
CONTRACT REVIEW MEMO & POLICY CHANGE PROPOSAL

TO: COL(R) Michael W. Hartley, Chairman;
ATOS Board of Directors

FROM: R. Jelani Eddington, Contract Administrator &
Chairman, Bylaws & Policies Committee

DATE: June 7, 2010

RE: Freelance Author Publishing Agreement

The following is a proposal to amend two contracts as well as written policies, which I submit jointly in my roles as Chairman of the Bylaws & Policies Committee and as the ATOS Contract Administrator.

These proposals would do the following:

- Amend the policy for freelance author submissions to *Theatre Organ* and modify the Freelance Author Publishing Agreement to reflect those amendments; and
- Amend the policy for an extremely confusing and complex set of rules relating to sales and commissions in the record shop at ATOS conventions and implement a Record Shop Consignment Agreement to reflect these changes.

I. FREELANCE AUTHOR SUBMISSIONS

A. LEGAL BACKGROUND – NEW YORK TIMES v. TASINI

The vast majority of content published in *Theatre Organ* originates from freelance authors. In 2001, the United States Supreme Court decided New York Times v. Jonathan Tasini et al., 533 U.S. 483 (2001)—a copyright infringement case with widespread ramifications for the publishing industry. The lawsuit was instituted by freelance authors against the New York Times for re-using and reselling the authors' articles to online databases such as Lexis-Nexis. The New York Times claimed to have the authority to publish "revisions" of those articles as part of a "collective work" under the Copyright Act. The Supreme Court disagreed, holding that the republication of the freelance articles constituted copyright infringement. Key to the Supreme Court's decision was that the online databases republished the articles standing alone and without the surrounding context and formatting of the original articles.

Shortly after the Supreme Court's decision and three years prior to my first election to the Board, I advised the Board of the Tasini decision and the potential impact on ATOS' publication of *Theatre Organ*. Inasmuch as ATOS publishes a *Web Journal* and other online reproductions of articles that previously appeared in the Journal, I stressed the need to comply with the post-Tasini industry practice of requiring freelance authors to sign a license agreement prior to publication in which the author specifically agrees in writing to allow ATOS to reuse and republish any freelance articles it receives.

B. ATOS POLICY

Then-President Gus Franklin brought the matter to the attention of the Board, and on April 24, 2002, ATOS adopted the policy that each freelance author must sign a release authorizing any potential reuse of those articles. Current ATOS Policy ¶ 10(t) reads:

Every freelance author who submits a feature article to the editor of any ATOS publication (the journal, a newsletter, a special specific publication, or the web site) shall be requested to convey the copyright in the article to ATOS if the receiving editor believes that ATOS may wish to reuse the article in any form whatsoever in any other publication. In this case, the receiving editor will request the ATOS Publisher to make the request of the author. The Publisher shall maintain a file of all such signed copyright agreements.

C. FREELANCE AUTHOR AGREEMENT

Despite Policy ¶ 10(t), and for unknown reasons, it has not been the practice of recent Editors to secure the required Freelance Author Agreement. Furthermore, ¶ 10(t) vested discretion in the Editor to determine whether to issue the contract (i.e., if the “receiving editor believes that ATOS may wish to reuse” the article). In light of Tasini, such discretion appears inadvisable as it remains vitally important to ensure that ATOS has the legal right to reproduce articles submitted to the Journal in various formats and contexts, such as on the ATOS web page.

Attached is a suggested revision of the Freelance Author Agreement, which should be signed by every contributor of an article to the Journal. The most important part of this agreement is the license granted to ATOS by the Author to use the work, not just in connection with *Theatre Organ*, but also in any other ATOS publication regardless of its format or context.

The primary changes from the original agreement include:

- Elimination of the requirement that the Author convey the copyright outright to ATOS. While not detrimental to ATOS, transfer of the copyright is redundant in light of ¶ 2 that clearly spells out ATOS’ right to use and re-use the work. Furthermore, to my knowledge, in the 8 years since the freelance policy was adopted, I am unaware of any instance in which ATOS has pursued copyright ownership in a work, as distinct from its copyright in the Journal.
- Clarification (¶ 4) that, while the Author has the right to re-use his/her article in other contexts, ATOS has the exclusive right to publish the work first.

I further recommend that the issuance of this agreement be mandatory, not discretionary and that the Board delegate to the Publisher and Editor the authority to sign this document on behalf of ATOS. Without such a delegation, the Chairman would be obligated to sign each document. See ATOS Policy ¶ 1(c)(iv).

D. SUGGESTED POLICY CHANGE & CONTRACT ADOPTION

For the reasons discussed above, I respectfully request that the Board consider the following two motions:

MOTION: That ATOS Policy ¶ 10(t) be repealed and replaced with the following text:

Every freelance author who submits an article to the Editor of any ATOS publication, including without limitation the Journal, a newsletter, a special publication, and/or the web site, shall, as a condition of publication, sign the Freelance Author Agreement as approved from time to time by the Board of Directors. The Publisher and/or the Editor are hereby authorized to sign the Freelance Author Publishing Agreement on behalf of ATOS. The person signing said agreement on behalf of ATOS shall forward a fully-executed copy of the agreement to the Secretary.

MOTION: That the ATOS Freelance Author Publishing Agreement attached to this report be approved for use consistent with the provisions of ATOS Policy ¶ 10(t).

II. ATOS CONVENTION RECORD SHOP PROCEDURES

A. BACKGROUND

Following the Wichita regional convention in 1999, the Board adopted a uniform policy for pricing and commissions at the Record Shop for ATOS-sponsored conventions. While the need for uniformity and consistency is vital, the policy as currently written is highly confusing and overly complex. The current policy (as reflected in the ATOS Convention Handbook) reads:

For CDs and cassettes, it shall be the policy to charge \$2 per item (same as the standard cost of mailing/handling if ordered through the mail), plus 10% commission charged to the artist on the net price. For example, on a CD that would sell for \$18 plus \$2 postage/handling, or \$20 total cost to the ATOS member sending in an order in answer to an ad in THEATRE ORGAN, the Record Shop would charge the same \$20, retain the \$2 added for postage/handling, and charge an additional 10% on the net \$18, or \$1.80. The consumer pays the same as through the mail but saves the cost of a stamp and the wait to receive the merchandise, and the purveyor pays only 10% commission to get merchandise sold, which is what most Chapters charge to sell artists' merchandise at a concert. On non-recording merchandise, the mark-up shall be 20%. Any state or local sales tax will be added as required.¹

Although the Record Shop is an independent chapter function, ATOS policy provides that "Notwithstanding the separate and independent financial status of these activities the Record Shop... must be conducted according to rules set forth in this handbook, and the host Chapter must so agree."²

Confusion exists with the current policy on many fronts, including:

- the complexity of adding \$2.00 shipping to the retail price, subtracting it again, applying a percentage commission to the difference, then adding the commission to the shipping price to determine the Chapter's total commission. In essence, the language above imposes a 19% commission on all CDs sold at the Record Shop for \$20.00.
- the lack of clarity this complex calculation formula fosters, both on the part of the convention artists and on the part of the host chapters.
- the omission of a calculation formula for double-CD sets.
- the ambiguity in the formula governing non-CD merchandise insofar as the term "mark-up" is nowhere defined, leaving unclear whether the 20% is applied against the retail price with or without shipping added.

This complexity and ambiguity have led to great confusion in recent years. For instance, numerous artists have reported that the host chapters have misunderstood their pricing instructions (resulting in CDs inexplicably being priced at \$22.00 instead of \$20.00). Additionally, for the most recent convention, confusion arose surrounding the host chapter's interpretation of these formulas. Most of these issues were able to be resolved, but the lack of clarity in these complex calculations has been widespread and unfortunate.

B. PROPOSED POLICY CHANGE & CONSIGNMENT CONTRACT

In order to simplify the pricing and commission calculations, it is my recommendation that the Convention Handbook policies be changed to eliminate all references to shipping costs and

¹ ATOS Convention Handbook Version 5 (2009) p. 28 ¶ 4

² *Id.* p. 6 ¶ 11

implement a flat commission rate. This amended policy would impose a commission formula that would both be easy to calculate and understand.

As such, I respectfully request that the Board consider the following two motions:

MOTION: That the ATOS Convention Handbook relating to Record Shop operations (p. 28 ¶ 4) be repealed and replaced with the following text, which change shall become effective beginning with the 2011 ATOS Annual Convention:

All CDs shall be offered for sale at the Record Shop at a retail price of no more than \$20.00 per single compact disc and no more than \$30.00 per double-CD set. All other merchandise shall be offered for sale at the retail price specified by the Vendor. For all merchandise sold at the Record Shop, commission shall be calculated as follows:

- *For any CD sold at \$20.00: \$16.20 to the Vendor and \$3.80 to the Chapter;*
- *For any double-CD set sold at \$30.00: \$24.30 to the Vendor and \$5.70 to the Chapter;*
- *For all other merchandise, including any CDs sold at a price other than specified above, 80% of the retail price to the Vendor and 20% of the retail price to the Chapter.*

Any state or local sales tax will be added as required. The Chapter shall issue to each Vendor the ATOS Record Shop Consignment Contract in the following form: [INSERT CONTRACT LANGUAGE HERE]

The Puget Sound Chapter drafted a Record Shop Consignment Agreement for use at the 2010 Annual Convention in Seattle.³ I respectfully request that the Board consider the following motion:

MOTION: That the ATOS Record Shop Consignment Contract attached to this report be approved for inclusion in the ATOS Convention Handbook, which change shall become effective beginning with the 2011 ATOS Annual Convention.

³ The author extends his thanks to Tom Blackwell and Jamie Snell for their drafting of the agreement, the essence of which forms the proposal herein.

**AMERICAN THEATRE ORGAN SOCIETY
FREELANCE AUTHOR PUBLISHING AGREEMENT**

1. This document shall constitute the agreement ("**Agreement**") between the American Theatre Organ Society, Inc. ("**ATOS**"), a California nonprofit public benefit corporation; 7800 Laguna Drive; Elk Grove, California 95758 and _____ ("**Author**"), with respect to _____ ("**Work**").

2. In consideration of ATOS's agreement to publish the Work in or in connection with any or all of its publications, including the Journal *Theatre Organ*, in such style and manner and at such time or times as practicable, the Author hereby grants to ATOS the irrevocable right throughout the world

- (a) to print, publish, and/or reprint the Work;
- (b) to display the Work, including without limitation on any website owned, operated, and/or maintained by ATOS;
- (c) to make versions, revisions, and/or adaptations of or to the Work;
- (d) to reproduce the Work mechanically, electrically, photographically, digitally, electronically, or in any other manner now known or later developed;
- (e) to license or assign its interest in the Work to others; and
- (f) to exercise any and all other rights now known or hereinafter to become known in the Work.

3. The Author represents and warrants that he/she is the sole owner of the Work; that the Work is free from all encumbrances; that he/she possesses the lawful right to convey the rights herein to ATOS; and that the Work does not infringe upon or violate any rights possessed by any third party. The Author further agrees to indemnify and hold ATOS harmless from and defend it against any claims, suits, or judgments made or entered against it, together with all costs and expenses, including legal fees incurred by ATOS in connection therewith, based upon breach of any representation or warranty contained in this Agreement.

4. It is understood that the Author has the right to reuse the Work in other publications, except that ATOS shall have the sole and exclusive right to the first publication of the Work.

5. It is further understood that this sole document shall constitute the complete and entire agreement between ATOS and the Author with respect to the subject matter herein, and shall supersede any and all prior or contemporaneous agreements or understandings, whether written, oral, express, or implied, with respect to the subject matter of this Agreement.

AGREED TO:

American Theatre Organ Society by

[Publisher/Editor]

Author

Date _____

Date _____

[YEAR] ATOS ANNUAL CONVENTION RECORD SHOP CONSIGNMENT AGREEMENT

This is an agreement between [NAME OF HOSTING CHAPTER] ("**Chapter**") and

(please print) _____ ("**Vendor**") concerning the consignment of merchandise ("**Merchandise**") to be sold by Chapter on behalf of Vendor at the Record Shop at the ATOS Annual Convention from [DATE] to [DATE], inclusive ("**Convention**").

1. Vendor agrees to ship the items prepaid, with a packing list including specified retail prices for all items, along with telephone and email contact information, to [RECORD SHOP CONTACT PERSON NAME/ADDRESS]
2. Vendor agrees to ship all items to arrive no later than [DATE AT LEAST 1 WEEK PRIOR TO START OF CONVENTION] to give Record Shop staff time to inventory, price, display, the Merchandise. Any Merchandise received after this date may not be displayed for one or more days after the Record Shop opens for business.
3. Chapter agrees that when Merchandise is received, a physical inventory and damage check will be completed by the Chapter. Chapter will confirm receipt of Merchandise to Vendor, and will notify Vendor of any damage and any and all discrepancies between the inventory and the packing list. Chapter agrees to take reasonable steps to ensure that the items are properly stored, transported to the Record Shop, and kept safe and secure for the duration of the convention.
4. Chapter agrees to display the Merchandise and to make a reasonable effort to sell the Merchandise. However, there is no guarantee that all or any of the Merchandise will be sold.
5. Chapter shall sell all Merchandise at the retail price specified by the Vendor. Notwithstanding, the retail price for a single compact disc shall not exceed \$20.00, and the retail price for a double compact disc set shall not exceed \$30.00, exclusive of any applicable taxes.
6. Payment and commissions for all Merchandise sold in the Record Shop shall be as follows:
 - For all single compact disc recordings sold at a retail price of \$20.00, Vendor shall receive \$16.20 per disc, and the Chapter shall retain \$3.80 per disc.
 - For all double compact disc sets sold at a retail price of \$30.00, Vendor shall receive \$24.30 per set, and the Chapter shall retain \$5.70 per set.
 - For all other Merchandise, including any compact discs sold at a price other than those specified above, Vendor shall receive 80% of the retail price and Chapter shall receive 20% of the retail price.
7. Vendor agrees to pick up any unsold items at the end of the convention. Any cost to Chapter for shipping unsold items to Vendor shall be deducted from the amount paid to Vendor for any items sold.
8. Chapter agrees to pay Vendor as specified above within thirty (30) days after the conclusion of the Convention.

We thank you for participating in the Record Shop!

Vendor's signature: _____ Date: _____

Signature for Chapter: _____ Date: _____

(please print): _____