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The Firm Foundation of Organizational Flexibility: The 360 Contract in the Digitalizing Music Industry

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ABSTRACT *The devaluation of the recorded music commodity under digitalization has destabilized the recording industry. One primary record industry response is the new "360 deal" form of the recording contract. By securing rights to individual acts' live performance, music publishing and licensing, and merchandizing activities, this new deal expands record companies' access to more profitable fields of music industry activity (if in piecemeal fashion). We examine the context, evolution, and varieties of the 360 deal, and argue that it re-secures record industry profitability and further stratifies the population of recording artists by shifting risk onto performers.*

KEYWORDS *Cultural Industries; Popular Music; Recording Industry; Creative Labour; Employment Contract; Intellectual Property*

RÉSUMÉ *La dévaluation marchande de la musique qui accompagne la numérisation a déstabilisé l'industrie de l'enregistrement sonore en Amérique du nord. Cet article en explore l'une des principales réponses: le nouveau contrat "360 degrés." En leur assurant des droits sur le spectacle vivant, l'édition musicale et les activités reliées aux produits dérivés d'artistes individuels, ce nouveau contrat élargit l'accès des maisons de disques à des champs d'activité industrielle plus rentables (même de façon fragmentaire). Nous proposons de rendre compte du contexte, de l'évolution et de la diversité des contrats 360 degrés, arguant qu'en reléguant la responsabilité des risques et des investissements aux artistes, l'industrie de l'enregistrement sonore ré-assure sa rentabilité et polarise davantage la population entre artistes établis et de la relève, fortifiant la position des premiers et intensifiant la vulnérabilité des seconds.*

MOTS CLÉS *Les industries culturelles; La musique pop; L'industrie de l'enregistrement sonore; L'emploi créatif; Le contrat d'emploi; La propriété intellectuel*

> The fantasy that the music industry is collapsing, disappearing, being destroyed by [an] army of downloaders is both a basic rock myth and a mystifying fantasy: the music industry is merely mutating to maintain its ability to extract surplus value from musical labour, just as it has done for more than a century. (Keightley, 2010, n.p.)

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> God, grant me the serenity to accept the things I cannot change [and] an entertainment lawyer with the clout to change the things he can. …
> (Young, 2006, p. 42).

Introduction

Far-reaching changes in the North American music industry are affecting the relationships between recording artists and record companies. The digitization of popular music and its unauthorized circulation by users of the Internet have transformed the recorded music commodity, and systems of accumulation that developed around its prior forms appear to have been fatally destabilized. The devaluation of the sound-carrier has led to a crisis of monetization in response to which record companies (now restyling themselves as "music companies") shift emphasis from the marketing of recordings to other activities. To replace lost and threatened revenues, companies are expanding into areas previously largely distinct from record making, underwriting these efforts through new forms of contractual and institutional relationships with recording artists.

Our focus in this article is on the emerging standard form of the recording contract known as the "360 deal" (and increasingly as the "multiple rights deal") through which much of this expansion is enabled and whose proliferation is redefining the politics of recording artistry. The 360 deal is so named because (in its paradigmatic form) it encircles the contracted artist so that non-record-related activities and revenues formerly beyond the reach of the recording contract become subject to "participation" by the contracting company. These activities and revenues chiefly include live performance and music publishing and increasingly incorporate the licensing of names, images, and logos (and the merchandizing of branded items), as well as other, typically new-media-enabled opportunities for monetization of the artist persona. This article offers an introduction to the 360 phenomenon; a planned future paper will further explore forms of stratification associated with its institutionalization, as well as artist and company rhetoric concerning its politics.

Our critical political economy approach is animated by democratic-theoretical and critical legal studies concerns regarding the politics of employment and contracts (e.g., Pateman, 1985, 2002; Gaines, 1991). This multidisciplinary frame foregrounds a crucial relation at the core of the music industry, that between recording artists and record companies, as a relation between suppliers of creative labour and intellectual property and the companies who are their employers and the marketers of their products. Furthermore, this perspective embeds a distinction between the closely related phenomena of exploitation and subordination, helping further to clarify the politics of creative work in the music industry. Contractual subordination, in this view, is a precondition of exploitation (Pateman, 1985). Our combined approach highlights the 360 deal as a form of employment contract that creates a relation of subordination (in which companies are empowered to command and dispossess recording artists) as the political basis of an economic relation of exploitation (the turning to account of the labor and products of recording artists by companies). Our principal sources of evidence are American and Canadian trade journals, specialist websites, major newspapers, and Leslie Meier's field notes from professional and industry conferences in New

York City in 2010 and 2011, as well as her original interview research. Our examination, while impelled by this hybrid theoretical frame, considers analyses offered by industry observers as well as by popular music scholars and scholars and practitioners of entertainment law. We perceive the talent contract to be a basic political-economic fulcrum of the entertainment industries and aim in this article to outline its current form and trajectory in the recording industry while identifying the relation of this current form to its predecessors.

In the midst of an epochal transformation of intra- and inter-organizational relations and dynamics, the dependence of the record industry on firm contractual control of the creative labour, recorded output, and (star) personae of music makers persists. Edgar Bronfman, Jr., former head of Warner Music Group, told his company's investors in early 2010 that, despite the company's ongoing diversification, "our business … is essentially a venture capital business where we're betting on … unknown artists who have yet to develop" in terms of their acts and their consumer constituencies (Seeking Alpha, 2010). Companies' ability to collect on their "bets" is assured by means of the contracts that secure their rights to artists' musical labour and the intellectual properties and revenues associated with those rights. Indeed, writes legal scholar Jonathan Blaufarb (1983-1984), "[a] record company's financial status depends on its long-term contracts with successful artists" (pp. 659–660). By expanding the reach of those contracts to encompass sources of revenue not immediately threatened by the devaluation of the soundcarrier, this new contract form helps companies to re-secure their ability to profit from artist popularity, playing a pivotal role in the ongoing transformation of the record industry.

This article examines the residual and novel features of the emerging talent contracting norms that complement and undergird record companies' developing digitalization-fueled business strategies. In the second section we summarize some of the main areas of growth into which record companies seek to expand through the contractual incorporation of 360 components. In the third section we introduce the central political terms of the late twentieth century recording contract—and a handful of related legal contests—in order to clarify the logics that we see persisting and intensifying in this process of expansion. In the fourth section we present an account of the development and contours of the 360 deal. Finally, we conclude that the 360 deal is a dynamic legal instrument, rooted in and dependent on longstanding conventions, that enables companies continually to fortify the contractual foundations of their business model experimentation.

In this article, our analysis remains largely within the limits of Laing's (2009) "narrow" definition of the music industry as a "unitary business sector" in which three "relatively autonomous" subsectors are engaged in "*directly* producing and disseminating music compositions, recordings and performances" (p. 15, original emphasis). These three sub-sectors—recording, music publishing, and live performance—have distinct logics (Hull, 2004; Wikstrom, 2009; Sutherland & Straw, 2007; see also Williamson & Cloonan, 2007), and have operated with some degree of independence for nearly a century. The recording subsector, long dependent on the sale of recordings on grooved discs, magnetic tape, and then digital CDs to music consumers, has been a primary centre of gravity, ascending to a dominant position in the postwar period. In the last decade of the twentieth century and the first of the twenty-first, a number of factors have reduced the centrality of the recorded music commodity to music industry activity. Most notable among these have been the end of the era of "CD replacement" (by consumers, of CD re-releases of recordings they had already purchased in vinyl or cassette forms) and the rise of unauthorized sharing of digital music files over the Internet. These and other factors have altered the balance between these three main subsectors, initiating a new cycle of change where publishing and live music increasingly appear as sources of profit no longer as decisively tethered to the marketing or sales of recordings as they had been. Appearing ripe for further capitalization, the publishing and live music sectors have attracted investors and become sites of accelerating activity. At the same time, formerly more sidelined licensing and merchandizing activities also present expanding opportunities. The 360 deal is a means by which record companies can capture portions of these markets in piecemeal fashion through individual artist contracts.

First, the U.S. music publishing sector showed a modest 2% rate of growth from 2005 to 2010; in Canada, the same sector has enjoyed increasing profitability (Ripley, 2010; Statistics Canada 2009). U.S. industry observers project an average growth rate of 3.2% to 2015 (Ripley, 2010). These rates of growth pale in comparison to those that fueled waves of record industry consolidation in the latter decades of the twentieth century (Chapple & Garofalo, 1977; Tschmuck, 2006) but appear increasingly attractive these days, and waves of consolidation in the publishing sector are already perceptible (Billboard, 2009). Second, for much of the last ten years, live music has been an area of "fast" growth (Laing, 2009, p. 19) as music industry capitalists have perceived new opportunities for investment (see also Holt, 2010). Ticket prices have risen "well above inflation," new entrants such as Live Nation and AEG have escalated concentration and oligopolization, and acts seeking to "buoy themselves against decreasing income from record sales" (Brennan, 2010, p. 9) are returning to regular live performance. Third, licensing and merchandizing are of the same logical type as publishing: they both involve the exploitation of intellectual property rights contractually assigned to companies by artists. The rapid institutionalization of these formerly more marginal practices offers expanding opportunities for rights holders to forge music licensing deals with advertisers (Klein, 2009) and other "brand partners," including television and film producers.[1] Record companies, "driven by a search for new revenue, not just economies of scale and higher market share" (Billboard, 2009), have been pursuing shares of the growth in music publishing, live music, licensing, and "merch" sectors. Much of this diversification, it appears, is carried out on the backs of artists who, through 360 deals, become captive clienteles for these services.

A primary theme evident across these changes is the decisive importance of rights for the recording industry. The significance of Simon Frith's (1987) insightful perception of a "move from record sales to rights exploitation as the basic source of music income" (p. 73) is underlined as rights holding and licensing have emerged as the essential conditions for accumulation by the contractors of talent in the new era. In the 360 deal, rights to intellectual property are only one part of the story: rights to performers' labour are also fundamental. At the core of the management of rights, whether over intellectual property or over labour, whether controlled by record companies, live music companies, publishers, or new entrants such as "lifestyle" (e.g., beverage and clothing) brands, is the contract by means of which rights are assigned by one party to another. To a significant degree, change and experimentation in the music industry presume the continued stability of "talent relations" (an entertainment industry adaptation of "labour relations"). In other words, as business environments become increasingly unstable (thanks, for example, to the proliferation of file-sharing or the entry of new players into the field), companies seek enhanced organizational flexibility such that they may experiment with new ways of doing business in order to remain competitive. Yet in the context of destabilization in some areas (e.g., the waning in steady sales of CDs or the erosion of control over certain markets for music or music-related commodities), experimentation appears to require a compensating increase of stability in others, demonstrating an unwillingness to let go of one handhold before securing another. The 360 degree deal helps to assure a stable basis for organizational flexibility by incorporating and securing rights to ever-widening ranges of artists' activities and incomes, strengthening and expanding companies' rights to command and dispossess artists, and it does so by building on the very sturdy contractual foundations laid in the pre-digital era. The 360 deal's mix of residual and novel elements becomes clearer against the backdrop of contracting norms that predominated prior to the onset of contemporary industry reconfiguration.

The North American recording contract takes the form of an "option contract." The "option" in option contract signifies "employment at will," but only at the will of *one* party, the employer. In the option contract the employer retains the sole right to terminate or extend the relationship (by exercising options to renew) and the performer is required to accept a position in which he or she has no control over the duration of the relationship, among other things (see Passman, 2006). The contract is set up as a series of "option periods" that are linked to the production and release of sets of recorded tracks (formerly known as "albums"). Each period culminates with an opportunity for the company either to "drop" the performer or to exercise its next option to renew the contract. In the latter case, the artist is obliged to record a further set of tracks, which must be declared satisfactory by the company in order for the obligation to have been met. The nature and the value of the option transform if desired success and profitability become reality. Until profitability is achieved, the most salient option for the company is the option to drop the performer; as success and profitability become more likely, the option to keep the artist by renewing the contract becomes more valuable. Only the company has options—the performer cannot refuse to be dropped or refuse to continue recording and promoting without (often) very severe penalties (Stahl, forthcoming).

With occasional exceptions involving artists bearing extraordinary bargaining power, there are terms that are simply not on the table in record contract negotiations. Some of these—exclusivity, assignment and duration—entail control of artists' labour: Companies typically require that the contract secures for them: (a) the exclusive right to the performer's labour and output, (b) the right to sell or assign the contract to a third party (such as the purchaser of the company that holds the contract), and (c) the ability to exercise these rights for a certain period, often as long the company likes. The last of these terms—governing the amount of time an artist is subject to the first two—is perhaps the most important; all three terms remain of crucial importance in the transition to the 360 deal as the industry's new basic mode of talent contracting (see Brereton, 2009).

The politics of the option contract are heightened with the problem of contract duration because of the business context in which the option logic of contracting norms developed. Companies have organized much of their business model around their ability to sign un- or less-proven performers at low initial rates with the prospective outlook that some small proportion of them will "break" (industry jargon for an artist's achievement of popularity and profitability). New artists typically bargain from very weak positions, but a minority of performers signed under these conditions generally does achieve or promise to achieve profitability. Because the long-term option contract anchors artists to those initially unfavourable terms, it keeps their cost to the company artificially low.[2] The artist may be able to renegotiate certain terms once successes begin to mount, but they will not (under "exclusivity") be able to test their value on the open market, and thus any renegotiations are unlikely to achieve the rates they could command from a new company anxious to exploit the performer's "buzz." The second of the largely non-negotiable terms, "assignment," covers the right of the company holding the contract to sell it (typically along with the sale of the company) to a third party, who will likely be very interested in the ratio of the performer's cost to the company to the profits he or she can bring the company. "Duration" governs the length of time during which companies enjoy these rights and hence is part of the value of the contract: A contract of a short duration with a successful artist is typically of much less value to a company or a company's prospective buyer than a contract of long or potentially interminable duration. The duration set out in a contract is usually one initial period (culminating in an album), typically followed by four to six option periods (and sometimes "overcall" rights enabling the company to demand yet more recordings in a period). Including the time taken to market the album and performer (often as much as 18-24 months), and accounting for the company's right to refuse delivery of an album it does not want to market, the ultimate duration of a successful artist's contract can easily exceed 10 or 15 years (Gardner, 2006).

The importance of contract duration to the relationships between performers and companies was intensified in the early 1980s, as the recording industry worked to rebuild profitability in the wake of a disastrous 1979-1980 global profit slump (Stahl, forthcoming; Straw, 1990). The industry's recovery was marked by an increasing reliance on smaller numbers of star performers generating a growing proportion of revenues. This "blockbuster" model was initially manifest in the staggering success of Michael Jackson's *Thriller* and then Bruce Springsteen's *Born in the USA* (Eliot, 1993; Garofalo, 1999). However, this model's limitations were made immediately apparent by a wave of U.S. artist unrest following the 1979 resolution of Olivia Newton-John's lawsuit against MCA Records (McLane & Wong, 1999; Stahl forthcoming). Newton-John's suit had clarified the legal right of performers in California—a major hub of the global recording industry—to terminate their contracts at seven years. This outcome heralded a weakness in the blockbuster model: What company would want to invest in the development and promotion of a potentially blockbuster-status star only to see that star enticed away by a competitor once his or her contract had expired? What investor or corporate board would want to buy into or buy a record company whose most successful artists (those still under contract after several years) could bolt at the peak of their profitability?

From 1985 to the early 2000s, the U.S. recording industry, acting through its trade association, the Recording Industry Association of America (RIAA), sought to tighten its contractual grasp on economically successful and promising artists through efforts to change state and federal law in the companies' favour, and to resist changes to law that would benefit artists. Played out before U.S. state and federal legislatures, these contests concerned important details in labour, bankruptcy, and copyright law (Stahl, 2008, 2010, forthcoming). They dealt with the rights of recording artists to a statutory limit on the duration of their contracts (decided in favour of companies in 1987), over the right to seek bankruptcy protection in the same manner as all other Americans (decided in favour of artists in 1998), over the terms on which companies may enjoin artists from recording for other companies (companies, 1993), and over the copyright status of sound recordings (artists, 2000). These encounters offer evidence of companies' attempts to maximize their control over their contracted performers and the intellectual properties that result from their work, and of the strategies of performers and their lawyers and unions to push back.

Assignment, exclusivity, and duration are generic contract terms, but the specifically American evolution of the recording contract is of decisive significance to the Canadian music industry. Richard Sutherland and Will Straw (2007) point out that "developments and decisions made in other countries have important effects" (p. 142) on the Canadian industry; the contracting norms of U.S.-based major record companies are reflected in the practices of their Canadian branches. Moreover, Canadian artists seeking access to the U.S.—"the largest market for Canadian music" (Sutherland & Straw 2007, p. 143)—often do so through the U.S. major labels, thus encountering U.S. contracts directly. It is on this terrain of control and contestation—shaped in the U.S. but influencing practices beyond national borders—that the 360 deal makes its appearance, and it is against this backdrop of patterned struggle that we ask: Who gets to control and appropriate what under which circumstances? What conventions and parameters of control and appropriation are emerging as these deals become institutionalized?

While the widespread implementation of the 360 deal as industry standard reflects a major shift in the record industry's business model, such deals are not new in principle. Bruce Springsteen's Mike Appel/Laurel Canyon contract, signed in 1972, secured a "trio of deals for management, records, and music publishing" (Pierson, 2010, p. 33) so that the company could

> participate in streams of income other than sales of recorded music by virtue of acquisition of music publishing rights and by a management commission on additional revenue sources that would almost always include live performance, merchandising, and endorsement income. (p. 33)

Nevertheless, the £80 million, six-album deal that Robbie Williams signed with EMI in 2002—the richest music deal in British music industry history—is widely touted as the first 360 deal (BBC News, 2002).

The groundbreaking Williams deal, which covers recording, live performance, film, and television, provided early evidence that established superstars could be rewarded handsomely for signing away rights to these other revenue streams. Notably, Williams was able to secure a reversion of copyright clause guaranteeing the return of his masters at a future date (Salmon, 2007), an extraordinary achievement for a recording artist of any stature (Stahl, 2008). Steve Greenfield and Guy Osborn (2007) characterize the Williams contract as a "penthouse suite" deal, the likes of which "will only be available to the elite artists" (p. 5).

Williams signed this deal after having already achieved great success in the United Kingdom, Australia, and a handful of European nations, appearing poised to break into the U.S. market. He was therefore in a formidable bargaining position, which had not been the case when he began his career at age 16 with Take That, a "boy band" created by music manager Nigel Martin-Smith. Indeed, the distinction between the "elite" and "boy band" 360 deal is instructive. Where the former represents the penthouse suite, the latter could be called a basement apartment deal, more akin to the kind offered to the majority of (aspiring) recording artists (especially those who do not compose their own material).

At the sub-basement apartment end of the 360 deal continuum is a particularly alienating approach that gained traction in the 1990s: Lou Pearlman's boy band contracts. Pearlman, creator of the Backstreet Boys and *NSync, is credited with developing a contracting approach that involves coupling a traditional recording agreement with an explicitly "employment-type" agreement.[3] The "boys" received annual salaries in exchange for assigning a percentage of merchandising, acting, licensing, and sponsorship revenues, in addition to recording, publishing, and live performance rights, to Pearlman's firm (LaPolt & Resnick, 2009). These deals serve as prototypes for contemporary boy band and girl group deals such as that of the Pussycat Dolls, an enterprise owned by Robin Antin and Interscope Records that employs a rotating cast of singers. In such deals, the firm often retains the power to dictate employee weight, hairstyle, and so forth (LaPolt & Resnick 2009). While the Backstreet Boys and *NSync would later successfully sue Pearlman for misrepresentation and fraud (Sanders, 2002), a replicable contract template had been established.

Comprehensive and restrictive contracts have featured in the entertainment industry since the early days of the Hollywood studio system. In fact, Matt Fitz-Henry, Walt Disney Records' director of new media, points out that Disney "has been doing that [360 deals] for 50 years" (Sandoval, 2008). Music industry talent contracts have been late to the all-encompassing party. Disney Music Group (DMG) only began obtaining multiple rights from its recording artists in 2005, the year that the 360 deal became more than just a peripheral phenomenon (LaPolt & Resnick, 2009).

The 2005 contract binding the band Paramore to the record company Fueled By Ramen, a Warner Music Group subsidiary, was widely commented on at the time and appears now as an early example of the more standard 360 deal that lies somewhere between the penthouse and basement apartment deals (see Leeds, 2007). In addition to obligating the band to record, Paramore's contract deeded to the label shares in touring, merchandising, and fan club fees (Harding, 2009). A key theme in the positive spin that coalesced around this deal was that it seemed to signal the apparent return of the "artist development" model dethroned by the blockbuster. The paradigm case of the artist development model is Bruce Springsteen, whose first albums were not strong commercial successes, but who was supported by influential executives devoting resources to the cultivation of his audience and to his artistic development (see Harden, 2010). According to Fueled By Ramen CEO John Janick, the executive who signed Paramore,

> [w]hen you have a strong infrastructure, like we do at Warner, and can be in the ticket business, the merch business, the publishing business, then you are doing a service for your artists. Their concerns aren't all in silos anymore. The label has put more on the line and invested more, and they have a bigger incentive to really work on building a career. (Harding, 2009)

Yet this logic is not essentially different than that which has driven the recording industry for decades: The incentive to invest in artists' stardom has ever been the anticipated returns of its monetization and circulation in the market; risk minimization has ever been the obverse of "artist development." The transition to the blockbuster model in the early 1980s was more of a shift of emphasis, toward the incorporation of "comprehensive strategies of audience-building within the promotional itinerary specific to any *individual album*" (Straw 1990, p. 214, our emphasis) as opposed to the cultivation of fans for whom deeper interest in an artist would mean the purchase of back catalogue as well as new releases. Today, indeed, "if a band's first album is not a hit, more often than not, that band is dropped" (Harden, 2010).

In 2006 a non-label player commenced the pursuit of revenue streams that traditionally fell outside its scope: live-performance oligopolist Live Nation. "Nu metal" band Korn signed a multiple rights deal produced through an EMI-Live Nation joint venture, an arrangement notable for "mak[ing] partners out of those who historically pursued distinctly separate agendas" (Waddell, 2006). Live Nation's 360 deals would dominate the headlines for the following two years. In October 2007, Live Nation signed a 360 deal with Madonna that promised the pop star $120 million over ten years (Gallo, 2007) and followed up with a $150 million, ten-year deal with rapper/producer Jay-Z (Leeds, 2008), a $70 million, ten-year deal with singer Shakira, and a $50-70 million deal with the band Nickelback "for three albums and three touring cycles, with an option for a fourth" (Gallo, 2008). As of 2010, however, Live Nation "[did] not expect to recoup some of the advances it paid out to big-name artists. Investors were wary of those multi-rights deals," and the company discontinued the practice (Peoples, 2010a). Five years later, the first Live Nation record, Madonna's *MDNA*, was released—on Interscope Records (Halperin, 2011).

Thus, in less than a decade (arguably between 2002-2008), we have seen the introduction, expansion, and maturation of a new paradigm in music industry talent contracting. While Live Nation may have cooled on 360 deals, the major record companies remain committed to such contracts. In November 2008, former Warner Music

Group CEO Edgar Bronfman Jr. announced that all of Warner's new artists would be required to sign 360 deals (McCarthy, 2008), and in the years since, these multiple rights contracts have become the industry standard.

This brief historical overview has highlighted a few notable high-profile contracts. However, the 360 deal has the greatest impact on the vast majority of lesser known recording artists whose contract negotiations receive little press. At one end of the continuum is a handful of superstars whose recorded music, touring, licensing/branding, and merchandising businesses align well with the requirements of the blockbuster model and who enjoy significant rewards. At the other end, the same basic framework of a 360-degree blockbuster model is being applied to smaller scale artists, but the math does not add up: Lower sales volumes of recordings, concerts, and merchandise, coupled with less favourable contract terms, is a formula that promises to deepen disparities between the elite and the ranks of aspiring, increasingly disposable artists from which new stars are expected eventually to appear.

360 deals are the new standard among majors and many independent record companies. Significantly, the scope of 360 deals even goes beyond activities traditionally under the control of the artist—music publishing, touring, merchandising, and endorsements—to increasingly incorporate rights associated with artist websites and online stores, fan club websites, virtual ticketing services, mobile phone marketing opportunities, video streaming services, photos, and other experiences offered to fans (LaPolt & Resnick, 2009). "Usually," writes Bart Day, "the label's share of those nonrecord kinds of income is in the range of 10 to 20 percent, but for new artists it can get as high as 50 percent" (Day, 2009). These deals take "passive" and "active" forms (Pierson, 2010). In the former, the artist is free to carry out or delegate to others non-recording activities while the company collects agreed-upon percentages of associated revenues. In the latter, the company also exercises some degree of control over these activities, often assigning them to the company's own contractors or departments. These non-record sources of income, formerly off-limits to companies in most recording contracts, used to provide an alternate means of support to the artist, enhancing the artist's independence and bargaining power vis-à-vis record companies. Record companies "now want a slice" of artists' "main source[s] of income" (Mitsopulos, 2008, p. 62); attorneys urge artists to limit their vulnerability to companies' participation in contract negotiations. But as Craig Leach reports, "a 360 component is pretty much mandatory" (Leach, 2010, p. 10) in new contracts in Canada as well as in the U.S. Of the two main types, active deals are particularly common among new artists.

What do artists gain in exchange for giving up control of non-record activities and incomes? As noted above, companies argue that their expanded participation adds incentive to market the acts concerned. In more concrete terms, early on in the institutionalization of the 360 deal, companies did pay and promise higher advances and royalty rates in exchange for additional rights; that period "lasted for about 9 to 12 months" according to Donald Passman, U.S. entertainment attorney and author of a respected music industry reference guide (Artists House Music, 2008). Canadian attorney Stacey Mitsopulos observed in 2008 that "some labels are offering a higher royalty share" in return for additional rights, "but this is not the norm so far" (2008, p. 62).

However, companies soon realized that there was no business rationale to moderate their longstanding "take it or leave it" approach to contracting with new or marginal artists. Nor was contract duration affected: The 360 deal is the new form of the option contract, which preserves for companies the exclusive right to determine when the contract has been fulfilled and at what point an artist is free to entertain other offers and sign with another company. With its expanded scope, the 360 version expands the subordinating politics of the option contract.

Despite the proliferation of the 360 deal as the new normal, established artists who have developed successful careers may be in a position to escape its reach. Some artists, notably Radiohead and Nine Inch Nails, have been able to opt out of the traditional record label system in which they developed their acts and audiences and establish themselves as firms, typically with the aid of Internet-based distribution and marketing. Radiohead has self-released two albums since parting ways with EMI; the band's "name your own price" digital download release of *In Rainbows* was followed up by a digital release of *The King of Limbs* that fell in line with standard retail prices (Billboard Pro, 2011). Trent Reznor of Nine Inch Nails started his own independent record label in 2008 and has offered free digital downloads (Harding & Cohen, 2008).[4] Through new media, according to Susan Kevorkian, digital music analyst with market intelligence firm IDC, such acts may "reach their fans much more directly without needing labels' marketing expertise. But for emerging groups to leverage the same technology to attract a following is a long row to hoe" (Sandoval, 2007). Despite the devaluation of the recorded music commodity—i.e., the "track" or "album" as the "unit" for retail sale—the record companies remain the most effective creators of markets and audiences for recording artists (see Sterne, 2011).

Independent record companies offer deals that resemble those of the majors, but they also provide variations on this contractual theme. An alternative to the 360 deal proposed by numerous independent record labels to new and established artists alike is the "net profit deal." These deals typically involve 50-50 sharing of net profits, which appears quite fair at first glance. However, as Bart Day (2009) explains, "in most Net Profit deals, the label doesn't have to pay the artist anything (including, under many contracts, even mechanical royalties) until the label has recouped all costs fronted by the label"; that is, nothing else is paid until all advances and other monies paid to the artist are recovered through profits. Day notes that "ten years ago, out of every ten indie record deals I negotiated, only one or two were Net Profit Deals. Today it's more like six or seven out of every ten, at least" (Day, 2009).

An additional independent label approach involves allowing the artist to choose to pay for particular services " à la carte." At the end of 2009, for instance, independent label Cooking Vinyl introduced a "stripped-down service model" wherein the label "claims no stakes in artist copyrights" (Ashton, 2010). The label's deals with The Charlatans and Underworld involve exchanging label marketing and promotion efforts for a share of artist sales revenue (Ashton, 2010).

Artist management companies, too, are emerging as options for artists seeking exposure and marketing and who are interested in retaining their copyrights. For instance, ATC Management, a U.K. company, funds and tries to break artists in a manner similar to that of record companies. According to ATC Management founder Brian Message, the company substitutes its "venture capitalist approach with artists" for the traditional "copyright trading model" (Hunter-Tilney, 2010). The artist management company's operations purportedly "resemble a cottage industry, treating bands like artisans and trying to find a niche for their products" (Hunter-Tilney, 2010).[5] "Think of it as *Dragons' Den* with guitars," suggests Hunter-Tilney, wherein "some young beat combo pitch their wares ('So, we're kind of like The Smiths meet Funkadelic …')." Though not obliged to sign away control of copyrights, the artists who sign with ATC are required to sign 360 deals that specify that "all income—from records, concerts, merchandise, commercial tie-ins, everything—is split between band and backers, after the initial investment has been repaid" (Hunter-Tilney, 2010). Far from a radical alternative to record label artist deals, then, ATC Management's deals are simply examples of "passive" 360 deals that require artists' omnilateral exposure to companies' ability to appropriate income, their assumption of considerable risk, and their long-term obligation to investors/creditors.

Lastly, consumer brands have started to sign recording artists. Mountain Dew's Green Label Sound, Red Bull Music Academy, Diesel:U:Music, Converse Rubber Tracks, and Scion Music Group, for instance, offer label, publishing, distribution, and/or recording studio services to emerging and unsigned talent. Such deals are typically quite "hands-off," and do not involve brand ownership of artist copyrights. However, there is almost no security for artists in such arrangements, and the amounts of financial support and investment appear quite small. For instance, at a 2011 North by Northeast conference panel on consumer brands' interest in recording artists, Adam Shore stressed the cost advantage associated with working with recording artists whose fees reflect a "tiny percentage" of a typical advertising budget (Shore, 2011). Many brands' interest in the cost effectiveness of independent artists is also reflected in their approach to licensing music for use in commercials. According to one Canadian music publisher, the advertising industry "has figured the trick out. … They'll … say 'Okay guys, here's your $500, off you go' and the band is thrilled. They're starving artists—of course they're thrilled" (J. Ferneyhough, personal communication, Toronto, September 28, 2009). Artists here enter into agreements with companies for whom the development of musical acts and the cultivation of musical audiences are sidelines, activities liable to be abandoned as new trends or modes of brand marketing begin to eclipse indie music.

A conceptualization of recording artists as "artist-brands" or, in the words of Jordan Shur, CEO of Suretone Music, "lifestyle-driven bands" (Donahue, 2008), undergirds the 360 deal. Articulated early on by Jeff Leeds in an oft-cited *New York Times* article (Leeds, 2007), the notion of the artist-brand has since become axiomatic, a music-industry truism, pushing older conceptions of the artist-company relationship off the horizon. In this model, in which we see a significant reworking, intensification, and ramification of existing cross-media models of celebrity (and which we intend to treat at greater length in future work), the core music commodity is no longer the recording, but instead is the artist persona. This is not to say that the recording has vanished from the business model; rather, it is one facet of an artist-brand commodity bundle that also includes touring, publishing, and various sponsorship, licensing, and endorsement agreements across television, film, advertising, and so forth—the very revenue streams on which 360 deals capitalize.

The range of benefits and liabilities to artists turning their personae to account in this fashion is broad. Lady Gaga's 360 deal includes corporate partnerships with Polaroid, Estée Lauder's MAC, Virgin Mobile, and other mass-market brands; it has already generated nearly $200 million in revenue for Universal's Interscope records (Roberts, 2011). An artist marketed towards smaller niche audiences, such as reggaeton artist Ivy Queen, may look forward to a very different suite of likely less-rewarding brand partnerships. Ivy Queen entered into a 360 deal with Universal's Latin music label, Machete, "a complete entertainment and lifestyle company" according to Machete president Walter Kolm (Ben-Yehuda, 2010). Machete intends to launch a perfume line and a doll, and is interested in exploring the possibility of book and clothing deals (Ben-Yehuda, 2010). While Ivy Queen's 2010 album *Drama Queen* achieved some success in the Billboard Latin charts, the perfume and doll have yet to be released, and it remains to be seen whether the application of a blockbuster merchandizing approach to a niche-specific artist will be viable for the label or the artist. At the far end of the spectrum, the entertainment and lifestyle retailing activities of some indie artists involves an altogether different approach to merchandizing, outside the 360 contract: the online auctioning of personal artifacts from the artists' own homes, or the selling of lunch or mini-golf dates (Kulash, 2010; Harding, 2010).

A crucial theme obtruding into the foreground here is the exacerbation of existing patterns of stratification among aspiring and professional makers of popular music. Some artists are better positioned to resist or reject expanding contractual demands, some much less so. While we intend to focus explicitly on this very important development in future work, for now we would like to offer the following brief observations.

In the pre-360 model, the revenues garnered from superstars were used to recruit, subsidize, and cultivate new artists, most of whom would be commercial failures. Today, by way of the one-sided terms of new-artist 360 deals, record labels seem to turn this logic on its head: They appear to be using their contracts with lesser-known bands to absorb label risk and subsidize their still-high failure rates. Additionally, the business model of the recording industry is founded on paying well below retail. Companies' willingness to accept smaller profit margins on established stars is correlated to demands for much greater margins on new or more marginal acts. This is manifested as a dynamic polarizing logic in terms of artist advances (Mitsopulos, 2008), publishing and licensing fees (Cardew, 2011), merchandizing (Seeking Alpha, 2010), and live music's increasingly "winner take all market," in which superstars gain disproportionately over "mid-tier and up-and-coming artists" (Peoples, 2010b).

Conclusion

In the face of the devaluation of the recorded music commodity and the consequent disintegration of a nearly century-old business model, the 360 deal plays a central role in the re-securing of companies' ability "to extract surplus value from musical labour" (Keightley, 2010). The logic of the 360 deal's part in this relation is dynamic: if an artist is getting paid for something, the label wants its percentage. As general manager of RCA Records Tom Corson exclaimed, "we've woken up and said, 'Hey, this isn't fair.' … Record companies for years have funded the brand creation of artists and have only benefited through record sales" (Knopper, 2007). These deals incorporate incomes and activities that were not formerly covered in recording contracts, enlarging companies' access to and participation in non-record markets including publishing, live music, fan clubs, merchandizing, and so on. Indeed, the rights conferred in a 360 deal may constitute "the sole livelihood for the artists who make the music for what may be the duration of their career" (Pierson, 2010, p. 31), putting companies in ever-more formidable power positions. By securing to companies rights in artists' non-record income (in passive deals) and in non-record income and decision-making (in active deals), the 360 deal increases artists' vulnerability to and dependence on companies, though the extent to which any particular artist's freedom may be constrained in this way depends on the bargaining leverage they bring to contract negotiations. Some legal scholars go so far as to argue that the 360 deal poses a new frontier of "unconscionability" in recording contracts (Anorga, 2002; Brereton, 2009; Gardner, 2006).

As companies large and small experiment with new models and revenue sources (Leyshon, Webb, French, Thrift, & Crewe, 2005; Wikstrom, 2009), and as record stores disappear from high streets, and limousines, private jets, underperforming artists, and entire departments from corporate ledgers (Power & Mostrous, 2010; Jurgensen, 2010), the contractual control of musical labour, property, and associated surplus remains a primary imperative. As Bruce Carruthers and Arthur Stinchcombe (1999) observe, "organizational flexibility derives from a structure of rigidities" (p. 376). For the recently rechristened "music companies," long-term, exclusive, assignable, rigid, and now *encompassing* performer contracts (and the legal structures that underpin them) form a (if not *the*) firm foundation upon which they may experiment with new operational strategies. We argue that 360 deals extend and intensify existing patterns of control, appropriation, and vulnerability long characteristic of record industry talent relations, and that the institutionalization of these deals indicates growing stratification and promises polarizing effects on recording artists' social security and mobility.

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Notes
1. These activities are playing an expanding and consequential role in the marketing of music and of performers' personae; Meier (2011, forthcoming) takes them up in detail.

2. This model was proven by the Hollywood studio system, as the facts evident in Bette Davis' and Olivia De Havilland's contractual lawsuits with Warner Bros. Pictures reveal (Greenfield & Osborn, 1998; Stahl, 2011)

3. The legal status of the artist-company relationship in the U.S. and Canada is beyond the scope of this article.

4. Even superstar Robbie Williams has threatened to withdraw from his record deal in the wake of EMI's expressed intentions to cut between 1,500 and 2,000 jobs: "Artists are concerned that the record

label wants to take a larger share of money made from concerts and merchandise, while cutting the marketing budget" (BBC News, 2008).

5. The use of the term "artisan" here is quite interesting. The artisan's status is that of an independently contracting vendor of finished goods; the contracting company that retains any rights beyond those that concern the immediate fate of a particular recording undermines the independent "artisan" status of an artist.

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