360° DEALS: AN INDUSTRY REACTION TO THE DEVALUATION OF RECORDED MUSIC

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I. INTRODUCTION

In October of 2007, Radiohead released *In Rainbows* without a record label. The band's contract with record company EMI had been fulfilled in 2003, and Radiohead did not bother finding a new deal as they began recording their seventh album.[1] Radiohead then made the album available at www.inrainbows.com, where fans were instructed to "pay-what-you-want" for the digital download.[2] Shortly after the album's release, the band's front man, Thom Yorke, said "I like the people at our record company, but the time is at hand when you have to ask why anyone needs one. And, yes, it probably would give us some perverse pleasure to say 'F___ you' to this decaying business model."[3]

It was no surprise that Radiohead received critical acclaim for the artistic merits of the album,[4] or that millions of fans found a way to acquire the music. Its financial success, however, was less predictable. Radiohead declined to release statistics related to its pay-what-you-want model, but a conservative estimate suggests that the band's profits from this digital release exceeded six and a half million.[5] Furthermore, when Radiohead contracted with iTunes and a distributor to sell the album on iTunes and in stores, its high sales pushed it to the top of traditional album charts[6] in early

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[1] Lars Brandle, *Label-Less Radiohead Pressing on with New Album*, BILLBOARD, Aug. 18, 2005.

[2] *Somewhere over* In Rainbows, HITS, Jan. 8, 2008, *available at* http://www.hitsdailydouble.com/news/newsPage.cgi?news06935m01; In Rainbows, WIKIPEDIA, http://en.wikipedia.org/wiki/In_rainbows; David Byrne, *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 [hereinafter *David Byrne and Thom Yorke on the Real Value of Music*].

[3] Josh Tyrangiel, *Radiohead Says: Pay What You Want*, TIME, Oct. 1, 2007, *available at* http://www.time.com/time/arts/article/0,8599,1666973,00.html.

[4] *See* Mikael Wood, *Radiohead* 'In Rainbows,' SPIN, Jan. 18, 2008, *available at* http://www.spin.com/reviews/radiohead-rainbows-inrainbowscom.

[5] David Downs, *Radiohead's* In Rainbows *Leads to Digital Pot of Gold*, S.F. WEEKLY, Oct. 10, 2007, *available at* http://www.sfweekly.com/2007-10-10/music/radiohead-s-in-rainbows-leads-to-digital-pot-of-gold (stating that, "According to a poll . . . fans are prepaying an average of $10 for *In Rainbows*. The *Wall Street Journal* estimates the cost to Radiohead is $3.40 per unit. So take $6.60 in profit, multiplied by a conservative million downloads, and Radiohead [bandmembers] look like the smartest guys in the room. And that's before you factor in future CD sales in 2008, tour dates, licensing, or the $80 *In Rainbows* enhanced box set."); *see also Radiohead* 'In Rainbows' *Already Platinum?*, SPIN, Oct. 12, 2007, *available at* http://www.spin.com/articles/radioheads-rainbows-already-platinum (reporting that as of October 12, 2007, the band had sold over 1.2 million copies from its website).

[6] These traditional charts tracking album sales did not account for the music sold on www.inrainbows.com.

2008.[7] The album's financial success was an effective retort to critics who claimed that Radiohead had "devalued" music.[8]

Radiohead's coup has been cited as a sign of "the end of music industry as we know it,"[9] but most bands are not positioned to carry out this strategy. The band was able to shoulder the enormous costs of recording and had already established a dependable base of adoring fans. As Yorke told *Wired* magazine:

> The only reason we could even get away with this, the only reason anyone even gives a shit, is the fact that we've gone through the whole mill of the business in the first place. It's not supposed to be a model for anything else. It was simply a response to a situation. We're out of contract. We have our own studio. We have this new server. What the hell else would we do? This was the obvious thing. But it only works for us because of where we are.[10]

When Yorke referred to "the whole mill of the business," he was speaking about the traditional process of recording and selling albums, in which artists are dependent on record companies for all aspects of their recorded music other than the creation of the music itself. Companies advance the funds needed for the costly recording process, manage the promotional campaigns and radio play, oversee the distribution of albums to record stores or retail outlets, and collect the income they produce.

Although this traditional regime is still standing, recent trends and technology have begun causing cracks in its foundation. For example, home computer equipment has reduced the costs of the recording process. Even though the cost of creating a high quality record remains prohibitively high for most artists, Radiohead has shown that some artists can afford to record on their own. The Internet presents an alternate distribution mechanism available to anyone who can afford a PayPal account. Record companies have also lost much of their edge in marketing; some believe that a band could create about as much interest using a free Facebook profile as could a campaign run by a record company.[11] Likewise, while a label's connections with a radio station are important, the credibility and wherewithal to generate buzz with "word of mouth" is now just as valuable.[12] Legendary producer and Columbia Records executive Rick Ruben commented on these trends:

> 'Until very recently . . . there were a handful of channels in the music business that the gatekeepers controlled. They were radio, Tower Records, MTV, certain mainstream press like Rolling Stone. That's how people found out about new things. Every record company in the industry was

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[7] *Somewhere over* In Rainbows, *supra* note 2.
[8] *See* David Byrne, *David Byrne's Survival Strategies for Emerging Artists—and Megastars*, WIRED, Dec. 18, 2007, *available at* http://www.wired.com/entertainment/music/magazine/16-01/ff_byrne?currentPage=all [hereinafter Byrne, *Survival Strategies*].
[9] *Id.*
[10] *David Byrne and Thom Yorke on the Real Value of Music*, *supra* note 2.
[11] *See* Lynn Hirschberg, *The Music Man*, N.Y. TIMES, Sept. 2, 2007, *available at* http://www.nytimes.com/2007/09/02/magazine/02rubin.t.html?_r=1&oref=slogin.
[12] Rick Ruben said that "'[t]he biggest thing in [young people's] life is word of mouth. That's how they hear about music, bands, everything.'" *Id.*

> built to work that model. There was a time when if you had something that wasn't so good, through muscle and lack of other choices, you could push that not very good product through those channels. And that's how the music business functioned for 50 years. Well, the world has changed. And the industry has not.'[13]

Record companies' vulnerability to the growing viability of the direct distribution model is coupled with a far more immediate problem, namely, the drop in profitability of their primary product: recorded music. The business model of record companies has always been making and selling recorded music, which, in 2008, means compact discs ("CDs") and, to a much lesser extent, digital downloads. This focus on one product has left record companies exposed to the decreased demand for legitimately purchased recorded music, which is largely a reaction to the dramatic increase in the accessibility of free, "illegitimate" music. Although the idea that the music industry as a whole is threatened by decreased CD sales is a common notion, the threat falls acutely upon record companies. As Warner Music chairman Edgar Bronfman stated, "The music industry is growing. . . . The record industry is not growing."[14]

Illegitimate sources of free music have lead to decreased demand for legitimate music, even though the general demand for recorded music remains as high as ever. This bisected market for recorded music answers talent executive Jeff Kwatinetz's query: "How is it that the people that make the product of music are going bankrupt, while the use of the product is skyrocketing?"[15] The CD remains the primary vehicle for distribution, though use of legitimate digital downloads is growing. CDs still account for over eighty percent of worldwide music sales.[16] However, Table 1 shows the decline in CD sales from 2000 to 2006. The downward trend continued through 2007. In that year alone, the CD buyer market lost about one million consumers.[17]

Table 1 also shows the increase in digital downloads in the past seven years. Despite the increasing use of legitimate downloads, overall music sales still suffer from the decline in CD sales: by 2006, album sales were only seventy-five percent of what they were in their peak year, 2000 (which was also the year Napster rose to prominence).[18] Furthermore, the results of a three year study by the International Federation of the Phonographic Industry indicate that "95% of music is traded illegally" by early 2009.[19]

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[13] *Id.*
[14] *A Change of Tune: Record Labels' New Approach*, THE ECONOMIST, July 5, 2007 [hereinafter *A Change of Tune*].
[15] Brian Hiatt & Evan Serpick, *The Record Industry's Decline*, ROLLING STONE, June 28, 2007, http://www.rollingstone.com/news/story/15137581/the_record_industrys_decline.
[16] *From Major to Minor*, THE ECONOMIST, Jan. 10, 2008.
[17] NPD Group, *More Music Sold but Less Revenue in '07, Kids Still Downloading Illegally*, MARKETING CHARTS, http://www.marketingcharts.com/direct/more-music-sold-but-less-revenue-in-07-kids-still-downloading-illegally-3611/ (stating that the "flight was led by younger consumers: 48% of US teens did not purchase a single CD in 2007, compared with 38% in 2006").
[18] Hiatt & Serpick, *supra* note 15.
[19] *On The Beat: The Reality* (KCRW Radio Broadcast Jan. 28, 2009), *available at* http://www.kcrw.com/etc/programs/ob/ob090128the_reality.

Table 1. United States Record Sales, 1997–2006[20]

Year	Full Length CDs (%)	Singles (All Types) (%)	Digital Downloads (%)	Overall Size of U.S. Recording Industry (in Millions)
1997	70.2	9.3	NA	$12,236.8
1998	74.8	6.8	NA	$13,723.5
1999	83.2	5.4	NA	$14,584.5
2000	89.3	2.5	NA	$14,323.0
2001	89.3	2.4	0.2	$13,740.9
2002	90.5	1.9	0.5	$12,614.2
2003	87.8	2.4	1.3	$11,854.4
2004	90.3	2.4	0.9	$12,338.1
2005	87.0	2.7	5.7	$12,269.5
2006	85.6	3.4	6.7	$11,510.2

The initial response of record labels to their deteriorating position in an otherwise strong industry was to focus on maintaining the status quo in the traditional regime. Rather than working to embrace the Internet and finding ways to maximize the profitability of downloads, labels launched (and continue to launch) legal and publicity attacks on participants in the illegitimate market. Labels not only sue the websites that allow free file-sharing,[21] they also initially sued individual users[22]—the same fan base that they target to buy their product.[23]

Rather than formulating platforms to sell their music digitally, labels waited for an outsider, namely, Steve Jobs, to create the most significant legitimate market; yet labels still remain weary of cooperating with such creators of legitimate music sites.[24] Currently, the website of the Recording

[20] Recording Indus. Ass'n of Am., 2006 Consumer Profile, http://76.74.24.142/E795D602-FA50-3F5A-3730-9C8A40B98C46.pdf.

[21] *See* A & M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001); *see also* Katie Dean, *RIAA Hits Students Where It Hurts*, WIRED, Apr. 5, 2003, *available at* http://www.wired.com/print/entertainment/music/news/2003/04/58351.

[22] *See* Matt Westmoreland, *RIAA Threatens to Sue Four Undergrads*, THE DAILY PRINCETONIAN, Nov. 26, 2007, *available at* http://www.dailyprincetonian.com/archives/2007/11/26/news/19460.shtml (stating that "[v]iolators could be fined up to $150,000 per copyrighted work infringed, though most charged in the past have settled out of court, generally agreeing to pay the RIAA between $3,000 and $5,000").

[23] In late 2008, the RIAA announced that it would not focus its legal efforts on individual users. Ryan Nakashima, *No More Suits Against Music Swappers*, L.A. TIMES (THE ENVELOPE F.) (Dec. 20, 2008), http://goldderbyforums.latimes.com/eve/forums/a/tpc/f/3226059864/m/765103332 ("The group representing the U.S. recording industry said Friday it has abandoned its policy of suing people for sharing songs protected by copyright and will work with Internet service providers to cut abusers' access if they ignore repeated warnings. The move ends a controversial program that saw the Recording Industry Association of America sue about 35,000 people since 2003 for swapping songs online. Because of high legal costs for defenders, virtually all of those hit with lawsuits settled, on average for around $3,500. The association's legal costs, in the meantime, exceeded the settlement money it brought in.").

[24] *See* Hiatt & Serpick, *supra* note 15; Rosie Swash, *Qtrax Off Track after Labels Deny Any Deal*, THE GUARDIAN, Jan. 28, 2008, *available at* http://www.guardian.co.uk/music/2008/jan/28/news.emi/print.

Industry Association of America features a special report entitled: "The CD: A Better Value Than Ever," showing record companies' lingering attachment to an outdated method.[25]

Although criticized for sticking its head in the ground as technology trends changed its context,[26] the recording industry is beginning to adjust to the new circumstances. One recent area of evolution is the contractual paradigm governing relationships between artists and record companies and between artists and promotional companies. The newest contracts governing the relationships between the key players in these areas reflect the positive trends in areas like concerts, merchandise and publishing as well as the downward trends in recorded music sales.

This Note will address the emergence of the "360" model as a basis for artists' contracts with record labels and with promoters. A 360 deal is a legal contract between a musical artist and one company, incorporating components of an artist's career that have traditionally been handled by separate contracts with different companies. Record companies have always contracted with artists with regard to their recordings, but in a record company's 360 deal, a label may also participate in additional aspects of an artist's career, like her merchandising, publishing, endorsements, and touring. Likewise, promoters have contracted with artists with regard to their live performances, but a promoter's 360 deal incorporates other areas, like recording and merchandising. This Note will focus on contracts that commingle recording and touring. The significance of the relative bargaining positions and incentives of the parties involved as well as the impact of the new contractual model on the allocation of revenues within the music industry will be highlighted.

Part II introduces the parties to 360 deals: artists, the major record labels, and tour promoters. Additionally, this Part describes the relative leverage of each party in negotiations.

In Part III, the traditional model for record contracts and touring's role within the music industry are explained. Important provisions in traditional record contracts, such as the contract term, the Recording Fund and the royalty rate are discussed with regard to how they reflect bargaining power and the allocation of costs and profits of records. Tours are also presented as a revenue source that helped the survival of the traditional model and that remains highly profitable as record sales dwindle. The contractual

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[25] RECORDING INDUS. ASS'N OF AM., THE CD: A BETTER VALUE THAN EVER (2007), *available at* http://76.74.24.142/F3A24BF9-9711-7F8A-F1D3-1100C49D8418.pdf.

[26] Hirschberg, *supra* note 11 (stating that "Columbia is stuck in the dark ages"); *see* Rob Landley, *Recording Industry in Denial*, THE MOTLEY FOOL, Mar. 18, 1999, http://www.fool.com/portfolios/rulemaker/1999/rulemaker990318.htm; Robert Batchelder, Commentary, *Record Labels in Denial about Peer-to-Peer*, CNET NEWS, Feb. 14, 2001, http://www.news.com/2009-1023-252626.html; Michael Wolff, *Facing the Music*, N.Y. MAGAZINE, June 3, 2002 (stating that "[t]here is, too, a management critique . . . that sees record labels as generally engaged in the usual practice of ripping off anyone who can be ripped off while remaining oblivious to the fact that Rome is burning"). *But see* Hiatt & Serpick, *supra* note 15 ("A lot of people say, 'The labels were dinosaurs and idiots, and what was the matter with them?' But they had retailers telling them, 'You better not sell anything online cheaper than in a store,' and they had artists saying, 'Don't screw up my Wal-Mart sales.' . . . 'Innovation meant cannibalizing their core business.'").

provisions relating to tours, within artists' contracts with record companies and tour promoters, are presented.

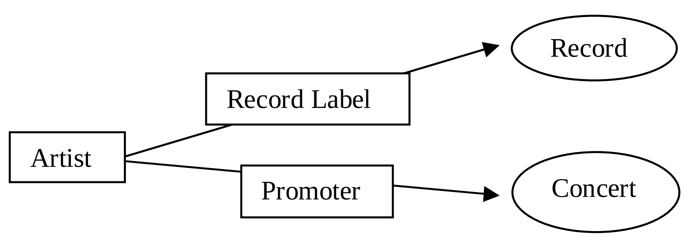
Part IV discusses the 360 model, as it relates to contracts that commingle recording and touring. The growing use of the 360 model is addressed followed by explanations of the major terms of 360 contracts. These terms are compared to their traditional counterparts, allowing for a discussion of changing bargaining positions and incentives of the negotiating parties. The resulting reallocation of touring and recording revenue in the music industry is also highlighted. Three executed 360 contracts are used to illustrate these themes: Paramore's deal with Atlantic, KoRn's deal with EMI, and Madonna's deal with Live Nation. At the end of Part IV, assumptions and concerns regarding the 360 model are addressed.

Part V contains concluding remarks.

II. THE PLAYERS

Artists provide the raw material of the music industry; however, the melodies do not make money on their own. This Note deals with two basic forms in which an artist's music is sold: as a record and as a concert ticket. Traditionally, artists have relied upon record companies and tour promoters to guide them down each of these paths to a profit. The record company does so by subsidizing the recording process and selling albums; the tour promoter does so by facilitating concerts. This relationship is illustrated in Figure 1 below.

Figure 1. Two Ways to Sell Audible Music



A. ARTISTS

As noted above, artists contribute the music itself to the business of music, but often rely on companies for the business aspects. The prohibitively high cost of recording, distributing, and marketing records means that artists almost never have enough money to convert their music into a sellable product without financial backing and expertise from an outside source. Artists' dependence on record companies to help them record and distribute their albums has diminished somewhat, but remains a necessity for most artists. These processes and their costs are discussed in more detail in Part II.

Furthermore, artists' ability to build a fan base, and thus demand for their product, has traditionally been limited. Artists have depended heavily upon record companies to market their music by conducting campaigns that deal with outlets like radio stations, MTV, record stores, and news sources. The evolution of the Internet presents opportunities for artists to market themselves at minimal costs. Many of the most effective promotional sites, which currently include YouTube, MySpace, and Facebook, are free forums for promotion.[27] An illustrative but relatively unique example of the self-marketing potential of the Internet is eighteen year old Dutch singer, Esmee Denters. As a nursing student living at home in a suburb of Amsterdam, Denters began posting videos of herself sitting in front of the computer—singing pop songs while reading the words from her karaoke machine—on YouTube. After one year, her YouTube site boasted twenty-one million hits and Justin Timberlake invited her to sign with his label.[28] Although a few people, like Denters, have been able to garner demand for their music before they sign record contracts, the general rule is that artists approach companies with only their talent and rely on the companies to package and market the talent to potential fans.

Musicians are a dispersed and unorganized group. There is no body that has been able to unite all recording artists to further their common interests.[29] In her famous letter to fellow musicians, rock artist Courtney Love lamented the lack of unity, and tried to inspire a change in the artist community to prevent situations like "Eddie Vedder and Pearl Jam's stand against TicketMaster. Everyone knew he was right and yet no other artist took a public stand against a company that we all knew was hurting our business because our managers and attorneys told us it would be a bad idea."[30]

Central to understanding contracts in music is recognition of the divide between "new" artists and "established" artists. New artists are musicians who cannot present labels with evidence of past success. "This is someone who has never before had a record deal, or someone who has been signed but never sold over 250,000 or so albums per release. It can also mean an artist who was once successful but lost his or her following and is having difficulty finding a record deal."[31] Without a track record of profitability, a new artist is basically a gamble for labels. If a label signs a new artist, the label hopes that the investment in creating the record will pay off but lacks a strong factual basis for that hope. Because of this high risk, labels have a

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[27] *See* Hirschberg, *supra* note 11.
[28] Stephen M. Silverman, *Justin Timberlake Signs YouTube Singer to His Label*, PEOPLE, June 5, 2007, *available at* http://www.people.com/people/article/0,,20041427,00.html.
[29] Letter from Courtney Love, Recording Artist, to fellow Recording Artists, *available at* www.therecordindustry.com/courtney_artist_rights.htm [hereinafter Love].
[30] *Id.*
[31] DONALD S. PASSMAN, ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS 84–85 (Free Press 6th ed. 2006).

strong incentive to manipulate contracts with new artists to maximize the labels' return, even at the artists' expense.[32]

Another explanation for why companies dominate negotiations with new artists relies on the basic ideas of supply of and demand for new artists. As will be discussed, record labels are a consolidated group. In terms of major labels, there are four channels of demand for new artists. To the contrary, there is an ample supply of new artists desperate to sign record deals. Like any glut, most suppliers of the new talent are forced to accept less favorable terms from the limited sources of demand. This imbalance is exacerbated by labels' claims that they will be signing fewer artists in this time of crisis in order to focus more attention on developing already-signed artists.[33]

These two theories explaining "new" artists' lack of leverage in their negotiations with labels also explain why "established" artists have significantly more leverage and can bargain for more favorable terms than their counterparts. Established artists have a record of selling their music and can present evidence of their profitability to labels.[34] Because the established artist can supply figures such as statistics of previous sales, a company contracting with an established artist has some degree of confidence that its investment in the artist will yield profits for the company. Labels' incentive to sign artists who are less risky encourages them to compromise in negotiations and provide established artists with relatively favorable terms.

The supply and demand of the contracting parties further explains the better leverage of established artists. Unlike new artists, the supply of established artists is limited. Among labels, there is high demand and competition for this class of artists who has achieved a fan-base ready to buy its records. Established artists, like suppliers of coveted goods in any market, enjoy this competition among labels and use it as leverage in negotiating more favorable terms than they may have achieved as new artists.

This Note deals with income from concert ticket sales and recorded music sales, but these are only two of a variety of revenue streams that may flow from an artist's work. If the artist is both the singer and songwriter of her music, she will collect writer's royalties in addition to her record royalties. The sale of merchandise from websites, at concerts, or at retail outlets such as Hot Topic[35] can also be a rich source of revenue. Similarly, endorsements can be highly profitable. For example the World Music

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[32] Hiatt & Serpick, *supra* note 15.

[33] *See* Interview by Tess Taylor with Bob Jamieson, President, RCA Records and Jack Rovner, Executive Vice President & General Manager, RCA Records (July 1, 1998), *available at* http://www.narip.com/index.php?option=com_content&task=view&id=114&Itemid=76&PHPSESSID=b574cd780e ("We'd rather sign fewer acts and work them harder than sign a lot of acts and throw them up against a wall, so to speak, and chase the ones that stick.").

[34] *See* PASSMAN, *supra* note 31, at 85.

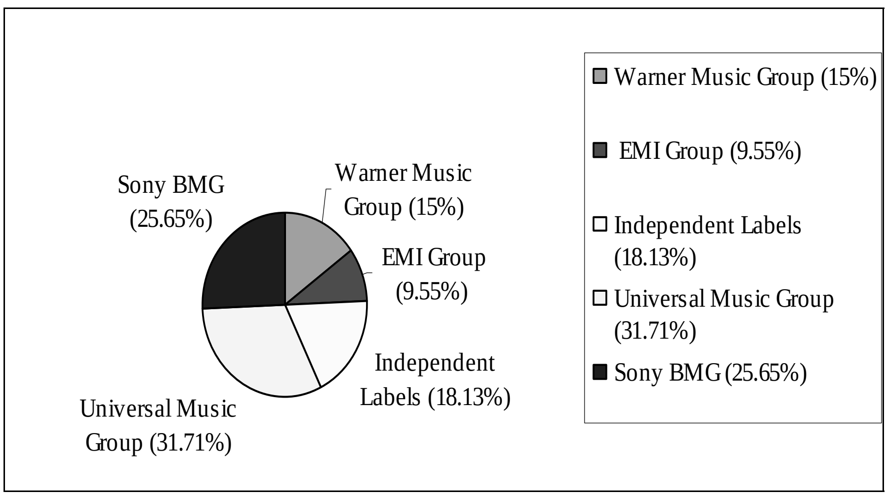
[35] *See Hot Topic*, WIKIPEDIA, http://en.wikipedia.org/wiki/Hot_Topic ("[M]ajor bands such as Korn, Good Charlotte and Avenged Sevenfold have allowed Hot Topic to release their concert wear to the general public before they themselves appear on television or at concerts wearing them.").

Award's 2007 Female Entertainer of the Year,[36] Rihanna, has worked with JC Penny, Nike, LG, and CoverGirl.[37]

B. RECORD COMPANIES

Artists face a consolidated group of record companies across the bargaining table. Due to a general consolidation in the music industry in the 1970s,[38] record labels have been concentrated within four major companies that sell most of the product in the market for recorded music. "The big four" companies, consisting of Warner Music Group ("WMG"), EMI, Sony BMG, and Universal, dominate the recording industry. As of 2005, the four "majors" controlled about seventy percent of the world market and eighty percent of the United States market for record sales.[39] Consolidation is an ongoing trend. Sony and BMG merged recently, in 2004, and EMI and Warner Music have reportedly "flirted with their own merger for years."[40] Not only are record companies consolidated, they have organized to present a united front in the Recording Industry Association of America ("RIAA"). Figure 2 shows the dominance of the four major labels in the market for recorded music.

Figure 2. United States Recorded Music Market Shares[41]



[36] Rihanna was awarded this title at the 2007 World Music Awards. *Rihanna*, WIKIPEDIA, http://en.wikipedia.org/wiki/Rihanna.

[37] Other artists included in the "Top 10 Brand Makers" are 50 Cent, Beyoncé, Missy Elliot, John Mayer, Brad Paisley, Aly & AJ, Fall Out Boy, and Justin Timberlake. Michael Paoletta, *Top 10 Brand-Makers: The Biggest Artist-Brand Partnerships Make the Most of Shared Messages*, INSIDE BRANDED ENTM'T, Sept. 29, 2007, http://www.insidebrandedentertainment.com/bep/article_display.jsp?vnu_content_id=1003645159&imw=Y.

[38] Tricia Rose, *Voices from the Margins: Rap Music and Contemporary Black Cultural Production*, *in* POPULAR CULTURE IN AMERICAN HISTORY 278 (Jim Cullen ed., Blackwell Publishers 2001).

[39] *Record Label*, WIKIPEDIA, http://en.wikipedia.org/wiki/Record_label.

[40] Hiatt & Serpick, *supra* note 15.

[41] *Music Industry*, WIKIPEDIA, http://en.wikipedia.org/wiki/Music_industry (percentages according to Nielsen SoundScan (2005)).

Record companies make, market, and sell recorded music. Their business model has been compared to that of film studios—churn out the albums, most will be unprofitable, but a couple of hugely successful albums will make it all worthwhile.[42] Despite clinging to the idea of the power of the smash hit,[43] record companies are beginning to acknowledge that the traditional "strategy" of relying on a few big-sellers to cover the costs of the gambles is no longer sustainable.[44]

C. TOUR PROMOTERS

Tour promoters are individuals or companies hired to facilitate live performances. Traditionally, promoters have been companies or individuals that focused on specific music types, on a city or regional scale.[45] Artists would contract with a variety of promoters in making a tour's itinerary. Recently, a few promotions companies have emerged offering the ability to organize national or international tours. In these cases, an artist would only sign with one promoter for an entire tour.[46]

Now, the promotions business is quite consolidated on a regional, and increasingly on a national, level; therefore, fierce competition among promoters is probably not the primary explanation for the relatively favorable terms for artists in their contracts with promoters.[47] For the past twenty years, there have been about four dominant promotions firms in each of the largest cities in the United States.[48] One of the recent forces of consolidation has been radio giant Clear Channel Entertainment ("Clear Channel"), which began its tour-promoting business in 2000, and is the source of Live Nation Entertainment ("Live Nation"), currently the biggest promoter.[49] Clear Channel's large market share and the trend of national consolidation over the past ten years are illustrated in Figure 3. By 2005, Clear Channel's dominance prompted *Billboard* Magazine's senior touring writer to comment that "[a]s Clear Channel goes, so goes the business."[50] In September of that year, Clear Channel's touring division spun off to become Live Nation.[51]

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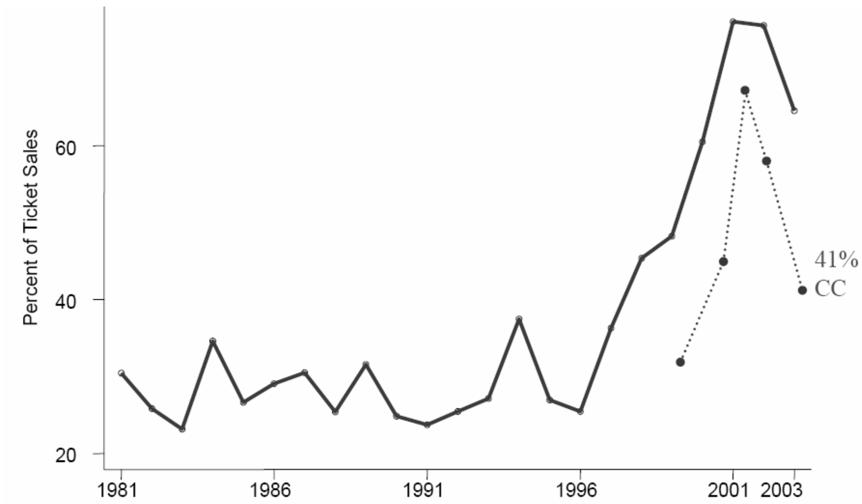
[42] Hiatt & Serpick, *supra* note 15.
[43] *Id.*
[44] Op-ed., *How to Stop Declining Album Sales*, L.A. TIMES, Jan. 22, 2008, *available at* http://www.latimes.com/news/opinion/la-ed-emi22jan22,0,260974.story?coll=la-opinion-leftrail [hereinafter *How to Stop Declining Album Sales*].
[45] PASSMAN, *supra* note 31, at 343.
[46] *Id.*
[47] Marie Connolly & Alan B. Krueger, *Rockonomics: The Economics of Popular Music* 23 (Nat'l Bureau of Econ. Research, Working Paper No. 11282, 2005) ("[C]oncert promotion has always been a highly concentrated business on a regional level.").
[48] *Id.*
[49] *Id.* at 22. Jeff Leeds, *Big Promoter of Concerts to Acquire House of Blues*, N.Y. TIMES, July 6, 2006, *available at* http://www.nytimes.com/2006/07/06/business/media/06music.html.
[50] David Lieberman, *Concert Promoters Hear Fans Singing the Blues*, USA TODAY, Sept. 26, 2005, *available at* http://www.usatoday.com/money/media/2005-09-26-concerts-cover-usat_x.htm?csp=34.
[51] *Live Nation*, WIKIPEDIA, http://en.wikipedia.org/wiki/Live_Nation [hereinafter *Live Nation*].

Figure 3. Percent of Total Revenue Handled by Biggest Four Promoters, Nationwide and by Clear Channel Communications[52]



Despite this consolidation, artists have flexibility in planning their tours, which can give them an advantage when negotiating with promoters. "Performers . . . can shop for great deals. They can sign with a single firm for a whole tour, split it among multiple promoters (McCartney's doing that now) or cut separate deals in different cities."[53] Furthermore, promoters' "demand for hot acts seems to outweigh the supply."[54] The few artists that have established themselves as touring powerhouses also hold leverage in negotiations with promoters because their shows are sure to be highly profitable, so promoters will sacrifice a little more in negotiations for the opportunity to be involved. *Rolling Stone* magazine described the terms that Bruce Springsteen was able to negotiate for his 2004 tour:

> Most rock bands hire a promoter, take a nightly guarantee and then split the profits after the show is done, taking seventy to ninety-five percent of the profits before the promoter gets his share. Not Springsteen. His deal was the best in the business: He reportedly received a guarantee of seventy percent of the potential gross—that is, if every ticket were sold in every corner of the arena. In many cases, sources say, promoters were hired for a mere $10,000 fee, saving millions in road costs.[55]

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[52] Connolly & Krueger, *supra* note 47, at 78.
[53] Lieberman, *supra* note 50.
[54] *Id.*
[55] Robert LaFranco, *The 2004 Rock Rich List*, ROLLING STONE, Feb. 25, 2004, *available at* http://www.rollingstone.com/news/story/5939025/the_2004_rock_rich_list/print [hereinafter LaFranco, *2004 Rock Rich List*].

Tour promoters usually incur the costs of putting on the concert, and aim to recoup these costs and make a profit from the money brought in by ticket sales. Sometimes, the biggest cost is renting the venue; however, some promotions firms have acquired venues. For example, Live Nation bought the House of Blues chain in November of 2006.[56] Artists usually pay for unique concert-specific items like special stages, lighting shows, and transportation.[57] Generally, artists receive the greater of a guaranteed sum or a percentage of the net profits or gross income from ticket sales.[58] This means that if ticket sales do not surpass the guaranteed profit, the promoter loses the difference.[59] Many promoters act in other capacities to earn money apart from ticket sales. For example, they may run parking and concessions businesses, and collect rent for use of any venues they own.[60] The costs and profitability of the touring business are further discussed in Part III.

III. THE TRADITIONAL MODEL

A. PROVISIONS IN THE TRADITIONAL RECORD CONTRACT

The product of the traditional recording contract is recorded music, ready for consumption. Although the "container"[61] carrying the music has changed over time—from phonographic disks,[62] to vinyl records, to eight-tracks and cassettes, to CDs, and now to digital downloads—the promises of the two parties to the agreements have been generally consistent.[63] The artist agrees to contribute his talent to make the music itself, and the record company puts up the cost of making the recording, marketing it, and getting it sold through its distribution channels.

This discussion of the traditional contractual model is supplemented by extractions from a real contract based on the traditional model, which can be found in Appendix I.[64] To facilitate reference to the sample contract, the relevant excerpts have been marked with letters. Table 2 provides a key linking the relevant contractual provisions that will be discussed with their letter, as marked in the sample contract.

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[56] Press Release, Live Nation, Live Nation Completes Acquisition of House of Blues (Nov. 6, 2006), *available at* http://phx.corporate-ir.net/phoenix.zhtml?c=194146&p=irol-newsArticle&ID=926913&highlight=.

[57] PASSMAN, *supra* note 31, at 357. *See* LaFranco, *2004 Rock Rich List*, *supra* note 55.

[58] PASSMAN, *supra* note 31, at 348.

[59] Lieberman, *supra* note 50.

[60] *Id.*

[61] Byrne, *Survival Strategies*, *supra* note 8.

[62] *See* Recording History: The History of Recording Technology, Beginnings: 1890–1900, http://www.recording-history.org/HTML/musicbiz1.php.

[63] *See* Byrne, *Survival Strategies*, *supra* note 8.

[64] This document will be referred to as "Sample Contract 1."

Table 2. Key Provisions in Traditional Contract and Correlating Letter

Provision	Letter	Page
Term	A	444
Options	A1	444
Term Measured in Albums	A2	444
Album Defined	A3	457
Recording Fund	B	446
Recording Costs (Recoupable)	B1	446
Recording Fund Calculation	B2	446
Amounts of Recording Fund	B3	447
Royalties	C	450
Escalating Royalties	C1	450
SLRP	C2	452
Free Goods, Royalty Deductions	C3	453
Royalty Deductions	C4	454
Container Costs	C5	457
Royalty Base Price	C6	458
Reserves	C7	457
Cross Collateralization	D	455
Tour Support	F	450
Focus on Recording	G	444
Label’s Control of Recording Process	H	445
Upfront Advance Fee (Recoupable)	I	447
Label Retains Ownership of the Records	J	448
Label’s Marketing	K	448
Exclusivity	L	455
Definitions	M	455
Advance	M1	455
Non-Fund Recoupable Costs	M2	456
Recording Costs (Defined)	M3	457
Mechanical Royalty	N	455

1. Term

The term is the period for which the artist records exclusively for the record company.[65] Rather than units of time, an artist commits to record a number of tracks, usually stated in terms of number of albums.[66] The length of the term varies, but usually involves a "firm commitment," followed by a string of options for the record company to require the delivery of one more album.[67] Companies usually firmly commit to only one album (or even less—a few tracks) for new bands, but reserve the option to demand up to five, six, or seven[68] albums.[69] Alternatively, a company may firmly commit to two albums, but reserve the right to "bail out" if the first album performs poorly.[70] Options benefit the record company because they often tie the artist exclusively to the record company for as long as labor laws allow,[71] but in turn, do not obligate the company to invest in an album that it believes will not be profitable. Conversely, artists benefit from minimal terms. If an artist's last album was successful, he would probably get more favorable terms from a brand new contract than he would in renegotiating his previous contract. Also, being tied to one label that is cross-collateralizing the artist's records can mean that an artist who has one very successful album may never collect any royalties from it if she recorded unsuccessful albums previously.[72] Established artists have the leverage to demand shorter terms.[73]

2. Recording Fund

The Recording Fund is a sum of money provided by the record companies to artists when they begin recording a new album.[74] The artist uses the money in the Fund to pay for the costs of recording; any money left over is kept by the artist as an advance fee.[75] If the costs of the album

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[65] Lawrence J. Blake & Daniel K. Stuart, *Analysis of a Recording Contract*, *in* THE MUSICIAN'S BUSINESS AND LEGAL GUIDE 282, 286 (Mark Halloran ed., Pearson Prentice Hall 3d ed. 2008); *see* Sample Contract 1, at G & L.

[66] Blake & Stuart, *supra* 65, at 286; *see* Sample Contract 1, at A, A2, A3 (At A3, the contract stipulates that "Album" will last more than 45 minutes and contain at least ten tracks.).

[67] *See* Sample Contract 1, at A1 (The contract contains one firm commitment followed by five options.). *See generally Frontline: The Way the Music Died* (PBS television broadcast May 27, 2004), *available at* http://www.pbs.org/wgbh/pages/frontline/shows/music/perfect/corp.html (on the "corporatization" of the music industry and its effect on the industry's business model).

[68] "Seven album cycles were the standard time frame for these deals, leaving most artists contractually obligated to a particular record label for their entire career." *On The Beat: 360's AKA Blind Ambition* (KCRW Radio Broadcast Nov. 14, 2007) *available at* http://www.kcrw.com/etc/programs/ob/ob071114360s_aka_blind_ambit [hereinafter *360's AKA Blind Ambition*].

[69] PASSMAN, *supra* note 31, at 96.

[70] *Id.*

[71] *See* CAL. LAB. CODE § 2855 (Seven Year Rule). Recording artists may invoke their right to limit their term to seven years even if their contractual obligations remain unfulfilled, but the record companies may collect from the artists, as damages, the money that they would have received from the sales of the unrecorded albums remaining in the contracts. *Id.*; Raphael Tisdale, Music Attorney, Entertainment Law Lecture at University of Southern California Law School (Feb. 21, 2008).

[72] PASSMAN, *supra* note 31, at 82.

[73] *Id.*

[74] RICHARD SCHULENBERG, LEGAL ASPECTS OF THE MUSIC INDUSTRY: AN INSIDER'S VIEW 87 (Billboard Books 1999); *see* Sample Contract 1, at B.

[75] *See* M. WILLIAM KRASILOVSKY ET AL., THIS BUSINESS OF MUSIC: THE DEFINITIVE GUIDE TO THE BUSINESS AND LEGAL ISSUES OF THE MUSIC INDUSTRY 23 (Watson-Guptill Publ'ns 10th ed. 2007). The

exceed the Fund amount, the contract normally states that the artist must pay the "overage."[76] This "all-in" model has generally replaced the previous practice of paying a set Recording Budget amount and a separate advance for the artist. The Recording Fund is a preferable method for record companies because it encourages artists to minimize the costs of recording[77] and puts a fixed amount on the table that the record company can anticipate paying.[78]

The amount of the Recording Fund is a major point of negotiation between the parties involved in the recording process: the artist (and the producer[79]) and the company. Unsurprisingly, artists and producers push for more money in the Fund, while record companies seek to minimize their obligations. Artists want more money in the Fund to free their artistic visions from financial restraints, and to maximize their advances. The total cost of recording an album varies considerably but is usually above $150,000.[80] This includes such expenses as the producer's advance,[81] tape, recording equipment, mastering costs, studio rental and sample clearance payments, each of which can be quite costly.[82] For example, use of a studio usually costs over $2,000 per day, incentivizing the artist to complete the album as quickly as possible.[83]

The Recording Fund increases with the record company's confidence in the selling power of the artist. Many contracts use "formulas" to set the amount of the Recording Fund according to the proven success (or failure) of artists' previous album sales.[84] Very simply, the formula correlates the amount of the Fund to the royalties earned by the artist's previous albums within given minimum and maximum amounts.[85] A new artist's Fund will normally be under $300,000. A midlevel artist can usually get a Fund of $500,000 to $750,000 or even one million dollars. Superstars command a Fund exceeding $1.5 million.[86]

While the Fund resembles an investment made by the recording company, it may be more appropriate to characterize it as a loan.[87] This is because the Recording Fund is an advance, meaning it is recoupable.[88] A recoupable advance is a sum that the record company initially pays but

fee can also be stipulated separately, but it is generally a function of the Fund. *See* Sample Contract 1, at I.

[76] *See* SCHULENBERG, *supra* note 74, at 87.

[77] SCHULENBERG, *supra* note 74, at 87 (stating that the Fund model leads to "better 'citizenship' in the studio").

[78] Blake & Stuart, *supra* 65, at 303.

[79] KRASILOVSKY ET AL., *supra* note 75, at 41.

[80] PASSMAN, *supra* note 31, at 90.

[81] BRIAN MCPHERSON, GET IT IN WRITING: THE MUSICIAN'S GUIDE TO THE MUSIC BUSINESS 62 (Rockpress Publ'g Co. 1999); SCHULENBERG, *supra* note 74, at 87.

[82] MCPHERSON, *supra* note 81, at 62; *see* Sample Contract 1, at M3.

[83] ROBERT WOLFF, HOW TO MAKE IT IN THE NEW MUSIC BUSINESS: LESSONS, TIPS, & INSPIRATION FROM MUSIC'S BIGGEST & BEST 13 (Bob Nirkind & Sylvia Warren eds., Watson-Guptill Publ'ns 2004).

[84] PASSMAN, *supra* note 31, at 91; *see* Sample Contract 1, at B2.

[85] PASSMAN, *supra* note 31, at 91; SCHULENBERG, *supra* note 74, at 87–88.

[86] PASSMAN, *supra* note 31, at 89; *see* Sample Contract 1, at B3.

[87] MCPHERSON, *supra* note 81, at 61–62; *see* Sample Contract 1, at B1. There are important differences between a loan and a recoupable fund. For example, a lender is entitled to collect the full amount loaned and frequently charges interest, while a record company's collection of the sum advanced is conditional.

[88] MCPHERSON, *supra* note 81, at 61–62.

plans to collect later from the artist's share of the album's profits.[89] If the album is successful enough that the artist's assigned portion of the profits exceeds the amount advanced, then the artist will have fully reimbursed the label for the Recording Fund and possibly any other amounts advanced. As indicated, labels usually advance more money than the Recording Fund. Non-Fund recoupable amounts tend to include music video production costs ($50,000 to $100,000)[90] and at least half of independent marketing and publicity costs.[91] One author lamented that, "Damn near everything" is recoupable.[92] The artist does not collect any money from a record until the record company collects all the money it put into making the album, or into past albums if the artist's account with the label was unrecouped.

Although advocates for artists believe that the recouping process means that artists pay for the entire cost of their records, the ultimate financier is the consumer to the extent the sales proceeds "recoup" the record company. If the company remains unrecouped, the artist does not have to make the company whole using her own funds. Instead, the artist's account with the company remains at a deficit.

Most contracts provide for cross-collateralization so that if the costs of one album remain unrecouped, the deficit is repaid from excess earnings of a past or future album.[93] For example, the contract may state that "advances can be recouped from royalties payable, and royalties can be used to recoup advances paid, 'under this *or any other agreement*.'"[94] "This is *never* good for the artist. NEVER,"[95] because incurring substantial costs in recording one album could "leave you in debt for the rest of your major label life."[96]

> <u>Sample Calculation of Recoupable Costs:</u>
> If the cost to the label of producing a radio version of a song is $5,000 and the label chooses to create radio edits for six songs on an album, the total recoupable amount for radio edits is $30,000. If the artist collects $.80 per CD sold and CDs sell for $15, then the album will have to sell an additional 37,500 copies just to recoup the costs of the six radio edits.[97]

Some consider the fact that the artist appears to pay for the recording paired with the fact that the record company retains the copyright privileges[98] "ironic."[99] Labels could justify the arrangement by pointing out that they take the financial risk in the project, and that "many artists derive major income from songwriting[100] and personal appearances—income in which the record company does not share, even though the company's

[89] *See* Sample Contract 1, at M1.
[90] PETER M. THALL, WHAT THEY'LL NEVER TELL YOU ABOUT THE MUSIC BUSINESS: THE MYTHS, THE SECRETS, THE LIES (& A FEW TRUTHS) 131 (Billboard Books 2006).
[91] *See* MCPHERSON, *supra* note 81, at 62; Sample Contract 1, at M2.
[92] MCPHERSON, *supra* note 81, at 62; *see* WOLFF, *supra* note 83, at 24–26.
[93] *See* Sample Contract 1, at D.
[94] PASSMAN, *supra* note 31, at 82.
[95] *Id.*
[96] WOLFF, *supra* note 83, at 23.
[97] *See* THALL, *supra* note 90, at 130.
[98] *See* Sample Contract 1, at J.
[99] Tisdale, *supra* note 71.
[100] *See* Sample Contract 1, at N.

recordings may have been essential in building the artist's popularity and generating such income."[101]

3. Royalties

A royalty is the artist's portion of the revenue derived from the sale of records.[102] The royalty calculation can be complex but basically involves multiplying the artist's percentage of the revenue by either the wholesale price, often called the Published Price to Dealers ("PPD")[103], or the suggested retail list price ("SLRP")[104] after packaging costs[105] are subtracted to yield a number of cents per album sold for the artist to collect.[106] The term "albums sold" is narrowly defined; it only applies to records actually paid for, so any promotional copies that the record company gives away for free, to radio stations or in marketing campaigns, are not accounted for. These free goods can account for five to ten percent of distributed records.[107] Additionally, the record company maintains "reserves" of the artist's royalties in case any of the records "sold" to retailers are returned.[108] The more bargaining power the artist has, the higher royalty rate his contract will stipulate. New artists are usually assigned royalties in the range of thirteen percent to sixteen percent of PPD, while mid-range artists get fifteen to seventeen percent. Superstars generally get eighteen to twenty percent, and occasionally demand more than twenty percent.[109] Often times the contract provides for escalating royalty rates in album sales that reach certain levels and with subsequent records.[110]

Royalty rates are more complex than a simple statement of how much an artist earns from an album's sales; they can determine whether the artist receives anything at all, because it takes less time to recoup at a higher royalty rate than at a lower one. Therefore, an established artist with a higher rate may collect some money on her album while a new artist with a lower rate will still owe the label money, even if the two artists sold the same number of records.[111]

The following sample calculation illustrates how an artist whose album sells 100,000 copies could end up collecting only the amount by which $57,375 exceeds her Recording Fund and other recoupable sums.

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[101] KRASILOVSKY ET AL., *supra* note 75, at 23.
[102] *Id.* at 16. *See* Sample Contract 1, at C.
[103] PASSMAN, *supra* note 31, at 69.
[104] *See* Sample Contract 1, at C2.
[105] Music attorney Raphael Tisdale mused that the "packaging deduction" ought to be called "a royalty deduction," since the amount is largely arbitrary and does not reflect true packaging costs—especially when used in Internet royalty calculations. Tisdale, *supra* note 71; *see also* Sample Contract 1, at C3, C4, C5.
[106] *See* MCPHERSON, *supra* note 81, at 65.
[107] *See* Sample Contract 1, at C3, C4.
[108] PASSMAN, *supra* note 31, at 71; *see* Sample Contract 1, at C7.
[109] PASSMAN, *supra* note 31, at 86.
[110] *See* Sample Contract 1, at C1.
[111] KRASILOVSKY ET AL., *supra* note 75, at 23.

Sample Calculation: Royalties

SRLP	$10.00
Royalty Rate	10%
Shipped Records	100,000
Reserves Amount	10%
Free Goods Deduction	$15,000

SRLP – Packaging Deduction = Royalty Base Price	$10.00 – $2.50 = $7.50
Royalty Base Price x Royalty Rate = Amount of Sale Price Allocated to Artist	$7.50 x 10% = 0.75
Records Shipped – Free Goods-Reserve = Records Shipped For Sale	100,000 – 15,000 = 85,000
Records Shipped for Sale - Reserves = Records Sold	85,000 – (10% x 85,000) = 76,500
Records Sold x Amount of Sale Price Allocated to Artist = Total Amount Credited to Artist's Account	76,500 x $0.75 = $57,375.00

As Table 3 indicates, selling 100,000 copies of a record is not worthy of special recognition. Even though this hypothetical uses modest figures, note that the $57,375 allocated to the artist's account from those sales is dwarfed by the $300,000 recoupable Recording Funds given to new artists, so the artist will likely not collect any royalties for this album. Furthermore, due to cross-collateralization, this deficit will continue to haunt the artist, making it difficult to collect royalties on subsequent albums.

Table 3. Various Achievements in Record Sales[112]

Status Achieved	Gold	Platinum	Multi-Platinum	Highest Selling Album	Top Selling Artist
Number of Sales of Full Length Album	500,000	1 Million	2 Million	29 million (Eagles, Greatest Hits)	170 Million (Beatles)

[112] Recording Indus. Ass'n of Am., Gold and Platinum Certification Requirements, http://www.riaa.com/goldandplatinum.php?content_selector=criteria.

B. WHAT THE ARTIST TAKES HOME

Although the royalty calculation is often thought of as "the most important part of the recording agreement,"[113] the fact remains that most artists never see any royalty money.[114] The deductions in the royalty calculation result in an amount credited to the artist's account that is much lower than simply the royalty rate times the total income from the record. This fact, cast against the need to repay the label for money advanced for the album and any cross-collateralized albums, means that record contracts are rarely directly profitable endeavors for artists, other than the portion of the advance that the artist keeps.[115] Furthermore, the drop in album sales has resulted in even less income for artists. As James Surowieki put it in his *New Yorker* article, "There are still artists who make huge sums of money selling records, but they are the lucky few. A longtime recording-industry rule of thumb holds that just one in ten artists makes money from royalties. Today [2005], it's probably less than that."[116]

Victims of this "rule" include artists who have sold millions of albums. "The typical pop star often lives in debt to their record company and a host of other entities, and if they hit a dry spell they can go broke. Michael Jackson, MC Hammer, TLC—the danger of debt and overextension is an old story."[117] Another example is successful country singer Merle Haggard, who never collected royalties from any of his 1960s and 70s albums, which included thirty-seven top-ten country singles, twenty-one of them number one hits.[118]

Although the album itself may not be profitable for most artists, albums have the indirect benefit of boosting income from other areas of an artist's career, including: concerts, merchandising, publishing, and endorsements.

C. CONTRACTUAL PROVISIONS REGARDING TOURS

1. The Role of Tours in the Traditional Model

One reason for the endurance of a contractual framework that leaves artists with little chance of collecting a significant percentage of what their albums earn is that artists have access to alternative sources of income. Concerts present artists with another avenue to distribute their music and allow them to collect a higher percentage of the shows' income than any record royalty rate ever could. For artists that have built a demand for their tickets, touring is a financially lucrative option. Economists Marie

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[113] MCPHERSON, *supra* note 81, at 65.
[114] Connolly & Krueger, *supra* note 47, at 6.
[115] *Id.* ("[B]ands receive relatively little of their income from recording companies. Indeed, only the very top bands are likely to receive any income other than the advance they receive from the company, because expenses—and there are many—are charged against the band's advance before royalties are paid out.").
[116] James Surowiecki, *Hello, Cleveland*, THE NEW YORKER, May 16, 2005, at 42.
[117] Byrne, *Survival Strategies*, *supra* note 8.
[118] Love, *supra* note 29.

Connolly[119] and Allan B. Krueger[120] summed up the importance of touring to artists:

> [I]t is clear that concerts provide a larger source of income for performers than record sales or publishing royalties. Only four of the top 35 income-earners made more money from recordings than from live concerts, and much of the record revenue for these artists probably represented an advance on a new album, not on-going royalties from CD sales. For the top 35 artists as a whole, income from touring exceeded income from record sales by a ratio of 7.5 to 1 in 2002. Royalties from publishing music was slightly less than income from recordings.[121]

Tours can be more profitable for artists even though recorded music's gross revenues exceed concert revenues. This is because, while the record company demands eighty to ninety-five percent of a record's earnings on top of recouping its initial investment, the artist controls most of the income from her tour. For example:

> In 2003 the total value of recording sales (including CDs, singles, LPs, etc.) in the U.S. was $11.8 billion . . . , while the total value of concert ticket sales was $2.1 billion . . . . Thus**,** from the consumers' perspective, recordings are a much larger market, but from the artists' perspective, concerts represent a much more important income source.[122]

Tables 4, 5, 6, and 7 provide an idea of the income that successful concerts and tours generate. Table 4 lists the gross income from touring for the top ten income-earners in music for the year 2002. Table 5 lists the top grossing events for February and early March 2008. Table 6 lists the ten highest grossing tours (or portions of tours) performed in 2007. These charts show only the most successful acts. Although relatively few artists achieve this kind of success, the importance of touring is increasing for all types of artists. Just seven years ago, two-thirds of all musicians' income came from their records, while concerts, endorsements, and merchandise combined to make up the other third. Since then, the relative importance of concerts, along with endorsements and merchandise, has grown tremendously. These areas now make up "the industry's biggest and fastest-growing sources of revenue."[123]

The total earnings from ticket sales has been rising steadily throughout the crisis of falling recorded music sales. In 2000, concert ticket sales in North America totaled $1.7 billion.[124] By 2007, that number had climbed to $3.9 billion.[125] Although ticket prices are rising faster than the rate of inflation, the increases in touring revenue has been attributed to "'selling

[119] Princeton University.
[120] Princeton University and National Bureau of Economic Research (NBER).
[121] Connolly & Krueger, *supra* note 47, at 4.
[122] *Id.* at 6.
[123] *A Change of Tune*, *supra* note 14.
[124] *Id.*
[125] Louis Hau, *Another Record Year for the Concert Industry*, FORBES, Jan. 4, 2008, *available at* http://www.forbes.com/2008/01/04/concert-revenues-2007-biz-media-cx_lh_0104bizconcert.html.

more tickets rather than more expensive tickets.'"[126] Table 7 shows the recent growth of gross revenue from North American touring.

Table 4. Estimated Pre-Tax Gross Income by Source for Top Ten Artists Who Toured in 2002 (Millions in U.S. Dollars)[127]

Rank	Artist	Live Concerts	Recordings	Publishing	Total Income
1	Paul McCartney	64.9	2.2	2.2	72.1
2	The Rolling Stones	39.6	0.9	2.2	44
3	Dave Matthews Band	27.9	0	2.5	31.3
4	Celine Dion	22.4	3.1	0.9	31.1
5	Eminem	5.5	10.4	3.8	28.9
6	Cher	26.2	0.5	0	26.7
7	Bruce Springsteen	17.9	2.2	4.5	24.8
8	Jay-Z	0.7	12.7	0.7	22.7
9	Ozzy Osbourne/ the Osbournes	3.8	0.2	0.5	22.5
10	Elton John	20.2	0.9	1.3	22.4
Average of top 35		**12.7**	**1.7**	**1.3.**	**17.4**

Table 5. Top Grossing Concerts: February/March 2008 (Venue Specific)[128]

Artist/ Event	Venue (City/State)	Event Dates (2008)	Gross Sales	Attendance	Prices	Promoter
Alejandro Fernandez	Auditorio Nacional (Mexico City, Mexico)	Jan. 31– Feb. 22	$4,617, 649	91,455 / 96,830	$50.49	CIE
Mana	Auditorio Nacional (Mexico City, Mexico)	Feb. 14– 17	$1,768, 216	36,152 / 38,732	$48.91	CIE

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[126] *Rolling Stones Lead 2006 Tours*, POLLSTAR, Dec. 28, 2006, http://www.pollstar.com/news/viewnews.pl?NewsID=7543 (quoting Pollstar's Editor-in-Chief, Gary Bongiovanni).

[127] Connolly & Krueger, *supra* note 47, at 71. Figures are estimates of pre-tax gross income in 2002. The total income may exceed the sum of the first three columns because of TV, movie, merchandise, and other potential sources of income.

[128] *See* Billboard, Boxscore Concert Sales, http://www.billboard.com/bbcom/charts/boxscore.jsp.

Bruce Springsteen	XL Center (Hartford, CN)	Feb. 28	$1,415,280	15,409 / 15,409	$95, $65	Live Nation
Kid Rock, Rev Run, Peter Wolf, Dickey Betts	Joe Louis Arena (Detroit, MI)	Feb. 8–9	$1,308,689	31,710 / 42,371	$45, $26.50	Live Nation/in-house
Bob Dylan	Auditorio Nacional (Mexico City, Mexico)	Feb. 26–27	$1,155,468	17,452 / 19,366	$66.21	Espectaculos Mayas
George Strait, Little Big Town, Sarah Jones	The Pit (Albuquerque, NM)	Mar. 6	$993,750	14,620 / 14,620	$68.75, $58.75	A.C.T.C./ Vernell Enterprises
Billy Joel	Pepsi Center (Denver, CO)	Feb. 28	$971,953	12,026 / 12,026	$99, $33.50	AEG Live
Rascal Flatts, Kellie Pickler	Air Canada Center (Toronto, Ontario)	Feb. 7	$915,770	11,732 / 11,732	$88.96, $49.20	Live Nation
George Strait, Little Big Town, Sarah Jones	United Spirit Arena (Lubbock, TX)	Mar. 7	$904,466	14,259 / 14,259	$64.50, $54.50	A.C.T.C./ Vernell Enterprises
Barry Manilow	Bank Atlantic Center (Sunrise, FL)	Feb. 23	$902,004	10,121 / 12,627	$197.25	Live Nation/in-house

Table 6. 2007 Top Grossing Tours in North America[129]

Artist	Gross (million)
The Police	$133.2
Kenney Chesney	$71.1
Justin Timberlake	$70.6
Celine Dion	$65.3
Van Halen	$56.7
Faith Hill and Tim McGraw	$52.3
Rod Stewart	$49
Genesis	$47.6
Josh Groban	$43
Rascal Flatts	$41.5
Bon Jovi	$41.4
Dave Matthews Band	$41.1
Billy Joel	$39.1
Roger Waters	$38.3
Bruce Springsteen and the E Street Band	$38.2
Hanna Montana/Miley Cyrus	$36
Elton John	$35.7
Jimmy Buffett	$35.6
Barry Manilow	$34.8
Toby Keith	$34.3

Table 7. North America Total Gross Revenue from Tours

Year	Gross Revenue
2000	$1.7 billion[130]
2004	$2.8 billion[131]
2005	$3.1 billion[132]
2006	$3.6 billion[133]
2007	$3.9 billion[134]

[129] *The Police Lock Top 2007 Tours Spot*, POLLSTAR, Dec. 31, 2007, http://www.pollstar.com/news/viewnews.pl?NewsID=9020; *see also* Hau, *supra* note 125.
[130] *A Change of Tune*, *supra* note 14.
[131] *Stones Score 2005's Top Tour*, POLLSTAR, Dec. 30, 2005, http://www.pollstar.com/news/viewnews.pl?NewsID=6558.
[132] *Rolling Stones Lead 2006 Tours*, *supra* note 126.
[133] *Id.*

2. *Touring Provisions in Traditional Record Contracts*[135]

Record contracts sometimes provide artists with tour support because record companies traditionally viewed concerts as catalysts to increased record sales.[136] For some artists, "[l]ive performances used to be seen as essentially a way to publicize a new release—a means to an end, not an end in itself. Bands would go into debt in order to tour, anticipating that they'd recover their losses later through increased record sales."[137] Going on tour can be prohibitively costly, especially for new artists. The profits from a new artist's shows rarely outweigh the costs of rehearsal, organizing logistics, travel, hotels, agents, managers, publicity and promotion campaigns, and any back-up musicians.[138] Sometimes the artist can negotiate with the record company to get it to provide enough money to make up for an artist's losses from touring. The recording agreement refers to this amount as "tour support."[139]

Tour support is now much harder to come by than it used to be, because record companies are questioning the live show's value as a marketing tool for recorded music.[140] The more likely a tour is to increase a band's record sales, the more likely the band can negotiate for tour support. Therefore, a heavy metal band would be more likely to attain tour support than a pop "crooner."[141]

When tour support is provided for, the actual amount of loss incurred, up to a set limit, determines its amount.[142] In addition to stating an upper limit, contracts also stipulate which costs it will cover and demand record company ownership of any equipment purchased for the tour. Now that the image of the tour as a promotional tool is waning, record companies have stopped treating tour support like non-recoupable advertising and deem it fully recoupable.[143]

Even if the marketing power of concerts has decreased, the idea that shows sell CDs is a firmly held belief in music.[144] For this reason, record companies have encouraged touring not only by providing tour support

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[134] *Id.*; Hau, *supra* note 125.
[135] *See* Sample Contract 1, at F.
[136] PASSMAN, *supra* note 31, at 143.
[137] Byrne, *Survival Strategies*, *supra* note 8.
[138] Jeri Goldstein, *How to Get Tour Support from a Record Label*, GETSIGNED.COM, June 6, 2001, http://www.getsigned.com/jeri51.html.
[139] PASSMAN, *supra* note 31, at 143.
[140] *Id.*
[141] *Id.*
[142] *See* Sample Contract 1, at F.
[143] PASSMAN, *supra* note 31, at 143.
[144] *See* KRASILOVSKY ET AL., *supra* note 75, at 25 ("Touring is an excellent means of promoting an artist's album, as sales consistently increase in areas in which the artist performs."); Goldstein, *supra* note 138 ("The one factor that every record executive will agree upon is the more you tour, the more recordings you sell. If you have had your own label, you will certainly attest to this fact. When you're not out gigging, the CDs remain piled in their boxes in the storage room. If you are a new artist to a label, the execs are even more anxious to have you on the road, playing to support the release of your new CD."); *Tour Promotions*, KNOWTHEMUSICBIZ.COM, Sept. 4, 2007, http://www.knowthemusicbiz.com/index.php/BIZ-WIKI/Publicity-&-Promotions/Tour-Promotions.html ("Touring also has a proven direct effect on music sales (both online and retail sales in the markets where the artist plays) and radio airplay.").

subsidies, but also by allowing the artist to control her own tour and to keep the tour's profits (after any tour support is recouped).

3. Artists' Contracts with Tour Promoters

A number of variables determine how a tour is arranged. Usually, the artist's agent or manager organizes the tour by: planning the itinerary, booking the transportation and hotels, and dealing with the crews. The agent or manager also formulates an image for the band or artist consistent with the tour (for example, he would not want to book a bubble gum pop singer as the opening act for a heavy metal band), handles any radio promotion, decides when to put the tickets on sale, sets the ticket price, and deals with promoters.[145]

Promoters are concert professionals; the artist contracts with them to organize the logistics of the concert. Usually, the promoter arranges and initially incurs the costs of vital aspects of the show, such as renting the venue, advertising the show and supervising the overall process.[146] The identity of promoters has expanded from individuals working in local markets to include regional promoters, national and international promoters, as well as venues acting as promoters.[147] Signing a single contract for a nationwide tour with a national promoter is becoming a more common phenomenon, especially for established artists, as national promoters like Live Nation and AEG Entertainment gain momentum.[148] The primary difference between a local one-off contract and a national deal is that the shows in the latter contract are cross-collateralized.[149] Despite the cross-collateralization, logistical and administrative benefits of streamlining a national tour by working with one promoter are significant.

The financial arrangements between artists and promoters differ but usually involve a set amount guaranteed to the artist and/or a share of the income from ticket sales. The promoter uses some of the money allocated to it to cover its costs of putting on the show. Smaller scale artists may contract to receive just a set fee from the promoter for performing at a club or as an opening act.[150] A newer artist or one with a local fan base can collect a fee of $250 to $1,500 per show, while a band with a fan base strong enough to sell one thousand tickets may demand at least $5,000 to $10,000 per show.[151] Promoters may split the income from ticket sales with artists instead of or in addition to the set fees. The percentages paid out vary according to each party's leverage as well as the number of bands performing in a concert.[152]

Many established artists arrange to receive a guarantee against their shows' net or gross profits.[153] In these deals, the artist is guaranteed to

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[145] PASSMAN, *supra* note 31, at 339–342.
[146] *Id.* at 343; Connolly & Krueger, *supra* note 47, at 5.
[147] PASSMAN, *supra* note 31, at 343.
[148] *Id.*; Connolly & Krueger, *supra* note 47, at 7.
[149] PASSMAN, *supra* note 31, at 354.
[150] *Id.* at 346.
[151] *Id.*
[152] *Id.*
[153] *Id.* at 348.

receive a certain amount of money, whether or not the promoter recoups its costs of putting on the show. If the promoter does not pay the artist the guaranteed fee before the concert takes place, then the first dollars collected from ticket sales are paid to the artist as a "guaranteed advance." Major artists playing in arenas get guarantees of hundreds of thousands of dollars, or even over one million dollars per show.[154] For example, the Eagles received advance guarantees of over one million dollars per concert in 2004.[155] The promoter collects the earnings from the next batch of tickets sold to cover expenses and a negotiated fee for the promoter, called a "guaranteed profit."[156] For this reason, the band pays the tour-specific expenses, such as custom stages, lighting shows and transportation, out of its income from the agreement.[157] The extravagance level of a show can make a big difference in the amount of gross profits the artist actually receives.[158] For example,

> [Britney Spears] embarked on a high-profile tour, but like both 'N Sync and the Backstreet Boys, the swollen cost of Spears' stage show—she had to pay for costume changes, dancers, a custom stage and riser, eighteen trucks and a climactic rainstorm that, conveniently, soaked her T-shirt—cut into the tour's profit margin considerably. The shows grossed $23.7 million, though Spears, sources estimate, saw only about ten percent of that figure.[159]

After the "guaranteed advance" and the "guaranteed profit" have been distributed, excess profits from ticket sales are split between the artist and the promoter. Commonly, the artist will collect eighty-five percent of the profits and the promoter will collect fifteen percent,[160] though artists with more bargaining power can collect ninety percent or even ninety-five percent of profits.[161] Some deals provide for the split to change as the income surpasses certain levels. For example, the contract may stipulate that the artist will initially receive eighty-five percent and the promoter fifteen percent of net profits, but that once the promoter is recouped, the split will change to ninety percent for the artist and ten percent for the promoter.[162]

These financial terms of artists' contracts with promoters are generally favorable for artists since artists will almost always collect some amount for performing, and artists who generate significant ticket sales can contract to receive most of the profits from these sales. Despite promoters' consolidation, artists have been able to negotiate contracts with them that allocate most—eighty-five to ninety percent—of the income from the tours, after their costs are recouped, to the artists. This dynamic differs from that of the artist with record companies who collect the costs of recording

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[154] *Id.*
[155] LaFranco, *2004 Rock Rich List*, *supra* note 55.
[156] Connolly & Krueger, *supra* note 47, at 7.
[157] *Id.* at 8.
[158] PASSMAN, *supra* note 31, at 357; *see* LaFranco, *2004 Rock Rich List*, *supra* note 55.
[159] Robert LaFranco, *The Rolling Stone Money Report*, ROLLING STONE, July 4, 2002, *available at* http://www.rollingstone.com/news/story/5938443/the_rolling_stone_money_report.
[160] Connolly & Krueger, *supra* note 47, at 8.
[161] PASSMAN, *supra* note 31, at 348–49.
[162] *Id.*

albums from artists' shares of profits before paying the artists, and keep more than half of the profits from records, even after being recouped.

D. UNDERLYING ASSUMPTIONS OF THE TRADITIONAL MODEL

This traditional framework of the recording and touring businesses within the music industry rests carefully upon antiquated assumptions. Two major assumptions underlying the record contract model have made labels extremely vulnerable. The first assumption is that the business of recorded music is profitable. Record companies used to view concerts as useful only to the extent that they increased record sales. Now, the opposite is beginning to be true—recorded music is viewed as a means of marketing an artist and a way to increase concert and merchandising revenues.

The second assumption is that artists need record companies to record and market albums. Computer technology and the Internet have weakened this assumption's foundation. The price of recording, though still prohibitively high for most artists, has decreased to a level that allows for less dependence on record company funding, as previously seen with Radiohead.[163] David Byrne (best known as front man of The Talking Heads) recently stated that records could be made for practically nothing but the cost of a laptop computer.[164] When confronted by fellow musicians who disagreed that recording costs could be so minimal,[165] Byrne admitted that "Yeah, you're right. I exaggerate." However, Byrne persisted, stating: "I'm working on one now and the cost is way lower than it would have been. So I haven't had to go to a record company, for example, to cover the costs. And, in general, though I exaggerated . . . the costs have indeed come down dramatically."[166] Computers and the Internet also provide for a distribution method, so artists are less dependent on record companies' channels. Like Radiohead, a band could pay the cost of an Internet-payment service and sell songs from a website. Additionally, the Internet supports free promotion that could be as effective as a labels' marketing.

One reaction of labels has been to change the contractual framework governing their relationship with artists and their access to revenue streams flowing from artists. By expanding the scope of their relationships with artists, labels are shifting their focus from trying to reverse the trend of declining CD sales to compensating for the decreased sales by participating in more profitable arenas.

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[163] Byrne, *Survival Strategies*, *supra* note 8. *See also* David Byrne, Online Journal Posting: *Correction?* (Jan. 9, 2008), *available at* http://journal.davidbyrne.com/2008/01/01092007-correc.html [hereinafter Byrne, Journal].http://journal.davidbyrne.com/2008/01/01092007-correc.html

[164] Byrne, *Survival Strategies*, *supra* note 8.

[165] Byrne, Journal, *supra* note 163 (noting that fellow artist Issa (formerly Jane Siberry) reacted to the article by saying, "Make records for almost nothing? I suppose. I'm already at 40K and . . . I really don't think I could do it for less." Also, Howard Bilerman, a music engineer/producer, estimated that "[a]ll tolled, in addition to the laptop, a band is looking at between $5,000–$10,000 in extra costs just to have the ability to record themselves.").

[166] Byrne, Journal, *supra* note 163.

IV. 360 CONTRACTS

A. THE RISE OF A NEW MODEL

There is widespread agreement within the music industry that it is time for the record company paradigm to evolve. One approach of record companies has been to change the structure of contracts with artists so that the contracts encompass more of the artist's output than just recorded music. The new contracts that allow record companies to participate in previously untapped areas are called 360 deals.[167] In 2007, legendary music mogul David Geffen told the *New York Times Magazine*, "[o]nly 10 years ago, companies wanted to make records . . . and see if they sold. But panic has set in, and now it's no longer about making music, it's all about how to sell music."[168] Possibly, when Geffen said "sell music," he intended to include all revenue streams stemming from a musician, not just the recording, but concerts, ring-tones, and artist-inspired merchandise as well. Despite the variety of rights that may be incorporated into 360 deals, this Note focuses on contracts that commingle the rights to recording and touring revenues.[169]

The 360 model has been gaining momentum since it emerged as a solution to the "crisis" in the industry in the early 2000s. British pop star Robbie Williams's 2002 contract with EMI was an early 360 deal.[170] The trend continued when WMG included merchandizing in its contract with the band My Chemical Romance in 2003 on the thought that a merchandising venture "might be a nice little addition to the pot."[171] In 2005, EMI and KoRn signed a more publicized 360 deal, leading *Rolling Stone* to report that "[s]o far, few labels have been as bold as EMI, but some have been testing the waters."[172] The model gained a significant credibility boost when Live Nation signed a highly publicized, "$120 million deal" with superstar Madonna—an artist generally recognized for her business sense.[173] Ironically, Live Nation's use of the model, which labels began using to expand their power and strengthen their threatened position in the industry, further exacerbates labels' problems by manipulating the 360 model with the intention of cutting the label out.[174]

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[167] *See* Susan Butler, *Music Biz Lawyers Wary of Labels' New Grab*, REUTERS, Dec. 29, 2007, http://uk.reuters.com/article/idUKN2849012220071229.

[168] Hirschberg, *supra* note 11.

[169] *See* Paul R. La Monica, *CBS Faces the Music*, CNNMONEY.COM, Dec. 15, 2006, http://money.cnn.com/2006/12/15/news/companies/cbs_analysis/index.htm.

[170] *See* Jeff Leeds, *The New Deal: Band as Brand*, N.Y. TIMES, Nov. 11, 2007, *available at* http://www.nytimes.com/2007/11/11/arts/music/11leed.html [hereinafter Leeds, *Band as Brand*].

[171] Evan Serpick, *Korn, MCR Cut New Deals*, ROLLING STONE, Oct. 27, 2005, *available at* http://www.rollingstone.com/news/story/8681455/korn_mcr_cut_new_deals (quoting WMG executive, Craig Aaronson).

[172] *Id.*

[173] Leeds, *Band as Brand*, *supra* note 170.

[174] *See* James Montgomery, *Are Radiohead, Madonna, Trent Reznor Sounding the Death Knell for Major Record Labels?*, MTV NEWS, Oct. 16, 2007, http://www.mtv.com/news/articles/1571936/20071015/radiohead.jhtml.

Only six years after the Robbie Williams deal, the 360 deal is becoming typical, "used by all the major record labels."[175] Producer Josh Abraham commented on the model's rise to prominence: "Five or eight years ago an eyebrow would be raised. . . . Now, it's everywhere. You can't talk about what a deal looks like without seeing a 360 deal."[176] Monte Lipman, president of Universal Republic Records, echoes this idea, stating, "I don't think there's a deal being made today where the 360 model doesn't come up."[177]

The growing influence of 360 deals is apparent in the internal reorganizations of record companies. For example, as it wavered on the verge of collapse, WMG purchased the nation's largest music management firm, Front Line Management.[178] This investment shows that WMG aims to expand its horizons to help develop and capitalize on its artists. As Edgar Bronfman Jr., WMG's CEO, stated in November, 2007, "We're not going to continue to sign artists for recorded music revenue only."[179] Another example is Universal's purchase of Sanctuary, a "struggling British label with a management arm that represents musicians including Elton John and Robert Plant," which also owns a merchandising company.[180]

B. PROMOTER-BASED 360 DEALS

Record labels are not the only businesses using the new model; tour promoter Live Nation has also begun drafting its own 360 deals under its new Live Artists division, formed in 2007. A spin-off of media conglomerate Clear Channel, Live Nation itself is relatively new, having begun to operate independently[181] from its parent corporation in 2005.[182] Analysts recognized the potential of the live events promoter and its stock price rose twenty-five percent within two weeks of its issuance.[183] Live Nation immediately began positioning itself as a leader of organizing high-profile events and international tours. For example, the company bought over one hundred venues internationally, including the House of Blues

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[175] Leeds, *Band as Brand*, *supra* note 170.
[176] *Id.*
[177] Janet Morrissey, *If It's Retail, Is It Still Rock?*, N.Y. TIMES, Oct. 28, 2007, *available at* http://www.nytimes.com/2007/10/28/business/28rockers.html.
[178] *See* Roger Friedman, *Warner Music No Longer a Record Company*, FOXNEWS.COM, Nov. 30, 2007, http://www.foxnews.com/story/0,2933,314102,00.html#4; *see also WMG May Buy Major Management Firm*, HYPEBOT.COM, Apr. 19, 2007, http://hypebot.typepad.com/hypebot/2007/04/wmg_may_buy_maj.html.
[179] Friedman, *supra* note 178.
[180] *A Change of Tune*, *supra* note 14; John Hayward, *Universal Sanctuary Bid Approved*, BILLBOARD.BIZ, June 15, 2007, http://www.billboard.biz/bbbiz/content_display/industry/e3ic5575a8c4f61aadd8d5ea2d7fde1fdee; *see also* Eliot Van Buskirk, *New Type of Record Label Handles Touring, Publishing, Merchandise*, WIRED, Sept. 20, 2007, http://blog.wired.com/music/2007/09/new-type-of-rec.html.
[181] Although Live Nation, which used to be Clear Channel Entertainment, officially separated from Clear Channel, there is still considerable overlap in the boards of directors of the two companies. *See* Live Nation, Corporate Governance: Board of Directors, http://phx.corporate-ir.net/phoenix.zhtml?c=194146&p=irol-govBoard; Clear Channel, Corporate: Executives, http://www.clearchannel.com/Corporate/PressRelease.aspx?PressReleaseID=1168&p=hidden.
[182] *See Live Nation*, *supra* note 51.
[183] Paul R. La Monica, *Live Nation: A Hot Ticket?*, CNNMONEY.COM, Jan. 4, 2006, http://money.cnn.com/2006/01/04/commentary/mediabiz/index.htm.

chain.[184] By the end of 2005, Live Nation had put on over 29,500 events for over sixty million attendees.[185] Live Nation is currently the world's biggest concert promoter[186] and is still aiming to expand its horizons by using the 360 contract.[187]

Live Nation has begun reshaping its "promoter" identity to one that comports with the 360 model. In early 2007, the company formed its Live Artists division "to partner with artists to manage their diverse rights, grow their fan bases and provide a direct connection to fans through the global distribution platform and marketing proficiencies that have made Live Nation the world's largest live music company."[188] The mission to be involved in the "diverse rights" of an artist shows that Live Artists is predicated on the 360 model. Live Nation believes that its promotions business, particularly the ability to match an email address to musical tastes, leads to one-on-one relationships with fans. Live Nation says it can use this connection to distribute multiple products directly to fans, thereby increasing the overall revenue of the artist.[189]

The alleged relationship with fans is a considerable advantage. To illustrate its strength, consider the strategy of Guy Hands, whose investment firm bought EMI in 2007—"spend more money finding and developing artists, then try[] to build audiences for them using new technology."[190] Live Nation purports to already have surpassed the last hurdle listed by Hand. As Live Nation's CEO, Michael Rapino, explained to one reporter at a Jay-Z show at Live Nation's House of Blues, "I should be emailing you the morning after the Jay-Z concert, saying, 'Want a CD? A download? Want a video of the show? Want a set list? Want a signed shirt with Jay-Z? We printed a limited edition.' The possibilities are endless."[191] Live Nation Artists' contract with Madonna, executed in October of 2007, lends credibility not only to Live Nation as an all-around business, but to the 360 model.

Although the Madonna deal proves that Live Nation is capable of executing the 360 contract, critics doubt promoters' capability of performing 360 contracts and doubt that 360 deals will yield a higher profit to the company. Two significant opponents of the promoter-based 360 deal

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[184] *Id.*
[185] CNNMoney.com, Live Nation Inc. Company Profile, http://money.cnn.com/quote/snapshot/snapshot.html?symb=LYV.
[186] *See* Mitchell Peters, *AEG's Leiweke: We Won't Go 360*, BILLBOARD.BIZ, Feb. 8, 2008, http://www.billboard.biz/bbbiz/content_display/industry/e3i1e0e186c138b932982c7d7bd14c5ad51.
[187] According to U2 manager Paul McGuinness, "Live Nation, previously a concert and venue company, is moving into position with merchandising, ticketing, online, music distribution as one of the powerful new centres of the music industry." Paul McGuinness, Speech at MIDEM's 1st International Manager Summit (Jan. 28, 2008), *available at* www.ifpi.org/content/library/paul-mcguinness-Jan2008.pdf.
[188] *Live Nation's Artist Nation Division Redefines the Music Industry with Unified Rights Model*, PRNEWSWIRE.COM, Oct. 16, 2007, http://www.prnewswire.com/cgi-bin/stories.pl?ACCT=109&STORY=/www/story/10-16-2007/0004683291&EDATE=.
[189] Interview with Gary Stiffelman, Partner, Ziffren, Brittenham, Branca, Fischer, Gilbert-Lurie, Stiffelman, Cook, & Johnson in Los Angeles, CA (Feb. 20, 2008) [hereinafter Stiffelman].
[190] *How to Stop Declining Album Sales*, *supra* note 44.
[191] Paul Sloan, *Live Nation Rocks the Music Industry*, FORTUNE, Nov. 30, 2007, *available at* http://money.cnn.com/2007/11/30/news/companies/live_nation.fortune/index.htm.

are AEG,[192] the second biggest promoter, and shareholders of Live Nation stock. In February 2008, AEG president and CEO Tim Leiweke publicly rejected the promoter-based 360 deal by announcing that AEG has no plan to pursue 360 deals.[193] Leiweke made his position clear when he stated that, "There are those that believe in a 360 model . . . . We don't."[194] Leiweke further stated that, "We go to the labels and let them know we're partners and that we can't distribute the music better than [they] can . . . . The labels have an important place within our industry. Quite frankly, if the label industry disappears, that's not good for the music industry." Leiweke appears to believe that promoters lack the necessary expertise to carry out responsibilities in the various business areas imposed by 360 deals. This is a commonly expressed concern for all 360 deals, whether the company be a label or a promoter.[195] Leiweke further expressed this doubt by saying, "We don't think that we do ticketing or distribution or managing artists better than you do."[196]

The business sense of promoters entering 360 deals is also debated. After all, why would a tour promoter, comfortably positioned in a highly profitable and growing area of music, ever want to go into the panic-stricken recording business? Live Nation's belief—that its relationship with fans positions it to sell tickets, merchandise, *and* albums most effectively, resulting in a larger overall pot for Live Nation to share with the artist—is not a good enough answer for some analysts. As Figure 4 indicates, the value of Live Nation stock—LYV—dropped significantly after the October 2007 announcement of the Madonna deal. This suggests that investors may doubt Live Nation's ability to profit from 360 deals; however, the shift could be the result of any combination of the many variables affecting stock prices. For example, although Live Nation's $4.2 billion revenue in 2007 was $473.3 million more than the 2006 total, its performance in the fourth quarter was less favorable.[197] The reported revenue for the fourth quarter of 2007, which more or less coincides with the reaction to the Madonna deal, was one billion dollars, which was $45.2 million less (4.3%) than its 2006 counterpart.[198] Live Nation attributed the difference to "timing of large music tours" in each of the years.[199]

[192] *See* AEG Homepage, http://www.aegworldwide.com/home.html.
[193] *See* Peters, *supra* note 186.
[194] *Id.*
[195] *See* Butler, *supra* note 167.
[196] Peters, *supra* note 186.
[197] Press Release, Live Nation, Live Nation Reports Fourth Quarter and Full Year 2007 Financial Results (Feb. 28, 2008) *available at* http://media.corporate-ir.net/media_files/irol/19/194146/news/4Q_2007_earnings.pdf.
[198] *Id.*
[199] *Id.*

Figure 4. Live Nation Stock Prices, March 2007 to March 2008[200]

Analysts disagree on whether Live Nation overpaid to sign Madonna, indicating a disagreement as to the profitability of the promoter-based 360 deal on a more general level. For example, one headline read "Live Nation Could Lose Money on Madonna Deal."[201] As the deal was announced and many wondered why Madonna's current label, Warner Music, did not rise to the occasion to match Live Nation's offer, Bank of America analyst Michael Savner defended the label's decision and subtly challenged Live Nation's decision when he stated that there "is clearly headline risk associated with a Madonna defection [from WMG, but] . . . the bigger risk . . . would be to overpay for an artist that does not seem to be generating the revenue to support the contract being discussed."[202]

C. PROVISIONS IN 360 CONTRACTS

As the 360 deal is a new innovation, no contractual paradigm has been established. There are various conceptions of basic ideas such as participation and the roles of the companies involved, as well as considerable variance on a deal by deal level. The idea of "participation" may mean a relatively passive payment for a share of equity in the projected future income streams from an artist's endeavors, or it may mean active involvement in developing different areas of the artist's career.

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[200] Live Nation Stock Information—Stock Chart, http://phx.corporate-ir.net/phoenix.zhtml?c=194146&p=irol-stockChart; *see also* NYSE listing for Live Nation, Inc., http://www.nyse.com/about/listed/lcddata.html?ticker=LYV&fq=D&ezd=1Y&index=5.

[201] *Live Nation Could Lose Money on Madonna Deal*, REUTERS, Oct. 13, 2007, http://www.reuters.com/articlePrint?articleId=USN1325809620071013 [hereinafter *Live Nation Could Lose Money*].

[202] Paul R. La Monica, *Madonna Is Live Nation's Lucky Star*, CNNMONEY.COM, Oct. 11, 2007, http://mediabiz.blogs.cnnmoney.cnn.com/2007/10/11/madonna-is-live-nations-lucky-star/.

Furthermore, the "company" involved is usually a label, but may be a promoter. Major deal points, such as the term of the contract, payment arrangements, and the extent of participation of the company in the different spheres of the artists' careers, vary considerably depending on the deal.[203] Lastly, the terms greatly depend on the artist's track record. Despite this variance, there is some parity among terms in 360 contracts that reflects the new incentives and bargaining positions of the parties involved and signals general shifts in the allocation of revenue generated by music.

1. Case Studies

The discussion of contractual provisions will be illustrated by three executed 360 deals: those of KoRn, Paramore and Madonna. The "nu metal" band[204] KoRn was one of the earlier big-name acts to agree to use the model in 2005. Rather than confining its deal to records, KoRn also agreed to sell a share of its revenues from touring, merchandising, publishing and licensing to its label, EMI.[205] The band has considerable bargaining leverage, since it has built a reliable fan base that buys records and concert tickets. Since the band formed in 1994, its "cathartic alternative metal sound positioned the group among the most popular and provocative to emerge during the post-grunge era."[206] The band has won two Grammy awards, and nine of its ten albums made it into the top ten on album-sales charts.[207] The band's touring has been as successful as its recording. KoRn put together the annual Family Values Tour in 1998 and, in the early 2000s, generated fifteen million dollars per year in ticket sales.[208] The band joined EMI in 2005 when their previous contract with another label neared its end. The reported details of the band's agreement indicate the relatively strong bargaining power and the proven financial success of KoRn.

Later in 2005, Atlantic Records, a label under WMG,[209] signed a 360 pact with the young band Paramore. This relationship has been cited as an example of how the model can benefit new bands.[210] In 2005, Paramore was led by sixteen-year-old front woman Haley Williams, and had occasionally played shows outside its home base of Nashville.[211] That year, executives at a label within Atlantic heard Paramore's "demo" recording,

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[203] Butler, *supra* note 167 ("Some labels want to be the merchandiser, while others want rights only in certain types of merchandise connected to album cover artwork. And when it comes to artist royalties, some labels pay a royalty based on wholesale prices, while others are offering profit-sharing arrangements.").

[204] *Korn*, WIKIPEDIA, http://en.wikipedia.org/wiki/Korn. *See also* MTV.com, Korn, http://www.mtv.com/music/artist/korn/artist.jhtml.

[205] Serpick, *supra* note 171.

[206] Billboard, Artist Biography—Korn, http://www.billboard.com/bbcom/bio/index.jsp?pid=121196.

[207] The chart referred to is the Billboard 200 Chart. Billboard, Artist Chart History—Korn, http://www.billboard.com/bbcom/retrieve_chart_history.do?model.chartFormatGroupName=Albums&model.vnuArtistId=121196&model.vnuAlbumId=828526.

[208] Jeff Leeds, *Korn Sells a Stake in Itself*, N.Y. TIMES, Jan. 11, 2006, *available at* http://www.nytimes.com/2006/01/11/arts/music/11band.html?_r=1&pagewanted=print&oref=slogin.

[209] *Atlantic Records*, WIKIPEDIA, http://en.wikipedia.org/wiki/Atlantic_Records.

[210] Leeds, *Band as Brand*, *supra* note 170; Gil Kaufman, *If the Old Music Is Dead, What's Next?*, MTV NEWS, Dec. 19, 2007, http://www.mtv.com/news/articles/1576838/20071219/paramore.jhtml. *But see* Peter Kafka, *WMG's 360 Deal Shrinks a Bit*, SILICON ALLEY INSIDER, Feb. 22, 2008, http://www.alleyinsider.com/2008/2/warner_music_s_360_deal_shrinks_a_bit.

[211] *Paramore*, WIKIPEDIA, http://en.wikipedia.org/wiki/Paramore.

watched the band perform live and offered Paramore a deal.[212] The band members' raw talent apparently impressed the label, but since they lacked material proof of success to boost their bargaining position, the members of Paramore lacked leverage in the bargaining process. By early 2008, Paramore has established itself as a successful band. Its second album *Riot!* became hugely successful, achieving Gold status, selling over 650,000 copies, and earning Paramore a Grammy nomination for Best New Artist.[213] Even though they have since become successful, the artists in Paramore were relatively unknown at the time they signed their deal in 2005, and their new artist status is apparent in the terms of their 360 deal.

The third example is superstar Madonna's deal with Live Nation introduced above. The deal was announced in late 2007, when forty-nine-year-old Madonna still owed WMG two albums under her previous recording contract. By the time she entered her promoter-based 360 deal, she had become the prototypical "established artist" with as much bargaining power as practically any artist ever had. According to *Billboard*, "[a]rguably, Madonna was the first female pop star to have complete control over her music and her image."[214] Her latest album, 2005's *Confessions on a Dance Floor*, went Platinum in the U.S., won numerous awards (including a Grammy), and debuted at number one in twenty-nine countries, setting the world record for a solo artist.[215] Madonna's Confessions Tour is also illustrative of her continued success. The sixty-show tour was the highest grossing tour event for a female artist, grossing over $260 million.[216] Aside from her CDs and concerts, the Madonna "brand" is valuable in itself. Her licensing and merchandising rights produce significant sums of money. For example, her H&M fashion line alone reportedly earned more than twenty million dollars in its first year.[217]

Madonna's uniquely powerful bargaining position allows her to demand terms advantageous to her. Her power is even more apparent when cast against the brand-new Live Artists division of Live Nation, which had never signed an artist and was likely eager to use the opportunity in signing Madonna to premier on the stage of the music world.

Excerpts from an executed 360 deal can be found in Appendix II.[218] This sample contract illustrates how the themes of the 360 model are stipulated in a contract. As noted, there is no paradigm for 360 contracts, so this sample is not meant to be indicative of 360 deals in general.

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[212] Tony Pascarella, *Interview: Haley Williams and Josh Farro of Paramore*, THE TRADES, Aug. 8, 2005, http://www.the-trades.com/article.php?id=3440.
[213] Nicole Keiper, *Paramore is a Band*, SPIN, Feb. 23, 2008, *available at* http://www.spin.com/articles/paramore-band.
[214] Billboard, Artist Biography—Madonna, http://www.billboard.com/bbcom/bio/index.jsp?pid=50294.
[215] Confessions on a Dance Floor, WIKIPEDIA, http://en.wikipedia.org/wiki/Confessions_on_a_Dance_Floor.
[216] Billboard, Billboard 2006 Year in Music: Top 25 Tours, http://www.billboard.com/bbcom/yearend/2006/touring/top_tours.jsp. If consistent with industry standards, Madonna probably received fifty to seventy million dollars from the tour. *Live Nation Could Lose Money*, *supra* note 201.
[217] *Live Nation Could Lose Money*, *supra* note 201.
[218] This document will be referred to as "Sample Contract 2."

2. Term

The term describes the length of the commitment of each of the contracting parties. Traditional recording contracts defined the term as the artist's commitment to record a number of albums, many of them at the record company's discretion, as options. The terms in contracts with promoters were more finite; they lasted as long as the portion of the artist's tour for which the promoter was responsible. Similar to traditional record contracts, the term in most 360 deals correlates to album cycles.[219] A company will fund an artist who will create a number of albums and, during that time, the company will collect revenue from alternate revenue streams. Madonna agreed to record three albums in her agreement with Live Nation.[220] This commitment is predicted to take about ten years.[221] In its 360 deal with EMI, KoRn committed to two album cycles, which was predicted to take five years, from 2005 to 2010.[222] Paramore's term, like that of most new artists, appears to incorporate a firm, one-album commitment, followed by an unreported number of options. However, one aspect of Paramore's deal was very different from traditional new artist deals. The contract based the first album on the traditional model; however, Atlantic was then given the option not only to make another album, but also to buy into other areas of Paramore's business.[223]

For new artists especially, labels are incentivized to lengthen the term of 360 deals because the company's investment in the artist's overall development has the potential to create long-term dividends.[224] A longer term has the potential to benefit the artist if it increases the company's interest in cultivating the artist's overall career—a change from labels' traditional album-to-album attention span. "The artist becomes a brand, owned and operated by the label, and in theory this gives the company a long-term perspective and interest in nurturing that artist's career."[225] The company would have little incentive to invest in a brand without assurances that the brand would remain with the company long enough to collect the profit stream. Labels might also be more patient in allowing artists to augment their skills and their popularity at a more natural and sustainable rate, rather than trying to squeeze out their worth as quickly as possible. "More important [than other aspects of 360 deal], perhaps, [is that] artists might be allowed more time to develop the chops needed to build a long career . . . [and face] less pressure to make back the label's money

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219 Stiffelman, *supra* note 189; PASSMAN, *supra* note 31, at 32 ("An *album cycle* means a period of time from the commencement of recording an album until the end of the promotional activities surrounding it.").

220 Sloan, *supra* note 191.

221 *See* Jeff Leeds, *Madonna Nears Deal to Leave Record Label*, N.Y. TIMES, Oct. 10, 2007, *available at* http://www.nytimes.com/2007/10/11/business/media/11madonna.html?n=Top/Reference/Times%20Topics/People/L/Leeds,%20Jeff; *see also* Sloan, *supra* note 191 ("The contract would pay for itself if Madonna does four tours and three albums in the next decade with revenues comparable to her recent output, the key assumption being that the 49-year-old star suffers no major dropoff.").

222 *Innovative Deal That Put KoRn on Top*, BILLBOARD, June 2007, *available at* http://www.kornspace.com/main/news.php?extend.843.2 [hereinafter *Innovative Deal*]; Stiffelman, *supra* note 189.

223 Leeds, *Band as Brand*, *supra* note 170.

224 Stiffelman, *supra* note 189.

225 Byrne, *Survival Strategies*, *supra* note 8.

immediately."[226] Paramore's options make it a longer term than an established artist would receive, but Paramore is reported to be benefiting from the length.[227] "[Paramore front-woman,] Williams said her band's deal makes it feel like the staff at its label are more invested in Paramore's future—and had the group not cut this kind of deal, the label may not have been as patient with their slow-blossoming success."[228]

Despite the possible benefits, the general rule in entertainment—that if an artist remains bound to a less favorable contract after she has proven his selling power, she is in a worse position than if she were free to negotiate new terms from scratch—holds true here. Therefore, newer artists may be forced to commit to longer terms, but established artists use their leverage to counter the company's incentive to lengthen the term. More defined terms are also better suited to the economics of 360 deals of established artists, which tend to be more like measured investments than like active development projects. Of course, all parties want the overall "pie" of an artist's revenues to grow, but the 360 deals of established artists tend to involve upfront payments in return for future earnings that have been meticulously projected based on past performance. An artist with negotiating leverage and the ability to present a record of past performance from which a future rate of return on the company's investment can be predicted has a strong argument for limiting his term so that the amount paid upfront correlates to the projected amount earned.

A new aspect of 360 contract terms is the idea of giving artists, especially those that are established, the option to terminate their contracts. This approach generally gives the artist an option to exit the contract if the company is not performing above some set standard. For example, if some lower limit of album sales is not achieved, or if the company's contribution does not result in a minimum incremental increase in an artist's revenue, an artist's option to exit may be triggered.[229] These options are attainable exclusively for established artists for two primary reasons. The first reason is the basic economic idea that established artists have more bargaining power because they are in high demand and in limited supply. The second reason is that they can provide a starting point from which the record company's contribution can be measured incrementally. These options are not in heavy use currently, but they are discussed as a possible concession to artists who are willing to give more expansive rights to labels.

The imposition of standards upon record companies via artists' options would be a sea change compared to traditional contracts. Use of these options would show the strong bargaining positions of established artists who could demand that record companies work to deserve their shares of additional revenues. Here, established artists would ensure that labels and promoters who hold that their additional interest in artists' careers will increase artists' overall revenues, can actually make good on this promise.

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[226] Leeds, *Band as Brand*, *supra* note 170.
[227] *See id.*
[228] Kaufman, *supra* note 210.
[229] Butler, *supra* note 167; Stiffelman, *supra* note 189.

3. Record Royalties

The effect of participation on the amount of record royalties allocated to the artist is largely unreported and is probably very case-sensitive. Theoretically, participation would lead to increased royalties because artists should be able to argue for higher royalties in return for giving the company additional interests in other areas.[230] After all, one reason for the survival of the traditional royalty calculation, which usually yielded nothing to the artist, was that the artist could reap the full financial benefits of touring. If a label wants to impinge on the tour income, it seems fair that it give up some of the record income. In fact, the ability of artists to take advantage of this trade will probably depend upon their status, with new artists continuing to receive lower percentages. The case studies with reported royalty rates conform to the theory that, in 360 deals, royalty rates ought to be higher than in traditional deals. An attorney who helped draft the KoRn/EMI deal agreed that increased participation makes higher royalties more likely.[231] *Billboard* reported that KoRn is receiving a royalty of seventy percent on recorded music—a number that no band, no matter how established, could achieve in a traditional contract.[232] As Jonathan Davis, KoRn's front man said, "It works better for someone who is selling records. . . . We're going to see more money with this deal because we get 70% of the record sales. That is 70% of the revenue that we have never seen." Madonna's royalties from Live Nation, on the other hand, have not been disclosed. Paramore was able to garner a percentage that practically doubled what it would have gotten as a new artist under the traditional model. Atlantic will pass thirty percent of its profits (if there are any) from albums to Paramore under its 360 terms, compared to the traditional thirteen to sixteen percent royalties for new artists.[233]

4. Tour

360 deals' effects on artists' touring are dependent on the type of artist and the type of company in the deal. For established artists, it is unlikely that the substance of touring provisions differs significantly from the traditional model to the 360 model. The 360 deal serves as a way for the label or promoter to buy a portion of the established artist's touring revenue for an upfront fee that is determined by a projection based on the success of past tours. Here, the artist will probably not need tour support because established artists usually do not lose money when they tour. It appears that established artists tend to not be obligated to perform a minimum numbers of shows in their 360 contracts. In a contract like KoRn's, where the deal is driven by a promised rate of return on the label's initial advance, the number of shows is one factor that KoRn uses in delivering the projected amount. As *Billboard* reported, "KoRn's stamina becomes important to its deal."[234] KoRn must tour to some extent to deliver the rate of return;

[230] Stiffelman, *supra* note 189.
[231] *Id.*
[232] *Innovative Deal*, *supra* note 222.
[233] Leeds, *Band as Brand*, *supra* note 170.
[234] *Innovative Deal*, *supra* note 222.

however, if the revenue is falling short of the projected amount during the term, KoRn will not necessarily have to increase the number of concerts it performs. Instead, KoRn may choose to alter the percentage of the revenue it allocates to EMI.[235]

In a contract like Madonna's, which appears to be based on Live Nation's purchase of a simple percentage of touring revenue, Live Nation could be wholly dependent on Madonna's choice to perform tours, as it is reported that she is not obligated to under the contract.[236] Considering that Madonna chose to contract with a promoter rather than a record company that was eager to appease her,[237] it seems likely that she plans on touring heavily during her term. This idea is supported by Madonna's respect for the touring expertise of Arthur Fogel, Chairman of Live Nation's Global Touring Division. As she told *Billboard* in 2005, "Arthur Fogel knows how to make the impossible possible. . . . He's a touring genius."[238]

Live Nation will reportedly receive ten percent of Madonna's ticket sales per tour, which, according to a conservative estimate based on her past performances, will yield Live Nation about five to seven million dollars per tour. Furthermore, Live Nation's thirty percent interest in Madonna's merchandising is predicted to be worth six and a half to seven million dollars per tour. If Madonna chooses to tour for each of the three album cycles of her term, Live Nation could collect more than forty-two million dollars from Madonna's tours due to its participation in her touring and merchandising.[239] The profitability of Live Nation's deal with Madonna is said to depend on Madonna completing three[240] to four[241] tours during the term. One provision in Madonna's promoter-based deal that differs from its traditional counterpart is her promise to work exclusively with Live Nation.[242] This exclusivity is probably not problematic for Madonna, who chose to work with Live Nation for her Confessions Tour.[243]

Newer artists may feel the effects of their 360 touring provisions more than established artists. New artists, especially, gain two important advantages of labels' new interest in tour revenues. First, the label will be inclined to subsidize tours to a much greater extent than the measly recoupable tour support sometimes provided for in traditional contracts. This advantage mainly benefits new artists, for whom touring can be prohibitively costly and whose 360 deals are more likely to be drafted to create an active partnership focused on artist development. This incentive is counter to the growing belief that tours do not help increase recorded music sales, which would encourage labels to reduce tour support under the

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[235] Stiffelman, *supra* note 189.
[236] *Live Nation Could Lose Money*, *supra* note 201.
[237] *See* Ray Waddell, *Madonna to Exit WMG for Live Nation?*, BILLBOARD.BIZ, Aug. 20, 2007, http://www.billboard.biz/bbbiz/content_display/industry/e3i4de42a68296f5b5142d6cfe9f069a1bc.
[238] *Id.*
[239] *Live Nation Could Lose Money*, *supra* note 201. This is also a conservative estimate.
[240] *Id.*
[241] Sloan, *supra* note 191.
[242] Alex Veiga, *Madonna, Live Nation Link Up on Deal*, REDORBIT.COM, Oct. 16, 2007, http://www.redorbit.com/news/entertainment/1104658/madonna_live_nation_link_up_on_deal/index.html.
[243] *Confessions Tour*, WIKIPEDIA, http://en.wikipedia.org/wiki/Confessions_Tour#_note-0.

traditional model. Also, labels that would otherwise exert pressure on artists to record albums quickly will be more inclined to have patience for longer tours that may be small-scale but have long-term dividends as the artists develop their skills and a fan base. For example, WMG's earnings call in 2008 celebrated that the label's "multi-year grassroots marketing effort has begun to pay off."[244] This long-run, smaller-scale attitude of a major label is a new phenomenon in music. Paramore agrees that it has benefited from this aspect of the 360 model. As Williams stated, "We were given all the time in the world, and all the support we could ever ask for, to basically do nothing but play shows. . . . [Were it not for the 360 model,] I don't know that we would've been given that lenience."[245]

A second advantage, beneficial to relatively few artists, is the potential to coordinate the record-marketing process with concerts to increase tickets sales. Here, the reallocation of some touring revenue to the company controlling the artist's recorded music business works to increase the overall revenue stream. For some new artists and a smaller number of established artists, a company with 360 rights would be incentivized to continue marketing a record in order to prolong the tour and increase its profits, when the label would have no incentive to do so otherwise.[246] Traditionally, the label's decision to market or continue the process of marketing an album was entirely dependent on whether the incremental benefit, namely, increased CD sales, would outweigh the cost. The costs to a label of releasing a single are considerable, and include the costs of producing radio-edits, cajoling radio stations or music video outlets to play the song, and a general marketing campaign. Normally a label would only undertake the effort if the resulting CD sales would make it worthwhile. Now that labels are acquiring interest in tour revenues, the effect of the album's marketing on the tour would also factor into the decision to continue marketing. Feasibly, a promotions company running the recording business of an artist would be at least as incentivized as the participating label to maximize the record sales to increase tour revenue. This advantage prompted attorney Gary Stiffelman to state that the artists who stand to benefit from profit-sharing are that "narrow sliver" of artists whose touring is somewhat dependent upon the success of their most recent record.

Most established artists do not fall within this narrow sliver. For example, the success of the Rolling Stones, whose 2005–2006 *A Bigger Bang* tour grossed a record breaking $558 million,[247] was probably not solely dependent upon the success of their 2005 album *A Bigger Bang*. That album was hailed as "a straight-up, damn fine Rolling Stones album, with no qualifiers or apologies necessary for the first time in a few decades,"[248] and achieved Platinum status (about 2.5 million worldwide,[249]

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[244] Kafka, *supra* note 210 (internal citations removed).
[245] Leeds, *Band as Brand*, *supra* note 170.
[246] Stiffelman, *supra* note 189.
[247] Ray Waddell, *Rolling Stones Tour Grosses More than Half a Billion*, BILLBOARD, Oct. 3, 2007, *available at* http://www.billboard.com/bbcom/news/article_display.jsp?vnu_content_id=1003650410 ("$558,255,524 to be exact.").
[248] Alan Light, *Rolling Stones Album Review:* A Bigger Bang, ROLLING STONE, Sept. 22, 2005, *available at* http://www.rollingstone.com/artists/therollingstones/albums/album/7590942/review/7600360/a_bigger_bang.

about 545,000 albums sold in the US[250]), but its sales were dwarfed by the top sellers of 2005, which included Mariah Carey's *The Emancipation of Mimi* and 50 Cent's *The Massacre*, which both sold over 480 million copies in 2005.[251] Furthermore, singles from *A Bigger Bang* were not systematically put in heavy rotation on radio stations. Other touring powerhouses like Jimmy Buffett, Dave Matthews Band, and Tom Petty and the Heartbreakers rarely release singles that receive heavy radio play, but consistently draw large crowds of ticket buyers. As *Rolling Stone* stated in 2005, "Alicia Keys, Nickelback, the Black Eyed Peas and Kanye West may dominate radio playlists and CD sales, but concert fans still give the edge to experience—the Rolling Stones, U2, Paul McCartney, the Eagles, Tom Petty, Jimmy Buffett and other veterans are among 2005's top live draws."[252] Despite its past success, a band like KoRn may benefit from record company interest in its tour more than these touring powerhouses. KoRn's past records have been marketed using singles pushed over the radio and music videos on channels like MTV, and EMI has the potential to increase KoRn's touring revenue by factoring the tour into its marketing strategy.[253] Therefore, unlike the case for touring giants like Madonna and others discussed in this Part, EMI could produce incremental benefits in KoRn's touring revenues that would justify its receipt of some portion of the income.

The drawbacks to the artist of granting the label a percentage of tour revenues are more certain than the circumstance-dependent potential benefits. Two disadvantages include the reduced portion of net profits that the artist keeps and the potential loss of control over the tour. As discussed earlier, artists usually make very little money from their records, which may be partly due to their ability to generate significant income from touring. Even if an artist is one of the few to enjoy collecting royalty payments, "[touring] was a musician's life-saver to survive in the lean years between hit records."[254] The idea of labels adding access to touring revenues on top of their control over record revenues is worrisome for many artist advocates. Still to be discussed, artist advocates have expressed concern that the participation interest in additional areas is a "land grab"[255] and "another way to make up for the money being lost on the Internet."[256] Artists worry that it seems fair to give up part of their touring revenues to labels who claim to be on the verge of crumbling in this time of flux, but that they will have relegated themselves to an inferior position that they

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[249] A Bigger Bang, WIKIPEDIA, http://en.wikipedia.org/wiki/A_Bigger_Bang.
[250] *The Rolling Stones Discography*, WIKIPEDIA, http://en.wikipedia.org/wiki/The_Rolling_Stones_discography.
[251] Gil Kaufman, *Mariah Carey Outguns 50 Cent on Year-End LP Sales Chart*, MTV NEWS, Dec. 29, 2005, http://www.mtv.com/news/articles/1519469/20051229/carey_mariah.jhtml?headlines=true.
[252] Steve Knopper, *Stones, U2 Boost Tour Biz*, ROLLING STONE, Nov. 2, 2005, *available at* http://www.rollingstone.com/news/story/8742275/stones_u2_boost_tour_biz.
[253] *See Innovative Deal*, *supra* note 222.
[254] *360's AKA Blind Ambition*, *supra* note 68.
[255] Stiffelman, *supra* note 189.
[256] Gail Mitchell, *Jay-Z Talks Exit Rumors, Grammys, 360 Deals*, BILLBOARD, Dec. 14, 2007, *available at* http://www.billboard.com/bbcom/search/google/article_display.jsp?vnu_content_id=1003685726.

will be stuck in when the industry reequilibrates.[257] This worry is even more serious when paired with the doubt that record companies will actually work to add to the "pot" of overall revenues brought in by the artist. These concerns show how the reallocation of touring revenue could be unfair.

The potential that an artist's control over his or her touring will be curbed by the label or promoter is also a disadvantage from the new artist's point of view. 360 deals introduce the possibility of labels micromanaging tour details,[258] unlike the traditional arrangement, in which artists control important decisions regarding their tours (including which promoter they hire). A label's interest can also restrict artists' authority over their tours so that an artist may feel compelled to tour when she otherwise would have chosen not to. This possibility could be likely in deals like KoRn's, where the band is obligated to deliver a certain rate of return on EMI's initial payment. KoRn would not be able to deliver the promised rate of return if the band significantly reduced the projected touring income.

Giving labels some control over tours could be problematic for reasons beyond concerns regarding the artistic integrity of the shows or artists' preferred itineraries. The ability of record companies to make wise decisions regarding the distinct business of touring has been questioned since the 360 model began gaining prominence. For that matter, the ability of labels and promotional companies to make decisions in any area beyond their specialties has been doubted.[259] For example, music attorney Elliot Groffman stated that "[i]f [labels] want to be actively involved in [an artist's] touring, that's problematic because they really don't understand the touring business."[260] Atlantic's contract with Paramore gives the label a degree of control that Groffman may be opposed to, namely, approval rights over the tour schedule(s) and the salaries of employees working for the tour.[261] Another music attorney predicted that 360 deal-bound artists will start suing labels for mismanaging their careers.[262]

5. *Payment & Participation*

a. *Upfront Payments*

The specifics of financial arrangements in 360 deals vary tremendously but there are a few common denominators. The first common feature is what defines 360 deals—the money received by the record company will come from areas beyond CD or download sales, and the money received by the promoter will include income from sources other than ticket sales. A

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[257] Butler, *supra* note 167 (Music attorney Elliot Groffman (whose clients include Pearl Jam and Dave Matthews Band) stated, "My concern is that we are going to allow (labels) to eat part of the artist's lunch while (labels) are starting to figure out the new distribution models, then in five to ten years they're going to control distribution again and control a good portion of the artist's income.").

[258] Sample Contract 2.

[259] *Live Nation Could Lose Money*, *supra* note 201 ("Live Nation is not a record label, doesn't have a label infrastructure, and is gambling that Madonna can maintain the same level of sales.").

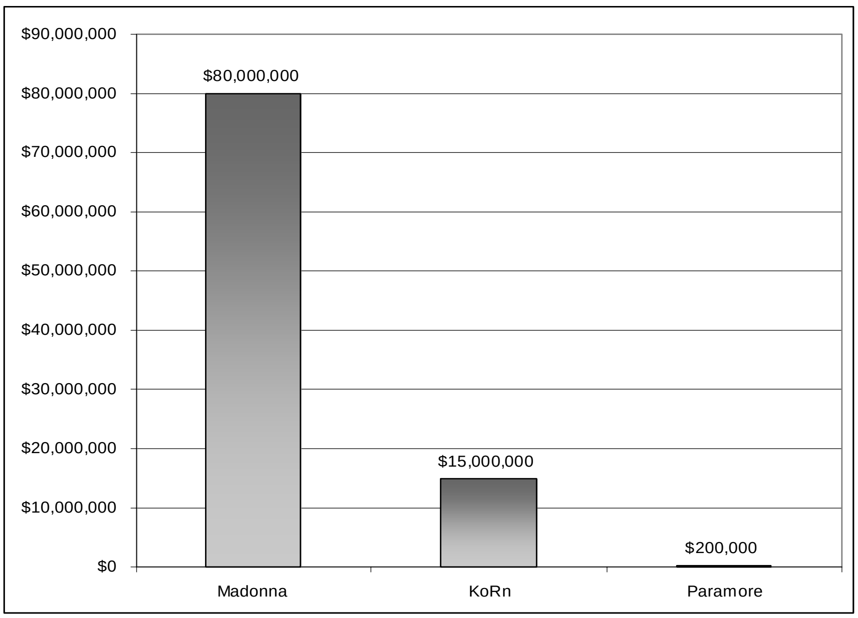
[260] Butler, *supra* note 167.

[261] Leeds, *Band as Brand*, *supra* note 170.

[262] Tisdale, *supra* note 71.

second generality is that artists will receive more money upfront upon signing 360 deals than they would upon signing traditional record contracts.[263] All three of the case study artists received considerable sums upon "partnering" with their respective companies. Paramore received $200,000 when Atlantic exercised its option to buy 360 rights upon the release of the band's first album.[264] Unsurprisingly, the upfront payment amounts rise with the proven profitability of the artists. *Rolling Stone* reported that EMI paid KoRn fifteen million dollars upfront for its thirty percent[265] participation rights.[266] Upon executing its contract with Madonna, Live Nation reportedly paid her seventy [267] to ninety[268] million dollars, in stock and cash.[269]

Figure 5. Bar Graph Comparing Upfront Payments to Case Study Artists



Receipt of this money, independent of the recoupable advances or Funds that usually account for any upfront money paid to the artist, can be a valuable advantage of 360 deals for artists, especially new artists in need of money. However, the fact that this is not a recoupable cost does not

[263] Leeds, *Band as Brand*, *supra* note 170.
[264] *Id.*
[265] *Innovative Deal*, *supra* note 222.
[266] Serpick, *supra* note 171.
[267] *Live Nation Could Lose Money*, *supra* note 201.
[268] Sloan, *supra* note 191.
[269] *Id.*

mean that there are no strings attached. After all, the record companies are making measured purchases of an interest that they believe will be worth more than the amount paid upfront. An equitable arrangement might involve the company paying the artist a sum roughly equivalent to the present net value of the company's additional interests in the artist's projected revenue streams, plus a percentage of the anticipated marginal increase in revenue due to the company's participation. For new artists, there is little to no basis for projections of their future success, so a company has a strong argument for using the most conservative estimates of the value of their interests. Furthermore, the new-artist rule, that "any deal is a good deal," means that the upfront fee paid to artists, while larger than what the artist would receive as a traditional fee, will surely be an underpayment if the artist becomes successful.

Another factor in the discussion of the company's expanded rights is its assertions that its participation in new areas will lead to increases in overall revenues brought in by artists. If label involvement leads to notable marginal benefits, then companies may be justified in paying less than the present net values of their 360 rights. Whether labels' or promoters' involvement in areas beyond recording or promoting will actually produce increases in the overall pie is hotly debated within the music industry.[270]

Record companies and Live Nation insist that they plan to work to develop artists' overall careers. Guy Hands, CEO of the investment firm that bought EMI,[271] indicated an intention to commit to artists' careers when he stated that "[w]e need a relationship with our artists based on a true partnership, in which we jointly share both the risks and the benefits."[272] Craig Kallman, chairman of Atlantic Records—signers of Paramore—echoed this idea when he said that "[i]f 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, not just to sell the CD but to build the artist's fan base?"[273]

These sentiments are met with skepticism from artists' advocates. "That's a hard speech for many people to buy into," according to talent executive Bruce Floor.[274] He continued that "[y]ou can speak to me that you're going to work a record for 18 months. You're going to work a record for 18 months when it's selling 420 copies six months from now? Come on—really?"[275]

In addition to questioning the integrity of their commitment to artists, labels' ability to contribute has been questioned as well, as noted previously in the discussion of labels' participation in tours. Music attorney J. Reid Hunter stated that "[i]n negotiations, we're having to educate the business

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[270] Leeds, *Band as Brand*, *supra* note 170 ("Not everyone is sold on the concept.").
[271] Terra Firma, Profile of Guy Hands, http://www.terrafirma.com/guy-hands.html.
[272] Music Tank, Topic of Panel Discussion: *Deal or No Deal? The Great Artist/Label Trade-Off*, http://www.musictank.co.uk/events/deal-or-no-deal-the-great-artist-label-trade-off (internal citations removed).
[273] Leeds, *Band as Brand*, *supra* note 170.
[274] *Id.*
[275] *Id.*

affairs folks on how the business runs in areas outside of records. That makes me worry about how prepared the majors are to get into these areas."[276] Likewise, Tim Renner, former head of Universal Music in Germany, worries that labels should have worked to expand their capabilities "years ago:" "'Then they had the money and could have built the competence by buying concert agencies and merchandise companies,' he says. Now it may be too late."[277] Artist and label CEO Sean Carter, better known as Jay-Z, addressed these suspicions by saying that,

> I believe that 360 becomes a bad deal unless you're doing artist development. Being an artist, I'm an artist-friendly executive as well. You can't take someone's rights, profess to be an expert in that field and then not doing anything for it. If you're sharing and partnering with an artist, you better build an artist.[278]

Speaking in his capacity as CEO of Def Jam Records, Carter added that, "If we're adding value, it's a partnership. If we're not, then we're just trying to find another way to make up for the money being lost on the Internet. And that's not cool."[279]

b. Extent of Participation

A key variable is exactly what this upfront money is buying. As one author wrote, the "percentages are all over the place" regarding the amount of interest labels are purchasing with the upfront payments. When Atlantic chose to exercise its option to purchase 360 rights for $200,000, it acquired thirty percent of the net income from all touring, merchandise, endorsements, and fan-club fees earned by Paramore.[280] EMI's fifteen million dollars bought it an interest in KoRn's touring, merchandise, publishing, and licensing revenue. *Billboard* reported that this interest is thirty percent of KoRn's income in these areas.[281] KoRn's transactional lawyer declined to confirm this number, but indicated that the value of the interest will deliver EMI a certain rate of return on its investment, based on projections of KoRn's future earnings that rely on KoRn's past performance.[282] *Billboard* stated that "for EMI to recoup their investment on the deal, *Billboard* estimates that KoRn needs to generate in excess of $50 million in profits during the five-year life span of the pact."[283] Live Nation's fees to Madonna reportedly allow it to keep ten percent of her touring revenue, thirty percent of merchandising revenue, and fifty percent of her licensing sales.[284] The portion of non-recording revenues reallocated from the artist to the label appears to be a function of the proven ability of the artist to generate income in these areas, which provides leverage to the

[276] Butler, *supra* note 167.
[277] *From Major to Minor*, *supra* note 16.
[278] Mitchell, *supra* note 256.
[279] *Id.*
[280] Leeds, *Band as Brand*, *supra* note 170.
[281] *Innovative Deal*, *supra* note 222.
[282] Stiffelman, *supra* note 189.
[283] *Innovative Deal*, *supra* note 222.
[284] *Live Nation Could Lose Money*, *supra* note 201.

artist in negotiations and provides a basis for the net present value of these interests.

A higher percentage allocated to the label is not necessarily unfavorable to the artist, as long as the upfront amount paid mirrors the higher percentage received. The company's contribution to the alternate revenue streams is also a factor. Paramore's exchange of $200,000 for thirty percent of net income from their other major sources of income is by far the least favorable arrangement of all the case studies, because Paramore receives a relatively tiny upfront fee (as shown by Figure 5) in return for a relatively significant percent of its future earnings. Paramore's upfront fee is 1.33% of KoRn's fifteen million dollars, and about 0.25% of Madonna's estimated eighty million dollars. Of course, Paramore's earning power is similarly a small fraction of the two established artists' proven profitability, but Paramore has already begun to show its high earning potential. Once Paramore generates more than $700,000 of net income from these areas,[285] Atlantic will have recouped its $200,000 upfront fee. The idea that the label contributes to the band's income with its patience and its marketing strategy may justify its receipt of touring and other income after it is recouped. However, it seems unlikely that the label's contribution is wholly responsible for thirty percent of the band's net income in these areas. Established artists like Madonna and KoRn would not bind themselves to a contract that would potentially allow the label to collect a large portion of revenue that the label does not help produce. Paramore's relatively unfavorable terms are a result of its new-artist bargaining position, its inability to show that the label's initial payment undervalues the band's profitability, and its relationship with the label being focused on development.

c. Recording Funds

In addition to the initial payments, 360 contracts maintain the traditional recoupable Recording Fund and royalty arrangements. As in traditional contracts, the label promises to give the artist a set amount of money to make the record, which will be repaid to the record company from the artist's portion of the album's earnings. If the 360 deal cross-collateralizes recorded music with other revenue streams, then the company may be recouped from other revenue streams as well. As in traditional contracts, cross-collateralization has negative implications for the artist because it allows money that the artist would otherwise receive to be diverted into the hands of the label. The likelihood that record royalty rates are higher in 360 deals than in the one-faceted recording deals, means that the advances have a better chance of being recouped more quickly, even if the contract does not cross-collateralize records with other revenue streams.[286]

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[285] Which it has likely already done. Paramore tours extensively and does not put on elaborate and costly concerts that would result in its net income being much lower than its gross.
[286] *See Innovative Deal*, *supra* note 222.

Paramore's contract appears to be written more like a traditional contract with its 360 components incorporated into it as an option. For this reason, it seems likely that the amounts of Paramore's Funds are what they were granted under the traditional model. Based on industry standards, Paramore may have Funds of $300,000 to $1 million for each of its albums. Reportedly, KoRn is set to receive ten million dollars in traditional advances per album from EMI, and there is no indication that this is strikingly different from what the band has received in the past. Madonna's Fund is reportedly seventeen[287] to twenty million dollars[288] per album. The increase in Fund amounts from Paramore to KoRn to Madonna is a function of their bargaining powers, and this pattern is consistent with what they would have received under traditional contracts.

Table 8 provides a brief comparison of major deal points between traditional and 360 contracts. Table 9 compares the 360 contracts of the case study artists.

Table 8. Comparison of Terms in Traditional Contracts and 360 Contracts

	Traditional Record Contract	**360 Contract**
Term	About 5–7 album cycles for new artists, with one firm commitment followed by options.[289] A few firm commitments followed by a fewer number of options (or no options) for established artists.	Labels are incentivized to increase the term. Newer artists may get longer terms; artists with more leverage can counteract the incentive.
Record Royalties	New Artist: 13–16% of PPD Mid-Level Artist: 15–17% Superstars: 18–20 %	Likely higher royalty rate allocated to artists.
Touring Provisions	Sometimes artists are provided with recoupable tour support.	The 360 model makes labels more supportive of tours, financially and with regards to patience with time. Promoter-based 360 deals will require exclusivity for touring.

[287] Associated Press, *Madonna Reportedly Near $120 Mil Record Deal*, MSNBC.COM, Oct. 10, 2007, http://www.msnbc.msn.com/id/21229890.
[288] *Live Nation Could Lose Money*, *supra* note 201.
[289] *See 360's AKA Blind Ambition*, *supra* note 68.

Recording Fund	New Artist: under $300,000 Mid-level artist: $500,000–$1 million Superstar: $1.5 million or more	Likely no significant change.
Financial Arrangement	Artist retains any excess money from recording funds and collects royalties once the label is recouped.	Artist receives bigger, unrecoupable upfront payment in return for granting the company access to various revenue streams. The various revenue streams are probably not cross-collateralized.
Participation	Label "participates" only in the business of recorded music, and promoter only "participates" in the tour.	Companies participate in areas beyond their previous focus.

Table 9. Comparison of Reported Terms in 360 Contracts of Case Studies

	Paramore (new artist)—WMG (Atlantic)	**KoRn (established artist)—EMI**	**Madonna (superstar)—Live Nation**
Term	1 Firm commitment plus options	2 Album Cycles (5 years)	3 Album Cycles (10 years)
Record Royalties	30% (after 360 option exercised)	70%	Unreported
Touring Provisions	Paramore probably receives more tour support than it would have under a traditional album. Also, Paramore is given more time to tour. Atlantic has some approval rights over touring decisions.	No specific obligation to tour or give the label control over tour; however, KoRn will have to tour substantially to deliver the projected rate of return to EMI.	Reported to have no obligation to tour. Live Nation paid her $50 million in cash and stock for the right to promote her tours, and Live Nation will receive 10% of her touring revenue.
Recording Fund	Unreported	$10 Million per album	$17–$20 Million per album

Upfront Fee	$200,000	$15 Million	$70–$90 million (in cash and stock)
Participation	30% of all net income from touring, merchandising, endorsements and fan-club fees.	30% of income from touring, merchandise, publishing and licensing.	10% touring revenue, 30% of her merchandising revenue and 50% of licensing sales

V. CONCLUSION

While uncertainty abounds in the midst of this contractual manipulation, the bargaining power dynamic remains relatively consistent in the shift from traditional to 360 deals. Established artists generally enjoy more favorable terms than new artists in both models because they have more leverage in their negotiations with companies. The bargaining power of established artists means that they can use the 360 platform to conduct "good business."[290] Armed with statistics of their recent tours, merchandise sales, and album sales, established artists and their managers can negotiate with labels to arrange an exchange of relatively equitable assets: high upfront payments and favorable terms, such as higher royalty rates, in return for interest in projected future revenue streams.

Meanwhile, new artists continue to be subjected to considerably less favorable terms. In addition to their minimal bargaining power, new artists are further disadvantaged in a 360 deal negotiation because they lack material evidence showing their current or projected worth at the time of contractual execution. The label has a strong incentive to base its payment for additional interests on minimal predictions of their worth. If her past earnings are scarce, there is little to no wiggle room for an artist to negotiate with the label or promoter.

The continued company dominance over contractual terms for new artists may appear ironic to an observer of the industry. After all, the highly publicized idea that record companies are scrambling to stay afloat in this crisis suggests that companies are the weaker party. Two responses to this observation help explain how labels have maintained their bargaining leverage despite their glaring vulnerability. First, even if labels are weaker than they were when CD sales were booming, the basic economics of the supply and demand curves discussed in Part I remains the same. In fact, labels' demand for new artists has been constricted since they shifted their focus to the development of their 360 artists rather than gambling on signing many new artists.[291] This balance may shift again if independent

[290] Stiffelman, *supra* note 189.
[291] *How to Stop Declining Album Sales*, *supra* note 44.

labels continue to grow, thereby increasing the number of channels of demand for new artists.

Second, labels have used their publicized crisis to their advantage in negotiating terms with artists. Labels appear justified in their claims that they need to dip into non-recording revenues when they insist that their full reliance on the recorded music business will lead them to extinction. As discussed, many artists and their advocates worry that companies are invading and planting their flags in territories traditionally belonging to artists. If companies eventually regain control of distribution and minimize the illegitimate market for recorded music, artists worry that they will be unable to reclaim the interests they lost in this time of crisis.[292]

Although new artists remain mired in an inferior bargaining position, there are potential advantages to 360 deal terms that may be enjoyed by some new artists. Almost all new artists will greatly value the receipt of more money upfront. In addition, the tour support in the form of money and patience will be enjoyed by bands and artists that need to tour to develop their images and fan bases. The new artists in the narrow sliver whose ticket sales are linked to how companies market their records will benefit if the marginal increase in touring revenues contributed by the label's promotional efforts exceeds the interest owned by the artist. Whether or not new artists will benefit from companies' promises to focus on their development depends in part on whether the companies deliver on these promises. As noted, many observers are skeptical concerning the ability of record companies to re-orient themselves from a focus on recorded music to other aspects of the industry.

With the 360 model still in its inception phase, a number of questions remain unanswered. Whether the 360 model, created as a response to specific circumstances, will endure the inevitable reequilibration of the music industry is yet to be seen. If 360 themes do survive, will a standard framework evolve, as one did for the traditional model, or will 360 contracts remain as variable as they are today? Perhaps different basic formulations will be formed for different types of artists. Another possibility is the ironic outcome that the 360 model will survive, but that record companies do not, due to the success and ability of other types of businesses, like Live Nation, to use the model to cut the labels out of the industry. Whether labels and promoters will be able to use the 360 rights to their benefit remains to be seen, as does their ability and commitment to increase revenues for artists.

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[292] This worry is felt by artists across the entertainment spectrum, as evidenced most recently by the 2007 Writers Guild of America strike.

APPENDIX I

EXCERPTS FROM TRADITIONAL CONTRACT

AGREEMENT made this _____ day of __________, 20XX between XXX and YYYY professionally known as ARTIST (individually and collectively referred to herein as "you") and LABEL, a division of RECORD COMPANY (hereinafter "LABEL").

1. [A] TERM

1.01.

(a) The term of this agreement and the initial Contract Period will begin on the date first written above.

(b) Each Contract Period of the term will end, unless extended as provided herein, six (6) months after LABEL's United States retail street date for the last Master Recording Delivered by you in fulfillment of your Recording Commitment for that Contract Period under paragraph 3.01 below. . . .

1.02. [A1] You grant LABEL five (5) separate, consecutive and irrevocable options to extend the term for additional Contract Periods ("Option Periods") on the same terms and conditions, except as otherwise expressly provided in this Agreement. . . .

2. SERVICES

2.01. [G] During the term of this Agreement you will render services as a performing artist for the purpose of making Master Recordings for LABEL, you will cause those Recordings to be produced and you will Deliver the Recordings to LABEL, as provided in this Agreement. . . .

3. RECORDING COMMITMENT

3.01. [A2] During each Contract Period, you will perform for the recording of Master Recordings sufficient to constitute one (1) Album, cause those Master Recordings to be produced and Deliver them to LABEL (the "Recording Commitment"). Each Album required to be recorded and Delivered by you hereunder is herein sometimes referred to as a "Commitment Album."

3.02. You will fulfill the Recording Commitment for each Contract Period within the first five (5) months of the Contract Period. . . .

4. [H] RECORDING PROCEDURE

4.01. You will follow the procedure set forth below in connection with Master Recordings made hereunder:

(a) Except as expressly noted otherwise . . . you and LABEL shall mutually approve each of the following; provided, however, in the event you and LABEL shall not be able to reach an agreement, LABEL's decision shall be final:

(1) Selection of Producer.

(2) Selection of material, including the number of Compositions to be recorded. . . .

(3) Selection of dates of recording and studios where recording is to take place. . . .

(4) A proposed budget (which you will submit to LABEL sufficiently in advance of the planned commencement of recording to give LABEL a reasonable time to review and approve or disapprove it at least fourteen (14) days before the planned commencement of recording). . . .

(d) As and when required by LABEL, you shall allow LABEL's representatives to attend any or all recording sessions hereunder at LABEL's expense. (Those expenses will not be recoupable as Recording Costs.) . . .

(f) You shall deliver to LABEL fully mixed, edited, and unequalized and equalized Master Recordings (including but not limited to a final two-track equalized tape copy), which are technically and commercially satisfactory to LABEL for the production, manufacture and sale of Phonograph Records. . . .

5. RECOUPABLE AND REIMBURSABLE COSTS . . .

5.02.

(a) [B1] All Recording Costs will constitute Advances. . . . Those amounts will also be recoupable from all monies becoming payable by LABEL to you under this Agreement or "any other agreement" (as such phrase is defined in subparagraph 14.01(a)) to the extent to which they have not actually been paid or reimbursed as provided in the preceding sentence. Fifty percent (50%) of all costs incurred by LABEL or its Licensees in connection with any television or radio advertising campaign(s) in conjunction with Records featuring your Performances will constitute Advances. Subject to subparagraph 14.01(b) below, all costs incurred by LABEL in connection with the production or acquisition of rights in Covered Videos, and fifty percent (50%) of all direct expenses paid or incurred by LABEL in connection with independent promotion and/or independent marketing of Recordings of your Performances (i.e., promotion and/or marketing by Persons other than regular employees of LABEL), will constitute Advances. . . .

6. ADDITIONAL ADVANCES

6.01. All monies paid by LABEL to you during the term of this Agreement . . . will constitute Advances. . . .

6.02.

(a) [B] In connection with each Commitment Album other than the First Album, LABEL will pay you an Advance in the amount by which the applicable sum indicated below ("Recording Fund") exceeds the Recording Costs (including anticipated costs not yet paid or billed) for such Commitment Album:

(1) [B2] The amount of the Recording Fund for each Commitment Album (other than the First Album) Delivered hereunder will be two-thirds (2/3) of whichever of the following amounts is less (subject to section 6.02(a)(2) below):

(i) the net amount of the royalties credited to your account on Net Sales Through Normal Retail Channels in the United States of the Commitment Album released most recently before the Delivery of the Commitment Album concerned (the "Prior Album") . . .; or

(ii) the average of the amounts of such royalties on the two (2) Prior Albums.

(2) [B3] No such Recording Fund will be more than the applicable maximum or less than the applicable minimum amount prescribed below:

		Minimum	Maximum
(i)	Commitment Album Delivered in the first Option Period:	$400,000	$800,000
(ii)	Commitment Album Delivered in the second Option Period:	$400,000	$800,000
(iii)	Commitment Album Delivered in the third Option Period:	$450,000	$900,000
(iv)	Commitment Album Delivered in the fourth Option Period:	$450,000	$900,000
(v)	Commitment Album Delivered in the fifth Option Period:	$500,000	$1,000,000

(b) . . .

(c)

(1) [I] Following the execution of this Agreement and the commencement of its term, LABEL will pay you an Advance in the amount of Sixty Thousand Dollars ($60,000). This paragraph will not apply to any Option Period.

(2) The Advance for each Commitment Album other than the First Album will be made by payment to you of:

(i) Fifteen percent (15%) of the amount of the then-remaining applicable minimum Recording Fund, but in no event shall such Advance exceed one hundred fifteen percent (115%) of the greater of (A) the amount of the Recording Costs incurred in connection with the Prior Album or (B) the approved budget for the Commitment Album concerned, following the commencement of recording of the Commitment Album concerned; and

(ii) the balance, if any, of the Advance, within thirty (30) days after the Delivery to LABEL of the Commitment Album concerned. . . .

7. RIGHTS IN RECORDINGS

7.01. [J] All Master Recordings made or furnished to LABEL by you under this Agreement or during its term from the Inception of Recording, and all matrices and Phonograph Records manufactured from them, together with the Performances embodied on them, all Covered Videos, and all artwork created for use in connection with the Phonograph Records hereunder ("Artwork") as well as all Website Material, ECD Material and Mobile Material shall be the sole property of LABEL, free from any claims by you or any other Person (all such Master Recordings, Phonograph Records, Performances, Covered Videos, Artwork, Website Material, ECD Material and Mobile Material are sometimes hereinafter referred to collectively as "Subject Materials"); and LABEL shall have the exclusive right to copyright those Subject Materials in its name as the author and owner of them and to secure any and all renewals and extensions of such copyright throughout the Territory. . . .

8. [K] MARKETING

8.01.

(a) LABEL and its Licensees shall have the perpetual and exclusive rights during the term of this Agreement (and the non-exclusive rights thereafter) throughout the Territory and may grant to others the rights:

(1) to use the names, portraits, pictures and likenesses of you and Producer(s) . . .

(3) to create, host and/or maintain any Websites which incorporate your name, likeness or any Master Recordings, Covered Videos or Artwork.

(b) During the term of this Agreement you shall not authorize any Person other than LABEL to use the Artist's Name and Likeness in connection with the advertising or sale of:

(1) Phonograph Records; or . . .

8.09.

(a) LABEL and any licensee of LABEL each has the perpetual and exclusive right, and may grant to others the right, without any liability to any Person, to create, maintain and host Websites relating to you (each an "Artist Website") and to register and use the name "ARTIST.XXX" and all variations thereof which embody your name or use a name similar to your name as Uniform Resource Locators ("URLs"), addresses and/or domain names (each an "Artist Domain Name") in connection with such Artist Websites. . . .

8A. PERSONAL APPEARANCE TOUR ARRANGEMENTS

8A.01. If you undertake a personal appearance tour of at least fifteen (15) major Phonograph Record markets in the United States in connection with the initial release of the First Album, then:

(a) Within a reasonable time before the plans for the tour are completed, you will notify LABEL of a complete itinerary, specifying the details of each engagement (including the time and place of each appearance). The itinerary (and each item thereof) will be subject to LABEL's reasonable approval.

(b) Only if LABEL approves of the tour and each item of the itinerary (and thereafter there is no substantial change of any element thereof without LABEL's prior written consent), then, provided the tour is completed in accordance with the approved itinerary, [F] LABEL will pay you that amount, if any, by which your direct expenses actually incurred in connection with the tour exceed your revenues for such tour, but not more than One Hundred Thousand Dollars ($100,000) for the First Album. Said payment will constitute an Advance and will be recoupable from all royalties (except Mechanical Royalties) becoming payable by LABEL to you and will be made upon LABEL's receipt of documentation of the tour expenses and revenues satisfactory to LABEL. If LABEL approves the shortening of any such tour, the amount set forth in the first sentence of this subparagraph will be reduced by one-fifteenth (1/15) for each market deleted from the itinerary.

9. [C] ROYALTIES

9.01. LABEL will pay you a royalty computed at the applicable percentage, indicated below, of the applicable Royalty Base Price in respect of Net Sales Through Normal Retail Channels of Phonograph Records consisting entirely of Master Recordings recorded under this Agreement during the respective Contract Periods specified below and sold by LABEL or its Licensees ("NRC Net Sales") . . .

(a) ON ALBUMS SOLD FOR DISTRIBUTION IN THE UNITED STATES:

(1)

(i) [C1] Master Recordings made during the initial Contract Period or first Option Period: 14%.

(ii) The royalty rate pursuant to subsection 9.01(a)(1)(i) will apply to the first 500,000 units of NRC Net Sales in the United States ("USNRC Net Sales") of each Album consisting of Master Recordings made during the initial Contract Period or first Option Period. The royalty rate will be:

(A) 14.5% on USNRC Net Sales of any such Album in excess of 500,000 units and not in excess of 1,000,000 units, and

(B) 15% on USNRC Net Sales of any such Album in excess of 1,000,000 units.

(2)

(i) Master Recordings made during the second or third Option Periods: 15%.

(ii) The royalty rate pursuant to subsection 9.01(a)(2)(i) will apply to the first 500,000 units of USNRC Net Sales of each Album consisting of Master Recordings made during the second or third Option Periods. The royalty rate will be:

(A) 15.5% on USNRC Net Sales of any such Album in excess of 500,000 units and not in excess of 1,000,000 units, and

(B) 16% on USNRC Net Sales of any such Album in excess of 1,000,000 units.

(3)

(i) Master Recordings made during the fourth or fifth Option Periods: 16%.

(ii) The royalty rate pursuant to subsection 9.01(a)(3)(i) will apply to the first 500,000 units of USNRC Net Sales of each Album consisting of Master Recordings made during the fourth or fifth Option Periods. The royalty rate will be:

(A) 16.5% on USNRC Net Sales of any such Album in excess of 500,000 units and not in excess of 1,000,000 units, and

(B) 17% on USNRC Net Sales of any such Album in excess of 1,000,000 units.

(4) As used herein, the "Base U.S. Album Royalty Rate" for a particular Album Delivered hereunder (and each Master Recording embodied therein) shall mean a royalty rate equal to the royalty rate for the first USNRC Net Sale of such Album on a configuration-by-configuration basis. . . .

(c)

(1) If LABEL sells or licenses to any third party the right to sell Electronic Transmissions of Records or Masters hereunder, the royalty rate will be the otherwise applicable Album royalty rate prescribed in subparagraph 9.01(a) or 9.01(b), as applicable. Sales of Albums by way of Permanent Download shall be treated as USNRC Net Sales for the purposes of Article 9 hereof, provided that the sales price concerned falls within a top-line sales price category applicable to such method of sale. . . .

9.03.

(b)

(1)

(i) The royalty on any compact disc Record will be a royalty computed at one hundred percent (100%) of the rate which would otherwise apply under this Agreement.

(ii) [C2] Notwithstanding subsection 9.03(b)(1)(i) above, if the SRLP of a particular Album hereunder in the compact disc configuration is less than the SRLP of LABEL's or its Licensee's or Distributor's Top-line Album in the compact disc configuration in the United States (which, as of the date hereof shall be deemed to be Thirteen Dollars and Ninety-Eight Cents [$13.98]), then the royalty rate for Net Sales of that particular Album in the compact disc configuration in the United States shall be reduced by being multiplied by a fraction, the numerator of which shall be the SRLP of that particular Album hereunder in the compact disc configuration in the United States and the denominator of which shall be the SRLP of LABEL's or its Licensee's or Distributor's Top-line Album in the compact disc configuration in the United States as of the date hereof (which is Thirteen Dollars and Ninety-Eight Cents [$13.98]; provided, however, that in no event shall the fraction exceed one (1). . . .

10. MISCELLANEOUS ROYALTY PROVISIONS

10.03. [C3] Except as otherwise provided in paragraph 10.04, no royalties will be due or payable in respect of Phonograph Records: (a) sold (for less than 50% of LABEL's posted wholesale price), distributed or furnished on a no-charge basis by LABEL or its Licensees for promotional purposes (including, without limitation, Records to disc jockeys, publishers, motion picture companies, television and radio stations, and other customary recipients of promotional Records) or to LABEL's or its Licensees' employees and relatives; (b) sold, distributed or furnished on a no-charge basis to members, applicants or other participants in any "record club" or other direct mail distribution method; (c) sold at close-out prices or as surplus, overstock or scrap; (d) sold as cutouts after the listing of such Records has been deleted from the catalog of LABEL or its Licensees; (e) given away or shipped as "free," "no charge" or "bonus" Records (whether or not intended for resale); and (f) sold at a discount from the Record's posted wholesale list price (but for more than 50% of such price), whether or not intended for resale. In determining the number of Records as to which no royalties are payable pursuant to subparagraph (f) above, LABEL shall multiply the percentage amount of such discount by the number of Records sold at such discount. No royalties will be payable to you on Records containing Recordings of not more than two (2) Master Recordings made hereunder sold as "samplers" at a price which is fifty percent (50%) or less of the SRLP of LABEL's then current newly-released Top-line Records, on Records intended for free distribution as "samplers" to automobile or audio and/or audiovisual equipment purchasers (whether or not postage, handling, or similar charges are made), or distributed for use on transportation carriers.

10.04. Those Records distributed pursuant to subparagraphs 10.03(e) and (f) are herein referred to as "Free Goods." [C4] LABEL shall have the right to distribute Free Goods not in excess of its then current Distributor's standard policy ("Standard Free Goods"), which, for Albums currently is fifteen percent (15%) of the aggregate units of all Top-line Albums distributed under this Agreement (provided, however, that there will be no deduction for Standard Free Goods with respect to Electronic Transmissions; provided, further, that deductions for Special Free Goods may be applied thereto in accordance with this paragraph 10.04). In addition, from time to time, LABEL or its Distributor, jointly or separately, shall have the right to conduct special sales programs of limited duration which include the distribution of Free Goods in excess of the limitation set forth in the preceding sentence ("Special Free Goods"). If LABEL distributes Free Goods in excess of the foregoing limitations, LABEL will not be in breach hereof, but LABEL will pay you your normal royalty on such excess. . . .

11. ROYALTY ACCOUNTINGS

12. LICENSES FOR MUSICAL COMPOSITIONS

12.01.

(a)

(1) You grant to LABEL and its Licensees and their designees an irrevocable license, under copyright, to reproduce each Controlled Composition on Phonograph Records, other than Audiovisual

Records, and to distribute them in the United States and Canada.

(2) [N] For that license, LABEL will pay Mechanical Royalties, on the basis of Net Sales, at the following rates: . . .

13. . . .

13.02.

(a) [L] You warrant and represent that during the term of this Agreement:

(1) You will not enter into any agreement which would interfere with the full and prompt performance of your material obligations hereunder; . . .

(3) Subject to paragraphs 13.02.1 and 13.02.2 below, during the term hereof, you will not perform or render any services as a recording, performing and video artist, or a producer for the purpose of making, promoting, or marketing Master Recordings or Phonograph Records for any Person except LABEL.

13.05. Your services are unique and extraordinary, and the loss thereof cannot be adequately compensated in damages, and LABEL shall be entitled to seek injunctive relief to enforce the provisions of this Agreement. (The preceding sentence will not be construed to preclude you from opposing any application for such relief based upon contest of the other facts alleged by LABEL in support of the application.)

14. [M] DEFINITIONS

14.01.

(a) [M1] "Advance" – a prepayment of royalties. LABEL may recoup Advances from royalties to be paid to or on your behalf pursuant to this Agreement [D] or any other agreement, except as provided in the last sentence of this subparagraph (a). "Any other agreement," in this paragraph, means any other agreement relating to you as a recording artist or as a Producer of Recordings of your own Performances. Advances paid under Article 6 will not be returnable to LABEL except as provided in Article 15 or elsewhere in this Agreement . . .

(b)

(1) [M2] Fifty percent (50%) of the production and acquisition costs incurred in connection with any Covered Video will be recoupable from your royalties on sales of Records which do not reproduce visual images ("audio royalties") under subparagraph 5.02(a), and one hundred percent (100%) of such costs will be recoupable from monies otherwise payable to you from the exploitation of such Covered Videos pursuant to paragraph 9.07 above; provided, however, that any such costs incurred in respect of any Covered Video hereunder in excess of One Hundred Fifty Thousand Dollars ($150,000) shall be one hundred percent (100%) recoupable from audio royalties. If any such costs are recouped from audio royalties and additional royalties accrue under paragraph 9.07 subsequently, the latter royalties will be applied in recoupment of those costs and the amount of those audio royalties which were previously applied against those costs will be credited back to your account.

(2) All costs incurred in connection with creating the so-called "enhanced" or multimedia portion (including without limitation, videos, photography, graphics, technology, etc.) of an enhanced CD, CD +, CD Rom, DVD or any other similar configuration (whether now known or hereafter created) embodying Masters hereunder (the "Enhanced Costs") including, without limitation, ECD Material, or creating Mobile Materials will be recoupable from record royalties otherwise payable to you hereunder.

(3) Fifty percent (50%) of all costs incurred by LABEL in connection with securing, registering and/or protecting Artist Domain Names, and creating, hosting and maintaining Artist Websites, including, without limitation, costs incurred in creating and/or acquiring the Website Material, will constitute Advances recoupable from royalties (excluding mechanical royalties) payable to you hereunder.

14.02.

(a) [A3] "Album" – a sufficient number of Masters embodying your Performances to comprise one (1) or more compact disc Records, or the equivalent, of not less than forty-five minutes of playing time and containing at least ten (10) different Compositions. . . .

14.06. [C5] "Container Charges" – the applicable percentage, specified below, of the Suggested Retail List Price applicable to the Records concerned: . . .

(b) Compact disc Records/New Medium Records – twenty-five percent (25%). . . .

14.20. [C7] "Net Sales" – gross sales, less returns, credits and reserves against anticipated returns and credits. Returns will be apportioned between Records sold and "free goods" in the same ratio in which LABEL's customer's account is credited.

14.26. [M3] "Recording Costs" – all amounts representing direct expenses paid or incurred by LABEL in connection with the production of finished Master Recordings under this Agreement. Recording Costs include, without limitation, the amounts referred to in paragraph 5.01, travel, rehearsal, and equipment rental and cartage expenses, advances to Producers, transportation costs, hotel and living expenses approved by LABEL, studio and engineering charges in connection with LABEL's facilities and personnel or otherwise, all costs and expenses of obtaining rights to all samples of Master Recordings, selections and other materials embodied in Master Recordings hereunder (including, without limitation, all advances, license fees, attorneys' fees and clearing house fees), all costs of mastering, remastering, remixing and/or "sweetening" and all costs necessary to prepare Master Recordings for release on digital media. Recording Costs do not include the costs of producing metal parts, but include all studio and engineering charges or other costs incurred in preparing Master Recordings for the production of metal parts. (Metal parts include lacquer, copper, and other equivalent masters.)

14.27. [C6] "Royalty Base Price:"

(a) The Royalty Base Price for Records (other than Audiovisual Records) shall be the Suggested Retail List Price applicable to the Phonograph Records concerned, less all excise, purchase, value added or similar taxes included in the price and less the applicable Container Charge.

(b) The Royalty Base Price for Records (other than Audiovisual Records) sold through any so-called "record club" will be the same as that for the identical Records sold Through Normal Retail Channels in the territory concerned.

(c) The Royalty Base Price for Audiovisual Records manufactured and distributed by LABEL or its Licensees shall be LABEL's or its Licensee's published wholesale price as of the commencement of the accounting period concerned, less all excise, purchase value added or similar taxes included in the price and less the applicable Container Charge.

19. MISCELLANEOUS

19.01. You will, during the term of this Agreement, actively pursue a career as an entertainer in the live engagement field. . . .

19.11. You recognize that the sale of Records is speculative and agree that the judgment of LABEL with respect to matters affecting the sale, distribution and exploitation of Records hereunder shall be binding upon you. Subject to the terms of this Agreement, nothing contained in this Agreement shall obligate LABEL to make, sell, license or distribute Records manufactured from the Master

Recordings recorded hereunder except as specified in this Agreement.

APPENDIX II

EXCERPTS FROM 360 CONTRACT

Entertainment Services Revenues. You hereby irrevocably grant and assign to Label and Label is entitled to receive, collect and keep for Label's own account throughout the Term an amount equal to ____ percent (__ %) of Artist's Net Entertainment Services Receipts and you will pay or cause to be paid that amount to Label as provided in paragraph 5 below. "Artist's Net Entertainment Services Receipts" in the preceding sentence shall mean all gross monies, however characterized, payable to you or Artist (or any entity otherwise partly or wholly controlled by Artist) concerning, without limitation, the use, licensing, exploitation, reproduction, publication, and/or exhibition of the Artist names, portraits, pictures and likenesses (including, without limitation, all past, present or future legal, professional, group, and other assumed or fictitious names or trademarks used by the Artist) and the related personality rights together or separately, or in conjunction with any other elements, for purposes of any endorsements, special with third parties, sponsorships (including tour sponsorships), or product, services, or brand tie-ins, and/or creation, hosting and maintenance of all so-called "fan club" websites relating to Artist, the use of any intellectual property relating to Artist in connection with non-fiction books, magazines and other non-fiction publishing materials, in games, including video games, and dramatizations including, without limitation, cartoons, less costs of collection and commissions paid by Artist to any unrelated third parties and all actual, bona fide, out-of-pocket third party costs or expenses attributable to the applicable Entertainment Service provided such costs are reasonably related to the applicable Entertainment Service, and are not excessive in nature.

Touring Revenues. You hereby irrevocably grant and assign to Label and Label is entitled to receive, collect, and keep for Label's own account throughout the Term an amount equal to ____ percent (__ %) of Artist's Net Touring Receipts, and you will pay or cause to be paid that amount to Label as provided in paragraph 5 below. "Artist's net Touring Receipts" in the preceding sentence shall mean all gross monies ("Gross Touring Receipts"), however characterized (including, but not limited to, ticket sales revenue and performance fees, but excluding tour merchandise which shall be governed by the Recording Agreement in connection with any Album Artwork and paragraph 4 below otherwise) payable to Artist (or any entity otherwise partly or wholly controlled by Artist) concerning Artist's services or endeavors as musician(s), vocalist(s), or performer(s) in connection with one or more live performances or engagements, broadcast, webcasts, motion pictures, one-nighters, tours, and/or other means, an of the foregoing whether undertake by Artist in support of a commitment album under the Recording Agreement or otherwise (collectively "Concert(s)") either alone or with one or more other individuals and in connection with a single Concert or series of Concerts, less costs of collection and commissions paid by you to any unrelated third parties and all actual, bona fide, out-of-pocket third party costs and expenses attributable to the productions, staging, promotion and marketing of the applicable Concert, such as sound and lights expenses and crew payments, but specifically excluding salaries, per diems, or other payments made to you an/or Artist). Notwithstanding the foregoing, in no event shall Label's share of Artist's Net Touring Receipts by less than __ percent (__ %) of the Gross Touring Receipts. Nothing contained herein shall limit Label's rights, during the term of the Recording Agreement, to record, film, and/or tape, in whole or in part and otherwise as Label elects, any Concerts by means of public stage performances of all kids, web-casts, sponsorships, television broadcast or cable casts (including pay-per-view telecasts), motion pictures, one-nighters, concert tours, and the like alone or in conjunction with others (including, without limitation, backstage and rehearsal footage). All such recordings, filmed footage and/or tapings will by deemed Covered Videos under the Recording Agreement.

Acting Revenues. You hereby irrevocably grant and assign to Label and Label is entitled to receive, collect, and keep for Label's own account throughout the Term and amount equal to ___ percent (__ %) of Artist's Net Acting Receipts, and you will pay or cause to be paid that amount to Label as provided in paragraphs 5 below. "Artist's Net Acting Receipts" in the preceding sentence shall mean all gross monies, however characterized, payable to Artist for services where she is engaged as an actor or as herself to appear (or to serve in a creative capacity such as director, writer, producer) in any dramatic or non-dramatic television series (or one or more episodes thereof), motion pictures, or similar productions (excluding only A-V Recordings made for Label pursuant to the Recording Agreement) or stage productions, for public audiences and/or for exhibition in any and all media now known or hereafter devised (but excluding commercials or endorsements of products which would be covered under Entertainment Services in paragraph 1 hereunder). Notwithstanding the foregoing, Artist shall neither render such services nor accept any engagement that would require Artist to render such services in a manner that would or might interfere with Artist's fulfillment of her other obligations under the Recording Agreement. For avoidance of doubt, doe purposes of computing the Artist's Net Acting Receipts, all sums received or credited to Artist (or her affiliates) and the economic value of any other non-cash consideration received shall be included, whether received before or after the Term (including residual accountings), so long as the agreement relating to the Artist's Net Acting Receipts was entered into during, or was in negotiation prior to the expiration or termination of the Term hereof.

Merchandise Revenues. You hereby irrevocably grant and assign to Label and Label is entitled to receive, collect, and keep for Label's own account an amount equal to ___ percent (__ %) of Artist's Net Merchandise Receipts, and you will pay or cause to be paid that amount to Label as provided in paragraph 4 below. "Artist's Net Merchandise Receipts" in the preceding sentence shall mean all gross monies ("Gross Merchandise Receipts"), however characterized derived from the use and/or exploitation, reproduction, publishing and/or display of Artist's name (and any subsequent professional name used by Artist), Artist's likeness(es), mark(s), logo(s) or biographical materials (collectively, "ID Materials"), any Artwork (except for Album Artwork which is covered in the Recording Agreement), either alone or in conjunction with other elements, pertaining to Artist for the manufacture, sale and distribution for commercial and/or promotional merchandising purposes (e.g., hats, t-shirts, sweatshirts, posters, books, calendars, comics, stickers, beauty product, and novelties etc.) as well as virtual items (e.g., avatars, screen savers etc.) including tie-ins, fan clubs and "bounce back" merchandising.