
A wooden gavel with a dark handle and a three-tiered head rests diagonally across a stack of old, worn books. The books have leather covers and visible text on their spines. The background is a warm, out-of-focus yellowish-brown.

A LEGAL GUIDE TO THE MUSIC BUSINESS *part one*

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New to a Foreign Land? Legal Aspects to Touring in the States and Beyond



No matter what side of the spectrum you are on, touring in a foreign land can be complicated. If you're considering your first tour or festival overseas, here are some things to keep in mind:

Foreign Artists Touring the United States:

Obtaining a work visa in the United States is not easy. Couple that difficulty with a minimal (or non-existent) payday, and the prospects can seem even more daunting. This has been a hot-button issue for bands trying to get to the States for popular festivals. British newspaper *The Guardian* discussed the red tape prohibiting some UK bands from performing at SXSW, stating:

"Artist manager Peter White, of Fear and Records, says the process of getting visas to play events such as SXSW and CMJ can be quite confusing. Simply having an invitation to play does not guarantee you a visa; you also have to prove that you're a professional band, serious about its career. According to White, there doesn't seem to be a set formula for demonstrating this. He says one UK band that has had quite considerable success was recently denied US visas after they were deemed insufficiently famous. Meanwhile, American bands playing events such as Brighton's The Great Escape have no problem getting visas, unless they have criminal convictions."

So what can you do to make it to next year's festival in the States? All international acts performing for a paying public audience are required to obtain a work visa regardless of compensation. To do that, you need to go through a few steps (below are the basics - for specifics, you'll want to go visit your country's checklist at the Department of State www.usembassy.gov)

Visa Type: You'll be coming to the US as a non-immigrant, temporary worker, and required to get a Category P-1 or P-2 visa type, which is designated for individual or group artists and entertainers.

Pre-Requisites: Before you can get a visa, you'll need the Department of Homeland Security and Citizen and Immigration Services to approve an application form I-129.

File Online: You can complete the visa application form DS-160 online at the U.S. Department of State. Make sure to have a current picture (within the past six months) ready to upload.

Schedule & Attend an Interview: You must schedule an appointment for your visa interview, generally, at the U.S. embassy or consulate in the country where you live. During your interview, a consular officer will determine whether you are qualified to receive a visa. You will need to establish that you meet the requirements under U.S. law to receive the category of visa for which you are applying.

Make sure you have all required documents: This will include: (1) Passport valid for travel to the U.S. (must be valid for at least six months beyond your period of stay). (2) Nonimmigrant Visa Application Form DS-160 confirmation page. (3) Application fee payment receipt. (4) Receipt Number for your approved petition as it appears on your Petition for a Nonimmigrant Worker, Form I-129, or Notice of Action, Form I-797, from USCIS.

From there, after processing, you will receive confirmation of visa approval or a denial letter. Under some circumstances, you may be able to travel to the U.S. without a visa under the Visa Waiver Program. For more information on this program visit travel.state.gov/visa/temp/without/without_1990.html.

Here are some other helpful links to get you on your way:

US Citizen & Immigration Services: www.uscis.gov/portal/site/uscis

US Department of State FAQ: travel.state.gov/visa/questions/questions_1253.html

US Citizens Touring Abroad: For acts from the States, touring abroad can be more straightforward, but not without its complications. The most

popular destination for American bands abroad is the United Kingdom. Here are the basics if you plan to tour there.

Get a valid passport: New passports or renewals can be obtained online through the U.S. Department of State's website: travel.state.gov. The cost varies between \$55 and \$165 depending on if you're a first time applicant, renewing, or obtaining a passport book or card. Check out iafdb.travel.state.gov to view the passport facilities nearest you and apply at least two months in advance of your trip.

In order for your group to perform in the UK, you need the requisite permits or visas. Here are the most popular options:

Work Permit: If you are planning a traditional tour, you'll need a work permit, regardless of the duration of your stay or how many gigs you've lined up. Your work permit will be applied for by your employer - most likely your promoter or, in rarer circumstances, the club/booking agent. You'll need a strict itinerary locked in prior to your employer applying for permits. If your band is less than 19 people, you'll need a work permit for each member. Your UK-based employer can find applications for work permits for musicians specifically under the Sportspeople and Entertainers work permit category. There is a fairly short turnaround for the work permit application process, generally around two weeks.

Entertainment Visa: An entertainment visa is the way to go if your band is (a) heading to the UK to perform in a music competition; (b) taking part in a cultural event sponsored by the government, or (c) taking part in a charity concert. These are generally good for six months and afford you the luxury of staying abroad without the same restrictions you'll encounter with a work permit. Of course, an entertainment visa is essentially predicated on the basis that you (i) are not paid for performing; and (ii) can include proof that you can support yourself during your time in the country.

▼ ABOUT THE AUTHOR

Adam Barnosky is a Boston-based attorney and writer. For industry trends, legal updates, or to request an upcoming Legal Pad topic, find him on Twitter at [@adambarnosky](https://twitter.com/adambarnosky).

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Concert Security

How to Protect Yourself, Your Fans, and Avoid a Lawsuit

THE SAME ELEMENTS THAT MAKE FOR A GREAT SHOW can sometimes turn against you. The combination of large crowds, loud music, dancing, booze and a host of other elements are often a breeding ground for injury and personal liability. Whether it's a fight, a fall, a stumble, or a combination of all three, you'll want to make sure you are protected when accidents happen. If a problem arises, how do you know whether it's your "fault," and what can you do to protect yourself against a lawsuit? This month's Legal Pad dives into negligence, insurance, and playing live.

"Negligence" = Liability. When you should have known better or could have done something about it, it is generally called "negligence" and you could be liable for someone else's injury. Nolo's "Plain-English" law dictionary defines negligence as:

"Failure to exercise the care toward others that a reasonable or prudent person would use in the same circumstances, or taking action that such a reasonable person would not, resulting in unintentional harm to another. Negligence forms a common basis for civil litigation, with plaintiffs suing for damages based on a variety of injuries, from physical or property damage to business errors and miscalculations. The injured party (plaintiff) must prove: 1) that the allegedly negligent defendant had a duty to the injured party or to the general public, 2) that the defendant's action (or failure to act) was not what a reasonably prudent person would have done, and 3) that the damages were directly ("proximately") caused by the negligence. An added factor in the formula for determining negligence is whether the damages were "reasonably foreseeable" at the time of the alleged carelessness."

While the test for negligence surrounds particular facts and circumstances, you should



pictured: The Jesus Lizard - photo by Nolan Wells

evaluate your act (and your venue) to determine what preventative measures you could take to stop a problem before it happens. Does your band have fans who jump off the stage into the crowd? You should get security as a barrier to the stage. Do you have a lot of minors at your show? Check IDs at the door and at the bar. Does your band light off pyrotechnics during the show? Stop doing that. You get the point.

Venues & Insurance: When someone is hurt at a concert, they will often seek money to cover their medical bills and expenses related to the injury. Many times this will come in the form of a lawsuit. Most popular venues will have insurance that covers people who might be injured during the course of a gig. If you are signing an agreement with a venue, find out whether they carry insurance. If they do, this should be contained in the contract. In the event that someone is injured and it turns out that the club does not have insurance – you could have a cause of action against them based upon the contract.

During the past few years, however, insurance companies have been cracking down on live venues. This has a trickledown effect on performers. Some insurance companies are requiring insured venues to have live bands provide their

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own insurance and liability waivers. Live performance insurance can include liability for personal injury and property damage and can be bought on an annual or per event basis. For smaller venues, policies covering between \$1,000,000 and \$2,000,000 should be more than sufficient (premiums are less expensive than it sounds). Again, oftentimes a venue contract will specify what policy limits are required and demand to see proof of insurance. If audience members, equipment, or you are injured during the course of the performance, club policy and party coverage will determine responsibilities and payout.

The good news is, if you have insurance, get sued, and the injury is covered under your policy, (a) your insurance will take care of the legal expense in defending the suit – there is a specialty in the field known as "insurance defense," and (2) the company will cough up any resulting damages from the suit.

Protecting Yourself: When in doubt, take it upon yourself to get covered. So what's the best way to get insurance? First, try exploring online options. New York-based MusicPro Insurance (www.musicproinsurance.com) has an informative and user-friendly website that makes insurance selection easy. You'll need basic information to get started, including tour itinerary (dates, venue, and venue capacity), transportation details, payroll information (if requesting workers' compensation), and your band's federal ID (if it's an LLC or a corporation). After filling in the required criteria, you'll be issued a quote. Better to take care of this sooner rather than later; your band, gear (and wallet) will thank you in the event that you actually need to use it.

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Bootleggers Beware: Your Band's Guide to Slaying Counterfeiters



MERCHANDISING HAS NEVER BEEN EASIER. Online resources have made the process of designing and manufacturing t-shirts, stickers, vinyl, etc. straightforward, fast, and relatively cheap. The downside, however, is that counterfeiters also have this luxury and - as a result - it has never been easier to manufacture and sell bootleg merchandise. While bootlegs were previously only a problem for mega-acts, smaller touring groups have reportedly seen a recent increase in counterfeiting online and at shows.

Can a bootlegger sell your merch without permission? Short Answer: No. The law protects your band's copyrights, trademarks, and likeness rights. Here is a snapshot of each:

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Copyright. Copyright violations arise when a bootlegger uses your band's music, artwork or photos without authorization. Copyright is a legal protection for those who create "original works of authorship." This extends to all recorded music and essentially allows the copyright holder to control the rights to their work. No formal filing or paperwork is required for the existence of this protection: it is protected upon creation. So what does this mean for you? Essentially, someone has your expressed permission (called a "license") to use your copyrighted material, they are violating the copyright laws. This protection is not limited to artists within this country alone. Due to international agreements, artistic works are mutually

protected in nearly every country in the world.

Trademarks. A trademark is a word, phrase, or other symbol used in commerce to identify your brand, product, or identity. In the music industry, a trademark exists for the protection of bands, labels, related businesses, and consumers by giving the creators and/or owners of products or services exclusive rights to use a certain name, word, or image to identify their products or services (and prevent others from using them). In addition, it protects consumers by ensuring that when they buy a product (like a piece of merchandise), they know they're getting the real thing.

Right of Publicity. In addition to stealing a copyrighted work, a bootlegger is breaking the law if they use your band's name, likeness, or personal attributes without permission. The right of publicity controls the commercial use of your identity/image. Again, a merchant must have your consent to use a legally protected name or likeness of another for commercial gain.

If a bootlegger is found to have violated any of these rights, they can be held liable for statutory damages (between \$750 and \$30,000), actual damages and profits, or - in rarer circumstances - criminal penalties.

PROTECT YOUR BAND AGAINST BOOTLEGGERS: REGISTER YOUR MATERIALS!

While the law will give you certain protections automatically, in order to have legal action against bootleggers, you need to register your work.

File for a Trademark. Your band may have already acquired trademark protection through common law (which is harder to determine and by no means foolproof); however, formal registration is hands down the way to go. The advantage of registration is that (1) it puts potential bootleggers on notice that your band's name is "taken" and (2) it allows you to sue in federal court if a dispute arises. There are some qualifications you will need to check off prior to registering. First, have you participated in "interstate commerce" (i.e. toured or sold your music in several states)? Second, do you have proof that your name has been used in commerce? If you've answered "yes" to both of these questions, you may begin the registration process. Make sure your name and any designs are locked down. First, go to **uspto.gov** and conduct a search for similar marks. Second, it is strongly recommended that you look through the full application process at **www.**

uspto.gov/trademarks/teas/new-teas-plus.pdf, which has screen shots of all the questions and information needed throughout the process.

Register your Copyright. First, to check out the step-by-step tutorial on registering your work online, go to **www.copyright.gov/eco/eco-tutorial.pdf**. You'll need to get all of your songs, composition names, and payment information together. From there, go to **www.copyright.gov** and click on the "Electronic Copyright Office" logo on the right side of the screen. You will have to complete a brief registration, after which you'll be taken to the registration home screen. Click "register a claim" on the left and complete the next three steps: (1) Complete Application; (2) Make Registration Payment; and (3) Submit Your Work.

Note: If you want the assurance that your

registration is completed properly, hire an attorney specializing in trademarks and copyrights.

Ward Off Offenders. There are many options you can take if you find someone selling bootlegged merchandise without permission. Your first line of defense should be to call the police. It is likely that these vendors do not have proper permits to sell merchandise and will be scared off or cited on that basis alone. This also creates a record in the event that further action need be taken. To that end, if a person or company is repeatedly bootlegging your band's merch, you'll need to take legal action to stop them, first for an injunction (an order to cease their illegal activities) and second for damages caused from the prior sales.

If this is an issue for your band, contact a lawyer in the area where this is happening that specializes in intellectual property and litigation.

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Why A Million Plays on Pandora May Only Net You \$16 An Intro to Online Royalties in Today's Marketplace

THERE'S NOTHING BETTER THAN A PAY DAY. With a multitude of income-generating avenues available for musicians on the Internet, there is no shortage of ways to make money online. How much you can make, however, is a different story. This month's Legal Pad looks into online streaming, the dollars and cents behind the services, and how these services may affect you - the performer - in years to come.

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BACKGROUND

While there is money to be made, don't bank on online services alone to make a living. In recent months, there have been various stories of artists making as little as 0.001 cents per play. Hypebot recently featured an article by singer/songwriter David Lowery declaring that he'd been paid only \$16.89 for over 1 million plays on Pandora. Enough to buy a few pairs of strings, but not exactly the payday you might imagine for the size of the audience reached. Lowery details his frustration with the process:

"Soon you will be hearing from Pandora how they need Congress to change the way royalties are calculated so that they can pay much much less to songwriters and performers. For you

civilians, webcasting rates are 'compulsory' rates. They are set by the government (crazy, right?). Further since they are compulsory royalties, artists cannot 'opt out' of a service like Pandora, even if they think Pandora doesn't pay them enough. The majority of songwriters have their rates set by the government, too, in the form of the ASCAP and BMI rate courts - a single judge gets to decide the fate of songwriters (technically, not a 'compulsory' [one], but may as well be). This is already a government-mandated subsidy from songwriters and artists to Silicon Valley. Pandora wants to make it even worse."

It has been reported, however, that Pandora pays

more to labels per stream, with labels receiving approximately 12 cents per 100 streams (Lowery's cut comes after the label's take and is watered down from splits with multiple songwriters/performers). Keep in mind that these rates are not set in stone. Every five years, the royalty fees paid to artists and record labels are set by three judges serving on the Copyright Royalty Board, an arm of the Library of Congress. The CRB follows guidelines in various copyright laws passed as new radio and online formats developed in prior years, and it has become stricter as a result of aggressive music industry lobbying (i.e. the efforts by Pandora to lower its rates).



STANDARD ROYALTY RATES FOR STREAMING SERVICES

It's not all bad news and many sites pay more than Pandora, depending on their model. New sites are launched daily that provide streaming or download capabilities. Several models exist: fee based, ad supported, and user-generated are three of the more popular models. Here are a few of the more popular sites and some of the fee structures they maintain:

SERVICE	MODEL	ROYALTY RATE (APPX.)
Pandora	Ad Supported	12 cents per 100 songs
Grooveshark	Ad Supported	None
Sirius/XM	Subscription	12.5% of the subscription
Spotify	Subscription	35 cents per 100 songs
iHeartRadio	Ad Supported	22 cents per 100 songs

CHANGES IN THE INDUSTRY

There may be more changes on the horizon for streaming services. It has been reported that tech/music giant Apple has opened discussions with record labels and industry leaders about obtaining rights to launch a music streaming service. Based upon their other forays into the music industry (monetizing digital downloads with iTunes), it is not difficult to see this as a game-changer. That said, there has been some push back from labels because Apple is offering a significantly smaller amount of money per stream. Their proposed rate has been reported at 6 cents per 100 streams (HALF of that paid by Pandora). Apple wants to make their new service, predictably called iRadio, bundled with iMatch, which allows iTunes users to make their music available on all iOS devices.

On a (somewhat) positive note, services that provide no royalties or payments of any kind to artists are beginning to feel the heat. Last year, Grooveshark was sued by all four major record labels for failing to pay royalties. Grooveshark, which relies on its 35 million-plus members to upload their music libraries to the streaming service, is somewhat protected under the Digital Millennium Copyright Act (which may avoid penalties if it removes infringing content within a specified timeline after notice). However, Grooveshark is not an innocent party in this practice. During the course of the lawsuit, emails showed that the company's employees led an effort to post more than 113,000 pirated songs. Another email reportedly from Grooveshark's chairman Sina Simantob says: **"The only thing that I want to add is this: we are achieving all this growth without paying a dime to any of the labels."** That about says it all. The Grooveshark suit, which is anticipated to settle, is still being actively litigated.

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RECOUP MONEY YOU'RE OWED FROM SHADY PROMOTERS LIVE PERFORMANCE CONTRACTS & THE LAW



photo by Benk Zsolt

LIVE PERFORMANCE VENUES FUNCTION IN A FORMER ERA. Handshake deals are commonplace, ink is rarely spilled, and a promoter or venue owner's word is often all you have to go on before you take the stage. In a way, this is the best way to go - no reason to complicate a straightforward deal: I play for ninety-minutes, you pay me. That said, there are dozens of issues that can block this simple transaction from transpiring and this month's Legal Pad dives right in:

BASICS

If at all possible, get your contract in writing. Most disputes start not because one party is trying to take advantage of the other, but because the parties have different ideas of what was supposed to take place under the agreement. Putting your terms in writing is a major step in avoiding confusion.

CONTRACTS TERMS

Name, date, location, and room within the location are more important than you think (many small to mid-size venues have various rooms; if you're traveling to a certain venue, make sure it's for the right room). While you're at it - get your order in the lineup confirmed (the term "headliner" can vary depending on venue).

Payout. There are many ways to get paid. A "flat fee" guarantees you a dollar figure so long as you show up and play. A "percentage of the gate" gives you a cut of the tickets sold. A "minimum guarantee" is hybrid of the two, allowing you a flat rate, plus a cut of the door (or bar receipts) after a certain number. There's incentive for both the venue and performer to lock these rates in before the performance date.

Rider and Personnel. There is a reason for the infamous "rider provision" of a venue contract. It allows a band the ability to control (and in some cases demand) certain portions of the set up, performance, and post-show. For touring groups, the rider provision is a must. Further, personnel issues should always be laid out in a contract. Is a soundman provided? Is he/she mandatory? Some groups would rather ditch the gig altogether than have house personnel control the sound, while other acts would be grateful to bring one less person on tour. Spell out these details in your contract.

Show Promotion. If you're lugging your equipment across country for the first time, there's only so much that Twitter outreach can do. Make sure you have in writing who is responsible for promoting your gig. This is less of a concern for flat fees gigs, where the onus is on the venue to bring people in. But when you are being paid a percentage of the door, you'll want to lock in promotion and advertising responsibilities ahead of time.

Liability. Make sure to protect your band's business and assets when signing the agreement with the venue. Don't take responsibility for any problems inherent in the venue's operation or anything that could be beyond your band's control. Some acts will request copies of general liability insurance binders before playing - this will give you some confidence that - in the event someone gets hurt - you won't be on the hook for related expenses. However, policies differ; make sure to review before signing.

If you are signing a high-stakes contract or multi-date agreement, there are a host of other matters to be aware of. These are simply the basics.

▼ ABOUT THE AUTHOR

Adam Barnosky is a Boston-based attorney and writer. For industry trends, legal updates, or to request an upcoming Legal Pad topic, find him on Twitter at @adamarnosky.

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THE "PAY TO PLAY" ARRANGEMENT

Some define "pay to play" in the literal sense: to play a certain venue, a band must pay an out-of-pocket fee. Promoters often define the process in terms of "pre-sale" tickets. This pre-sale process is the one usually sold to relatively unknown and untested bands. Under this arrangement, a band is given a certain number of tickets to sell. These, however, are not comp tickets: a band is required to pay the promoter/venue for the tickets upfront. If the band is unable to sell the tickets on their own, they have to eat the cost (i.e. paying for the privilege to play the show). For a new band, pay-to-play can be an avenue to playing a live venue. Other bands may see an advantage to playing an historic or reputable venue. Of course, there are downsides to these deals. Bands often find themselves paying hundreds of dollars to perform limited sets along with a random assortment of other acts. The lineups, particularly with many festivals, are assembled based upon ability to pay the promoter or sell tickets - not because they fit a certain bill or attract a similar audience.

WHAT CAN YOU DO IF YOU DON'T GET PAID?

If you've signed a contract with a venue or promoter for a certain amount and they fail to pay, then you may have the right to sue for payment. In Massachusetts, for example, if the amount is less than \$7,000 you can bring an action in small claims at your local district court. This is the fastest and least expensive way to go (filing fees are approximately \$100 and you won't need a lawyer for formal proceedings). If your fee is higher, you may have an action in a higher court - which will require professional assistance. If you find yourself in any of these situations, it can be beneficial to first write a position statement or demand letter detailing your circumstances and the reasons you feel entitled to your request. This can often be the first step in resolving your issues. If you have questions or want to make sure it's done correctly - hire a lawyer who has experience in contracts and the music industry.

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Royalty Watchdog Keep Tabs on Your Label's Books



IF YOU'RE SIGNED TO A LABEL, THE MONEY YOU EARN FROM RECORD SALES doesn't flow directly from your supporters to your pocket like it did in the early days. A majority of your income now flows from your fans to an online or brick and mortar store, through your label, then down to you and your bandmates. At the basic record label level - gross profits are accounted, overhead and out-of-pocket recouped, with the net allocated according to your royalty rate. While a check will come to you in the mail, you'll never get to watch the sausage being made. Can you trust the person signing your checks and is there a way to know if you're being ripped off? This month's Legal Pad looks at label contracts, accounting, and getting what you've earned.

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When You'll Get Paid: You will only begin to see royalty payments once your label has recouped the money it spent out of pocket to record, manufacture, and promote your album. That said, you should begin to see royalty statements almost immediately. Most labels will send royalty statements twice per year, conducting accounting within 90 days after the end of June and December, with statements issued after the books are complete.

In the event that you feel as though your record label hasn't paid you what you deserve, you want the ability to check the records. The review of your label to determine whether it is paying the proper amount of royalties and complying with relevant provisions of your contract is called an audit. Whether major label or indie, an audit provision is a staple of any good record contract. If you don't have a stipulation in the contract that gives you this authority to audit, your ability to do so becomes much more difficult (but more on that later).

Audit Provision: If you're signing a record label contract, it is recommended that you have an attorney review and negotiate the agreement on your behalf. As an example, here is a sample audit provision:

"Label will maintain books and records which report the sales of Records, on which royalties are payable to you. You may, but not more than once a year, at your own expense, examine those books and records, as provided in this paragraph only. You may make those examinations only for the purpose of verifying the

accuracy of the statements sent to you. All such examinations shall be in accordance with GAAP procedures and regulations. You may make such an examination for a particular statement only once, and only within one (1) year after the date when Label is required to send you that statement."*

Read this provision closely - you'll see that, while giving you the right to audit, the provision is still highly restrictive (i.e. limits audits to once per year and only for one year after statements are issued). Whenever you can, broaden the scope of your audit provision. Labels will add as many limiting provisions as possible, making sure they have the right to determine when, where and how the audit takes place, and requiring any accountant examining the books to sign a letter of confidentiality. Further, as in the example above, labels will require that an auditor be paid from the band's pocket (discouraging audits that allow payment on a contingency of the audit proceeds). A flat fee audit can be incredibly expensive and cost prohibitive. There's no mystery behind why this provision is included - the label is discouraging your ability to audit by making it too expensive to do so.

***GAAP** stands for Generally Accepted Accounting Principles, and is the general framework accounting in any given jurisdiction. In the event that you want a review of your label's books, hire a certified public accountant (CPA) to handle your audit (and preferably one with knowledge of the record industry).

The Audit: Audits are commonplace in the recording industry and can take anywhere from a day to several weeks, depending on the complexity of the numbers and records involved. Generally, accounting issues at record labels can be the result of (1) human error; (2) errors based upon company procedure; and (3) misinterpretation of your record agreement. A fourth category - unscrupulous business practices - is typically less of an issue, but always one to look out for. While most major artists will audit their label at least once - if not several times - over the course of a contract, it is less common for smaller labels. That said, you should have no hesitation in the event you feel an audit is required. Big business or small, each label should maintain detailed records of all income, overhead, and disbursements.

If you choose to audit your label, make sure to abide by the timelines and guidelines set forth in your contract. Failure to do so can render any errors void. In the event that you don't have an audit provision in your contract, have a letter written to your label requesting an audit and specifying the time and place of the review. If you get no response, send a follow up. In the event that your label is unwilling to allow an audit, you may have to bring a legal proceeding against your label for the ability to inspect its books.