

Buyer Beware

Why Artists Should Do A 180 On 360 Deals

BY BOB DONNELLY

I've been fortunate to be affiliated with artists who have collectively sold more than 300 million records, as well as their managers. Not once during my three decades in practice did I ever get a call from a record company executive who said, "Hey, Bob, we just had a phenomenally profitable year, and therefore we are sending your client a big bonus check to show our appreciation for making the label lots of money."

Now that the record business economy is faltering, label honchos are complaining that they can't make enough money from record sales alone. Perhaps not surprisingly, they expect their own recording artists to sign so-called "360" deals to subsidize executive compensation packages worthy of Wall Street.

In the past, when record labels faced additional costs associated with new modes of doing business, they simply passed those costs along to their artists in the form of artist royalty reductions, such as the so-called "research and development" costs associated with manufacturing CDs in the '80s.

This time, the power grab is much more insidious because it involves taking a portion of income from categories that have always belonged exclusively to the artist.

Under the terms of a typical 360 deal, labels are demanding a portion of an artist's income from touring, publishing, endorsements and merchandise sales in addition to the vast majority of the record-sale income that labels have always enjoyed.

When you read the fine print, you'll also discover that the labels want to make money from the books that artists write, the Hollywood movies in which they act and the fan clubs they create. In fact, the labels want a share of absolutely everything. Does that sound fair to you?

In many of these 360 deals, the record company will demand that its earnings come out of gross revenue. This means that if the cash the labels actually receive has been reduced by any parties in the middle of the transaction (even if those parties themselves add value, as, for example, many music publishers do), then the label will add those amounts back in before calculating the percentage of revenue they retain.

Think about that for a moment. The manager doesn't get paid on gross, and the artist certainly doesn't get paid on gross. Why then should the record company be paid on gross?

The 360 deals that I've reviewed re-



quire the artist to relinquish between 5% and 50% of revenue from sources other than record sales. To illustrate this point, let's use 20% as the percentage that the record company is seeking from an act's live touring income. If that act is paying all of the traditional touring costs (such as hotels and transportation) as well as paying a manager a 20% commission, a booking agent 15% and a lawyer and a business manager 5% each, then that could result in a record company receiving half of every net touring dollar that usually winds up in the artist's pocket.

What's more, record companies love to "cross-collateralize," a 31-point Scrabble word that refers to the practice of taking an artist's positive earnings from one category (e.g., publishing income) and applying it as a record company expense that affects the artist's unrecouped balance in another category (e.g., the record royalty account).

In other words, the labels are postponing the day when the act actually receives a positive cash flow from its end of the pipeline. Yet when it comes to the income that they would like to receive from an artist's 360 income streams, the labels want to keep 100% of the money they are entitled to, without applying (i.e., cross-collateralizing) any of it to reduce the artist's debt to the record com-

pany. Apparently, what's good for the goose . . . is only good for the goose.

These 360 deals are also rife with conflicts of interest. For example, will an artist still be free to accept a sponsorship from a company whose business is in direct competition with one of the record label's non-music divisions? And how will record companies deal with fiduciary obligations to their artists, which they were previously able to avoid? And how do record companies think they are going to get around the booking agency laws in California and other states?

And then there is the mother of all conflicts: when an artist's management company is owned by the same entity that owns the artist's record company.

Labels justify profiting from multiple rights because they are making a substantial investment in the artist. And in all fairness, sometimes this is true. Our firm represents a young artist called Owl City, who is signed to a 360 deal and topped the Billboard Hot 100 last year with his hit single "Fireflies." I would be disingenuous if I didn't acknowledge that such success would not have happened without the financial commitment and promotional and marketing experience of the Universal Republic label team. The Owl City success underscores the fact that major labels are still the best way to break an artist whose music is uniquely suited to pop radio.

Record companies say that they are seeking 360 rights because they are investing in the careers of the artists. If they mean it, they should put it into the contract. And if they don't, then I sincerely hope artists will do a 180 on 360 deals.

For a longer version of this opinion piece in which Donnelly presents potential alternatives to 360 deals that he would endorse, go to billboard.biz.

Bob Donnelly is an attorney with the law firm of Lommen Abdo in New York. He played a key role in sparking then-New York Attorney General Eliot Spitzer's investigation of major-label "suspense accounts," which resulted in a 2004 settlement that paid artists \$55 million in past-due royalties. He can be reached at bobdonnelly@lommen.com.

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