste should ask for a "guaranteed" release clause, defining "recording" to include "releasing." The artists should also avoid "minimum commitment" language.

(4) Delivery: "Delivery" of a master recording at certain times is required of the recording artiste by every recording contract. Failure to deliver product on time may prevent the record company from timely manufacturing and selling records. This may affect the artiste in a number of ways, including extending options dates, expirations dates, and payments of advances.

(5) Suspension and Extension: These clauses are usually triggered by some failure of the artist to record or the artiste committing an immoral act. Generally, care should taken by the artiste to avoid automatic "suspension" clauses for non-delivery or late product. Instead, request that the suspension applies only if the non-delivery was the failure of the artiste and/or that it is excused if the record company bars the artist from recording.

(6) Injunction and Equitable Relief: Record companies try to prevent the artiste breach of a recording contract by restraining the artiste from recording elsewhere. They do this by inserting a

clause stating the artist's personal services are "unique" and "special" and exclusive to the record company. A recording agreement with this language entitles the record company to injunctive and other equitable relief. The artiste should limit this to provide that the record company is only entitled to "seek" injunctive or other equitable relief.

(7) Royalties: The "base royalty rate" is the gross or starting royalty for "regular full-price sales". It is negotiable, and varies from artist to artist. Generally, it may range from 5% to 10% for a new unknown artist, to 15% for a hot new artist in a bidding war, or up to 18% for a seasoned recording artist. The base royalty rate is usually severely reduced by various other royalty provisions and definitions.

The packaging deduction is another common provision. Record companies usually deduct what is known as a "container charge", "packaging deduction" or "jacket charge." This is the single largest reduction of the base royalty percentage and is usually non-negotiable.

An artist may also rarely avoid a "free goods" clause; this allows the record company to give away free CDs and tapes to radio and retailers for promotional purposes that can result in as much as a 15% reduction on the base royalty rate.

Royalties from the sale of CD's are often computed by many record companies on the basis of less than 100% of the sales. For example, royalties for CD's are commonly calculated on the basis of only 85%, or even as low as 75% of sales. Try to avoid this historical practice. There is really no justification today for this reduction since the price of making CD's is negligible compared to other formats.

Record club royalties are usually reduced by 50%, and are further calculated on the basis only 85% of sales. The right artiste with sufficient clout may be able to ask for 100% sales on record club royalties, and should also place limits of freebies.

There are reductions for foreign royalties. For example, because of extra costs involved with over seas distribution, the royalty on foreign sales of records is usually reduced to one half (½) of the normal domestic rate.

And, if possible, try to insert a provision that accounts for countries with blocked currency or funds. Some countries require royalties remain in their countries or at least be spent in their country. To be protected against these blocked royalties, the artist should negotiate a clause that requires the deposit of these blocked royalties in the name of the artist.

(8) Advances: Royalty "advances" are basically pre-payments of estimated royalties. They are non-refundable but recoupable, meaning they can be paid back to the record company from artist's earnings only. They come in different forms, the obvious being an advance payable upon execution of an exclusive recording agreement.

(9) Reserves: Currently, most record companies limit returns to 20% to 22% of records shipped. Because record companies do not know how many records will be returned by retailers, they compute mechanical royalties based on net sales "less returns" so as to avoid any overpayment of royalties. They maintain what is known as a "reserve" against future returns. The reserves are a

percentage of gross sales of a record. These reserves may range from 30% to 75%. Since most record companies are not going to accept more than a 22% return privilege from retailers, the artist should try to limit these to "reasonable" reserves, not to exceed a certain percentage (e.g., 20% to 25%), and include a specific liquidation clause ensuring full payment after a certain period of time (e.g., within three or four accounting periods.).

(10) Cross-collateralization: This clause should definitely be avoided. A cross-collateralization clause compromises the song writer's otherwise independent royalty income. Under this clause, the record company is allowed to recoup mechanical royalty advances from sources other than from the actual sales of the record in question. For example, if an artist owes the record company for unrecouped mechanical royalties from LP1, the record company can use sales from LP2 or even publishing income to get paid. This obviously substantially reduces and sometimes eliminates the likelihood that the artiste will receive any royalties. This clause is never called by its name. It is usually recognizable by the term, "all agreements between artiste and record company heretofore or hereafter entered into shall be deemed to be one accounting unit." Always try to get these clauses removed from the recording contract.

(11) Accounting: This is the provision that tells the artiste when he/she gets paid. Record companies usually pay semi-annually (e.g. a specified number of days after June 30 and December 31). Others account on a quarterly basis, every three months.

(12) Audit: An audit provision allows the artiste to contest and investigate a royalty dispute by looking at the record company’s books. Most audit provisions limit the audit period to and require the artiste to actually pay for and use only a certified public accountant. In order to deter vexatious or litigious artiste, many record companies also place restrictions on how many audits can take place in a give time period. Some agreements also exclude manufacturing records from the audit. The artiste should try to include a provision whereby the cost of the audit is paid for by the record company if the audit reveals a substantial underpayment of royalties (e.g. a minimum of a 10% variance.) There is usually an express limitation on the period the artists may object to or question a particular accounting statement. The time to object will vary from 90 days to 3 years or more.

In all, the artiste should understand the right(s) he intends to transfer to the record company under the agreement and insist that they be stated clearly in the recording contract.

Lastly, an experienced counsel in the field of copyright and music should be consulted before any recording contract is signed. With the right counsel and bargaining power, better deals are possible.

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