

**PUBLIC**



TESTIMONY OF

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**QUALIFICATIONS**

My name is Tom Mackay, and I am the Senior Vice President of the Artist & Repertoire (“A&R”) Department of Universal Republic Records, a subsidiary of the Universal Motown Records Group. As the Senior Vice President, I oversee the operations of Universal Republic’s A&R Department, which is responsible for discovering and recruiting new artists, working with artists on the recording process, delivering master recordings to the label for release and working with our sales and marketing and all other departments to maximize sales of our recordings. I have been employed by Universal Republic for almost ten years and during that time have worked with numerous artists. I have been involved with the creation of over 75 albums. I have been the A&R executive responsible for artists such as Moby, 3 Doors Down, Pat Green, Sonique, Flaw, and Hinder.

**SUMMARY**

I understand that in this proceeding the Copyright Royalty Judges will determine royalty rates and terms for the “mechanical” compulsory license, which allows record companies and others to reproduce and distribute musical works as part of recorded music products and services. In setting those rates, I understand that the Copyright Royalty Judges will consider, among other factors, the relative creative contributions of the songwriters and the users of their copyrighted musical works such as the record companies. In addition, I understand that the Copyright Royalty Judges will consider the risks associated with our respective businesses.

The purpose of my testimony is to explain the creative work that I and my A&R colleagues at the record companies do and the risks we take as a business in order to bring records to the public. Almost all of the income for artists, songwriters, publishers and the record companies themselves derives directly or indirectly from the record company investments in

creating, distributing and promoting a sound recording. Part I of my testimony contains a detailed discussion of the A&R process. I discuss our efforts to find and develop new talent, negotiate contracts, and then record, and master their albums. In Part II, I discuss some of the implications of the fundamental change in our business resulting from digital distribution and piracy, particularly in terms of the effect of this change on album sales.

**I. The A&R Process**

Those of us who work in A&R are the life blood of the record business. We discover and develop talent, oversee the creation of albums, and support the marketing and promotion of the artists and their recordings. A&R executives often specialize in particular genres of music. My career has focused on rock music of various types, though I have also worked in the urban/hip hop, pop, dance and country genres as well. As I will describe in more detail below, there are innumerable decisions I make and creative input I have in guiding the typical artist from contract signing to album release and then in following through to make sure we are selling as many albums as we can. With each of these decisions come risks. I have been responsible for developing albums that have become commercial successes, like the current platinum album *Extreme Behavior* by Hinder (currently the biggest selling rock album in the U.S.), and smash hits like 3 Doors Down multi-platinum albums *The Better Life*, *Away from the Sun*, and *Seventeen Days*. Unfortunately, because such successes are the exception rather than the rule in the record business, I have also worked on numerous albums which have not been commercial successes. I will explain each step of the process in more detail.

**A. Scouting and Recruiting Talent**

The first step is for us to discover the artist. A&R is responsible for discovering a constant stream of new talent. There are a number of different ways that record labels go about

discovering talent. Our A&R Department has talent scouts who listen to thousands of demonstration recordings (“demos”) sent to the label each year by managers, agents, producers, and artists. Our scouts also scour the country, looking for new acts in clubs, talent shows and festivals where artists perform, conduct market research, and meet with artist’s managers. I have scouts working for me. When they find an artist they think I might be interested in, they provide me with the demo and a report. On average, I evaluate roughly [REDACTED] new songs every day and [REDACTED] unique bands a week. Only a small fraction of the talent we identify each year is ever signed to a recording contract.

Our A&R representatives must use their knowledge of music and popular music history, industry trends, and instinct to identify artists that not only have talent, but who have a certain uniqueness that would make them compelling to a wider audience. They must have “good ears” and the ability to hear a new twist on an old sound and recognize how it fits into the current music scene and whether it can be successful. To an untrained ear, an artist that “sounds good” may be nothing more than a tired sound that has no real market potential, while an artist that “sounds bad” may be unpolished but have a fresh take and a groundbreaking new sound. When I listen to a demo, I am listening for hidden potential in an unfinished product. For example, when I listen to a demo of a rock band, I listen to whether the band understands vocal melody and harmony, if they have a unique sound and presence, if their lyrics have a distinct perspective, and if they aspire to produce music that goes beyond the mainstream of their genre. In my experience, these are key traits for a successful band. While I occasionally hear a demo that suggests the artist may have some potential, rarely, if ever, do I hear a demo of a song that could be successfully released without significant revision and development.

When I hear a demo that has potential, I will arrange an in-person meeting to listen to the artist perform and to evaluate whether or not he or she should be signed. In addition to assessing musical potential, I have to learn what kind of album the artist is interested in making, and whether or not the artist is committed to making the album a commercial success. If an artist cannot (or will not) interview with and present well to the media, any album will be extremely difficult to market, and there is a greater risk in signing that artist. Sometimes, the process of selecting which artists to sign involves having them play for various company executives as well as producing new demo recordings to help us assess the artist's potential. For artists that I think are potentially worth the huge investment of time, effort and financial resources of the label, I will make a recommendation to senior management that we try to sign the artist to a recording contract, and they make the ultimate decision on whether or not to sign an artist.

**B. Contract Negotiations**

Once the decision is made to sign an artist, the next step is for the Business & Legal Affairs Department to negotiate a recording contract with the artist's attorney. Depending on how competitive and/or complex the deal is, this process averages between four and six weeks. Because of changes in the industry and the general decline in CD sales over the past six years, A&R budgets have been cut and the financial pressure on each album to be successful has increased significantly. We are very focused from the point we first begin working with an artist on the need to maximize every possible revenue stream and every opportunity to market and promote our recordings.

Artists get various payment streams from record companies, including advances and artist royalties (once enough records have been sold to "recoup" the advance). Record companies also routinely provide tour support. Artists that write their own songs also receive mechanical

royalties. The artists' record royalties are usually based upon a percentage of the wholesale price of the record after the record company has recovered some of its up-front costs. These royalties reflect the vital role of the artists in the success of a recording.

Songwriters (whether they are the artist or not) through their music publishers are also paid mechanical royalties pursuant to mechanical licenses. One important consideration for me in signing a new artist is whether or not that artist writes his or her own songs. For artists that do not write their own songs, obtaining mechanical licensing for the songs the artist will perform is a significant cost. For most of the artists I work with, however, songs are written by the artist and/or the producer, and the amount of the mechanical royalties due to them is usually set forth in their record contract in something called the Controlled Composition clause.

### **C. Pre-production**

After an artist is signed, the process of making an album begins. There are four stages to recording an album: pre-production, recording, mixing, and mastering. I am involved at some point in all of those stages, acting essentially in an executive producer role.

Before an artist enters the recording studio, the responsible A&R representative will work with the artist and begin developing the material to be recorded. This process requires patience, focus, and creative skill. I have to get to know the artist, understand what he or she is trying to accomplish artistically, and understand the artist's limits. When I work with new artists, I am often surprised at how little they actually know about music fundamentals and the music business. I spend a significant amount of time teaching artists about basic song construction, the recording process and the basics of marketing and selling recordings.

For new artists who write their own songs, though they may think their songs are ready to record, I usually find that the songs are only partially completed when I first hear them.

Generally we'll sit down and I'll diagram the construction of their songs, showing them what works, what does not work, and how to improve their songs without losing their creative voice. Together, we will work through which songs have potential and which songs do not. We will deconstruct and then reconstruct each song from the ground up to make it better. It is this process that can turn a mediocre song into a smash hit.

While working with the artist, I will learn his or her personality and begin looking for the right producer, engineer, and studio to best capture the artist's potential. I generally interview between fifteen and twenty producers for an artist before proposing some finalists for the artist's approval. When evaluating producers, I must find someone who matches the personality and style of the artist, who has an ear for creating hit songs in the particular genre, and who has the right creative instincts. In the case of hip-hop recordings, I will often sift through hundreds and hundreds of tracks by various producers to try and find the magic combination of artist, song and producer that makes for a hit record. Most importantly, the producer must have the right people skills for getting the best performances out of the artist, engineers, musicians, and label personnel, and must produce a final product on budget. I manage the process of selecting the right producer, establish a budget, and begin working with the assembled team on recording an album.

During pre-production, I will often sit down with the producer and artist and work out the arrangements for each song. I'll work with others in the A&R Department on the business and administrative aspects of the process, including travel, purchasing studio time, and renting equipment. I'll make arrangements for session players to be brought in, if necessary, and will coordinate with union representatives for background musicians and vocalists. Like selecting



producers, I select session musicians based on how I think they will fit musically and personally with the artist.

For artists who have never recorded before, there is a big transition from performing live, which can be forgiving, to performing in a recording studio, which will pick up every flaw in a performance. Where there are performance problems, I arrange for vocal trainers or session musicians to be brought in to help an artist find the right sound for the studio performance.

**D. Recording**

During recording, the key is for the artist and producer to find the right tone for the performances, and I have to decide when I should become more involved in the creative process and when I should step back. The degree of my involvement, of course, depends on the type of music in question and the dynamics of the people involved. My role during recording is often much like that of a coach. I try to step back and let the producer and artist work through the performances together. Occasionally, however, I will lean on artists in conjunction with the producer to push them to reach their potential. This is often true, for example, for artists who are working on their second album. Most artists refined their material on their first album for several years before getting their first record contract. But with the second album, artists have had substantially less time to develop compelling material, and the first efforts almost always require substantial work.

**E. Post-production and Marketing**

Once the basic recording process has been completed, there is an enormous amount of work to do. Songs are always recorded on multiple tracks, and usually there are 24 or more tracks that must be edited and mixed by the sound engineers to 2-track stereo. Once a song has been mixed, it will be mastered, which is the final step where the frequency equalization and various sonic qualities are adjusted and the “master recording” is created. Often we will create

numerous “re-mixes” of the same material, and even hire different producers to create versions for specific markets. For example, we may have multiple versions created for an album, different versions created for radio airplay and even more versions created for dance clubs.

Once the songs have been mastered, I will work with the artist and producers to select the tracks that will be released on the album, and then the Art, Marketing, and Production Departments will work with the artist to design artwork and take photographs to be used as the album’s visual imagery, including album cover, posters, retail displays, merchandise, and other promotional material. I stay involved in this process as we begin to plan how the album will be marketed and then as we carry through our marketing effort.

A critical component of the success of an album in the current retail environment revolves around the delivery of exclusive content, which can jumpstart and drive sales. Because of the growth in the digital side of the business and the decline in physical sales, online and brick and mortar retailers often request exclusive content in order to drive consumers to their locations. Therefore delivering exclusive content can be essential to expand our ability to reach various new digital formats and to bolster flagging physical sales.

Exclusive content is content that is tied to the album in whatever form it is sold as an extra incentive for the consumer to purchase it. In the current environment, we increasingly depend on exclusive content to drive digital sales and bolster declining physical sales. Exclusive content is developed both during and after the recording process. Normally, I will have an artist record an acoustic version of three or four of their songs in the studio, record extra “b-side” songs that will not appear on the album, and create extra video content. Once an album is released, if a particular song becomes a hit, I may have live performances of the song recorded for exclusive promotional use. Exclusive content will then be tied to specific products and

promotions to drive sales. For example, an album on iTunes maybe coupled with exclusive acoustic versions of a particular song and a CD maybe coupled with exclusive DVD footage.

Exclusive content is becoming more and more common, and many retailers are demanding this content to promote an album in their stores and drive traffic. For example, in my work with the band Hinder on their hit album *Extreme Behavior*, I have developed numerous exclusive circular promotions with the retail store Best Buy to help drive sales of the album. Our Sales Department will negotiate the terms of the circular, which will involve heavy promotion by Best Buy, and then the Sales Department will contact me to develop a concept, acquire content, and create exclusive material as part of the promotion. For Hinder, I have created bonus CD's with a 2 song sampler of live performances, an enhanced e-card for access over the internet to live video, and a 10 minute DVD of a live performance. Just last week, another Best Buy promotion for Hinder that I developed was launched. It was a CD of a live acoustic performance from a Best Buy store in Minneapolis that consumers got for free if they bought the Hinder album. That promotion alone generated over [REDACTED] new units sales of the exclusive at Best Buy, and increased sales of the underlying album (without the exclusive) by an additional [REDACTED] from the week prior. Promotions like this have become absolutely essential to maintain and drive sales of albums, and have been critical to Hinder's success.

Although exclusive content is added to drive product sales and respond to retailer demands, there are costs associated with it. In addition to the extra manufacturing and production costs associated with creating and distributing different versions of albums for retailers, mechanical royalties or synchronization license fees will also be owed for additional exclusive content. In my experience, despite the critical need to develop and distribute exclusive

content to support sales, publishers rarely if ever bear any part of that cost and often demand to be compensated for the use of this content.

For example, although Hinder's promotions have been successful at driving sales of *Extreme Behavior*, EMI Publishing (Hinder's publisher) still required payment of mechanical royalties for the exclusive content used in these promotions, even though the extra content did not generate any additional revenue on a per album basis. As a result, we have been forced to ask Hinder to absorb the additional publishing costs in order to make these promotions economically feasible. Without Hinder agreeing to accept some of the risk, we would have never been able to get these successful promotions with Best Buy.

## **II. Changes in the Music Industry**

The recording business has fundamentally changed in the last six or seven years. In my opinion, the advent of digital distribution of music has changed the way people buy music, what music they buy, and greatly increased the amount of music that is stolen through piracy. It is clear to me that these changes are continuing and permanent. The restructuring of the recording industry to operate in a digital world has consequences for the work that I do discovering, developing and recording artists.

Of all of the changes that have followed the advent of digital distribution, one that is of particular significance to me is the decline in album sales. When I started in the record business, the industry was sustained by hit albums with enormous, high volume sales driven by hit singles. This has changed and has impacted the A&R process. As a result of the fundamental changes in our business, we now have to find ways to share more risk with artists, and to take fewer risks overall. Peak album sales have declined steadily and even hit albums are selling fewer records. For example, in 2000 the highest selling album was N SYNC's *No Strings Attached*, which sold

9.9 million albums. By 2005, the highest selling album, Mariah Carey's *The Emancipation of Mimi*, sold roughly 5 million albums.

To the extent albums sell today, it is because consumers are predominantly interested in the artist, not in a particular song. Consumers now have the unprecedented ability to download (both legally and illegally) a particular song without purchasing the entire album, and so a hit single will no longer necessarily drive sales of the whole album. A good example of album success driven by a hit single would be the group Eiffel 65. They were an electronic/eurodance group that formed in the late 1990s and sold over a million albums based on their hit song *Blue (Da Ba Dee)*. Today, because consumers can easily buy or pirate on the internet just the song *Blue* and not the rest of the album, a group like Eiffel 65 would be lucky to sell even 500,000 albums. The rest of the sales likely would be single-only. As a result, if the same Eiffel 65 album with *Blue* was released today, I believe it would generate much lower revenue even though the costs of making the album would be the same.

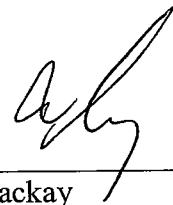
Another more recent example is the rapper Jibbs, who had a hit single *Chain Hang Low*. *Chain Hang Low* generated significant airplay during the week of its release, reaching number 13 on Rhythmic stations, number 16 on Urban stations, and number 42 on Top 40 stations according to Nielsen Broadcast Data Systems. *Chain Hang Low* had significant digital single sales during this time, with over 500,000 units sold during pre-release and an additional 40,000 sold during the week of the release. *Chain Hang Low's* ringtone sales were enormous, selling over 1 million ringtones during pre-release. Despite the overwhelming airplay, digital sales, and ringtone sales, however, sales of Jibb's album *Jibbs Feat* (which features the song) have been comparatively low selling only 100,000 albums to date.

Thus, a hit single will no longer necessarily drive the level of album sales that it once would, which reduces our return on investment and increases the risk in signing and developing any new artist. With this in mind, I try to be more careful than ever in terms of the risks I take in signing artists and the money I spend in bringing their recordings to the market.

**CONCLUSION**

A&R departments play an essential role in discovering and recruiting new artists, working with artists on the recording process, delivering master recordings to the label for release and working with our sales and marketing teams to maximize sales of our recordings. The recording industry has changed in fundamental ways over the last ten years, and these changes have impacted A&R departments both in terms of the risks we are able to take on new artists and in the content we deliver to consumers. In my experience publishers rarely share in these risks.

I declare, under penalty of perjury, that the foregoing testimony is true and correct to the best of my knowledge.



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Tom Mackay

Date: 11/28/06