

MUSIC LAWYERS

IF YOU HAVE ACHIEVED ANY LEVEL OF SUCCESS IN THE MUSIC BUSINESS, YOU KNOW THAT YOUR QUALITY OF LIFE IS GREATLY INFLUENCED BY THE QUALITY OF THOSE AROUND YOU WHO LOOK AFTER YOUR BUSINESS AFFAIRS. THESE DAYS, YOUR MUSIC LAWYER IS AN ESSENTIAL PART OF THAT TEAM. THIS CHAPTER IS INTENDED TO HELP YOU SELECT YOUR MUSIC LAWYER AND BETTER UNDERSTAND WHAT THEY DO, HOW THEY CHARGE, WHAT YOU EXPECT OF THEM AND WHAT THEY CAN EXPECT OF YOU.

CHOOSING YOUR MUSIC LAWYER

Not very many years ago, music lawyers were 'general' practitioners. We were trained to believe that if we were given the facts, we could find out the law and apply it. These days, things have changed. Commercial lawyers have become much more specialised.

There are a few commercial lawyers who are all-rounders, but most find themselves doing one or two sorts of work more than others: taxation, bankruptcy and liquidations; mergers and acquisitions; banking and finance; insurance; superannuation; intellectual property; media and so on. These days, practising commercial law requires more and more specialist knowledge and thus a narrower scope of academic knowledge and business experience. There are now armies of besuited and neatly-groomed men and women who wouldn't know much at all about practice areas that are outside their strict area of expertise.

With this increased specialisation it is perhaps not surprising that there has been a change in the relationship between client and lawyer. We were taught at law school that it was our job to give legal advice and not commercial advice. Indeed, at one time it was considered unethical to advise whether or not a deal was a good one. That was for the client to decide upon alone and it was the lawyer's job to strap it up if the client decided to proceed.

These days, specialty-specific lawyers have become (for better or worse) an integral part of the commercial decision-making process. Of course, they still advise on the potential legal pitfalls of a deal but increasingly their advice is sought about the deal's commercial terms. This makes sense, because your specialist lawyer will probably have done many of these sorts of deals before

and can therefore be expected to know not only how they work but also to be familiar with the going market conditions.

The best way to choose lawyers is to talk to people who have used them. Don't choose them for their smile or because they went to school with your sister or because they have a fabulously decorated office. You need someone you feel comfortable talking to, someone you feel able to trust and someone who is expert in your area of need.

No one lawyer can fulfil all of your legal needs. If your lawyer suggests otherwise, you need a new lawyer. Good lawyers will tell you when they do not have expertise in your area of need and will refer you to someone they know to be expert. It is only common sense that most lawyers have a wide range of contacts in their profession and if they don't know the right person, they probably know someone who does.

FINDING YOUR MUSIC LAWYER

Choosing your music lawyer is no easy task. These days, with the huge degree of speciality, not even all entertainment lawyers work in all areas of the entertainment industry. A film lawyer may hardly ever do record deals, another who does a lot of theatrical work may not have much experience in publishing and so on. Some are all-rounders and others are more specialised.

The best way of choosing which entertainment lawyer to approach is by recommendation. Talk to your colleagues and contacts in the business. Find out who they use, what sort of work the lawyer has done for them and if they are happy with the service they have had. If the lawyer sounds right for you, ask a couple of other people for their opinions. Not only lawyers improve with experience, so do their clients!

Once you have selected your prospective lawyer, make an appointment to meet. If you intend this meeting to be an interview to make your mind up, make this clear when you make your appointment. Ask if you will be charged for the meet and greet time. Most charge for it. Some do not. If they do not, it is hardly fair to then use the time to ask for specific advice when you meet. If they will be charging you, draw up an agenda for them, so that you can make the best use of the time in the meeting and cover the topics you want to discuss.

Remember that your music lawyer is not a designer accessory. You don't have to like his or her decor or hairstyle. That can be easily bought. You need a lawyer who is approachable, trustworthy and expert.

WHAT MUSIC LAWYERS DO

CONTRACT ANALYSIS, ADVICE AND NEGOTIATION

Your first meeting with your music lawyer will probably come about because you have been offered (or want to be offered) a recording, publishing or management contract. You are probably excited by the prospect that your career is about to enter a new phase. You want to sign but you don't know if the deal is a fair one, or whether it can be improved by negotiation.

You can almost guarantee that any contract you are offered can be improved by professional analysis and negotiation. Just remember that if your career is a failure, the terms of your contract probably won't matter. But if you are a success, a contract entered in your early days, in haste and without advice, will cause you grief.

No one can legitimately object to you taking a potential deal to your lawyer for advice. Most record companies and publishers will insist on it. Getting advice will not blow the deal. Music lawyers are in the business of making deals, not wrecking them!

As a general rule, don't sign any contract in the music business unless you get expert advice first. The document that seems straightforward to you may not be as benign as it looks. This is not the voice of paranoia. It is experience learned from hearing many clients over many years complaining about having entered deals that looked all right at the time. There are two reasons behind this advice. First, very few non-lawyers, particularly at the beginning of their careers, have the training to fully comprehend the legal (and thus professional) consequences of apparently simple contractual terms. Secondly, consider the old adage – 'A lawyer who does his own legal work has a fool for a client' (and a fool for a lawyer). It is very difficult to analyse a deal in which you are personally involved. Your conscious and subconscious desires and needs interfere with your judgement too easily.

When asked why they entered a deal without getting expert legal advice, many young musicians respond that they couldn't afford the advice. The reality is that they couldn't afford not to. Remember that it will cost you less money in legal fees to get into a deal, than to fight your way out of one. It may be little solace but, if you can't afford to get proper advice, you probably can't afford to do the deal!

CONTRACT DRAFTING

One of the most important skills of any successful entertainment lawyer should be the ability to draft a tight and unambiguous contract. If they can do it succinctly and in reasonably simple English, so much the better.

Many clients seem to believe that their lawyer has a bundle of ready-made documents in the computer and that they simply press Button B and out comes the contract. If only it were so easy! Those same clients are then surprised at the amount they get charged for what, to them, seems like such a simple process.

Without doubt, your lawyer will have an extensive precedent base of earlier-prepared documents. These precedents are the backbone of the business. After all, no one wants to rethink and re-draft every document from scratch. It would waste time and would be very expensive for clients indeed. Although it may sound like lawyers making excuses, it is largely true that there is no such thing as a standard contract. Precedents are not standard contracts, they are models that you have shaped from other contracts and that you may use to create your next one.

No deal is the same. Why? Because no two parties are the same – either in personal or professional characteristics. The proof is simple: most music lawyers enjoy drafting agreements. If it were as straightforward as merely selecting the right precedent, it would soon become routine and boring. Instead, most are intrigued by the challenge of articulating the needs of the individual parties in such a way as to reflect accurately the practical needs and desires of their client.

GENERAL ADVICE

Many musicians who do not have a manager use their music lawyers to fulfil some of that role. They seek career advice, not just legal counsel. Because lawyers work so extensively in the industry they are generally well informed about the opportunities, the deals and the players. If the benefit of this is something your lawyer is prepared to offer (and is something you are prepared to pay for), so much the better.

Your lawyer can assist you with the structuring of your business and advise as to the other members that you may need on your team, such as a competent accountant experienced in the music industry to handle your financial affairs.

Because of their wide range of contacts in the industry, established music lawyers can be very helpful in sourcing a deal. That said, none of them really enjoy shopping demo recordings. Some will not do it at all (on the basis that it is not strictly a part of a lawyer's function). Of those that will agree to shop a deal for you, most will only agree if they really believe in the potential of the product.

You may be incredibly talented, but if you expect to use the reputation and contacts of your lawyer to promote your own commercial opportunity, you must realise that lawyers will expect to be paid for their efforts and the use of their reputations. Almost certainly, you will be asked to put some money into the firm's trust account before any shopping expedition will be undertaken.

WHAT LAWYERS COST

Like most specialists, entertainment lawyers are expensive (but then, so are good mechanics and anyone else who provides professional advice). In your first interview (or even when you make the first appointment) you should always ask about the basis upon which you will be charged. The methods of charging are fairly standard.

THE HOURLY RATE

Most Australian entertainment lawyers charge an hourly rate. At time of writing this is generally between \$350 and \$550 an hour for senior lawyers. Employed solicitors cost less per hour than partners in the same firm. And don't forget, there is 10% GST to be added to the hourly rate.

Of course, not all of your money is going into your lawyer's pocket. The cost of buying and maintaining all the ancillary support (e.g. premises, staff, computer and communication equipment, etc.) will probably be running at 40% to 70% of gross billings and bad debts probably account for another 5% to 20%. In most practices, the 'hourly rate' includes all the support staff's time as well, so you do not get charged for secretaries' time as a separate item. It would be easy to bill it as a separate item, as some accountants do, but it is not usual practice for lawyers.

You should also ask how the hourly rate is calculated. Most lawyers divide up their working day into units of six minutes each. The unit is the minimum chargeable time for any work done on your behalf. This means that if you ring your lawyer for three minutes you will be charged one unit, if you talk for ten minutes you will be charged two units. It is not hard to work out that it is going to be cheaper to use someone who uses six-minute units rather than 10-minute or even 15-minute units!

Remember that you will be charged for all attention that you or your matter requires. All of the time that is taken up by you and your affairs is time that they cannot spend on some other client's paying work. If you communicate with your lawyer (whether in person, on the telephone, or by letter), expect to be charged. If your lawyer has to communicate to others on your behalf, expect to be charged. If your lawyer has to shop demos, attend meetings, negotiate, research, draft documents or travel, expect to be charged. Lawyers who use a time billing method have to keep very meticulous records of all of this because all they have to sell is their time.

On top of this you are likely to be billed for all disbursements. These are any expenses incurred on your behalf. These will include filing fees, barristers' fees, service agents' fees, travel costs, and perhaps even photocopying, postage, metered calls, couriers and the like.

ESTIMATES

You should always ask for an estimate of the likely cost of the work that you want done. (In New South Wales, lawyers are obliged to provide this in writing.) Remember that this can only be an estimate – an estimate is not a fixed quote. It is a guide based on the lawyer's experience of those particular types of deal. As the deal progresses, the individual circumstances of the transaction often mean that the estimate will need to be revised.

THE CAPPED FEE

Music lawyers are often asked to quote a capped fee, but few will work this way because they all know that if something that is completely out of the hands of the lawyer goes unexpectedly off-track, and it requires a huge amount of work to salvage, they will lose money on it. You don't have to be too bright to realise that, after a lawyer has been caught like this once, he or she is going to be gun-shy next time.

For this reason, when you demand a firm quote from your lawyer, realise that you are going to be paying a premium. There will be a premium built into the quote to cover unforeseen contingencies. So, the downside is that if everything goes very easily, you will have paid more than you would have had you used an hourly rate. On the other hand, you are secure in the knowledge that the amount is capped and that you can afford it. The all-in fee is a difficult gamble for both parties.

Capped fees are never used in litigation because, in anything more than the most banal cases, it is impossible to estimate accurately the twists and turns of the case and the tactics of your opponent. What looked hard may prove easy. What looked simple can turn into something like trench-warfare.

SUCCESS FEES

A few lawyers charge success fees. They charge an hourly rate but then charge an additional fee based on some predetermined indicator, such as the value of the advance on royalties. This is considered professionally unethical in some parts of the country but is permissible in others.

In day-to-day deals this is not recommended. There are a lot of very skilled music lawyers who will do the job for the hourly rate with the same degree of care and attention whether the advance is for one thousand or one hundred thousand dollars.

PERCENTAGES

Although it is common practice in the United States, it is unusual in Australia for lawyers to work on a percentage basis. Indeed, in some states it is still illegal. Many lawyers in the United States will charge 10% (frequently more) of the particular deal's worth (e.g. advances) and many charge 5% of all gross income earned over the life of the deal!

The exception to this in Australia is in larger, corporate start-up transactions. In these situations it is increasingly common for the lawyer to be offered shares or options in the company in order to ensure an ongoing relationship. It is a way of bonding the team from the outset and making sure that the key players share in the success that they help to build.

PAYING THE BILLS

The best way of souring your relationship with a lawyer is not to pay the bill. If you have a complaint about the bill, raise it as soon as possible after you receive it. You have every right to demand an itemised bill (unless you have agreed to an all-in fee). You will find that your lawyer is more than happy to discuss the bill, explain the charges and fix any errors. Some lawyers work on payment within 14 days and others within 30 days.

If you can't afford to pay you shouldn't have spent the money you didn't have or couldn't find. Don't just ignore the bill and hope that the lawyer will lose interest in it. Call and explain that (and why) you can't pay it all at once and try to work out a reasonable regular schedule of payments. The key words here are reasonable and regular. It is pointless paying off a bill of \$6000 at \$50 a month. It'll take ten years! What's more, the loss of interest on the money and the cost of administering the account mean that in such an arrangement the lawyer is losing more than you are paying.

If your lawyer does agree to a regular schedule of payments, walk over broken glass to make sure that you keep to the agreed schedule. Every music lawyer understands that a client's ability to pay sometimes lags behind the need to retain legal advice. If the lawyer has worked for you in good faith, you will keep that good faith by ensuring that your instalments arrive like clockwork. As soon as the lawyer has to chase you to make payments, you lose face and the lawyer loses interest in you.

COMMUNICATION

Keep in touch with your lawyer. Call, write, inform, discuss, then having made sure that you have got the advice you need, make your own decisions. Remember that lawyers are not blessed (or cursed) with telepathic powers. They can't help unless you involve them fully in your business dealing. The

best money you will spend in a lawyer's office is getting into a deal; the worst is in trying to get out of a deal.

Although all of this communication costs you money, you can minimise the cost by making sure that you are as organised as possible. Instead of sitting in your lawyer's office and recounting the facts and having the lawyer laboriously write it all down in front of you, write out all the details before you come to the meeting. Preparation helps you get your money's worth.

CONFLICTS OF INTEREST

A lawyer has a legal and professional duty to disclose any conflict of interest. Having competing interests is not in itself either illegal or unethical. Having such competing interests might be unwise, and it is a situation that certainly can be abused, but the important thing is that the competing interests are disclosed. Only then is a client in a position to say, 'I need independent legal advice', or 'I don't mind if you work for both of us, but I'll remember that you do and take that into account when assessing your advice to me'.

All of the major music lawyers have both companies and talent on their client list. This can benefit the client because the lawyer will have a good understanding of the attitudes and needs of both parties. It also means that the lawyer's range of contacts in the industry will be useful in sourcing deals. Lawyers are often commercially attractive to new clients because of, rather than in spite of, their existing clients – and the consequent potential for deal-making.

For their part, companies like to know that their lawyers still act for talent because then they are more likely to be offered the first chance to sign the available talent.

Conflicts of interest are almost inevitable when the lawyer is the catalyst for the relationship between the parties. Imagine you are an established music lawyer. You are acting for a musician looking for a record deal. You also act for a record company. You call the A&R Manager or the Managing Director and tell them about your musician. They play the demo. They like it and want to do a deal. Another client, a film producer, tells you that she is looking for a composer to write and perform on the soundtrack of her next film; you believe that your musician client would be perfect for the job. You introduce the two of them and they decide to do a deal. The film producer wants a book done of her film. You act for a major publisher who you know is interested in this sort of project. You introduce them and they decide to do a deal. The musician now decides to get a publishing administration deal from a publisher. You act for a major publisher. You call them. They want it. Now the musician needs a publicist. Coincidentally you act for a couple of very good ones. You recommend them... and so it goes on.

To some extent, particularly in sourcing deals, this capacity for conflict of interest makes a music lawyer particularly useful. However, beware. The sensible and ethical lawyer will always make it clear in such transactions that he or she is acting for only one party at a time and that the others are not only free to get independent legal advice but should actually do so. Whether or not they do is their business. Most lawyers will put that in writing so that they are protected if anything goes awry later.

CHANGING LAWYERS

If you are not happy with your lawyer you have every right to find another one. It is important that you are able to communicate with your lawyer and have faith in his or her skill. Once either of these is missing, you might as well change lawyers.

Although there is nothing stopping you simply going to another lawyer and asking them to arrange for the files to be passed over, it is preferable first to contact your lawyer and discuss the reasons for your displeasure. After all, there may be something quite simple that can be rectified if it is discussed. No relationship, personal or professional, is without its low moments. Most can be sorted out. In any event most lawyers appreciate the courtesy of being told why the change is being made. If the lawyer doesn't know why it happened, how can he or she improve the quality of service?

If you do change lawyers, your previous solicitor can (and probably will) hold on to your files until you pay your outstanding accounts with the firm. Swapping lawyers is not a way to avoid paying your bills.

FREE LEGAL ADVICE

This sounds too good to be true. Well, it is and it isn't, as you will see.

Australia is very fortunate in having services that provide a range of free legal advice to performers and artists of all kinds. Some services don't actually give advice, but they will direct you to someone who can. They are referral services rather than acting as lawyers. Others can provide initial contract and negotiating assistance. Their legal advisers are either in-house lawyers or panels of lawyers from legal firms who volunteer their time and expertise. Union members can also contact their union for assistance.

Of course, there are limits to how much these services can do for one person or artist. Unfortunately, most of these organisations are, to a greater or lesser extent, dependent upon government grants and in these stringent times, none receive sufficient funds to enable them to provide all the facilities needed to run a legal practice. This is why, ultimately, they are not a substitute for musicians retaining their own legal advisers.

CONTACTS

Arts Law Centre of Australia, The Gunnery, 43 Cowper Wharf Road, Woolloomooloo, NSW 2000, tel: (02) 9356 2566, toll free: 1800 221 457, fax: (02) 9358 6475, web: www.artslaw.com.au

Arts Law Centre of Queensland, 4th Floor, 109 Edward Street, Brisbane, QLD 4000, tel: (07) 3211 3628, fax: (07) 3211 3758

Australian Copyright Council, 245 Chalmers Street, Redfern, NSW 2016, Web: www.copyright.org.au