

Twenty Questions for New Artists
by Chris Castle and Amy E. Mitchell

and

They Call It Red For A Reason
and
The (Near) Future of Online Licensing
by Chris Castle

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You've decided to form a band. Let's get your business in order.

This article assumes that you are an independent artist who is assembling their business for the first time. If you are signing to a major label, many of these same issues arise, but are more complex.

What are the most important things—*affordable things*—the band can do to make sure that you don't trip yourselves up down the road? What can you do to make sure that you don't have to pay later to fix business mistakes you could avoid now? Here are 20 questions to ask yourselves before you get too far.

1. **Pre-existing Contracts**: Ask for copies of any music industry contracts the band, or any of you, have previously signed before you formed or joined the band. Whether it be a credit card, management agreement, publishing deal, previous band agreement or a production agreement, it is important to understand the band's current rights and restrictions. If any of the members are still tied to an exclusive recording agreement from a prior band, or has credit card debt from a prior band, that needs to be cleared up sooner rather than later. Extracting the artist from a prior agreement may not be quick or even possible.

2. **Band Administrator**: It is a good idea for one band member to take responsibility for keeping track of the papers and information relating to the band's business, such as receipts, bank statements, credit cards, payments, approvals for licenses, etc. This is especially important if there is no manager involved with the band. The "managing member" does need to keep the other band members informed, and should not be able to assume any liabilities or sign any contracts on behalf of the band without written consent of the other members and giving them a chance to read and understand what it is they are signing up to.

3. **Band Agreements/Business Organizations**. It is a good idea to prepare some baseline band agreement to cover key issues such as what rules you are going to follow amongst yourselves to make voting decisions about spending money, contracts, tours, leaving members, who can sign checks and for how much, etc. The decision of what type of business organization to choose can be from a liability perspective as well (i.e. a partnership versus a corporation). This is also a good time for the band to hire an accountant or bookkeeper familiar with tour accounting and receipt-intensive travel to assist you in your decision of what type of business organization you should form and what type of tax treatment you should elect. It is also a time that you will need a lawyer to help you make these decisions and draft the appropriate contracts.

4. **Bank Accounts/Tax Returns/Accountants**: A common mistake that bands make is to have all income paid to one band member, which usually results in unnecessarily complex adjustments at tax time. Check with your bank branch to find out what the bank requires in order to open a bank account in the band's name (usually

at least a “doing business as” or “dba” filing with a government agency of some kind). You should also consider obtaining an account that will allow you to use a credit card for venue sales fulfillment. The band should find an accountant in your geographical area who is familiar with music issues and band accounting and take a meeting with that accountant (preferably a Certified Public Accountant). The band’s accountant should be able to advise you on questions such as the deductibility of expenses (recording sessions, haircuts, meals and travel, cell phones, etc.); liability issues (not surprisingly, liability issues substantially increase as soon as the band hits the road and starts driving); whether the band should lease or buy that new band van; and how to treat various income streams such as money received from investors, royalty income, merchandise, etc., as well as payment of sales tax, withholding and income tax.

5. **Insurance**: Many bands overlook the importance of insurance, often until it is too late. Even if you don’t overlook it, many artists don’t fully understand why their coverage may be lacking. It is a very good idea for the band to meet with an insurance agent experienced in music industry insurance and get a report from that agent about the coverage the band has (if any) compared to what the agent recommends. In the early days, the band may not have sufficient monies to both get insurance and set up limited liability entities. We always recommend insurance in this case. At a minimum, the band should have commercial insurance on your van and sufficient coverage to protect against loss or damage to the band’s musical instruments. If feasible, the band should also seek general entertainer liability insurance, which is an umbrella policy that covers artists above and beyond the typical automobile insurance and other common coverages. (*Tip*: Watch out for exclusions for thrown objects.)

6. **Legal Names of Members**: Each member should provide the managing member with the member’s full legal name. This will be necessary for contracts, registration of copyrights, etc. It is a good idea to have a list of each member’s cell phone and email so you can give that to anyone who needs to reach the band, particularly on the road or in case of emergencies. If there are any sidemembers (i.e., “hired hands”), list them as well. This type of information can also help the band’s accountant spot red flags like the employee versus independent contractor issues.

7. **Date of Birth and Nationality**: It is important to know early on if any members are not of the age of majority so that if someone is under age, you will be prepared for any issues in your state relating to age of consent (usually for contracts) and employment law (performing in clubs that serve alcohol, for example). If the band tours out of state, you will need to consider these issues. Often this involves having a parent or guardian available to sign off on any written agreements. Many states have court procedures (particularly California) that can allow minors to have special rights to do business or make contracts, such as “emancipated minor” laws or “judicial ratification” of contracts. Do not assume that these laws apply to minors in your band without talking to an experienced labor lawyer familiar with your state (and any other

states or countries you may be touring in).

It's also handy to have each member's date of birth available for any copyright registration applications you file (such as Form PA for musical compositions) because the U.S. Copyright Office often requires applicants to include the year of birth.

8. **Passport/Work Permits:** If the band is planning to tour internationally—*including Canada and Mexico*—each member (and any crew traveling with you) must have a valid passport. You should get a photocopy of the inside pages of the passport (in case of loss or damage and for immigration forms). It may also be useful to calendar the expiration date of each passport so that you can quickly know if one member's passport is set to expire when negotiating any tour agreements outside of the United States. There are services that can turn around a passport renewal in 24-48 hours, but they are expensive. There is also an expedited passport renewal process at the Passport Office in Rockefeller Center in New York, but that, too, is an expensive process and typically requires physical presence.

The band would also be well to consult an experienced immigration lawyer before committing to any contracts for touring abroad to ensure that you have the proper work permits. Every year, international acts are accepted to festivals such as SXSW only to be turned away at the border for failing to secure the proper permits. There are even stories of bands being turned away for failing to file a tax return or convictions for driving under the influence or drug possession.

9. **Instrument(s) Played, Brand and Inventory:** While band members will know who plays what, it's useful to have a written record of who plays what so you can give it to someone else (such as a manager). Also, having information about the instrument(s) and brand(s) that a member uses could prove useful in strategizing for sponsorship opportunities. We also recommend having the band complete an inventory of instruments for insurance purposes (including serial numbers if available), complete with photographs or video of the instruments. This visual record is especially useful with customized, rare or one-of-a-kind instruments.

10. **Split sheets:** Song splits are probably the most sensitive conversations that the band has together. Many professional songwriters take split sheets into each writing session and sign off on the split sheet and register the song as soon as the song is completed. This is another one of those discussions that are better had before the band is making money to avoid the "selective memory disease" and can help if the band (or any member-writer) is ever accused of copyright infringement in connection with a song.

11. **Performing Rights Society Affiliation:** There is a bit of strategy involved with affiliating with a performing rights society in the United States. All the societies have a creative staff. The decision to affiliate with a particular society should be made after the

artist/writer has taken some meetings with the performing rights society and decided if there's more love coming from one than another. Most of the time we like to wait until the music is fairly well formed and the band has gelled into a working unit before approaching the societies unless there's a reason to move more quickly, such as getting a film or TV license, or substantial radio/webcasting play. In more experienced bands, the writers will already have an affiliation, so it is a good idea to know this in advance for purposes of servicing the creative staff with new music, competing for slots on compilations and festival shows, etc. The major U.S. performing rights societies are the American Society of Composers, Authors and Publishers (www.ascap.com), Broadcast Music, Inc. (www.bmi.com) and the Society of European Stage Authors and Composers (www.sesac.com). (SESAC is now based in Nashville, Tennessee despite the "European" reference in its name.)

12. **Publishing Company:** Do the writer members of the band have a publishing or administration deal or are you self-published? Multiple publishing deals in the same band are less frequent problems for independent artists, but it does happen and it can add a layer of complexity when shopping for a new publishing deal. Keep in mind that if the writers have affiliated with ASCAP, BMI, or SESAC as a writer, your publishing company must follow the same affiliation. Another wrinkle comes with writers who are affiliated with foreign societies (e.g., SOCAN, MCPS-PRS). If the band has a foreign society writer or co-writer on any songs, the members should consult with their U.S. society to determine how to handle their affiliation and registrations.

13. **SoundExchange:** Featured recording artists and bands that own their own sound recordings should register with SoundExchange, the U.S. performing rights organization for sound recordings. Registration forms are available on the SoundExchange website (www.soundexchange.com), and membership is free. It is a good idea to check the PLAYS database (which can be done online with a simple registration) for any titles of your band's recordings to see if the recordings are already included in the database or are mis-registered.

14. **Marital Status:** Common problems arising from marriage that require planning include divorce (and the state law community property issues) and heirs (if a member dies). The band might be stuck dealing with the (sometimes resentful or surly) widow or widower who may inherit consent rights for synch or master use licenses, for example, if these approval rights are not lawfully foreclosed from descendibility in any band agreement. Make sure each band member understands the importance of discussing your intellectual property assets (e.g., songs and recordings) with your spouses and considers taking advice for appropriate legal protections for all concerned.

15. **Trademark the Band Name/Logo:** While there's nothing new under the sun, the band should do its best to come up with an original name for the band. There may be other bands using the exact same name or a different name but the same logo. Don't assume that the other band using the same name is not important—we have

heard excuses from “we’ve heard the other band will break up” or “the other band hasn’t logged into their Myspace account in three months.” Logos are equally important in this age of merchandising and branding, so it is essential to have a discussion about the origin or inspiration for a logo, if any. The band should seek the advice of an experienced trademark attorney to register your band’s name and logo for trademark protection.

16. **Social Networking and Domain Names:** Many bands think that if you have a Myspace and Facebook page you don’t need to get a domain name, too. It is better to secure rights in the band’s domain name for at least one top-level domain such as .com, even if you just have the band’s domain point to a Myspace page for the moment. After all, no social network provider promises to stay in business forever nor do they offer the plentiful e-commerce possibilities available through an independent website.

17. **Aggregator:** It is almost required that an independent artist sign up with an aggregator in order to have your works serviced to many online outlets. Realize that mere servicing does not do one thing toward making the artist less of a needle in a bigger haystack online as hardly any aggregator these days will guarantee marketing and promotion.

Some basic aspects of aggregator deals to be concerned about include the ironclad ability to opt-in to any retailer or to opt-out at any time, and also to terminate the aggregator deal on short notice for any or no reason (e.g., 30-60 days). If you are asked to sign a deal with an indie label or with a major label, these labels will require that you give them exclusive distribution rights—including the digital rights you have already granted to the aggregator. That means that you need to have the ability to terminate your aggregator deal and transfer digital distribution to the new label. There have been instances where digital distributors tried to hold up artists from signing to bigger situations based on a prior grant of digital rights. As digital becomes the primary means of sales, this issue is front and center.

How the aggregator is compensated is also an issue of concern. In the traditional model, the aggregator took a percentage of sales as their compensation. This meant that the aggregator only made money if the artist made money. (This is similar to a traditional distributor model.) Some aggregators charge a flat fee on some basis (such as a per-retailer basis) instead of a percentage.

Each model has its strong and weak points. The percentage model pays the aggregator regardless of whether they are making an effort to stimulate sales (which few of them do in any event). However, under the percentage model the aggregator only makes money if you make money, so the incentives are aligned. The percentage should be low (10% or so) to take into account that the aggregator has lower incremental costs over time of maintaining content in their catalog.

The flat fee model has the artist pay the aggregator a fee for distribution instead of paying the distributor a percentage. While this is attractive from the point of view that the artist knows what their distribution costs will be up front, it also transfers all of the risk of distribution to the artist.

In order to determine which is the better model, the artist should compare their most favorable percentage based offer to the flat fee model and see what the breakeven point will be. Try using a formula like this:

$$\begin{aligned} [\text{Flat Fee}]/[\text{percentage}] &= \text{Gross Income to be earned at breakeven} \\ \text{Gross Income}/\text{wholesale price} &= \text{breakeven units} \end{aligned}$$

or, for example:

$$\$100/.10 = \$1,000 \text{ (Gross Income to be earned at breakeven)}$$

$$\$1,000/ \$0.70 = 1428 \text{ units (rounded down)}$$

In the example, a \$100 flat distribution fee is equivalent to a 10% distribution fee model if you sell 1,428 units at a wholesale price of \$0.70 (a typical wholesale price for permanent downloads). That means that at 1,428 units you will be indifferent between the two models. It also means if you sell less than 1,428 units, you will be better off under the percentage model. If you sell more than 1,428 units you will be better off under the flat fee model.

To take another example of the flat fee model, what would a \$100 flat fee equate to under the percentage model at 500 units at a wholesale price of \$0.70?

$$[\text{Flat Fee}]/[\text{Gross Income}] = \text{Distribution Fee as a percentage}$$

$$\$100/[(500) \times (\$0.70)] = 28.6\%$$

In any of these examples, you will need to use your own projections on sales, wholesale price and configurations in order to get a projection that is relevant for your own use.

Also, the aggregator need not collect SoundExchange monies and should not be able to enter into any agreements on behalf of the artist/copyright owner that allows the aggregator to waive any rights (such as litigation rights) or to settle any claims.

18. **ISRC:** The International Standard Recording Code or “ISRC” is an international identifier for individual sound recordings and music videos. Before any sound recording is distributed by a digital retailer, each recording should have an ISRC.

Consult the individual retailer for their specific requirements, but many retailers and also CD duplicators may require an ISRC as a condition of distribution or manufacture.

Each sound recording copyright owner should have its own unique Registrant Code (the first few characters of the ISRC) which is administered in the US by the US ISRC Agency which has an online application at <http://www.usisrc.org> and charges a modest fee (currently a lifetime \$75 for 100,000 ISRCs per calendar year). (For readers outside of the US, consult your local recording industry association, but remember that typically membership in the association is not required to get an ISRC Registrant Code.)

This means that if you own your own sound recordings or videos and wish to distribute your own content, you should have your own ISRC Registrant Code that has been issued to you. There are also designated “ISRC Managers” who will do this for you, but you should seriously consider whether it is to your advantage to involve a 3rd party (see https://usisrc.org/faqs/3rd_parties_managers.html#Q1 for a description of the role of ISRC Managers). The current list of ISRC Managers is available on the US ISRC Agency website (<https://usisrc.org/managers/index.html>).

It is a very common practice that artists who do not have their own ISRC Registrant Code use someone else’s Registrant Code when making their tracks available online to avoid the “hassle” of obtaining a code. Our understanding of the US ISRC Agency’s practices is that only the sound recording owner or an approved ISRC Manager is able to obtain an ISRC Registrant Code. Over time, using other people’s Registrant Codes could create an administrative mess as the ISRC is the one unique identifier that follows a recording throughout its life. One caveat—the ISRC concerns the *recording only (or video)*, not the song, and while not required by law in order to enjoy any rights of a copyright owner, it is advisable to obtain as a practical matter, and inexpensive.

Another reason it is advisable to obtain your own Registrant Code is that the international recording industry is moving toward a global identifier and a global database of sound recordings, likely mapped to songs. A good guess would be that this database will likely be regional at first.

An early attempt at creating the identification infrastructure for this database is the GRid standard (http://www.ifpi.org/content/section_resources/grid-standard.html#1.4) which utilizes ISRCs among other identifiers. The DDEX standard (<http://www.ddex.net>), another system that standardizes XML communications in the digital supply chain, accepts the GRid identifier (according to GRid), so you see how having the correct ISRC may become more important in the very near future. (A list of DDEX members is maintained on the DDEX site, but the list includes Apple, The Orchard and the larger PROs and collecting societies http://www.ddex.net/members_list.htm.)

As these tracking systems become more robust, there may come a day in the not too distant future when artists and songwriters can be paid directly by retailers. When

that day comes, it will be important to have the cleanest possible data in the chain. This is why it is advisable to get the ISRC in the beginning, as like so many things it's a lot cheaper to do it right the first time than to fix it in the future.

19. **Unions:** The two principal music industry unions are the American Federation of Musicians ("AFM") for musicians and the American Federation of Television and Recording Artists ("AFTRA") for vocalists. Any artist who has recorded a major label album has likely already joined one or both unions. Knowing whether a musician is a union member is important because union membership carries with it various restrictions such as a minimum fee to perform at recording sessions (i.e., union scale), as well as payment of royalties such as the Music Performance Trust Fund and the Special Payments Fund. If any band members play or sing on union sessions with any great frequency, you probably are or should be members of one or both unions. AFTRA in particular has very good health insurance available for near-free if the AFTRA member does over a certain threshold of work through the union (currently approximately \$40,000 per year). AFTRA has also developed an "indie" membership. It is also important to know whether any "side artists" who have played on the band's recording are members of a union and were paid the appropriate rates.

20. **Side Projects:** All major label deals and many independent record deals require the exclusive services of their recording artists. You should know what other recording projects, if any, the individual band members have committed to and if there are any restrictions. This issue may also come up when a musician signs an artist management contract or a merchandising deal.

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There are many more than twenty questions for new artists to answer about their business, but we think these are a good place to start.

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