MUSIC WITHOUT BORDERS:

Hot Legal Topics in the Music Business After the First Quarter of the 21st Century

An Approach to Methodology for Music Catalogues Legal Due Diligence

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» Introduction

Investments in music catalogues have risen in recent years probably due to two key factors. On one hand, music rights have become increasingly attractive as financial assets due to digital exploitation, which allows for more accurate and predictable revenue forecasting based on stable streaming consumption data. On the other hand, this trend coincides with a growing number of artists seeking to capitalize on their economic rights during their lifetime, often as a way to access immediate liquidity or to proactively manage their estate planning by passing on their legacy in an orderly manner.

This financial attractiveness does not mean that catalogue buyers (e.g., private equity firms, publishers, or investment funds) do not need to conduct thorough legal due diligence before performing such acquisitions.

Indeed, this is crucial, not only to gain clarity on what one is buying, but also because certain limitations may have a profound impact on economic benefits (e.g., duration of rights, payment obligations, reversion rights, etc.).

Therefore, a prior due diligence process ensures that such buyers acquire a clear title, assess potential liabilities, and mitigate legal risks through appropriate representations and warranties within the sale and purchase agreement.

In this sense, key considerations include verifying ownership, understanding contract terms, identifying future obligations, and anticipating potential legal disputes.

This article provides a guideline for entertainment lawyers to conduct effective due diligence on music catalogues. Although this article is mainly focused on an EU law perspective, we deem that it might also be of interest to lawyers of other jurisdictions in terms of methodology, for instance, because the principles that we explain are applicable worldwide.

» Contracts to be Checked

Due diligence primarily involves a chain of title review, confirming how rights in the catalogue were transferred to the seller and what contractual obligations remain. In this sense, in the following sections , we will comment on each typology of key agreements in this kind of transaction:

- Recording agreements (seller-artists) and further distribution agreements (seller-distributors).
- Publishing agreements, future song deliveries, and sub-publishing agreements.
- License agreements.
- Synchronization agreements.
- Image rights, merchandising, and trademarks.
- Other agreements.

Obviously, there might be other agreements, but we consider that those are normally the key ones involved in a catalogue acquisition.

2.1 Recording Agreements and Distribution Contracts

These are contracts between artists (performers) and record labels. Therefore, the object of these agreements are the rights in sound recordings, including the ownership of the master (i.e., the original sound recording of a music performance) or the right to exploit it.

In traditional recording agreements, record labels own the masters, while artists receive royalties arising from the exploitation of the sound recordings. A thorough review should confirm ownership terms and scope of exploitation rights, including whether rights are granted in perpetuity (if possible under applicable laws) or revert to the artist after a specified period. Assignment feasibility (consent by the artist) should also be checked.

A particularity of recording agreements is the scope, specifically whether "digital distribution" is included. Note that many of these agreements originated in a period when digital exploitation through streaming platforms was not yet implemented. Therefore, a key question is: does the agreement include the rights to exploit the sound recordings on streaming platforms such as Spotify®? Or, even if the agreements contain a generic reference to all means known or to be known in the future, is this feasible according to the applicable local laws?

Distribution agreements must also be examined to verify the term, income to be paid to the right-holder, territorial restrictions and exclusivity provisions.

2.2 Publishing Agreements and Sub-Publishing Agreements

These are contracts between songwriters (authors) and publishers. Therefore, the object of this agreement is the share of the seller in the rights on compositions. Note that publishers may also acquire administration rights. And that there may be several writers and publishers in one song

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Similarly, or even in more detail, one must bear in mind the assignment of rights over future formats or works, as we mentioned for recording agreements. For instance, in many jurisdictions, such as in Spain, copyright law does not allow the assignment of rights on unidentified future works or to formats unknown at the time of executing the publishing agreement. However, a writer may commit the delivery to a publisher of a precise number of works which do not exist at the time of entering into the contract; therefore, the status of the performance of such commitment agreements should be carefully checked.

Finally, sub-publishing agreements, common for international markets, may impose long-term obligations restricting the buyer's ability to change administration. Therefore, this is not a minor issue to be assessed at the time of acquiring a music catalogue.

2.3 License Agreements
These are contracts between rightsholders (e.g., label or publisher) and third parties interested in exploiting a song or music recording in various ways, such as mechanical licenses (e.g., for cover versions) or master use (e.g., for compilations).

In this sense, thorough due diligence involves verification of the scope, term, and exclusivity of these licences, ensuring no conflicting agreements exist.

2.4 Synchronization Agreements
These are contracts between sound recording or composition rightsholders (e.g., label, publisher) and third parties interested in exploiting such recording or compositions in timed relation with visual media (e.g., a film or commercial spot).

They are nowadays quite important since they represent a relevant part of music incomes. Therefore, the buyer should verify carefully exclusivity, approval rights, and duration since some contracts might grant production companies ongoing rights or future options, which indeed may have an impact on the catalogue value.

2.5 Image Rights, Merchandising, and Trademarks
These contracts are not directly related to the composition or recording, but to the artist or band, since the object is the commercial exploitation of other products such as t-shirts or similar merchandise related to an artist or band.

Besides, one has to bear in mind that image rights and trademark rights for merchandising are not deemed automatically included in a recording or publishing agreement.In this sense, certain contracts might include a general provision to exploit these rights (e.g., the so-called 360° deal). However, it is always advisable to check whether an independent contract is necessary.

This is particularly advisable when we talk about artists or bands with a strong brand. If we close our eyes, rapidly, it comes to many of us the t-shirt with the Rolling Stones' Hot Lips logo, one of the most iconic in music history.

2.6 Other Agreements
Additional contracts affecting catalogue value include producer agreements (which may grant ownership interests in recordings), collaboration agreements (governing band

revenue splits), and sample clearance agreements (ensuring lawful use of sampled music).

Indeed, these other necessary agreements should be considered at the time of legally analysing a catalogue. Certainly, their importance may differ depending on the music genre or artist's performance because some of them are more inclined toward collaborations, with hip-hop and rap standing out for their collaborative culture, for example.

» Key Points in Contracts

When reviewing the above contracts, legal advisors should focus on certain key aspects in each agreement. These points have an impact on the value of the catalogue. Below is the following checklist of such critical elements to extract from contracts:

- Object.
- Ownership.
- Copyright and PRO registrations.
- Rights acquired.
- Future commitments.
- Exclusivity and term of duration.
- Options and first refusal rights.
- Advances due.
- Unrecouped advances.
- Accounting and payment.
- Limitations, restrictions, and termination.
- Anti-assignment clauses.

3.1 Object
Identify the object of each contract: which compositions or recordings are covered? Is it a specific list of works or an entire catalogue? Besides, we need to confirm which rights it includes, such as copyright assignment or license for mechanical, performance, synch, etc.

This understanding prevents gaps ensuring that no song of interest is excluded inadvertently. In this sense, carrying out a detailed list is highly valuable, for instance, to be afterwards included in the sale and purchase agreement.

3.2 Ownership
A fundamental task is verifying ownership and chain of title. Trace how rights moved from the original author or artist to the current seller. This includes confirming that every

assignment or license was properly executed and that all involved parties, particularly when dealing with bands, executed the relevant agreement.

Checking copyright registration certificates for the works, if applicable -since this is not mandatory- may indeed be good approach. In summary, the buyers' legal advisors shall have to ensure that the seller owns what it claims, being this a top priority in due diligence (and also the seller's legal advisors when the task is a seller's due diligence).

3.3 Copyright and PRO Registrations

Reviewing copyright and Performing Rights Organization ("PRO") registrations is also mandatory to confirm ownership and royalty collection. For instance, in the US, a song must be registered with the U.S. Copyright Office to sue for infringement or to collect mechanical royalties, as it serves as a public ownership record.

Checking PRO registrations, e.g., PRS in the UK or SGAE in Spain , is also necessary to ensure that songs are duly registered in favour of the correct publisher or writer to collect performance royalties. Obviously, if the registration is not up to date, it might generate difficulties when receiving income or may even lead to future rights ownership conflicts.

3.4 Rights Acquired

Identifying the specific rights granted in each contract is a core task in the due diligence process. For instance, publishing agreements typically allow the publisher to license the work for various uses, but some rights might be excluded or reserved to the writer. In recording contracts, labels usually acquire all exploitation rights, though an artist might keep specific rights or approval rights.

" Identifying the specific rights granted in each contract is a core task in the due diligence process "

Therefore, checking for limitations is crucial, such as format restrictions. As mentioned before, future formats or unknown formats at the date of the agreement may lead to conflicts regarding the scope of the permitted exploitation rights , consequently having a heavy impact on the value of the transaction. For instance, if it is unclear whether "digital distribution" is included, it might represent a red flag. The buyer may reconsider the offer, price, or even include appropriate conditions precedent in the sale and purchase agreement until this grey area is clarified.

3.5 Future Commitments

Identifying any future obligations within contracts to confirm whether the buyer will likely assume them. For example, do the agreements include the need to fund a new album? Also, identifying any pending approvals is essential to be assessed before the transaction takes place.

In summary, the due diligence report should list these issues so the buyer is able to take appropriate action before closing the deal.

3.6 Exclusivity
Another core aspect is identifying if each agreement is exclusive or non-exclusive, which may affect both granted rights and obligations. Exclusivity generally increases the value of the catalogue since non-exclusive contracts may lead to parallel exploitations for the same songs. In this sense, the lack of exclusivity may result in a deal-breaker.

3.7 Term of Duration
Similar to exclusivity, reviewing each agreement for its term is crucial to understand and determine the perimeter of the transaction's value. Having a list or classification of target contracts sorted by its duration would be very welcome by the buyer and its financial advisors.

Finally, reversion clauses should also be assessed, as well as statutory terminations (see Section 4). In this sense, note that some contracts are perpetual, but this cannot be accepted under all jurisdictions.

3.8 Options and First Refusal Rights
Music industry contracts often contain options for deal extension or expansion, and rights of first refusal or negotiation. In this sense, it is crucial to list these during due diligence to take appropriate action before or after the transaction closing. In any event, the buyer needs to be aware of them since they involve important restrictions to the deal, affecting future deals or even the deal itself under the due diligence process.

3.9 Advances Due
Indeed, this might impact the price and, therefore, financial advisors of the buyers should assume this task.

3.10 Unrecouped Advances
Same as of section 3.9 above, financial advisors of the buyers should assume this task.

3.11 Accounting and Payment
As in sections 3.9 and 3.10 above, financial advisors of the buyers should assume this

task since, for instance, payment terms might impact accounting matters such as cash flow or amortization.

3.12 Limitations, Restrictions, and Termination Provisions
Checking for other contractual limitations is also a must, such as moral rights, approval rights , or media restrictions, since they may limit the catalogue usage and, consequently, its value. In the same line, termination conditions could also have an impact. For instance, are there breaches allowing early termination and, in such a case, what are the consequences? Also , looking for customary "use it or lose it" clauses should be on the list of items to review. Summarizing these provisions in the report is a good strategy to support the buyer's negotiations in terms of price or waivers, if needed.

3.13 Anti-Assignment Clauses
Anti-assignment clauses may be included in agreements and are one of the first things to check when performing due diligence regardless of the sector. The structure of the transaction may supersede these clauses. For instance, an asset purchase, where these clauses may have impact, differs from a company purchase where a universal succession of business takes place (i.e., it is not an assignment). Another consideration is when we face change of control clauses, which are less common but might be a deal-breaker if the transaction is not realized by the relevant party.

» Legal Termination Rights

Evaluating statutory or legal termination rights impacting catalogues, which are rights granted by law to authors or performers to reclaim or terminate transfers, is also crucial when conducting a due diligence.

For instance, under US law, authors/performers might terminate a grant of rights after a certain period. In the EU, authors might revoke an exclusive license if their work is not exploited after a certain time or also have an underpayment reversion right.

Similarly to other reviews, charting such dates will also be helpful for the buyer at the time of assessing the whole catalogue value.

» Moral Rights

Moral rights protect authors' work integrity and attribution. These rights cannot be waived in many countries (e.g., France, Spain, or Germany) and may affect modifications or remixes of songs. If a composer has approval rights over alterations, the buyer must consider potential legal challenges.

» Copyright Infringement: Pending or Threatened Litigation

Due diligence should investigate ongoing or past infringement claims regardless of the sector. In the music industry, we may specify the following typical conflicts:

- Plagiarism lawsuits (e.g., alleged similarity to another song).
- Contract disputes (e.g., claims for unpaid royalties).
- Sample clearance issues, where a song contains an unlicensed sample.
- Scope of the license and, particularly, formats included.

Conflicts shall be assessed on a double perspective because there might be a pending litigation that could be a gamechanger, whether in favour or against. For example, the Spanish courts recognized flamenco guitarist Paco de Lucía as the sole author of 37 musical works, including the iconic *"Entre dos aguas"*. The court determined that producer José Torregrosa, previously listed as co-author, had merely transcribed Paco de Lucía's compositions without contributing original content. Consequently, Torregrosa's heirs were ordered to return a significant amount of royalties received and pay moral damages.

Besides, nowadays, we consider that we can also include potential claims regarding AI, since it is uncertain whether, and if applicable how AI models have been trained or fine-tuned.

» Pro Administration and Membership Changes

Many catalogue revenues depend on correct PRO registrations. If the seller is a member of a PRO, the buyer must transfer the publisher's share or register with the PRO to ensure royalty collection. Some administration agreements may require notice periods or approvals before rights can be reassigned. The above might seem secondary, but indeed something to be reviewed and regulated in the relevant sale and purchase agreement, for example, as a post-closing obligation.

» Multi-Jurisdiction Due Diligence

Catalogues might be spread across different jurisdictions when, for example, they include artists, labels, licensees or publishers/sub-publishers from different countries. Therefore, the buyer shall consider whether to limit the review to the main jurisdiction or conduct the due diligence in all the involved jurisdictions. The response is the proper balance between risk assumptions and time-cost effectiveness. A prior jurisdictional matrix, and the help of lawyers in the different jurisdictions involved will help to summarize risks per country to adopt an informed decision.

» Heavyweight Portfolios: AI Tools in Due Diligence

Similar to the above, large catalogues may present the buyer with a dilemma on how to perform due diligence in terms of time-cost effectiveness. In this sense, sometimes, an exhaustive review of every contract may be impractical or useless. Therefore, the buyer should consider alternative approaches such as follows:

- selective review, focusing on top revenue-generating assets;
- AI-powered contract analysis to scan thousands of agreements for key provisions; or
- a mix of both human review of top agreements and AI review for the rest.

» Conclusions

Investments in music catalogues are rising due to the appeal of music rights as stable financial assets and artists seeking liquidity. In this sense, buyers should conduct thorough legal (and financial) due diligence to ensure a clear title and manage liabilities minimizing risks with proper representation and warranties in the sale and purchase agreement.

Although each lawyer or firm may have its own methodology and know-how, in this article we provide a guide to conduct such a due diligence process. We hope it will serve both experienced and non-experienced lawyers.

> “An exhaustive review of every contract may be impractical or useless”

Indeed, identifying the key aspects of each type of agreement (e.g., a publishing agreement significantly differs from a sync agreement) is a crucial step before starting the review. Other elements have also to be reviewed thoroughly such as duration, exclusivity, scope, or potential restrictions arising from legal statutory provisions (e.g., moral rights) or contractual terms (e.g., options or first refusal rights).

Besides, before starting the review it is also very important to align with the client the scope of the report. Multi-jurisdictional catalogues might require the assessment of foreign lawyers, but the client may have budget limitations or a particular hurry in the acquisition. Therefore, the approach shall be defined at the beginning, e.g.: exhaustive country per country review, selective reviews, etc. In a case of country-by-country review, selecting a firm with a solid network in different jurisdictions is always advisable. In this sense, IAEL members may indeed meet with this requirement.

On a similar way, facing a heavyweight portfolio review needs to have a clear methodology beforehand. We always plead for human-bespoken legal service. However, using AI automated processes might be indeed an option to be considered in certain transactions or for certain aspects to increase efficiency.

Ultimately, we encourage using charts to synthesize relevant information and have a clear easy view of key findings. Despite this involving extra effort, the buyer, and other players within the transaction (e.g., financial advisors), will always appreciate such a structured deliverable.

» Sources

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