

Creating Independent Record Labels for Artists

FOR SOME TIME NOW the music industry has been consolidating, downsizing, and signing fewer artists and songwriters. The industry continues to struggle with piracy, illegal downloading, and the challenge of new technologies. Attorneys who represent musical artists, songwriters, producers, and others with musical ambitions likely have noted the resultant chilling effect and despair among their clients. The doors to the major labels and music publishers were never open wide. Now, fewer doors exist.

One outlet remains, however, for clients who need to find a path to rock stardom: independent record companies. The good news is that there are thousands of independent labels. Some are vanity labels that feature one artist (and may be owned by that artist). Many vanity labels start small but then sign a number of artists and procure national distribution of their recordings (if the music interests the distributor). An indie label with a track record can persuade a major label to handle distribution on a national and even international level. Major labels look to indies to locate new and edgy artists. Large and small companies may work together on joint venture releases. Sometimes, a major acquires the indie as an affiliate.

Advising clients to form an independent record company is relatively easy. Many steps in formation resemble those taken to form any other type of business. Capital is necessary to establish and conduct the business. The type of entity depends on the client's budget, needs, expertise, and the anticipated size and scope of the business. A sole proprietorship can work if the client knows how to find talent as well as handle business matters such as licenses, applications, and contracts. This form requires applying for a city business license and filing a fictitious name certificate.

A partnership, on the other hand, may work best if one party's strengths are in the creative area and others have a better aptitude for running a business. The city business license and fictitious name filing are again necessary, and a partnership agreement is advisable. A corporation, an LLC, or other form can be considered in weighing financial liability and tax issues. Articles of incorporation and other documents must be filed with the state.

Name clearance and protection are needed to avoid later conflicts and disputes. If a client cannot finance a professional search and trademark application, it is advisable to make as thorough an informal search as possible. In addition to checking registered trademarks (federal and state), clients can research music industry publications, source directories, and online databases. The names chosen should not be similar to other labels, music publishers, distributors, music marketing companies, or other music industry companies.

The client may be the label's only artist for a while. If and when another artist is signed, an exclusive artist recording agreement grants the company rights to record the artist's performances and release records, subject to payment of royalties to the artist. The agreement should include the label's right to shop the recordings to a distributor or other label. Most companies, large or small, will not obligate themselves to release an artist's recordings.

Written agreements are essential to keep the artist from jumping ship after clients have invested in the artist's career. Most agreements provide that the artist's performance and producer's work were rendered on a work-for-hire basis. A producer agreement secures the copyright in the producer's work on the recording. Producers can be hired for a flat fee or for royalty payments on a project-by-project basis. The agreement may grant the producer some creative control over the choice of studio and recording and mixing process.

Rap and hip-hop labels sometimes have staff producers whose talents become synonymous with the label's name. Musicians who are hired only for the particular recording project need to enter into a side-man agreement or service release so that the label owns the copyright and other proprietary rights in their performances. Compensation is usually handled with a flat fee. If a client has sufficient funds, it is advisable to pay parties for the project and thus dispense with the need for future accounting. Clients will need assistance with registering copyrights in the sound recordings and obtaining mechanical licenses for the use of copyrighted music on the recordings. Forms and information are available at www.loc.gov/copyright. Music with or without lyrics is registered on Form PA, and recordings are registered on Form SR.

Independent label clients are well advised to acquire a publishing interest in their artists' songs. Publishing income from various uses of music is often the way the label funds its recording expenses. Publishers have duties to register song copyrights; file clearances with a performing rights society such as ASCAP, BMI, or SESAC; collect earnings; and account to songwriters.

Some artists who are less typically commercial may not get much radio play but can sell if promoted to specialty shops such as the Nature Company, Starbucks, Victoria's Secret, and so on. The Internet has become a fertile ground for marketing independent artists and labels. Until clients have the budget for promotion, they can court the favor of college radio program directors who look for unusual, less mainstream releases. Live performances can be set up at shopping centers, colleges, universities, high schools, athletic events, restaurants, and typical nightclub venues. Local newspapers and underground publications are happy to hear about new creative ventures and should be contacted often. Press reviews are useful to help sell product.

Attorneys for small labels should be careful to avoid potential conflicts of interest when clients bring musicians, producers, songwriters, and others to discussions. In such situations, attorneys should clarify who the client is and encourage everyone else to seek independent legal counsel. In so doing, attorneys may avoid a claim of breach of fiduciary duty.

Perhaps the best focus is to encourage clients that they can create their careers in the music industry. Besides legal input, attorneys can provide their creative clients with support for, and confidence in, their ambitions. ■

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