THE MUSIC INDUSTRY COMES FULL CIRCLE: THE HISTORICAL IRONY AND FUTURE IMPLICATIONS OF "360" DEALS

BY HOWARD SIEGEL, ESQ.

Has enough been said and written about the music industry's reliance on so-called 360 recording agreements? Apparently not.

Despite the fact that the concepts associated with 360 deals have been reflected in the template of most recording contracts for the past decade, commentary from both sides of the artist/label contractual equation continues unabated. There is a helpful perspective to be gained by stepping back from the present state of affairs and assessing current trends against historical industry practice. In the case of 360 deals, there is also an inescapable irony.

What are 360 deals? They can be described fairly simply. 360 agreements permit a record company to participate in the artist's income stream from sources in addition to those generated by the sale of records. The all-encompassing implication of the term "360" might suggest that the label is involved in all of the artist's income sources, but that is not necessarily the case. The label may, depending upon the course of contract negotiations, end up participating in the artist's earnings from one or more of the following: merchandising, endorsements, fan clubs, tours and music publishing, among other activities. Some record companies have also assumed a management role in the artist's career, thereby deriving commission income based on the label's providing personal management services.

The irony of these participations in an artist's earnings is that they are distinctly reminiscent of the record industry as it was more than a half century ago. In the 1950s and 1960s it was not uncommon for a label to own an artist's publishing; neither was it unusual for the record company to be involved in management, tours and other ancillary sources of their artists' income streams. This type of deal became scarce during the more prosperous decades of the 1970s through the early 2000s. But with the explosive growth of the new music delivery systems (*i.e.,* the ability for the consumer to download or stream particular songs, rather than having to purchase an entire album), more pervasive label involvement has once again taken hold.

The justification, or at least the explanation, usually offered for these arrangements is that the plummeting income from traditional record sales over the past 10 years has threatened the very existence of record companies and, without some device in place to keep the labels from going out of business, the entire industry would be at risk. Statistically, there is no question that the near-extinction of sales from hard copy formats of recorded music has dramatically cut into record company income. Studies generally reflect a decline in album sales in excess of 70 percent since 2002, with a concomitant decline in overall music-related income. The end user now has more options, and all of them translate into less income for the labels than provided by the traditional album-buying model. Since record companies still remain the primary source of venture capital for artists seeking the monies needed to record an album, it can certainly be argued that keeping the labels alive and relatively healthy is in the industry's best interest.

Despite these challenges, it is safe to say that the music business isn't going anywhere soon. It is an industry that has survived other media transitions — from the original "Edison discs," to the various configurations of vinyl, to tape (including reel-to-reel, eight track and cassette tapes), to CDs, and now to digital formats. Moreover, music is so much a part of our culture, of every aspect of our lives and, indeed, of our very genetic makeup, that the industry, and especially the consumer, will, as they have done in the past, most certainly find a way to fit the inevitable, ongoing advances in technology into the parameters of a workable economic structure. 360 deals are one such structure.

Whether or not 360 deals are fair is an often-asked and deceptively simple question. Not only is the concept of fairness, by definition, largely subjective, but the fairness debate has been raging for as long as these deals have been in existence. One might suppose that labels generally consider the 360 paradigm to be fair, given that the labels derive income from multiple sources under the typical template; conversely, one might therefore also assume that artists, who are compelled to surrender more of their earnings under 360 deals, would view such arrangements as oppressive. However, while that is the case in many instances, it is far from a universally held perception. Some artists recognize that the partnership forged by the structure of 360 deals helps to ensure more active participation by the label in the artist's career development and more support on all levels. Moreover, given the extremely daunting challenges of getting a record deal in the first place, and turning those deals into successful marketplace products, many artists are grateful for the involvement of the record companies in the broader scope of the artist's professional activities. Labels, on the other hand, often take additional risks under 360 arrangements, by expending staff time and additional money on the non-recording facets of an artist's career.

Perhaps the best measure of fairness is this: are the record companies meaningfully contributing their energies and resources to those areas from which they are deriving income? If the labels are passive, and merely taking their cuts as they come in, clearly there is little fairness to the scenario. On the other hand, it is obviously more difficult to argue unfairness in cases where the labels are bringing something of real value to the table.

Subjective yardsticks aside, the reality is that today's music industry is very different from the industry that gave rise to the traditional notions of record deal economics. In spite of those obvious differences, including those that permit a more expansive label participation in the artist's income stream, 360 deals certainly do not represent a total departure from the historical economic template. The

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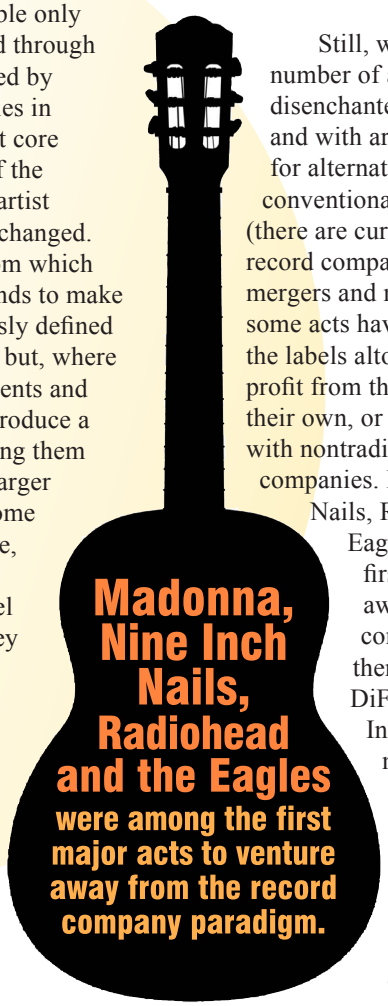
label continues to take 100 percent of the financial risk. Therefore, when monies invested in recording and other areas such as touring, merchandising and publishing are not recouped by the label, there is no personal debt owed by the artist to the record company. Typically, any such sums are recoverable only through royalties earned through record sales, or generated by the artist's other activities in the music industry. That core economic component of the conventional company/artist relationship remains unchanged. True, the overall pie from which the record company stands to make money is more generously defined under a 360 agreement; but, where the companies' investments and efforts have helped to produce a larger pie, then permitting them to have a piece of that larger pie does not seem, as some have argued, prima facie, unconscionable. However, when the label invests little or no money and expends little or no effort to support an artist's overall career activities, that same analysis may well lead to a contrary conclusion.

It seems clear that 360 deals will remain for the foreseeable future. In the longer run, however, their viability will depend on whether both the labels and the artists are deriving sufficient benefit from such arrangements. If there is a fair rate of return on both sides of the label/artist equation, it is likely that this type of arrangement will continue to dominate the music business landscape.



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Still, with an increasing number of artists becoming disenchanted with their labels, and with artists' choices for alternative avenues of conventional distribution limited (there are currently only four major record companies, as the result of mergers and marketplace attrition), some acts have elected to abandon the labels altogether and seek to profit from their recordings on their own, or through partnerships with nontraditional entertainment companies. Madonna, Nine Inch Nails, Radiohead and the Eagles were among the first major acts to venture away from the record company paradigm; since then, artists such as Ani DiFranco, Macklemore, Ingrid Michaelson and, more recently and most notably, Taylor Swift have also broken ties with their labels. Ironically, the nontraditional 360 model can only survive in an environment of the traditional artist/record company relationship. Any widespread departure of artists from their labels could spell the end, not only of 360 deals, but of the music business as we know it. Such a mass exodus is not likely, however; only well-established, widely recognized acts have a reasonable chance of succeeding in the highly competitive marketplace without the economic backing and industry savvy offered by record companies. Therefore, it is probable that both the traditional relationship between artists and their labels, and the critical role that 360 agreements play in that relationship, will continue to define the record business for some time to come. **NL**

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