

Preparing For Battle

Publishers, Songwriters Get Ready To Fight For A Share Of Unmatched Funds

BY WALLACE COLLINS

The stage is set for a brutal tug of war among major music publishing companies, indie publishers and individual songwriters over millions of dollars that are available under the National Music Publishers' Assn.'s late-fee settlement with the RIAA.

Under the settlement, the RIAA offered to turn over these funds to the NMPA in order to pre-emptively settle any claims against the four major labels for late fees on certain monies that had been held in what are known as "pending and unmatched accounts" for the years 2000-06 (Billboard, Oct. 17, 2009).

Most of these monies were related to cases where labels released albums before contractual agreements and splits among songwriters had been finalized, sometimes prompting the labels to withhold payment of royalties on all compositions on an album, even when only one song's splits were under dispute. The settlement establishes a fund of up to approximately \$285 million to be distributed among music publishers based on market share, rather than based on the actual amounts owed to publishers.

As a lawyer who represents songwriters as well as independent music publishers, I have serious concerns about the hurdles they will face in getting their fair share of the funds. For starters, all interested parties need to know that this is an "opt in" arrangement: If you want your share, you must make a claim within the next few weeks or face the prospect of losing it.

The NMPA has designated Kenneth R. Feinberg as "special master" to administer the distribution of the settlement funds. Feinberg, who administered the Sept. 11 Victim Compensation Fund and the TARP bailout for the U.S. Department of the Treasury, has been notifying publishers and songwriters who own a share of their publishing about applying for their respective share of the settlement.

Feinberg will make a market-share determination in order to calculate the amount due each claimant and, if the respective claimant accepts the amount offered, then that publisher is precluded from pursuing the record companies on the claim. No doubt, there will be a feeding frenzy among major music publishers and the various parties vying for a piece of the pie.

Many of my indie publishing clients are concerned that, as is often the case,



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major publishers may try to game the system by laying claim to more than they are entitled to. The NMPA/RIAA arrangement requires that any such disputes must be resolved between the parties, and the leverage in such a situation will surely favor the big guy.

Another looming pitfall of the settlement for indie publishers: Because the \$285 million is being allocated by market share, many major publishers that in some cases have already collected what they were owed during the relevant years may be paid twice, while indie publishers and songwriters who were never paid before and thus can't claim any market

share could be short-changed again. Also under dispute is who gets paid if a song's ownership or administration has changed since it was first published.

Most of the unpaid funds originated in R&B and hip-hop, where there's often a multitude of writers and publishers claiming not only a share of writing credits but credits for samples as well. Songwriting credit disputes are much less common in pop and country music where one or two writers usually compose a song. Urban artists and publishers will need to be especially vigilant to assure that they get their fair share of the settlement monies from their respective publishers.

Each songwriter will need to pursue his or her publisher for a share of what the publisher collects from the NMPA settlement. Otherwise, there's a strong likelihood that publishers will simply hold the monies they collect in their "pending and unmatched accounts" indefinitely, just as the labels had done previously.

If a songwriter isn't satisfied with what his or her publisher offers, the songwriter is free to pursue further claims against a label—but such a process would be overwhelmingly costly and time-consuming for most songwriters. The best alternative for many of them is to contact their publishers now and let them know they're aware of the NMPA settlement and keep making noise so that the publishers will be motivated to calculate and pay each songwriter his or her share.

The late-fee settlement isn't perfect by any means, but it does make available \$285 million for songwriters and publishers that wasn't accessible before. In some respects, it will be a classic David-and-Goliath battle pitting indie publishers against the majors and songwriters against publishers. Through it all, songwriters need to be especially vigilant, even if it means pestering their publishers to get their fair share of the pie as the feeding frenzy begins.

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