

Lommen, Abdo, Cole, King & Stageberg, P.A.

ENTERTAINMENT & SPORTS LAW SYMPOSIUM

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Negotiating Recording Contracts: The Impact of Digitization, Technology and New Media

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I. TRADITIONAL RECORDING CONTRACT MODEL

- A. Record company owns and has exclusive rights to Artist's recording services and recordings created during the term of the contract.
- B. Typical Deal Points:
 - (i) Record company pays for all costs of recording, manufacturing, distribution, marketing, promotion and advertising the recordings, create promotional videos, and provide tour support.
 - (ii) Artist receives advance payments against royalties on record sales at a negotiated rate, based on either wholesale or retail selling price.
 - (iii) Artist is subject to a "controlled compositions" clause for mechanical royalties, with a maximum royalty "cap" per album.
 - (iv) Record company does not receive income from Artist's other professional activities.

II. HISTORY OF CHANGE

- A. Illegal downloads and other factors causing a substantial decrease in physical record sales.
- B. iPods and other portable devices redefine the marketplace.

III. NEW RECORDING CONTRACT MODEL

A. Background:

- (i) Economic shift in evolving music industry.
- (ii) Record companies argue they are instrumental in building the Artist's "brand."
- (iii) New multiple rights for the record companies in non-traditional revenue streams.
- (iv) Traditional deal concepts remain: mechanical royalties, record and release commitments, tour support, videos, album/recording cycles, recording commitments, and recording procedures remain in the new business models.
- (v) Moving away from the album-based model to singles or body of masters.
- (vi) Artists as financiers and owners of masters to record/produce and how this affects deal – whether licensed or not.
- (vii) Negotiating license terms or reversions when the case warrants.
- (viii) Leveraging self-development as always but with new tools - the internet.

B. Delivery Materials:

- (i) Analog vs. Digital

C. Artist Website – Record Company Controls:

- (i) Official website (domain names).
- (ii) Fan club site (including contests).
- (iii) Exclusive right to sell merchandise on websites.
- (iv) Reversion of rights post-term.

D. Digital Royalties:

- (i) Pre-2000 record deals and calculations.
- (ii) Post-2000 record deals and calculations.

E. 360 Agreements / Brand Equity:

- (i) Justification: partnership or collateral?
- (ii) With respect to each of the ancillary rights, will the record company
 - (a) merely participate in revenue streams from activities managed and controlled by the Artist, or
 - (b) manage and control these activities and pay the Artist?
- (iii) If the record company desires to manage and control these ancillary activities, does the record company have the personnel and expertise (either in-house or through joint venture arrangements) to deliver effective results? Scrutinize if record company is actually in the merchandising, touring, publishing, or other businesses or whether this is just a third party assignment that the artist could arrange alone. Is there real assistance and services or is really just income participation as collateral?
- (iv) Will these income streams be “cross-collateralized” and, if so, how?
- (v) Will this arrangement interfere with any of Artist’s existing deals?

F. 360 Deal – Ancillary Rights:

- (i) Endorsements / Sponsorships:
 - (a) Whether or not secured by the record company.
 - (b) Percentage of participation: 10% - 50% of gross or net income.
- (ii) Concerts / Touring Services:
 - (a) Analysis of “net income.”
 - (b) Percentage of participation: 10% - 50% of gross or net income.
- (iii) Acting Services:
 - (a) Whether or not secured by the Record company.
 - (b) Television series, motion pictures, stage productions.
 - (c) Percentage of participation: 10% - 50% of gross or net income.

- (iv) Literary Services:
 - (a) All literary endeavors of Artist, including books, magazines and screenplays.
 - (b) Percentage of participation: 10% - 50% of gross or net income.
- (v) Personal Appearances:
 - (a) All appearances outside of Artist's concert and touring services, including speaking engagements.
 - (b) Percentage of participation: 10% - 50% of gross or net income.
- (vi) Artist Properties (name, likeness, logos):
 - (a) Record company's exploitation of Artist's name, likeness, logos.
 - (b) Percentage of participation: 10% - 50% of gross or net income.
- (vii) Merchandise:
 - (a) Any kinds, including merchandise sold at live concerts, on websites, fan club merchandise, etc.
 - (b) Including creation, production, licensing, marketing and fulfillment.
 - (c) Percentage of participation: 10% - 50% of gross or net income.
- (viii) Music Publishing:
 - (a) Income participation in Artist's revenue streams (i.e., public performance income, synch licensing, etc.) from musical compositions in which Artist has an authorship share.
 - (b) Income participation ranges from 10% - 50% of gross or net income.
 - (c) Copyright ownership of musical compositions.
- (ix) "Catch-All" Entertainment Activities:
 - (a) Including video games, cartoons and other animation using Artist's name and likeness.
 - (b) Percentage of participation: 10% - 50% of gross or net income.

- (x) Participation Period:
 - (a) What is the length of participation in these ancillary rights after the recording agreement expires?
 - (b) Does the percentage decrease over time?
- (xi) Advances:
 - (a) How are Artist's cash flow and living expenses being accommodated?
 - (b) Is all or a part of it considered an advance against one or more of Artist's revenue-stream splits?
- (xii) Are 360 deals working and, if so, for whom?

IV. CONTINUING EVOLUTION OF RECORD DEALS

- A. As its pitfalls and benefits are explored.
- B. As the industry continues to cope with a changing marketplace.

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Ken Abdo, Co-Chair of the Entertainment Law Department, has helped build one of the largest, most visible and successful entertainment law practices in the Midwest over the past 25 years. Mr. Abdo's primary focus is on music law transactions. He is a well known artist advocate, a leader within the national entertainment law community, an author and a popular lecturer. He is a voting member of The Recording Academy® (presenter of the GRAMMY® Awards) and serves on its Chicago Chapter Board of Governors. He is the past Chair of The GRAMMY Foundation® Entertainment Law Initiative. Mr. Abdo has repeatedly been on the Super Lawyers® list by Minnesota Law & Politics. He is admitted in Minnesota and is AV rated by Martindale-Hubbell. He can be contacted at Lommen, Abdo, Cole, King & Stageberg, P.A., 2000 IDS Center, 80 South Eighth Street, Minneapolis, MN 55402; 612-336-9316; Fax: 612-339-8131; E-mail: ken@lommen.com.

Paul Bezilla has over 25 years of extensive experience in all segments of the entertainment law practice. During his career, he has provided legal services for an array of high profile individuals and companies, including Frank Sinatra, Cher, Quincy Jones, Warner Bros. Records, The Walt Disney Company, PolyGram Music Publishing and K-tel Records. His practice encompasses music, film, television, intellectual property, technology, software and licensing. Mr. Bezilla is a life-long musician who continues to pursue his love of music performance by playing bass guitar in various rock and jazz groups. He is admitted in Minnesota. He can be contacted at Lommen, Abdo, Cole, King & Stageberg, P.A., 2000 IDS Center, 80 South Eighth Street, Minneapolis, MN 55402; 612-336-9344; Fax: 612-339-8131; E-mail: paul@lommen.com.

Bob Donnelly's law practice covers the full gamut of the entertainment spectrum from television (Lifestyles of the Rich and Famous) to commercials (Diet Pepsi) to record labels (UFO) to music publishing (Cherry Lane) to internet business (Priceline.com) to licensing (Gloria Vanderbilt), and to theater (Beatlemania). Mr. Donnelly is probably best known for having brought a case with the New York State Attorney General which resulted in major labels having to pay artists \$55 million dollars in back royalties. Mr. Donnelly also settled the largest case in world music on behalf of his Irish music clients Atlan, Eileen Ivers, Mick Moloney and Cherish the Ladies. He is admitted in New York. He can be contacted at Lommen, Abdo, Cole, King & Stageberg, P.A., 2000 IDS Center, 80 South Eighth Street, Minneapolis, MN 55402; 212-683-8775; Fax: 212-414-0525; E-mail: bobdonnelly@lommen.com.