

Recording Contracts - Getting Started in the Music Business

[To Continue](#) | [Back to Section Outline](#) | [Back to Table of Contents](#)

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How do I get my demo heard?

The larger the label or publisher, the less likely your chances that they will listen to a tape or compact disc that you send to them unsolicited. In fact, many majors will return the envelope to you unopened with "refused" written on it.

At the very least, you should call the label you're interested in and ask the receptionist if they accept unsolicited material. If they do, ask for specific instructions on how best to submit it, and to whom it should be submitted.

Rather than mailing out unsolicited demo tapes, etc., to major labels and publishers, it's better to try a grassroots approach to gaining their interest first so that you are more attractive to them.

Ask yourself, if I was an A&R representative at a major label / publisher, what would I look for in a prospective signee?

1. demonstrated ability to tour; quotes from club owners added to your bio / website;
2. band has begun a fan club with an email list; has at least 1,000 members / email addresses;
3. band has an excellent promotional pack and website;
4. all songs (Form PA) and recordings (Form SR) fully registered with US Copyright Office;
5. affiliated with BMI, ASCAP & SESAC and maintain working relationship with your Writer / Publisher Relations representative;
6. released a demo tape or first record; retain sales records that demonstrate band's ability to independently and successfully market and sell their recordings;
7. positively written about in local, state or national publications;
8. performances at high profile music conferences such as CMJ, SXSW, NXNW etc.

Even if a label or publisher won't accept your CD, that doesn't prohibit you from mailing them copies of reviews, sales sheets, radio airplay lists, etc., that show your commitment to achieving success and your desire to contact them.

Always cultivate any label contacts you make on the road while touring. If there are specific record labels that seem like a good fit, try to book performances with artists already signed to that label. This is an excellent way to build strong contacts, especially with smaller independent labels. Many times independent labels depend heavily on their own bands and artists to act as informal A&R scouts.

What is a "Demo Deal"?

You can make a deal to produce a demonstrational recording ("demo") with either a record label or an individual investor who could be a producer who likes your music or a rich fan. Under these deals, the label or investor fronts the money for you to go into the studio and record your demo. Their money is reimbursed, or "recouped," when that demo gets you a record deal. As an incentive to invest in the music, some demo deals offer the investor a small percentage of royalties from the songs on the demo tape when they are recorded and sold.

"Artists and Repertoire" (A&R) representatives from record labels sometimes approach bands and offer them demo deals. This generally occurs when a band generates interest from the A&R rep, but the label wants to hear the band in the studio before making an offer. The record label fronts the money to produce the demos, and then the label gets a specified period of time, such

as thirty days, to make a decision on whether to sign the band. If the label wants to sign the band, contract negotiations begin. If the label passes on the group, the band can take the demo and shop it to other labels, but will probably have to reimburse the cost of producing the demo if that same demo gets the band a record deal somewhere else.

If a record company paid for my demo, do I have to accept its offer?

Not necessarily. Demo deals generally include provisions that give the record company "first negotiation rights" and the right of "first refusal." In effect, if you accept funds from a label to record your demo, you are obligated to negotiate with that label for a deal before you go anywhere else to shop the tape. If you are unable to reach an acceptable agreement and you receive a better offer from another company, you have to give the original label its right of first refusal, which is a chance to either match the offer or let you go.

If the original label is willing to match the better offer, you will be obligated to sign with it. If not, you can sign with the new label, but you will be responsible for reimbursing the cost of the demo. Usually the signing label reimburses the label that funded your demo recording as a part of your signing deal. They will, however, want to recoup the cost from your royalties, so ultimately you may end up paying for the demo.

What is a "record" as defined by my contract?

The word "record" is a "term of art" in the record business, which is a word that has a special meaning within a particular business that is different from the common meaning. In a recording contract, the word "record" includes any *audio* recording device; such as cassettes, CDs and vinyl records, and any audiovisual devices, such as videocassettes and laser discs. In fact, anything that is capable of transmitting sound is included in the definition of a "record" in your contract, so all new technologies will come under the description.

What is an "option" in my contract?

Contract options are rights that you grant to the record company to buy your records and produce them within a specified period of time. Options are only irrevocable from the artist's side of the deal, meaning that you cannot take the options back, but the record company is not obligated to exercise them. Essentially, the options allow the record company to hold the artist to the terms of the contract for as many albums as the company elects to take. With a new artist, a label may commit to accept the first album (the "commitment album"), and then hold the artist to six to eight "option periods." The company must exercise each option within the option period (usually nine months), or the option will expire and the contract ends. If you are successful, the company will continue to exercise its option to produce your next record. If the company is unsatisfied, it will decline to exercise the next option and let the contract expire.

How long will I be bound to the contract?

The length, or "term," of the contract is not measured by years in the recording industry. Instead, the term is measured by album production periods so that the contract remains in force until the artist delivers the last required record. Most contracts provide for an initial period of one or two records, a number of option periods, and then a period of six to nine months after the final album is delivered. For example, the initial period of a typical contract begins when the deal is signed and ends when you deliver the first recording. If that deal includes six option periods, you could potentially be under contract for as long as it takes you to produce seven albums, plus nine months. Or, if the company does not pick up its option to produce your next recording, you could be out of the deal nine months after you deliver the first record.

This doesn't mean you can be under contract forever if the company picks up its option and you never produce the record. Recording contracts routinely include "late delivery" provisions, which stipulate that if the artist fails to deliver the next recording within a specified time, such as nine to eighteen months, the company can cancel the deal. The company also will not accept all seven albums at once. The contract will usually provide that the artist must deliver the next

commitment album no sooner than six to nine months and no later than nine to eighteen months after the last album was delivered.

If you want to try out the business before you dive into a potentially long-term contract, the independent labels are more likely to contract for just one record (a "one-off" deal).

How many records am I committing to record for the label?

The "amount of product" you are committing to produce for the company is the initial commitment album(s) plus the total number of albums called for in the option periods of the contract. If the label offers you an initial commitment of one record with six option periods for one record each, you are committing to produce *up to* seven albums for the company. You do not necessarily have a deal for seven albums. You have a solid deal for one record, and then the company gets to decide if it wants to exercise its option on the second record, the third and so on.

How do advances work?

Advances are sums of money that record companies give to their recording acts in the beginning of the contractual relationship to get the group started in recording and supporting the upcoming record. The advanced money is "recouped," or taken back by the company, out of your artist's royalties for the number of records you sell. Advances are generally structured as a "recording fund." This fund will be a set amount of money allocated to the artist to cut the record and any cash surplus goes to the artist as an advance on his royalties. The entire fund is "recoupable" against the artist's royalties. For example, if the company provides your group with a \$50,000 fund, that money is yours to produce the record and you may keep whatever is left over as an advance. The company will then withhold \$50,000 from any royalties due you from the sales of your record.

Advances are non-returnable, so you don't have to give the money back if you don't sell any records. However, the record companies don't allow you to pocket this money if you remain under contract and will produce another record for the label. The company can still recoup the \$50,000 advance by piling it on top of the recoupable advance for your next record. This practice is called the "cross-collateralization" of your albums, and it will be specified in your recording contract. The amount you still owe on your advance for the first record "piggy-backs" on to the next record so that you do not receive artist's royalties for either record until the company recoups all of the advance money it has put up so far. Continuing the example above, if you take a \$60,000 advance for your second record and it earns you artist's royalties of \$100,000, you do not get to pocket the \$40,000 difference. That surplus will go back to the record company toward the \$50,000 of recoupable advance from your first record, and you will still be \$10,000 in the recoupable hole!

These numbers may sound intimidating when they add up, but think of it in terms of risk. You need the advance money to cut a great record, buy some beautiful new guitars and quit your day jobs so that you can put all your energy into promoting the record. The record company makes a high-risk investment in your group knowing that if your records don't sell, it will never see the money again. The company protects its risky investment by cross-collateralizing it against your subsequent albums that will hopefully sell better as your career matures. Your group gets to make a record and buy those beautiful guitars, but the money is more like a loan against your future earnings than a gift, and you may still be paying it back several records into your contract. Also note that advances are taxable income, so be sure to report them on the band's business tax forms and/or your personal income tax return.

How are the artist's royalties computed?

Artist's royalties are computed as a percentage of the "suggested retail list price" for the total number of records sold. A new artist can contract to receive anywhere from an 8% to 15% royalty rate, depending on the level of hype surrounding his signing and the business practices of the particular record label. The royalty percentage is commonly expressed in "points." If you get a

12% rate, then you've got "12 points" in your deal. Royalty rates may also be expressed in "escalations" for selling a certain number of records, such as 10% for sales up to 100,000 units sold, 12% on 100,000 to 500,000 units sold, and 14% for all records sold beyond the 500,000 mark.

Some standard industry deductions apply to the royalty rates so that the artist does not actually receive the full royalty percentage of the retail price on each record that he sells. The largest deduction is for the packaging and label on the record. Because a part of the purchase price reflects the cost of the packaging, the companies do not pay royalties on that amount. The packaging deduction could amount to a quarter of the suggested price, so if your record is listed at \$12.98 per CD, the price would be adjusted to \$9.73 per CD (\$12.98 minus 25% for packaging) before your artist's royalty is applied. If your royalty rate is 12%, the packaging deduction would bring the royalty down from \$1.56 (\$12.98 x 12%) to \$1.16 (\$9.73 x 12%) per record. Also, if your deal is the "all-in" type, you are responsible for paying the producer's royalties out of your cut. For instance, if the producer gets a 3% royalty, that will bring your royalty down again from 12% to 9% of the retail price after the packaging deduction adjustment, or 88¢ per CD (\$9.73 x 9%).

Other common royalty deductions are deductions for "free goods" and promotional records. Some record companies designate a percentage of the records they distribute to wholesalers as "free goods." Since artist's royalties are only paid on records *sold*, by definition "free goods" earn no royalties. Likewise, when the company sends out promotional copies of your record to radio stations, retailers, promoters and so forth, they do not pay you a royalty on these copies because they were not actually sold. Your royalty account is also likely to be charged for promotional costs, travel and accommodations, video production costs and tour support before you get to pocket your royalties.

Another important aspect of the royalty clause in your recording contract is a provision that allows a "reserve" of royalty monies to be held by the company until all sales are final. This is because records are sold on a refundable basis to the wholesalers and retailers. If the records don't sell, the record stores send them back and the artist does not receive a royalty on the returned records. The "reserve" amount is usually expressed as a percentage of the total royalties owed to the artist. If your contract specifies a reserve of 30%, that means that the company only pays you 70% of the artist's royalties due you after all your advance money is recouped. The company holds the other 30% to make sure the records are all sold, rather than shipped back from the record stores six months later because of poor sales. When all sales are final, the reserved 30% of the royalties should be released to the artist's royalty account.

What is a "Controlled Composition Clause"?

The "controlled composition" clause in your contract refers to the mechanical publishing income that you earn from the record company aside from your artists' royalties on records sold. When your publisher grants a mechanical license to the record company to reproduce your songs, the publisher is entitled to collect the mechanical royalties for every composition on the record that is owned, written or otherwise controlled by the artist. The record companies prefer to reduce the amount they have to pay out to your publisher in mechanical royalties because the companies don't get to recoup their expenses against your publishing income as they do against your artist's royalties.

In effect, the company may owe you mechanical publishing royalties although you still owe the company a chunk of your future artist's royalties for advances and recording costs. Record companies tip the scales back into their own favor by stipulating in your contract that they will only pay you a percentage of the statutory mechanical licensing rate for your mechanical royalties. Even though the minimum rate of 7.1¢ per copy is designated by statute, the law allows you and the record company to set your own price in the contract. The industry standard is 75% of the statutory rate of 8.00¢ for songs five minutes or less or 1.55¢ per minute or fraction thereof per unit sold - whichever is greater, in mechanical royalties. The per-album rate is usually capped at 10 times the per-song rate, regardless of how many songs are on the record. The company may also stipulate that they don't have to pay you any mechanical royalties on the

"free goods" and promotional copies discussed in **How are the royalties computed?**

For any songs recorded on the record that were not written or controlled by you, make sure that your contract provides the full statutory mechanical license fee, instead of the 75% fee for your songs. If your contract also imposes the limit on songs not controlled by you, you may get stuck either bargaining with the copyright owner of the cover song or paying the other 25% of his licensing fees out of your own mechanical royalties.

All in all, you stand to lose some significant publishing income in the nuances of your contract's "controlled composition clause", and you may be counting on this publishing money if your artist's royalties are not coming through when you need them. Controlled composition clauses are complicated, but take the time to discuss the terms with your attorney because this clause determines a big part of your early cash flow. Your attorney can try to negotiate the terms of the controlled composition clause for you, but keep in mind that this setup is the industry standard, and your bargaining power is slim in the beginning. Ask your attorney to try and get you larger percentages than 75% on subsequent albums, and to negotiate a higher per-album limit than 10 times the per-song rate if the album will have many more songs on it. Also, ask your attorney to make sure that you get the full statutory license fee for cover songs that are not controlled by you.

Is it true that the company doesn't have to actually make my record?

Probably, yes. Recording contracts for new and mid-career artists routinely include a "pay or play" provision that allows the company to pay the artist off rather than produce the records. The company may exercise this right to pay you off if the company does not think the record will be profitable or if the company is in operational limbo for any reason. The payoff is either the minimum union scale for an album or the difference between the recording fund the company would have paid and the projected recording costs.

What am I giving away in the "Grant of Rights" clause?

The "grant of rights" clause in your contract itemizes the rights that you agree to give to the company as part of the deal. This clause will typically state that:

- Any masters and copyrights from any sound recordings produced during the term of the agreement are the sole property of the record company
- The company has the exclusive right to reproduce and distribute the recordings throughout the entire world
- The company is the sole owner of any album artwork created for the contract recordings
- The artist is exclusively engaged by the recording company and will not record for any other company or individual during the term of the contract
- The artist grants the company the right to use and publish his name, likeness and biographical material for promotional materials and activities

On what grounds can the company refuse to accept my record?

The company can refuse to accept the record in several scenarios. Every recording contract includes a "Warranties and Representations" clause. This is a list of guarantees that you make to the company as part of the agreement. If you breach these guarantees, the company can refuse to accept the record and you may be subject to the withholding of your royalties, a lawsuit, or the cancellation of your contract. Warranty clauses vary, but every one will require you to guarantee that none of the songs or artwork delivered to the company contains material that infringes any trademarks or copyrights, or will otherwise cause the company any legal troubles. If you deliver a master that contains an unlicensed sample, then the "warranties and representations" clause of your contract kicks in and the company can refuse the entire recording.

The contract will also stipulate specific "delivery requirements". If you hand over your master recordings and the company decides that these requirements are not met, it will refuse to accept the recordings. The typical requirement is that the masters must be "technically and commercially satisfactory". A recording is "technically satisfactory" as long as it sounds like a professionally produced piece of work, as opposed to something you recorded on a 4-track in your bedroom.

"Commercially satisfactory" is a much tougher standard. It means that the company thinks the record has potential for commercial success. If the company decides that the record probably won't sell, it can refuse to accept delivery and possibly cancel the contract. The company may also specify that it does not have to accept "limited market recordings", such as children's records or a Christmas album, and that you may not deliver any songs that you recorded before entering into the contract.

Can I maintain creative control over the recording and marketing?

COMING SOON

What is Tour Support?

"Tour support" is money that the record company advances to the band to cover any losses incurred on tour. Tours often end up costing more than they earn for newer artists, but because touring is necessary to promote your records and gain exposure in new markets, the record company may front some money to the band to keep it on the road. Recording contracts generally provide that tour support money is recoupable against your royalties, so ultimately the band will pay the entire cost of the tour.

Can I still appear on a friend's record?

Guest performances on other artists' recordings are called "sideman performances." Recording contracts require artists to record exclusively for their own labels, but the record companies allow sideman performances because the companies also benefit from guest appearances on their own artists' recordings. You can usually appear on a friend's record without dispute so long as you are not featured on the record. Your friend's label obtains a simple clearance from your record label and includes a "courtesy credit" on the album covers to acknowledge your label, such as "Jane Doe appears courtesy of XXXX Records." If you are in a group, multiple members may not be able to appear together on another artists' record, because your unique group "sound" is exclusively contracted to your own label.

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