

WRAPPING YOUR HEAD AROUND 360 DEALS

Presented by

**The Young Professionals Division
of the New York Chapter
of the Copyright Society of the U.S.A.**

&

**The Music and Recording Industry Committee
of the Entertainment, Arts and Sports Law Section
of the New York State Bar Association**

in conjunction with

The Cardozo Intellectual Property Society

&

The Cardozo Sports and Entertainment Law Students' Association

April 7, 2009

**Benjamin Cardozo School of Law
55 Fifth Avenue
New York, NY**

Speakers:

AMAECHI UZOIGWE (Definitive Jux Records)

ELLIOT RESNIK (Solo Practitioner)

RAND LEVIN (Universal Motown Republic Group)

Moderator:

JEFF LIEBENSON (Herrick, Feinstein LLP)

WRAPPING YOUR HEAD AROUND 360 DEALS

TABLE OF CONTENTS

- 1) Speaker/Moderator Biographies
- 2) CLE Materials:
 - a) Sample 360 Provision
 - b) Sample Ancillary Rights Provision
 - c) Michael I. Rudell and Neil J. Rosini, *The "360 Agreement" Emerges in the Music Business*, New York Law Journal (Friday, August 22, 2008).

Speakers / Moderator

SPEAKERS:

RAND LEVIN is Vice President, Business & Legal Affairs, at Universal Motown Republic Group, a division of Universal Music Group, where he is involved in all manner of business affairs transactions, including the negotiation of recording agreements, label agreements and distribution agreements, as well as non-transactional legal aspects of the business of the record division. Prior to joining Universal, Rand served as Senior Counsel, Business & Legal Affairs, at Razor & Tie Entertainment, an independent record label which includes traditional record label functions, as well as direct response and special products businesses. Prior to joining Razor & Tie, Rand was a litigation attorney at Robinson Silverman, Pearce Aronsohn & Berman, LLP (now Bryan Cave, LLP), where he specialized in intellectual property and employment law matters. Rand received a J.D. from Benjamin N. Cardozo School of Law, where he was on the Law Review.

ELLIOT RESNIK opened his private law practice in October 2003. Formerly an attorney at TVT Records, Elliot has worked closely with artists such as Lil Jon & the Eastside Boys, Snoop Dogg Presents Tha Eastsidaz, Sevendust, Default and Naughty By Nature. Elliot is a 2000 graduate of the New York Law School and served as President of the Media Entertainment Sports Law Association. He obtained his B.A. in Philosophy from McGill University. He is a member of the American Bar Association and New York State Bar Association's Entertainment, Arts and Sports Law section. A staunch supporter of independent music, Elliot is a member of the American Association of Independent Music and proudly serves on the A2IM Legal Committee.

AMAECHE UZOIGWE is co-founder and owner of the legendary independent hip hop label Definitive Jux. Amaechi is also co-proprietor of the PLUG Awards, which has emerged as the most recognized and credible platform for celebrating the achievements of the independent music industry. As a consultant, Amaechi assisted in the creation and development of the online music site paperthinwalls.com, which was acquired by Getty Images in 2007. He was also retained in 2007 by Dimensional Associates, owner of eMusic and The Orchard, the world's largest independent digital distributor. In 2006, Amaechi was named Chairman of the Board for the American Association of Independent Music (A2IM), the trade organization representing the collective interests of independent music industry in the U.S. marketplace, a \$3 billion industry covering over 30% of the music market. Amaechi also serves on Executive Advisory Council for eMusic; and sits on the Board of Advisors for Fairtilizer.com, a new Geneva-based technology platform; Synthesis Networks; and Ourstage.com.

MODERATOR:

JEFF LIEBENSON is Counsel at Herrick, Feinstein LLP, where he specializes in digital entertainment, music and intellectual property law. Jeff has over 20 years experience in the entertainment industry, which includes representing Gracenote in obtaining digital lyric rights from the music publishing industry, Sony Music in the establishment of its Pressplay online service with Universal, and EMI Recorded Music in the first iTunes negotiations with Apple. Prior to joining Herrick, Jeff served as Vice President of International Legal and Business Affairs for BMG Entertainment. Jeff received a J.D. and a L.L.M. in Trade Regulation from New York University School of Law.

Sample 360 Provision (No Publishing)

Name and Likeness; Merchandising; Digital Products & Services; Touring; Entertainment Services

(a) Name & Likeness. Company shall have the perpetual right (such right to be exclusive during the Term and non-exclusive thereafter), without any liability to any party, to use and to authorize others to use Artist's name and biographical material and the names (including any professional names heretofore or hereafter adopted, including "_____", "_____" and any variations thereof), and any photographs or likenesses, autographs and biographical material relating to Artist and any producer of Masters hereunder for purposes of advertising, promotion and trade and in connection with the making and exploitation of Masters, Recordings and Records hereunder and in connection with the creation and exploitation of merchandise and in general goodwill advertising. Artist warrants and represents that Artist owns the exclusive right to so use such names, likenesses, autographs (including facsimile signatures) and biographical materials and that the use of same will not infringe upon the rights of any third party. If any third party challenges any Artist's right to use a professional name, Company may, at its election and without limiting Company's rights, require Artist to adopt another professional name approved by Company without awaiting the determination of the validity of such challenge. During the Term, Artist will not change the name by which Artist is professionally known without Company's prior written approval.

(b) Merchandise Rights. In addition to the name and likeness rights granted to Company pursuant to the terms herein, you also hereby irrevocably grant to Company the exclusive right during the Term hereof and throughout the Territory for Company to use and/or sublicense to others the use of Artist's name(s) (both real and professional), logotype, photographs, likenesses, signature(s) and other identification for merchandising and other commercial purposes (whether or not such merchandising and commercial purposes are related to the manufacture and sale of Records) in connection with the sale, exploitation, marketing and promotion of merchandise, services and products, including without limitation, t-shirts, shirts, sweatshirts and other clothing and apparel, posters, stickers, novelties, dolls, action figures, figurines, games, video games, all paper products, Internet uses, and for any and all other so-called "merchandising" uses, "commercial tie-up" uses, "premium" uses or the like ("Merchandise Rights"). Subject to the full performance of all of Artist's obligations hereunder and provided Artist is not in default of any provision herein, Company will credit to Artist's royalty account hereunder ___ percent (___%) of Company's "Net Merchandise Income" from the exploitation of such Merchandise Rights and Company shall retain the remaining ___ percent (___%) of such Net Merchandise Income for its own account. "Net Merchandise Income" shall mean the income actually received by Company from the exploitation of Merchandise Rights relating to Artist less all costs and expenses incurred by Company, directly or indirectly, relating to the exploitation of such rights. After the expiration or termination of the Term, Company's merchandise rights shall continue in perpetuity with respect to merchandise products or services created or exploited during the Term or agreements relating to Merchandise Rights entered into during the Term.

(c) Digital Products & Services. Without limiting the generality of any of Company's rights under this Agreement, Company shall have (i) the exclusive right, and may grant other Persons the right,

to use reproductions or adaptations of packaging artwork, pictorial and graphic materials used for marketing or publicity, and other materials owned or controlled by Company, whether or not incorporating Artist's names (including, without limitation, professional, group, or other assumed or fictitious names or sobriquets used by the Artist), portraits, pictures, likenesses and logos, on merchandise of any kind (including without limitation the digitally distributed products and services described below); and (ii)(A) the exclusive right, and may grant other Persons the right, to use spoken word Recordings of the Artist's performances in connection with digitally distributed products and services (e.g., digital content distributed via cellular phones, personal computers and other consumer electronic equipment and so-called interactive voice response services), and (B) the exclusive (except as otherwise provided in this Agreement) right, and may grant other Persons the right, to use the Artist's names (including, without limitation, professional, group, or other assumed or fictitious names or sobriquets used by the Artist), portraits, pictures, likenesses, and logos, in connection with digitally distributed products and services. For purposes of this Agreement, uses by Company as described in this paragraph shall be included within the definition of "Merchandise Rights," and subject to the full performance of all of Artist's obligations hereunder and provided Artist is not in default of any provision herein, Company will credit to Artist's royalty account hereunder with __ percent (__%) of Company's Net Merchandise Income from the exploitation of such Merchandise Rights and Company shall retain the remaining __ percent (__%) of such Net Merchandise Income for its own account.

(d) Artist's Performances.

(i) You and Artist agree to use best efforts to exploit Artist's talents and services at all times during the Term, including undertaking personal appearances. You and Company acknowledge that Artist's personal appearances, live performances and engagements (whether taped or live), including musical, dramatic and otherwise ("Artist's Performance(s)") are an essential part of Artist's career and have a direct impact on Company's ability to promote Artist's career to the fullest extent. At all times during the term, any agreements relating to Artist's Performances shall be subject to Company's prior approval, not to be unreasonably withheld. Company shall receive copies of all correspondence, proposals, deal memos, draft agreements, short form agreements and any other agreements or communications relating to Artist's Performances (and if same are not in writing you and Artist shall promptly communicate same to Company in writing) and shall have the right and opportunity to provide comments thereto. The final agreement(s) relating to Artist's Performances shall be subject to Company's prior written approval, not to be unreasonably withheld.

(ii) Artist shall pay Company (or to whom Company directs) __ percent (__%) of the "Gross Touring Income" derived as a result of Artist's Performances which are performed during the Term and continuing through the later of the expiration or termination of the Term and the completion of the final "Album Cycle" pursuant to this Agreement and the Distribution Agreement. For purposes of this subparagraph, "Gross Touring Income" shall mean all monies and other consideration earned by you or Artist or on your or Artist's behalf, or which is committed to be paid to you or Artist, directly or indirectly, in connection with any of Artist's Performance(s). You and Artist shall cause each agreement relating to Artist's Performances to provide that Company shall receive its applicable share of Gross Touring Income (and statements relating thereto) directly from the applicable promoter or other payor. Without limiting the generality of the foregoing, you and Artist hereby irrevocably authorize and direct any payors of Gross Touring Income (and you and Artist shall further direct and authorize such parties to the extent necessary or requested by Company, including via an irrevocable letter of direction) to render

statements and payments directly to Company for Company's share of Gross Touring Income at the same times as the monies relating thereto are payable to you and/or Artist. In the event that any payor fails or refuses to pay Company directly, you and Artist shall pay Company its share of Gross Touring Income within ten (10) days of your and Artist's receipt thereof.

(iii) You and Artist shall cause each agreement relating to Artist's Performances to provide that Company shall have the same right to examine the applicable person or entity's books and records relating to Artist's Performances on the same terms as apply to your or the Artist's rights (or the rights of any Person contracting on your or the Artist's behalf) to examine such books and records. Without limiting the generality of the foregoing, Company shall have the right at its sole cost and expense to, examine, or appoint a third party to examine, your and Artist's books and records as same pertain to Artist's Performances. Such examination shall take place at your or Artist's or the applicable business manager's offices in the U.S., during normal business hours on reasonable prior written notice.

(iv) It is expressly understood and agreed that Company is neither an employment agency, a talent or theatrical agency nor a booking agent, and that Company has not offered or promised to obtain employment or engagements for you or Artist, and that Company is not obligated, authorized or expected to do so.

(v) As used herein, an "Album Cycle" shall be defined as that period of time beginning with the commencement of pre-production of a long-playing album solely containing Artist's newly-recorded studio performances as the featured artist, and continuing through the later of (A) the commercial release of such Album in the United States by Company or Distribution Company (as applicable) and the full completion of all touring and promotional activities in connection with such Album and (ii) commencement of recording of the next committed album pursuant to Artist's applicable recording agreement.

(e) Entertainment Services.

(i) You and Artist agree to pursue and use reasonable efforts to exploit all of Artist's talent's services, activities and undertakings throughout the entertainment industry, including, but not limited to, Artist's activities and services as a producer of sound recordings, songwriter, musical composer, publisher, live performer (including tour and other sponsorships), actor, screenwriter, producer of audio-visual works, director, model, spokesperson, and all other performances and activities throughout all fields of the entertainment industry, including, without limitation, in the fields of music, recording, television, motion pictures, radio, Internet, book and other publishing, and any and all public performances, and in connection with merchandise, endorsements, commercials and any and all other exploitations of Artist's services, talents and activities in any way connected with or appurtenant to the entertainment industry and related fields throughout the universe (individually and collectively, "Entertainment Services"). You and Artist also hereby engage Company on a non-exclusive basis during the Term and throughout the universe, to represent you and Artist as a non-exclusive consultant in connection with Artist's Entertainment Services.

(ii) At all times during the term, any agreements relating Artist's Entertainment Services shall be subject to Company's prior approval, not to be unreasonably withheld. Company shall receive copies of all correspondence, proposals, deal memos, draft agreements, short form agreements and any other agreements or communications relating to Artist's Entertainment Services (and if same are not in writing you and Artist shall promptly communicate same to Company in writing) and shall have the right and opportunity to provide comments thereto. The final agreement(s) relating to Artist's

Entertainment Services shall be subject to Company's prior written approval, not to be unreasonably withheld.

(iii) With respect to any Entertainment Services you and Artist render during the Term or thereafter (if pursuant to an agreement entered into during the Term or within 12 months thereafter), whether secured through Company's efforts, your efforts, a third party's efforts or otherwise ("Covered Agreement(s)"), you agree that Company shall be entitled to receive a share of any sums earned or received by you or Artist in connection with all such Covered Agreements (the "Company Share"). The rate of the Company Share shall be equal to [] percent ([]%) of all "Gross Income" (as hereinafter defined in this paragraph) derived as a result of all Covered Agreements and all Entertainment Services which are performed and/or rendered, as well as all extensions, renewals and modifications thereof (or replacements therefor). It is expressly understood and agreed that notwithstanding the expiration or termination of the Term of this Agreement, Company shall continue to receive the Company Share pursuant to Covered Agreements in perpetuity. "Gross Income" as used in this paragraph shall mean all gross sums of money or other considerations including, but not limited to, fees, salaries, earnings, royalties, residuals, advances, union fees, bonuses, proceeds of sales, leases or licenses, recording costs, gifts, shares of stock and partnership, corporate, LLC or other interests, directly or indirectly earned or received by you or Artist or your or Artist's heirs, successors and assigns, or earned or received by anyone on your or Artist's behalf, in connection Artist's Entertainment Services and related activities. Without limiting the generality of the foregoing, you and Artist agree to furnish Company with a true and complete copy of any Covered Agreements promptly following Company's request therefor.

(iv) You and Artist shall cause each agreement relating to Artist's Entertainment Services to provide that Company shall receive its Company Share (and statements relating thereto) directly from the applicable promoter or other payor. Without limiting the generality of the foregoing, you and Artist hereby irrevocably authorize and direct any payors of Gross Income earned pursuant to any Covered Agreements (and you shall further direct and authorize such parties to the extent necessary or requested by Company, including via an irrevocable letter of direction) to render statements and payments directly to Company for the Company Share at the same times as the monies relating to the Company Share are payable to you or Artist. In the event that any payor fails or refuses to pay Company directly, you and Artist shall pay Company the Company Share within ten (10) days of your or Artist's receipt thereof.

(vi) You and Artist shall cause each Covered Agreement to provide that Company shall have the same right to examine the applicable person or entity's books and records on the same terms as apply to your or the Artist's rights (or the rights of any Person contracting on your or the Artist's behalf) to examine such books and records. Without limiting the generality of the foregoing, Company shall have the right at its sole cost and expense to, examine, or appoint a third party to examine, your and Artist's books and records as same pertain to the Covered Agreement and/or Artist's Entertainment Services. Such examination shall take place at your or Artist's or the applicable business manager's offices in the U.S., during normal business hours on reasonable prior written notice.

9A. ANCILLARY ENTERTAINMENT-RELATED REVENUE (No Publishing)

9A.01. You shall pay or cause applicable third parties to pay Company the Company Revenue Share (as defined in subparagraph 9A.05 (a) below) in connection with Other Entertainment Services hereunder.

9A.02. As used in this agreement, "Other Entertainment Services" shall mean As used in this agreement, "Other Entertainment Services" shall mean any and all entertainment industry activity that would normally fall outside of the scope of this recording agreement, including, without limitation, the following: (a) the exploitation in any and all media of the name(s) likeness(es), visual representations, biographical material and/or logo(s) of or relating to Artist or any member of Artist (all of the intellectual properties relating to Artist referred to above are sometimes referred to herein collectively and individually as "Artist Properties"), either alone or in conjunction with other elements, including without limitation merchandise for sale at the site(s) of any and all live concert engagements performed by Artist or any member of Artist, premiums such as products which bear a third party's trademarks or logos together with Artist Properties, tie-ins, "bounceback" merchandising, and fan club merchandise, whether or not in connection with Master Recordings (individually and collectively "Merchandise"); (b) endorsements, special marketing arrangements, sponsorships (including tour sponsorships), strategic partnerships or other business relationships with third parties (provided such partnerships or other business relationships are related to Artist's services a performer), appearances by Artist or any member of Artist where Artist appears in professional capacity as a performing artist (regardless of whether such appearances includes a musical performance) including but not limited to appearances in any print, on-line, radio or television advertising campaigns and/or commercials ("Endorsements"); (c) the creation, hosting and maintenance of all so-called "fan club" websites relating to Artist or any member of Artist; (d) live performance engagements as a musician, vocalist and/or performer by the Artist or any member of Artist in all media, including but not limited to musical performances on tour, in concerts, on television broadcast or cable casts (including pay-per-view telecasts), radio, "webcast" and all other means ("Touring Services"), Touring Services may either be either the Artist or any member of Artist alone or with one or more other individuals and may be in connection with a single concert or a series of concerts (a "Tour"); (e) the professional acting services of the Artist or any member of Artist including, but not limited to, appearances in theatre, films, and/or television programs but only to the extent that such services are musical in nature ("Acting Services"); (f) the use of Artist Properties or Artist's writing services in connection with books, magazines and other publishing materials, including, without limitation, the use of Artist Properties in connection with non-fiction books, magazines and other non-fiction publishing materials; (g) the use of Artist Properties in games, including video games, and dramatizations such as cartoons; and (h) Artist's music publishing. Notwithstanding the foregoing, Merchandising Uses as described in subparagraph 9.06 above are not included in Other Entertainment Services as herein defined and shall be exclusive to Company in perpetuity.

9A.03. You shall account to Company, or cause applicable third Persons to account to Company, for the Company Revenue Share in connection with all Other Entertainment Services existing and/or secured during the term of this Agreement including those opportunities that have been secured during the term such that the parties have agreed on material terms but have yet to execute an agreement. On those Other Entertainment Services that exist and/or are secured during the term, Company will have the right

to receive the Company Revenue Share until the period twelve (12) months after the termination or expiration of the term of this agreement. Notwithstanding the foregoing, in the event that the term of this Agreement terminates because Company has exercised its option for the last applicable Option Period available hereunder and the last Contract Period hereunder has ended, Company will have the right to receive the Company Revenue Share in connection with all Other Entertainment Services existing and/or secured for a period of nine (9) months after the termination or expiration of the term of this Agreement. For greater certainty, Company's right to receive the Company Revenue Share shall continue for the duration of each Tour commenced during the term in support of a commitment Album hereunder until its completion, notwithstanding the earlier termination or expiration of the term of this Agreement.

9A.04. You and Company acknowledge that Company's right to receive income from Other Entertainment Services under this Agreement shall not constitute management of the Artist and that Company shall have no obligation to advise Artist or guide Artist as to the advisability of exploiting Other Entertainment Services, or to locate any opportunity to exploit Other Entertainment Services, and you and Company acknowledge that Company's right to receive the Company Revenue Share shall not include the right or obligation to procure employment for the Artist. You and Artist acknowledge that Company has advised you and Artist to retain the services of an independent manager to advise Artist generally in relation to Artist's career and Artist's activities in the music and entertainment industries.

9A.05. In respect of Other Entertainment Services throughout the Territory, the following will be payable to Company:

(a) You shall pay Company for its own account a percentage equal to _____ percent (___%) of Net Entertainment Income (but in no event less than __ percent (___%) of Gross Entertainment Income) derived from Other Entertainment Services, excluding Touring Services (the "Company Revenue Share"). In the foregoing sentence "Net Entertainment Income" shall mean all royalties or flat payments received by or credited to you, Artist and/or any member of Artist (or an entity furnishing the Artist's services) in connection with or arising from Other Entertainment Services ("Gross Entertainment Income"), less any costs of collection and commissions payable by you, Artist and/or any member of Artist (or an entity furnishing the Artist's services) to any unrelated third parties. Notwithstanding the foregoing, Company Revenue Share shall be _____ percent (___%) of Net Entertainment Income (excluding Net Entertainment Income generated in connection with Touring Services) generated in connection with opportunities originated and presented to you or Artist by Company (i.e., gross income generated by such opportunities offset by only those costs of collection and commissions paid in connection with such opportunities).

(b) You shall pay Company for its own account a percentage equal to _____ percent (___%) of Net Entertainment Income derived from Touring Services (the "Company Revenue Share" or "Company Tour Participation"); **provided, however, that, in the event Company's receipt of the Company Tour Participation with respect to any particular Artist live performance would result in you and Artist collectively earning less than Five Thousand Dollars (\$5,000) from the applicable Artist live performance, then the Company Revenue Share with respect to such Artist live performance shall be reduced to an amount that would result in you and Artist collectively earning Five Thousand Dollars (\$5,000) from the applicable Artist live performance.** In the

foregoing sentence "Net Entertainment Income" shall mean [**Gross Tour Revenue**] [**Net Tour Revenue**] (as defined below).

(c) You shall irrevocably direct (and/or cause Artist to irrevocably direct) in writing all third parties to pay the Company Revenue Share to Company at the same time as such third parties account to and pay you and/or Artist in accordance with a letter of direction satisfactory in form and content to Company. You shall provide to Company a copy of each third party agreement in respect of Net Entertainment Income received by you or Artist. To the extent that any such third party shall fail or refuse to make such payment, you shall account to Company within ten (10) days after you are accounted to by any third parties concerning all income derived from and relating to Other Entertainment Services. In the event that you or Artist (or an entity furnishing the Artist's services) directly handle Other Entertainment Services accounting (and not through a third party), then you shall compute the Company Revenue Share from revenues derived from each such opportunity and account to Company within thirty (30) days following the final engagement of each such opportunity. Notwithstanding the foregoing, Company shall be accounted no less frequently than semi-annually within thirty (30) days following each June 30 and December 31st. Company shall have the right to appoint a certified public accountant to audit your books and records concerning your accounting to Company with respect to all Net Entertainment Income once per calendar year, upon reasonable written notice and during normal business hours and at Company's sole expense.

9A.06. The following definitions shall apply to terms used in this Article 9A:

(a) "Concert Date" shall mean a concert or other live performance at which Artist performs or for which Artist is on the bill as a scheduled performer.

(b) "Gross Tour Revenue", as used in this Article 9A, shall mean any and all sums of money or other consideration (including but not limited to: royalties, flat payments, performance fees, salaries, guarantees and other advances, shares of box office receipts, sponsorship and/or endorsement income, advertisement, merchandise income (if applicable), bonuses, leases or licenses, shares of stock, partnership interests and amounts paid for packaged television, motion pictures and/or radio programs, etc.) directly or indirectly earned or received by or credited to you, Artist and/or any member of Artist (or an entity furnishing the Artist's services), and/or or your respective designees, in connection with any Touring Services, including in connection with any and all Concert Dates. For purposes of clarification, "Gross Revenues" as used in this Article 9A shall include consideration earned by Company and/or Artist and/or their respective designees during the term of this agreement, and thereafter (i) in connection with the duration of each Tour that commenced during the term (notwithstanding the termination or expiration of the term of this Agreement prior to the end of the Tour); (ii) under any engagement or contract entered into or negotiated during the term hereof and; any extension, modification, addition or renewal of such contract or employment regardless of when entered into, and any substitutes, directly or indirectly, for such contract or employment; and (iii) with respect to all judgments, awards, settlements, payments, damages and proceeds (whenever received) relating to any suits, claims, actions, proceedings or arbitration proceedings arising out of any alleged breach or non-performance by others of any portion of any contracts, engagements, commitments or other agreements with respect to Concert Dates occurring

during any Tour that commenced during the term (notwithstanding the termination or expiration of the term of this Agreement prior to the end of the Tour).

(c) "Net Tour Revenue", as used in this Article 9A, shall mean Gross Tour Revenue, less only costs of collection and agency commissions payable by you to any unrelated third parties directly related to Touring Services performed during the applicable Tour, **[and less bona fide, direct out-of pocket costs actually paid by you or Artist to unaffiliated third parties directly attributable to the production of Artist's live income generating performances that are a part of the applicable Tour, i.e., so-called "sound and lights" expenses, crew expenses, production costs (including freight costs), but specifically excluding salaries, per diems or any other payments made to any member of Artist and the like.]**

ENTERTAINMENT LAW

BY MICHAEL I. RUDELL AND NEIL J. ROSINI

The “360 Agreement” Emerges in the Music Business

During the last few years, recording artists have been entering into so-called “360 agreements” with record companies and entertainment corporations in increasing numbers, changing the relationship that existed for decades among artists and major labels. Instead of focusing solely on sales of recorded music, the record companies now are sharing, through these agreements, in performers’ income from a 360-degree range of professional activities. High level artists such as Madonna, Jay-Z and Nickelback signed such agreements with Live Nation, a large promoter of concert tours, while traditional record companies have attempted to use this approach as the new “norm” in signing new artists. These developments reflect the difficulties encountered in the music industry as electronic transmission of recordings has become dominant and piracy rampant, making the financial returns from sales of records insufficient to justify the cost of creating, marketing and promoting recorded music.

Traditional Agreements

The traditional agreement between a recording artist and a record company gave the company exclusive rights to the artist’s services with respect to master recordings created during the term of the agreement. The record label would pay the recording costs and the expenses of manufacturing, distributing, marketing, promoting, and advertising the recordings; create promotional videos; and provide tour support. The artist received

advances against a negotiated royalty rate, which would be a percentage of the retail or wholesale price of records (and would also be charged with recording costs and some of the promotional expenditures).

If the artist wrote the musical compositions he or she sang, or just controlled the publishing rights in them, the record company customarily insisted upon a reduction of the “mechanical” royalty rate that otherwise would have been payable for a compulsory license under the Copyright Act. The label also would cap the total mechanical license fees it agreed to pay per album irrespective of whether the artist or a third party controlled the compositions. These demands required the artist to obtain corresponding concessions from music publishers. In many instances, the record label also encouraged the artist to enter into an agreement with the label’s publishing affiliate for the administration of the copyrights in the musical compositions, often with a transfer of ownership, too. The artist negotiated that deal independently and received a separate advance.

A major record company generally would not share in the income an artist received from other professional activities such as live touring performances, acting roles, and general merchandising, although there were some exceptions. For example, record companies did merchandise the images found on album covers and other properties they created in connection with the artist’s records, and sometimes when a record company had an affiliate in the merchandising business, there would be a separate negotiation for those rights. Major labels did not seek, however, all-encompassing multiple rights deals. (Independent labels, on the other hand, more commonly offered recording deals that included

MICHAEL I. RUDELL and NEIL J. ROSINI are partners in Franklin Weinrib Rudell & Vassallo. Both practice entertainment law and have written and lectured extensively on the subject.

publishing and sometimes even merchandising components.)

Justification for 360 Treatment

Some who are critical of 360 deals have argued that record companies should function in difficult times as other businesses do: by cutting costs without changing their business model. The companies answer that the digital age has not changed basic economics of the record business enough to let them overcome their problems with cost-cutting. The costs of engaging producers, the studio, engineers, and side musicians as well as editing, mastering and mixing have not diminished. Marketing and advertising expenses in the United States still are incurred on a national level, and recording artists still expect to receive advances for their living expenses while recording.

Major labels also point out that their reduced earnings are not simply due to losses from piracy. Digital copies that consumers buy usually involve one master recording and one composition at a time rather than an entire album of 10-12 tracks, which previously needed to be purchased to obtain 3 or 4 key songs. In the digital environment, the consumer can collect and compile precisely what he or she wants without investing in entire albums.

The companies say they are correcting an imbalance through 360 deals by requiring that artists, who benefit from successful recording careers financed by record companies, share with those companies the revenue streams enhanced by that support. When an artist's career is newly launched, it presents the most unattractive ratio of risk to reward to record companies. Once an artist achieves fame and success, he or she not only enjoys more public recognition and a more secure sales base, but also the ability to realize substantial financial rewards from digital sales even if physical CDs are not selling well. Some of the more successful artists have spoken in favor of "free" digital deliveries without apparent concern for the negative impact that might be felt on their record sales. This may be because

they derive revenues primarily from live concerts for which their recordings serve as promotional items. (This is not a new phenomenon; it was treated as common knowledge that "The Grateful Dead" did not seem to object when concertgoers taped their music.)

Against this backdrop, record companies and other entertainment companies have turned to 360 deals to share in all the ancillary methods by which an artist generates income. These money streams may include music publishing income, such as music synchronization licenses, performance rights and revenues from sheet music; merchandising income, such as t-shirts, endorsements and use of the artist's names and likenesses for other commercial purposes; live performances; and professional appearances outside of the music business, such as acting engagements.

Components of 360 Deals

The industry components involved in 360 arrangements vary from deal to deal with the stature of the artist and the nature of the company.

Currently, most companies involved in 360 agreements have more expertise in a particular segment of the of the music business and not in the full range of entertainment categories. For instance, Live Nation is a formidable live performance company but it may still turn to labels to make recordings and perform other services that record companies traditionally handle. Similarly, record labels are not yet in the touring business and are only marginally in the merchandising business, so they tend to delegate those responsibilities to third parties. In both cases, the companies incur costs and perhaps a diminution of returns by sharing these responsibilities and their proceeds.

In almost all 360 deals, the artist will be paid an advance that can range from a modest sum to the multi-millions reportedly payable to Madonna and Jay Z. All or part of the advance will be applied against sources of income derived from the artist's efforts. In the past,

the negotiation of royalty provisions related mostly to rates and the application of wholesale and retail calculations, varying by territory, format and pricing. The allocation of shares of net profits used to be relegated to areas of ancillary exploitation, such as flat fee licenses. With focus shifting to the question of how different revenue streams will be shared, the manner in which "net" is defined and the costs deductible in its calculation become much more central. Further, the allocation of different royalty or net receipts rates may take into account additional artist-specific factors. For example, an established artist capable of earning large amounts on tour but not in music publishing (e.g., when the artist does not write his or her own compositions), might expect a greater percentage on the performance side.

These distinctions provide fertile grounds for negotiation, which can be considerably more complicated compared to pre-360 days. The new mixture of product lines and services creates new questions: To what extent will there be cross collateralization among the "revenue buckets" of income? What expectations does the artist have with regard to areas of exploitation that are not within the prime expertise of the acquiring company? Can the artist at some point of dissatisfaction take particular areas out of the contract -- or at least demand a change in management talent -- if a minimum level of performance is not met? And what controls and approvals, if any, will the company have over the tour schedule, the personnel involved on tour, and tour expenses?

In the recorded music business prior to 360 deals, the artist's right to end a contract generally hinged on the record label's failure to record or release the product. In a management contract, the artist often had the right to terminate if a certain amount of income were not obtained over a given period of time. But when the scope of the contract includes all of the artist's "entertainment business," what happens when some aspects of the businesses are going well and some are not? Will the contract permit the 360 relationship to be

completely unraveled, undone in part, or proceed without change?

For an established artist, a transition to a 360 deal from the batch of separate deals he or she has previously made, also raises issues. For example, if Live Nation wanted to enter into a 360 agreement with an artist who owes two additional albums to a record company with whom the artist is under contract, those obligations to the first company would continue during the new relationship. Live Nation might require the contribution of those earnings toward the recoupment of its risk money, but there may be limited comfort in that contribution. Not only might those earnings be encumbered by prior costs and advances but also they may be subject to unknown expenses -- under the control of third parties -- if the albums have not yet been recorded and the costs of production are not yet finalized. Similarly, a record label that wants to include an artist's merchandising opportunities in the deal may have to wait for the current merchandising contract to run its course and settle in the interim for a share of earnings from those arrangements. Like any other negotiation, such variables will influence the size of the advance that the 360 company is willing to pay.

Conclusion

There is much to learn for artists' representatives and for record companies as they gain experience with this new business model. The 360 agreement will necessarily evolve as its pitfalls and benefits are explored -- and as the music industry continues to look for ways of coping with a changing marketplace.

The authors gratefully acknowledge the assistance of our partner, Nick Gordon, in the preparation of this article.