INTERNATIONAL & COMPARATIVE MUSIC LICENSING

Final Examination: Fall 2002

Professor Allison Demas

INSTRUCTIONS

1. This is an open-book, take-home exam, to be returned to the Registrar's Office by noon on Monday, December 16, 2002.
2. You may brainstorm and discuss the issues raised in this exam with your colleagues. However, **your answers must be written entirely on your own**. Credit is given for independent and reasoned analysis.
3. You are free to consult any reference materials you wish.
4. This exam has two parts. Part I consists of three questions **all** of which you are required to answer. In Part II, you are given a choice of two questions and you may answer any **one** of them.
5. Your answers to Part II must not be longer than 6 pages.
6. You should type all your answers with double-spaced lines, using Times New Roman 12- point font.
7. Put your exam number (not your name) on each page of your answers.

This exam is worth a total of 80 points. The point value of each question is indicated at the beginning of each question.

PART 1

Fact Pattern for Part 1

Manhattan Music Inc. ("MM") is an independent music publishing company based in New York City. MM secured the recording of a CD album featuring performances by the group "Ameridance" of songs written by 3 of the 6 members of the group ("Songwriters"). The Songwriters entered into an exclusive publishing agreement with MM on February 1, 2001 for a term of 25 years. MM is a member of BMI. The CD was released in the US by MM's affiliated record company Manhattan Records in August 2001. One of the tracks on the CD entitled "The Love Game" was in the Top 10 of the record charts for 16 weeks and the CD album was certified Platinum.

In March 2002, MM entered into sub publishing Agreement with Leicester Square Music Ltd. ("LSM") an independent music publishing company based in London, England. LSM is a member of PRS and of MCPS. The Sub-Publishing Agreement granted LSM publishing rights in the UK in relation to all songs embodied in the CD album. LSM secured a cover recording of "The Love Game" by "Brittsdance" one of the most popular music bands in the UK. Brittsdance's track has been rapidly climbing the UK charts. LSM has asked you to review the sub publishing agreement (which is one-sided in favor of MM) and to redraft the agreement on more balanced terms in order to achieve a "win-win" for both parties.

Questions

1. (25 points) Redraft the following extracted provisions of the agreement on more balanced terms:

SUBPUBLISHING AGREEMENT

This Agreement made this 21st day of March 2002, by and between Manhattan Music Incorporated (hereinafter referred to as "Publisher") and Leicester Square Music Limited (hereinafter referred to as "Sub-Publisher").

In consideration of the mutual promises herein contained, and other good and valuable consideration, the receipt of which is hereby acknowledged, the parties agree as follows:

Grant of Rights

1. (a) Publisher hereby grants to Sub-Publisher, the following rights in and to each musical composition specified in the Schedule (hereinafter referred to as ("Compositions")upon and subject to the terms and conditions hereof and for a period of one year:

(i) The right to print, publish and sell copies of the Compositions in the Territory, provided, however, that Publisher reserves to itself the right to ship or license the shipment into the Territory of printed music embodying Compositions manufactured by Publisher or by its subsidiaries, affiliates or licensees outside of the Territory, and Sub-Publisher shall have no right to receive any portion of any sums received by Publisher on account of such importation or licensing;

(ii) The right of public performance of the Compositions, (including broadcasting and television), and of licensing such rights in and for the Territory;

(iii) The right to license the manufacture of mechanical reproductions, serving to reproduce the Compositions, provided the mechanical reproductions shall be licensed for sale within the Territory but not elsewhere; and

(iv) Upon securing the prior written consent of Publisher, the right to grant non-exclusive synchronization licenses for the recording of the Compositions in and with motion pictures, and television productions produced in the Territory, and of making copies of recordings thereof, and exporting such copies to all countries of the world.

(b) Publisher does not warrant or represent that it has or will have the right to assign to Sub-Publisher any or all of the rights above set forth in the case of each and every musical composition which it owns or controls.

Reservation of Rights

2. Publisher hereby reserves unto itself:

(a) All rights in the Compositions and the copyrights therein for the world outside the Territory, and all rights within the Territory other than as are specifically herein granted to Sub-Publisher;

(b) The exclusive right to grant licenses for the entire world (including the Territory) for the synchronization and public performance of the

Compositions with motion pictures or television productions produced outside the Territory, and Sub-Publisher shall not be entitled to share in any fees received by Publisher in respect to such worldwide use; and

(c) The exclusive right to dramatize, worldwide, the Compositions, and to license the use and performance of such dramatic versions throughout the world;

(d) The exclusive right to license worldwide uses of the titles of the Compositions;

(e) The exclusive right to make literary versions of the Compositions throughout the world, and to print, publish and sell such literary versions (as well as the dramatic versions aforementioned) throughout the world; and

(f) The exclusive right to grant licenses throughout the world for any form of use (whether now known or hereafter devised) of the Compositions or any part therefore for or in connection with purpose of trade, advertisements, commercials, or merchandising of any goods, products, wares or services of any and every kind.

Royalties

3. All monies payable to Sub-Publisher with respect to the exploitation of rights granted hereunder shall be referred to herein as "Publishing Income." Sub-Publisher agrees that it shall have the duty to collect and to be responsible for the collection of all Publishing Income payable within the Territory. Sub-Publisher shall pay to Publisher the following royalties in respect of the Compositions upon the following terms and provisions:

(a) Ten percent (10%) of the marked or suggested retail selling price of each copy of each Composition in any and every printed edition sold by Sub-Publisher, on all gross sales (after deduction of actual returns), and that proportion of ten percent (10%) of the marked or suggested retail selling price of each songbook, folio or similar compilation edition sold by Sub-Publisher on all gross sales (after deduction of returns), which the number of Compositions included in each edition shall bear to the total number of copyrighted compositions (including the Compositions) contained therein for which a royalty is payable.

(b) Ninety percent (90%) of all income derived from the use of each Composition in any piano copies, songbooks, folios, books, newspapers, magazines or other printed editions.

(c) Ninety percent (90%) of all income derived from the sale in the Territory of phonograph records or other such devices embodying mechanical, electrical or other audio reproductions of the Compositions (as described in paragraph 1(a)(iii) above), with respect to master audio recordings originally produced outside of the Territory; provided, however, that if Sub-Publisher secures the release in the Territory during the term hereof of a master audio recording of a Composition originally produced within the Territory (hereinafter referred to as a "Cover Recording"), Sub-Publisher shall pay to Publisher eighty percent (80%) of all income derived with respect to such Cover Recording.

(d) Seventy-five percent (75%) of the Sub-Publisher's share of all public performance fees earned in the Territory with respect to the Compositions, it being understood and agreed that the Sub-Publisher shall authorize and direct the appropriate performance rights society in the Territory to pay to Sub-Publisher one hundred percent (100%) of said Sub-Publisher's share and that Sub-Publisher shall remit to Publisher its aforesaid share thereof, together with a statement signed by said performance rights society indicating in detail the titles of the Compositions and the amounts paid to Sub-Publisher on account of the public performance in the Territory of such Compositions.

(e) Ninety percent (90%) of all income derived from all other sources and uses with respect to any other rights to the Compositions which are expressly granted to Sub-Publisher hereunder including so-called "black box payments".

(f) One hundred percent (100%) of all Publishing Income received by Sub-Publisher from any exploitation of rights in and to the Compositions other than those rights expressly set forth in paragraph 1 above. Nothing herein shall in any way increase or enlarge the rights granted to Sub-Publisher hereunder, which are solely as set forth in paragraph 1.

(g) Provided that Sub-Publisher performs each and all of its covenants, warranties and agreements hereunder, it shall be entitled to deduct and retain for its own benefit the balance of Publishing Income not payable hereunder to Publisher.

(h) Sub-Publisher shall not license the mechanical, electrical or other reproduction of any Composition for phonorecords or other such devices at a rate less than the highest prevailing rate in the Territory. Sub-Publisher shall not refuse to grant a mechanical license for a Composition at the prevailing rate in the Territory to any authorized manufacturer in the Territory of a recording of said Composition made by Publisher or its parent, affiliate or subsidiary.

(i) Notwithstanding any provision to the contrary herein contained, Sub-Publisher shall collect royalties under subparagraph (c) above only with respect to phonograph records and other devices sold in the Territory, irrespective of whether such phonorecords or devices are manufactured within the Territory or outside of the Territory. Accordingly, Sub-Publisher shall not collect royalties hereunder with respect to phonograph records and other such devices manufactured within the Territory but sold outside of the Territory.

(j) Notwithstanding anything to the contrary herein contained, all royalties or other monies payable to Publisher hereunder are to be computed at the source from which the payments giving rise to such royalties or other monies are originally made, less only the actual commissions or collection fees (if any) retained by the performing rights society and the mechanical royalty collection society in the Territory.

(k) In the event Sub-Publisher is prevented from paying any monies hereunder due to currency restrictions, Sub-Publisher shall so advise Publisher by written notice accompanied by a copy of the applicable law, regulation or order and Publisher shall have the right to elect to accept payment of such monies in foreign currency in a depository selected by Publisher, and if Publisher shall so elect, by written notice to Sub-Publisher, Sub-Publisher shall promptly deposit or cause to be deposited all such payable

monies to the credit of Publisher in such foreign currency and shall promptly give Publisher written notice of said deposit. Payment so made to the depository so elected by Publisher shall fulfill Sub-Publisher's obligations hereunder as to the monies so payable to Publisher.

Accounting

4. True and correct accounts shall be kept by Sub-Publisher, and a statement of such accounts shall be delivered to Publisher as of June 30th and December 31st of each year, within sixty (60) days after each of said dates, and all monies shown to be due thereunder shall be paid by Sub-Publisher to Publisher, in United States currency, together with each statement. Each statement shall include the following information for each Composition: its title, the number of copies of each printed edition sold, the number of copies of each phonograph record or other such device sold embodying the Composition, the nature and amount of the Publishing Income received with respect thereto, and Publisher's share thereof. Without limiting the generality of the foregoing, each statement shall account for and be accompanied by payment to Publisher of all Publisher's share of all Publishing Income received by Sub-Publisher and/or Sub-Publisher's affiliated or subsidiary companies during the preceding semiannual period. Prompt and accurate accountings and payments shall be the essence of this agreement, and failure to submit accurate and timely statements and payments shall entitle Publisher to terminate this agreement by written notice to Sub-Publisher.

Sub-Publisher, in submitting accountings and payments to Publisher, shall account and pay separately on each Composition, in accordance with the provisions of this agreement.

Sub-Publisher shall permit Publisher and its representatives to visit Sub-Publisher's place of business, upon reasonable notice, during Sub-Publisher's usual business hours, for the purpose of inspecting and making copies or excerpts of all books, records and other documents relating to the Compositions, for the purpose of verifying royalty statements rendered by Sub-Publisher or which are delinquent under the terms hereof. Such inspections shall be at the expense of Publisher unless a discrepancy of the equivalent of One Hundred United States Dollars (US$100.00) or more is discovered, in which event such expense shall be borne by Sub-Publisher.

[Clauses Intentionally Omitted]

Default

19. In the event Sub-Publisher becomes insolvent, or any insolvency, bankruptcy or composition proceeding is commenced by or against Sub-Publisher and is not dismissed within fourteen (14) days, or in the event Sub-Publisher makes or attempts to make an assignment for the benefit of creditors or the equivalent thereof, this agreement shall automatically be deemed terminated by Publisher for good cause , as provided in paragraph 4 above.. In the event Sub-Publisher shall fail to account and make payments hereunder in accordance with the terms and provisions hereof, Publisher shall have the right, in addition to its other rights and remedies at law or otherwise, to terminate this agreement for good cause. In the event Sub-Publisher shall fail to perform or comply with any other material obligation hereunder and Publisher shall have given written notice to Sub-Publisher thereof and such failure shall not have been cured within fourteen (14) days

after such notification, Publisher shall have the right, in addition to its other rights and remedies at law or otherwise, to terminate this agreement for good cause by giving Sub-Publisher written notice of its election to do so. Upon any such termination as above described, all rights of any kind or nature granted to Sub-Publisher hereunder shall revert to and be the sole and exclusive property of Publisher, free and clear of any rights, claims or demands on the part of Sub-Publisher, its successors or assigns, without in any way affecting the rights of Publisher.

[Rest of Clauses Intentionally Omitted]

Part I Questions continued:

2. (20 points) In relation to the rights granted under the Sub-Publishing Agreement, please give five (5) examples of possible commercial exploitation of such rights by the Sub-Publisher in the UK and in each instance identify the type of license(s) required and from whom such licenses may be obtained.

3. (5 points) Assume the Publisher enters into a contract with a website operator in the US for the use of "The Love Game" recording in a non-interactive non-subscription service. Give an example of such use and identify what licenses are required, the reason(s) why such licenses are required and from whom the licenses may be obtained.

Part II (30 points). Answer only one of the following questions (your choice):
(See Instruction #5 for page limitation).

4. The Minister of Trade & Industry of Musicland, a developing country in the Pacific with a highly skilled technological workforce and a creative music industry, seeks your advice. Universal Music Group has expressed interest in setting up subsidiary record and publishing companies in Musicland, however, the multinational company is concerned about the high level of CD-R piracy in Musicland. Advise the Minister as to what measures should be adopted in order to encourage local and foreign investment in Musicland's music industry and what advantages could accrue to Musicland as a result of the implementation of such measures.

OR

5. *"It may pose a massive threat, but digital dissemination is a huge opportunity, too"* (Guy Fletcher, Chairman, British Academy of Composers and Songwriters, 43rd CISAC World Congress, London, September 2002). Discuss this statement in the context of the international regime for the legal protection of musical works and sound recordings.