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Wealth Nation: Times May Truly Be A-Changin'[1]

By Daniel J. Scott

So much has happened to the music industry in the last decade. An innovative college student forever changed the landscape of the music industry from the confines of his college dorm, as the world was catapulted into the digital age of media and file-sharing. Corporate giants fell to their knees and cried poverty as album sales continued to plunge. Ringtones became major sources of revenue, and large department stores known for carrying everything from appliances to sleep apparel gained exclusive rights to sell highly anticipated albums. Record labels grew increasingly interested in how many "hits" each song has on MySpace, as opposed to how many seats they could fill in the local clubs. Some major acts, like Radiohead and Nine Inch Nails, completely removed the middleman and released their music directly to fans over the Internet. Most recently, Madonna, Jay-Z and others made headlines by signing blockbuster deals with Live Nation, while other record companies adopted the so-called "360-deal" approach.

Nobody knows for certain what all of this means, but what is clear is that the music industry is undergoing a serious makeover. While we may be faced with the challenge of adapting to new forms of media and the creation of a new and viable business model for the digital age (and beyond), we are also being presented with the opportunity to cure some of the perceived inequities of the past—specifically, the exclusive and infinite ownership of master recordings by record companies.

It was not too long ago that Prince painted the word "slave" on his face and changed his name to a symbol in an attempt to break his contract with his then record label, Warner Bros. Similar artist-record label feuds unfolded publicly in the past, from Frank Zappa to 30 Seconds to Mars. Most, if not all, of these disputes stem from the ownership and control of the master recordings. Until recently, master recordings were typically owned entirely by the record company, and artists were deemed "works-for-hire." As a result, while an artist would be entitled to share in the revenue generated by the exploitation of the artist's master recording (after the record company recouped its costs, of course), the artist never owned the underlying asset—that is, the master recording—itself. This has been a source of controversy that has frustrated artists for years, leading to countless tales of successful bands failing both professionally and economically because of the record companies' loss of interest in promoting them. It has also deprived the artist of a potentially valuable asset and source of wealth.

As I understand them, the Live Nation deals (or at least many of them) are turning the traditional model for recording agreements on its head. Instead of the artist effectively providing a service to the record company in exchange for a percentage of revenue, Live Nation is providing a service to the artist in exchange for a percentage of revenue. The bonus is that the artist is ultimately retaining ownership of the master recordings. How could this be? you ask. Has Hell frozen over? Not exactly.

What Live Nation has realized is that the real money is not made on album sales, but rather on touring, merchandise, publishing, ringtones, and other ancillary markets. As a result (and by no small part because of its control of many concert venues), Live Nation would prefer a percentage of the revenue generated by all of these various markets over owning the master recordings. Some may argue that Live Nation is in actuality taking more from the artist than record companies typically have in the past. Granted, this is from a significantly larger pool of income than record companies would ordinarily take a percentage (which, of course, is also changing), but the artist does ultimately keep ownership of the master recordings, and after the term of the Live Nation deal expires (e.g., 10 years), the artists will be free to do as they please with their works.

It remains to be seen how artists will succeed financially during the term of a Live Nation deal. While the artist may be giving away a greater percentage of his income from more varied sources, Live Nation may prove to be more lucrative for artists, depending on the success it achieves with promoting and exploiting the artist in all of these various markets.

What fascinates this author about this new business model, however, is not really the economics of album sales or downloads, or concert and merchandising profits. It is the artist's possible retention of the ownership of the master recordings, and the long-term opportunities this retained ownership creates from a wealth, tax and estate planning perspective. One of the common difficulties in such planning for recording artists is that, if successful, they are extremely income heavy—making large sums of money during a typically short period in their careers while they are popular—without really having any wealth or equity to show for it. Put another way, artists are like extremely highly paid employees, as opposed to the owner of a successful company (the latter of whom is both highly paid, with the added value of owning the company). If artists own their master recordings, then they may begin their careers owning a very real (and potentially valuable) asset that can earn significant income for generations to come, or be sold in the future for a significant profit.

Typically, when an artist begins his career, he owns very little, if anything, in the way of assets. It is only from the income generated by ticket, merchandise, album and other sales that he is able to acquire substantial assets (e.g., homes, cars, yachts, aircraft, jewelry, and other luxury items) and make other investments to accumulate and grow wealth. Owning a catalog of master recordings from the beginning would be a major head-start to accumulating wealth. More importantly, those master recordings will be valuable assets that will give the artist leverage he does not currently have. For example, they can be used to borrow funds in order to make other investments now, as opposed to having to save the money earned from touring, merchandise and album sales in order to make investments in the future. Starting out by owning own master recordings will better position the artist to put together a diverse portfolio of investments early in his career, which will be beneficial once the spotlight dims.

Another upside to having an artist own master recordings is the control that comes with exploiting those masters during the course of the artist's lifetime and beyond. With the variety of possibilities ever expanding—commercials, movies, television, ringtones, videogames, and downloads, among other things—the artist is (and, arguably, always has been) better positioned to oversee and aggressively market and exploit his music over the long term. Too often, an artist's success fails the minute popularity wanes or the record company loses interest. Yet that does not mean that the artist's hits do not continue to have a commercial outlet, and who better to own those master recordings and push for their continued exploitation long after the artist's career has ended than the artist himself? Rather than collecting dust in some record company archive years after everyone (including the record company) has forgotten about an artist, or occasionally appearing on a "one hit wonders" countdown, an artist would be able to continue celebrating his work and earn money from it.

Even though some artists and their estates have had continual success long after their careers and lives have ended (the Elvis Presley estate, for example), these stories are the exception, where cultural icons passed a legacy to their heirs based on the brand that the artists' successes were ultimately able to create. However, what about most artists who never reach that status? They, too, should be able to make the most of their works during their lifetimes and benefit future generations. Ownership over master recordings is a key component to achieving this success and can be a significant asset for an artist's heirs, especially where the artist has not achieved legendary status.

In addition the benefits provided to artists, this new business model could save record companies, which will profit from the added revenue streams not typically found in traditional recording contracts. The newfound partnership and atmosphere of teamwork between artist and record company should rejuvenate the industry. Artists (perhaps feeling less like a "slave") will be inspired to produce better music and perform more passionately. Record companies will be more incentivized to come up with creative ways of marketing the artists and their music, including via new technologies, in order to continue generating revenue. If the record company is successful and does its job, there is no reason as to why term renewals could not be negotiated (or become automatic, based on performance hurdles), in order for the record company to be guaranteed a continuing share in its investment in the artist.[2]

When negotiating deals for artist clients in the current climate, an entertainment attorney should try for the lion's share and have the client retain ownership of his master recordings. What once seemed impossible is now becoming a reality, and attorneys should seize this opportunity and create a new trend in the music recording industry. The "works for hire" clauses and assignments of rights in perpetuity should be eradicated. Instead, the artist and the record company should work together, as a partnership with one common goal: namely, the success of the client's career. Furthermore, when the time comes for the record company to move on—whether because of the artist's age, or maybe because interest has waned—it is important to have the client do so with pride and dignity, happy to move on from what was an exhilarating (if not surreal) experience, holding firmly to and owning his master recordings, along with all of the stories and memories that come with them, and ready to begin the next journey.

As for the record companies and executives, the idea of partnering with artists, as opposed to owning them, should be an exciting one. It is a time for record executives to remove their villainous capes and become heroes, beloved for saving the music industry and giving back to artists ownership stakes in their futures. It is a chance for record companies to stand by, and not over, the artists that they produce. More importantly, it may be a more viable economic model for the industry, providing greater wealth for all involved. Record companies will profit from the added revenue streams, and artists will retain their master recordings. To pull a line from Bob Dylan, the old road of traditional recording contracts is "rapidly aging. Please get out of the new one if you can't lend your hand . . . " (I hope you know the rest).

Endnotes

1. When this article was submitted for publication, Live Nation and Ticketmaster had entered into a definitive merger agreement, which was pending government approval. This article in no way reflects the author's opinion on the pending merger.
2. Another option, which still gives the artist ownership and ultimate control of the master recordings, is to have the record company be part owner of master recordings that it participates in producing, so that it can continue to receive a portion of the revenue generated by such master recordings after its services in promoting the artist are no longer desired.

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