A Change is Gonna Come: The Future of Copyright and the Artist/Record Label Relationship in the Music Industry

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ABSTRACT

The purpose of my research is to examine the music industry from both the perspective of a musician and a lawyer, and draw real conclusions regarding where the music industry is heading in the 21st century. Digital technologies are overhauling the way in which musicians, record labels, and other industry professionals make a living, and my goal is to decipher what these changes mean in the long term. In light of this transformation, my research investigates whether musicians still need record labels in the digital era, and what role copyright law will continue to have in this new model.

The method of research for my thesis was slightly atypical. While I utilized any textbook and scholarly journal that was available on the topic, much of my most valuable research came in the form of personal interviews with some of the biggest players in the music industry, as well as various articles and studies found online.

My thesis argues that the roles played by artists and record labels have completely changed in the last five years, and the parties that will find success on either side of the bargaining table will be those most appreciative of and adaptive to this change. Directly related to this is the changing face of copyright in the music industry. My thesis argues that while copyright used to provide massive value from a single source in the short term, it now generates smaller amounts of value from an infinite array of sources, in the long term. The significance of this finding cannot be understated, for both artists and their investors. In this way, my research aims to be equally significant and accessible to musicians, industry professionals, and academics.

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The highway is for gamblers
Better use your sense
Take what you have gathered from coincidence

Bob Dylan – ‘It’s All Over Now, Baby Blue’

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INTRODUCTION

Since the early days of recorded music, record labels have been the banks of the music industry, providing artists with large amounts of money up front in exchange for ownership in the copyright of the works created thereafter. Along with this financial advantage, the major labels have also held a monopoly over distribution and retail, and used this bottleneck to maintain control over every artist that had to pass through it.

However, in recent years, the major labels' control over this bottleneck has been threatened, as distribution, promotion, and manufacturing have gone digital, causing artists to question whether they need the services that have traditionally been provided by the majors. The technologies that record companies blame for the downturn in retail music sales – computers, CD burners and the Internet – are now allowing musicians to do more of the things that record labels used to. Suddenly, the 'rates' being offered by these 'banks' no longer seem appealing, and this is causing artists to look for other options.

Similarly, the majors have all but stopped signing large deals themselves. According to Susan Abramovitch, one of Canada's most renowned entertainment lawyers, the traditional stand-alone record contract from major labels is a dying breed in today's digital climate.[1] Further, artists like U2, Prince, Radiohead, Paul McCartney, Nine Inch Nails, Nickelback, Jay-Z, Madonna, and Shakira have all but abandoned their traditional recording labels and signed to

[1] Personal interview with Susan Abramovitch (Entertainment Lawyer – *Gowling Lafleur Henderson LLP*, Toronto), March 2008 [Abramovitch].

varying degrees with Live Nation Artists, the recording arm of the touring behemoth Live Nation.[2]

The question begs to be asked: do artists need record labels at all in a digital world? As CD sales plummet and fans continue to obtain music for free online – or tune in to their favorite bands via YouTube, MySpace and other Internet forums – the question is a valid one to say the least.

Clearly the industry is changing. The one thing that has remained constant is this: the major labels have the money, and new artists do not. New bands with their eyes on stardom still need the deep pockets of the major labels to pay for the promotion, marketing and distribution necessary to get heard above the din of countless other acts. And perhaps the megastars still need labels to some extent as well: all of the artists that have signed with Live Nation also have deals in some form with major labels – to take care of distribution, manufacturing, and sometimes promotion. Despite the turmoil in the industry, the major record companies continue to exert considerable influence in the marketplace. But the question is, for how long?

Record labels have traditionally focused their business model on obtaining and controlling the copyrights in the underlying musical composition and performance. However, in a digital age, the value of copyright in the music industry – and in the world in general – is being threatened, as identical and free copies can be made of any piece of music in literally a few seconds. This has caused many to question the value of copyright in this climate, when copying material is essentially free and knows no limits. According to David Bowie:

> The absolute transformation of everything that we ever thought about music will take place within ten years, and nothing is going to be able to stop it. I see absolutely no

[2] Bonner, Lisa, "Move over record labels; 360 deals give recording artists new power," *The Daily Voice* August 12, 2008 <http://thedailyvoice.com/voice/2008/08/360-deals-001000.php>.

> point in pretending that it's not going to happen. I'm fully confident that copyright, for instance, will no longer exist in ten years, and authorship and intellectual property is in for such a bashing. Music itself is going to become like running water or electricity. […] So it's like, just take advantage of these last few years because none of this is ever going to happen again. You'd better be prepared for doing a lot of touring because that's really the only unique situation that's going to be left. It's terribly exciting. But on the other hand it doesn't matter if you think it's exciting or not; it's what's going to happen…[3]

On the other side of the debate are those that suggest copyright will continue to act as a crucial provider of artist revenue, and as such, stronger copyright protection should be afforded in order to ensure that artists and their investors can continue to make a living. Certain record labels, entertainment lawyers, and industry analysts have suggested that the downfall of the CD, or of any physical carrier of music not easily copied, will signal the downfall of the record industry as we once knew it.

Regardless of what side of the debate one is on, it is clear that the music industry is being dramatically affected by the digital revolution, and this is having profound effects on artists, labels, managers, promoters, and consumers. Whether this overhaul will render copyright valueless remains to be seen.

I will examine how major labels are altering their operations to adapt to changes in the industry, and whether this is working. More importantly, I will investigate whether artists still need the services offered by record labels, and if so, how the relationship between the two parties is changing. Further, I will look at what value copyright law will have for both parties in the

[3] Excerpt taken from a *New York Times* interview in June 2002, cited in Kusek, David, and Leonhard, Gerd, *The Future of Music: Manifesto for the Digital Music Revolution* (Boston: Berklee Press, 2005), at 3.

coming years, and how this will affect the bargaining process between them. I aim to prove that copyright law will indeed continue to have value in the coming years, albeit in a drastically different manner than in decades past. Further, I will show that while some artists will continue to need the capital and the expertise held by record labels, many others will be able to generate this capital and replicate label expertise on their own, thus greatly reducing the reliance of artists on record labels in the 21st century.

Chapter One will look at the various rights that exist in a piece of music, and how those rights are conferred in the *Copyright Act*. Further, this chapter will examine which parties in the music industry get which rights, and how these rights are typically exchanged in the record industry.

After showing how various rights are exchanged, **Chapter Two** will analyze *why* these rights are exchanged, and *why* artists continue to assign them in a digital world. I will examine the five functions traditionally performed by record labels in exchange for artists' rights, and question whether these five functions are still valuable in the 21st century music industry.

Chapter Three will analyze how the so-called '360 deal' is overhauling the entire music industry, and the effect it is having on the artist/label relationship. I will investigate the pros and cons of this type of deal, and whether it should be embraced or resisted by artists.

Chapter Four will tie the entire thesis together, illustrating how 360s are reflective of current trends in the music industry, what this means for industry players, and how these trends will affect the rights enumerated under the *Copyright Act*. I will look at four predictions for the future of the music industry, and what these predictions mean for artists wishing to find success in the modern music industry. Further, I will question whether these predictions tend to favor artists signing with record labels, or employing a different approach.

CHAPTER 1
THE RIGHTS IN A SONG

1.0 Introduction

This Chapter will examine the various rights that exist in a musical composition under the Canadian *Copyright Act*; who has claim to these rights; and how these rights are exchanged among the applicable parties. The complex web of legal rights that exists in any piece of music is confusing even to those who practice in the area, and for this reason a fairly thorough analysis is a crucial starting point in any examination of the artist/label relationship. The chapter is necessary in order to understand the legal consequences of signing a record deal and recording a piece of music, and how each party involved in the cycle is entitled to different rights. This will allow us to envisage how the artist/label relationship might develop in the coming years, as the entire record industry is overhauled by digital technology.

1.1 Overview of Rights Under the *Copyright Act*

The world of music copyrights is one of the most complicated areas within copyright law. The complexity stems from the historical development of the music industry and the corresponding process of reactionary regulation to deal with changes in the industry over time.[1]

[1] Pallas Loren, Lydia, "Untangling the Web of Music Copyrights," *Case Western Reserve Law Review*, Vol. 53, Spring 2003, at 679 <http://ssrn.com/abstract=424701>.

In Canada, the *Copyright Act* (the "Act")[2] provides the statutory basis for a number of rights in a song. These rights, which fall under the terms "copyright" and "moral rights", are set out in the context of the Act in s. 2 as follows:

> "copyright" means the rights described in
>
> (a) section 3, in the case of a work,
>
> (b) sections 15 and 26, in the case of a performer's performance,
>
> (c) section 18, in the case of a sound recording, or
>
> (d) section 21, in the case of a communication signal;
>
> "moral rights" means the rights described in subsection 14.1(1);

The owner's rights under copyright in Canada are entirely statutory.[3] Despite the unity of their source (the Act), it is difficult to discuss the rights under copyright in a general sense because they can differ significantly in nature and application. Multiple and distinct rights may exist in the same work. Multiple copyrights may also overlap; a single action may violate the rights of more than one copyright owner. For example, where a number of copyrighted works have been included in a compilation, separate rights exist both in the compilation and in the underlying works.[4] Multiple layers of copyright owners characterize the music industry, and each of those owners is granted multiple rights. Some of those rights are subject to compulsory licensing provisions and a few of those rights have spawned entire organizations that specialize in authorizing downstream uses.[5]

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[2] *Copyright Act*, R.S.C. 1985 c. C-42 (as amended).

[3] R.S.C. 1985 c. C-42 (as amended) at s. 89: No person is entitled to copyright otherwise than under and in accordance with this Act or any other Act of Parliament.

[4] *Robertson v. Thomson Corp*., [2006] 2 S.C.R. 363 (SCC).

[5] Examples include CMRRA (Canadian Musical Reproduction Rights Agency Ltd. - www.cmrra.com) and SOCAN (Society of Composers, Authors and Music Publishers of Canada – www.socan.ca) in Canada, and the Harry Fox Agency (www.harryfox.com), ASCAP (American Society of Composers, Authors and Publishers – www.ascap.com), BMI (Broadcast Music Inc. – www.bmi.com) in the US.

However, generally speaking, the rights in copyright can be broadly classified into economic and moral rights.

1.2 Moral Rights

Moral rights can be difficult to distinguish. Although they differ in nature from economic rights, both types of rights arise in respect of the same work, and moral rights may be exercised (or waived) for economic gain. In *Théberge*, Justice Binnie, writing for the majority, described the contrast as follows: [6]

> Moral rights, by contrast, descend from the civil law tradition. They adopt a more elevated and less dollars and cents view of the relationship between an artist and his or her work. They treat the artist's œuvre as an extension of his or her personality, possessing a dignity which is deserving of protection. They focus on the artist's right (which by s. 14.1(2) is not assignable, though it may be waived) to protect throughout the duration of the economic rights (even where these have been assigned elsewhere) both the integrity of the work and his or her authorship of it (or anonymity, as the author wishes).

Moral rights thus provide the author of a work the right to its integrity and the right to be associated with it.[7] Unlike economic rights, which are held by the owner of the copyright,[8] moral rights are specific to the work's author, who may or may not own the copyright. This is because the ownership of economic rights in copyright may be assigned or licensed,[9] but moral rights cannot be assigned.[10] Although moral rights can be

[6] *Théberge v. Galerie d'Art du Petit Champlain inc.*, [2002] 2 S.C.R. 336 (SCC), at para 15 [*Théberge*].
[7] R.S.C. 1985 c. C-42 (as amended) at s. 14.1(1).
[8] R.S.C. 1985 c. C-42 (as amended) at s. 27(1).
[9] R.S.C. 1985 c. C-42 (as amended) at s. 13.
[10] R.S.C. 1985 c. C-42 (as amended) at s. 14.1(2).

waived in whole or in part, the assignment of copyright in a work does not, by itself, constitute a waiver of moral rights. An author may therefore charge one price for the sale of his copyright, and charge another for the waiver of his moral rights.[11]

While moral rights form an important part of the law of copyright, rarely do they come up in the artist/record label relationship, as record labels typically require artists to waive their moral rights completely in the recording contract, before any works are created.[12] As such, we will now turn to economic rights.

1.3 Economic Rights

The key provision of the *Copyright Act* that grants exclusive economic rights to the copyright owner is s. 3(1), which sets out thirteen rights: reproduction, performance, publication, communicate to public by telecommunication, and others. While each of these rights is different, in every instance the right is a "sole right." This means that the owner of the right can not only do the thing specified, but can also exclude others from doing it.[13] For example, the reproduction right allows the owner to reproduce the work, and to disallow others from doing so without their consent.

Section 3(1) of the Act sets out the rights as follows:

> For the purposes of this Act, "copyright", in relation to a work, means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatever, to perform the work or any substantial part thereof in public or, if the work is unpublished, to publish the work or any substantial part thereof and includes the sole right
>
> (a) to produce, reproduce, perform or publish any translation of the work,
>
> (…)

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[11] *Théberge, supra* note 9, at para 59.
[12] This could be the topic for another thesis entirely. Source: personal interviews with Paul Sanderson (Entertainment Lawyer – Sanderson Law, Toronto) October, 2008 [Sanderson], Susan Abramovitch *supra* note 1, and Danny Craig (Musician/Producer – drummer in Vancouver rock band Default) October, 2008 [Craig].
[13] Murray, Laura Jane, and Trosow, Samuel, *Canadian Copyright: A Citizen's Guide* (Toronto: Between the Lines, 2007) at 54.

(d) in the case of a literary, dramatic or musical work, to make any sound recording, cinematograph film or other contrivance by means of which the work may be mechanically reproduced or performed,

(e) in the case of any literary, dramatic, musical or artistic work, to reproduce, adapt and publicly present the work as a cinematographic work,

(f) in the case of any literary, dramatic, musical or artistic work, to communicate the work to the public by telecommunication,

(…)

(i) in the case of a musical work, to rent out a sound recording in which the work is embodied, and to authorize any such acts.

Production, performance, and publication form the core of the economic rights, and are the foundation for the exchange of services and rights between artists and record labels

2.0 Who gets these rights?

2.1 Musical Work Copyright

With each piece of recorded music, there are two distinct copyrights: one in the musical work or composition, and one in the sound recording of this musical work. Within those two types of copyright, there are three sets of parties that have control of the copyright in a song: the writer, the performer, and the producer or engineer (known as the "maker" under the Act).[14] The writer has copyright in the musical work, while the performer and producer or engineer is often granted a copyright in the sound recording. If the songwriter is also the performer on the sound recording, they are granted rights in both the musical work and the sound recording.[15]

[14] R.S.C. 1985 c. C-42 (as amended), at s.3, 13, 15, 18.
[15] See Appendix A, Table 1 for a more detailed deconstruction of the rights and parties involved, and Table 2 for a detailed breakdown of the various licenses that exist in music.

Once codified into a notated sheet or a phonorecord, a musical composition becomes "copyrightable", provided it meets certain conditions of eligibility, such as "originality" and sufficient "creative effort".[16]

Under the Act, the musical work copyright is given to the writer of the work via s.13:[17]

> 13. (1) Subject to this Act, the author of a work shall be the first owner of the copyright therein.

This right is often assigned to a publisher, who then exploits the song commercially. Generally speaking, the musical work copyright is negotiated between the songwriter and a publisher, and operates separate and distinct from the artist/label relationship. However, the music publishing industry is dominated by essentially the same transnational corporations that operate in sound recording: BMG, EMI, Sony/ATV, Universal and Warner Chappell.[18] Thus, publishing remains linked to the artist/label relationship, albeit indirectly.

2.1.1 Income Generated from this Copyright

There are four sources of revenue that are generated from creating a musical work and having it published:

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[16] What is copyrightable is not straight-forward: "In specifying the criteria of copyrightability, the designers of any copyright system must select a position somewhere on the spectrum marked by what is 'original' and what is a recognizable combination of the existing. Such judgment has become even harder with information technology making it possible to merge and change existing compositions, so what is new becomes debatable (the same problems apply to copyrights in software). Another ambiguity is that copyright law does not require any proven artistic merit or novelty (as in patent law) and accepts authorship on the basis of creative effort; thus arrangements, compilations, listings, databases, etc., are protected by copyrights separately from the original material embodied in them". See Cheung, S, "Property rights and invention," in Palmer, J, ed. *Research in Law and Economics: The Economics of Patents and Copyrights*, (1986) 8: 5–18. On the topic, the Supreme Court in *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13, [2004] 1 S.C.R. 339 held as follows: "an 'original' work under the *Copyright Act* is one that originates from an author and is not copied from another work. In addition, an original work must be the product of an author's exercise of skill and judgment. The exercise of skill and judgment required to produce the work must not be so trivial that it could be characterized as a purely mechanical exercise."

[17] R.S., 1985, c. C-42, s. 13; 1997, c. 24, s. 10.

i) Performance Royalties – Are generated from having work played on radio, in a bar, restaurant, live venue, etc. These rights are administered and enforced in Canada by SOCAN[19];

ii) Mechanical Licensing Fees – When a song is reproduced on a "mechanical contrivance" such as a CD, cassette tape or other media, the record label or individual pressing such album pays the publisher/writer of the song a fee of approximately $0.08 per song per record sold.[20] In Canada this is the "prescribed rate" set by agreement between the recording and publishing industries. In the USA, the rate is a "statutory rate" set by legislation. If an artist or label wishes to record a song, they must first secure a "mechanical license" from the owner of the copyright. This can usually be done through the CMRRA in Canada and the Harry Fox Agency in the USA;

iii) Synchronization Licensing Fees – When a song is placed on a film or T.V. soundtrack, the producer of the film or T.V. program is required to pay the publisher or author of the work a "Sync Fee". It is a similar concept to the mechanical license; and

iv) Miscellaneous – Revenue generated from more creative uses of musical works, such as printing lyrics on t-shirts, using songs in video games and ringtones, or

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[18] Throsby, David, "The Music Industry in the New Millennium: Global and Local Perspectives," Paper prepared for The Global Alliance for Cultural Diversity Division of Arts and Cultural Enterprise, UNESCO, Paris (2002) at 5.

[19] Society of Composers, Authors and Music Publishers of Canada, which is the Canadian copyright collective for the right to communicate to the public and publicly perform musical works. SOCAN administers these rights on behalf of its members (composers, lyricists, songwriters, and their publishers) and those of affiliated international organizations by licensing the use of their music in Canada. The fees collected are distributed as royalties to its members and to affiliated organizations throughout the world.

[20] The "mechanical rate' is administered by The Canadian Musical Reproduction Rights Agency Ltd. (CMRRA), a non-profit music licensing agency, which represents the vast majority of music copyright owners (usually music publishers) in Canada. On their behalf, CMRRA issues licenses to users of the *reproduction right* in copyrighted music. These licenses authorize the reproduction of music in CD's and cassettes ("mechanical licensing") and in films, television programs and other audio-visual productions ("synchronization licensing"). Licensees pay royalties pursuant to these licenses to CMRRA and, in turn, CMRRA distributes the proceeds to its publisher clients. The publisher in turn distributes the songwriter's portion of such revenues to the songwriter involved.

having songs play in toys and other commercial products. Also, the Act adds a "Blank Tape Levy" on recordable media including Cassette Tapes, CDRs and other media as determined as commercially viable under the legislation, in order to compensate artists for the pirating of their works. Finally, writers also receive income from the sale of sheet music containing their works.

2.2 Sound Recording Copyright

The other type of economic rights are the copyrights that exist in the sound recording. The eventual owner of these copyrights is usually a record label. However, in the case of an independent artist, the artist may own such rights.

For acts that do sign with a label, it is typically required that they assign all master recording and recording performance copyrights to the label. The label pays for all costs of recording, pressing, promotion and marketing, and the label will often pay an advance against future royalties with a royalty rate of 10-13% of retail selling price.[21] In other words, the label pays all the costs and assumes all the risk, but demands 90% of each record sold thereafter to make up for it.

If the artist records his or her own masters, they may *license* rather than assign such recordings to a record label. In such a situation, ownership of the rights in the underlying recording remain with the artist, while the right to use the recordings is transferred to the label, usually for a limited period of time. The label is not responsible for the costs of production in this situation, but would take on the costs of pressing,

[21] Personal interview with Bob D'Eith (Entertainment lawyer - D'Eith & Co, Vancouver, and Executive Director of MusicBC <www.musicBC.org>), February 2009 [D'Eith].

marketing and promotion. In such a situation, a typical royalty rate would be between 15-18% of the retail selling price, with or without an advance going to the artist.[22]

The artist who produces his or her own masters may release their material directly to the public. In this case, the artist becomes the de facto record label, and would be responsible for all costs of production, pressing, marketing and promotion. They would likely arrange a distribution deal with a third party distributor which would pay a wholesale price of $7.00-$9.00 per CD sold. Out of that, the artist would have to pay all costs of pressing, marketing and promotion.

2.2.1 Income Generated from this Copyright

There are three main sources of revenue that flow from the sound recording copyright:

i) Record Sales Revenue – This includes revenues generated by direct sales and sales of records through third party distributors both traditional (CD) and digital downloads;

ii) Master Use Licenses – This revenue stream includes licensing to third party labels to release records in specific territories. This also includes licenses to allow a film or T.V. producer to place the recording in a film or T.V. production[23]; and

iii) Private Copying Levy – Owners of sound recording copyrights also benefit from the Act's 'Blank Tape Levy', which is a special levy charged on purchases of recordable media (blank CDs, DVDs, tapes, etc.).[24]

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[22] *Ibid*.

[23] A film requires two licenses—the above-mentioned "Sync License" from the publisher and a "Master Use License" from the label.

[24] R.S.C. 1985 c. C-42 (as amended) at s. 79.

2.3 Neighbouring Rights

Another important set of rights created under the Act are neighbouring rights, which were incorporated into the Act through amendments made in 1997.[25] Neighbouring rights include the maker's rights in sound recordings, performer's performances in sound recordings, and communication signals. For our purposes, "performers" include singers and musicians on a sound recording, while "makers" include producers and engineers that 'fix' the song on record. The "first owner" of the copyright in a performer's performance is the performer and in a sound recording is the maker[26], though these rights are usually assigned before the musicians and producers enter the studio.[27]

Broadcasters are responsible to pay a tariff to approved collection agencies in order to compensate the performers on records and the labels owning the sound recordings. The AVLA[28] administers neighbouring rights for labels and ACTRA[29] or AFM[30] administer neighbouring rights for performers.

3 How Artists Assign Their Rights

3.1 Section 13

As we have examined, both artists and producers are the first owners in the performer's copyright and the maker's copyright, respectively. However, both of these

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[25] Bill C-32, *An Act to Amend the Copyright Act*, S.C. 1997 c. 24.
[26] R.S.C. 1985 c. C-42 (as amended) at s. 24
[27] Passman, Donald S., *All You Need to Know About the Music Business*, 4th ed. (New York: Penguin, 2004) [Passman].
[28] Audio-Video Licensing Agency Inc., a non-exclusive agency that provides licences on behalf of record companies and producers for the purpose of broadcasting or duplicating audio and video recordings in Canada.
[29] Alliance of Canadian Cinema, Television and Radio Artists, an organization that aims to protect and promote the rights of Canadian performers through collective bargaining, administration and enforcement of performers' rights, and other services.
[30] The American Federation of Musicians, the largest organization in the world representing the interests of professional musicians, through negotiating fair agreements, protecting ownership of recorded music, securing benefits such as health care and pension, and lobbying legislators.

parties are almost always under contract with the record label that is funding the recording, resulting in the copyright being assigned to the label well before the work is recorded.[31]

The crucial part of the Act that enables this assignment of rights is section 13:

> (3) Where the author of a work was in the employment of some other person under a contract of service or apprenticeship and the work was made in the course of his employment by that person, *the person by whom the author was employed shall, in the absence of any agreement to the contrary, be the first owner of the copyright*. (…)
>
> (4) *The owner of the copyright in any work may assign the right*, either wholly or partially (…) and either for the whole term of the copyright or for any other part thereof, and may grant any interest in the right by license, but no assignment or grant is valid unless it is in writing signed by the owner of the right in respect of which the assignment or grant is made, or by the owner's duly authorized agent.

This section of the Act enables record labels to obtain sound recording copyrights from recording artists and producers, and also applies to writers who assign their musical work rights to a publisher. Subsection (3) – also known as the "work for hire" clause – states that any time an employer (the record label) hires someone (the artist, engineer, producer) to work for them as an employee, the copyright in the resultant product belongs first to the employer, barring any agreement to the contrary.[32] Subsection (4) states that the first owner of a copyright may assign that right either wholly or partially, or may

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[31] The wording in most recording contracts is something like: "*As between you and Label, those Master Recordings, <u>from the inception of the recording</u> thereof, and all Records and other reproductions made therefrom, together with the performances embodied therein and <u>all copyrights therein</u> and thereto throughout the Territory, and all renewals and extensions thereof<u>, shall be entirely Label's property</u>, free of any claims whatsoever by you or any other person, firm, or corporation.*" [Emphasis added] For more, see: Barber, Andrea Goode, "Analysis of a Recording Contract", *StarPolish.com* <http://www.starpolish.com/advice/print.asp?id=113> [Barber].

[32] For example: "*Each Master Recording made under this agreement will be considered a "work made for hire" for Label within the meaning of Canadian Copyright Law." Ibid*

grant an interest in the right by license, so long as either of these agreements is put in writing.

Record labels typically require that artists *assign* their rights rather than *license* them. This is because an assignment results in an actual transfer of ownership in the underlying rights, whereas a license grants only a time-limited authorization to use those rights. Generally speaking, artists would be better off licensing their works to record labels rather than assigning them, but the major hurdle is that they are then left with the costs of production, distribution, and promotion.[33] While it is not always the case that recording musicians are viewed as employees of their record label under the law, it is typically the case, with the exception being artists with a sizeable amount of bargaining power.

3.2 The Recording Process & Assignment of Rights

An analysis of the recording process will help us further understand *how* an artist might assign his or her rights to a label. The process from creation of the musical work to the production of the sound recording is summarized as follows.

Once a song is written, the songwriter typically enters into a contract with an interested music publisher that is responsible for the commercial application of the songwriter's musical work (finding users, issuing licenses, collecting money, and paying the writer – collectively known as 'administration rights'[34]). In exchange for these services, the songwriter assigns their section 13(1) author's right in the song to the publisher, who then takes on partial ownership of the assigned right via s.13(4).

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[33] Abramovitch, *supra* note 1, and personal interview with Stacey Mitsopulos (Entertainment Lawyer – *Taylor Mitsopulos Klein Oballa LLP,* Toronto), October 2008 [Mitsopulos].
[34] Passman, *supra* note 30, at 217.

As per s.3(1) of the Act, the publisher obtains the right of first publication in the work, granting them the exclusive right to publish and sell said work. The publisher then receives a percentage share of all publishing revenues generated from the commercial application of the musical work, known as the 'publisher's share'.[35] These publishing revenues come from the performance of the works in public, as per s.3(1)(e) of the Act, and also the communication of the works to the public as per s.3(1)(f). Where the songwriter is also the performer, the publisher may assist in securing a recording contract with a record company.

The publisher or artist manager then negotiates a contract with a record company to record the musical work, that is, to produce a sound recording. The record company then invests a sum of money by way of a recording advance paid to the artist or group of artists performing the musical work. This can be a substantial amount, normally between $150,000 to $400,000 for a new artist and over $1,000,000 for a superstar release.[36] These numbers have drastically fallen along with the decrease in album sales.

The artist, in collaboration with the record company, engages a record producer to record the musical work and produce a master recording. In exchange for its investment in the creation of the recording, the record label typically receives ownership of the copyrights in the master recordings created during the contract period, as well as a majority share in the future royalties from sales of the recording.[37] For new artists, the standard royalty rate per album is roughly 10%. For more established acts, this number

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[35] The publisher's share is typically 50%, and covers overhead and profit. Passman, *supra* note 30, at 218. See also Donnelly, Marian, *Legal Stuff: What You Should Know*, Developed for The Management Workshops: Encouraging Professionalism in Canadian Artist Management, 2002 (handout).

[36] See: Passman, *supra* note 30, at 100; Thall, Peter M., *What They'll Never Tell You About the Music Business* (New York: Watson-Guptill Publications, 2002), at 25 [Thall], and Avalon, Moses, *Confessions of a Record Producer: How to Survive the Scams and Shams of the Music Business* (San Francisco: Miller Freedman, 1998), at 52 [Avalon].

can move upwards around 15%.[38] In this way, record labels are like the banks of the music industry, investing large amounts of money into thousands of artists in exchange for ownership in the master recordings and a majority of the royalties from their sales.[39]

It is from the master recording that multiple copies of the sound recording are manufactured and sold to the public. The s.3(1)(a) production/reproduction provision gives the label the right to make copies of the work for sale to the public, whereas s.3(1)(d) allows the song to be mechanically produced by others (i.e. as a 'cover' song), so long as the writer and label that created the work initially are paid the mechanical royalty set by the Canadian Musical Reproduction Rights Agency Ltd. (CMRRA).[40]

Distributors are responsible for the timely delivery of the product to retailers, coinciding with a marketing and promotion campaign for the sound recording. The marketing campaign incorporates a range of activities including advertising, publicity, radio airplay, Internet, TV, and live performances. The expenses incurred in order to effectively market an act can easily climb above $1,000,000 for a major label artist.[41] These expenditures – as well as any other money spent on the artist –

are recouped by the record label from artist royalties on record sales, in a controversial process known as recoupment.[42]

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[37] Passman, *supra* note 30, at 69.
[38] Passman, *supra* note 30, at 94, and Craig, *supra* note 15.
[39] See generally: Avalon, *supra* note 39.
[40] The current mechanical royalty in Canada is 8.1 cents per copy manufactured. See: http://www.cmrra.ca/cmrradocs/mlbe06.pdf. The US equivalent to CMRRA is ASCAP and BMI.
[41] Craig, *supra* note 15.
[42] For more on recoupment, see Thall, supra note 39, at 23 and Passman*, supra* note 30.

CHAPTER 2
WHY ARTISTS ASSIGN THEIR RIGHTS

1.1 Introduction

Now that we have examined the rights that exist in songs and how they are exchanged, we will now turn our focus to *why* they are exchanged. While some artists enter contractual agreements with record labels without knowing their rights or the consequences of signing a record contract, most artists retain qualified legal counsel before doing so. Intuitively, this reveals that record labels continue to offer something of substantial value to artists, and vice versa. This chapter examines the precise functions that record labels provide for artists, and how these functions are changing in a digital age. This chapter is necessary to understand the high-cost, high-risk music industry, and to help determine the extent to which record labels are still needed in this context.

1.2 The High-risk, High-cost Music Industry

Record labels have held a monopoly over two things since the infancy of popular music: distribution and promotion. In a detailed study of the music industry in 2003, these two essential aspects of the industry were related to the relative indispensability of record labels.[43] The music industry was found to be characterized by the major record label's control of these two channels – the 'bottleneck' that every artist had to pass through to reach the masses – therefore labels were found to be relatively indispensable.

The four major labels (Universal, Sony/BMG, Warner, and EMI) and their subsidiaries currently hold 87% and 80% of the American and Canadian market shares,

[43] Regner, Tobias, "Innovation of Music," in R. Watt, ed. *The Economics of Copyright: Developments in Research and Analysis* (Cheltenham: Edward Elgar Publishing 2003) at 1011.

respectively.[44] The majors are best described as conglomerations of smaller labels that typically focus on a particular music genre. Both majors and independents provide similar intermediary services to artists precisely because distribution and promotion requires real resources and entails the assumption of financial risk.[45]

In virtually all cases, labels take on the risk of financing the intermediary functions of an artist's career until sales are made. To call this risk substantial is a massive understatement: the recording industry is effectively predicated upon mass failure – failure for the artist but also for the investors, the record companies.

The vast majority of sound recordings that are released are not economically lucrative, often failing to recoup the initial outlay from the label.[46] One study found that releases that sell below 250,000 copies result in financial losses for major labels, and often loss of a contract for the artists.[47] According to the Recording Industry Association of America (RIAA[48]), only 10% of major label releases are profitable, yet they are *so* profitable that they are used to finance the remaining 90% that generate losses.[49] Another study found that the proportion of new titles that are financial failures range from 80 to

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[44] Associated Press, "Top record labels: artists, market share," Oct. 10, 2008 < http://www.theglobeandmail.com/servlet/story/RTGAM.20081010.wgtmusicshare1010/BNStory/Technology> and Reuters Staff, "Nielsen Music 2007 Year End Music Industry Report For Canada," Jan. 4, 2008 < http://www.reuters.com/article/pressRelease/idUS214743+04-Jan-2008+BW20080104> [Nielsen].
[45] Michel, Norbert J., "Digital File Sharing and Royalty Contracts in the Music Industry: A Theoretical Analysis," *Review of Economic Research on Copyright Issues*, Vol. 3, No. 1, pp. 29-42, 2006, at 31. Available at SSRN: http://ssrn.com/abstract=1143826 [Norbert].
[46] Osborn, Guy and Greenfield, Steve, "Understanding Commercial Music Contracts: The Place of Contractual Theory," *Journal of Contract Law*, Vol. 23, 2007, at 3 [Osborn]. Available at SSRN: http://ssrn.com/abstract=1068621.
[47] Papadopoulos, Theo, "Are Music Recording Contracts Equitable? An Economic Analysis of the Practice of Recoupment," *Music & Entertainment Industry Educators Association Journal* Vol 4 No 1, 83-104, 2004 [Papadopulos], and Fink, Michael, *Inside the Music Industry: Creativity, Process and Business* (New York: Schirmer Books, 1996), at 94 [Fink].
[48] See www.riaa.com.
[49] Philips, C., "Record Label Chorus: High Risk, Low Margin," *Los Angeles Times*, 2001 [Philips].

90 percent[50], which is close to the RIAA estimate of 90%. One US industry analyst suggested that: "of the approximately thirty-two thousand new CDs released each year, only 250 sell more than ten thousand copies, and fewer than thirty go platinum"[51]. That works out to roughly 1/10 of 1 percent of new releases. As file sharing becomes more and more popular, these figures promise to become more staggering.

These numbers reflect the idea that the demand for pop records is to a high degree fickle and unpredictable, as a product that is in high demand one month may suffer a catastrophic fall in demand in the next.

1.3 Effect on Artists and Labels

The effect of this uncertainty, when coupled with the massive cost of releasing a record, is twofold. First, the artist is put into a position of reliance on the record label, knowing that to survive they must immediately produce commercially successful sound recordings or demonstrate the potential for future economic success. Second, from the record company's view, the artist is a high-risk investment. In order to manage their risk, labels have demanded a complete assignment of the underlying copyrights in the songs created, which – when coupled with low royalty rates on records sold – enables them to recoup their investment in the long term over a large portfolio of acts.

With this as a background, it becomes clearer that artists have needed record labels because only labels have the *capital* and the *connections* necessary to effectively fund and promote an album, and then weather the storm if it is not successful.

1.4 Is the Internet Reducing Risk and Cost?

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[50] Papadopoulos, *supra* note 50.
[51] Kusek, *supra* note 3, at 108.

Granted, the fickle and high-risk aspect of the industry will likely never change.[52] However, the Internet is threatening to transform the high-cost aspect of the industry, and this may reduce artist dependence on record labels. With relatively little investment, artists can easily distribute their own music through the Internet. Through sites like CDBaby.com, acts can now have their songs available on iTunes at relatively no cost, giving them access to the largest distributor of music on the planet.[53] On the promotional end, sites like Facebook, Myspace, Sonicbids, and YouTube allow artists to market their recordings to consumers anywhere in the world, in ways that were never imaginable just five years ago. Technological developments are also reducing recording costs, and as CD sales continue to decline, manufacturing may become less important for many acts.

With these developments overhauling the way music is created, marketed, and consumed, the question begs to be asked: do artists still need record labels – to hedge against risk and cover costs – in a digital age? Do artists need to keep assigning their rights to labels? Are labels still needed to fund the cycle of recording and touring? In the aforementioned study analyzing the indispensability of record labels, researchers found that as digital technology opens up alternative distribution and promotion channels, labels would become more and more dispensable.[54] In other words, without a bottleneck on distribution and promotion, labels start to lose control of their dominant position at the

[52] In fact, in this writer's opinion, it seems to be getting more fickle with each year. Again, this is topic for another thesis, perhaps two.
[53] Bangeman, Eric, "Apple passes Wal-Mart, now #1 music retailer in US," *ARS Technica*, April 2, 2008 < http://arstechnica.com/news.ars/post/20080402-apple-passes-wal-mart-now-1-music-retailer-in-us.html> [Bangeman]. Author's note: for independent artists like my band, a sale on iTunes nets us $0.70 per $0.99 song sold (Apple keeps $0.29 to cover costs). Major labels get the same amount - $0.70 – but give most of their artists $0.09 per sale or less, as per previously agreed upon contractual terms. For more see: Marsal, Katie, "iTunes Store a greater cash crop than Apple implies?" *Apple Insider* Apr. 23, 2007 < http://www.appleinsider.com/articles/07/04/23/itunes_store_a_greater_cash_crop_than_apple_implies.html > and Welte, Jim, "Allmans, Cheap Trick sue Sony," *MP3.com*, April 27, 2006 <http://www.mp3.com/news/stories/4310.html>.

bargaining table. Clearly these alternative distribution and promotion channels have 'opened up' and are thriving; yet record labels still seem to play an important role in the industry. Intuitively this reveals one of two things: record labels still offer something to artists that they do not have on their own, or labels have nothing to offer anymore, but artists do not know any better. I suggest it is a bit of both: record labels continue to play an important role in the industry, but that role is undergoing a major overhaul, and artists need to understand this and negotiate their contracts accordingly.

For the time being, major labels still have the money and the connections that artists need to reach the masses. However, with less money coming in, and new options for artists, we will now examine the extent to which new artists need record labels, and whether they should continue to assign their rights to them. We must further examine whether the Internet and new technologies are reducing the risk and cost associated with releasing music. We will do so by looking at the functions traditionally performed by record labels, and how these functions are changing in a digital world.

While promotion and distribution are perhaps the most obvious label functions, there are in fact five general areas of expertise that record labels have traditionally supplied to artists:[55]

(1) Recording;

(2) Manufacturing;

(3) Distributing;

(4) Promoting; and

(5) Managing.

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[54] Regner, *supra* note 46, at 108.
[55] Norbert *supra* note 48, at 31.

To further analyze the artist/label relationship and determine the extent to which artists still need record labels, we must examine each of these functions in more detail.

2.0 Recording

For a major label act, recording an album intended for mainstream release traditionally would cost between $150,000 and $500,000 for an average artist, and over a million for a superstar release.[56] For indie[57] or niche acts, these numbers drop down to $10,000 - $30,000, and upwards of $50,000 for bigger names. This takes into account studio costs, engineering costs, musician and singer costs (including union dues), equipment rental, mixing, mastering, and most importantly, producer costs.[58] As we have seen, labels typically take on the risk of financing the intermediary expenses incurred by the artist and their team until sales are made.[59] In exchange for this investment, the label is typically assigned ownership of the copyrights in the master recordings created during the contract period, and a majority share in the future royalties from sales.[60]

However, as big money and the music industry part ways, the need for cheaper solutions for recording is growing.[61] In recent years, developments in technology have greatly improved the sound quality and affordability of home recording systems, causing the cost of recording to drop substantially. According to renowned Montreal producer

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[56] Craig, *supra* note 15, and personal interview with Fred St. Gelais (Songwriter/Producer and owner – Studio La Chambre, Montreal), October 2008 [St. Gelais], and Einhorn, Michael A., "Gorillas in Our Midst: Searching for King Kong in the Music Jungle" November 17, 2007. Available at SSRN: http://ssrn.com/abstract=1030886, at 702 [Einhorn].

[57] By 'indie' I mean any artist signed to an independent label, or generally appealing to a smaller demographic, i.e. not mainstream.

[58] The big difference in price from average acts to superstar acts is the cost of a name producer. Reportedly, ultra-hip producer Timbaland is so in-demand, he commands $500,000 *per song* for his production skills. Legendary producer Rick Rubin also fetches in the millions for each album he produces. Source: St. Gelais, *supra* note 59.

[59] Norbert, supra note 48, at 32.

[60] Passman*, supra* note 30, at 69.

[61] Young, Kevin, "Home Recording 2008," *Canadian Musician Magazine*, Sept/Oct 2008, Vol. XXX No.5, (Norris-Whitney Communications Inc., St. Catharines, ON) at 50.

Fred St-Gelais: “if someone is able to make a great-sounding record using his laptop in an apartment, he stands more chance of making a living making records into the future”[62]. An example he cites is Canadian singer Daniel Powter, who recorded his debut release in an apartment in Vancouver for $6,000. His single "Bad Day" was an international smash, going to number one in several countries around the world, without the large production budget that would necessitate a major label investment.[63]

But can these low-cost, do-it-yourself recordings match the type of sound produced by the pros at the larger studios? Is the Daniel Powter example the exception rather than the rule? To a great degree, the answer depends on *what* is being recorded. For niche or indie acts that appeal to a smaller fan base, the sound quality offered by smaller studios and cheaper recording equipment is a better fit. Getting a ‘big sound’ is generally less of a concern for these acts, and in fact many of them appeal to fans because of their ‘loose’ or ‘organic’ sound.

The problem arises when we examine mainstream acts, or acts that *wish* to reach the mainstream. The sound quality demanded at this level has always been high, as acts have to compete with thousands of the best artists and producers on the market. According to renowned Canadian music industry analyst Larry Leblanc, artists in the pop and rock genres have so much competition; that they need to put up the big dollars to make their product stand out.[64] Of course, there will always be exceptions to the rule, as bands like The White Stripes, Wolfmother, The Strokes, etc. have proven by successfully bringing a lo-fi sound to the masses.

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[62] St. Gelais, *supra* note 59.
[63] Craig, *supra* note 15.
[64] Personal interview with Larry LeBlanc (Long-time music industry analyst, consultant and writer), October 2008 [LeBlanc].

On the flipside, artists with a more narrowly defined niche (roots, blues, heavy metal bluegrass, etc.) generally speaking do not need to spend as much on recording, as the competition is less and the audience seeks them out because they enjoy that niche in general.

For rock and pop acts, the price of renting from a major studio remains relatively high. These large studios have millions of dollars in equipment, and thus their overhead translates into a high 'card rate'.[65] However, the rates at these professional studios are on the decline: Vancouver's The Warehouse, for example, has dropped their day rate to $950 from $2500 a few years ago, as a result of increased competition from more affordable alternatives, a slumping economy, and decreased record sales.[66] Interestingly, studios will make exceptions to their 'card rate' for indie or unsigned acts, knowing that these artists may not have the same kind of capital available as major label bands. In these circumstances, being unassociated with a major label can drastically reduce costs, without too much compromise in sound quality.

Generally what we see happening is that producers and artists are employing a hybrid approach: recording drums at the large, expensive studio to get the best 'room sound' possible; then doing the rest of the recording (guitars, vocals, etc.) and mixing at a home studio, where the 'room sound' is not quite as important.[67] This helps to get the 'big' sound that labels, radio, and consumers want to hear, while keeping costs down for both the label and the artist. There is also incentive for the producer to employ this system and

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[65] This is the advertised rate, which is charged to any act signed to a major label.
[66] Personal interview with Mimi Northcott (Owner of Canadian Recording Services; Manager for legendary mixer Mike Fraser), February 2009.
[67] Craig, *supra* note 15, and St. Gelais, *supra* note 59. Author's note: this is precisely the procedure my band, One Bad Son, employed for recording our most recent album, which occurred during the writing of this thesis.

keep costs down, as they are often given a lump sum to record from the label (e.g. $80,000 for an up and coming band), and whatever is not spent at the end of the day they get to keep.[68]

The Daniel Powter example reflects the idea that certain genres will be able to benefit from the cost advantages offered by smaller home studios. Music in the singer/songwriter genre typically focuses on vocals and guitar or piano, so getting the 'big sound' for the rest of the band is not usually needed. Conversely, a mainstream rock band like Nickelback spends in the millions to record each album, as the resultant sound is what their fans – and the mainstream media outlets that embrace them – expect to hear.[69]

2.1 Producer as Label?

Another trend that has emerged as a result of decreased record sales and a decreased ability to pay high producer fees is artists being developed and released online by the producers themselves. According to Sandy Robertson of World's End Producer Management – one of the world's largest producer management firms[70]: "It's an exciting time for a producer who may want to develop acts and release them himself. There's no cost in putting (music) out digitally. So if a producer, who has a (home) studio, finds an act he can sign them, record them and he can digitally release that record and get the lion's share of digital (revenue). This is the way producers have to think now. I think it's in the band's interest to cut the producer in as a participant in other areas, if they don't have the funds (for a fee). Sales figures are down. If a producer makes great music with a

[68] Within reason of course. The end product must be of a certain quality for this to apply. See Craig, *supra* note 15.
[69] Craig, *supra* note 15.

band and then they go off and make money on the road from playing live and selling T-shirts and the producer doesn't (participate in these revenue streams), I don't think that's balanced. The band should be smart and say, 'Listen we 're going to bring the producer in and we're going to make him a partner.'"

While this trend is certainly not employed by a majority of artists or producers at the moment, it indeed signals an important shift towards producers playing a more active role in the careers of those they produce, and artists working with other non-label parties to get their material exposed.

2.2 Fan Funded Recording

An alternative approach – which has gained much media attention in recent months – is artists funding their recordings though the financial support of their fans. One example, SliceOfThePie.com, helps artists raise money directly from their fans to record albums, while allowing them to keep their copyright and publishing rights. Fans can invest in artists they think will be successful, and be entitled to a future return based on the number of singles and albums sold by the artist over a 2 year period.[71]

ArtistShare.com is a similar "fan funding" organization, but caters to fewer artists (roughly 30) and maintains a higher standard of quality (4 Grammy awards, 11 Grammy nominations for the funded artists since the company was founded in 2003).[72] The focus with ArtistShare is exposing fans to the creative process and rewarding them with special offers.[73] Other artists like folk singer Jill Sobule are pursuing similar opportunities on

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[70] Excerpt from interview between Larry LeBlanc and Sandy Robertson, circulated in Larry LeBlanc's 'Industry Profile: Sandy Robertson' email.
[71] See www.sliceofthepie.com/about/howitworks.aspx.
[72] See http://www.artistshare.com/home/about.aspx.
[73] For example, with a $2500 contribution to the recording project of Grammy-award winning composer Maria Schneider, the fan will receive among other things: their name listed as contributor in the personally-signed CD booklet, 6 VIP passes to Maria Schneider Orchestra performances, two signed bottles of Maria

their own, contacting their fans directly for support through their own websites and social networking tools.[74]

While the opportunity for fan-funded initiatives will only apply to a small number of artists with a loyal and substantial fan base, the idea that artists are starting to go directly to their fans – while cutting out the record label middleman – signals another important shift away from reliance on major label funding for recording.

Overall, we see a trend emerging towards reduced expenditures on recording, whether at the indie or mainstream level. It is foreseeable that this trend will continue into the future, as major labels attempt to deal with declining revenues. As suggested by St. Gelais, we are in a transition: while the old generation of recording relied on a large team of players being employed (engineers, mixers, producers, and various other studio assistants), the new wave will involve tech-savvy producers who can do it all themselves, and rely on less equipment overhead and lowered operating costs. While it used to carry a sense of prestige to have recorded and released an album, now anyone can do it, at relatively little cost. In this regard, major labels are less and less the 'banks' for recording albums. As we will see, however, their functions are much more crucial when it comes to getting these albums in the hands of consumers.

3.0 Manufacturing

For a CD to be manufactured, record labels pay roughly $1 per unit, which is quite substantial in light of the $10 price tag that adorns most recordings today.[75] As a point of

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Schneider Riesling, a personalized DVD welcome message, monthly project updates via streamed video, and a personal DVD following Maria on a bird excursion through Central Park.

[74] "Jill Sobule Goes to Fans for Album Financing," *Wired Listening Post*, March 5, 2008 <http://blog.wired.com/music/2008/03/jill-sobule-goe.html>. Sobule offers fans an advance copy of her upcoming album and a 'thank you' on the liner notes ($50), free admission to all her live shows in 2008 ($200), a personal house concert ($5000), and the opportunity to come and sing/play on her record ($10,000).

comparison, most new artists receive a 10% royalty on record sales – so in many cases the cost to manufacture the disk is the same as the money flowing to the artist from its sale.[76] The money spent on manufacturing is recouped out of artist royalties, so the artist pays for these expenses themselves. With this in mind, one could see the benefit of reducing this amount if at all possible.

For unsigned or smaller independent acts, an album can be pressed by an organization like Indie Pool[77], which acts as a content aggregator for these sorts of acts. However, this process can still be quite expensive, upwards of $2-$3 per disk, depending on how many are being manufactured.[78]

Some labels have recently moved to an all-MP3 format, embracing the cost benefits that come from eliminating manufacturing altogether.[79] TheOrchard.com is one of the largest 'digital record labels', focusing on distribution of digitized music, video, and new media to online music retailers, advertising firms, and music and film agencies. While this all-digital operation is not the norm at the moment, purchasing trends suggest the industry could be heading that way. Recent statistics indicate that digital sales are surging in popularity while CD sales are plummeting. In 2007, global digital sales were up 34%, while sales of CDs and DVDs were down 13%.[80] In Canada, overall album sales

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[75] Thall, *supra* note 39, at 25.
[76] This is also a best-case scenario: most artists receive far less than $1 per CD sold once the plethora of royalty reduction schemes are applied.
[77] Roughly $1500 for 500 disks. Personal interview with Trevor Norris (Artist Rep – Indie Pool Independent Artist Services), October 2008.
[78] *Ibid*.
[79] See for example: TheOrchard.com; "T-Pain Launches Digital Record Label," *Ace Showbiz*, June 4, 2008 <http://www.aceshowbiz.com/news/view/00016269.html>, Gallo, Phil, "CBS spins digital record label," *Content Agenda*, June 2, 2008 <http://www.contentagenda.com/article/CA6568154.html>.
[80] Bloomberg News, "CD sales falling faster than digital music sales rise," *International Herald Tribune* June 18, 2008 < http://www.iht.com/articles/2008/06/18/technology/music.php>.

were down 6.9%, while digital album downloads were up 93%.[81] A recent study predicted that digital sales would surpass CD sales by 2012, signaling "the end of the music industry as we know it".[82]

Does this mean CDs will stop being manufactured completely? For the time being, CD sales in both new releases and catalog items remain a large revenue source, despite the gloomy predictions. According to Paul Sanderson – one of Canada's most prominent entertainment lawyers – "in the real world, the CD is still huge. We are still in the CD era, and will be for several years."[83] Recent statistics published by Nielsen Soundscan echo this sentiment, as 85% of album purchases in 2007 were in CD form.[84]

Recent actions of digital distributor TheOrchard.com are a prime example: in order to boost its revenue base, the company recently won a bidding war to obtain the valuable back catalog of bankrupt indie label TVT Records.[85] According to former TVT A&R[86] man Lenny Johnson, this proves case in point that artists and labels still need physical product, as catalog sales remain a big percentage of total revenues, and they promise to remain this way for the next few years.[87] Additionally, for any young touring band, the main source of revenue on the road is usually CD sales, which often put gas in the van and food on the table. That is not to say that this will not change – bands are already

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[81] Nielsen, *supra* note 47.

[82] Forrester Research principal analyst James L. McQuivey, in Hefflinger, Mark, "Report: Digital Music Download Sales to Pass CD Sales by 2012," *DigitalMediaWire*, Feb.19, 2008 <http://www.dmwmedia.com/news/2008/02/19/report:-digital-music-download-sales-pass-cd-sales-2012>.

[83] Sanderson, *supra* note 15.

[84] Nielsen Soundscan State of the Industry 2008, available online: http://www.narm.com/2008Conv/StateoftheIndustry.pdf.

[85] "The Orchard Wins Bid For TVT Records", *Hip Hop DX*, June 20th, 2008 < http://www.hiphopdx.com/index/news/id.7163/title.the-orchard-wins-bid-for-tvt-records>.

[86] Artist and Repertoire – the division of a record label that is responsible for talent scouting and the artistic and commercial development of the recording artist. It also acts as a liaison between the artist and the record label.

[87] Personal interview with Lenny Johnson (New York A&R man), October 2008 [Lenny].

selling download cards at shows rather than CDs[88] – but the popularity of these cards is minimal at the moment compared to disks.

Thus, it seems that forgoing manufacturing altogether and strictly selling songs in digital form is not a viable option at the moment for most artists, at least those who plan to make a living off of their music. The amount saved by omitting manufacturing is currently eclipsed by the potential returns from the sale of physical product. However, as digital sales continue to grow while CD sales drop, there may come a time when manufacturing can be cut out and artists can avoid the expense. While record labels are no longer the only option for having a CD manufactured, they still offer the best rates due to economies of scale.

This has led many artists to sign what are known as 'P & D' (pressing and distribution) deals, which allow artists to utilize the corporate strengths of major labels without forfeiting as much of their copyrights. Under these deals, artists fund the recording of an album themselves (which as we have seen is more affordable now than ever), the label or distribution company presses the album (at the cost of the artist) and distributes it in exchange for a percentage of royalties from sales.[89] The biggest benefit of these arrangements is that the artist retains copyright in the material, and has complete artistic control during the writing and recording process. The downside is that the artist is entirely responsible for the costs of producing and promoting the record, and as we will see, the latter can be immensely expensive.

4.0 Distribution

4.1 Physical Distribution

[88] One example is my band, One Bad Son, which sells download cards with 5 songs for $5 at our shows (though perhaps it is not as attractive to have a download card signed by the band, but I digress).

Closely related to the manufacturing of product is its distribution. Record labels have traditionally held a monopoly on expensive shelf space in record stores, and as a result they have yielded great bargaining power vis-à-vis artists. However, this has all changed in the last several years, as the Internet has made distribution to 'bricks and mortar' record stores less important.

Chain bankruptcies or distressed buyouts of physical stores since 1994 have included Camelot, Wherehouse Entertainment, CD World, HMV, Musicland, National Record Mart, F.Y.E., Sam Goody, Suncoast, and Tower Records.[90] The stores that have survived are mass retail or 'big box' outlets such as Wal-Mart, Best Buy, and Target, which sell over 50% of all albums retailed in North America.[91] Selection in these big box stores is limited, as only the top selling titles are stocked. On average, Wal-Mart stores display 5,000 titles, which contrasts with 60,000 titles displayed at a large specialized record store.[92] As a result, shelf space is extremely expensive, and limited to only the top-selling releases.

These mass-market discount stores use music sales as a loss leader, selling below their wholesale cost, to get foot traffic into the store to sell other products. Record labels depend on these giants, but this dependence is not reciprocated: music sales make up less than one-tenth of 1% of their revenue![93] As more small record stores close, product

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[89] Sanderson, *supra* note 15.

[90] "Did iTunes Kill the Record Store?," *ROUGHLYDRAFTED.COM*, Mar. 2, 2007, <http://www.roughlydrafted.com/RD/RDM.Tech.Q1.07/1C726ADF-0ED1-42D0-93D9-4FA4E698E94A.html>.

[91] Einhorn, *supra* note 59, at 706. Twelve years ago, big box retailers accounted for only 10% of music sales in Canada. Source: LeBlanc, Larry, "The Music Distribution Industry in Canada," Prepared for the Canadian Association of Broadcasters (CAB), Feb. 2006 <http://www.cab-acr.ca/english/research/06/sub_mar1506_app_h.pdf>.

[92] Cohen, Warren, "Wal-Mart Wants $10 CDs," *Rolling Stone*, Oct. 12, 2004 <http://www.rollingstone.com/news/story/6558540/walmart_wants_10_cds>.

[93] Kusek, *supra* note 3, at 87.

selection narrows, and only hits and best sellers are carried. This leads music fans to look online for their favorite acts, as they are unable to find them in stores.

The downturn in retail is reflective of the aging store population in the 'bricks and mortar' sector. In 2007, 48% of US teens didn't buy a single CD, compared to 38 percent in 2006.[94] With more technical proficiency, younger shoppers are attracted to file-sharing, online markets, video games, DVDs, and other forms of digital entertainment. This is causing artists to question whether physical distribution is truly that important in today's market.

According to some of the most respected industry professionals in Canada[95], if a new act wishes to reach the masses, physical distribution *is* imperative. Last year, there were still sales of 500 million CDs in the US alone, down 9.5% from 2006. This translates to 90% of the total music purchased.[96] While CD sales are clearly on a downward slide, they are still a crucial determinant of success. According to Bruce Allen, "the record companies are still at their best as distribution pipelines. They still have money to invest in acts. They can profile artists better than anyone"[97].

4.2 Digital Distribution

Digital distribution has seen exponential growth in the last few years, evidenced by Apple iTunes sales surpassing Wal-Mart in April 2008 as the largest retailer of music in North America.[98] Compared to physical distribution, digital is relatively cost-free. For an artist to get their music on iTunes, they need only submit their songs to an organization

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[94] Bangeman, *supra* note 56.
[95] LeBlanc, *supra* note 67; Abramovitch, *supra* note 1; and Sanderson, *supra* note 15.
[96] Associated Press, "U.S. Album Sales Fell 9.5% in 2007," *New York Times*, Jan.4 2008 < http://www.nytimes.com/2008/01/04/business/media/04music.html>.
[97] Excerpt from Larry LeBlanc interview with Bruce Allen and Sam Feldman, Dec.21, 2008, via email from Larry LeBlanc [Feldman and Allen].
[98] Bangeman, *supra* note 56.

like CDBaby.com, which acts as an aggregator on behalf of unsigned (and signed) artists. Companies such as Tunecore[99], IODA[100], and The Orchard[101] provide similar services, and are free for artists to use in most circumstances.

The implications of the shift from physical to digital consumption are enormous for artists. As we have seen, physical distribution costs for major label artists make up 10% of the total price of an album, which as we have seen is roughly equivalent to the percentage of royalties most artists make on each record sale (i.e. 10%).[102] New artists could in theory get around these costs by exclusively distributing their songs digitally. Granted, digital sales make up only 10% of total music sales at the moment, but change is clearly in the air. Recently, Atlantic Records – a division of parent company Warner Music Group – announced that its revenues generated from digital sales (songs, ringtones, etc.) eclipsed that generated from CDs, making it the first record label to reach the milestone that many industry analysts have obsessed over since the early days of the MP3.[103]

This marks an important shift in the artist/label relationship. As digital music becomes the preferred form of consumption for fans, artists will have to rely less and less on the major label distribution channel. One could foresee an era where only the largest acts can afford widespread physical distribution, while everyone else focuses on digital sales. Some would say we have entered that era already.[104] This promises to be a viable business model in the coming years, as overall music purchases continue to rise while CD

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[99] See www.tunecore.com.
[100] The Independent Online Distribution Alliance. See www.iodalliance.com.
[101] See www.theorchard.com.
[102] Thall, *supra* note 39, at 25.
[103] Arango, Tim, "Digital Sales Surpass CDs at Atlantic," *New York Times* Nov. 25, 2008 <http://www.nytimes.com/2008/11/26/business/media/26music.html?partner=rss&emc=rss>.
[104] See Bob Lefsetz blog, The Lefsetz Letter: http://lefsetz.com/wordpress/.

purchases steadily decline. In 2007, for example, US consumers made 1.6 billion decisions to purchase music, versus 1.3 billion in 2006.[105] So music is still being consumed, just in different formats than the traditional industry is used to providing. For the time being though, physical distribution remains crucial for artists wishing to reach a broader audience, while digital distribution is gaining more and more ground as the primary revenue source for artists in the years to come.

4.2.1 Classifying Digital Sales

For acts that do sign with a record label, a key consideration is how digital sales will be classified. While many record companies already sell physical merchandise directly to consumers through direct mail catalogs, the promise of the direct distribution, "cut out the middle man", model via the Internet is having a major effect on the artist/label relationship. While most labels demand that artists grant all digital delivery rights as part of the package of complete assignment of all rights to the master recording, artists are arguing that with no manufacturing and negligible distributing costs, these rights should be retained.

In a model where the record company receives 100% of the list price instead of a discounted wholesale price, and where there are no traditional manufacturing costs to produce a CD, the performing artist may be looking for an increased share in what may be perceived as an increased new use revenue stream for the record company.

Conversely, record companies argue that technology partners and in-house staff that provide digital software services such as encoding, encryption, payment systems and website maintenance may ultimately eat up a bigger slice of the revenue pie than the

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[105] Nielsen, *supra* note 47.

traditional CD manufacturers.[106] However, these concerns have failed to be shown true, as digital distribution costs have dwarfed those of physical distribution. The most difficult task of online music distribution has been simply sorting out royalty payments, which is now an easy computer logging process.[107] In other words, the digital distribution of music costs labels significantly less than physical distribution, and artists are justified in demanding a higher percentage of sales as a result.

Another issue with digital distribution is whether the distribution is offered to the consumer as a *sale* of the file, or as a restricted *license to use* the file. The advantages of offering deliveries as a license instead of a sale include negating the first-sale doctrine which would otherwise apply in the case of a transfer of ownership, and which would allow the customer to transfer the file to others.[108]

If a digital distribution is more akin to a license than a retail sale, the performing artist may claim that the royalty percentage for digital deliveries should be based not on a physical merchandise model (where the performer's royalty may typically be in the range of ten to fifteen percent of list price),[109] but on a licensing model where the performer and the record company divide the proceeds in a more equal percentage. Such licensing provisions may already exist in artist contracts, for example, where master recordings are licensed to film and television media.

Clearly it is advantageous for artists to push for digital sales as licenses rather than physical sales. In Canada, however, the way that digital sales/distributions have been

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[106] Field, Corey, "New Uses and New Percentages: Music Contracts, Royalties, and Distribution Models in the Digital Millenium," *UCLA Entertainment Law Review*, Spring 2000, at 5.
[107] Blanchette, Kasie, "Effects of MP3 Technology on the Music Industry: An Examination of Market Structure and Apple iTunes," Holy Cross School of Economics Honours Thesis, at 10. Available online at: <http://www.holycross.edu/departments/economics/website/honors/blanchette_thesis.pdf> [Blanchette].
[108] *Ibid*., at 6.
[109] Passman, *supra* note 30.

treated is similar to physical sales.[110] According to Susan Abramovitch, the license versus sale issue is a moot point in new agreements, as labels understand the value of digital sales and are thus classifying them as just that, a sale.[111] The issue only comes up in older contractual agreements that fail to address digital sales, or in new agreements where artists have immense bargaining power.

4.3 Distribution Conclusion

For the time being, physical distribution of albums is crucial for most artists in order to achieve success on a larger scale. If predictions from industry analysts are accurate, however, CD sales will continue to fall and be surpassed by digital sales in the next five years, at which point going strictly digital could be a possibility for many artists, allowing them to cut down on the amount of money invested in manufacturing and distributing, and connect with consumers directly. Whether that occurs or not, the label function that promises to maintain its importance is promotion; without it, distribution promises to yield no return.

5.0 Promotion

So far we have found that technology and the Internet have made recording and manufacturing much more affordable for artists, and thus reduced their reliance on record companies to fund these functions. Physical distribution remains expensive, yet with digital sales threatening to eclipse CD sales, it promises to be less crucial than in the past.

These changes create a dichotomy of sorts: almost any artist can get their material recorded and have it online within minutes, readily available to anyone in the world; yet because of that, there is an abundance of music and information available to each

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[110] See the Canadian Copyright Board's findings in the CSI and SOCAN decisions, online at: http://www.cb-cda.gc.ca/new-e.html.

consumer, making it more difficult than ever for them to find what they want. In this way, the freedom of the Internet may actually make it more difficult for an artist to be 'found'.

In order to get through this fog and get their acts discovered, record labels have traditionally depended on three information and marketing platforms: record stores, broadcast radio, and music video (e.g., MTV, MuchMusic, VH1, etc.).[112] As we have seen, the first is increasingly dysfunctional, while the remaining two face increasing competition from more interactive online alternatives.

5.1 Radio

Related to the transformation of record stores is the diminishing importance of radio. Labels and retailers cite a waning impact of the medium on overall sales. A 2000 survey found that 75% of the population identified radio as a determinant of their last CD purchase, in favorable contrast with recommendations (46%), music video (45%), store view (42%), soundtrack (37%), and live performance (29%).[113] However, since the turn of the millennium, North American radio stations have lost audiences in all age groups, with the worst percentage drops among teenagers (12–17) and young adults (18–24).[114] In 2006, Edison Media Research found that Time Spent Listening (TSL) among twelve to twenty-four year olds had declined 22% since 1993.[115]

As a practical matter, broadcast radio is convenient for reaching adult audiences during rush and work hours, but is less appealing to teenage and younger buyers who

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[111] Abramovitch, *supra* note 1.
[112] Einhorn, *supra* note 59, at 706.
[113] Edison Media Research, The National Record Buyers Study 3, <http://www.edisonresearch.com/home/archives/emr10036-recordbuyers3.pdf>[Edison].
[114] Arbitron, Persons Using Radio Report, <http://wargod.arbitron.com/scripts/ndb/ndbradio2.asp>.
[115] Edison, *supra* note 116.

demand more control, interaction, and portability.[116] According to Bruce MacKenzie, senior buyer for the parent company of Music World Canada: "radio is not even close to being the leader in letting (retailers) know about new acts. Radio is reactive, not proactive. The Internet is far more important than radio today. Internet sites like MySpace let us look at new artists and see what kind of buzz is out there."[117]

A recent study of Clear Channel – which owns 1200 stations in North America and is the largest provider of radio in the world – found that the company plays the same songs 73% of the time between stations.[118] This consolidation of control and programming across the music industry has made it nearly impossible for independent artists – or in fact, any artist that is not a recognized star – to get any relevant radio play whatsoever. This is one of the many reasons the record industry is in such trouble – music fans no longer turn to radio (and MTV) for what is hip, yet this is what the labels continue to rely upon.

This has major implications from an artist perspective. Major labels have traditionally spent hundreds of thousands[119] on radio promotion – also known an independent promotion or payola[120] – to market records. This involves paying large sums of money[121] to one of the big independent promoters (also known as "indies", though not to be confused with "indie" record labels) who then use their connections at various radio

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[116] Einhorn, *supra* note 59, at 708.
[117] LeBlanc, *supra* note 67.
[118] Kusek, *supra* note 3, at 60.
[119] Craig, *supra* note 15: "To market a record properly in the US alone is $500,000 - $1,000,000. The majority of that goes to radio promotion and advertising. There are video and tour support costs as well. On a big record it can get a lot higher as well. I'll bet the Nickelback marketing budget has to be five, six million."
[120] For more on payola and independent promotion, see: Dannen, Fredric, *Hit Men: Power Brokers and Fast Money Inside the Music Business* (New York: Times Books, 1990) [Dannen].

stations to get a song spun on the air. Some or all of these expenditures are paid for out of artist record sales[122], and this practice is still alive and well in today's music industry.[123] However, what the above statistics suggest is that this practice is becoming less and less effective as fewer listeners – especially young listeners – continue to tune into mainstream broadcast radio for their music. Artists need to understand exactly how much is being spent by their label on independent promotion, and then decide whether this amount is a wise investment. While the previous generation relied heavily on radio to discover new music, the digital generation is utilizing other resources, and both labels and artists need to acknowledge this shift. Radio today drives sales of only a limited range of music product, particularly pop, country and specific rock acts[124], so the value it offers to each artist needs to be considered and negotiated upon accordingly.

5.2 Video

Since the explosion of MTV in the 80's, the music video has been a crucial tool in marketing an artist, and the investment by record labels in videos reflected this. The price tag for a professional video ranged from $50,000 for smaller acts to $500,000 or more for stars.[125] This investment was often worth it, as MTV and MuchMusic were seen as arbiters of taste for youth culture, and an innovative and eye-catching video could truly make an artist's career. In recent years, however, MTV has all but stopped playing music videos, while do-it-yourself sites like YouTube have taken its place. This – coupled with an increase in the affordability of cameras and editing programs – has resulted in a great

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[121] Ahrens, Frank, "Technology Repaves Road to Stardom," *Washington Post* May 2, 2004 < http://www.washingtonpost.com/wp-dyn/articles/A59753-2004May1.html>: upwards of $200,000-$300,000 per radio single is spent paying off radio programmers across the country.
[122] Thall, *supra* note 39, at 34.
[123] Abramovitch, *supra* note 1.
[124] LeBlanc, *supra* note 67.
[125] Craig, *supra* note 15.

decrease in the cost of making and distributing videos, as well as a diminished need for these expensive productions.

Just like the CD though, the music video is by no means dead, and in fact promises to last longer than the compact disk: it is still an extremely effective way to communicate an image and a message to viewers. However, the need for $500,000 productions has lessened for most acts. Rather than being the only method of communication between an artist and their fans, the music video has now become part of the overall communication package, along with blogging, press, playlisting, social networking, etc. Artists and labels need to assess video's importance accordingly. As Lenny Johnson suggests: "it still makes sense for band like Nickelback to spend half a million on a video, because that is their demographic, whereas a band like Arcade Fire cuts an 'indie-looking' video for $10,000 and invests the rest in valuable press."[126] So for most acts, spending huge amounts on video is no longer a surefire way to connect with fans. More and more, the type of connection that is proving most popular is occurring online.

5.3 Online Promotion

While radio and video are losing their efficacy in a digital world, many artists are questioning whether they can take on promotion themselves, without the help of labels, by utilizing the many options available online. The flexible and interactive capabilities of the Internet provide new acts with a communication platform that can generate significant hype with a few tracks effectively distributed and promoted online. Interpersonal recommendation — i.e., email, blogging, playlisting, sampling, social networking, band websites, online local newspapers, expert recommendations, seeding, super-distribution

[126] Lenny, *supra* note 90.

— has the *potential* to build enough hype to break new acts, without the cost of the traditional promotion machine.

However, because there is so much music and information available online, fans and artists need some sort of filter to find each other. The problem is not that information is scarce, as in the early days of the Internet when information was "liberated," but that it is hard to find the information that one is looking for.[127] Information no longer wants to be free[128]; it wants to be found. In this regard, the Internet makes for fewer barriers to entry for artists, but much more competition *once they have entered*, as consumers must sift through a barrage of information to find them. For most artists, the problem is not piracy, but obscurity.[129]

Effective online promotion can act as a filter, enabling artists to find the fans that might like them and vice versa, at relatively little cost. Examples exist of smaller indie acts that have utilized the aforementioned networking tools on the Internet to create a groundswell of hype, without the aid of major label funding. England's Arctic Monkeys reached #1 in the U.K. without any major label marketing or advertising, based rather on hype surrounding the online circulation of their demos, which were handed out as burnt CDs for free at their live shows.[130] Montreal's Arcade Fire was similarly heralded as an

[127] Gervais, Daniel J., "The Price of Social Norms: Towards a Licensing Regime for File-Sharing" (December 2003). Journal of Intellectual Property Law, Vol. 12, 2005. Available at SSRN: <http://ssrn.com/abstract=525083>.
[128] One is reminded of the famous slogan, "information wants to be free; it also wants to be expensive" generally attributed to Stewart Brand (http://en.wikipedia.org/wiki/Stewart_Brand).
[129] This is a variation on a Tim O'Reilly quote: "For a typical author, obscurity is a far greater threat than piracy." O'Reilly is the founder of O'Reilly Media and supporter of the free software and open source movements. He is widely credited with coining the term 'Web 2.0'. See: http://en.wikipedia.org/wiki/Tim_O'Reilly.
[130] Barton, Laura, "The question: Have the Arctic Monkeys changed the music business?," *The Guardian* Oct. 25, 2005 <http://www.guardian.co.uk/arts/features/story/0,11710,1599974,00.html>.

Internet phenomenon, as their debut album Funeral became an international hit without the backing of a major label.[131]

However, examples of artists reaching the masses without the help of a major label are the exception rather than the norm. Just like any small business, artists can only grow so large and reach so many consumers before they need to bring in other members to their team, members with deep pockets and established connections. A bit of luck certainly helps as well. The Arcade Fire phenomenon was undoubtedly helped by public praise by music legends such as David Bowie, U2's Bono, and David Byrne, while the Arctic Monkeys' story was embraced and exploited by the press at an early stage of their career. From there, the promotion online, in print, and on tour was self-perpetuating for both bands. Perhaps this is the key development that the Internet offers new bands: it allows them to make the *initial* connection with fans, and from there it is up to fans, the press, and just plain fate to decide whether the act breaks to a larger demographic.

This is the problem with peer-to-peer file sharing: new artists can use the networks to distribute their songs, but first they have to become known, and this still means facing the same old promotion problems that plagued the CD-based industry. Services like recommendation engines, referral sites and blogs, and the Genius application on iTunes all help fans of a certain type of music find other artists in the same vein. These services promise to be crucial in helping fans and artists cut through the fog created by infinite amount of information online.

So low-cost forms of online promotion can help act as the 'filter' for bands to connect with their fans and start building a career, but they are not the panacea that some claim

[131] Frey, Darcy, "One Very, Very Indie Band," *The New York Times* March 4, 2007 <http://www.nytimes.com/2007/03/04/magazine/04arcade.t.html?_r=1&oref=slogin>.

them to be. For every Arcade Fire there are literally thousands upon thousands of bands whose music and stories are available to anyone online, yet they get no traction. For the time being, a great deal of successful promotional campaigns in the record industry will continue to be the kind of high-price, high-reward initiatives that only big corporations such as the major labels can afford. There is simply too much information on the Internet for most acts to gain the attention of a substantial crowd on their own.

Once the initial connection is made online between a band and their fans and a buzz is created, outside parties are still needed to take this buzz to a larger demographic in nearly all situations. Historically, these outside parties have been record labels, whose one-two punch of capital and expertise has been unattainable for most artists elsewhere. According to Susan Abramovitch, the major labels possess definite expertise in the area of promotion – expertise that is not easily replicated by non-label parties.[132] However, the area in which major labels have expertise (i.e. selling CDs) is losing its importance, creating room for new agents to surface.

5.4 New Agents in Promotion

Some suggest that entirely new agents will emerge to help consumers and artists sift through the fog. According to industry analyst Michael Einhorn: "a new sector of professionals in the industry will develop and revise hierarchies and techniques for analyzing recorded music, plumbing consumer tastes, and presenting new information to cut through the fog created by an abundance of releases."[133] Einhorn does not think these agents will necessarily replace the major labels, but work with them, helping them observe grassroots tastes and extract otherwise useful data on existing market trends.

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[132] Abramovitch, *supra* note 1.
[133] Einhorn, *supra* note 59, at 712.

Emerging power players like News Corporation, Apple, Google, Yahoo, Live Nation, and BitTorrent will position alongside the media companies that have led the industry to the present date, and new hierarchies will emerge that bring order to the current chaos and create new promotion opportunities for artists.[134]

One of these new agents promises to be the music supervisor, or the individual that picks songs to be used in films, commercials, television shows, video games, etc. Using the right song with the right product – or at the right time in a movie – has always been lucrative, and will become increasingly valuable method of exposing acts to the masses. Examples are easily found in the recent promotions for Apple computers, which featured Canadian songstress Feist and French-Israeli singer/songwriter Yael Naim, both of which were relative unknowns on the global scale before Apple used their songs. Both advertising campaigns were pivotal in exposing these two acts to the masses, arguably launching both careers to levels that would have been impossible – or taken much longer – otherwise. We will look at these 'new agents' in more detail in the final chapter.

Regardless of what types of outside parties evolve to bring artists to a larger audience, one thing is clear: no artist will stand a chance of reaching the masses without dedicated online promotion at their own level. Major labels are no longer willing to invest large sums of money to develop and break new talent. Instead, the types of acts that are now being signed are those who have done the work of developing a strong following, releasing some albums, and proving themselves to be a draw at venues and online. The functions of artist development and artist discovery (A&R) are being left to indie labels, and only once an act has proven its salability will a major show interest.[135] As such, not

[134] Einhorn, *supra* note 59, at 702.
[135] LeBlanc, *supra* note 67.

only is do-it-yourself online promotion *helpful* at the initial stages of an act's career, it's *essential* in today's market.

As one industry insider suggests: "The game used to be really simple. You get your record played on radio, you get your face on Rolling Stone, and you get on 'Saturday Night Live.' Now, you put your video on YouTube, you get your MySpace page happening, you do your deal with Facebook, you tour ... all these things add up, hopefully, to a successful record."[136]

6.0 Management / Touring

For good reason, the functions of managers and record labels have traditionally been kept separate, to avoid a potential conflict of interest: managers must ensure that the label acts in the best interests of the artist, and therefore they must be kept at arm's length from the label. Often the closest relationship – business, and sometimes personal – that a working band has is with its manager. He or she generally serves as point person to a band's label, and to other arenas in which a band does business, such as tour booking and T-shirt sales. Typically, an artist manager gets 10-15% of all revenues generated by the artist, be it touring, merchandise, licensing, publishing, etc.[137] The corollary, however, is that if the artist makes nothing, neither does their manager.

Record labels have traditionally taken on managerial-type roles when they put up money for the artist to stay on tour, give advice regarding what studio to work with or what lawyer to employ, etc. In this regard, record labels were in charge of nurturing their artists' careers and ensuring their longevity and productivity. Record labels, in exchange

[136] Bruce Flohr, executive at Red Light Management (Dave Matthews Band, Alanis Morissette, David Gray, Crowded House, etc.), taken from: Associated Press, "Is this the day the music died?" *MSNBC.com* October 12, 2007 < http://www.msnbc.msn.com/id/21269633>.

for gains made on increased record sales, traditionally absorbed these expenses, with the understanding that the result would be healthier careers for their artists. While managers traditionally took a small percentage of everything that an artist made, record labels have taken a large percentage of only one thing: record sales. However, in an age of declining CD sales and increased fragmentation of revenue streams, this model is no longer working for labels, and the result is that manager and label functions are merging. Record labels whose revenue streams are solely linked to record sales are quickly disappearing, as labels are embracing the alternative revenue sources that managers and outside parties have profited from for decades.[138]

As such, the management model is being declared the new centre of the music industry, and record labels are altering their operations accordingly, trying to get a piece of all non-CD forms of revenue such as touring, merchandising, licensing, voice-over rights, etc.

One of the most crucial sources of revenue in today's industry is that related to live performances, as touring has become vital for success.[139] As we examined at the outset, touring has become the focal point of contractual negotiations for megastars from Madonna to Jay-Z. This is because online distribution is disrupting the 'three-income business model' in the record industry of:

1) Selling recorded music;
2) Broadcasting recorded music; and

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137 Taken from 'The New Indie' Podcast, presented by the Canadian Independent Recording Artists' Association (CIRAA), online at: <http://www.thenewindie.com/> [New Indie].
138 *Ibid*.; and personal interview with Jonathan Simkin (lawyer and co-owner of 604 Records), February 2009 [Simkin].
139 While touring could also fall under the 'Promotion' heading, we will examine it from a Managerial/Career Development viewpoint.

3) Charging to see live music.[140]

By allowing consumers to obtain music without paying for it, digital distribution greatly reduces the potential revenue streams from the first two arms. As such, many industry analysts predict that artists will start to receive most of their income from concert performances and merchandise, and very little from record sales.[141]
Indeed we see this happening already. While an artists' position on the *Billboard* chart remains a crucial indicator of success, it is their concert draw that now seems to truly determine their worth. While a new album release by the Rolling Stones, Bruce Springsteen, or Jimmy Buffett will likely make little impact on the *Billboard* chart, the concert draw for these acts is among the highest in the industry. According to industry critic Bob Lefsetz, "it used to be the tour was an advertisement for the album, now the album is an advertisement for the tour."[142] A look at the most recent numbers supports this: U.S. concert grosses from May 1 to Labor Day were $1 billion, up 5% from $948.5 million in 2007[143]; U.S. album sales in 2008 plummeted 14%, even after digital sales were included.[144]

While overall concert ticket purchases were down in that period, total revenue was up, meaning one thing: ticket prices are on the rise.[145] Artists used to price their concerts

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[140] Blanchette, *supra* note 110, at 6.
[141] Meisel, John and Sullivan, Timothy, "The Impact of the Internet on the Law and Economics of the Music Industry," *Journal of Policy, Regulation and Strategy for Telecommunications* v. 4 no. 2 (2000) at 16-22.
[142] Lefsetz, Bob, "iTunes/Ticketmaster," *The Lefsetz Letter* blog May 10, 2007, <http://lefsetz.com/wordpress/index.php/archives/2007/05/10/ticketmasteritunes-3/>.
[143] Jones, Steve, "Economy can't cool summer tours: Earnings rise 5%," *USA Today* Oct. 15, 2008 <http://www.usatoday.com/life/music/news/2008-10-14-summer-tours_N.htm?csp=34>.
[144] Source: Nielsen Soundscan 2008 Report, cited in: Goodman, Dean, "Music album sales tumble further in 2008," *Yahoo News* Dec. 31, 2008 < http://news.yahoo.com/s/nm/20090101/stage_nm/us_sales>.
[145] Concert ticket prices have risen steadily since 1996, when they shot past other forms of entertainment and inflation. While inflation rose 2.3 percent per year, concert prices jumped 8.9 percent annually. Source: Palouf, Christine, "Rockonomics: Studying the disrupted concert industry," *Buzzle.com* August 11, 2006, <http://www.buzzle.com/editorials/8-10-2006-105115.asp>.

lower, because bigger audiences translated to increased album sales. Today, that link does not exist, and the majority of performers' income is coming from touring. This is why concert tickets are getting more and more expensive: artists cannot rely on income from recorded music to make up nearly as big a portion of overall income as it used to. The Internet is single-handedly shifting the distribution of money from recorded music to concert ticket sales.

In this setting, artists must question what a record label can offer them in terms of management and touring. While labels used to perform 'management-type' functions *au gratis* for artists – knowing the end result would be increased record sales and profits – this is no longer the case. The focal point of the industry is no longer the sale of recorded music, yet this is the arm in which record labels have expertise. Record labels are now demanding rights in touring, merchandising, publishing, licensing, and more – and artists must decide if labels are the best-suited parties to provide these services. Now more than ever, artists must question whether they should assign their rights to a record label, and examine closely the value of what they might get in return.

7.0 Ch. 2 Conclusion

As we have seen in this chapter, artists have traditionally needed the five functions provided by record labels to mitigate the substantial risk – as well as put forth the substantial capital required – in order to embark on a career as a recording and/or performing artist.

While the Internet and new technologies are definitely changing the nature of the industry and of the five functions, it is difficult to say whether they are making record labels obsolete. While it is popular to write-off the major labels as obsolete, this is inaccurate or at least premature. Instead, what can be said is that the nature of the artist/label relationship has changed drastically over the past several years, and this should have profound effects on the contractual terms underpinning the relationship.

While the functions of recording and manufacturing have become increasingly affordable to most mid-level artists, distribution will remain expensive so long as product needs to be put in shelves. As we examined here, this may only be for another four or five years, at which point a majority of acts will be able to embrace an all-digital model, thus forgoing the expense of manufacturing and physical distribution, save for limited pressings for touring and other special circumstances. The corollary is that effective promotion has become more costly than ever, as there are simply too many artists online now that the bottleneck has been blown open. In this regard, record labels still may have much to offer artists. As Larry LeBlanc notes, "the major labels can still provide the market sizzle"[146]. However, the question that must be asked by artists is whether the sizzle alone is worth giving up so many rights in order to attain.

Artists need to ask what it is a label can offer them, and decide if assigning their rights in the underlying songs is worth it. As we enter an era in which labels are demanding rights in touring, merchandise, licensing, and more, this question becomes increasingly critical for each and every artist.

This brings us to the current buzz term in the industry: 'the 360'.

[146] Excerpt from Larry LeBlanc interview with Chris Taylor, March 15, 2009, via email [LeBlanc and Taylor].

CHAPTER 3
360 DEALS

1.0 Introduction

Now that we have examined in detail the various rights that exist in songs, the parties that obtain and exchange these rights, and the industry background that has made the entire process necessary, we will now turn to the future: technology is completely overhauling the artist/label relationship, and the new centre of the music industry is no longer the CD, but the management model. As such, the major labels are now embracing what is known as the '360 deal'. For better or worse, artists are being forced to do the same. As we have seen in the previous chapter, the major labels still maintain a stranglehold on the channels of promotion and to a lessening degree distribution, and now they are trying to gain access to non-CD streams of revenue via 360 deals. This chapter will examine 360 deals - their pros and cons, and whether artists should embrace or reject this industry phenomenon. This analysis is crucial in order to understand the current state of the artist/label relationship, as 360s are quickly becoming the new norm.

1.1 Definition

The meaning of the term '360 Deal' can take on as many permutations as there are recording artists. Universal Music Canada President Randy Lennox says there are "a thousand points of light"[147] when it comes to 360 deals, suggesting there are no two deals that are the same. According to Toronto entertainment lawyer Chris Taylor: "All labels approach these (deals) differently. One will try to have participation in merchandise and

[147] New Indie, *supra* note 140.

another will try to force you to sign with their publishing company. Another might offer a more artist-friendly royalty rate if you go with their publisher"[148].

Broadly speaking, a 360 deal is any agreement between an artist and record label that sees the latter being involved in (and seeing profits from) revenue streams other than physical record sales. To put it another way, 360 deals encompass the other 2 'arms' of the music industry that we examined earlier: broadcasting recorded music (for our purposes – publishing, licensing, synching, etc.) and charging to see live music (touring, merchandise, etc.); in addition to the first arm of selling recorded music.[149]

This broad definition now encompasses nearly every recording contract signed by a new artist today. At a recent Web 2.0 Summit, Warner Music Group CEO Edgar Bronfman told the audience that his label now *requires* all new artists to sign 360 deals, and about a third of their already-signed artists are under such contracts.[150] In his words, this is because "the *music* industry is growing. The *record* industry is not growing"[151].

Chris Taylor also acknowledges this widespread acceptance of 360 deals: "Labels started putting that gorilla in the room a couple of years ago, but they would politely escort him out once you asked him to leave. Now everybody brings the gorilla to the room. You can have four offers from four majors for a new artist in a mid-level bidding war situation and you are still looking at 360 elements. Labels will walk away if they can't get it. They aren't allowed to go beyond a certain line without getting some of it"[152].

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[148] LeBlanc and Taylor, *supra* note 149.
[149] Blanchette, *supra* note 110, at 6.
[150] Arrington, Michael, "360 Music Deals Become Mandatory as Labels Prepare for Free Music," *TechCrunch* Nov.8, 2008 < http://www.techcrunch.com/2008/11/08/360-music-deals-become-mandatory-as-labels-prepare-for-free-music/> [Arrington].
[151] *Ibid*.
[152] LeBlanc and Taylor, *supra* note 149.

With few exceptions, 360 deals are becoming the main type of record contract being signed in today's music industry. Accordingly, we will examine them in some depth.

1.2 Controversy

As one might guess, there exists sizeable controversy surrounding these new deals, and many strong voices on both sides of the debate. Some are of the view that 360 deals are a last ditch effort by dying record labels to take more from artists while giving nothing in return (and in fact, providing *fewer* services than before).[153] They suggest that record labels have exploited artists for years on record sales, leaving the lower margin concert and merchandise businesses for other parties. Now that record sales are no longer the cash cow that they once were, labels are aiming to get their hands on these other revenue streams, without changing what they offer artists in return.

On the other hand, some suggest that 360s are merely a reflection of the times, and may in fact allow artists to maintain control of the ownership in their copyrights and result in a less subservient relationship with the record label.[154] They suggest that digital technologies are disrupting the way in which creators used to make money, so artists and record labels need to work together to exploit all possible revenue streams in order to create and nurture healthy careers in these tumultuous times.

Regardless of which side one is on, one thing is clear: CD sales are losing their grip as the main determinant of artistic success, and both artists and labels need to change

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[153] Examples of those who share this view include: popular industry analyst/blogger/lawyer Bob Lefsetz, who called 360s a "land grab"; New York A&R man Lenny Johnson; long time talent agent Bruce Flohr (Dave Matthews); Los Angelese entertainment lawyer Peter Paterno (Pearl Jam); etc.

[154] Some examples include: Toronto entertainment lawyer Paul Sanderson; Nettwerk Records owner Terry McBride; etc.

their strategies as a result. Our purpose in this chapter is to examine whether the 360 deal is the best way of doing that.

1.3 Theory of the 360

The thinking behind the 360 is as such: record labels invest substantial amounts in the risky and expensive process of developing talent, so they should receive a substantial share of the band's success – from all sources of revenue – as it is the label's investment in the creation of the recorded material that makes all the other revenue streams possible. In intellectual property terms, one would decipher that the record label pays for most of the costs associated with creating the copyrighted intellectual property (the sound recording), and all the non-copyrightable sources of revenue that are generated as a result of this intellectual property (touring, merchandise, licensing, publishing, etc.) should at least partially belong to the record label.

The opposing theory is that revenues such as touring and merchandise are often all that an artist has to keep them afloat in the interim between recording an album and seeing profits from it, and the unwritten understanding has been that these revenues would be left for the artist as a sign of goodwill on behalf of the label. It can also be argued that touring and merchandise monies are generated as a result of the artists' hard work on the road, and as such are separate and distinct from the recording/royalty system. There is also the theory that artists have always signed unbalanced recording contracts as it were, knowing that they could rely on and grow other revenue streams like concert tickets and merchandise. Under this view, the 360 is stripping from artists the revenue streams that they previously relied upon, and arguably generated on their own.

Further examination of the 360 will help us decide which view is more accurate.

1.4 Origins

Like many innovations, 360 deals were born of desperation: after experiencing the financial havoc unleashed by years of slipping CD sales, music companies started viewing the ancillary income of artists as a potential new source of revenue.

The concept of the 360 deal is not new, and in fact has been around since the 80s when indie labels wanted to play a more active role in an artists' career. For example, Bruce Cockburn has shared profits in touring, merchandising, licensing and record sales with his record label throughout most of his career.[155] Independent labels in the 80s wanted to offer their artists contractual terms that put the artist in the position of partner rather than employee, and thus acted more as manager of the artist's career, taking a specified percentage of everything in exchange for a more holistic approach to building a career. In other words, the major labels are now pursuing – out of necessity – what indie labels have successfully pursued for years out of principle.

The first 'modern' 360 deals to garner attention involved Robbie Williams and Korn and their record label EMI, which occurred in 2002 and 2005, respectively.[156] However, the difference between these early deals and the current ones that are being required of new artists is that Robbie Williams and Korn had a choice *not* to sign them, and received massive advances for the assignment of their rights. Most artists signing a 360 today do not get much by way of an advance, and as we have seen, are not given the choice of a non-360 deal.

1.5 Frontend vs. Backend Revenues

[155] Sanderson, *supra* note 15.
[156] Leeds, Jeff, "The New Deal: Band as Brand," *New York Times* Nov. 11, 2007 <http://www.nytimes.com/2007/11/11/arts/music/11leed.html?pagewanted=1&_r=1> [Leeds].

Traditionally, record labels focused almost solely on recorded music. As we have seen, in exchange for the massive investment required to produce and package hit acts, music companies kept most of the profit generated by album sales[157], leaving the lower margin concert, merchandise and music publishing industries to outside parties. Labels therefore made their money in the relative short-term, recouping their investment (albeit on relatively few acts) through revenues from CD sales. On the backend, labels did not get to share in revenue streams from touring, merchandise, and publishing, which now compose about 70% of artist incomes.[158]

360 deals attempt to address this disparity between front-end investments and backend revenues. As such, the 360 is analogous to the artist/manager relationship, where one party (the label) gets a percentage of nearly every single revenue stream that the artist generates, in exchange for a “deepened commitment”[159] to the artist.

The change is so profound that the days of standalone record labels and standalone managers are no longer. There is simply too much fragmentation of revenue streams, meaning that the only way to make money off an artist is to develop them as a brand and take a slice of whatever returns that brand can generate, be it from a voiceover, product endorsement, television ad, tour, etc. As lawyer and 604 Records co-owner Jonathan Simkin notes: “we’re not a record label anymore, we’re a management/multimedia company. We do not sign record deals anymore. The deals look more like management deals now. If we are unable to participate in other revenue streams, we’re dead”[160]. Warner Music Group CEO Edgar Bronfman’s recent speech

[157] As we have seen, labels typically keep 90% of record royalties, leaving 10% for the artist.
[158] Einhorn, *supra* note 59, at 703.
[159] The term “deepened commitment” was taken from entertainment lawyer Chris Taylor,
[160] The New Indie, *supra* note 140.

echoes this: "it does not make sense for labels to pour money into artist development when CD sales, our primary source of revenue, continue to decline"[161].

Herein lies the rub: as record labels make less money on 'frontend' CD sales, they increasingly need to pursue other 'backend' revenue streams. However, how will they be in a position to offer artists something more as a result of this transformation? With decreased revenues, and expertise in an area that is on the decline, what will labels offer artists in exchange for access to these new sources? How will labels be able to make a "deepened commitment" to artists in this setting?

The answer to whether 360 deals are good for artists depends on what a "deepened commitment" to the artist really means. This is what we will examine next.

2.0 Real World Examples

2.1 Korn

A good starting point for analyzing the value of what is exchanged between artists and labels in a 360 deal is looking at some real world terms that have been negotiated.

In the aforementioned Korn agreement of 2005, EMI agreed to provide an estimated $25 million advance to the band in return for 30% of the band's merchandising, touring, and publishing revenue, over a two album period through 2010.[162] Insiders characterize the arrangement as a series of separate deals tied to the various revenue streams that live within the context of the overall partnership. The challenge facing the two parties, according to lead Korn attorney Gary Stiffelman, was to find a way to align

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[161] Arrington, *supra* note 153.
[162] "Billboard Does Korn/EMI Math," *Coolfer.com* July 5, 2007 <http://www.coolfer.com/blog/archives/2007/07/billboard_does.php>.

the interests of the label with those of the artist, so that the decisions made would ultimately benefit both parties.[163]

Korn lead singer Jonathan Davis said that roughly $10 million of the EMI money was structured in the form of a traditional album advance, leaving EMI's 30% buy-in valued at about $15 million.[164] Therefore, for EMI to recoup their investment on the deal, Korn would need to generate in excess of $50 million in profits during the five-year life span of the pact. There are remedies for EMI if Korn does not tour enough, and the revenue streams are to be calculated on either net or gross, depending on the nature of the stream. For example, touring – with its heavy overhead and costs – will be calculated on a net return, while other streams such as merchandising or film/TV licensing deals are to be worked out on gross returns.[165]

2.2 Atlantic Records

A recent document obtained from Atlantic Records provides another example of how a 360 might be structured. The agreement commences with a conventional cash advance to sign the artist, who then receives a royalty for sales after expenses are recouped. With the release of the artist's first album, however, the label has an option to pay an additional $200,000 in exchange for 30% of the net income from all touring, merchandise, endorsements and fan-club fees.[166]

Further, Atlantic would have the right to approve the act's tour schedule and determine the salaries of certain tour and merchandise sales employees hired by the artist.

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[163] "I.B. Bad on Korn/EMI: The Real Deal," *HITS Daily Double* Sept. 14, 2005 < http://www.hitsdailydouble.com/news/newsPage.cgi?news05845m01>.
[164] "KORN Members Discuss Innovative EMI Deal," *Blabbermouth.net* July 4, 2007 < http://www.roadrunnerrecords.com/blabbermouth.net/news.aspx?mode=Article&newsitemID=76054>.
[165] *Ibid*.
[166] Leeds, *supra* note 159.

In exchange, the label offers the artist a 30% cut of album profits (if any). This represents a substantial improvement from the industry standard 10-15% royalty rate.

According to Atlantic Chairman Craig Kallman, if the label engages more artists in such agreements, it will have to devote more resources to a smaller roster and "raise our batting average" in order to be successful.[167] This highlights a crucial aspect of 360s that we will examine later: to truly make them work, more investment is required, so the 90% rate of failure[168] that characterized the traditional industry will simply not work in the 360 model.

2.3 Indie Examples

Another example from a U.S. indie hip hop label[169] is the following: the label takes 70% of music sales, giving the artist 30%, while for merchandise and touring revenues the percentages are reversed. Another indie label offered 15% of music sales to the artist, in exchange for 10% of touring, merchandise, etc.[170]

2.4 Figures from Industry Professionals

According to Toronto entertainment lawyer Paul Sanderson, most major label 360 deals start with the asking rate of up to 25% of all sources of revenue, and then the artist can negotiate this down from there depending on their bargaining strength.[171] However, Sanderson cautions that we must draw a distinction between major and indie label deals. For the latter, some arrangements move upwards of 50% sharing of net revenues

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[167] Leeds, *supra* note 159.
[168] Philips, *supra* note 52.
[169] Red Zone Records: www.redzonerecords.net.
[170] The New Indie, *supra* note 140.
[171] Sanderson, *supra* note 15.

concerning specified sources, but also offer greater ownership in the underlying copyrights.[172]

Another highly recognized entertainment lawyer in Toronto – Stacey Mitsopulos – suggests that anywhere between 5-30% of touring income, endorsements, and merchandise revenue is being demanded by labels, be it indie or major.[173] She also stressed the difference in contractual terms between new acts versus established stars, which is a reflection of the bargaining power held by the artist in each situation.

3.0 Pros

Now that we have examined some of the actual figures involved in a typical 360 deal, we will now scrutinize the pros and cons of signing one, from both an artist and a label perspective.

3.1 Convergence

Perhaps the most obvious benefit of one party handling all the business affairs of an artist is convergence. Labels have touted the idea that under one roof, there is more likelihood of achieving one clear vision for an artist, as opposed to the traditional model which necessitated many outside parties being contracted out to deal with numerous aspects of an artist's career. Further, those in favor of 360s argue that this convergence will result in less double dipping, or similar activities being done by more than one party. This unnecessary overlap, they argue, has plagued the music industry for years, as several parties have been employed to do the same thing (for example: promotion), causing real inefficiencies in the overall marketing of the artist. The 360 model would create an economy of scale of sorts, allowing labels to operate and manage one large promotional

[172] Arrington, *supra* note 153.
[173] Mitsopulos, *supra* note 36.

machine with minimal overlap. Having all the decisions relating to an artists' career occurring under one roof may allow labels to cut down on a lot of waste and overlap when dealing with their artists.

Further, proponents of this model stress that only the 360 can provide the central leadership required to break an act in today's music industry, and capitalize on the fragmentation of revenue streams that has occurred in the digital age. Rather than one large source of income from record sales, artists now must generate earnings in small amounts from hundreds of different sources. Supporters of the 360 argue that the management and development of these streams is best handled by one consolidated entity, namely a record label.

3.2 More Artist Ownership of Copyright

According to Nettwerk Records head Terry McBride, no 360 deal is complete without more ownership in copyright being ceded to artists. In fact, 360 deals are the original Nettwerk philosophy by another name. When McBride and his partners started Nettwerk in 1984, the group's holistic ethos was quite novel. At the time, Nettwerk was one of the first labels to take control of all aspects of an artist's career (management, publishing, graphic design, etc.), contrary to the sales-only focus of major labels. In exchange for the assignment of some of these revenue streams, the artist would receive a greater ownership in the underlying copyright in their works, as well as a larger slice of the royalty pie from record sales.[174]

According to McBride, only with this arrangement will artists truly be viewed as partners with their record label, rather than a sort of subservient employee. In fact,

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[174] Liss, Sarah, "The Terry McBride Philosophy," *CBC News* March 6, 2008 < http://www.cbc.ca/arts/music/blogs/CMW08/2008/03/a_few_words_on_terry_mcbride.html> [Liss].

McBride further suggests that a true 360 deal should include stock options for artists; much like other company executives receive.[175] Only in this way, McBride suggests, will artists and label's interests truly align.

While most 360s currently offered by major labels do not include increased copyright ownership for the artist, this is a trend that will likely develop further. With labels expanding their revenue streams beyond CD sales, they can now afford to grant increased ownership in copyright to artists, thus providing them with more creative freedom to manage their own catalogue. However, one must question the value of this increased ownership as CD sales continue to slide. As we will examine later, it seems the Musical Work copyright promises to be more lucrative than the Sound Recording copyright in the long-term, and labels only have control over the latter.

3.3 Higher Royalty Rates

As we have seen in some of the real world examples examined, labels have been willing to offer artists a higher royalty rate on each record sold in exchange for percentages in ancillary revenue streams. Atlantic Records has offered some of its artists a 30% royalty on album sales, while Indie labels embracing 360s have offered upwards of 50% of each record sold.[176]

Again, artists must question the extent to which these increased royalties are valuable. If the increased royalty is on physical album sales only, it will continue to lose value as CD sales decline and are eclipsed by digital sales. If the increased rate is on all types of sales, than it promises to be more lucrative in the long term.

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[175] Baage, Jay, "Terry McBride: 'A True 360 Deal Should Include Stock Options'," *Digital Media Wire* March 6, 2008 <http://www.dmwmedia.com/news/2008/03/06/terry-mcbride:-"-true-360-deal-should-include-stock-options"> [Baage].
[176] Leeds, *supra* note 159.

3.4 Industry Connections

Related to the economies of scale argument is the idea that record labels bring their network of industry connections to the table on behalf of the artist, and that these connections will be opened up further with 360 arrangements. It is argued that these associations simply cannot be made through an artist's own self-marketing efforts online. As Troy Marshall, vice president of Rap Promotions at Interscope/Geffen explains: "It's just easier for us to walk in the door. When we're walking into a Microsoft or Hewlett-Packard, we're also bringing Mary J. Blige, Soulja Boy, and G-Unit."[177] So proponents of the 360 model argue that artists still need record labels, and if they give up percentages of other revenue streams, they will gain access to vital industry connections (video game companies, cell phone companies, etc.) that will generate greater revenue.

However, one must question whether these connections will truly be available and useful to all acts that sign a 360. As Edgar Bronfman noted earlier, *all* new acts are being required to sign a 360, so it is questionable whether these label connections will truly be accessible to each of these acts. Granted, the platinum acts, with a proven track record of sales, will be offered special deals with Apple and Motorola for example, but it remains to be seen what will change for smaller acts. In this way, these 'industry connections' may not be much different than in the pre-360 world. After all, it is assumed that signing any sort of agreement with a large, multinational corporation would open up opportunities that did not exist previously, so one must question exactly what has changed under the 360 model. Further, one must question whether the major labels still

[177] Resnikoff, Paul, "In 360-Degrees We Trust: Evolving Deal Points Emerge," *IPRcast Blog* April 11, 2008 < http://iprcast.wordpress.com/2008/04/11/rochelle-news-in-360-degrees-we-trust-evolving-deal-points-emerge-digital-music-news/?referer=sphere_related_content/> [Resnikoff].

have valid connections in today's fast-paced market, or whether they have severed many of these ties over the past ten years of suing customers, laying off staff, and losing money generally.

Thus the real question is to what extent labels will exhibit a "deepened commitment" to their artist roster, and whether this warrants both the assignment of copyright and the forfeit of other revenue streams.

3.5 Less Reliance on Megahit = More Career Nurturing

Record executives argue that 360 deals could free both record labels and artists (not to mention music fans) from the music industry's reliance on the megahit, as there would be less pressure on all parties involved to make back the record label's investment immediately, thus allowing labels to focus on longevity of careers rather than instant payback in the form of a chart topping hit. In the 1990s, the arrival of computerized data from *Nielsen SoundScan*[178] meant the industry had an instant scorecard that tempted major labels to push for Hollywood blockbuster-type opening weeks. The demand for quick payoffs has persisted today, even though a review of the last 15 years of *Billboard* data shows the albums that immediately seized spots on the upper half of the *Billboard* Top 200 chart go on to sell fewer copies, on average, than the releases that slowly worked their way up.[179]

There may be some merit to these claims. According to Craig Kallman, chairman of Atlantic Records: "If we weren't so mono-focused on the selling of recorded music, we could actually take a really holistic approach to the development of an artist brand. What's the healthiest decision to be made, to sell the CD or to build the artist's fan

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[178] *Nielsen Soundscan* tracks sales of all forms of music. See: www.soundscan.com.

base?"[180]. An example of this is Toronto rock band Pilot Speed[181], who signed a 360 deal with MapleMusic Recordings in 2003.[182] Their first album sold roughly 5000 copies, markedly short of the number required to keep their career going in a traditional CD-only record contract. However, as a result of revenue generated from touring, publishing, and synching (TV/film/video games), they were able to keep money flowing into MapleMusic, thus allowing the label to keep investing money into the band. When the time came to record their second album, the band did not owe the label any money, and the label could afford to fly the band to various conferences and showcases outside of Canada (Los Angeles, New York, Nashville), which is crucial for any Canadian band looking to compete on a major level. Had the band signed a regular, non-360 deal, the money generated from CD sales alone would likely have been insufficient to allow MapleMusic to continue working with the band.

Another example is Tennessee band Paramore[183], who signed a 360 with Altantic Records in 2005. The band was drawn to the comprehensive approach of the 360, which allowed for them to grow slowly over two years, developing their live act, songwriting skills, and most importantly, their public persona. As the band developed, Atlantic underwrote many of its touring expenses, including the purchase of a van and payments allowing for the band member's continued high school education on the road. Atlantic – and the band's management – wanted the band to hone its craft away from the industry radar, forgoing the push to get radio play for any singles from the band's first album, 2005's 'All We Know is Falling'. Instead, they tried to create hype online and on tour

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[179] Leeds, *supra* note 159.
[180] Leeds, *supra* note 159.
[181] See: www.pilotspeed.net.
[182] The New Indie, *supra* note 140.

while they figured out whom they were musically and personally. Their debut albums sold roughly 140,000 copies – respectable, but not nearly enough to recoup the label investment in the band. However, with constant touring and several product tie-ins, the band was able to keep money flowing into the label. Their second album 'Riot!' sold over 350,000 copies, and the band is now filling theatres throughout North America on their own. Both the band and their management feel that, without the 360 deal in place, they would not have been given the opportunities they were because there was not a massive, immediate hit on the first record.[184] Because the band could be easily marketed to the youth demographic, they were able to generate non-CD revenue that gave Atlantic enough time to invest in the band and let them develop their career further.

4.0 Cons

4.1 Mandatory Acceptance

According to Warner Music's Edgar Bronfman, 360 deals are essentially required of all new acts that sign with his record label. Therefore, one must question whether new acts really have much bargaining power to: a) demand a non-360 agreement; or b) demand certain specifics within a 360 agreement.

As mentioned before, new artists are not getting the kind of advances seen by Robbie Williams and Korn.[185] The imbalance in terms of supply (of artists) and demand (for artists) – coupled with the low success rates that we have examined earlier – leaves

[183] See: www.paramore.net.
[184] Leeds, *supra* note 159.
[185] The exception would be new acts at the centre of a bidding war between two or more labels.

record companies free to adopt a competitive bargaining strategy and implement a 'take-it-or-leave-it' attitude in the negotiations of a 360.[186]

Granted, this 'take-it-or-leave-it' attitude was prevalent in the pre-360 record industry, and the stories of artist exploitation by record labels abound.[187] However, with 360s the stakes are higher, as substantial percentages of future revenue streams are being signed away without much in the way of negotiation. If these deals are negotiated effectively, the 360 can provide artists with contractual leverage either initially, or over time, if their ability to generate ancillary revenue can be demonstrated. In this way, artists can be seen as having something that record labels need now more than ever, and therefore the decline in CD dominance in the industry may have empowered artists looking to sign a 360.

At the bargaining stage, however, it is undoubtedly still the case that labels are in an immeasurably stronger position than the individual artists, especially those who are unsigned and seeking an initial contract. Most artists at this level must simply try to negotiate the best possible terms within the 360, and insert clauses that require renegotiation of the contract at set intervals. These intervals can be measured in terms of time, revenue generated, or any other milestone the parties deem appropriate. Given the complexity of the music industry, it is crucial – and perhaps becoming more so in this new era – for artists to seek out sound legal advice before entering agreements. While this can be costly, there is a substantial amount of free information online that can help artists familiarize themselves with the concepts at play, and reduce some of these costs at least initially.

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[186] This approach was noted with respect to publishing contracts in *A Schroeder Music Publishing Co Ltd v Macaulay* [1974] All ER 616.

From a contract theory perspective, we would say that the parties to a record deal negotiate on equal terms according to their positioning in the market, despite their obvious inequality in terms of knowledge and leverage. This 'inequality' would not be a relevant consideration to justify any later attempt to nullify the agreement, unless it crosses the line into undue influence.[188]

4.2 Standard Form

One of the most common complaints regarding contracts in the pre-360 music industry was that – from a legal theory perspective – most record contracts for new artists did not involve a true 'meeting of the minds', as they were often of a standard form, and involved very little actual negotiation, as a result of the clear imbalance of power between the parties. Conventional discussions of "meeting of the minds," "assent," and "freedom of contract" have unclear application when a large proportion of the transactions entered into are based on agreements presented on standardized forms, and are not subject to negotiation.[189]

The question is: do 360s change this standard form problem? Ideally, each 360 that is signed would focus on the unique strengths of both the artist and the label, and would involve real negotiations to arrive at the appropriate balance in contract form. But if all new acts are being required to sign a 360, as Bronfman suggests, one must question how much the standard form contract will change. As per Paul Sanderson, most major label contracts start with the same asking rate of 25% of all sources of revenue, and then

[187] For examples, see Dannen, *supra* note 123; and Avalon, *supra* note 39.
[188] Osborn, *supra* note 49, at 10. Undue influence would be found if it was found that the record label took advantage of their position of power over the artist, to the extent that the artist's free will to bargain was negated. If proven, the contract would be voidable, and the remedy would be rescission. Sanderson, *supra* note 15.
[189] Bix, Brian, "Contract Law Theory," (March 17, 2006) *Minnesota Legal Studies Research Paper No. 06-12*. Available at SSRN: http://ssrn.com/abstract=892783.

the artist can negotiate this down depending on their bargaining strength.[190] Artists must question whether the label is investing any time into tailoring the contract to fit their needs and strengths. If the label is investing no more time drafting and negotiating 360 contracts than they did non-360 contracts, than it is questionable whether they deserve a quarter of all revenue streams. For labels, if they fail to customize each contract according to each individual artist, they will fail to maximize returns from each new revenue stream. Further, in these difficult times in the music industry, signing the right artists is now more crucial than ever for labels. As we will see later, labels are starting to sign fewer acts, and thus have the time to invest more into each act that is signed. One thing is clear: a starting point to offering a "deepened commitment" to artists is movement away from homogenous, standard form contracts.

4.3 Taxation Without Representation

One of the major objections against 360 deals is that they allow record labels to demand more from artists in return for nothing new. Again, we find ourselves coming back to the definition of "deepened commitment". In each situation, artists must ask what extra services record labels are offering to warrant a share in non-record or ancillary revenue streams.

From a label perspective, the argument is that artists are able to sell concert tickets and t-shirts, as well as negotiate licensing and publishing deals, in some respect, because of the promotional work that the label has done. Therefore, in an age of decreasing album sales, artists should be willing to give up these other incomes because they all stem from the hard work of the record label.

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[190] Sanderson, *supra* note 15.

The corollary is that these revenue streams are often all that keep a band solvent while they wait – often indefinitely – for royalty payments from the label. As we have seen, there was an unspoken understanding in the pre-360 record industry that artists would sign the seemingly unbalanced record contracts because they could rely on and grow other revenue streams like concert tickets and merchandise.

Thus the test is whether an artist's ability to generate tour, merchandise, publishing, and licensing revenue has greatly increased as a result of the 360 agreement. If so, then perhaps the label has a valid claim to a fair percentage of these non-CD revenues, thus negating any claim of taxation without representation. The next step is being able to document the increase in potential ancillary revenue provided by a 360, in a tangible manner.

4.4 Tangible vs. Intangible Terms

In determining the extent to which a record label will provide a “deepened commitment” to an artist, we must look at how this commitment might be quantified. One of the great challenges in negotiating such deals from the artist's perspective is that the participation requested by the label in the artist’s non-traditional revenue streams is easily quantifiable (e.g., "Artist shall pay to Company 10% of Net Touring Revenue as herein defined"). However, the terms offered by the label (e.g., "Company will provide promotional support for Artist's tours during the Term") in exchange for such participation are usually much more difficult to measure (or enforce). This can be a major problem for the artist when it comes time to litigate or to review the performance of the label at the renegotiation stage. Absent careful negotiation and drafting, the 360 can become a relationship in which the traditional elements of partnership such as operational transparency, equal access to information, and equal participation in key decisions are virtually non-existent.[191]

The key for artists and their representatives is to not get caught up on such subjective concepts as 'fairness' and 'equity', demanding instead hard numbers in terms of higher record royalties, increased tour support, and greater financial security during the development period of their career. Only then will the agreement justify the forfeiture of substantial portions of touring, merchandising, and other revenues. Granted, it is nearly impossible to draft any sort of contract with absolute certainty in light of unforeseen future events, but generally speaking, artists must look for more clarity than not.

4.5 Do labels have expertise in these new areas?

Once we have decided that a label has indeed invested more time and money into the areas that they are requiring a share of, we must examine to what extent these investments are likely to benefit the artist.

According to Los Angeles entertainment attorney Peter Paterno[192]: "the labels don't know how to do anything besides sell records. They don't know how to sell concert tickets or T-shirts. Why should I give them a chunk of my money unless they add something? I'd rather share that money with a concert professional or a T-shirt specialist."[193] Herein lies the problem: after outsourcing these functions for decades, it is questionable whether record labels will be successful at offering the sort of one-stop model that is at the heart of the 360. Experts in touring, merchandising, licensing, and

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[191] Michael Milom, entertainment lawyer at Milom Joyce Horsnell Crow, PLC in Nashville, TN. Excerpt from "Music Row on the 360 Deal," *Coolfer Blog* Feb.18, 2008 <http://www.coolfer.com/blog/archives/2008/02/music_row_on_th.php>.
[192] Attorney for Dr. Dre, Pearl Jam, Metallica, and several others. For more: <http://www.khpblaw.com/index.html>.
[193] Duhigg, Charles "EMI Takes a Stake in Band," *Los Angeles Times* Sept. 12, 2005 <http://davidkusek.typepad.com/future_of_music/KORNEMI.pdf>.

publishing have been honing their craft and developing their connections for decades, whereas labels are relative newcomers in these fields. As Dew Process Records[194] founder Paul Piticco suggests: "There is better value in getting bread from a baker and meat from a butcher. You won't get the best results if you give all the rights to one person."[195]

The real question is what value record labels will be able to add to these areas of business. There is a clear difference between investing money in a given area, and getting results from that investment. Record labels simply do not have the same experience in touring/promotion as Live Nation, for example. For many artists, their main source of income in the short term is touring and merchandise, while in the long term it is often publishing.[196] According to Chris Taylor, label expertise in each of these areas is different: "(They) are up to speed on publishing but they are all just learning how live and merchandise works."[197].

Giving up 25% of one's main source of income to a label without much experience in these fields may be tough to swallow for most artists, especially in an era where artists handle a majority of their own promotion. According to Sam Feldman of S.L.Feldman and Associates[198]: "Labels don't supply the kind of infrastructure or services to deserve that kind of grab of the income stream. In a sense, it's easier for us to back into their business than it is for them to back into our business"[199]. As we have seen

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[194] See: http://www.dew-process.com/
[195] Cashmere, Paul, "Major Labels Need To Rethink The 360 Deal," *Undercover.com* Sept.14, 2008 < http://www.undercover.com.au/News-Story.aspx?id=6285> [Cashmere].
[196] Mitsopulos, *supra* note 36.
[197] LeBlanc and Taylor, *supra* note 149.
[198] With more than 70 employees in offices in Vancouver and Toronto, S.L. Feldman & Associates has a towering presence in entertainment. As Canada's largest full-service talent agency, it represents over 200 artists, ranging from Avril Lavigne, Sarah McLachlan, Jann Arden and Nelly Furtado. See: www.slfa.com.
[199] Interview between Larry LeBlanc and Sam Feldman, received via email [LeBlacn and Feldman].

already – and will revisit later – many artists are already ‘backing into’ areas of business that were previously handled exclusively by large labels, some with much success.

In order for labels to be taken seriously in these new areas of business, they need to start by creating their own companies in each respective field, says Eleven Records[200] founder John Watson. He recommends that until a label has its own merchandise company, publishing company, or ticketing company, artists should seriously question whether the label will be able to provide the necessary expertise in each field. According to Watson: “there are no rights without responsibility. [Labels] have to deliver what [they] promise.”[201]

Establishing companies in each of the new areas of business is a definite initial step that artists should look for prior to negotiations. However, creating a new arm of a company and exhibiting *expertise* in these areas are two different things. For example, Chris Taylor suggests that, “Warner Bros. has a pretty good merchandising company. Universal has a merchandise company. They will both try to escort you over that way and there may be incentives in the deal to go that way. Sony may look to participate but they don’t have an active merchandiser at this stage. I haven’t done a deal for awhile with EMI”[202]. Therefore, artists need to look for specific companies within each label, and demand details in terms of that company’s track record.

4.6 Conflict of Interest

Directly linked to the potential benefits of convergence is the potential for conflicts of interest. As ‘manager’ of an act and its career, the label must act in the best

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[200] The company represents acts such as Silverchair, Wolfmother, and Missy Higgins. See: http://www.elevenmusic.com/

[201] Cashmere, *supra* note 198.

[202] LeBlanc and Taylor, *supra* note 149.

interests of the artist, while as ‘label’ they must act in the best interests of the company and its shareholders. In the pre-360 model, this conflict was avoided by ensuring that an artist’s management company was exterior to the record label. Indeed, the manager was the key player acting on behalf of the artist to keep a check on the activities of the record label.

Under the 360 model, the role of manager is not necessarily being replaced by the activities of the label, but the separate functions of label and manager are being merged. As we have examined here, the days of the standalone record label and standalone management company are a thing of the past. More and more record labels are taking roles that used to be reserved for managers. In some situations, one party is being employed to act as the manager and as the label. This creates the potential for discord. For example, what if a new label comes along and makes a better offer to a signed artist? Acting as ‘manager’ of that artists’ career, the label must make decisions that are the best for the artist in the long term. Yet as a label, they must act in the best interests of the company, which would likely mean disallowing the artist to sign elsewhere.

According to 604 Records co-owner and entertainment lawyer Jonathan Simkin, these situations are simply a necessary evil in today’s music industry. The times have changed, says Simkin, and the merging of management and label functions is the only way companies can stay afloat.[203] “It is only a perceived conflict for some,”[204] says Simkin. He suggests that the 360 business model will only be flawed and conflicted if the contractual agreements are flawed and conflicted; therefore the documents must be drafted carefully to avoid double dipping and other conflicts. Realistically, all parties tied

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[203] Simkin, *supra* note 141.
[204] The New Indie, *supra* note 140.

to an artist stand to make money only if the artist is successful, so agreements that are inefficient in this new era of fragmented revenues will simply not last. In order to survive in today's music industry, both artists and labels must contract around these potential conflicts of interest, as they simply have no other choice. More than ever, the artist-label relationship will have to be built around mutual trust. According to Sam Feldman, this trust cannot be gained that easily: "Artists also have to have an advocate; and a corporation can't be an advocate. You can count on two hands, if you are lucky, the number of managers today that can do the job effectively. This is a very unique skill set. It is just not like you can have a corporation and appoint a manager. Nor can you have a corporation appoint an agent. It's a Moroccan Bazaar and artists need an interpreter. We are the interpreters, and we are the artist advocates."[205]

4.7 Short-term vs. Long-term Returns

One of the major hurdles facing the 360 model is the inherent struggle that exists between its more long-term return on investment structure and the short-term return at the heart of the traditional record industry.

For 360s to work, labels must be willing to make long-term bets early in the careers of many small bands, with the knowledge that most will generate little if any payouts for the first few years. This is in stark contrast to the traditional major label system.

Since the 70s, when the major labels consolidated and became large, multinational corporations, they have relied on large investments yielding even larger payoffs in the relative short term. In the late 80s early 90s, these multinational entities

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[205] LeBlanc and Feldman, *supra* note 202.

bought up most of the indie labels that had turned the music industry into a cash cow, and the results were record-breaking profits – the 'Golden Age' of physical sales of music. But this corporatization meant a need for quarterly profits, so as to satisfy shareholders and bank covenants each fiscal term. This translated into more pressure to deliver instant returns, which meant that new artists needed to sell immediately or risk being dropped by their label. This reliance on short-term gains has become entrenched in the industry, and has increased with each year, especially in light of the file-sharing phenomenon. A quick comparison illustrates this: In 1992, 60% of the top 50 acts on the *Billboard* chart got there by building sales slowly, often starting on an indie label and working their record through touring; in 2007 only 5% of the artists in the top 50 had climbed the chart slowly, while the remaining 95% sold a majority of their product in the first few weeks of release.[206] We are amidst the days of the instant hit, while the 360 model is premised on career longevity. This promises to make it difficult for labels to commit broader revenues towards a long-lasting, diversified career for their artists.

Under the 360 model, the only way record labels have been able to generate immediate results is by signing superstars who are already generating substantial ancillary revenue. These superstars have not given up these valuable rights without massive advances, which means that any revenue generated by the label thereafter has been at a low or zero margins, at least in the short-term. For all non-superstar acts, the return on investment from a 360 deal simply cannot be generated in the short-term, except in rare circumstances. The real potential of a 360 does not emerge unless an act is popular long enough to attract either loyal fans that reliably buy tickets, merchandise, etc., or garner enough attention from business partners that help market spinoffs like a

[206] Leeds, *supra* note 159.

fragrance or sneaker line. In other words, the 360 game is one based in the long-term, while the corporate record industry that has existed since the 70s is built on short-term hits and short-term payouts.

This crucial consideration is the corollary of a decreased reliance on the megahit: for 360s to work, labels must take the time to let artists' careers build, eventually creating a 'brand' that can be tied to all ancillary revenue streams, generating payoffs a few years into the whole process. If this model works, the industry may be able to nurture more healthy careers and create another Springsteen or Dylan, profiting off of longevity rather than short-lived successes. However, breaking free from the reliance on the instant hit system will be painful, and neither artists nor labels know just how long this shift will take to occur, or how successful it will be when it happens (if at all). Like *New York Times* writer Jeff Leeds notes: "what record company has time for a 5 year build for an artist?"[207] This question is especially relevant in an era where the hot ringtone or single of the week can sell a million copies, and be forgotten just as fast.

One thing is certain: it will take a couple of years before anyone can determine whether a group's ancillary income can offset the revenue lost from the continuing slide in album sales, so labels must invest wisely in terms of the acts they choose to sign to a 360.

4.8 Larger Investment = Fewer Artists Signed

Related to the short-term/long-term dichotomy is the idea that record labels will have to invest more money and time into each act they sign, in order to develop the act and its brand sufficiently enough to see returns. The 90% rate of failure that we have examined in the traditional record industry will simply not work in the new 360 model, as there is simply less money going around in the music industry in general. The consequence is that – relatively speaking – fewer artists will be signed under the 360 model.

The numbers already reflect this change. Chris Taylor suggests that, "today, there are fewer deals. In the early '90s we were doing 25 major label record deals per year. We are probably doing 10 per year now. The size of the deals is smaller than what they were before, even though there are normally more rights attached"[208].

This is not necessarily a negative change. As we have seen earlier, record labels used to operate on a 'throw everything to the wall and see what sticks' mentality, where roughly 90% of acts signed generated losses for the label. With an increased investment required for each act signed – coupled with less money to be made from record sales – we might see labels spend more time and money ensuring they invest in artists that will have success in the long term.

However, the opposite may occur: record labels may start investing only in sure-fire hits, and avoid taking risks on truly original acts altogether. In this writer's opinion, this mentality has plagued the major labels for the past 10 years, as they have simply followed whatever trend was hip at the time, signing bands that emulate the current sound, be it the next Nickelback, Radiohead, or Coldplay. Rather than look for innovators, the industry has sought after (and rewarded) emulators, with the end result being short-lived careers. While the major labels used to invest in unique, one-of-a-kind acts, that last decade has seen them look for insurance – a guaranteed sell – before they

[207] Leeds, *supra* note 159.
[208] LeBlanc and Taylor, *supra* note 149.

sign. According to long-time industry observer Larry LeBlanc: "Dylan and Hendrix could not get signed if they came around today – they would be far too dangerous"[209].

If the majors wish to turn this around, the 360 should be viewed as a long-term investment in acts that will bring in more revenues than multiple acts with short-lived careers. The potential downside is that fewer acts will be signed and exposed to the capital that used to be available, but this seems to be the case regardless of whether the 360 is embraced or not.

4.9 360s only for stars?

As we examined earlier, nobody is quite sure if 360 deals will work for anyone except established stars. Stars already have a recognized 'brand', which makes it easy to generate ancillary revenue outside of album sales. New acts, however, have yet to prove their market potential, and as such have very little bargaining power when it comes to negotiating percentages within the 360. According to Middleton Law Group attorney Matthew Middleton, "for a new artist, it still remains to be seen if the 360-degree model works".[210]

Smaller acts cannot generate much revenue from touring, as playing clubs or opening for larger acts is rarely a breakeven venture, let alone a source of major revenue. In fact, touring has traditionally cost labels money for smaller acts, and was seen as a necessary step in the promotion of the act and their record. So there exists a great divide in touring acts: a majority of artists are well below break even on the road, while a small percentage get to a level where touring becomes by far the most lucrative source of revenue of their career.

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[209] LeBlanc, *supra* note 67.
[210] Resnikoff, *supra* note 180.

Clearly, record labels know that some of today's new and unproven acts will catch a break and be the next megastars, but getting there is the risky part. The 360 might mean taking bigger risks than in the traditional model – as more time and money have to be invested in order for the 'brand' to come to fruition.

Again, labels will be forced to make wiser investments in order to bank on future success stories. As we examined with the Pilot Speed and Paramore examples, the acts need not be selling out stadiums to keep the whole agreement out of the red. Licensing, merchandise sales, and publishing can also keep the things moving forward during the development stages of a career.

4.10 360s only for certain genres?

The industry's hunger for 360 deals might also subtly shift the ways labels view the scouting and cultivation of talent, or A&R. With touring and merchandise generating huge numbers in the past few years, record labels are looking for acts ready to tour. Some are questioning how this will affect artists that do not wish to tour, or songwriters who do not perform live.

Generally, touring acts will have an advantage over non-touring acts or writers when it comes to 360s, but songwriters are not really signing these deals, opting for publishing deals instead. For non-touring acts, they simply must shift their focus to licensing their songs for film, television, commercials, etc. The possibility of a latter-period Beatles model, where an act records but does not tour, is decreased in this new era, unless the act is writing the kind of back-to-back #1 hits that Lennon and McCartney produced.

Artists in the rap genre, for example, might find more difficulty attracting a 360, since their recordings can be expensive to produce and very few become touring successes. These acts will have to look to endorsement deals, for products from sneakers to computers to soft drinks, as stars like Jay-Z and P-Diddy have done with much success.

5.0 Live Nation 360s

5.1 Background

Now that we have looked at the pros and cons presented by the record label 360, we will turn our focus to similar offers being made by the biggest competitor of the major labels: Live Nation.

Live Nation is the largest producer of live concerts in the world, annually producing over 16,000 concerts for 1,500 artists in 57 countries.[211] By combining its connections with the most desirable concert venues in the world with the prowess of the industry's most successful marketers, Live Nation has become a major powerhouse in today's music industry. While 360-type deals had been around since Indie labels started using them in the 80s, it was Live Nation that made them the new norm in the last few years, acting as label, promoter, presenter, and gift shop for their many artists.

Live Nation has constructed a physical recording label, 'Live Nation Artists', which is a division of Live Nation Music Group. The label is expected to become a major rival against the four major record labels, as it will handle recorded music, merchandise, ticketing, broadcast/digital media rights, sponsorship and marketing. Despite declining music sales, recorded music still offers juicier margins than concerts, at least for the time

[211] See: http://www.livenation.com/company/getCompanyInfo

being.[212] For this reason, Live Nation Artists plans to release albums, and claims to be unburdened by the expensive overhead that plagues major labels.[213] According to the company, major labels make on average a 16% margin on CDs, whereas Live Nation plans to survive on about half of that, with the balance going to artists.[214]

Among the high-profile acts already signed to the company are: Madonna, Jay-Z, Nickelback, Shakira and U2. For these major touring acts, the benefits are clear: they can move away from the tumultuous major label system, be paid a massive advance for their rights upfront, and know that their touring will be properly promoted by the most powerful promotion company in the world.

5.2 Real World Examples

5.2.1 Madonna

Madonna signed the first and perhaps most-publicized deal with Live Nation on October 16, 2007, reportedly worth $120 million over 10 years.[215] The deal encompasses future music and music-related businesses, including the Madonna brand, albums, touring, merchandising, fan club and Web site, DVDs, music-related television and film projects, and associated sponsorship agreements. Under the terms of the deal, Madonna would receive a signing bonus of about $18 million and an advance of roughly $17 million for each of three albums, according to sources close to the deal. A portion of the compensation involves stock, and Madonna stands to benefit significantly from the touring component of the agreement, which gives Live Nation the exclusive right to

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[212] Sloan, Paul, "Live Nation rocks the music industry," *Fortune* Nov. 30, 2007 < http://money.cnn.com/2007/11/30/news/companies/live_nation.fortune/index.htm?source=yahoo_quote> [Sloan].

[213] Van Buskirk, Eliot, "Live Nation to sell major label MP3s on artist pages," *Wired* November 11, 2008 <http://blog.wired.com/music/2008/11/live-nation-pla.html>.

[214] Sloan, *supra* note 215.

promote her tours. As of Dec. 22, 2008, Madonna's most recent 'Sticky and Sweet' tour had become the highest grossing tour of all time for a solo artist, selling a staggering $280,000,000 (USD) in tickets.[216]

5.2.2 U2

On March 31, 2008, it was confirmed that Live Nation signed a 12-year deal with U2 worth an estimated $100 million.[217] The deal includes Live Nation controlling the band's merchandise, sponsoring, branding, licensing, and their official website, but does not include recording and publishing revenue. U2 will continue the band's long-term recording and publishing relationship with Universal Music Group. At the time of signing, then-chairman of Live Nation Michael Cohl said: "It's not a do-or-die situation that we have to be involved in the recordings. We'd prefer to, but it's not always available."[218] Cohl said the new model would help boost the overall company's profit margins, as touring and ticketing have traditionally been a low-margin business.

The company would not reveal financial terms of the U2 deal but analysts estimated that the deal would be in the US $100 million range.[219] The parties agreed that the band would receive $25 million for 1.6 million shares of the company. However, as per the initial agreement between the parties, Live Nation had to buy back all 1.6 million shares from the band for $25 million on Dec. 18, 2008, though the market value of the

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[215] Associated Press, "Madonna announces huge Live Nation Deal," *MSNBC.com* Oct.16, 2007 <http://www.msnbc.msn.com/id/21324512/> [Madonnna].
[216] Press Release: "MADONNA'S 'STICKY & SWEET TOUR: #1 GROSSING TOUR IN HISTORY FOR SOLO ARTIST," *Madonna.com* Dec. 22, 2008 <http://www.madonna.com/news/>.
[217] Thelwell, Emma, "U2 Ties the Knot With Live Nation Deal," *Telegraph* April 1, 2008 < http://www.telegraph.co.uk/finance/newsbysector/mediatechnologyandtelecoms/2787228/U2-ties-the-knot-with-Live-Nation-deal.html>.
[218] Reuters, "Live Nation Agrees to 12 Year Pact with U2," March 31, 2008 < http://www.reuters.com/article/entertainmentNews/idUSN3040810420080331> [Reuters U2].
[219] *Ibid*.

shares had fallen to $6 million. Live Nation brushed off the $19 million loss, hoping to recoup it with the release and tour of U2's next album, ‘No Line on the Horizon’.[220]

5.2.3 Jay-Z

After signing Madonna and U2, Live Nation signed hip hop mogul Jay-Z to a reported $150 million package in exchange for the totality of his creative output – including his recordings, tours for the next decade, and any current and future entrepreneurial ideas.[221] Live Nation is reported to be providing Jay-Z with $5 million annually for his own label, publishing arm, and management company, as well as $25 million upfront and $10 million per album for a minimum of three albums over the next decade. The deal is the most extensive, and involves the most rights, of the Live Nation deals.

After selling his Rocawear clothing line in 2008 for $204 million dollars, Jay-Z started a chain of nightclubs, so this deal gets Live Nation into a whole new range of businesses. Jay-Z will also get an additional $25 million for "Roc Nation" a company to finance future Jay-Z ventures, from which Live Nation will get half the revenues.

5.2.4 Shakira

On July 2, 2008, Shakira signed a 10-year deal with Live Nation, with an estimated value between US $70 and $100 million. The singer would have to fulfill two more albums and a greatest hits release under her old contract with Sony BMG, but all touring and other aspects of the singers musical career would be in effect as of signing

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[220] Reuters, “Live Nation takes $19 million hit on U2 buyback deal,” Dec. 18, 2008 <http://uk.reuters.com/article/rbssConsumerGoodsAndRetailNews/idUKBNG16028420081218>.
[221] Tyrangiel, Josh, “Jay-Z: Music’s $150 Million Man,” *TIME* Apr. 3, 2008 <http://www.time.com/time/arts/article/0,8599,1727519,00.html?imw=Y>.

with Live Nation.[222] The deal will encompass tours, recordings, sponsorship and merchandising throughout the world.

5.2.5 Nickelback

Less than a week after signing Shakira, Live Nation signed a three-album, three-tour deal with Nickelback reportedly valued at US $50-70 million.[223] The deal includes all merchandising, licensing, sponsorship, secondary ticketing, endorsements, DVD and broadcast rights, fan club, web site and literary rights. However, the band still has two albums and a greatest hits package left to deliver to its longtime label Road Runner Records before it records any albums for Live Nation.

5.3 Only for stars?

It is difficult to point to any aspect of these Live Nation deals as being negative for the acts involved. The artists are being given top dollar for their creative output, with the knowledge that Live Nation will promote them effectively because their bottom line depends on it. Rather, the criticism of the Live Nation deals is that they will only be available to megastars, whose success has been proven time and time again. If that is the case, Live Nation would not act as an alternative to the major label system, but rather an elite service offered only to elite artists.

So the question remains: can the Live Nation model work for other artists? According to Live Nation CEO Michael Rapino, "There's no reason it can't work with a baby band".[224] After signing with Madonna, the company announced that it expected to do other all-encompassing deals involving a range of artists, from superstars to new

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[222] Sisario, Ben, "Shakira Leaves Record Company for Live Nation," *New York Times* July 2, 2008 <http://www.nytimes.com/2008/07/02/arts/music/02shakira-brief.html?_r=1&ref=arts>.

[223] Sisario, Ben, "Nickelback Signs up with Live Nation," *New York Times* Jul 9, 2008 <http://www.nytimes.com/2008/07/09/arts/music/09nickel.html?_r=1> [Times Nickelback].

talent. At the current time, though, the only acts that have been signed to Live Nation Artists have been megastars. This makes sense from a business perspective, as the first few acts signed have to be a sure thing in terms of generating revenue.

However, this may be symptomatic of the idea that this model will only work for *established* stars. After signing U2, Michael Cohl – former Chairman of the Board for Live Nation – said the company would focus on signing other *major* artists rather than developing new acts, as would a traditional music label or publishing house. "Our intention is to work with artists who are already making it or on their way to making it," he said.[225] This change in company tone is perhaps reflective of the inner turmoil that existed between Rapino and Cohl in terms of corporate vision. Only Cohl envisioned a more record-label type system involving dozens of acts, while Rapino wanted to be more cautious with their signings, creating a slow build of established stars. The result of this disconnect was Cohl's departure in June of 2008. After signing Nickelback in July 2008, Live Nation announced that it planned to sign four to six acts within a year.[226]

This seems to settle the debate: at the moment, Live Nation is only interested in signing well-established, bankable stars. Once these stars fulfill their contractual agreement with their respective labels and start to release records for Live Nation Artists, then perhaps we will see just how many smaller acts the company signs. Thus Live Nation will employ the opposite approach to the 'throw it to the wall and see what sticks' model of the major labels. In these unsure times in the music industry, Rapino's approach makes perfect sense. In one interview, he admitted that he is not looking to transform Live Nation into a label that bets on scores of artists in the hopes that one or two will

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[224] Madonna, *supra* note 218.
[225] Reuters U2, *supra* note 221.

score big. Rather, he plans to cherry-pick perhaps a dozen superstars over the next few years, those who have done the dirty work of establishing a solid connection with fans around the world.[227] Indeed, this model seems predicated on the fact that someone else (arguably a record label) has done the hard work of developing the 'brand', and now Live Nation will use their efficient and established system to get that brand out to the masses. The question of who is going to invest in and nurture acts while they are creating a brand is not on Rapino's – or Live Nation's – mind.

5.4 Outsourcing

One of the crucial differences between record label 360s and those proposed by Live Nation is that the latter may outsource many of the functions that labels have traditionally performed. As of July 30, 2008, Michael Rapino said the company is considering doing licensing deals on an artist-by-artist basis, and is not planning to build an infrastructure or carry any overhead.[228] The move is modeled after the "rent-a-system" model used in Hollywood, whereby one studio produces a movie but licenses all the other functions to another studio that already has a distribution and marketing infrastructure. In other words, Live Nation may employ the marketing, manufacturing, and distributing services of the major labels from which they have just taken their biggest and most bankable stars.

While CD sales are down, megastar artists still need to press several hundred thousand copies of each album. This is a massive capital undertaking for a

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[226] Times Nickelback, *supra* note 226.
[227] Sloan, *supra* note 215.
[228] Garrity, Brian, "A Different Tune: Live Nation may be forced to lean on music labels," *New York Post* July 30, 2008 < http://www.nypost.com/seven/07302008/business/a_different_tune_122233.htm> [Garrity].

management/touring firm, and one that could backfire badly if the CD fails to sell.[229] To avoid these infrastructure costs, industry analysts predict that Live Nation will sign P&D deals with the major labels to press and distribute product for their artists. Another option would be to bypass the labels and strike exclusive deals directly with retailers like Wal-Mart or Target who would handle distribution and to a lesser degree marketing, similar to what The Eagles, AC/DC, and others have done with Wal-Mart.[230]

If Live Nation opts for the licensing model with major labels, they would likely collect a less lucrative outsourcing royalty of between 25 percent and 35 percent, based on other industry licensing deals.[231] Live Nation would then be responsible for using that licensing money to pay the artist's royalty on record sales. However, without a new album due to Live Nation from any of their signed acts for at least a year, the company is in no rush to make a decision.

5.5 Does Live Nation have expertise in these new areas?

Artists need to ask the inverse question of Live Nation as they did of major labels: what does a concert promoter know about releasing music? As we have seen, the company will likely need the long-entrenched major-label infrastructure to get CDs pressed and released. In fact, all of the acts currently signed to Live Nation Artists have also signed ancillary agreements with the major labels to access the distribution channels over which they have long held control.[232]

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[229] Fine, John, "Leaving Record Labels Behind," *BusinessWeek* Oct.29, 2007 <http://www.businessweek.com/magazine/content/07_44/b4056094.htm>.
[230] See: Levine, Robert, "For Some Music, it has to be Wal-Mart and nowhere else," *New York Times* June 9, 2008 < http://www.nytimes.com/2008/06/09/business/media/09walmart.html?_r=1>.
[231] Garrity, *supra* note 231.
[232] Associated Press, "Is this the day the music died?" *MSNBC.com* Oct. 12, 2007 <http://www.msnbc.msn.com/id/21269633/>. Conversely, bands may also sign a 360 deal with a record label, and a touring/promotion deal with Live Nation. Korn followed up their aforementioned EMI deal with a Live Nation deal, which pays the group $3 million in return for 6% of the band's future tour

So for pressing and distribution, Live Nation may have to outsource the services of major labels, for a percentage. As we have seen in Chapter 2, these functions can be expensive, but are becoming more affordable with time. The real expense in today's fragmented music industry is marketing and promotion. When asked whether he would recommend his acts to sign a 360 with Live Nation, legendary Canadian talent agent Bruce Allen said: "No. Who's going to market the music? They are a touring company. They aren't going to staff up with 90 people to sell records"[233]. He brings up a good point: while the act of touring itself can be a good form of promotion alone, it is usually supplemented at a major label by a full-on marketing plan consisting of several layers of employees. According to Chris Taylor: "there are still good people working at major record companies. If they are focused on your career then it could be a 100 people focused on your career as opposed to four people in a managers' office trying to put out records"[234]. Will Live Nation have the promotional infrastructure to successfully market the acts that they are putting on tour?

Granted, the hierarchal, corporate approach of the major record companies has not been that successful in the past several years, so if Live Nation employs a different strategy, it may not be a bad thing. Also, Live Nation has a great deal of revenue coming in from its promotion arm, so it can afford to invest in new marketing initiatives for its Live Nation Artists arm. What they may lack in expertise in being a 'record label' they make up for in revenue from being a promoter. Further, the acts that they are signing are so big that much of the promotion is self-perpetuating: when Madonna announces a tour,

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earnings. See: Zahlaway, John, "Korn Forms Partnership with EMI, Live Nation," *Live Daily* Jan. 11, 2006 <http://www.livedaily.com/news/Korn_forms_partnership_with_EMI_Live_Nation-9436.html?t=98>.

[233] LeBlanc and Feldman, *supra* note 202.

[234] LeBlanc and Feldman, *supra* note 202.

even non-fans hear about it; when a shoe company gets the chance to work with Jay-Z, all media outlets cover the story. The connection with fans and others is already made. With megastars, the hard work is already done. If Live Nation signs lesser known acts in the future, the acts themselves will still have to work hard at self-promotion, but that is just par for the course in today's music industry.

5.6 Ownership in Copyright

Perhaps the most apparent difference between Live Nation 360s and those offered by labels is that Live Nation signs artists as a record label, but predominantly takes the role of promoter – rather than *owner* – of the music. The deals with U2 and Madonna, for example, do not include copyright of the artists' future recordings. Clearly, these megastars acknowledge the significant value that remains in their recorded material, and in its publishing. They also have the bargaining power to ensure this value is not lost.

This is a huge distinction from label 360s, which could have a major effect on how artists manage their own careers in the years ahead. The role of promoter rather than owner of the music created is precisely on point with what musicians like Peter Gabriel have been suggesting for years: "There's still room for record companies but they should reinvent themselves as a service industry and not as owners"[235]. We have seen that forward thinker Terry McBride of Nettwerk has also pushed for more artistic ownership in copyright for the bands that he has signed, based on the belief that artists should be given more control of their catalog and careers.[236]

This complete forfeiture of ownership in copyright by labels is possible under label 360s, but it is rare. Paul Sanderson suggests that labels are not entertaining the

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[235] BBC News, "Record Labels Need 'Reinventing,'" *BBC News.com* July 14, 2008 <http://news.bbc.co.uk/2/hi/entertainment/7505108.stm>.

notion of giving up ownership in copyright in these troubled times, unless it is with an artist with major bargaining power.[237] Otherwise, Sanderson says, the investment becomes too risky: labels still make most of their money from CD sales, and these revenues are based on the copyrights we examined in Chapter 1.

For Live Nation though, the acts being signed are the absolute biggest in the industry, and as such have far more bargaining power to demand ownership in the underlying copyrights. Further, Live Nation uses the copyrighted work (the recording) as a promotional tool to generate revenue from other, non-copyrightable streams of income (touring, merchandise, licensing, synch rights, etc.). While the company surely will have a hand in how the copyrighted work is used to generate revenue (i.e. the marketing plan), they have the luxury of knowing that the sound recording and the other products it creates will sell almost without fail, as a result of the 'brand recognition' that has been created over the course of the artists' career. Therefore, Live Nation can afford to let the artist maintain ownership in the underlying copyrights, as there is less risk involved when it comes to ancillary revenue streams. Most record labels have no such luxury, because they: a) do not sign strictly 'winners'; and b) are still predominantly focused on record sales. Thus the answer, it seems, is for labels to sign fewer losers, and diversify their revenue base (if it were only that easy).

For artists, the result of more (or complete) ownership of the copyrights in their work is more control over their catalog, and more control over their career generally. But what good is ownership of copyrights when the revenue streams that increasingly have more value today are outside the realm of copyright law? What good will it do Peter

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[236] Baage, *supra* note 178.
[237] Sanderson, *supra* note 15.

Gabriel to own his copyrights when very few are paying for his recorded music? We will examine this crucial question in the final chapter of this thesis.

6.0 Conclusion

The answer to whether artists should embrace 360s and give up their rights to ancillary revenue streams is not easily ascertained, and will be entirely different in each agreement that is negotiated. As we examined in Chapter 2, artists still need capital to be able to effectively market and distribute their product, and record labels continue to have the ability to provide this capital. However, this comes at a cost. As we have examined in this chapter, artists are now being given no choice but to sign a 360 with most record labels if they wish to access label resources.

We have looked at the controversy that surrounds 360s, and what all the hyperbole means to the average artist. Are 360s exploitive or empowering? To use a popular cliché, the devil is in the details. It is true that modern artists that wish to make money must create a 'brand' and sell it accordingly, but is a record label the best business partner to help an artist to do this? However, artists that show a decreased level of commitment to the label and the 360 will be met with a decreased level of commitment from the label. Chris Taylor agrees:[238]

> I've heard stories of artists thinking that they had outsmarted everybody by keeping everything off the table during a negotiation. The next day the head of the label or an executive VP calls saying, "You should put the merchandise back on the table here. We need this." It's like forcing a single on a label. If you are a new artist do you not want to get the full weight and degree of enthusiasm of that label behind you? Do you want to be 27 and kicking yourself because you didn't give up 10% of merchandise and then somebody pulled the plug on your project?

We have also seen that other parties besides record labels may be able to offer the services necessary to nurture and/or break careers, although at the moment Live Nation is the only real competitor to the labels, and their current vision involves only the most elite artists in the world. Structurally, Live Nation cannot afford to sign acts that may not sell, as they simply do not have the infrastructure in place to weather the losses.

While Live Nation will not – at least in the short term – be the panacea for all artists in a digital age, its shift in focus from copyrightable works to ancillary revenue streams seems to be indicative of the shift occurring generally in the music industry. However, Live Nation has made it clear that at the moment, recorded music continues to offer higher margins than promotion, so the CD and digital sales remain crucial. As such, record labels still have bargaining power, as they seem to remain the best providers of P&D and perhaps marketing.

So we see that to survive now, music companies have to be involved in all aspects of the industry, not just those associated with the copyrightable sound recording. According to Madonna's manager Guy Oseary, "for a company to do well in music now, it's got to be in all aspects of the business. And Live Nation is the risk-taker. It's leading the charge"[239].

Artists must develop strength in all areas as well. If they can do it without signing away large percentages to record labels, then great. But as the competition online gets thicker and the money coming in gets thinner, the examples of bands that will be able to do that are few and far between. Artists today have to do much of the initial heavy lifting: only by developing a following, releasing their own first records, cultivating an online

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[238] LeBlanc and Taylor, *supra* note 149.
[239] Sloan, *supra* note 215.

presence with online sales, will acts be able to gain any attention from labels or others in terms of an investment. Labels are investing less and less in A&R and career development, and this is putting more responsibility on artists to develop things themselves. Gone are the days when an act would be signed before they played their first live show. In its place are the days when an act must prove it can sell, prove it will continue to sell into the future, and then be prepared to negotiate down the amount the label will take from all sources of revenue that the band has nurtured up to that point.

It is at this negotiation stage that the definition of "deepened commitment" from the label will be ascertained. As we have examined, if the 360 contract is negotiated effectively, it can create a relationship that benefits from convergence, is less reliant upon short-term success, and profits from the synergy that record labels can bring through their industry connections. If giving up ancillary revenues results in a greater share of record royalties or more ownership in the underlying copyrights, and labels show ability in the fields they are getting into, then perhaps a mutually beneficial balance can be struck with a 360, where the "deepened commitment" on both sides creates results that exceed what might be achieved under a non-360 deal. Canadian band Pilot Speed and Americans Paramore are success stories base on this model.

If negotiated poorly, the 360 can create a situation where the artist is being taxed without representation, the label shows no expertise in the areas in which they are getting involved, and there exists conflicts of interest on various levels. Essentially, the artist will be giving a great deal more while receiving nothing more in return.

Now that we have thoroughly examined the industry phenomenon that is the 360 deal, we must now analyze the effect these agreements will have on copyright law, the artist/label relationship, and the music industry in general.

CHAPTER 4
IMPLICATIONS OF 360S ON COPYRIGHT AND THE ARTIST/LABEL RELATIONSHIP

Now that we have thoroughly studied the artist/label relationship and the emerging 360 model that has taken hold in the industry, we will now turn our focus to the implications these changes have on the players in the music industry, and what the future holds for artists and labels.

A good framework for this analysis is a recent article by industry analyst/consultant Michael Einhorn regarding the future of the music business, in which he makes the following predictions:[240]

> 1. The center of the music industry will move from the sale of the compact disc/digital track to the integrated promotion of the entire recording act;
> 2. Labels will more equitably share in revenues from concerts, merchandise, and publishing, while artists will receive a greater share of label earnings;
> 3. Labels will continue to reduce A&R, marketing, and administration costs by picking up successful acts from independent labels and self-promoting artists; and
> 4. Recording artists and labels will tap new revenue streams, such as online advertising and brand sponsorship.

We will now examine all four predictions in light of our findings thus far, and investigate how they will affect the artist/label relationship, and the way in which the two parties will continue to make money in the music industry should the predictions be accurate.

1.0 Centre of Music Industry is No Longer the CD

While record deals used to focus strictly on ownership in the intellectual property in the songs created, they are now moving beyond that – out of necessity. As we have seen, digital technologies are disrupting the 'three-income business model' in the record industry, as consumers no longer have to pay for recorded music.

The music industry is therefore turning its focus away from the sale of recorded music (albeit slowly), and placing new emphasis on the other streams. In other words, the intellectual property that exists in the CD itself now has lessened value. While sales of CDs are on decline, the medium is not dead quite yet, and in fact may never die altogether. As we examined earlier, physical sales still make up 80% or more of revenue in the music industry, but this is clearly on a downward slide.[241]

In this writer's opinion, physical sales of compact disks will eventually go the way of vinyl, appealing to a specific niche of consumers that wish to have something physical in their hands, for the artwork, the disk, and the associated experience. CD sales at concerts will continue to appeal to those who want to 'take home' the live experience.

For the remaining majority of consumers, the cost benefits of peer-traded music, and the convenience of purchased digital music, will replace the relatively cumbersome and expensive nature of CDs. The CD will shift from being the centre of the music industry to being more of a promotional tool, sold or given away at concerts.

So what does this mean for the rights we have examined under the *Copyright Act*? Is the demise of the CD equated with the demise in value of copyright in the music industry?

The question must be answered in the negative. The shift away from the CD does not mean that the underlying copyrights that exist in sound recordings and musical works

[240] Einhorn, *supra* note 59, at 701.
[241] Most recent stats from Nielsen show 2008 album sales down a whopping 10% in Canada from 2007. See: "AC Nielsen '08 music industry report," *FYI Music News* Jan. 9. 2009 < http://fyimusic.ca/industry-news/ac-nielsen-08-music-industry-report>.

are no longer valuable. On the contrary – the intellectual property remains incredibly valuable, just in a different manner: it now generates revenue from far more sources, yet at relatively lower levels from each source. While artists in the traditional model made most of their money off of CD sales, which involved the sound recording copyright (and was even better if the artist wrote the song, and held the musical work copyright); artists in the current record industry see revenue from a wide range of fragmented sources, most of which flow back to the *writer* of the song.

Thus it seems the musical work copyright is more valuable in a digital world, as record sales continue to slide but overall *use* of music (in film, TV, radio, commercials, video games, cell phones, etc.) continues to rise. Artists who do not write their own material will find it very difficult to make a living, unless they are at the superstar level of Britney Spears or Celine Dion, where record sales are so high that the revenues generated from record sales (and the sound recording copyright) are ample, and it allows them to tour as a result. But megastars of this magnitude are a rare breed. In today's fragmented music industry, artists that do not write their own material will increasingly find it difficult to make a living, as the most reliable revenue streams are from publishing, licensing, synching, and the like.

On the other hand, writers who are not performing artists will not be able to capitalize on the cash cow that is touring. These artists will have to focus on getting the songs they write used in commercials, synched to film and television, and recorded by others.

Regarding the sound recording copyright, what we will see more and more of is artists recording their own masters, then licensing rather than assigning the sound recording copyright to a record label. Artists in this scenario must pay the costs of recording, but the label takes on the expense of pressing and promotion. If the artist has developed a significant following and buzz on and offline, they may release their material directly to the public if they own their own masters. In this case, the artist becomes the de facto record label, and would likely sign a distribution deal with a third party distributor which would pay a wholesale price of $7.00-$9.00 per CD sold. Out of that, the artist would have to pay all costs of pressing, marketing and promotion. Retaining ownership in the master recordings gives artists more creative control and contractual freedom down the road, and grants them the right to exploit the recordings as they see fit should licensing or synching opportunities arise.

1.1 Abandon CD to Save Music Industry?

According to technology research and advisory firm Gartner Research, not only is it beneficial to shift the collective focus of the industry away from the CD; it is imperative. The firm's research suggests that the music industry must move away from the retail CD as its primary revenue generator before Christmas 2009, as the reliance on revenue from the sale of prerecorded CDs is hindering the music industry from fully embracing online distribution opportunities. "By propping up the CD business, rather than fully investing in online distribution alternatives, the major labels and the larger music industry have neither succeeded in stamping out piracy nor done much to recreate the business models of the old 'record business,'" said Mike McGuire, research vice president at Gartner. "Music labels should instead emphasize 'digital first,' making all new releases and catalog issues via digital services and moving CDs to an on-demand publishing mode"[242].

From an artist perspective, this aligns with the trends we have examined thus far. In Chapter 2 we looked at the five functions traditionally performed by record labels, and found that technology has made recording high quality productions much more affordable. If the CD were abandoned altogether, that would eliminate the costs of manufacturing and distribution, leaving only promotion and perhaps management in the hands of outside parties. In other words, the major label system has been based on the CD (or cassette or vinyl that came before), and that has put artists in a position of reliance. Without the need for a physical carrier for the music created, the entire distribution and manufacture chain is eliminated, resulting in a decreased reliance of artists on labels. All an artist needs in an all-MP3 world is an effective promoter and a connected, trustworthy manager, who may be the same person. Without product in shelves and in people's faces, the importance of good promotion cannot be overstated.

2.0 Labels Share in Other Revenues, Artists Receive Greater Share in Earnings

As we examined in Chapter Three, the music industry can be broadly divided into three main arms in terms of the revenue it generates: 1) selling recorded music; 2) broadcasting recorded music; and 3) charging to see live music.[243]

As sales from recorded music go down, record labels are looking to the second and third arms to recoup their investment in their recording artists. They are doing this via the 360 deal, which we thoroughly scrutinized in the previous chapter. Chris Taylor suggests that labels are first looking to merchandise revenues, followed by concert

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[242] Gartner Media Press Release, "Gartner Says 2008 Should Be the Last Christmas for Retail CDs," *Gartner Media* Dec. 22, 2008 < http://www.gartner.com/it/page.jsp?id=844812>.

income, followed by whatever other revenue streams they might be able to participate in.[244]

At the heart of the 360 is the assumption that the intellectual property (the record) is the basis for – and generator of – all other forms of revenue (touring, merchandise, licensing, etc.). Further, it is assumed that because the label puts up money to make the intellectual property possible, they are therefore entitled to a percentage of the ancillary revenue streams.

However, after our in-depth analysis herein, one must question the validity of this line of thinking. Now more than ever, artists are taking on more of the five functions, while labels are generally investing less while performing fewer functions. More and more artists are going to labels with completed, professional sounding albums, with only the label's promotional muscle and distribution chain (for the next five years or less) needed.

Thus the real answer to whether artists need labels is this: the less they need labels, the less they will have to give up. In today's digital world, artists only need labels for the things they cannot do themselves. According to Haydean Neale, lead singer of Canadian soul/R&B group JackSoul: "Every question you can't answer on your own costs you money. What are we going to wear for the shoot? The label hires stylist. What are we going to do with this chorus melody? Label hires a co-writer. What are we going to have on the album cover? Label hires a designer"[245].

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[243] For our purposes, we will assume that licensing music to be used in film or with a product shall be lumped in to the second arm of 'broadcasting' recorded music.
[244] LeBlanc and Taylor, *supra* note 149.
[245] The New Indie, *supra* note 140.

The Internet empowers artists, but if they fail to take initiative, it can be disempowering, as they will need more label support to get heard above the barrage of acts online, and the label will demand much in exchange. The days of artists focusing only on creative pursuits while they hire others to focus on everything else are long gone. Now every artist must be a marketer, accountant, lawyer, tour manager, and publicist, all at once. Labels are less likely to provide all these services to an act, and if they do, it will cost the act dearly in the 360.

Further, artists must question the value of what record labels are offering. Most 360 deals boast an increased royalty percentage going to artists from each record sold. While this can be valuable now, what value will it have in five years? What good is an increased share in a revenue stream that is plummeting each year? The labels are finally giving a fairer portion to artists, simply because the value of record royalties is losing its currency. It is akin to Bre-X giving investors a deal on their share price, just after the first suspicious reports began to emerge. In the record business, the writing is on the wall that it is just a matter of time before CD sales are a minor part of the music industry.

2.1 Artist Recommendations for 360s

Artists instead should push for the following when negotiating a 360:[246]

- "Passive Participation" from the record label: Many 360s have the label wanting to act as business manager and collect the touring income, and in some cases hire the artist's tour manager. Artists must try to limit the label to passive participation, so that the artist collects the money and then remits to the label what they owe, as opposed to vice versa.

[246] Mitsopulos, *supra* note 36.

- Minimize “Cross-collateralization”: Artists must ensure that all the different income streams that are being generated under the 360 are kept separate and not cross-collateralized. This means, for example, that the label should not be using publishing income to recoup record label advances and expenditures.
- Publishing: If an artist decides to do a publishing deal with a label, the label should be offering a cash advance for the rights they are seeking. According to Chris Taylor, publishing is the one thing that there is some wiggle room on in negotiations: “Some times you can have publishing excluded and other times you can’t. Sometimes they want a matching right”[247].
- Specific Rights Enumerated: In most traditional record contracts, artists would waive any and all rights that they may have in the songs created. In today’s market of fragmented revenues, artists should demand that all the specific rights that exist under the *Copyright Act* be enumerated in the contract. Who owns the rights should also be made clear.
- Touring: Label participation in touring revenue should not commence until the artist is playing large venues or running profitable legs for X months at a time. Artists may want a solid guaranteed tour support budget before allowing the record label to participate in this income stream. These amounts should reduce per album cycle, and obviously the less the artist pays, and the shorter the term, the better. Percentages can be calculated on “net” or “gross”, and the more deductions that can be defined as “net” (booking agency fees, crew fees, opening acts, sound and lights, etc.), the better off the artist will be.

[247] LeBlanc and Taylor, *supra* note 149.

- Merchandise: While it might be best for artists to keep 100% of the merchandise revenue, often that is not possible. A best-case scenario is where the label gets no merchandising but has a "matching right". This means that the artist can go out and shop around for the best deal on merchandise, but must come back to the label and give them a chance to make a better deal than what the artist has found from competitors. An artist will also want full creative approval over all merchandise designs and limit the percentage of net profits that are being paid to the label, ensuring that these amount reduce with each album cycle.
- Endorsements: The above principle also applies to endorsement deals. The artist should have approval over which company they choose to endorse, and how much they are paid.

3.0 Labels Reduce Spending Overall, Artists and Indie Labels Nurture Careers

As we have examined throughout this thesis, record labels are drastically cutting spending on the five functions that they have traditionally provided, putting more onus on artists to perform these tasks on their own.

One of the largest cuts has been to A&R, or the discovery and nurturing of new talent. To compensate for the uncertainty and decreased revenues that they are now facing, the majors have cut investment in the discovery and development of artists. Instead, they are simply relying on indie labels to find and develop talent, and then coming in at the requisite time to inject capital and expertise to expose the most promising acts to the masses. They are doing the same with bands that are not signed to any label, but who generate a buzz on their own via self-promotion.

As we have seen already, it is increasingly difficult for the major labels to control the retail channel and drive huge hit-record successes like they did in the past.[248] As such, the majors can no longer sustain a scenario in which 10% of records sell millions of units and supports the records that do not sell at all. Further, the majors are desperately trying to lower their break-even points, so that records do not need to sell 250,000 copies to turn a profit. As one label head suggested: "our batting average has to go up"[249].

The result is that the major labels are investing less, while demanding more from artists as their margins dissolve, via the 360. They are signing fewer artists and releasing fewer records, as the stakes for each release have been raised as a result of the current music climate.

Further, the *type* of artist being signed may be changing as well: while labels used to invest in unique, one-of-a-kind acts, now they want insurance – a guaranteed sell – before they sign. However, one must question if this approach is working – or if it in fact perpetuates the problem of declining interest in major label releases. Perhaps it is the major's failure to release acts that are truly different that is one of the major causes of decreasing interest in purchasing music. Maybe if they started taking some chances on unique acts the public would take more notice. This is a topic for extensive research outside of our work here.

For now, what can be said is that the majors are relying on indie labels to discover and nurture new talent, especially new talent that is deemed too unique and therefore risky. The organizational structure of indie labels has allowed them to maneuver through these tumultuous times more successfully, as they are much smaller business entities with

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[248] For more on this, see 'The Britney Effect' by Kurt Dahl. Available by request via email to: kurt_dahl@hotmail.com.

lower overhead, less investment required in each act, and typically no need to meet quarterly shareholder expectations. The break-even point of an indie artist is drastically lower than a major label act. Further, the percentage of acts that result in losses for the label is much lower than the 90% figure associated with the majors. In other words, the organizations that promise to have the most likelihood of success in the new music industry are the smaller, independent ones.

The most recent statistics from *Nielsen Soundscan* reflect this idea. While the major retailers such as Wal-Mart, Best Buy, and the major music chains have all experienced consistent losses in sales over the past several years shelving major releases only, independent record stores have seen relatively steady sales figures year-to-year, even seeing an increase of 1% in album sales from 2006 to 2007.[250] On another level, Indie acts won 50% of last year's Grammy awards, the largest Indie showing to date.[251]

3.1 Size Does Matter

The relative success of indie labels vis-à-vis the majors is reflective of a more profound shift in the music business: the bands, producers, managers, agents, and labels that will find success in the new model will be able to record, release, and promote music at lower price points than was done previously.

For the first time in decades, artists who have built loyal, mid-size followings will be able to carve out a more sustainable living. Chris Taylor suggests that these more

[249] Arrington, *supra* note 153.
[250] Solters, Larry, "2008 U.S. Music Purchases Exceed 1.5 Billion; Growth in Overall Music Purchases Exceeds 10%" *Business Wire* Dec. 31, 2008 <http://www.businesswire.com/portal/site/home/permalink/?ndmViewId=news_view&newsId=20081231005304&newsLang=en>.
[251] Press Release: American Assocation of Independent Music, "Independent Artists and Labels Win 56 Prizes at This Year's Grammy Awards," February 10. 2009 <http://www.a2im.org/newsDetail.aspx?newsID=207>.

niche-type artists will continue to find greater levels of success than they did throughout the past few decades:[252]

> We have seen the rise of mid-level type artists like Alexisonfire, and Bedouin Soundclash – groups that can cobble together an international touring career. They can make enough money to earn a decent living, buy a house and have enough money to afford lawyers to help them. These days they can also make the record they want to make on their own terms because the gate keeping for that kind of artist has been removed to a large degree. With so many artists sustaining themselves on that mid-level then that becomes a realistic goal, something that is achievable. Whereas before you had a day job as you were building your career. It either exploded or you worked at Steve's Music for the rest of your life and taught guitar.

This type of artist – or label, agent, manager, etc. – will be able to change with the times, operating with a smaller infrastructure and overhead. They will be able to adapt with a quick email or phone call rather than a series of board meetings and administrative hurdles. As we saw in Chapter 2 – the producers that will find success will be able to record albums in their apartment on a laptop, while artists that can record, distribute and promote themselves for less will be more likely to survive. Major acts will be built in more of an indie manner than in previous decades. According to Craig Kallman, Chairman and CEO of Atlantic Records:

> The business has gotten so much more complex. It is now harder to create that perfect storm of radio plus video – that sort of combustible dramatic moment coalescing all of the forces. You now really have to aggregate lots of important threads that you are weaving together to build the story. Radio, of course, is still of paramount importance but film and TV placement syncs have become important. Obviously, a mobile strategy is important. Your digital strategy. Your viral strategy. Video is still

[252] LeBlanc and Taylor, *supra* note 149.

important but the video is both online and through terrestrial and cable. And still the fundamentals are still important as well. Touring and so on.

The aggregate of a vast number of relatively small promotion techniques is the new model in which artists will find success. The trend is clear: smaller *everything* is the future of the music business.

3.2 Majors Focus on Marketing

As record labels deal with decreased revenues across the board, they will continue to reduce spending on the five functions we examined earlier. More specifically, as digital downloading becomes the preferred method of music distribution, the majors will have to focus their intermediary services on marketing and promotion. As we have seen, artists and their representatives are increasingly handling recording, manufacturing, distribution and management, as these functions have become much more affordable as a result of technology and the Internet.[253]

However, the price tag of effective promotion remains high. In fact, the two trends are linked to a degree. Because any act can record and distribute their music online with relative ease, this makes competent promotion all the more crucial.

In this setting, it makes sense that the capital-rich, connection-heavy major labels will focus their business models on what they have done best from the start: promotion. They will be able to cut costs by passing the functions of recording, manufacturing and distribution to the artist, while leaving management functions to be contracted between artists and management companies. When these steps have all been taken and a record with potential enters their radar, the major labels will press the button and turn the promotion machine on. The price they charge for this service will depend on the amount of self-promotion that has been done by the artist, and the potential sales the particular release promises to garner.

What will keep a check on the amount that the majors are able to charge for this service is the knowledge that they will not be the only potential providers on the market. Emerging players threaten to compete with what has been an oligopoly for decades.

In the past, the labels were the most dominant provider of promotion, because they owned the distribution channel that all material had to flow through, and possessed the capital and the connections to get product through and in the eyes and ears of consumers. Now that the bottleneck is broken, it is time for new players to emerge in promotion. Bruce Allen suggests that, "it's easier for us to back into their business than it is for them to back into our business"[254]. In other words, while record labels used to be the only hope for an act to reach the masses, in today's industry, an artist with an effective team of managers, publicists, and investors may be able to reach the masses without the guidance of a major label.

Einhorn agrees, and suggests that new agents will emerge in the music industry, to "develop and revise hierarchies and techniques for analyzing recorded music, plumbing consumer tastes, and presenting new information to cut through the fog created by an abundance of releases."[255] While these agents are not likely to replace the major labels altogether, they will definitely work with them and overhaul the way the majors do business, helping them observe grassroots tastes and extract otherwise useful data on existing market trends.

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[253] The functions of managers, meanwhile, are required to link the whole process together seamlessly.
[254] LeBlanc and Feldman, *supra* note 202.
[255] Einhorn, *supra* note 59, at 712.

The million-dollar question in today's industry is how to break a new act, and there truly is no single answer. A combination of smart online promotion, touring, blogging, licensing, and most importantly, good material is a starting point. The bottom line is that record labels are no longer there to bankroll the entire process, so the 21st century musician must be as smart and business-minded as they are creative.

3.3 P&D Deals

Another consequence of decreased label spending will be more pressing and distribution deals being signed with artists. So-called 'enhanced P&D deals' involve the label providing more services to the artist the more the artist agrees to pay.

In many ways, the P&D deal is the exact opposite of the promotion-only approach discussed above. Here, the label agrees to cover the costs of pressing and distribution, while the artist is left with the costs of promotion. What the two approaches have in common is that labels are no longer performing all the functions they did in the traditional model.

The P&D deal is best suited for bands that have an established following, and an established connection with that fan base. A band that comes to mind would be The Dave Matthews Band, who could likely contact their core group of fans with relevant information regarding an upcoming release or tour without the need of a major marketing campaign. In exchange for paying recording and promotion costs out of pocket, the Dave Matthews Band would own the masters to their recordings and have control of how their fans are reached under a P&D deal. In other words, they would not find themselves at the whim of record label priorities with other acts when it comes to marketing their record.

However, the key here is that the artist has built enough of a presence that fans know who they are, and know when new material or a new tour is being announced. There must be a strong and intimate connection with fans in place in order for the P&D deal to be effective. To make this initial connection, the artist must self-market and build up a substantial following before any outside parties will take interest in them.

3.4 'The Straddle'

As labels continue to decrease spending and artists take on more responsibility in developing their own careers, the ability to balance online and offline development becomes vitally important. A term that has gained attention online recently is an artists' ability to 'straddle', or divide their marketing efforts between the online and offline worlds.[256] The idea is that only the musicians who leverage the fan base they build online in order to grow their offline presence (and vice versa) will be successful.

In a digital world, it is easy for artists to forgo what is really important: building real connections via playing live and writing better songs. Online promotional tools such as Facebook, Myspace, ReverbNation, Sonicbids, etc. are so easy and quick that they give the illusion of progress and accomplishment to artists. However, this progress can be misleading. If artists emphasize their online presence and forget about their real-world presence, or vice versa, they will not be able to take their careers to the next level.

An example of this dichotomy is a comparison of Facebook and Myspace, two social networking sites. While Facebook helps people and artists do the straddle, MySpace is an online-only experience. Facebook works because it allows users to enhance and augment their offline experiences, as they can post photos of things they do

[256] Howard, George, "Coin a Phrase: The Straddle," *9GiantSteps Blog* Oct. 17, 2008 <http://www.9giantsteps.com/?p=974>.

with your friends, write on friend's walls regarding offline experiences, create events occurring in the offline world, etc. On the other hand, MySpace has nothing to do with one's offline life; it's only related to user's online life. The result is that Facebook has become one of the world's most used websites, while Myspace has quickly become outdated.

4.0 New Revenue Streams Tapped by Artists/Labels

4.1 Formula for Success

At the recent Midem Technology and Music Conference in Cannes, France, a presentation was given by tech blogger Michael Masnick regarding the business model that Nine Inch Nails leader Trent Reznor has adopted with much success in the last few years. The core of the presentation is the following simple "formula" that is the basis for making money in the music business (and perhaps any business) in the digital era:[257]

Connect With Fans (CwF) + Reason To Buy (RtB) = Business Model ($$$$)

According to Masnick, there are many artists at all levels of success who have been making use of this formula – knowingly or not – to create successful strategies for building a stronger fan base, funding new works of art, distributing to the community, and most importantly, getting paid for it all. Trent Reznor specifically has done it so many times in so many different ways that he represents a great example of how artists can approach this simple formula in an infinite variety of creative ways.

One of the issues Masnick encounters in discussing recording industry business models is that artists and related parties often make excuses for why each model will not work. "You hear 'Well, that guy can make money selling t-shirts, but this guy's fans

[257] Masnick, Michael, "Trent Reznor And The Formula For Future Music Business Models," *Techdirt Blog* Feb. 5, 2009 < http://www.techdirt.com/articles/20090201/1408273588.shtml>.

aren't t-shirt types.' 'That guy will sell concert tickets, but this guy doesn't like to perform.' 'Maybe some fans will pay upfront, but people are so greedy that most will just free-ride.' It's all excuses. They all want a simple model that everyone can follow, but the point here is that while the model itself is simple, executing on any business model is difficult"[258].

Thus the key for artists (as well as labels, managers, etc.) is to apply this simple model in a variety of different creative ways. Each must play to their respective strengths. For example: A band like Rush has built a connection with fans over years of consistent touring, focusing on long, virtuosic songs, and intricate songwriting. If they released an album that was blatantly aimed at the Top 40 demographic, they would lose the connection with fans (CwF) that they have built up over four decades, and would quickly find that their fans would no longer have a reason to buy (Rtb). Their business model would suffer accordingly.

Further, acts that write but do not tour must focus on connecting with fans (and with corporate buyers) via film, television, and sponsorship deals, while performers who do not write must connect (and collect) on the road and in the studio. Nine Inch Nails marketed their last two albums (*Ghosts I-IV* and *The Slip*) by giving away their music for free under a Creative Commons license, then selling different versions of the same content: fans could download the first nine tracks of *Ghosts* for free, but could also purchase a $5 download of the whole album, a $10 2 CD set, a $75 DVD box set, or a limited edition $300 ultra-deluxe box set signed and numbered by Trent Reznor himself. Here the connection with fans (CwF) has been developed throughout the twenty-five years the band has been giving the middle finger to the status quo (which is accentuated

[258] *Ibid*.

with this free song offer), while the reason to buy (Rtb) is offering fans the music, with something extra added in. The band does not offer the music by itself, but with something else, be it special packaging or a limited edition signature.

Radiohead did something similar with their last album *In Rainbows*. They gave away something desirable (the entire album) and then got the right to make contact with the fans thereafter via email. At a recent industry conference (MIDEM), Brian Message, the co-manager of Radiohead, said the *In Rainbows* release allowed the band to collect 3 million e-mail addresses, and ultimately play to 60,000 in San Francisco as opposed to 25,000 the previous time through.[259] According to Message: "Radiohead, for want of a better word, is a trusted brand. Once you drive that trust, you have a big opportunity"[260].

A big hurdle for artists and labels lies in understanding that Reason to Buy (RtB) is a voluntary transaction. Musicians and labels need to move away from the thinking that there is some sort of *obligation* to buy on behalf of consumers. Artists can easily put their product on the market with a price tag, yet most fail to effectively convince fans why they should buy. Then some artists lash out at their fans for hurting them by downloading their material for free.

The fault, however, lies with the musician and/or label that failed to give a proper reason to buy, and falsely assumed that fans had some sort of obligation to buy. If an artist believes there is an inherent obligation to buy, fans will often educate the artist very quickly of the contrary.

Artists in today's music market that do not want to make the effort to connect with fans (CwF) better write truly exceptional songs that sell on their own, or there will

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[259] Paine, Andre, "MIDEM Gets Message on Radiohead Experiment," *Billboard.biz* Jan. 19, 2009 <http://www.billboard.biz/bbbiz/content_display/industry/e3i895f97f5ddfbe6556fbf83e6fb42598d>.

simply be no business model to profit from. There are tremendous opportunities allowed by new technologies, new communities and new methods of communicating today. All enable artists to make connecting with fans that much easier.

The lesson to be drawn from the Reznor and Radiohead examples is that artists can get permission to contact people by offering them something, then can use this connection to make money, so long as the relationship is not abused (for example, by spamming), and the artist continues to deliver the information and goods that fans desire.

In today's digital world, this connection is more important than radio, and more important than physical retail. The biggest priority for any band is their relationship with their fan. Fans will buy the $100 deluxe package, and fans will pay that or more to come to see the band live.

4.2 Where Will Artists & Labels Make Money?

In the same article, Einhorn suggests that three main channels of revenue will be crucial to the music industry in the coming years: i) digital services; ii) concerts; and iii) advertising.[261]

He suggests that – faced with difficulties in retail and broadcast radio – labels and independent marketers of music must now look to new retail platforms and information channels to get the word out to diverse and empowered fans. This is in line with what we examined in Chapter Two, regarding the dissolution of the traditional marketing and distribution chains in today's digital market.

Also in line with our analysis here is Einhorn's prediction that a wide variety of new commercial instruments will arise to provide opportunities for promoters and

[260] *Ibid*.
[261] Einhorn, *supra* note 59.

financiers to introduce new bands and profit from successful acts. We will now examine how these parties, as well as the artists involved, will be able to profit in the new model.

4.2.1 Digital Services

In the past five years, new digital services such as Apple, Sony, Napster, RealNetworks, Wal-Mart, Microsoft and Virgin have begun to sell downloads or streaming subscriptions to online buyers. Although this market has seen tremendous growth that will no doubt continue, it will present confounding problems to major labels that have historically depended on the sale of bundled tracks through a CD price of $10 to $18. Now that individual tracks are selling at a smaller amount (usually 99 cents), digital services will have a mixed effect upon label finances and present interfaces that new players may exploit.

As a matter of economics, the online market is vigorously price-competitive. In search of new listeners, all services now allow users to sample songs, purchase downloads, transfer tracks to portable devices, and exchange personal recommendations with friends. The general market price of 99 cents per download is roughly equal to the related cost of licensing, bandwidth, credit card services, and administration that music services must pay to content owners, transport providers, and administrators.[262] In other words, both labels and artists do not stand to make nearly as much money in digital sales as they did in the traditional CD, cassette, and LP worlds. While some have hailed digital sales as the new savior of the troubled music industry, the numbers unfortunately do not endorse this.[263]

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[262] Einhorn, *supra* note 59, at 710.
[263] One example from the 2008 US Nielsen Soundscan data is this: while digital album sales went up from 50 to 66 millions units, physical album sales dropped to 535 from 585 million units. For more see:

Regardless of whether digital sales revenue will ever come close to matching the revenues once made on CD sales, one thing is certain: artists still stand to gain much from keeping their digital rights when negotiating with labels. For many acts, one of the consistent cheques coming in every month is their iTunes cheque. According to Radiohead leader Thom Yorke: "Don't sign a huge record contract that strips you of all your digital rights, so that when you do sell something on iTunes you get absolutely zero. That would be the first priority"[264].

4.2.2 Concerts/Merchandise

The most recent data reflects the idea that concert revenues are dwarfing record sales. *Billboard* magazine recently listed the top money earners in the music industry, taking into account record sales, digital sales, and concert revenues. What the report makes clear is that touring is driving the music industry, not record sales. Only one of the top 20 acts had a Top 10 record in 2008 (Coldplay), while the top earner – Madonna – had only the 50th best selling album of the year.[265] Further, many of the acts on the list – #2 Bon Jovi, #4 The Police, #5 Celine Dion – did not release albums at all. For almost all the top earners, touring generated a majority of their revenue, with digital sales, ringtones, licensing, and publishing rounding out the figures.

According to Rob Levine, *Billboard's* executive director: "People call the music business the record business. Touring revenue drives the train here. For artists, recorded

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http://www.businesswire.com/portal/site/home/permalink/?ndmViewId=news_view&newsId=20081231005304&newsLang=en.

[264] Wired Staff, "David Byrne and Thom Yorke on the Real Value of Music," *Wired* Dec. 18, 2007 <http://www.wired.com/entertainment/music/magazine/16-01/ff_yorke?currentPage=all>.

[265] Waddell, Ray, "Madonna Tops 2009 Music Money Makers List," *Billboard.com* Feb. 12, 2009 < http://www.billboard.com/bbcom/news/madonna-tops-2009-music-money-makers-list-1003940730.story?pn=1>.

music sales have almost become extra income"[266]. Put another way by Bob Lefsetz: "Today an album is just an element in the overall marketing plan. It sets up the spectacular tour! The key is to have enough hits, enough familiar tracks, which may not even be owned by the public, to get people to go to the show"[267].

So while live music used to be the poor cousin of recorded music, the tables clearly have turned. This is because the experience of attending a live show – the excitement, the sweat, the smells – cannot be duplicated digitally. As such, artists and their handlers are recouping losses from music sales in the arena. As such, concert ticket prices will continue to rise as long as consumers continue to pay them.

The question is: is this huge touring revenue only for the established megastars? The answer is yes and no. While developing acts will continue to tour for little or no profit (in fact, often at a loss), once they achieve mid-level success and are playing to 1000+ audiences, the money from touring can be enough to live on, when combined with revenues from licensing, publishing, etc. Artists like Joel Plaskett and Arcade Fire rarely crack the mainstream radio or album charts, yet because of their faithful and sizeable followings, are able to make a decent living off of touring and merchandise.

4.2.3 Advertising, Licensing, Publishing

The third revenue stream that Einhorn suggests will be crucial in the coming years in the music industry is advertising: "Advertising now has great potential for monetizing investments in new musical releases and existing acts…The potential connection of

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[266] Hasselback, Drew, "Madonna tops 2008 moneymaker list with successful concert tour," *National Post* Feb. 14, 2009 < http://network.nationalpost.com/np/blogs/fpposted/archive/2009/02/14/madonna-bon-jovi-bruce-springsteen-the-police-and-celine-dion-top-billboard-s-annual-list-of-music-moneymakers.aspx>.

[267] Lefsetz, Bob, "Do You Need to Own the Record?" *The Lefsetz Letter* Jan. 7, 2009 < http://lefsetz.com/wordpress/index.php/archives/2009/01/07/do-you-need-to-own-the-record/>.

online advertising and music is considerable"[268]. In addition to these streams are licensing and sponsorship deals.[269]

In the coming years, more artists will adopt an approach similar to that taken by Moby with his 1999 release *Play,* the first album ever to have all of its tracks licensed for use in movies, television shows, commercials, and online. One of the more notable commercials featured golfer Tiger Woods playing a round of golf around New York City to the tune of "Find My Baby". According to *Wired* magazine, the songs on *Play* "have been sold hundreds of times... a licensing venture so staggeringly lucrative that the album was a financial success months before it reached its multi-platinum sales total"[270].

'Music futurist' David Kusek agrees: "our hunch is that as much as 50 or 60 percent of the future revenues will come from selling other products and services, and from advertising, sponsorship, and marketing tie-ins. The music itself may often only be the default ingredient in the mix, rather than the sole purpose of the transaction"[271]. According to Kusek: "exposure begets discovery, begets income"[272].

While music in the 60s, 70s, and 80s was an end in itself, the reality of today's music climate – for good or bad – is that the actual songs may only be one aspect of the overall 'band as brand' approach. There will be exceptions, where the songs are so good that they sell on their own terms, but generally what we see is a trend towards tying the songs in with various products, television shows, and film.

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[268] Einhorn, *supra* note 59, at 715.
[269] I have also included Publishing here, as it is an often overlooked revenue stream that fits in here.
[270] Smith, Ethan, "Organization Moby," *Wired* May 2002 <http://www.wired.com/wired/archive/10.05/moby.html>.
[271] Kusek, *supra* note 3, at 31.
[272] Kusek, *supra* note 3, at 105.

Licensing of music for film, television, and products is now bigger than ever, to the point where a successful music supervisor[273] can be as sought-after (or more) than a successful A&R person.[274] Artists are realizing that while an A&R person can shop them to record labels which *may* yield results and royalties in several years time, a music supervisor or licenser can secure them a song placement and a lump sum payment within months. A song placement in a video game, for example, can earn artists anywhere from $3,000 to $100,000, depending on the game and the level of artist.[275] In this way, licensing of music is becoming an alternative to radio, TV, and other 'old-school' marketing techniques in terms of exposing acts to the masses. Also, licensing revenues are one part of our system of copyright that has not been ravaged by digital distribution.

Along with licensing, David Kusek predicts that publishing "will likely be a digital cash cow for artists and writers" in the coming years, so long as technology develops to make more accurate tracking of what is being played.[276] Again, we see that the musical work copyright promises to be more and more lucrative in the future. Once a song is copyrighted and then published, revenue comes from the four main sources we examined in Chapter 2: i) Performance Royalties; ii) Mechanical Royalties; iii) Synchronization Royalties; and iv) Miscellaneous Revenues. While mechanical royalties generated from sales of music may decline with the decline in physical sales of music, the other three sources still offer much potential for revenue generation.

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[273] The individual who picks songs to be placed on a movie soundtrack or television episode, or to be linked to a product.
[274] Pareles, Jon, "Songs from the Heart of a Marketing Plan," *New York Times* Dec. 24, 2008 <http://www.nytimes.com/2008/12/28/arts/music/28pareles.html?pagewanted=1>.
[275] Lenny, *supra* note 90.
[276] Kusek, *supra* note 3, at 120.

5.0 Chapter 4 Conclusion

Chapter Four has examined four major shifts that analyst Michael Einhorn has predicted will occur in the coming years in the music industry. In particular, we set out to determine two things: a) how these shifts might affect the artist/label relationship; and b) how both parties will continue to make money if these shifts are indeed occurring.

5.1 How will predictions affect the artist/label relationship?

Firstly, as we see the industry focus less on the CD and more on ancillary revenues, there will be a corresponding demand from labels for artists to tour, and tour effectively. A look at the increase in concert ticket prices over the past few years is a clear indicator in how these margins will be made up.[277]

If artists are not able to generate much revenue on the road, their next option will be the other ancillary revenues that we have examined here, namely licensing, advertising, publishing, and digital sales. While the music industry will no doubt still be based on hit records, the need for massive chart-toppers has waned in this new model. Bands with loyal live followings will continue to find success and be in demand for record labels. Artists such as Phish, Rush, Widespread Panic, and Arcade Fire all have substantial concert draws, yet rarely grace the Top 40 charts. These are the types of acts that will continue to carve out successful careers in the 21st century, and continue to be pursued by record labels and other investors.

Second, recording artists will start owning more and more of their master recordings, and will be given a larger percentage of record sale royalties from record

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[277] For more on analyst predictions for the Ticketmaster/Live Nation merger and its effects on concert-goers, see: Hypebot Staff, "6 Predictions for Live Nation Ticketmaster," *Hypebot.com* Feb. 11, 2009 <http://www.hypebot.com/hypebot/2009/02/6-predictions-for-the-live-nation-ticketmaster-merger.html>.

labels. As we have seen here, these percentage points may not have as much market value in five to ten years, but they will allow for an artist to exert more control over their recording catalogue and how their songs are used. This signals a shift in control to artists over their recording legacy, which translates into more control over their careers in general.

Third, as labels continue to decrease spending – on A&R, career nurturing, promotion, etc. – effective promotion and self-management by artists will become more and more crucial for success. Artists will continue to take on more responsibilities, including: registering their songs with a collective (e.g. SOCAN), getting the songs published, sending them to radio, getting them on iTunes, booking shows and arranging tours, contacting media personalities & arranging interviews, keeping track of all expenditures & revenues, filing taxes, applying for grants, collecting and managing email addresses, documenting happenings on video, posting them online, filming music videos, maintaining a blog, creating and managing a website, negotiating contracts (live, licensing, recording, between members, with manager, agent, etc.), registering as a business, creating artwork for albums, having albums pressed, etc. Most importantly – after all this is done – finding time to write and record exceptional material. Artists that successfully do all these tasks, and start to generate significant ancillary revenue, will find that they have increased bargaining power should they want to attain any services of a record label.

In the past, record labels would sometimes hire a different person to take care of each of the above functions. Today, artists must take on these functions themselves, sometimes all in the same week. The money is simply not there like it was in the traditional model. This is not necessarily a bad thing. In the end, artists will end up owing much less to their label (if they are indeed signed), and will not have to sell a quarter of a million records to break even. Horror stories abound from the old system regarding recoupment, where every single penny that can be seen as helping the artists' career is kept track of and then recouped out of record sale royalties. An example would be flying in various music writers from across the country to see a band's CD release, only to charge not only the flights and accommodations to the band, but also the 'free' champagne doled out at the show. Successful artists (examples include: the Byrds, Willie Nelson, and a majority of black musicians in the 50s and 60s) would go entire careers without ever getting out of the red with their label, never actually making any revenue, while living on 'advances' from their label (which would then add to the total amount needed to be recouped through record sales).

These inefficiencies should be minimized in this new model, where neither artists nor labels can afford to throw around money like they once did. This could also mean wiser investments in talent by labels, which may translate into less garbage being pushed at music fans. Or not – it could also mean less investment in truly original acts, which present too much of a risk to cash-strapped labels. Only time will tell. What is certain is that it will be indie labels that will continue to invest in one-of-a-kind acts – and more acts generally – as the majors continue to look for acts that have already proven themselves.

5.2 How will artists and labels make money if these predictions are accurate?

After analyzing how the artist/label relationship might change in light of the four Einhorn predictions, we looked at what that might mean in terms of making money in the new music industry.

While CD and music sales in general are no longer the centre of the music industry, the underlying copyrights in the music are still immensely valuable. Rather than losing its value as suggest by David Bowie, copyright is instead undergoing an overhaul in the role it plays in the generating revenue for artists. Copyright will continue to generate revenue from far more sources, yet at relatively lower levels from each source. This reflects the idea that smaller everything is the new rule in the 21st century music industry, be it artists, labels, managers, promoters, etc.

Examining the two main types of copyright that exist in music, we found that the sound recording copyright carried more value in the traditional model, where the CD was king and all other revenue streams considered secondary. In the new model, these ancillary revenue streams have taken centre stage, causing the musical work copyright to be more valued. This is because – although record sales continue to slide – overall use of music (in film, TV, radio, commercials, video games, cell phones, etc.) continues to rise. This means that artists who write their own material today will have a better likelihood of making a living playing music than those who record material written by someone else. Unless an act can sell at the level of Britney or Celine, they will have a much more difficult time making money performing other people's songs in the new model.

The major sources of revenue will continue to be touring, digital sales, and the combination of licensing, advertising, and publishing one's music. Once an act has gained some exposure from any combination of the above, the key to a successful career is connecting with fans and giving them a reason to buy, whether it be a record, concert ticket, or t-shirt. The manner in which artists will continue to connect with fans and give them a reason to buy is only limited by one's imagination.

6.0 Thesis Conclusion

Throughout this thesis, we have been attempting to answer the question of whether artists need record labels in the 21st century digital music industry. As we have seen, the answer is not so black and white.

Record labels continue to play an important role in the industry, but that role is undergoing a major overhaul. The same can be said of artists, as what is expected of them has been vastly expanded in the modern music industry. The result is that the *way* in which labels and artists might need each other is entirely different than it was even five years ago.

In the traditional model, labels hired musicians to record and create music, and all creative output was in fact owned by the label, considered a "work for hire" under the *Copyright Act*. Now the tables have turned, and artists are in a position to contract out the services of labels, managers, agents, publicists, etc., as needed – a "hire for work" situation.[278] It is an incredibly exciting time for artists, as they now have the tools to empower themselves and take more control of their careers.

While labels of the past served as a bank or venture capitalist – and essential gatekeeper to distribution – the labels that will find success in the modern industry will find, groom, develop, accompany, and take care of promising artists and writers. They

[278] For more, see: Leonhard, Gerd, *Music 2.0 – Essays by Gerd Leonhard* (Creative Commons License, 2008) at 101 [Leonhard].

will guide – rather than control – artist careers, and be in charge of many facets of their artists' branding, marketing, and revenue-generating activities.

If this sounds a lot like what a manager or agent usually does, that is no coincidence. As we examined in Chapter Three, the new centre of the music industry is the management model, where the guiding party takes a relatively small percentage of every form of revenue being generated by the act. In the new model, managers will either be part of the record label, or work in close conjunction with them.

Unlike the past, artist/label relationships in the coming years will not involve the label owning the artist's recordings and compositions outright. Rather, labels will be appointed, and continuously re-appointed, to be the warden of the artist's interests for a specified period of time. This time frame could be long or short, depending on the performance of both parties. Clearly, longtime alliances will be the most fruitful and will probably be more common, but not necessarily.

Generally speaking, labels will make money – not off of – but *along with* their artists. The often lamented "plantation deals" of the past, where artists work and the labels own, will soon be a thing of the past. Because labels today need to have the ability to secure any and all deals that involve the artist's activities – be it placements in motion pictures, mobile campaigns, ads, games, video/TV, and the like – the label will need to represent both the artist's compositions and their master recordings. As a result, labels in the coming years are likely to sign only artists that either write and perform their own music, or can provide both rights via solid and cooperative third-party relationships.[279]

[279] *Ibid*.

According to 'music futurist' Gerd Leonhard, the actual sale of music products (i.e., downloads, CDs, vinyl, etc.) will likely only contribute around 30%–40% of the total revenue being made by artists in the coming years, on average.[280] Instead, labels and artists will thrive by providing music as a service, and will be very keen to pursue revenue-sharing deals rather than the fixed-fee deals we have seen in the past. Or as another futurist suggests: "when artists stop thinking of themselves as providers of solid goods, then the doors will open for a much wider variety of music to flood into limitless and low friction distribution channels, without five or ten or twenty companies gating the flow of content"[281].

A downside, perhaps initially, is that until an artist has achieved a certain level of exposure and can drive meaningful revenues, most labels will tend to invest a lot less money into that artist's career than they might have previously. As we have examined, this means that artists must incubate their own careers, self-promoting and self-managing through the tough initial years. Some will be so successful at this that they will not need a record label at all when they reach their fruition, opting instead for hiring a publicist and an independent marketing company rather than giving up so much potential income to a label. Others will find it greatly beneficial to give up somewhere between 20-30% of their overall revenues to gain access to the marketing muscle held by a label or other investor.

The concept of a record label, though, will still be alive and well. According to Chris Taylor: "Until someone else, Live Nation or some management company, booking agency or law firm starts putting development money and infrastructure into the equation,

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[280] *Ibid*., at 103.
[281] Kusek, *supra* note 3, at 15.

major labels are going to have a persuasive argument that they are still the gateway to getting to the next level for a new artist and artists know this"[282].

However, my studies reveal that the artist/label relationship will be based less on control and ownership, and more on synergies and profit sharing. According to Michael Parisi, Managing Director of Mushroom Records and Head of A&R for Warner Music: "we will start to see the word 'partnership' more in deals with artists"[283]. Record labels will have to prove themselves, again and again, just like the artists have to every time they get on the stage. They will also have to take a cue from Live Nation Artists and start signing more winning artists, while diversifying their revenue base. Just like Live Nation uses the copyrighted work (the recording) as a promotional tool to generate revenue from other, non-copyrightable streams of income (touring, merchandise, licensing, synch rights, etc.), so must record labels in today's industry.

Based on the trends we have examined here, it seems likely that the music industry will no longer be dominated by a few massive corporations, but a plethora of small-to-midsize record labels, as well as numerous other 'new' service companies, each keeping close connections to their artists and the niche that those artists appeal to.[284]

6.1 The Future of Copyright?

As we have examined the artist/label relationship in the digital era, we have also probed the question of what value copyright will continue to have in the coming years. Will it be – as David Bowie suggests – valueless in the near future? The answer again must be answered in the negative.

[282] LeBlanc and Taylor, *supra* note 149.
[283] Cashmere, *supra* note 198.
[284] A visual representation of this new paradigm can be found in Appendix A, Tables 3 and 4.

Granted, recorded music can and will continue to be copied perfectly at no or very little cost. But while selling recorded music was the dominant source of revenue in the *record* industry, it is only one of many sources in the *music* industry. Artists that write their own material will see more and more revenues generated from their musical work copyrights, as their songs are published, played on satellite and internet radio, licensed in TV, film, and video games, and more.

Where the sound recording copyright used to generate major returns in the short term, we see that the real value to be extrapolated from copyright law by both artists and record labels now lies in the long term, predominantly with the musical work copyright. Rather than massive amounts of revenue from one source (CD sales), technology has shifted the business model to smaller amounts from hundreds of sources. A band like the Arcade Fire, for example, would likely make a decent amount of money on album sales, but will continue to make a living off the consistent flow of revenue from having their songs being played in movies, on satellite and internet radio, in commercials, in video games, etc.

For labels and other investors, this fragmented flow of revenue from copyrights is hard to predict and even harder to extract value from. The investing party needs to obtain value from *all* the various sources rather than one, which is undoubtedly a more complex and expensive process. This has led to the 360.

As we have seen, the first and foremost revenue stream at the heart of the 360 is concert revenue, so the overall value and priority of copyrights surely has lessened. That being said, the continued value of copyright should not be understated. For many artists on the way up, copyright-related revenues like iTunes sales, radio play, and licensing payments can be the determining factor in terms of nurturing their careers and breaking to a larger audience. As per Thom Yorke's suggestion, young artists should try at all costs to hold on to their copyrights as long as possible, so that the iTunes cheques keep coming throughout the development stage. The long term benefit of retaining copyrights is that an artist will also have more control over their catalogue of music, and will be able to exploit their songs as they see fit via licensing, synching, etc.

The corollary, however, is that labels and other investors will only want to invest in acts and allow acts to keep their copyrights if the act can demonstrate substantial revenue potential in all the non-copyrightable areas. Artists will obtain this bargaining power only if they self-empower throughout the early stages of their career, and successfully take on the five functions that labels used to provide. The key is for acts to get to a level on their own where they do not need outside investors. The rub is that once they reach this point, everybody wants in.

Only the smartest, hardest-working, and most talented artists will ever approach a level close to this. For most acts the problem is not piracy but obscurity. Once they start to emerge from the haze of obscurity, they will face some important decision about how they will receive outside investment, and what they are willing to forfeit to get that shot at the big time.

According to Charles Darwin, it is not the strongest or most intelligent that will survive and flourish, but the ones most adaptive to change. The same can be said of artists in today's music industry, as change – and rapid change at that – is the only thing that can be predicted for the coming years with any certainty. As David Bowie suggests, it’s terribly exciting. But on the other hand it doesn’t matter if you think it’s exciting or not; it’s what’s going to happen.

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APPENDIX A
TABLES

Table 1 - Deconstructing Musical Ideas for Copyright

Music Idea	**"Authors" for Copyright Purposes***	**Physical Objects in which the Musical Work can be Fixed****
Musical Composition/Work	• The composer • The lyricist	• Notated Copy (sheet music) • Phono-record (cassette, LP, CD, digital file, etc.)
Sound Recording	• The performer (or recording artists) • The record producer (or publisher) • Or both	• Phono-record (cassette, LP, CD, digital file, etc.)

* Composer, lyricist, performer (or recording artist) and record producer (or publisher) are not necessarily different people.

** The physical objects are not musical compositions or sound recordings, merely the various ways in which different kinds of musical works can be fixed.

Table 2 – Common Music Licenses in North America

Type of music use	*Type of license required*
1. Commercial broadcast of non-dramatic music	Performance license
2. Non-broadcast performance of non-dramatic music	Performance license
3. Phono-record sold for private use	Compulsory or "negotiated" mechanical license
4. Music video production used for broadcast or cable TV	Synchronization license and performance license
5. Movie, music video other video software sold or rented to individuals for home use	Synchronization license that includes license to mechanically reproduce copies for sale
6. Motions picture for theatrical exhibition	Synchronization license that includes a right to exhibit (performance right)
7. Broadcast commercial	Special use permit
8. Merchandizing tie-ins, computer software applications, etc.	Special use permit
9. Environmental music (e.g. Muzak)	Transcription license that includes the right of performance
10. Dramatico-musical production (performed live)	Grand right or dramatic right
11. Public broadcasting station	Negotiated license
12. Jukebox	Negotiated license
13. Cable TV	Compulsory license for some, negotiated for others

Table 3 - Evolution from static to a dynamic choice of actors[1]

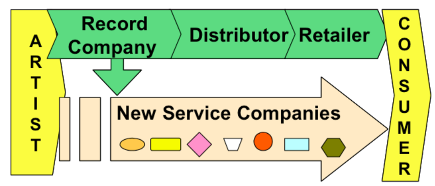
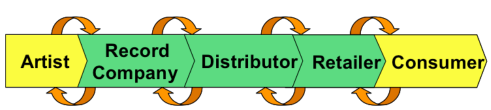
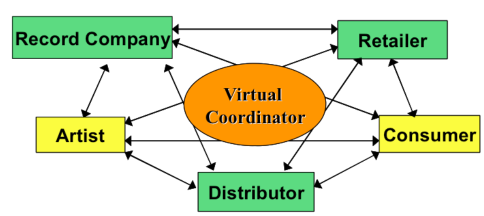
Choice of Actors	**Static**	**Dynamic**
	Limited choice of actors (high vertical integration of record companies) Relationships mainly long-term  The choice of actors – traditional system	High flexibility in the choice of actors Relationships vary from: ➢ long-term to short-term ➢ formal to informal Relationships ad-hoc with an arising business opportunity  The choice of actors – new system

Table 4 – Impact of the Internet on Record Industry Coordination Structure

Coordination Structure	**Dyadic (hierarchic structure)**	**Myriad (complex constellations)**
	Communication through proprietary information systems (EDI) ➢ Sequential communication flow ➢ Bullwhip effect (over-and underproduction) Physical intermediaries co-ordinate information and product flow  The traditional coordination structure	Communication through the universal and open information systems (Internet) ➢ Real-time interaction with multiple suppliers/ customers ➢ Diminished Bullwhip effect Virtual intermediaries become important for co-ordination structure (central points)  The new coordination structure

[1] Graham, Dr. Gary, "The Transformation of the Music Industry Supply Chain: A Major Label Perspective," *Manchester Business School Executive Briefing* (2006).