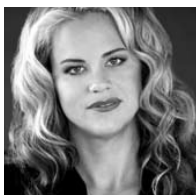


Multiple rights deals in the US: 360° and beyond...



Author: Dina LaPolt and Bernard Resnick

Although many recording agreements today are being referred to as “360° deals”, the concept of obtaining ‘multiple rights’ from US recording artists is not a new one despite what many music attorneys may have been led to believe. It is true that during the last 40 years, US-based record companies have concentrated their efforts on obtaining and exploiting rights associated only with master recordings. However, the deals for some of the manufactured groups of yesteryear such as The Monkees and The Partridge Family can closely be compared to modern multiple rights arrangements with current popular artists such as The Pussycat Dolls and Hannah Montana or those artists discovered through popular reality TV shows such as American Idol or Nashville Star.



Outside of the majors, the many independent record companies in the US have a history of obtaining multiple rights from their artists in addition to record rights; this is achieved under the notion that their arrangements with their artists are based on a ‘partnership’ model as opposed to paying the artist a low royalty and recovering or “recouping” most of the record company’s expenditure from the low royalty (as is traditional with the major record labels). During the last decade many of the successful independents (for example Victory Records, Vagrant Records, Fueled By Ramen, Wind-Up and so on) have been concluding agreements with their artists which are similar to those the majors are completing.

It appears as if multiple rights deals in the US have now become almost industry standard rather than the exception which, from the artist’s point of view, looks unfortunate at this point.

Accordingly, if the attorney cannot exclude ancillary rights altogether in negotiating the artist deal, the two questions for the US artist music lawyer become: “How can we minimise the record companies’ involvement in these additional rights?” and “How can we contractually obligate the company to monetise these additional rights and not cross-collateralise them?”

>>Multiple rights - what are they?

When we refer to the different types of multiple rights deals in the US, it’s helpful to understand what rights are targeted and what type of company is obtaining these rights. It is not always a record company.

What multiple rights include:

In addition to traditional ancillary rights such as music publishing and rights relating to touring, merchandising and endorsements there is also a new ‘bundle’ of rights associated with the Internet and fan clubs. These have recently been monetised and can become very valuable. These ‘new types’ of rights are derived from artist-based websites and fan sites (sometimes through paid memberships) and include virtual ticketing, platinum ticketing packages and other fan club experiences. For example:

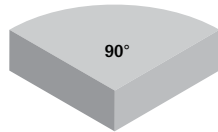
- a “ticket package” could be a combination of a concert ticket with one or more value-added components, which may include various merchandise, online store discount coupons, pre-concert parties, VIP entry, travel arrangements and hotel accommodation, and a ‘meet n greet’ with the artist.
- a “virtual ticket” package may include a fan-orientated Internet-based product featuring the artist that offers value-added benefits for the purchaser such as access to various content channels including video streaming, written and taped accounts from band and crew, photos, set-lists from concerts and more.
- mobile phone marketing opportunities may also exist whereby phone carriers create or sponsor custom-made ad campaigns.
- fans can text messages to the artist that appear on a large video screen located at the edge of the stage during the performance, to download portions of the concert to the user’s mobile phone.

“The idea of an artist sharing revenue in all categories with a record label is hardly a novel concept in the US”

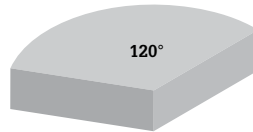
These fan-based rights, coupled with traditional merchandise marketing platforms, have encouraged other types of music-related (and sometimes non-music-related) companies to get involved with recording artists. Thus, it is not uncommon to see a modern day recording artist enter into a multiple rights deal with such companies as concert promoters (i.e. Live Nation, Roc Nation), brands and products (i.e. Bacardi, Guitar Hero), and mobile phone carriers (i.e. Verizon, Sprint).

>>Types of multiple rights deals in the US

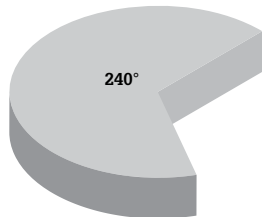
The multiple rights deals with US artists are taking on all shapes and sizes. According to one insider at a prominent American major label, potential multiple rights arrangements are internally described as follows:



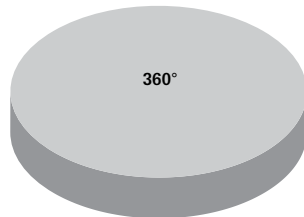
90°
Record rights and webstore.



120°
Record rights, limited tour and retail merchandising.



240°
Record rights, tour and retail merchandising, webstore and fan club.



360°
Record rights, book publishing, tour, all merchandising, sponsorship and endorsements, fan club, music publishing and sometimes even acting.

Of course obtaining the foregoing rights depends upon the leverage of the record company versus the leverage of the artist. It is important to track the evolution of recent multiple rights deals in the US before it is decided whether this is a model based on sound business principles or whether this is just another aggressive move by record labels to get their hands on additional rights that they neither deserve nor understand how to exploit or monetise.

>>Creating the artist as a “brand”

In the early-1990s, popular American recording artists The Backstreet Boys were developed through a partnership between the group's creator, Lou Pearlman (via his company, Transcontinental) and a major US record company. Pearlman, owner of the group's brand and, later, other acts' brands, closely nurtured and developed the group which was ultimately signed to Jive Records and went on to sell millions of records. Although the business deals between Transcontinental and some of its artists, including The Backstreet Boys, pre-dated the invention of the term “360° deal”, these types of deals were, in fact, multiple rights deals with a twist. These agreements purported to treat the group as employees of a company with yearly salaries, reimbursement of costs and living advances, bonuses, profit sharing, etc. in exchange for the transfer of their recording, publishing, live performance and other rights to the company.

The foregoing business venture became the current prototype for the creation of today's branded music artist deals such as The Pussycat Dolls enterprise which is co-owned by Robin Antin and Interscope Records. In fact, the Pussycat Dolls venture has been so successful it was able to expand into other entertainment areas and even includes a successful American TV show, a merchandising venture, sponsorship, endorsement, and even a Pussycat Dolls-themed nightclub in Las Vegas. Types of agreements for these sorts of artist ventures may include a traditional recording agreement along with an ‘employment-type’ agreement which allocates yearly salaries to each member and provides for contingency participations in various ancillary income streams such as merchandising, acting, sponsorships, endorsements, and other co-branded licensing opportunities after recoupment and provided other income thresholds are met. In

addition to the foregoing, these agreements may also contractually obligate the artist to maintain certain weight requirements and may go as far as to require written permission for a change in hair style. The artist is deemed to be “an employee” of the venture and sometimes health insurance and other benefits are included in the overall compensation package.

>>The advent of American Idol and its effect on US multiple rights deals

The success of the competition-based TV show, American Idol, created a whole new perspective on the concept of “artist development” in the US whereby participants are weeded out weekly on the series that airs from late-September to the end of May. According to Nielsen ratings, American Idol draws between 25-30 million viewers each week.

First broadcast in 2001, the American Idol agreements sent to potential contestants by the show’s production company (UK-based 19 Entertainment) were barely short of overreaching. The agreements obtain the contestants’ rights in recordings, music publishing, merchandising, touring, acting, sponsorship, endorsement, co-branding opportunities and fan club throughout the entire TV season, including three months after the broadcast of the last episode of that particular cycle in the series. The winner of the season is automatically signed to 19 Entertainment and is distributed through the RCA Music Group (or sometimes Jive Records), which is the US-based major label and music distribution arm of the American Idol venture. The production company also has the option to sign the non-winning contestants to a more formal long-term multiple rights agreement.

Some successful American Idol artists that did not win but were ultimately signed (and became very successful) include Chris Daughtry, Kellie Pickler, Clay Aiken and, a few years after her appearance, Jennifer Hudson. Although network executives refuse to make any changes to the American Idol form anyway, those practitioners in the American music business quickly found out that by insisting on changes to the Idol agreement, they could greatly jeopardise their client’s chances of being selected

to participate on the show. Now in its eighth season, American Idol has become one of America’s most successful entertainment endeavours, complete with successful merchandising, touring, and sponsorship, product placement and cross-promotion ventures. In fact, in 2007 the creators of American Idol even started a charity, called Idol Gives Back, which has raised over \$100 million in its first two years.

The mega success of American Idol has spawned other successful American talent competition shows such as Nashville Star, Rock Star: Supernova, Making The Band, America’s Got Talent, The Pussycat Dolls Presents: The Search For The Next Girl Group, as well as other cable-based TV shows which have become America’s ‘new A&R vehicle’ due to their ability to create brands and launch new artists. Some of these other programmes have attempted, with various degrees of success, to pressure the potential contestants and their counsel to agree to unfavourable business terms. The attorneys for some of these production companies have gone as far as to decline even to make corrections to incomplete sentences, misspellings, and grammatical errors within their huge series of documents, while insisting that the potential contestant review and sign agreements quickly or face losing their opportunity to appear on the programme. Although these agreements, which under ordinary circumstances would be considered nothing less than textbook “contracts of adhesion” by US legal standards, these types of TV shows and the corresponding opportunity they provide are difficult for artists in search of stardom to refuse.

>>The wonderful world of Walt Disney

Starting in 2005, the Disney Music Group (DMG) began obtaining multiple rights from its recording artists, commencing with Jesse McCartney. DMG, a pioneer in the land of the 360° deal, is in a unique position because it owns and controls its own national radio network (Radio Disney), a TV station (The Disney Channel), a consumer products company (Disney Consumer Products), a concert tour division (Buena Vista Concerts) and two record companies (Hollywood Records and Walt Disney Records). It has the ability, through these multiple platforms, to market and promote its artists on a much grander scale than any of their entertainment company competitors. Recent DMG signings following the 360° model include Selena Gomez and Demi Lovato of the Camp

“The American Idol agreements sent to potential contestants were barely short of overreaching”

Rock franchise. Sometimes prior to signing an artist to a 360°-type model, Disney may attempt to develop talent through its TV medium as it did with Miley Cyrus in Hannah Montana. Miley Cyrus, the adolescent daughter of American country music star, Billy Ray Cyrus, plays a regular girl named Miley Stewart in the Disney Channel's original TV series, Hannah Montana. In the series, the Miley Stewart character has a secret double life as the biggest singing superstar on TV, named Hannah Montana. Cyrus became an overnight sensation after the Hannah Montana TV show debuted in March 2006 and after the subsequent October 2006 release of the corresponding Hannah Montana soundtrack album consisting of eight songs Cyrus sang, in character, on the TV show.

Subsequent to the success of the Hannah Montana TV show and the soundtrack album, DMG then decided to sign Cyrus to a multiple rights deal through Hollywood Records. In December 2007, Cyrus was ranked #17 in the list of Forbes Top Twenty Earners under the age of 25 with annual earnings of \$3.5 million. Her first solo album entitled Hannah Montana 2/Meet Miley Cyrus was released in June 2007 and has sold over three million units in the US according to Nielsen SoundScan. Her sophomore album entitled Breakout, released in July 2008, was her first album that did not involve the Hannah Montana franchise. However all albums debuted at #1 on the US Billboard Top 200. In fact, obtaining a concert ticket to a Hannah Montana show in the US was nothing short of a miracle: the tour quickly sold out arenas throughout America with parents and children sleeping overnight in parking lots for days before tickets went on sale. In addition to Miley Cyrus, current teen sensations The Jonas Brothers came to Hollywood Records in 2007 after being dropped from Columbia Records (part of Sony BMG) after selling only 65,000 units of their 2006 debut album, It's About Time, according to Nielsen SoundScan. Hollywood Records first signed them to a 360° deal and then the Disney Channel later signed them to star in their own TV series. Unless an artist has an incredible amount of leverage, it is anticipated that all future Disney Music Group signings will be based on the 360° model.

>>Legacy and heritage artists

The multimillion-dollar multiple rights deal between EMI and British pop singer Robbie Williams in 2002 for a reported £80 million was the first type of all-rights deal with an artist of this magnitude. EMI/Capitol struck a similar deal with US act Korn a few months later.

>>Key Live Nation deals

The recent multi-million dollar multiple rights deals in the US by Live Nation have all been done (so far) with multi-platinum superstars:

Madonna: a 10-year deal valued at \$150 million according to Billboard magazine. Covers future music and music-related businesses including the exploitation of the 'Madonna brand', three new studio albums, touring, merchandising, fan clubs/websites, DVDs, music-related TV projects and associated sponsorship agreements. When drafting the contract, US-based entertainment lawyers (Andy Tavel and Gary Epstein of Greenberg Traurig and David Toraya of Grubman Indursky), shaped the agreement as a customised corporate joint venture involving licensed rights. According to Billboard, issues covered in the agreement include recording, touring, merchandise, and sponsorships; different income splits per revenue stream; recording, marketing, video shoot and related costs issues; which activities and costs require pre-approval and by whom; what minimum amounts can be spent without pre-approval; recoupment; and how to calculate net proceeds from gross revenue. To keep accounting streamlined, all gross revenue flows through Live Nation which accounts and then pays Madonna's company.

U2: a 12-year deal which includes touring, merchandising and the U2.com website.

Jay-Z: includes his touring and future recordings (he owes one more album to Def Jam Records) and also includes a start up venture between the parties called Roc Nation. Funded by Live Nation, Roc Nation (a venture co-owned by Live Nation, Jay-Z and his business partners) includes a record company, music publishing, merchandise, and artist consulting division.

Shakira: a 10-year deal that has been estimated at a total value of \$70 million to \$100 million according to *LA Times* and *Billboard*, amongst other industry sources. Live Nation will reportedly handle Shakira's concerts, recordings, merchandising, digital and other aspects of her career. However, Shakira is still under contract to her current record company, Epic Records (part of Sony BMG). Accordingly it is anticipated that Shakira will fulfil her delivery commitment of three more albums to Epic prior to releasing any recordings through Live Nation or its record company designee.

Nickelback: according to *Billboard* (8th July, 2008), a source confirms the Nickelback deal to be worth in the \$50-\$70 million range. Rather than a set time frame, a Live Nation statement says the deal "contemplates" all areas of Nickelback's global music enterprises, including three touring and album cycles, with an option for a fourth. Under the deal, Live Nation has acquired 12 separate artist rights to feed its global distribution pipe, including: touring, tour sponsorship, tour merchandise, tour VIP/travel packages, secondary ticketing, recorded music, clothing, licensing and other retail merchandise, non-tour sponsorship and endorsements, DVD and broadcast rights, fan club, website and literary rights. Nickelback will perform concerts in Live Nation amphitheatres and will transfer its merchandise sales to Live Nation's designee. Thus all of Nickelback's operations will be consolidated under the Live Nation umbrella.

However, as of press time, it's not clear as to whether Live Nation will decide to outsource the marketing, promotion and distribution of records on an artist-by-artist basis after the departure of Bob Ezrin, Bob Cahill and Bill Hein from Live Nation's artist division, Artist Nation.

Live Nation is not the only "non-record company" doing direct deals with recording artists. The highly publicised deal between alcohol spirit brand Bacardi rum and British electronic duo Groove Armada, integrates a marketing deal including recordings, touring, and audio-visual content with the liquor company actually taking over the role of marketing and promoting the music. America also has its fair share of these 'brand-based' deals, such as super-producer Timbaland's recent venture with Verizon

mobile phones. However, these types of arrangements rarely make sense for corporate sponsors unless the deal is with a mega artist who has also become a "brand."

>>Emerging artist deals with the US major labels

By 2007, almost all of the major labels in the US were attempting to obtain some sort of multiple rights arrangement from new artist signings. In fact, two prominent major labels are obtaining multiple rights from all new signings regardless of whether they have the mechanisms in place to adequately exploit these rights. These rights include granting themselves a 20-30% income participation in publishing, merchandise, touring, endorsements and sponsorships. Another major label: (a) allocates the artist what it defines as a "net profit" share in the albums (as opposed to paying a net artist royalty) after the record label first deducts its 6% "label services fee"; (b) attempts to acquire a 10-20% share in the artist's income stream from touring and merchandising; and (c) attempts to acquire a co-publishing interest in the artist's musical compositions.

The foregoing deals are all contained in one lengthy written agreement, as opposed to a series of different agreements for each of the multiple rights obtained, as another US label has been doing. The 'separate' agreements include a recording agreement, a co-publishing agreement, a merchandise agreement and a 'development agreement'. The development agreement grants the record label a net profit share in the artist's touring revenue, and at times even goes as far as to attempt to limit the amount of commissions an artist can pay their manager and agent. At first glance, using separate agreements appears to be the better of the foregoing scenarios from an artist's perspective as the accountings can be more transparent (there are separate royalty statements) and advances tend not to be cross-collateralised. Nevertheless, these arrangements are ultimately more burdensome on the artist because the label ends up controlling and administering these rights (i.e. the label enters into all third party deals and pays the artist their negotiated income stream) instead of the more traditional approach which allows the artist to continue to control and administer these rights.

Although some of the major labels either own or have acquired an interest in bona fide merchandising companies (i.e. Universal Music Group with Bravado and Epic Records

“Combining all of the artist’s rights in one company makes 360° deals an ‘all or nothing’, high-risk venture for artists”

with Thread Shop) which gives them the upper hand over some of their major label counterparts, it is still not clear if these types of signings are actually generating more revenue for the label and the artist. Additionally, prior forays by other major labels (i.e. Sony’s merchandise company Sony Signatures) have had disappointing results and were therefore discontinued.

>>Legal and business issues for the artist’s attorney

For the artist’s attorney, different variations of the multiple rights agreements raise different issues of concern. For those artists in employment deals, one practical difficulty is that the record companies are still trying to require that the artist indemnify the record company against third party claims in connection with making the albums (i.e. against claims by producers, sample owners, and side artists) as is standard in traditional recording agreements in the US. However, in traditional recording agreements, although the master recordings are owned and controlled by the record company, the artist’s attorney is usually responsible for drafting and negotiating the producer and side artist agreements on behalf of the artist. In addition, the artist still had some mutual approvals over the use of their image and the use of their trademarks and logos. However, under the employment agreement scenario, the artist is merely a ‘hired hand’ with no creative approvals or consents (because the record company owns and controls the entire brand) and the label lawyers are the ones negotiating and drafting the producer agreements and side artist clearances.

Another practice problem requiring careful drafting relates to the exclusion of pre-existing deals in various rights categories. This is particularly true for mid-level and legacy artists, who have commenced, completed and/or terminated numerous contracts throughout their lengthy careers. This can be complicated by poor record keeping, mergers, bankruptcies and acquisitions of companies the artist has been in contractual relations with in the past, and the near constant shuffling of the artist’s team of professional advisors.

As referenced in the emerging artist section, administration and control over rights is a hotly negotiated subject. Some of the labels are attempting to acquire

administration rights over these newly acquired rights. This practice places the artist at a disadvantage as far as deal making with third parties goes. Traditionally, the artist controls all excluded rights (i.e. publishing, touring, merchandising, endorsements, etc.) but if the label ends up obtaining income streams AND administration rights from the artist, the artist loses all ability to control which deals are done, the collection of money and approvals over his or her brand.

The issue of cross-collateralisation also becomes magnified in a 360° deal. In the past, when the artist had different agreements with different companies for the various rights, it was impossible, for example, to cross-collateralise record company losses in the recording category against T-shirt company profits in the merchandise category. The trend towards combining all of the artist’s rights in one company, with the corresponding cross-collateralisation provision included in the contract, make the 360° deal an “all or nothing”, high-risk venture for artists.

A final item of concern is the potential for conflicts of interest. One conflict may occur when the record label also acts as the artist’s manager or the manager works for the record company. This is commonplace in the reality TV show contestant category of multiple rights arrangements. Another example of potential conflicts comes to light when examining recent entertainment industry mergers and consolidations, which have somewhat blurred the traditional lines of separation between companies. This could conceivably become an issue in Ticketmaster’s recent purchase of Front Line Management, as many of Front Line’s management clients are promoted by other concert promoters and/or appear on tour in non-Ticketmaster venues. In the final analysis, the implications of 360° deals on previously-existing relationships, whether contractual or otherwise, need to be fully explored in any potential consolidation, merger or acquisition.

>>Summary

Although the title “360° deal” is a new one, the idea of an artist sharing revenue in all categories with a record label is hardly a novel concept in the US. The main developments in the recent past are that now the “majors” are requiring the same arrangements as their “indie” colleagues; TV companies are entering into the music business; and other non-record companies are also becoming significant players in the industry. Unlike attorneys who represent superstar clients, lawyers representing emerging artists and TV contestants have little negotiation leverage in deals of this type. Only a competing offer from another record company (or a pre-existing contract which binds the artist prior to being offered a multiple rights deal) will allow the attorney to obtain any significant concessions for the client. However, one thing is eminently clear: as these types of deals get more sophisticated and more inclusive, it is not enough for the US music attorney to simply rely on relationships and a background in IP. It is more likely that in order to deliver complete representation to their clients, music attorneys will require consultation with other lawyers who have particular expertise in tax, securities, and corporate issues, together with an international understanding of the industry as a whole.