

# 11|SB



## Maintaining the Status Quo

Record Royalties: Protecting and Claiming your Share

Robert Deacon

1. In the sixties and seventies bands were formed with much less formality than they are these days. Recording royalties were a major source of income and bands with proven success commanded large advances and increasingly generous royalty shares. Often little thought was given to what should happen to this income if the band split or members left. Former band members have found difficulty getting continuing band members to pay over back catalogue royalties and have found themselves short changed. Such claims are often difficult to formulate and they become stale. Delay may eventually prove fatal. Many issues arise in such claims not least how to fund them in the courts.
2. In a recent case involving Status Quo<sup>1</sup> a claim was made by two former band members (Alan Lancaster and John Coghlan) for payment of back catalogue royalties primarily against the two continuing band members (Rick Parfitt and Francis Rossi). The claims were essentially in respect of Pye royalties (going back to the sixties) and Phonogram royalties (going back to the seventies). The Pye contracts were relatively unsophisticated and made direct with individual band members. As the band became more successful the contractual arrangements became more sophisticated and during the time the Phonogram contracts were made the band's corporate vehicles came into the picture. The contracts made direct with individual band members "merged" with contracts made with the corporate vehicles.

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1 *Lancaster v Handle* [2007] in which I acted on behalf of the Claimants Alan Lancaster and John Coghlan.

3. At the end of the trial the Pye royalty claims were upheld and it was declared that the royalty shares belonging to the Claimants were held by the continuing band members on a class 1 constructive trust. As a result of this finding the limitation period was disapplied and royalties going back to the eighties were held to be recoverable. This bulletin is about the sort of problems likely to be faced pursuing back catalogue royalty claims in those cases where former band members have direct contracts with the record company and find, having left the band, they are not receiving their royalty share. A number of broad issues need to be considered in making such claims particularly:
  - a. The contractual arrangements with the recording company.
  - b. The ownership of the copyright in the sound recording.
  - c. The contractual arrangements, if any, within the band.
  - d. The contractual arrangements governing the departure from the band.
  - e. The contractual arrangements for recoupment of advances to the band.
  - f. Limitation issues.
  - g. Funding issues.
4. Back catalogue royalty claims are essentially contractual and the contract with the record company is the obvious starting point. A distinction must

be drawn between contracts where band members perform in the studio in return for remuneration from the record company and contracts where the band itself (or one of its companies) acts as producer producing recordings, providing masters and assigning or licensing sound recording copyright to the record company. This latter type of contract usually fits in as part of a complex contractual and corporate structure where the companies rather than the individual band members are entitled to the income.

5. We are primarily concerned with contracts where royalties are paid by the record company in consideration for the band members having performed in the studio on the recordings. The level of remuneration is usually dependent on the ultimate success of the album being recorded. Since the record company owns copyright in the sound recording no question of copyright assignment or licences arise. The band is paid for performing in the studio and the recordings are produced and owned by the record company. Sometimes the band members will have produced and, therefore, own the copyright in the sound recordings. In those cases different issues will arise.
6. Sound recordings<sup>2</sup> are defined for these purposes as recordings of the whole or part of a musical work from which sounds reproducing the work

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2 Section 1 (1) (b) of the Copyright, Designs and Patents Act 1988 ("the CPDA").

or part of it are produced<sup>3</sup>. The first owner of copyright in sound recordings is the person who creates them <sup>4</sup>namely the producer <sup>5</sup>or “the person by whom the arrangements necessary for making the sound recordings are undertaken”. This sometimes difficult concept broadly means the entity or person directly responsible for having hired the studio and session musicians etc. to enable the recording to be made. Usually it is the record company but in borderline cases it is sometimes the producer is not easy to identify.

7. A sound recording is the fixation of a performance of a musical work. The property right which arises on fixation is a separate property right from the right in the underlying work or the rights in the performances which are the subject of the recording. Before recording starts it is necessary for the producer to ensure that these other rights are or will be cleared otherwise the recording cannot be exploited. The principal form of exploitation is selling physical copies of the recordings (formerly vinyl now CDs) and includes public performance of the sound recording and communicating and making the sound recording available to the public (downloads).
8. Record companies create or acquire the rights in sound recordings and are responsible for subsequent exploitation by selling the physical product to the public. This is about investment and risk. A big outlay is for the

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3 Section 5A

4 Section 9(2) (aa) and 11

5 S 178 CPDA

performers on the sound recording ie the recording services of the band. Given the level of investment record companies like to have exclusive rights to the performers’ entire recording output for the duration of the term of the contract and confirmation that it owns all rights in the physical recordings (as the first owner of copyright) and that any other rights are assigned over. Typical recording contracts make provision for performers to perform on or deliver a minimum number of recordings of performances for each contract period and contain option provisions for extensions to the period. They should make provision for what is to happen should the band split or if members leave. The record company might want continued exclusivity over continuing band members and even over individuals who have left.

9. In most cases under exclusive recording agreements bands receive advances against royalties which are usually recoupable but not returnable. They vary considerably. Successful bands look for large advances as an incentive to ensure record companies generate sales to recoup the advances. Whilst they continue to be successful bands are invariably “unrecouped” against advances. Back catalogue royalties are often made recoupable against fresh advances under new recording deals.
10. There may well be no back catalogue royalty income stream flowing until a band is recouped so back catalogue income, if it is not being currently paid, is easy to overlook when a band member leaves. When the band eventually becomes recouped and back catalogue income begins to flow

again former band members may well be forgotten. It is very difficult for former band members to discover whether the band is recouped against advances and if the band is enjoying a resurgence of popularity the potential royalty stream can be substantial.

11. The first issue to address is whether royalties are payable to individual band members, to the band as a unit or to companies owned by the band. Where sophisticated corporate structures are in place the principal band members normally hold shares in the companies and their shareholdings (often in off shore companies) will determine their respective entitlements.
12. Where group companies are not involved it is necessary to consider the entitlement of individual band members. They might each be contracting parties or, alternatively, one or two central figures may be signed up and the other band members employed to work alongside them and paid a wage for their recording services. Band members in this category are akin to session musicians and are not entitled to a share of the royalties
13. Individual band members who have a direct entitlement to a share of royalties under the recording contract may have received them as personal income or have treated them as partnership income. If royalty income is personal to band members they should to continue to receive it after leaving the band. Those who receive such income (usually the continuing band members or their companies) should account to the former band members who are entitled and are liable to be sued on the basis of

trusteeship if they fail to do so. A contractual claim might also lie directly against the record company. If the record company has paid the band it is likely to have discharged its liability for past royalties at least<sup>6</sup>. It is important to ask the record company to put a block of paying over royalties to the continuing band at least in respect of the former band member's share.

14. Where equal band members are in an informal relationship there is usually a partnership between them governing assets and income. Absent contrary agreement partners share equally and the provisions of the Partnership Act 1890 apply to them. If there is a split or a member leaves something must be done about the partnership. There are several possibilities:
  - a. The departing member retires and the existing partnership continues for all purposes.
  - b. The existing partnership is dissolved and a new partnership comprising the continuing members takes over for the future.
  - c. The existing partnership is not dissolved but nevertheless a new partnership comprising the continuing members takes over for the future. The original partnership in such cases continues to be entitled to back catalogue royalties.

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<sup>6</sup> Payment to one of a number of joint creditors discharges the debt.

15. In cases of retirement back catalogue royalty rights should be dealt with under the terms of any retirement agreement. The departing partner may have been paid off and relinquished the right to a share of partnership income. This is often in return for an indemnity in respect of obligations under the current recording contract.
16. In cases of dissolution the affairs of the partnership should be wound up and dissolution accounts taken. Back catalogue royalties should be dealt with in the winding up and provision made for distributing the income when it is received in the future. Not uncommonly band members leave without thought being given to dissolving the partnership which consequently continues in existence (although not active) and continues to be entitled to back catalogue royalties. In this situation there are two partnerships running in parallel: one (non active) comprising the existing members and one (active) comprising the continuing members. A strict division should be made in the books between the two quite separate income streams (ie back catalogue and current catalogue) because those entitled to the monies are not the same individuals. The key to this is the principle that partnership members who receive monies belonging to other partners owe them strict fiduciary duties to ensure the monies are paid over to those entitled and are not allowed to keep them.
17. Band members usually have continuing onerous obligations to fulfil under the current record contract and usually advances remain unrecouped for long periods of time. Departure agreements concentrate on current

contracts and little thought is given to the back catalogue. Departing members probably want a clean break with the continuing group which usually means a lump sum and a release from obligations under any current recording contract in return for relinquishing a share of back catalogue royalties. A clean break obviously should end the departing member's right to the back catalogue royalties.

18. If a band is unrecouped and there is no flow of royalty income not surprisingly little attention is given to the back catalogue income by departing members. There may be no departure agreement at all or nothing at least dealing expressly with the back catalogue. Years down the line when the advances are recouped and back catalogue royalty income starts to flow the continuing band members have a windfall particularly where the band is enjoying a resurgence in popularity. Former band members might not know or be told about these royalties and years may pass. Limitation and laches issues arise in relation to any potential claim.
19. Two provisions of the Limitation Act 1980 may become important<sup>7</sup>. The time limit for actions founded on a simple contract is six years and the same period applies for a claim for an account based on contract<sup>8</sup>. Leaving aside any allegation of fraud or mistake:
  - a. Section 21 provides that no limitation applies to an action to a

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7 See sections 21 and 32.

8 Sections 5 and 23 of the Limitation Act 1980

beneficiary under a trust to recover trust property or the proceeds of trust property in the possession of the trustee or previously received by the trustee and converted to his use.

- b. Section 32 provides that where a fact relevant to a claimant's right of action has been deliberately concealed from him by the defendant the period of limitation shall not begin to run until the claimant has discovered the concealment or could with reasonable diligence have discovered it (and for this purpose deliberate commission of a breach of duty in circumstances in which it is unlikely to be discovered for some time amounts to a deliberate concealment of the facts involved in the breach of duty.

20. To determine whether or not the recipients of the back catalogue income stream are within section 21 it is necessary to show that they are trustees of the monies. Trust in this context can include express, implied and constructive trustees. Claims against continuing band members for a share of back catalogue royalties will involve establishing that the royalties are held on a class 1 constructive trust that is to say:

*"A constructive trust [which] arises by operation of law whenever the circumstances are such that it would be unconscionable for the owner of property ...to assert his own beneficial interest in the property and deny that of another...the constructive trustee really is a trustee...He does not receive the property in his own right, but by*

*a transaction which both parties intend to create a trust from the outset, and which is not impugned by the [claimant]"*<sup>9</sup>

21. The reason why the limitation period does not run against such a trustee is that:

*"...the possession of an express trustee is never in right of his own but is taken from the first for and on behalf of the beneficiaries. His possession was consequently treated as the possession of the beneficiaries, with the result that time did not run in his favour against them...The rule did not depend of the nature of the trustee's appointment and was applied to trustees de son tort and directors and other fiduciaries who, though not strictly trustees, were in an analogous position who abused the trust and confidence reposed in them to obtain their principal's property for themselves. Such persons are properly described as constructive trustees."*<sup>10</sup>

22. In the Status Quo case the judge accepted that the back catalogue Pye royalties came into the hands of the continuing members of the band impressed with a trust from the outset and with an obligation to distribute to the band members who were entitled to a share. The judge found that the pre-existing trust like obligation on the continuing band members arose out of the joint ownership and quasi-partnership of the band

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<sup>9</sup> Millett LJ in *Paragon Finance v Thakerar & Co* [1999] 1 AllER 400.

<sup>10</sup> Millet LJ in *Paragon Finance ibid.*

members. The judge also found that the continuing band members either still held the relevant monies as trust property, or they had spent them, which was a conversion for the purposes of sub-section (b). Either way no period of limitation was held to apply and a declaration was granted that the monies were received by the continuing band members on a class 1 constructive trust for and on behalf of the Claimants.

23. In the Status Quo case the court rejected the defence that the Pye royalties were partnership or corporate monies and held that the Claimants were individually entitled to them. The defence that each Claimant had relinquished his right to Pye royalties on leaving the band as part of the departure terms was also rejected as were the limitation and laches defences.

### **Robert Deacon**

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Robert has broad experience in chancery, commercial and business related civil litigation with specialist knowledge in intellectual property and media and entertainment. His expertise extends to banking and guarantees, partnership, construction, fraud and asset tracing and professional negligence. Primarily known as a litigator he has undertaken many heavily contested often high profile trials and devoted a substantial part of his practice to specialist advice work. He is an experienced interlocutory litigator particularly in relation to freezing and search orders and other interim remedies.



His intellectual property practice ranges from trade marks to copyright, patents and design right work and he has extensive experience of defamation and privacy claims. He has chaired and for some years delivered lectures at the annual intellectual property law and sports law conferences for London Legal Training. His lecture topics have included privacy and image rights, performers' rights, performers' royalties, database rights and freedom of movement of goods.

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11 Stone Buildings  
Lincoln's Inn  
London WC2A 3TG

T 020 7831 6381

F 020 7831 2575

[clerks@11sb.com](mailto:clerks@11sb.com)

[www.11sb.com](http://www.11sb.com)