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Copywrite is published  
quarterly by the  
Entertainment & Sports  
Law Section of the  
State Bar of Georgia,  
Suite 100,  
104 Marietta Street, NW,  
Atlanta, Georgia 30303.

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# OPENING OFFER

CONTENT MAY BE KING,  
BUT YOU HAVE TO CONTROL IT  
TO SIT ON THE THRONE  
BY J. MARTIN LETT

YOU may have seen the stories announcing Verizon's and Sprint's recent content deals with Shakira and T.I. These deals are examples of the promising and lucrative opportunities that mobile media offers the music industry: ringtones, mastertones, voicetones, ringback tones, wallpapers, custom games, and full song and video downloads. In the last few years, the number of ways that music lovers can experience music over their mobile devices has sky-rocketed; and as next generation broadband networks expand within the U.S., as they have in Europe and Asia, the opportunities and possibilities will expand as well. Nevertheless, as mobile opportunities grow for music and media content, the control of that content and the rights that go along with it will dictate who benefits from those opportunities.

Control over the content is what everyone wants. Publishers, record companies, recording artists, songwriters, and even the mobile service providers are seeking control over the content and the various revenue streams that arise from it. At a minimum, each party is trying to define, grasp, and protect its interest in the content. The struggles between record companies and their recording artists (or at least those artists that have any leverage to argue about

the issue) are indicative of the clashes that are ensuing in the early days of this quest for mobile media treasures.

The record companies, as generally the owners of master recordings and audiovisual recordings, are strongly positioned with the sale of mastertones, ringback tones, and full song and video downloads. Their right to license the sale of the masters in these new forms stems from the recording agreements they have with their artists, whether those agreements specifically address the sale of mobile and digital media or simply reference the ubiquitous “all media now known or hereafter developed” language that appears in virtually all recording agreements. The companies, however, are also aggressive about asserting rights (or at least claims) in the sale of voicetones, wallpapers, and other mobile media that rely on the name, likeness, or vocal performance of their recording artists.

So for lawyers that focus their practice on the representation of artists, it is imperative that you familiarize yourself with the economics of mobile media and what it means to your clients and to the record companies. Whether the issue is advocating for your client’s right to control the use of its name, likeness, or vocal performances; making sure your client receives its fair share of income derived from mobile sales of master recordings; or ensuring that your client’s share of income from mobile media is not cross-collateralized within the client’s recording deal—whatever the issue may be, the lawyer must be vigilant so as to protect and enlarge the coffers of the client’s kingdom. Long live the king!

J. Martin Lett is a partner with the firm of Register | Lett LLP. Mr. Lett has maintained a transactional practice for the past 9 years in the areas of music, entertainment, licensing, mergers and acquisitions, corporate structuring, and franchising. Mr. Lett represents nationally-recognized producers, songwriters, artists, independent record companies, entertainment executives, and businesses. He is vice chair of entertainment for the Entertainment & Sports Law Section of the State Bar of Georgia and he maintains his own MySpace page at [www.myspace.com/musicandthelaw](http://www.myspace.com/musicandthelaw). Mr. Lett’s e-mail is [jllett@njlawfirm.com](mailto:jllett@njlawfirm.com).



CONTROL OVER  
THE CONTENT  
IS WHAT  
EVERYONE  
WANTS.  
PUBLISHERS,  
RECORD  
COMPANIES,  
RECORDING  
ARTISTS,  
SONGWriters,  
AND EVEN THE  
MOBILE  
SERVICE  
PROVIDERS  
ARE SEEKING  
CONTROL OVER  
THE CONTENT  
AND THE  
VARIOUS  
REVENUE  
STREAMS THAT  
ARISE FROM IT.

–J. Martin Lett



## MINIMUM AGE REQUIREMENTS IN THE NFL AND NBA: A LEGAL REVIEW BY RICHARD SHEINIS

THE NBA and the NBA Players Association (NBPA) recently adopted a new collective bargaining agreement. One of the provisions of the agreement that has drawn public commentary is the new minimum age requirement. The agreement states that in order to be eligible for the NBA draft, a player must be one year removed from the graduation of his high school class and must turn 19 years of age during the calendar year of the draft. Foreign players must only meet the requirement that they turn 19 during the year of the draft.<sup>1</sup>

The rule comes on the heels of the Maurice Clarett case in which the NFL's draft eligibility rules were challenged. The NFL's rule is that no one is eligible for the draft unless they are three years removed from either their high school graduation or the graduation date of their high school class.

While much has been written regarding the social, moral and political implications of the NBA rule, the purpose of this commentary is strictly to address the legality of minimum age rules. The new NBA minimum age requirement is a departure from what had come to be accepted as just the way things were: Any high school player that chose to enter the NBA draft was free to do so. But it was not always this way.

In 1971, Section 2.05, in conjunction with Section 6.03, of the NBA bylaws provided that no person was eligible to be drafted until four years after he had graduated or four years after his original high school class had graduated. This rule was challenged by Spencer Haywood, who claimed it violated the Sherman Antitrust Act.<sup>2</sup>

Haywood was a junior college All-American during the 1967-68 season. In 1968 he led the U.S. Olympic basketball team to a gold medal. He played the 1968-69 season for the University of Detroit, where he was again an All-American. In 1969-70 he played for the Denver Rockets of the now defunct American Basketball Association. In 1970, Haywood signed to play for the Seattle SuperSonics of the NBA. Haywood's contract with the SuperSonics was disapproved by the NBA Commissioner on the grounds that Haywood was not four years removed from his high school graduation.

Litigation ensued with a federal district court ruling in favor of Haywood. The court found that NBA teams conspired not to deal with players whose high school classes were not four years beyond graduation. This concerted refusal to deal constituted a group boycott in violation of the Sherman Antitrust Act. And ever since Spencer Haywood broke down the four year barrier, drafting players who have completed four years of college has become the exception rather than the rule.

The NFL eligibility rules, on the other hand, barring college underclassmen from entering the draft, have been in effect in one form or another for many years. The original rules precluded a player from entering the draft until four seasons after his high school class had graduated. In 1990 the rule was shortened to three seasons.<sup>3</sup> The rule was challenged in 2004 when Maurice Clarett applied to be eligible for the 2004 NFL draft. Clarett, a running back for the Ohio State University football team, was prevented from entering the draft by the NFL's eligibility rule precluding any player from entering the draft unless three seasons had elapsed since his high school graduation. When Clarett was denied permission to enter the draft, he sought legal recourse. Clarett's suit alleged that the eligibility rule violated antitrust laws.

The NFL asserted that the rule was immune from the antitrust laws because it was the subject of collective bargaining between the NFL and the NFL Players Association (NFLPA).<sup>4</sup> Certain subjects of collective bargaining are exempted from antitrust law under what is known as a non-statutory labor exemption. The exemption is so named because it is inferred from federal labor statutes, which set forth a national labor policy favoring free and private collective bargaining. The exemption is intended to encourage good faith negotiations between employers and unions regarding terms and conditions of employment without fear of violating antitrust laws. In other words, some restraints on competition may be imposed through the collective bargaining process in order to allow meaningful collective bargaining to take place. When this non-statutory labor exemption is deemed to apply, the legality of the rule at issue is governed by labor law rather than antitrust law. Labor laws will generally allow an employer (NFL) and a union (NFLPA) to agree on certain aspects of employment that would not be allowed if the rule were governed by antitrust laws.

On motion for summary judgment, the district court ruled in favor of Clarett. The court stated that the non-statutory labor exemption did not apply. The eligibility rule was governed by antitrust law, not labor law. The rule was deemed to be an unreasonable restraint of trade in violation of antitrust law and the NFL was ordered to allow Clarett to enter the 2004 draft. On appeal to the the Second Circuit, the ruling was reversed. A review of the court of appeals' opinion is necessary for a full understanding of its decision.

Many of the terms and conditions of NFL players' employment are set through the collective bargaining process that occurs between the NFLPA and the NFL clubs. These

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terms and conditions of employment are deemed mandatory subjects of collective bargaining. Mandatory subjects of collective bargaining include wages, hours and terms or conditions of employment. The court of appeals found that the rules regarding eligibility for the draft were a mandatory subject of collective bargaining, as the rules relate to a condition of employment. As a mandatory subject of collective bargaining, the court stated that the NFL and its players union are free to agree on any rules affecting who can be considered for employment as long as those rules do not violate the federal laws prohibiting unfair labor practices or discrimination.

The court of appeals decision, therefore, hinges on the classification of the eligibility rule as a condition of employment and a mandatory subject of collective bargaining. If the rule is not found to be a condition of employment, it is not a mandatory subject of collective bargaining and is not protected by the labor laws. It would then be exposed to scrutiny under the antitrust laws.

The court found that the eligibility rule was a condition of employment because it served to protect the jobs of union members. The court cited two cases as support for the proposition that preserving jobs for union members is a valid function of unions in the collective bargaining process. A review of these two cases, however, shows that they do not apply to the NFL eligibility rule, which does not preserve jobs for union members.

The court cited *Fibreboard Paper Products Corp. v. National Labor Relations Board*<sup>5</sup> and *Intercontinental Container Transport Corp. v. New York Shipping Association*<sup>6</sup> for the proposition that it is within the province of unions to preserve jobs for union members and such preservation is a mandatory subject of collective bargaining. The court stated that since the number of jobs open to players in the NFL is capped by the number of teams in the league and the roster limits, eligibility rules preserve the jobs of those players already in the NFL.

*Fibreboard* and *Intercontinental*, however, did not involve rules that prevented a person from becoming a union member. They simply sought to preserve work for the union as a group. In *Fibreboard*, a union of maintenance workers sought to prevent Fibreboard Paper Products Corporation from contracting out its maintenance work. The union of maintenance workers was seeking to force Fibreboard to have its maintenance work done by union workers rather than by outside contractors. If Fibreboard were to contract out its maintenance work, the entire group of union maintenance workers would have been out of a job. The union was not seeking to have a class of individuals prohibited from joining the union. They only wanted to prevent the work performed by the union members from disappearing. The court found that Fibreboard could not contract out the work without bargaining with the union.

Similarly, in *Intercontinental*, a union representing the employees of steamships sought to preserve work for the

union members as a group. The case had nothing to do with what specific individuals would comprise the group of union workers.

In *Clarett*, the court stated that the NFL eligibility rules seek only to do what the unions in *Fibreboard* and *Intercontinental* sought to do, which is to preserve jobs for union members. But this is a mischaracterization of the NFL eligibility rules.

The NFL eligibility rules do not act to preserve jobs for union members. Firstly, *Clarett* does not seek to have the work currently done by NFL players—who comprise the union—move to some other group of players who are not members of the union. No matter who plays in the NFL each year, the players will still be members of the union. This is not a situation where allowing Maurice Clarett to enter the draft will result in the NFLPA, as a group, being pushed aside in favor of a group of players who are not members of the union.

Secondly, whether Clarett was in the draft or not, there is no shortage of college players seeking to earn a roster spot at the expense of a player already in the league. To say that Clarett is not eligible for the draft so that the roster spots of veteran players are protected is unrealistic and ignores the competition for roster spots that already exists in the NFL. The NFL eligibility rule does not preserve jobs for the union, as was the case in *Fibreboard* and *Intercontinental*; it merely dictates who may compete for those union jobs.

The court of appeals then justified the NFL eligibility rules by comparing them to union hiring hall arrangements, which have long been valid.<sup>7</sup> A hiring hall is a process whereby the hall is the sole source of employees for various employers in a particular field. The union hiring hall selects and refers applicants on the basis of factors such as seniority in employment, length of residence in the area and work experience. There is no discrimination or preference between those who are members of the union and those who are not. The hiring hall thus establishes a system of seniority rights and job priority. Since it pertains to a term or condition of employment, and is non-discriminatory, it is protected as a mandatory subject of collective bargaining.

The hiring hall arrangement is a far cry from the NFL eligibility rules. The hiring hall is non-discriminatory. It gives everyone an opportunity to compete for a job. The NFL eligibility rules discriminate against anyone not three years removed from high school. The NFL eligibility rule prevents a class of people from competing for a job. It ignores ability and work performance.

In the end, the court of appeals stated that the NFL eligibility rules are nothing more than an agreement between the employee (NFL) and the labor union (NFLPA) regarding the criteria a prospective employee must meet in order to be considered for employment. This is a condition of employment which is subject to labor law, not antitrust law. The court reasoned that allowing Clarett to have his case decided under antitrust law would provide an advantage to



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—Richard Sheinis

professional football players that is not available to transportation workers, coal miners, meat packers and the like.

The court neglected, however, to cite a single case where a term or condition of employment completely excluded an entire class of people based upon nothing more than age. Such a sweeping exclusion is not a condition of employment and does not serve to protect a source of work for union members. It is a discriminatory practice that is not a mandatory subject of collective bargaining. Since it is not a mandatory subject of collective bargaining, the eligibility rule must be evaluated under antitrust law and may not hide within the protective cloak of labor law. Once the artificial shield of labor law is removed, the NFL eligibility rule can be seen for what it is—a discriminatory and unlawful restraint of trade. The result should have been no different than the result in the *Haywood* case.<sup>8</sup>

So the new NBA eligibility rule should be viewed no differently than the NFL eligibility rule. Recent drafts have shown us that players directly out of high school are often successful in the NBA. The minimum age requirement is a discriminatory restraint of trade that cannot be justified as a condition of employment and cannot be shielded because it is included in the collective bargaining agreement.

#### Endnotes

<sup>1</sup> See [http://www.nba.com/news/CBA\\_050730.html](http://www.nba.com/news/CBA_050730.html)

<sup>2</sup> *Haywood v. The Denver Rockets*, 325 F. Supp. 1049 (C.D. Ca. 1971).

<sup>3</sup> See *Clarett v. National Football League*, 306 F. Supp. 2d 379 (S.D.N.Y. 2004), *rev'd*, 369 F.3d 124 (2nd Cir. 2004).

<sup>4</sup> The existence of a collective bargaining agreement is an important factor, which distinguished the *Clarett* case from the *Haywood* case. In *Haywood*, the eligibility rule was unilaterally imposed by the league. It was not the product of collective bargaining between the league and the players.

<sup>5</sup> 379 U.S. 203 (1964).

<sup>6</sup> 426 F.2d 884 (2d Cir. 1970).

<sup>7</sup> See *Clarett*, 369 F.3d 140-141.

<sup>8</sup> For a more exhaustive analysis of the NFL's draft eligibility rule as it existed in 1984, see Robert A. McCormick & Matthew C. McKinnon, *Professional Football's Draft Eligibility Rule: The Labor Exemption and Antitrust Laws*, 33 *Emory L.J.* 375 (1984).

Richard Sheinis is partner with Hall, Booth, Smith & Slover PC., where he is a member of the firm's sports law practice group. Mr. Sheinis has also been a Category III United States Cycling Federation (USCF) bicycle racer and an ironman distance triathlete. His e-mail is [rsheinis@hbss.net](mailto:rsheinis@hbss.net).

# IN RED LINE

## PRODUCTION AGREEMENT BETWEEN BAND AND PRODUCTION COMPANY BAND'S REDLINE BY SCOTT KENILEY

### Commentary

THE production agreement or as often referred to as a furnishing agreement is in essence an exclusive recording agreement with an independent, undistributed company sometimes owned or operated by a music producer. The concept of most production agreements is to sign an aspiring artist to an exclusive deal and “shop” the artist by and through the production company to a major record label wherein a separate exclusive record deal cloaked in the form of a “Distribution Agreement” is entered into between the record label and the production company for the exclusive services of an artist or artists. Production deals have been in existence for many years, but have significantly grown in popularity and acceptance as a result of the independent artist movement of the 1990s.

There are general concerns the practitioner should have when negotiating the agreement on behalf of the artist, but most importantly this practitioner is most concerned with the ownership of the master recordings if the production company is unable to secure “distribution.” To further explain: if the production deal expires on its own terms without a “distribution deal,” the artist may later attain a recording agreement with a record label on their own wherein the label will record, promote and release new masters and the production company will have the opportunity to release the old masters recorded under the production agreement and at the same time ride the wave of the record label’s marketing campaign and ultimately cause confusion in the market place. A current case styled *TVT Music vs. Rep Sales and DM Records D/B/A Critique Records* in the Southern District of New York is presently addressing a similar fact pattern. The alternative is for the artist or the record label to buy the masters to prevent that occurrence. Ultimately, through advances or recoupment, the costs will fall on the artist.

Agreement

As of May 8, 2006

Groovy Chicks

Re: Production Agreement

Ladies:

This "Agreement", when signed by Groovy Chicks ("Artist") and Getcha A Deal Productions ("Company"), shall confirm the material terms of the agreement between the parties with respect to the exclusive recording services of Artist.

In consideration of the mutual promises made herein and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties agree to the following terms:

1. Term:

(a) The Term of this Agreement shall be for an initial period commencing on the date hereof and shall end the later of (i) twelve (12) months after the initial commercial release in the United States of the First LP or (ii) ~~two (2) years~~ eighteen (18) months from the date hereof.

(b) Artist hereby grants Company three (3) irrevocable options to extend the Term for three (3) additional contract periods (each option period may be referred to individually as the "First Option Period," "Second Option Period," etc., or collectively as the "Option Periods") only to be exercised in the event that Company enters into a Label Agreement and Distributor has exercised their option rights. ~~The Option Periods shall be automatically exercised by Company unless Artist receives written notice from Company to the contrary prior to the expiration of the then current period, or, if exercised, written notice of termination at any time during the current period.~~ Each Option Period shall commence immediately upon the expiration of the then-current period and shall end twelve (12) months after the commercial release in the United States of the applicable LP. The initial period and Option Periods are collectively referred to herein as the "Term."

1A. Major Label Recording Agreement:

(a) The parties acknowledge that Company intends to seek an agreement ("Label Agreement") with a "major label" record company (i.e., a record company distributed by EMI, BMG, UNI, Sony or WEA) ("Distributor") or other record company mutually approved by Artist and Company to furnish Artist's recording services. Upon Company's entering into a Label Agreement, Artist shall execute an inducement letter with such Distributor.

(b) If Company has substantially negotiated (or is in the process of negotiating) a Label Agreement, the

Initial Period shall be extended until such negotiations result in the execution of a Label Agreement or until such negotiations cease with no intent of resuming the same. If such negotiations result in a Label Agreement, such Label Agreement shall be deemed to have been entered into during the Term hereof, and the Term shall be extended for a period co-terminus with the full term of the Label Agreement, including any extensions, options, renewals or substitutions, and Company shall at all times during the term of the Label Agreement be authorized to furnish Artist's services to the Label pursuant to the Label Agreement.

(c) Notwithstanding the foregoing, if any Label Agreement expires or terminates prior to the date on which it would have otherwise expired had the Distributor exercised all options thereunder, Company shall have the same number of Option Periods otherwise remaining as if there were no Label Agreement, or, in the event that Company has no further options remaining (i.e., Company has exercised its three (3) options), the Term shall be automatically suspended until the date Company enters into a new Label Agreement. In no event, however, shall any such suspension continue for more than twelve (12) months. If during such twelve (12) month period, Company enters into another Label Agreement, the Term shall be deemed extended under the same terms and conditions as contained herein for the entire term of such Label Agreement, including any renewals, extensions or substitutions thereof. Notwithstanding the foregoing, if on the date on which the Term would otherwise expire Company has substantially negotiated (or is in the process of negotiating) another Label Agreement, the Term shall be extended until such negotiations result in the execution of such Label Agreement or until such negotiations cease with no intent of resuming the same. If such negotiations result in another Label Agreement, such Label Agreement shall be deemed to have been entered into during the aforesaid suspension period. In the event Company obtains another Label Agreement, Artist agrees to execute a letter of inducement as described above.

(d) Nothing contained herein shall cause the Term to extend for a period in excess of the period permitted by applicable law, if any, for the enforcement of personal services agreements, but in the event this Agreement shall be deemed by a court of competent jurisdiction to extend for such excess period, this Agreement shall be deemed modified only to the extent necessary to conform the Term to that permitted by law, and as so modified this Agreement shall remain in full force and effect. Notwithstanding the foregoing, if the Term is still in effect at the time Artist has recorded eight (8) albums for Company hereunder, the Term shall expire upon the date such album is delivered and accepted by the major label.

## 2. Recording Commitment:

(a) One (1) full length studio album ("LP") per contract period (at least 35 minutes in length) (individually referred to as the "First LP," "Second LP," etc.) not to exceed the mechanical royalty Controlled Cap unless otherwise

HOWEVER, IF  
COMPANY HAS  
NOT SECURED A  
LABEL  
AGREEMENT  
DURING THE  
INITIAL TERM,  
ARTIST SHALL  
HAVE THE  
OPTION TO  
PURCHASE ALL  
MASTERS.

requested by Artist. All elements for the production of an LP, including, without limitation, the compositions to be embodied in the masters recordings ("Masters"), individuals rendering services in connection with the production and mixing of the Masters, including any third party producers, and the studios, times, and locations for the recording of Masters shall be mutually approved by Artist and Company; provided that Company's decision shall be final. Company owner producer is hereby approved as the producer for the recording of Masters. Each Master shall be subject to Company's approval, and upon Company's request, Artist shall re-record any recording until a Master satisfactory to Company has been delivered.

(b) All Masters recorded during the Term, from inception of the recording, and all reproductions and derivatives therefrom, together with the performances embodied therein, and all artwork created by or paid for by Company, shall be Company's property as a work for hire, and Company shall have the exclusive right to copyright such Masters and artwork in its name as the owner and author thereof, and to secure any and all renewals and extensions of such copyrights. In the event and to the extent that by operation of law or for any other reason the Masters are not deemed works for hire as provided in the immediately preceding sentence, Artist hereby assigns to Company all of Artist's right and title to the copyright in and to the Masters, and all renewals and extensions of such copyrights. However, if Company has not secured a Label Agreement during the initial Term, Artist shall have the option to purchase all masters for \$ \_\_\_\_\_ per master ("Master Price"). In the event that Artist enters into a Label Agreement after the Term herein expires and Artist has not bought or paid for said masters, Company shall sell masters to Artist at Masters Price plus ten (10%) percent. Company at no time shall commercially release masters within nine (9) months of any other releases by Artist and shall first consult with Artist prior to release.

(c) Company and its subsidiaries, affiliates, designees and licensees shall have the sole, exclusive and unlimited right throughout the world to manufacture, advertise and distribute Masters by any method now or hereafter known; to publicly perform such Masters; to edit the Masters; and to sell, transfer, lease, deal in or otherwise dispose of the Masters under any trademarks, trade names or labels designated by Company.

2A. Delivery Requirement: Artist shall deliver to Company all multi-track master tapes, stereo mixes, and digital files (i.e., Protools) or similar computer based digital recording files, with full documentation as to track content, software and plug-in versions used, and all back-up data in formats and configurations acceptable to Company. Artist shall timely submit to Company complete label copy, liner notes and credits (including complete and accurate writer and publisher credits), sequence and final timings, and all consents or clearances required by Company in relation to the use of the Masters hereunder (including, without limitation, any sample clearances and mechanical licenses in

form acceptable to Company with respect non-Controlled Compositions). It is further understood and agreed that Artist shall be responsible for and shall pay any and all costs, fees and expenses in connection with such licensing of samples, and that all such sums (including royalties), to the extent not paid by Artist, shall be recoupable by Company from any and all monies otherwise becoming due under this Agreement. Artist shall be responsible for furnishing the services of producers of the Masters (other than for the services of any in-house or Company shareholding producer), and shall secure and timely deliver to Company necessary union forms (if any are legally or logistically required) and immigration clearances for all persons performing services in connection with Masters. Without limiting the generality of the foregoing, Artist shall deliver to Company the names and addresses of the publishers of all non-Controlled Compositions.



PARAGRAPH  
4 (C)  
IDENTIFIES  
PERCENTAGES  
PAYABLE TO  
THE COMPANY  
FOR TOURING  
AND MERCHAN-  
DISE SALES.  
ALTHOUGH  
THIS IS UNCON-  
VENTIONAL,  
THE CONCEPT  
IS BECOMING  
MORE  
POPULAR AS  
AN "OUTSIDE  
THE BOX"  
SCOPE OF  
AGREEMENT.

3. Recording Advances/Budgets:

(a) With respect to the First LP, Company shall pay Artist a non-recoupable signing bonus of One Thousand Five Hundred Dollars (\$1,500.00).

(b) Artist shall record each LP pursuant to a recording budget approved in advance by Company. Artist shall be responsible for all costs in excess of the applicable recording budget and, to the extent Company pays any of such costs, Company shall have the right to demand reimbursement therefor from Artist and/or Artist may deduct such amounts from any and all monies otherwise payable to Artist hereunder.

3A. Additional Advances: If Company pays Artist an advance against Artist's share of Net Receipts, provides so-called "tour support" for Artist, or engages the services of independent promoters or marketing or publicity consultants in connection with the promotion, marketing or publicity of records hereunder, Company's expenses shall constitute "Advances" to Artist, and shall be recoupable from Artist's share of Net Receipts and any and all other royalties accruing or becoming payable to Artist pursuant to this Agreement. Independent promoters shall be recouped at fifty (50%) of actual expenditures. The expenditures referred to in the preceding sentence, if any, shall be within Company's sole discretion.

4. Compensation:

(a) Provided that Company receives monies "all-in" of Company's and Artist's share of Net Receipts (and Artist is not paid its share direct), Company shall pay Artist ~~Fifty percent (50%)~~ Sixty (60%) Percent of Net Receipts received by Company from the exploitation of the Masters embodied on the first three (3) LPs recorded hereunder, and ~~Sixty Seventy percent (60/70%)~~ of Net Receipts received by Company from the exploitation of Masters embodied on any LPs recorded thereafter, inclusive of all royalties payable to Artist, including mechanical royalties for Controlled Compositions. "Net Receipts" is defined as all advances, royal-

-Scott Keniley

ties, and other sums actually received by Company from the exploitation of the Masters and records derived therefrom LESS any costs incurred by Company in connection with the Masters, including, without limitation, recording, production (including producer or other third party fees and royalties), union fees, mixing, mastering, manufacturing, packaging, exploitation, distribution, or other similar costs ("Incidentals") paid by or charged to, or recoupable from, Company (or Artist as may be applicable), taxes, mechanical royalties for non-controlled compositions and attorneys' fees and expenses associated with the negotiation and administration of contracts with respect to the Masters. Artist's share of Net Receipts shall be prorated for Masters coupled with other recordings and for Masters jointly recorded with other artists. Artist's share of Net Receipts shall be subject to the recoupment of any and all Advances paid to Artist under this or any other agreement with Company. Recoupment of Company Advances shall not comprise of more than Twenty-Five (25%) percent of Advances or all in recording budgets after Incidentals.

(b) In the event that Company is engaged to produce Masters under the Label Agreement, Company and Artist shall negotiate in good faith the terms of such producer agreement; provided that the producer royalty shall not be less than ~~four-Three~~ percent (~~4-3~~%) of retail (or equivalent) computed retroactively to the first record sold after recoupment of recording costs at the net artist rate on an album-by-album basis, and a producer advance shall not be less than ~~Fifty Thousand Dollars (\$50,000.00) or Five-Thousand Dollars (\$5,000.00) per Master~~ Producer's standard ongoing rate plus Ten (10%) percent for each Master recorded and approved under Label Agreement, whichever is less.

(c) Artist shall pay Company five percent (5%) of (i) gross income earned and received by Artist from touring and live performances, less reasonable, out-of-pocket costs paid by Artist for production, sound and lights in connection with such live performances, and (ii) gross income earned and received by Artist from sales and exploitation of Artist's merchandise, less merchandising expenses with regard to items sold by Artist as opposed to a licensee, including, without limitation, actual, out-of-pocket costs of artwork, manufacturing, shipping, distribution and sale, taxes included in or added to the selling price, and vendor and venue fees.

#### 5. Controlled Compositions:

(a) All musical compositions or material recorded pursuant to this Agreement which are written or composed, or owned or controlled, in whole or in part, directly or indirectly, by Artist ("Controlled Compositions") shall be and are hereby licensed to Company and its designees throughout the world at a royalty per selection rate equal to ~~seventy-five~~ One Hundred percent (~~75~~100%) of the minimum U.S. statutory per selection rate (without regard to playing time) or minimum prevailing per selection in Canada as applicable, effective on the date of commencement of record-

ing the Masters concerned ("Licensed Rate"). In the event that Company receives a ~~less~~more favorable Controlled Composition term from a Label Agreement, Company shall pass through such ~~more~~less favorable terms to Artist not to be less than seventy-five (75%) percent of the then prevailing statutory rate.

(b) Notwithstanding the foregoing, the maximum aggregate mechanical royalty rate which Company or its designees shall be required to pay in respect of any Single, EP or LP hereunder, regardless of the total number of all compositions contained therein, shall not exceed ~~two (2)~~Three (3) times, five (5) times, and ~~ten (10)~~twelve (12) times ("Controlled Caps") the Licensed Rate, respectively. In this connection it is specifically understood that in the event that any Single, EP, or LP contains other compositions in addition to the Controlled Compositions and the aggregate mechanical royalty rate for said Single, EP or LP shall exceed the applicable maximum aggregate mechanical royalty rate provided herein, the aggregate mechanical royalty rate or the Controlled Compositions contained thereon shall be reduced by the aforesaid excess over said applicable maximum aggregate mechanical royalty rate. Additionally, Company shall have the right with respect to any such excess to deduct such excess payable thereon from any and all monies payable to Artist pursuant to this Agreement. Artist will not record Masters in excess of Caps identified herein or according to less favorable terms from the Label Agreement unless pre-approved by Artist.

(c) All mechanical royalties payable hereunder shall be paid on the basis of records sold and not returned. Notwithstanding anything to the contrary contained herein, mechanical royalties payable in respect of Controlled Compositions for sales of records for any use other than as full-price retail sales shall be at the rate set in the Label Agreement not to be less than seventy-five percent (75%) of the Licensed Rate. Controlled Compositions which are arranged versions of any musical compositions in the public domain shall be free of copyright royalties.

(d) If any single record, EP or LP contains other compositions in addition to the Controlled Compositions, Artist will obtain for Company's benefit mechanical licenses covering such composition on the same terms and conditions applicable to Controlled Compositions pursuant to this paragraph 5.

~~5A. Co-Publishing: Provided that Artist is the one hundred percent (100%) owner of the Controlled Compositions, Artist hereby assigns to Company or its publishing designee an undivided fifty (50%) of all of Artist's (including Artist's publishing designee's) right, title and interest, including worldwide copyright, in and to the Controlled Compositions written during the Term and/or embodied on LPs released during the Term, but not to exceed four (4) LPs, entitling Company to, among other things, fifty (50%) of the "publisher's share" of income derived from such Controlled Compositions. To the extent that Artist is not the one hundred percent (100%) owner of Controlled Compositions (i.e., Artist~~

PRODUCTION DEALS  
HAVE SIGNIFICANTLY  
GROWN IN POPULARITY  
AND ACCEPTANCE AS A  
RESULT OF THE  
INDEPENDENT  
ARTIST MOVEMENT OF  
THE 1990s.

enters into a co-publishing agreement with a third party publisher), Company's ownership share in Controlled Compositions shall be reduced in proportion to Artist's ownership share in Controlled Compositions. Artist and Company shall simultaneously execute herewith the Co-Ownership and Co-Administration Agreement attached hereto as Exhibit A.

6. Accounting:

(a) With regard to the exploitation of Masters recorded hereunder, all gross income shall be paid directly to and collected by Company and thereafter accounted to Artist within ninety (90) days after each semi-annual period ending June 30 and December 31 with respect to monies received by Company during the preceding six-month period. Each payment to Artist shall be accompanied by a reasonably detailed accounting statement indicating the amount and source of each item of gross income, and the amount and nature of any other charges thereto. Artist hereby authorizes and directs Company to withhold from any monies due Artist such amounts required by the United States Internal Revenue Service and/or any other governmental authority to be withheld, and to pay same to the United States Internal Revenue Service and/or such other authority.

(b) Each statement shall become binding on Artist and not subject to any objection unless Artist shall advise Company, in writing, of the specific basis of such objection within eighteen (18) months after the date such statement was rendered. Company shall have no obligation to furnish statements after the expiration of the Term if no receipts are payable.

(c) Artist will not have the right to sue Company in connection with any royalty accounting, or to sue Company for royalties accrued by Company during an accounting period, unless Artist commences suit within two (2) years after the date such statement was rendered. If Artist commences suit on any controversy or claim concerning royalty accountings rendered to Artist, the scope of the proceeding will be limited to determination of the amount of the royalties due for the accounting periods concerned, and the court will have no authority to consider any other issues or award any relief except recovery of any royalties found owing.

7. Name and Likeness: Artist hereby grants to Company the worldwide right in perpetuity to use Artist's name, likeness, and biographical information, and the right to grant others the use of Artist's name, likeness, and biographical information in connection with the promotion and exploitation of the Masters, including, without limitation, as part of Company's domain name and on websites.

8. Exclusivity and Re-recording Restriction: During the Term of this Agreement, Artist shall not perform or record for the purpose of making master recordings for any person, firm, or company other than Company without Company's prior written consent. For five (5) years following the completion of recording of any material recorded hereunder or

two (2) years following the expiration of the Term, whichever shall expire later, Artist shall not, for the purpose of making and/or exploiting master recordings, radio or television commercials or soundtracks, perform such material for any person, firm or company other than Company. There shall be no re-record restriction should Company not attain a Label Agreement.

9. Indemnification: Both Artist and Company shall and do hereby indemnify, save and hold each other harmless from any and all loss and damage (including court costs and reasonable attorneys' fees) arising out of, connected with or as a result of any inconsistency with, failure of, or breach or threatened breach by the other of any warranty, representation, agreement, undertaking or covenant contained in this Agreement including, without limitation, any claim, demand or action by any third party in connection with the foregoing, which has resulted in a judgment against either or which has been settled with the other's consent, which consent shall not be unreasonably withheld. Artist hereby indemnifies Company and holds Company harmless against any and all losses and damages (including reasonable attorneys' fees) arising out of any claim by a third party due to any act or conduct by Artist which is inconsistent with any warranty, representation, promise or covenant made by Artist in this Agreement. Artist shall pay Company on demand any sums for which Artist is liable hereunder and if Artist fails to do so, Company shall have the right to withhold and reserve, from any sums otherwise payable to Artist hereunder, sums reasonably sufficient to secure Company for Artist's liabilities hereunder.

10. Miscellaneous:

(a) This Agreement shall supercede any prior agreements entered into between the parties hereto. This Agreement sets forth the entire understanding between the parties with respect to the subject matter hereof, and no modification, amendment, waiver, termination or discharge of this Agreement shall be binding upon the parties hereto unless confirmed by a written instrument signed by both parties. No waiver of any provision or default under this Agreement nor any failure to exercise rights hereunder shall prejudice the rights of either party thereafter, nor shall it be a precedent for the future.

(b) Artist warrants and represents that Artist has the right to enter into this Agreement and to grant the rights herein granted to Company. Artist shall not enter into any other third-party agreement(s) that would interfere with Artist's ability to enter into this Agreement. No materials, ideas or other properties furnished or designated by Artist which are used in connection with the Masters will violate or infringe upon the rights of any person, firm or corporation.

(c) It is understood and agreed that Artist may enter into agreements with management, booking, concert and/or theatrical agencies. Artist shall not, however, engage any management, booking, concert and/or theatrical

ARTIST WILL NOT  
RECORD MASTERS  
IN EXCESS OF CAPS  
IDENTIFIED HEREIN OR  
ACCORDING TO LESS  
FAVORABLE TERMS  
FROM THE LABEL  
AGREEMENT UNLESS  
PRE-APPROVED BY  
ARTIST.

agents or employment agencies without first consulting with Company.

(d) Each party has had the unrestricted opportunity to be represented by independent legal counsel of their choice in connection with the negotiation and execution of this Agreement.

(e) No failure by Company or Artist to perform any of ~~its~~ the material obligations under this agreement shall be deemed a breach of this agreement until Artist ~~has given Company~~ written notice of such alleged breach itemizing the specific details thereof has been served on the alleged breaching party, and such breach has not been corrected within thirty (30) days after the giving of such notice. In the event Artist breaches this Agreement, Company shall be entitled to seek injunctive and other equitable relief in addition to whatever legal remedies are available to Company to prevent or cure any such breach or threatened breach.

(f) Nothing contained herein shall constitute or be deemed or construed to constitute a partnership or other fiduciary relationship between, or a joint venture by, Artist and Company, or constitute either party hereto as the agent or legal representative of the other, except to the extent otherwise specifically contained in this Agreement.

(g) This Agreement shall be deemed to have been made in the State of Georgia, the venue for any action or proceeding brought by either party hereto against the other shall be in the state or federal courts located in Gwinnett County, Georgia, and the validity, construction and legal effect of this Agreement shall be governed by the laws of the State of Tennessee applicable to agreements entered into and wholly performed therein.

11. Notices: The respective addresses of Artist and Company for all purposes hereunder are set forth on page 1 hereof, unless notice of a different address is received by the party notified. All notices shall be in writing and shall either be served by mail, email or by telefax, in each case with all charges prepaid. Notices shall be deemed effective when mailed, emailed or sent by telefax, all charges prepaid, except for notices of a change of address, which shall be effective only when received by the party notified.

Very Truly Yours,

Company  
By: \_\_\_\_\_

AGREED AND ACCEPTED:

Groovy Chicks  
By: \_\_\_\_\_

By: \_\_\_\_\_

By: \_\_\_\_\_

BOTH ARTIST AND COMPANY SHALL AND DO HEREBY INDEMNIFY, SAVE AND HOLD EACH OTHER HARMLESS FROM ANY AND ALL LOSS AND DAMAGE.

Paragraph 4 (c) identifies percentages payable to the Company for touring and merchandise sales. Although this is unconventional, the concept is becoming more popular as an “outside the box” scope of agreement and in lieu of this percentage often companies offer a higher CD sales percentages. When representing the production company, the practitioner should be interested in seeking such an outside the box revenue source because the production company in most instances will step into the same shoes and share CD sales royalties with the artist, and artists rarely recoup royalty advances in the form of cash, recording budgets and promotions. Most often the only income earned as profit will result from touring, merchandise and publishing revenue sources.

Scott Keniley, of the K5 Keniley Law Firm, practices entertainment law and is a frequent guest speaker at symposiums, music conferences and universities. Mr. Keniley is on the board for the Louisville Music Industry Alliance and chairs the Annual Southern Entertainment & Sports Law Conference. Additionally, he presides as a part-time municipal court judge in Dekalb County, Ga. Mr. Keniley's e-mail is [scott@k5law.com](mailto:scott@k5law.com).

**JET  
SET**

## SUN AND CLE: NEWS FOR THE CONFERENCE JET SET

### Keeping Better Records on the Road

LOGGING miles on behalf of your company can get expensive. Whether you have a corporate card or use your personal card, it is important to keep track of your expenses so that you can get reimbursed in a timely fashion. The following are some suggestions for keeping yourself organized on the road:

**Get Receipts:** Whether you take a cab or tip the bellman, make sure you get a receipt for all things business related. Companies have different policies on what they will consider business expenses, so check with your supervisor before you leave.

**Organize Receipts:** Organize your receipts for optimal recording. Some companies' expense records are grouped

primarily by date or by category. Keep your receipts organized in a manner that will help you fill in your expense record quickly.

For example, put transportation receipts (taxi, rental car, subway fare) together so you can fill in your record quickly. If sorting by date works better, do that instead.

**Store Receipts:** Keep your sorted receipts in an organizer or a billfold with laminated dividers. By doing so, this step will help you to easily access your receipts for when you fill in your expense record. It will also keep them separate from non-business related receipts.

**Reorganize Receipts:** Once you return from your trip, pull out your receipts and lay them out lengthwise. Many people are visual learners and by spreading out your receipts, you create a visual map of your trip. This step will help you in quickly filling out your expense record.

Following these steps will not only help you fill out your record accurately, but also complete your record in a timely fashion.

#### Key Features of the Best Business Hotels

Not every hotel is built for business travelers. Some hotels are simply geared for leisure travelers, and place a higher focus on different features than those in a business hotel. Some important features of a great business hotel are as follows:

**Location:** Hotels that are situated near an airport or located in a city's business district usually cater to business travelers. Airport hotels rarely offer much on scenery, but they make up for it with convenient location. This feature is why many recruiters typically schedule interviews in airport hotels. It is easier to fly in, meet several candidates, catch up on work in the business center, and fly back out.

**Internet Access:** Most hotels offer some form of Internet access whether it's use of the business center's computer, high-speed access in the room, or wireless hotspots. However, the best business hotels focus on this feature upfront. For example, the Sheraton Chicago Hotel & Towers actually incorporated a Yahoo Link Cafe in the hotel with five or six terminals for easy access.

**Quick, Customer Service:** Hotel professionals are in the business of providing good customer service. Business hotels make the important distinction of offering good customer service quickly and efficiently. A guest's needs must be met quickly so that he or she can focus on the professional reasons they are there in the first place.

**Easy Transportation:** Business travelers need to be places on time and with minimal hassle. The best business hotels usually offer transportation shuttles to major business areas, or assist travelers with securing taxis or private cars.

110% Effort: The best business hotels allow travelers to focus on their jobs by sweating the small and big stuff.

These five features are just a few traits of a great business hotel. If a hotel can hit all these points and provide you with a restful night's sleep, you should perform admirably on that next business trip.

Travel tips compliments of *Age of Travel, Inc.*

# SOUND EXCHANGE

## ARE XM AND SIRIUS CUTTING YOUR CLIENTS A CHECK?

BY J. MARTIN LETT

YOU have probably seen these headlines: "Sirius Pays Shock Jock \$500M In Stock" and "XM Signs \$55M Deal to Cozy up on Oprah's Couch." If you have not, then it's time for you to hit your alarm clock and wake up.

Over the last few months XM and Sirius have aggressively acquired new content and personalities for their subscription satellite radio services. Your friendly neighborhood satellite radio providers can afford to strike these deals because their paying subscriber base is growing. XM has six million subscribers and Sirius recently passed four million, and each of those subscribers is paying about \$10 to \$20 per month.

You can do the math. With that kind of monthly revenue it is not hard to understand why Mr. Howard and Ms. Winfrey are lending their names to the satellite radio phenomenon. However, if you represent a recording artist or a record label, maybe your client should be receiving a check from XM and Sirius too.

For the better part of a decade now, satellite radio providers and other digital music service providers have been obligated to pay owners of sound recordings, pursuant to The Digital Performance in Sound Recordings Act of 1995 (DPSR) and the Digital Millennium Copyright Act of 1998 (DMCA). If you represent songwriters, then you are aware of performing rights organizations (PROs)—ASCAP, BMI, and SESAC—and the fact that they collect performance royalties from radio stations, concert venues, hotels, and nightclubs. The PROs redistribute the amounts they collect to their members in some proportion to the number

of performances of each member's compositions in those outlets.

This can lead to a nice stream of income for songwriters and publishers. But for years the recording artists that perform the compositions (but not write them) and the record companies that own the master recordings have listened to dollars floating pass them through thin air, since radio stations and other venues are not obligated to pay performance royalties in connection with the masters themselves.

Unlike with terrestrial radio, the DPSR and DMCA require satellite radio providers like XM and Sirius (as well as Internet broadcasters) to pay a performance royalty not only to the songwriters and publishers but also to the featured artists on the masters and the record companies that own the masters. However, before your clients will receive any checks, they must register with SoundExchange, which is the performing rights organization that Congress designated to collect all digital performance royalties for artists and record companies. If your client is not the main featured artist on a master but a side artist or producer, he or she may still be entitled to a share of the digital performance royalties. But your client must be registered and the featured artist must be registered as well.

You also may have to negotiate with the featured artist to secure your client's share because SoundExchange requires a written designation from the featured artist about how the artist share should be divided. Nevertheless, whether your client is the featured vocalist or his best friend that showed up for the recording session and did an impromptu monologue, you need to make sure your client is registered with SoundExchange to be in the game at all.

J. Martin Lett is a partner with the firm of Register | Lett LLP and is vice chair of entertainment for the Entertainment & Sports Law Section of the State Bar of Georgia. His e-mail is [jlett@nljlawfirm.com](mailto:jlett@nljlawfirm.com).

OVER THE LAST FEW  
MONTHS XM AND SIRIUS  
HAVE AGGRESSIVELY  
ACQUIRED NEW CONTENT  
AND PERSONALITIES FOR  
THEIR SUBSCRIPTION  
SATELLITE RADIO SERVICES.

# TECHNO & CLICKS

TECHNOLOGY IS A BEAUTIFUL THING:  
FOUR PLAYERS IN THE ATLANTA ENTERTAINMENT  
INDUSTRY SHARE WEBSITES THEY  
CLICK ON

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# NOTES

# NOTES

# "We Help People Retire Well"

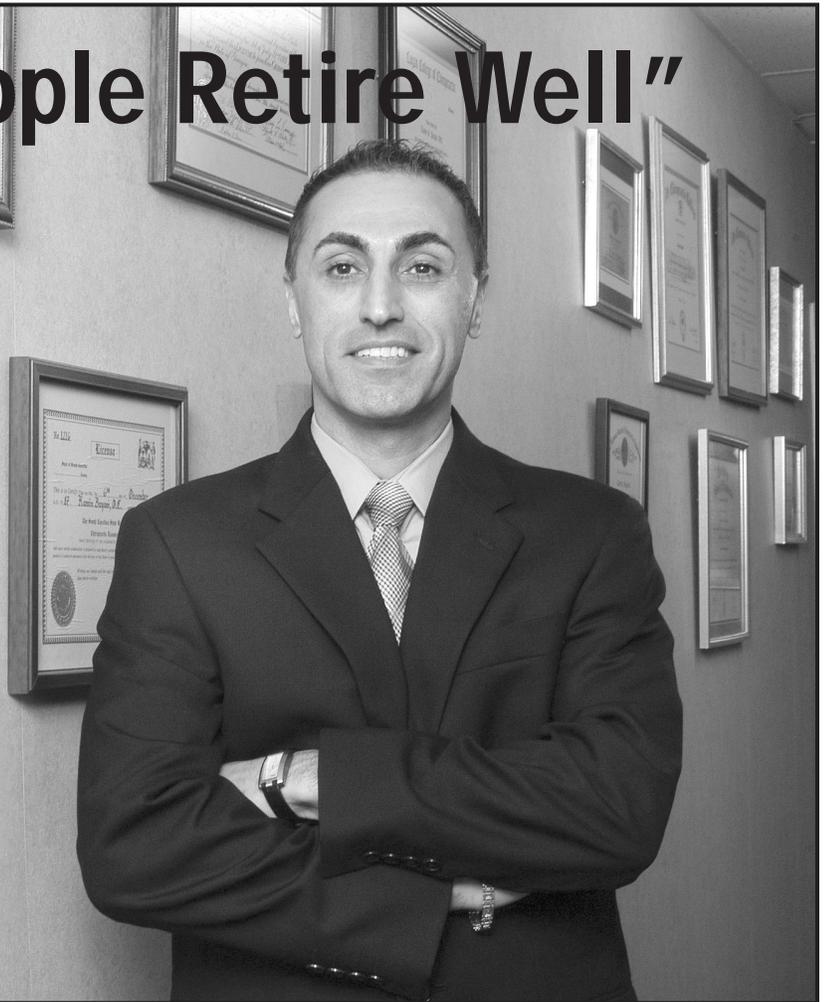
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