BY GLENN LITWAK

THE ART OF THE 360 RECORD DEAL

I. INTRODUCTION

In the last few years, major record labels have been requiring that artists who seek a recording contract enter into a new type of record deal called a "360 Deal." The number 360 represents the number of degrees in a circle and it refers to an all encompassing deal (that covers more than just record sales) for an artist's services in the entertainment industry. This article will discuss the background of the 360 Deal as well as its components and how the artist can best negotiate one.

II. BACKGROUND OF THE 360 DEAL

A. The Traditional Deal

In the past, major record companies (Universal Music Group, Sony, Warner Music and EMI Group), when signing new artists or groups, simply required that the artist divide record royalties with the label. Typically, a new artist or group might receive approximately 14-16 "points" which is defined as 14% - 16% of the suggested retail list price of each record sold, minus various deductions for packaging, free goods, etc.

B. Decreased Income Due to Piracy

In recent years record labels have complained that their income is decreasing due to rampant piracy (illegal downloading) over the internet. According to an October 14, 2008 article in the L.A. Times, "Last year, the entire music market as measured by album and track sales shrank nearly 10%, and it is down about 5.4% so far this year."

It is clear that traditional record sales have been decreasing for a number of years. However, this is made up for, in part, by increased digital revenue (e.g. digital downloads and ringtones).

III. WHAT DOES A 360 DEAL COVER?

The record labels have been complaining that because of their decreased revenue from traditional record sales, they need to replace the lost income by finding new revenue streams. What the record labels have come up with is that when they sign a new artist, in addition to sharing revenue from record sales, the artist is required to share income from merchandising, acting, TV commercials, endorsements, sponsorships, and touring (and often publishing).

The percentage that the labels demand varies. For instance, it might be 25% of the artist's net touring and endorsement income, and 15% of net acting income. For merchandising, the record label might demand exclusive merchandising rights during the term and 50% of net merchandising income (from t-shirts, sweatshirts, baseball caps, buttons, stickers, etc.).

IV. JUSTIFICATION FOR A 360 DEAL

The artist may argue that the record label is not really going to help the artist promote his TV or film career and he or she already has to pay an agent, attorney, and manager. So why should the artist have to pay the record label anything other than record royalties? The justification record companies use for taking a percentage of these new revenue streams is that they will make the artist famous by promoting and selling records thus opening up new revenue streams for the artist. In other words, the record labels would argue that these other revenue streams would not exist unless the label made the artist famous by selling records. In all fairness, there is some validity to this claim.

Some labels have begun taking a more proactive role in non-record aspects of an artist's career, thus providing additional justification for participating in ancillary revenue streams. For instance, Hollywood Records (owned by Disney) may cross promote its recording artists with other Disney divisions (TV, film).

It is not as simple as saying all 360 deals are automatically unfair to the artist. The provisions of each proposed 360 deal must be analyzed in light of all the pertinent facts and circumstances. 360 deals are evolving in some instances to be more of a partnership between the label and artist.

V. CAN YOU ELIMINATE THE 360 ASPECTS OF A RECORD DEAL?

Artists may ask whether the 360 aspects of a record deal can be eliminated from their new recording contract. The answer usually is no. Mid-level, or superstar artists might be able to negotiate and reduce (or possibly eliminate) label participation in some or all ancillary revenue streams. However, my experience is that you can do very little with a new group to eliminate or reduce label participation. Of course, it is a negotiation and if a number of record labels are engaged in a bidding war, an artist might get a better than typical 360 deal.

VI. POSSIBLE EXCLUSIONS FROM A 360 DEAL

Sometimes when signing a 360 deal the artist may have a good argument for excluding certain types of income from record company participation. For instance, if a successful actor decides to become a recording artist, he should argue that his or her preexisting income from acting should be excluded from record label participation.

VII. ALTERNATIVES TO 360 RECORD DEALS

There may be alternatives if an artist does not want to enter into a 360 deal with a major label. My experience with R&B/pop type acts is most do not get signed directly to a label. Rather, they first get signed to a production company that then enters into a direct contract with the label for the recording services of the artist.

An established production company may attempt to enter into a different type of deal (so called Pressing & Distribution ("P&D") or joint venture type deals) with a label/distributor rather than a traditional royalty based deal with a record label. Depending on an artist's/production company's bargaining power, a distributor may or may not be willing to enter into this type of deal and the production company may nevertheless require the artist to sign a 360 deal with it.

Alternatively, some artists may try to get signed to an independent label or set up their own label. But especially for establishing a pop type act, there is nothing like the marketing and promotion muscle of a major label.

VIII. NEGOTIATING A 360 DEAL

When negotiating a 360 deal from the artist's perspective, I suggest attempting the following:

Reduce the types of income covered by the deal. For instance, some labels do not require that they participate in music publishing income. However, they might require a "right of first negotiation" or a "matching right" if you are offered a publishing deal.

Reduce the percentage taken by the label from each type of non-record income.

Exclude preexisting revenue streams as discussed above.

Limit the length of time (term) of the label's participation in ancillary revenue streams. At least have the term clearly defined in the agreement. For instance, the right to all non-record income could terminate when the recording contract terminates or after a certain number of years.

Negotiate a separate advance for each type of non-record income (in addition to an advance for record royalties).

Require that non-record income not be "cross-collaterized." This means, for instance, the record company would not be able to recoup the money it advanced to make the album from non-record income.

Negotiate a commitment from the record company to do something in exchange for receiving a percentage of non-record income. For instance, money for tour support, and/or additional advances for living expenses.

IX. CONCLUSION

It appears likely many artists will be offered 360 deals for the indefinite future. In entering into a 360 deal the artist should make sure that he or she understands all of its ramifications and have skilled and experienced representation to negotiate this new type of contract.

Glenn Litwak is a founding partner with the Law Offices of Litwak & Havkin in Beverly Hills, California. He represents recording artists, songwriters, producers, management and production companies, as well as clients in film and TV. He is a frequent speaker at music conferences around the country. For more information log on to www.litwakandhavkin.com or email Glenn@litwakandhavkin.com