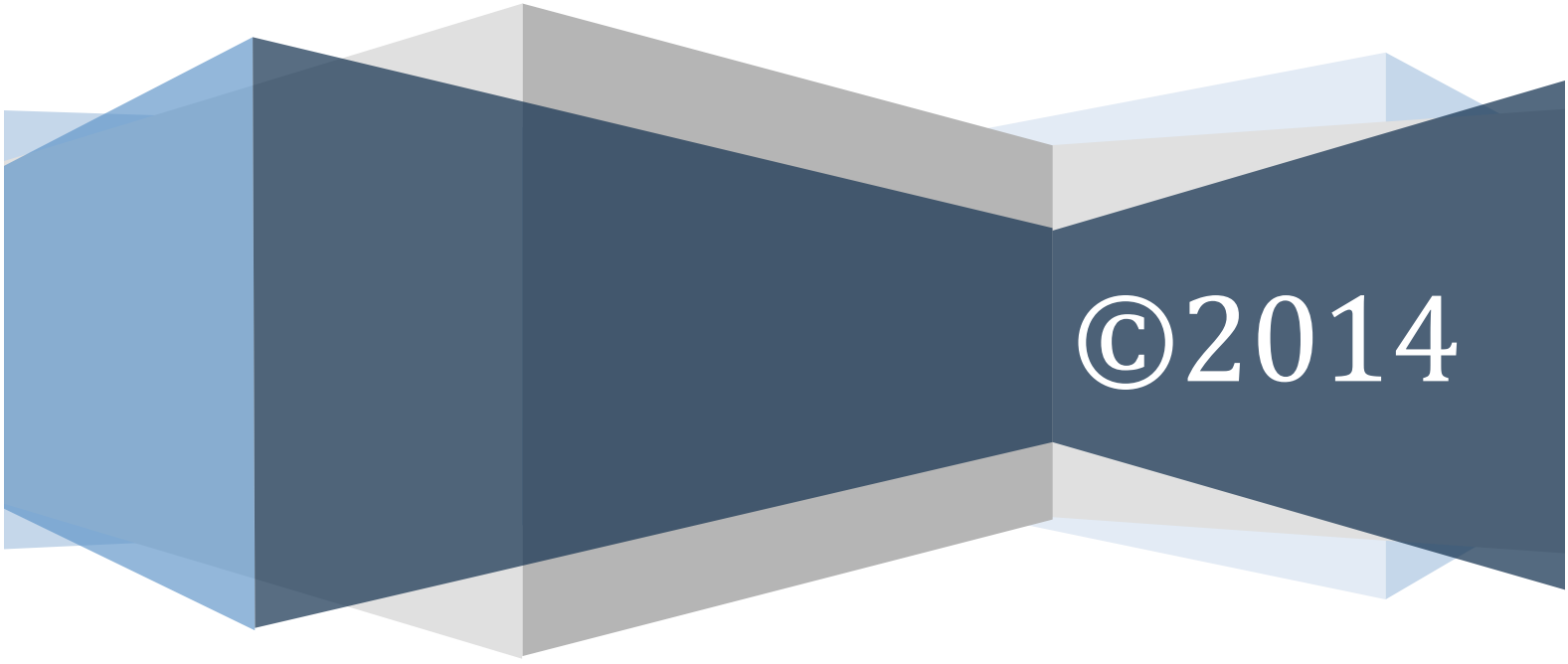
5 DANGERS OF SIGNING A "360" DEAL

BY BARRY CHASE



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About the Author:

Barry Chase, the author of this ebook, is the Senior Partner of ChaseLawyers℠, an entertainment, sports and media law firm with offices in Miami and New York City.

The Principal Attorney at ChaseLawyers™ entertainment attorneys is Barry Oliver Chase, Esq. Mr. Chase is an honors graduate of **Yale College and Harvard Law School**. While at Yale, he was elected to Phi Beta Kappa, the most prominent national collegiate Honor Society, and was listed as a Ranking Scholar during the majority of his eight semesters before graduating magna cum laude. At Harvard, Mr. Chase graduated with honors, earning his JD degree cum laude.

Mr. Chase began his legal career with a large Washington, D.C. law firm in 1970, focusing his practice on Communications and First Amendment law. During the early 1970s, Mr. Chase represented such media giants as CBS, the Times-Mirror Company, Capital Cities Communications and Time, Inc., regarding Federal Communications Commission (FCC) matters. In connection with his First Amendment work, Mr. Chase represented journalists who came under fire during the famous Watergate litigation before Judge John Sirica. He also represented journalists in the course of the criminal proceedings leading to the historic resignation from office of Vice President Spiro Agnew.

In 1976, Mr. Chase became Associate General Counsel of the Public Broadcasting Service (PBS) Television Network. In that capacity, he dealt with national and international television program and music rights, on-air legal issues relating to the Fairness Doctrine, Equal Time and defamation, and program funding. After two years in the PBS Counsel's Office, he became Director of PBS's News and Public Affairs Programming and later became the top national PBS programming executive (Vice President for Programming). During this period, he was PBS's point-man in charge of such projects as EYES ON THE PRIZE, NATIONAL GEOGRAPHIC, FRONTLINE, THE NEWSHOUR, Carl Sagan's COSMOS series, NOVA, and the CIVIL WAR series. In 1991, he re-located to South Florida, becoming the Senior Vice-President of National Production for South Florida's PBS affiliate.

After his high-level hands-on experience in the world of television and film production, Mr. Chase returned to the practice of entertainment law in Miami. He represents Spanish- and English-language musical artists; television stars; composers; record companies; filmmakers; actors; models; authors; screenwriters; live performers; visual artists; and Internet and New Media entrepreneurs. He lectures regularly on the representation of media personalities and the legal "do's and don'ts" of music, television and film production.

Introduction:

A “360 Deal” is the new “standard deal” singer/songwriters (“Artists”) sign these days. As the name suggests (“360 degrees”, as in a full circle), the Artist agrees that in return for the financing and promotional clout of the record label, the label will share in ALL the revenue streams the Artist develops: record sales, ringtone sales, live performance, product endorsements, merchandise, composer revenue (“publishing”), movie revenues, etc.

A 360 Deal may, or may not, be good for the Artist, but here are 5 important things that every Artist should watch out for before signing.

1. Stay "Independent" Until the Right Deal Comes Along

There are many Artists who think they MUST be "signed to a label." This is old-fashioned thinking, based on the days when the only way for an Artist to be launched was the backing of a label. But times have changed. Today, the "Do-It-Yourself" ("DIY") method is not only possible, but DESIRABLE, for a new Artist. Here's why.

(1) **First**, going DIY for as long as possible means you don't have to share revenue with anyone.

(2) **Second**, it will encourage you to learn something about the business side of music, which too many Artists avoid, making them easy targets for unfair treatment by managers, labels, music publishers, etc. Remember, while you may care only "about the music," you can have a real "career" only if you make money at it. If you don't learn, you will be taken advantage of over and over again.

(3) **Third**, you're not going to find any open doors at good labels unless you can show them that people are ready to PAY for your music. Some labels are very interested in "making beautiful music," but ALL of them are interested in "making beautiful money." If you can show them that you have already sold a lot of downloads, on your own, or that you can fill a 500-person venue with your own fan base, you'll be taken more seriously.

(4) **Fourth**, think about having a meeting with label executives to sell them on signing you. What are you selling? What are you asking them to invest in? If all you have are your demos, you're asking them to buy into one out of the thousands of other unknown artists seeking a deal. But if you walk into the meeting with 10,000 units sold and a track record of filling venues with your fans, then YOU have something to offer, and the negotiation is entirely different. You may be able to do better than the "Standard Deal," which will be very one-sided against you. You may even be able to stimulate interest in several labels at the same time and create a "bidding war" for your talent. At ChaseLawyers℠, we have clients who make very good DIY livings on their own; have never been "signed;" and who now have little interest in being signed.

Bottom line? Don't be in a hurry to be "signed."

2. Don't Sign the 360 Deal if the Label Doesn't have the Money to Invest in You

Remember, you're giving up a percentage of your income from **everything** because you think the label will take your career to the "next level". But the label can't do that if it doesn't have enough cash to:

(a) pay for "radio-ready" demo recordings;

(b) pay a web designer to set up a good website for you with SEO support;

(c) set you up for digital sales on iTunes, etc.;

(d) get choreographic and "acting" help for live appearances;

(e) promote your live appearances;

(f) create and buy advertising for each record release;

(g) pay for and produce first-class music videos.

Anyone can start a company and call it a "record label." There is no legal requirement that a label be licensed or that the owner have a business background. The actual definition of a record label is a company that owns sound-recording copyrights (more about that later). There is no requirement of honesty, knowledge of the industry, investment capital or anything else. So it doesn't get you very far to be "signed" if you're signed to the wrong company. And some companies that call themselves "labels" may know less about the music business than you do. If you MUST be "signed to a label," call a lawyer and spring for the few hundred bucks that it will cost you to file for and set up your own label. Then you can be "signed" to yourself.

3. Don't Sign Unless You Have an "Escape Clause"

One of the saddest moments at ChaseLawyers℠ is a first meeting with a "signed artist" who has been "put on the shelf". Most 360 deals will tie you up for **5-7 years**, but they will not REQUIRE the label to do anything – not even to record or release any of your music. If the label runs out of money or discovers a new artist that will pay off more than you, they can just leave you "hanging around" -- still "signed" to them but with nothing to do and no support from the label. There are two ways to avoid this problem when your deal is being negotiated:

(1) You can insist on a "music release clause," which requires the label to release each of your tracks within a certain time, to a certain market, with required promotional support; and

(2) You can insist on a termination clause which gives you the right to get out of the deal if goals are not reached within, say, the first 18 months. The goals can be stated in terms of minimum money that you must make in that period, or number of record sales, or signing a contract with a major label. If the goals are not met, you're free. But if you don't have this termination right in your contract, you're stuck.

4. Contract Clauses to Watch Out For

(1) First, you need to know how long the deal will last. Typically, if you're in your twenties, and you're thinking of signing a five-album deal, you might be stuck with the label until you're in your thirties. If it doesn't work out with this first label and you're thirty and you're a female, it will be difficult to re-ignite your career with a new label, simply because the nature of sexism in the entertainment businesses requires females to be young. Don't blame me; blame our popular culture. (I, personally, LOVE women over thirty.) Even if you're a guy, the idea of starting all over again as a musical artist at thirty will seem like a huge effort. It benefits your label to sign you for as long as possible, so they can try to make money on you for as long as possible. A 360 deal doesn't REQUIRE the label to record and distribute five albums. The contract just says the label has the "option" to do so. If they're unhappy with Album #1 (or even if they never get around to recording Album #1), they never have to record Album #2, and they never have to let you go for the length of the deal. So you want to negotiate for as SHORT a term as possible in the first deal you sign.

(2) Second, you need to know what revenue streams are actually covered in the 360 deal. It is traditional for labels to insist on a percentage of your record sales. Traditionally the label will take the lion's share and you will receive a percentage "royalty" on record sales. Other revenue streams will include your fees for live appearances; sales of merchandise using your name or picture; money your composer copyrights generate -- "publishing" money (more about that later); money from product endorsements you agree to; money from producing music for other artists; money from a book you might write; even money from a movie or TV role you might play.

(3) Third, you need to understand how royalties are generated through your "Royalty Account." Your "Royalty Account" starts out as a huge financial hole that the label digs but you need to climb out of before they begin paying you anything. For example, let's say that the label spends $200,000 on recording your music, buying radio advertising for your launch, and organizing events for your early live performances. So your Royalty Account will start out showing a $200,000 deficit. Let's say now that you are successful and you sell sufficient copies of your first single to yield $100,000 in revenue. In this scenario, your first royalty statement will show that you still OWE $100,000 to the label, out of the $200,000 still-"unrecouped" amount they spent earlier. So there will be no royalty payment to you unless and until there is another $100,000 in revenue (for a $200,000 total). And because you are "signed" and not operating on a DIY basis, you have no control over these "recoupable" expenses. If the label's VP decides he needs to rent a Rolls convertible while attending your recording sessions, or that he needs to fly First Class to your early concerts, that expenses is added to the hole that you started out in, and you'll wait that much longer to see any royalties. So it is a bad idea to assume that even a successful first record will make you very much money from record royalties.

In a 360 deal, remember, the label's revenue goes far beyond just record sales. Typically, it includes at least a percentage of your live-performance revenue, a percentage of merchandise that carries your picture or name, and a percentage of any product-endorsement deal you enter into. This is not necessarily a bad thing if you think about it, because the more money the label thinks it will make on you the more investment it will be willing to make in your career. But you still need to be careful. The 800-pound negotiating point in many 360 deals involves your revenue as a composer. If you write little or none of your own music and think that you never will, this is not an important point. But be aware that, despite the greater glamour of the "performing life", in many cases the REAL money in music is made on the composer copyright – the "Music Publishing" activity.

Composers who create music have a legal copyright in it – which means that they own it and can control how it is performed, by whom and where. They make their money by "licensing" the right to perform the music to record companies, radio stations, bands, movie producers and people who print up sheet music. The composer copyright (aka "music publishing") is one of two completely separate music copyrights – (1) the composer copyright and (2) the sound-recording copyright. "Record labels" own sound-recording copyrights, and "music publishers" own composer copyrights. Even though a lot of publishing companies and record labels are owned by the same conglomerate corporations, they are separate businesses and separate companies – Sony Records vs. Sony Music Publishing; Warner Records vs. Warner-Chappell Music Publishing. So what a singer/songwriter creates when she (1) composes and (2) records a new song are actually TWO items of intellectual property, each with its own copyright.

Even most small record labels fancy themselves music publishers as well – mostly because they do not want to lose out on the tremendous revenue potential from licensing your compositions to movie producers, to producers of advertisements, to producers of elevator music and to radio and TV stations, among many other uses. All of these are types of "public performances" which today's owner of the composer copyright can license or not license. Over the course of the lifetime of a composer copyright (the composer's life plus 70 years, a total of as much as 150 years or more), the revenue from these licenses may be HUGE. Just imagine if you had composed "White Christmas", which has been recorded hundreds of times (with each recording having its own separate sound-recording copyright), used in countless movies and ads, is played in elevators and played to death on radio stations of all types during the Holiday Season. All of these uses produce revenue for the owner of the composer copyright. So a commonly heated point of negotiation in a 360 deal is the ownership of the singer-songwriter's publishing rights. Despite what the label may try to tell you, there is no "standard" resolution of this issue. It is going to be resolved depending on the relative bargaining power of the singer-songwriter artist, on the one hand, and the label on the other. If you're coming to the label on bended knee, begging to be signed, you'd better be prepared to give up a lot (maybe all) of your publishing rights; if you come to them as a "going concern" because you are already making a living as an independent artist, things will be different.

Okay, so we've covered (1) the length of the 360 deal and (2) the scope of what the label gets as revenue streams. What else should you, the artist, watch out for?

Let's remember that your revenue from record sales is going to be stated in terms of a royalty percentage. It may be a percentage of "retail sales" or a percentage of the label's "gross" or "net" revenue. But if you're receiving a percentage of something, how do you know that you're actually receiving what you've been promised? Let's say that your deal gives you 30% of the label's "net revenue" from record sales of all types – physical sales and downloads. Assume that there has been a total of $100,000 collected by the label for these sales. So you should receive (or have your Royalty Account credited with) $30,000, right? Not so fast. To know how much you'll actually receive, you (or your lawyer) need to understand the definition of "net revenue" under the contract. It turns out that the $100,000 is actually the "gross revenue" from record sales. "Net revenue" is always this gross revenue MINUS expenses. If the definition says (as it usually does) that the label can deduct all expenses before calculating the "net revenue," then that fat $100,000 might end up being $50,000 or $20,000, or even – in an extreme case – zero. So your 30% may evaporate during the label's calculation of net revenue. And this evaporation could occur in ways that seem unfair to you – for example, in very expensive bottles of champagne that the label's VP decides he will buy for your album release party, or the $1000/night hotel room that he feels is necessary when he has meetings in New York, or his First-Class airfares to get there. None of these expenditures are of any particular help to you, and none of them has actually been approved by you. But all of them may qualify as legitimate expenditures from a business accountant's point of view.

But let's be more optimistic for a minute. Let's assume that the label has been prudent in its expenditures, and the $100,000 gross amount is reduced to a "net" of $70,000. Your 30% share is $21,000. Even in this more favorable setting, how can you really know that the $70,000 shouldn't actually be $80,000? The answer is that you (or your lawyer) should make certain that you have an "inspection clause" in the 360 Agreement. This kind of clause gives you the right to look at the label's financial accounts to assure that they're not just making up expenditures to reduce the $100,000 and cheat you. If you don't have this right, you are more or less inviting the label to cheat you. So, in addition to being careful about the duration of the agreement and the scope of your activities that the label shares in, you need to be careful to include an inspection-of-books clause. Otherwise, you are ASKING to be cheated.

One more thing you should be wary of is the authority of your label to transfer your services to another (usually bigger) label. Being "signed to a major" is such a romantic ideal for most new artists that you may be thrilled at this prospect. But it may or may not be good for you. Typically, this kind of contract clause will say that your label can "assign" (which is lawyer-talk for "transfer") its rights in your career to another label. And this is understandable in many cases, because you may in fact outgrow the ability of your first, small label to support the expansion of your career. It may not, for example, have an international reach even though your career is ready to go global. In that circumstance, there is a lot of potential benefit for you in being transferred to a bigger label with contacts throughout the world. But, as always, the devil is in the details. Do you have any ability under your 360 contract to approve the new deal between you and your new, bigger label? Do you even have the right to SEE what the new deal will be? If not, you may be entering into what appears to be a thrilling new stage of your career, but you also may be stuck in a contract that doesn't really fit what you want to do and may not make very much money, or produce very much fame, for you. It may, for example, commit you to being part of a musical group being organized by the bigger label. And being part of a group may be the furthest thing from your mind. But if you have no approval rights over this new contract, or – even worse – don't even know what it says, you may be sorry for the remainder of your career.

Finally, you need to know what your percentage royalty will be from each revenue steam that the label shares in. The percentage split on record sales, for example, may be different from the split on live-performance revenue. And you, your attorney, or SOMEBODY, needs really to understand the numbers. For example, if the label will pay you a 10% royalty on record sales, (1) is that 10% of the wholesale or retail price? (2) is it figured on 100% of record sales or, say, 80%, in which case your 10% royalty is really 8%. The basic point is that you are signing a very important document here, a real commitment that you can't ignore, and you should find some way to understand it.

5. The 3 "Business" Things You MUST Know About Before Signing

(1) There are TWO copyrights in every piece of recorded music – (a) the composer copyright and (b) the sound-recording copyright. It doesn't matter that the same person creates both the composition and the sound recording. There are still two separate copyrights, often called the "publishing" (for the composer copyright) and the "master" (for the sound recording copyright, short for "master recording"). There are separate revenue streams and licenses for each copyright. While you may become famous for your recorded performances, you may become rich for your talent as a composer. The major money-makers for publishing are (a) radio play (performance license – which is where ASCAP, BMI and SESAC come in), (b) "mechanical royalties" for sales of sound recordings with your composition on them (mechanical license), and (c) use of any recording of your composition in advertisements (transcription/synchronization license). The major revenues for the "master" come from (a) record/ringtone, etc. sales and (b) use in advertisements and movies. The bottom-line point is that you need to know enough about these revenue streams to know how hard to negotiate on the items that produce the revenue. For example, you don't need to care as much today about the split on record sales as you did a few years ago because of the long-term decline in that revenue stream. So you may be willing to "lose" on that point to "win" on, say, the live-performance split (which is a growing revenue steam).

(2) Under the Copyright Act, ownership is magically created when you "fix" (which is copyright talk for "write" or "record") sounds and lyrics in a "tangible medium" – like a computer file, a piece of paper, or a sound recording. So the composer copyright is created when you write, or create a file, or do a scratch-track, of musical sounds and, if there are lyrics, words. The sound recording copyright is created the instant the sounds are "fixed" in a recording medium – a tape, a computer file, etc. The key point is that the OWNER of the copyright is, as the Copyright Act says, the "author." The way "author" is used in the law, Picasso is the "author" of his artworks, a novelist is the "author" of her book, and an architect is the "author" of his plans for a new building. YOU are the "author" -- and therefore the owner -- of the songs you compose.

Under a 360 deal, the label is the "author" – and therefore the owner -- of the sound recordings. You don't even have to register your copyright, although it is wise and cheap ($35 online at copyright.gov) to do so. The function of the copyright is that the composition or recording then becomes "intellectual property" you can rent (with a license) or sell, just as you could any other kind of property. If you can rent or sell something, you can make money from it – so that is when "music" becomes the "music business."

(3) A copyright property can only be transferred in writing. This sounds simple, because everyone always hears "you should get it in writing." But in the copyright world, the "should" becomes a "must." Why? Because the Copyright Act says so. In order for an "author" to transfer her copyright in either a composition or a sound recording, there must be a document – or the transfer never happened. It's not just that it's more difficult to prove; it never happened at all. In your life as a singer/songwriter, this means that anyone who urges you to forget about putting it in writing is either (a) dishonest or (b) not well informed abut the music business. In sum, before you can make a career out of your musical talent, you have to be ready to insist on deals that are in writing.

If you remember these five warning-areas, you'll have a fighting chance to avoid being taken advantage of in your first 360 deal. These deals can be good if they encourage your label to invest in your career. But they can be bad if they tie you to a label that can't or won't advance your career. It's your career. You'll improve your chances of making it a great one if you keep these things in mind.

If you need help on your music project, please feel free to contact me for a consultation.

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