

Bargaining Power In The Typical Recording Industry Negotiation

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The following is not meant to substitute for legal advice. For legal advice seek the advice of a lawyer directly.

Introduction

Most often, in this writer's opinion an Artist's success at the negotiating table is primarily due to one single factor: bargaining power which is actually a multitude of interrelated factors as discussed below.

In this article I will review the primary determinants of "bargaining power" and provide a realistic view on what the Artist should expect in a typical recording industry negotiation. Most of the examples discussed concern recording contracts, however, many of the points raised can apply to publishing, management and other industry contracts.

Factors

There are basically four (4) main factors which affect bargaining power in recording industry negotiations:

- i. the number of parties, or perceived parties, bidding for the Artist's services;
- ii. the past history of success of the Artist, if any, or the perceived or projected level of success if the Artist is an untried act;
- iii. the desire of the company to sign the Artist; and,
- iv. the willingness of the Artist to just say, "no";

All of these factors are interrelated to some degree. Let's examine how they play out in day-to-day experience.

(i) Parties Bidding

This may be the single most important factor in determining the bargaining power of the Artist. Often in a negotiation there is a single company interested in the Artist and the company has a pretty good idea that they are the only company bidding for the Artist. Not a great start to obtaining significant leverage in the negotiation process.

If there is no other company making better offers there is no strong incentive for the company concede key negotiating points such as, advances, term of the contract, etc. Most Artists want to sign a record deal and companies know this. The Artist's lawyer and the Artist know how many deals are on the table and many Artist's will be reluctant to push too hard when there aren't any other takers on the horizon. Often one needs to look to other factors to increase bargaining power.

(ii) Past Success of the Artist

As mentioned above, the past success of an Artist will likely lead to more company interest. In addition, past success is a strong indication for a company that the Artist is a "safe bet". An Artist with an impressive track record on an independent or major level should expect stronger deal points in the agreements they enter into.

For example, on an independent level, The Barenaked Ladies, initially shopped their demo tapes to all the major Canadian record companies prior to their independent success. They received negative response across the board. Soon thereafter their independently released cassette started to garner significant radio airplay, their live shows starting drawing larger and larger crowds, and their independent cassette went on to sell 80,000 copies.

All of sudden the same record companies that had turned them down were very interested in signing the band. Did the band improve dramatically over a one year period? Did they write some new tunes that blew record execs away? No. Did they get a better deal because lots of companies were interested? Yes. Was the deal even better because of their impressive independent sales record? Of course. Not only does a strong track record bring the record companies calling. It also gives you a stronger voice at the bargaining table.

(iii) Desire of Company to Just Say, "No"

Some A&R people and their companies may be truly inspired by an up-and-coming Artist. They may see the Artist as their next, Celine Dion or Alanis Morissette. In most cases companies do not table offers just to table offers. There is usually a genuine interest in an Artist before a contract is put forth.

As a lawyer you must be acutely aware of the signs or indications that a company or an A&R person is over the top about a particular Artist and play that to your client's advantage. Is the company contacting you everyday? Every hour? Presents?

There are parameters to what a company can and cannot offer an Artist. Misreading the desire and pushing too hard can result in an offer being withdrawn. Your lawyer should be aware of these factors and should have a feel for whether the interested company can be pushed to upper levels of the scale based on their desire to sign the Artist.

(iv) Willingness of Artist to Just Say, "No"

When finally faced with a major recording contract or publishing deal Artists are finally forced to face the fact that the record industry is a business of exploitation. Some Artists put up a bit of a fight on key issues and then lie down. Others fight to the bitter end and blow out deals. Often the middle ground makes the most sense between these two scenarios.

I am often pleasantly surprised by my clients who want to push hard and negotiate better deals as a result, however, merely asking for "more, more, more" without any logic or a willingness to walk away threatens an otherwise successful negotiation and can waste time. As an Artist you should determine early in the negotiation what is acceptable and what is not the so-called "bottom line" and be prepared to walk away if you don't get it. Often the company will not be prepared to move very far until they perceive that the Artist is prepared to walk away from the deal.

Are you?