

Sunset for agents?

Julian Turton argues that the agent's perpetual right to commission is untenable

Never has there been such widespread interest in the commercial affairs of literary agents. The catalyst for this is the recent upheaval at the renowned agency PFD; a group of leading individual agents (many of them literary) have announced their resignations and intention to set up a rival agency. This has turned a spotlight on one key aspect of the contractual relationship between authors and their agents: who owns the commission entitlements to the backlist? It has been widely reported that commissions will remain with PFD and will not move with the departing agents. This is likely to have undesirable consequences for the authors of the backlist works, especially those who want to move with the departing agents, and for those agents themselves.

In the context of the manoeuvrings at PFD, books have been described as 'product', commission generated by them as 'assets' and agencies as 'conglomerates'. This is a far cry from the genteel image of authors and their literary agents. Rather, it mirrors the language of the music business. Interestingly, in two particular respects, an author's literary agent is usually rewarded in a manner that is far more beneficial to the agent than is a musician's manager, who does a comparable job.

Literary agents expect to receive their commission on contracts they negotiated for as long as revenue is generated by the relevant books. In the case of very successful books that have become classics in their genre, this is potentially until 70 years after the author's death. This will be many years after the death of the individual agent with whom the author enjoyed what may have been a very fruitful relationship. Furthermore, the commission payable will not diminish in percentage. It will endure whether or not the author, or his or her heirs, terminates the engagement of the agent and appoints another to look after the backlist. It can be sold by the agent, bartered or just received for the benefit of the agent and his or her heirs. Authors and their heirs are stuck with paying the commission at full rate in perpetuity.

By contrast to these very long and undiluted rights enjoyed by literary agents, managers of musicians will usually be subject to what are often termed 'sunset provisions' in their commission entitlement. Once the manager's engagement has been terminated by the musician, for whatever reason – death, incapacity, incompetence or just the artist wanting to move on – the manager and his or her management company will enjoy commission for a number of years at full rate but this will then taper until it ceases altogether. The most common periods of tapering are a full rate for five years after the termination of the management arrangement and 50% of that rate for another five years, then diminishing to nil.

The other key element usually found in the calculation of a literary agent's commission is the right to commission earnings from all contracts entered into during the period of their engagement, not just in relation to books actually written during their engagement. So if a contract for three books is entered into with a publisher, the agent will expect to be entitled to perpetual commission at full rate on all income from all three books (where such income arises from that contract rather than from contracts, e.g. for reserved subsidiary rights, subsequently negotiated by a future agent), even if the author decides to dispense with the agent's services after the first book has been written. In other words, the backlist for a literary agent will include not just works written during his or her period of engagement, but also books that may be written many years later. These unwritten but contracted books might be termed the 'forelist'.

This is not the case with musicians, whose managers usually only receive commission under their sunset provisions on recordings made and compositions written during the period of their engagement. So, a manager may negotiate a songwriting agreement with a music publisher under which that publisher is entitled to publish three albums' worth of songs. If the musician decides to dispense with the manager's services after one album, that manager will earn no commission on the songs written for albums two and three. Again, the musician is in a much more favourable position than his or her literary counterpart. The musician is free to appoint a new manager without having any of the earnings after the new manager's engagement encumbered by commission due a previous manager.

Comparing like with like?

But are authors' agents and musicians' managers doing a comparable job? As far as function is concerned, both provide the interface between talent and those who exploit the products of that talent. Arguably, there is no difference at all: both literary agents and music managers sometimes participate in the process of creation, often provide shoulders to cry on and sometimes help organise personal lives. Both find deals, negotiate contracts and help focus a publisher or record company's marketing, publishing and release activities. Very few invest directly in the talent they represent by paying advances or fees. That is the role of the publisher (literary or musical) and record company, who in return for that investment, will either own all or part of the copyrights created or enjoy exclusive licences to exploit them. Literary agents and music managers are the *hommes* (and *femmes*) *d'affaires* of their respective

creative worlds. The fact that one is called an agent and the other a manager is of no significance.

Do the other commercial terms of the arrangements compensate music managers for their far less attractive position in relation to the backlist and forelist? Managers receive a slightly higher rate of commission than literary agents. This is the only significant distinction in their agreements with the talent they represent, although at the start of their relationship with a musician, managers will usually expect a guaranteed engagement for the cycle of creation and promotion of one album. Agents tend now to receive commission of 10–15% (increasing to 20% for some overseas activities where they appoint sub-agents) while managers usually work on 20% worldwide. The justification for this may be the far greater day-to-day involvement that music managers will have in the careers of a successful active performing musician. At least, while the musician is alive. Music managers justify their 20% commission on the basis that managing a successful recording artist is a very time-consuming business – more so than acting as a literary agent for a successful author – and because the live touring activities of an artist require expensive administrative back-up. An author's performances will principally be promotional in nature and will be organised by his or her publishers. Record companies and music publishers do not get involved in the logistics of their artist's touring activities; this is left to their managers who have to fund heavy overheads out of their commission to support this. It should also be borne in mind that very few managers or management companies in the music business look after more than a handful of artists (of whom one or two may be successful). Many literary agents and agencies, on the other hand, have very large stables of active writers and writers' estates – it is not uncommon for one agent to have 30–40 clients.

If literary agents and music managers do broadly the same job, is there any justification for authors enjoying a significantly less favourable position in the commission they pay on the backlist and forelist? Agents point to the many years spent nurturing the talent and receiving no earnings from it until the author comes good. But music managers can make the identical point. There are many arguments that can be employed by agents to justify their positions and some are respectable. But these need to be balanced against the interests of authors which will be that at a certain point they or their heirs may want to appoint a different agent to look after their body of work. In such circumstances neither authors nor their heirs will want to pay double commission or be unable to incentivise new agents effectively, in relation to their backlist and forelist, because no commission is being paid to the new agents. This parting of the ways may occur because an author's original, utterly splendid agent has died or retired, or it may be because the author starts taking the view that the agent wasn't quite as brilliant as he or she had originally thought. There may even be circumstances where the agent has not performed at the level that should be expected. The advantage of the sunset provision is that it gives

the author some means by which to counterbalance the agent's rights and entitlements under the agency agreement.

Why have the above arrangements evolved in the music business so as to create, arguably, a fairer balance in the management agreement? The answer is in part that for the last 30 or 40 years musicians have increasingly sought independent legal advice on all contracts they have entered into, including their management agreements. This has resulted in a re-balancing of the interests under the management agreement, so that practically all agreements now include sunset provisions and provide that commission arrangements will only attach to a backlist and not to a forelist. This has been the norm for almost the last two decades.

Managers did not all graciously accept the current status quo. Many of their agreements used to mirror current literary agency agreements. In some cases they had to be dragged kicking and screaming, at least in the early days, to give up their valuable forelist rights and accept a tapering of the perpetual full rate commission which literary agents still enjoy. A number of ground-breaking legal cases in the 1980s, employing legal principles of restraint of trade and undue influence, forced through these changes. Those legal principles, developed by the likes of Elton John and Joan Armatrading, as well as competition law issues, make current literary agency agreements look vulnerable. But no authors have yet tested their commission arrangements in court.

Returning to current events at PFD, this might be an opportune moment for agents and their authors to re-examine their contractual relationships.

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