

New Music Monetization Structure Allows Artists To Retain Ownership of Their Work



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Top artists have been making headlines for striking music rights deals with deep-pocketed investors who acquire their music publishing and recording rights. Within the last two years, Bruce Springsteen, Stevie Nicks, Bob Dylan and Shakira, among others, entered into such arrangements. But artists who desire liquidity and want to capitalize on sky-high prices for their music rights have resisted selling their life's work.

A music catalog monetization structure called a "RECAP" (Artist Retained Equity in Catalog With Assignment of Proceeds)¹ has been developed, which effectively gives artists the best of both worlds: a significant upfront payment and retained legal ownership of their catalog. Unlike traditional catalog deals where legal ownership is transferred to the buyer, in a RECAP the artist retains full legal ownership of their catalog, and economic ownership reverts back to the artist automatically at the end of the contract.

A Closer Look at Music Catalog RECAPs

Traditionally, artists looking to monetize their music publishing or recording rights had two options: (1) sell their catalog and lose ownership and control of their works, or (2) debt finance their catalog and take on minimum debt service payments and related financing risks (*e.g.*, risk of default, foreclosure and sometimes personal liability).

In a RECAP, however, an artist is paid a lump sum cash payment by an investor (such as a private equity firm) in exchange for assigning the artist's future catalog proceeds for a predefined period. Unlike a loan, the artist is not required to make any interest or principal payments, so there is no payment default or foreclosure risk. Rather, the artist retains their same legal ownership and control over the catalog assets (including any intellectual property rights therein) as before the transaction, and the rights to the catalog proceeds revert back to the rights holder automatically at the end of the contract term.

To justify the risks as well as transaction and opportunity costs, particularly given that a RECAP typically does not require artists to tour or promote their catalog, the catalog's projected revenue stream must be sufficiently large and expected to have legs over the life of the agreement. Accordingly, a RECAP is more appropriate for large catalogs with popular, profitable songs and/or established artists with a history of strong catalog sales. The greater the projected net present value of the catalog proceeds at the time the parties enter into the agreement, the greater the potential lump sum payment to the artist. Because the artist retains ownership of the catalog assets, the payout will not be as large as if the artist had sold the catalog, but many artists view this as a fair trade-off for not selling their life's work.

A RECAP's key elements are negotiated on an artist-by-artist basis but generally include:

- **Artist-retained ownership of rights.** A RECAP's primary attraction to artists is that it does not require rights holders to forego any equity or legal ownership in their catalog. Only the relevant catalog proceeds, not underlying catalog assets, are assigned; the right to receive such proceeds reverts back to the artist automatically upon a RECAP's conclusion (with off roads as the end of the term approaches to ensure a smooth reversion of payments).
- **Catalog proceeds assignment.** In exchange for the lump sum payment, the artist assigns to the payer (the assignee) all catalog proceeds attributable to "exploiting" the catalog assets during a RECAP's term. Typically, "catalog proceeds" is defined broadly

¹ RECAP is a registered trademark.

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(*e.g.*, digital download sales, sync licenses, merchandise, vinyl record sales, public performances, etc.), and “exploitation” includes all known or future technology, transmission mediums and distribution methods.

Artists often must procure “letters of direction” at closing instructing that royalties and other income streams (at least for the major labels, PROs and other significant contract parties) be sent directly to the assignee. Customary cooperation covenants (including to maintain the letters of direction during the term), “anti-circumvention” provisions and “wrong pockets” clauses are designed to protect the assignee for making the upfront payment and leaving the artist with ownership of the catalog assets.

- **“Catalog” definition.** A RECAP can, but does not need to, encompass an artist’s entire body of work. Rather, the catalog may include a selection of works and often excludes future works (subject to certain exclusions such as derivative works relating to the relevant catalog assets). Each deal is negotiated on a case-by-case basis, including to address treatment of blanket rights payments, audit proceeds and other extraordinary items that may be received during the life of the contract.
- **Long-term relationship.** RECAPs may be in place for decades, potentially outlasting the parties who negotiated the deal. As a result, one downside of a RECAP is not knowing who either side will be dealing with down the road.
- **Bonus and buyout provisions.** In addition to the upfront lump sum, artists may receive “bonus” payments if the catalog proceeds collected by the assignee hit certain revenue milestones. Additionally, a RECAP could include an artist “buyout right” whereby the artist can terminate a RECAP early by paying the assignee a buyout price based on a formula or preagreed amount.
- **Sync revenues.** Synchronization rights and licenses can impact a song’s value and/or artist’s reputation (and thereby materially affect the catalog proceeds). As a result, whether an artist must consent to sync licenses within certain parameters (or at all) is often heavily negotiated. Factoring in sync revenues under a bonus structure and/or buyout payment may help align the parties’ incentives.
- **Protective provisions.** A RECAP has various protective provisions and cooperation covenants to ensure both sides are treated fairly throughout the life of the long-term contract. Because the assignee lacks ownership interest in the catalog assets, a RECAP obligates rights holders throughout the contractual term to,

among other things, defend lawsuits involving the catalog (*e.g.*, infringement allegations), not transfer or encumber the catalog, and negotiate favorable terms to maximize the proceeds (*e.g.*, renewing and replacing arrangements with record labels, PROs, streaming services and other distributors on commercially reasonable — and possibly no less favorable — terms). Artists are prohibited from impeding or otherwise frustrating the assignee’s right to receive the catalog proceeds and typically must meaningfully consult, and receive consent from, the assignee before engaging in any activities that could materially affect the catalog. For example, while artists retain the right to make administrative decisions regarding the catalog assets, the assignee must be meaningfully consulted and consent to any agreement that would diminish any earnings that they would otherwise receive. The parties’ ability to initiate and enforce audit rights is also frequently negotiated.

- **Security arrangements.** A RECAP contract may include mechanisms to prevent artists from assigning or pledging the catalog to a third party and to provide the assignee additional protection in the event the artist becomes bankrupt or fundamentally breaches their obligations (*e.g.*, artist refuses to pay over catalog proceeds, or transfers or encumbers the relevant catalog assets, etc.). The assignee may request that the artist execute a security agreement and file a UCC-1 financing statement to perfect the assignee’s security interest in the catalog proceeds and put third parties on notice that the assignee has a first-priority security interest. Such measures prevent artists from pledging contracts with labels, or relevant intellectual property rights or catalog proceeds to a lender, any of which could jeopardize the ability of the assignee to receive the projected catalog revenues.

Key Takeaways

A RECAP can be an attractive catalog monetization structure for artists and other rights holders wanting to capitalize on a hot market for music and publishing rights but not wanting to “sell out” to third parties. The structure requires, among other things, a detailed analysis of the rights holder’s and assignee’s legal rights, a delicate balance of contractual provisions designed to protect both parties’ interests over a long term and agreeing to the scope of the catalog assets. Rights holders should consider a variety of other legal issues, including tax structuring, and consult their business and legal advisers to determine if a RECAP is right for their catalog.