

*Why Free Agency Matters: The Coming Changes in Record Company Artist Relations*<sup>†</sup>

By Christian L. Castle

The mantra of the “mp3 community” has long sounded in a brutal hatred of major labels. The conventional wisdom is that the major labels are big, dumb and going down hard. The story goes that the Internet will allow fans to connect directly, and eliminate the major label as a middleman. Record deals are designed to take advantage of the artist in underhanded ways, and record labels are populated with people who lack compassion, don’t care about artists or music and just want to get big salaries and have big expense accounts while artists starve. Although this mantra as enunciated by mp3.com has softened somewhat in recent months for reasons that one can only guess at, yet it continues.

The labels, on the other hand, have long avoided learning about the marketing and distribution benefits of the Internet. They thought they could take their time determining how they would control the space, and in the words of one record executive, the labels’ strategy was that they could afford to be “last to market”, and so they are. (Enter Napster.) The conventional wisdom was that the labels controlled the content, so no one could do anything online without coming to the content owners, without dealing with them. (There is something to that, but I don’t think that being acquired by AOL or Yahoo! was what they had in mind.) The techies were just a bunch of geeks who were wild-eyed anarchists who couldn’t get a date and who definitely did not understand the music business. The techies have to be stopped at any price.

As is the case with most extremely polarized arguments, the search for truth takes you somewhere in the middle. I think that the artist relation’s model that will emerge from the millennial music wars will be one that is similar to professional sports, the artist as free agent. I don’t think that there is any magic to this point of view, but what I do think is important for everyone to understand is that not only is it possible, it is likely.

The reason is quite simple: All artists who seek success are in the process of brand management and development. That process has a product life cycle, like anything else. Owners of strong brands partner with others as it makes sense to do so. There is nothing inevitable about having to be signed to a major label, at least not any more. Although it has not happened yet on a

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large scale, there are music web sites that are developing expertise in selling records and integrating the Internet into their sales and marketing strategy. This is new. But like so many things about the Internet, there is less here than meets the eye. Like music videos, there is nothing particularly complex about knowing that consumers use the Internet to get information about music, indeed, to get music itself. MTV took a little bit of installation, and labels and artists had to get into the habit of making and marketing music videos, but there was nothing particularly complicated about it.

What is new about the Internet is that for artists who want to control their own destiny, are prepared to fund their business from sales and not from advances, and who have an interest in marketing themselves and staying close to their fans, the Internet lets them do it in a infinitely scalable manner. (At least a *theoretically* scalable manner, like you will *theoretically* beat the house if you keep doubling both your winning and losing bets.) If the artist has the means and patience to build their brand completely outside of mainstream labels, the Internet allows them to do that.

Artists can partner on a nonexclusive basis with music websites such as mp3.com, garageband.com and riffage.com, and sell their records through the site. Whether a site that solely caters to independent musicians can stay in business (even absent adventures such as my.mp3.com) is an open question. There is something of a fallacious theory behind the business model of these sites that goes something like this: If we sell 100 records by 5,000 artists we'll have the equivalent of a gold record. This isn't quite right, as it overlooks the transaction costs involved with rendering statements to 5,000, among other things.

There already is a business like this. It's called classical music. It loses money. Lots of money.

But another approach for an artist is to partner with a major label to do the heavy investing in the artist's brand, and when the artist's record deal is at an end, for the artist to move on with their careers as a free agent. This can be as true of a dropped artist as a successful artist. It is this arc that is worth giving some thought.

What has changed about the music business since the Internet, and most pointedly since the success of peer-to-peer applications like Napster, CuteMX, and others, is that it is now very clear that there is a tremendous amount of demand for music on the Internet. Monetizing the Internet as a distribution channel of commercially available product is another story, but certainly as an U.S. promotional tool, it has great depth and accessibility.

I remember long ago when I was a struggling musician driving a cab in Manhattan, I ran into another cabby who had been in a well-known band that had been signed to major label. They'd gotten dropped, and disappeared. I recognized him and asked him if he was the guy in that band. We got to talking about the business, and he said something to me that I always remembered. He said there is a big difference between being in music and being in the music business. He had decided that he didn't want any part of the music business, but still loved playing which he did for himself.

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It seems simple, but it is a river that an artist may cross without thinking too much about it, like a frog jumping across a rut in the road. I assume if you're reading this article, you've probably already crossed that river. If instead you're an artist who has decided to just stay home and play, you have my profound respect. You'll probably find all this amusing, for you are the freest of all free agents.

### ***The Free Agency Cycle***

Of all of the opportunities that the Internet offers, one of the most compelling is the ability of artists to communicate directly with their audiences at relatively low cost. There is a very big gating item to marketing success through this channel: The size of the artist's customer base will vary widely, and absent an integrated and sustained online marketing program and business development program, growth will be dependent on the artist's touring and other promotional efforts, just like success in the physical world would depend on marketing push.

When the free agent artist is at the beginnings of a career, this audience is rather small, and is therefore more manageable. When the artist has a few international hit records to their credit, the artist will likely be able to attract the administrative support to make the much larger administrative task easier.

It's pretty clear that there is an arc across the product life cycle of the artist's brand, from free agent, to signed artist, to free agency *again*. At the beginning, the artist is free because the artist is investing her own sweat equity in her brand to attract consumers and other investors. In the beginning, the free agent artist can manage their career alone. In the middle, the artist can benefit from the major label as a partner and investor. If the artist returns to free agency at the height of their career, the artist can find independent resources and leverage the Internet to recapture their brand from the major label. Recapturing that brand will take effort, time and risk, but should bring greater rewards.

### ***The Value of the Internet to Independent Artists***

Independent, unsigned artists are able to use the Internet to reach a limited market of fans and potential record buyers. Independent artists are trying to build a brand, and they can either do that by playing local clubs and acquiring a fan base and possibly getting an A&R following, or they can try to build their brand over the Internet and reach a larger circle of fans.

The local A&R buzz may lead to a signing, and sometimes to a bidding war. A&R executives will often pay substantial advances for a relatively unproven band that has sold a couple thousand units of an EP locally. They will look to almost anything as a proxy for success that justifies the signing. The band that falls victim to the bidding war's siren song (often vocalized by their lawyers) frequently ends up on the ash heap of A&R history. Record companies often do not afford bidding war bands the opportunity to develop a brand that would justify the amount of money they got in advances from the label, and the bands are dropped after one LP.

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The dropped bidding war band is sometimes picked up by another label, but is more often considered “damaged goods,” since they “had their shot” and it didn’t work out. The lawyers who created the bidding war are on to the next one, and don’t have much interest in picking up the pieces, so the artist is out on their own again. This “damaged goods” phenomenon directly equates the value of the artist with their identity as a major label signing, not with any intrinsic creative reason for why the artist was signed in the first place. It also pins what is often the *label’s* failure on the artist.

This is an extremely inefficient way to develop artists. Of all the cost cutting that is imposed by corporations on their record company subsidiaries, this one always seems to escape the accountant’s scalpel, yet it is a major source of waste.

As free agents, independent artists record what they want, perform where they want, and market themselves as they want. They can post their mp3 files to any website that they want, including their own.

The artist also has to take direct responsibility for the consequences of this freedom. Free agency is a hard row to hoe from a business point of view, however, if the marketing activities of the band are to result in any meaningful income. Artists are forced to take care of a lot of business details that have little to do with developing themselves as compelling artists, and can end up taking a lot of time away from the reason that the artist was drawn to music and the music business in the first place.

This is not to say that artists cannot make a good living if they are successful in running their own world in the independent music business. The Grateful Dead, Ani DeFranco and others have demonstrated that it can be done. It is a mistake to underestimate the value of brand, and there is nowhere that brand is more important than in the clutter and howl of the Internet. Independent artists who are successful in using the Internet seem to be doing so in concert with a traditional program of touring, tour marketing and promotion, all of which is coordinated with a strong Internet strategy.

At a certain point, however, the independent artist as free agent is going to bump up against the brand power of major artists, and the machine that feeds them. The scalability of the Internet does not translate to the physical world. The independent artist may find that they simply cannot get past a certain sales plateau in any meaningful way, they can’t get consistent national distribution (much less international distribution) they can’t get the tours they need, they cannot get themselves launched internationally. The ceiling may come in many forms, but it will eventually come.

Independent artists must then decide what they want to do. If they want to keep growing slowly and steadily, and can afford to do so, then they should probably stay an independent. Another possibility is that the artist simply is not a mass-market artist, and they should be happy in their niche.

If the artist wishes to expand their brand, however, they may think about a major label deal. If they've been selling units in any meaningful way, and have developed a compelling artistry, this probably will not be all that difficult to accomplish. It may just mean returning some phone calls.

### ***The Need for the Big Pipe***

If independent artists decide to go forward with a major label deal to get the "Big Pipe" of major label promotion and distribution, they should do so with a particular goal in mind. I think that goal should be to enter into a long-term contract for the purpose of using the leverage of the record company's investment to build the artist's brand. If this is the goal of the artist, the artist will approach the deal in a different manner than the traditional major label artist whose identity is all-too-often intertwined with being signed.

Just as major labels have a certain way they do business with artists, artists who want to be on major labels have traditionally had a certain way they do business with the labels. That tradition is not to get recouped—it's to stay unrecouped. These artists, and the managers and lawyers who represent them, want to get the biggest advances that they can and keep getting these advances for as long as they can. For artists who plan on staying in the major label system for their careers, that is because it is much better to get a dollar today than a burger on Thursday, particularly if the burger turns out to have tainted meat. If the artist gets dropped and gets another major label deal, all the better, because the unrecouped balance doesn't follow them, and the advances start again.

There is a lot of handwringing in the mp3 community about how the labels rip off the artists by accounting tricks and subterfuge, and that certainly does go on at some major labels as well as at a lot of indie labels. There is also a lot of sound and fury about how the artists don't get a royalty check even if they sell a lot of records. Very often, though, the artists representatives want to get as big an advance against royalties as they possibly can—perhaps because they are compensated on a commission basis, and they themselves have a stake in the action. (Whenever you see an odd looking number as an advance in a record deal, try adjusting that advance number for a variety of commission rates.)

If what you want is to get as much money as you can without the risk of selling records to justify the advances, then this is the way to go for you. You'll be rolling the dice as to how long you can keep this balancing act going, but some people have kept it going a long time and have the "red balance" to show for it.

If what you want is to build brand, you're going to be looking for a very different kind of record deal from the major, because you have a different business plan. While everyone needs money, you're going to be equally interested in marketing and promotion commitment, international development, touring support, reversion of masters, and above all the lowest number of committed LPs that you can get away with.

Your goal is to use the major as an investor in developing your brand, and then move out of the system as soon as you can. It's going to be awhile though, this won't work overnight. If you're

doing well and don't get dropped, it could take 5-7 years to get back to free agent status. If you do get dropped, you will hopefully have built the label's systems into your own, so that you will be able to take advantage of all the benefits of the label's investment when you get free again and can replace those systems with your own.

The label gets something out of it, too, they get your catalog. It will be virtually impossible to get them to agree that you can ever get these masters back. There are ways to make this fact not hurt too badly, and they can be negotiated into the deal. This resistance may change over time, but for the moment it is total.

### ***The Value of Major Labels***

In theory, major labels bring access to the Big Pipe. Some are better at this than others, and some are better at some aspects of manipulating the Big Pipe than others. If an artist is fortunate enough to line up all of the pieces and get even 60% of them to work at the same time, this is much, much more than the artist would be able to do on their own.

It is not an easy process to get the Big Pipe to work for you. It is quite a bit different from being a free agent, but in some ways it is not an alien experience.

It is a big mistake to think of major labels as heartless and cold corporations filled with people who don't care about music. That just describes the lawyers who have survived all the mergers and layoffs.

Many marketing, distribution, sales and promotion people are some of the biggest music fans I've ever met. They often develop real attachments to the artists they work, and are more likely to beg for an artist not to be dropped than the A&R staff. They are also faced with corporate mandates to work "priority" records, and often are unable to justify devoting resources to breaking new artists.

Companies are people. Once an artist gets inside the system, the artist needs to find their fan base within the company, because if the troops know who you are and love your music, they often will help you even if the powers that be don't put your record on the priority list. Also, the VP or director of sales who likes you could end up as a senior vice president in a year or two, depending on whose friend he is during the next merger, so be nice to everyone.

The major label has a big, big pipe that has to be filled with product. Take advantage of this pipe to get your record played on radio, and do all the radio promo tours that you can. Get to know as many people in the radio world that you can, because that is the hardest nut to crack as a free agent, Internet radio notwithstanding. Go to the Gavin convention every chance you get.

Do all the sales tours that you can, too, get to know the field staff, and the buyers at the big accounts. Go to NARM! I realize that if you are a member of the mp3.com youth brigades and are unable to repress the need to run up and scream "Cartel pig!" to people you don't know in such

social settings, attending NARM or Gavin may be a bit more than you can bear, and you may be a bit more than they can bear, too.

You will also have the opportunity to market your records internationally. Although the Internet holds a lot of promise for the international distribution of music, so far no one has leveraged the Internet internationally. It is very, very difficult to consistently market new artists and catalog records internationally, and if you are lucky enough to have landed at a record label that is good at doing this, the international marketing and sales team are worth their weight in gold to you. International markets typically stay with an artist much longer than do the US markets (which are much more hit-driven and fickle). Witness Tina Turner, Joe Cocker, Bryan Adams, Sting, and Jon Bon Jovi among others. Take a trip to Europe some time and see who is touring locally over there. You'll be surprised at some of the names you see who "couldn't get arrested" in the US.

The point that I am trying to make in this section is that when you are signed to a major label, don't stop thinking of yourself as a free agent. Many bands break up after they are dropped. Sometimes it is the trauma of getting dropped that makes the members think about doing something else with their lives and they move on. Sometimes the band members really couldn't stand each other after all. But very often the reason the bands break up is because they had come to think of themselves as Artist A signed to Label B. So when Label B drops them, Artist A can't continue to exist because Label B defined the existence of Artist A. This is very dysfunctional thinking, but it happens. If Artist A goes into the major label relationship thinking of itself as a free agent, then getting dropped or having success is just another decision box in the business plan. Artist A does not internalize the commercial judgements of Label B.

Not only will you get to know the people who are selling your records to help you while you're in the system, you'll also be getting to know a potential group of hires for when you leave the label and go back to free agent status. You will need them, for the next time you go out as a free agent, you'll be running a much bigger organization, and you'll need a lot more people to help you. Unlike being a local artist where you might possibly have been able to run your business yourself, you will not be able to run an international organization by yourself.

### ***Competing Like Anyone Else***

When you come to the end of your record deal, you have to decide if you are ready to return to free agency. If you are, tell your label that they can make an offer to continue distributing your records, but everything else is under your control. They can take a distribution fee, but that's it. All the rest of the money has to come to you. And no recoupment of old red balances, either.

If you take this approach, you'll have to be prepared to pay all your own marketing costs, all your own promotion costs. You'll have to have your own staff to perform the marketing and promotion functions, you'll have to be good at hiring independents, and you'll have to have the money and the business coordination to monitor it all.

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Your label will probably say no, so have Plan B. However, I believe that the free agency model will eventually become the norm in the record business. As the free agency model settles into the record business, the labels will become more inclined to maintain their relationships with their artists by entering into pure distribution deals, which are a natural extension of the joint ventures and other backend sweeteners that they currently offer their most successful artists.

At the end of the day, it is much more efficient for an artist to outsource the basic sales and marketing functions to third parties, so I sincerely hope that the free agent model I've envisioned will come to pass and that in 5-10 years time we will see the free agency cycle become more prevalent as the common business model on which the industry is based.

### ***Hard Work and Music for Music's Sake***

When I was a musician, I spent a good deal of my time trying to get some sleep. It's very hard work, odd hours, dangerous travel, treacherous agents, and long stretches of time away from home. It always amazed me how girlfriends' fathers assumed that I was a lazy lout just because I played an instrument. I worked harder than they did.

There's nothing easy about being a free agent, either. It's a lot easier to be signed to a major, take a good, but not equal share of the pie, and try to make it up on merchandising and publishing. Running your own artistic show is not for everyone, just like being an entrepreneur is not for everyone. But if you really want to call the shots, be free artistically and take the maximum risk and reap the maximum rewards from your efforts, free agency is the way to go.

As the generation of artists weaned on the Internet moves into major label signings, the labels will find themselves having to make some shifts in their business model to accommodate them. Eventually, these will be big changes. And if the artists hang tough, they will eventually win these points because there is a generational shift about to happen throughout the majors, and it will be the Internet-era artists and the executives who sign them who make that shift real.

On the other hand, there is a difference between being in the music business and being in music. So if creativity for its own sake is enough for you, that's a great choice.