

**360 DEALS AND WHAT THEY INDICATE ABOUT THE FUTURE OF
THE MUSIC INDUSTRY STRUCTURE**

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By: Jonathan E. Basofin¹

I. Introduction

The record business is dying. Music sales in the United States are less than half of what they were just a decade ago and will almost certainly continue to drop.² In response, record labels³ have dramatically altered the parameters of their contracts with artists. The labels' primary objective is to capture revenue streams beyond sales of recorded music. Since the dawn of the industry, the role of a record label was limited to producing, distributing, marketing, and selling recorded music. Under the new model, however, labels receive income from other sources of artists' earnings, such as live performances, merchandise sales, publishing, and commercial endorsements. These "360 deals," or "multiple rights deals,"⁴ therefore, allow record labels to take income that was never before available to them, rendering labels less reliant on music sales.

The 360 model is only sustainable, however, if it benefits both artists and labels, while providing a desirable product to music consumers and efficiency to the industry at large. Thus, this paper looks at 360 Deals from a variety of angles: first, the paper discusses the current state

¹ The author, a third year law student at Chicago-Kent College of Law, spent the bulk of his twenties playing music professionally in the pop/rock band, The Changes. The Changes signed recording contracts with both independent and major labels and toured extensively in the United States and abroad. More information on The Changes can be found at www.myspace.com/thechanges.

² Dean Goodman, U.S. Album Sales Fall Despite Michael Jackson Boost, Reuters, Jan. 6, 2010, available at <http://www.reuters.com/article/idUSTRE6055R020100106> [hereinafter "Goodman"].

³ Both traditional record labels (e.g., Warner Music Group) and certain promoters (e.g., Live Nation Entertainment) are parties to the new "360" contracting practice discussed in this paper. Because the bulk of these contracts are with traditional labels, however, this paper uses the terms "record label" or "label" to refer generically to the companies with whom artists deal. Additionally, unless otherwise noted, references to labels mean "major labels," or subsidiaries thereof, as opposed to "independent labels." In 2010, there are four "major labels:" Universal Music Group, Sony Music Entertainment, Warner Music Group, and EMI. The term "independent label" refers to all other labels.

⁴ Hereinafter, the new form of contracts described in this paper will be referred to as "360 Deals."

of the recorded music business and analyzes why music sales have dropped so considerably; next, it compares 360 Deals to the traditional industry model; then, the paper discusses arguments for and against 360 Deals; and finally, it assesses the economic efficiency of the 360 structure and offers predictions for what may be sustainable industry models in the future.

This analysis shows that labels' 360 Deals are likely not presently efficient. While the new model may work for artists whose personas are uniquely positioned to exploit a variety of income streams,⁵ it will not be acceptable, long-term, for most artists. For the time being, however, artists will continue to form 360 contracts with labels because labels remain the primary source of venture capital for artists. Eventually, however, the majority of artists may forego traditional record labels altogether. Rather, they may seek 360-style arrangements, but with more adept and efficient industry players like managers and booking agents.

II. The Current State of the Recorded Music Business

Since 2000, sales of recorded music have dropped rapidly and continuously.⁶ This Section discusses the extent of that decline and analyzes the reasons the music industry finds itself in its current state.

A. Sales of Recorded Music: Then and Now

Since Nielsen SoundScan⁷ began aggregating sales data in 1991, 2000 and 2009 marked the high and low points, respectively, for album sales in the United States.⁸ 785.1 million

⁵ E.g., The Pussycat Dolls, an artist who will be more thoroughly discussed in Section VI(C) ("Encouragement of Inartistic Branding").

⁶ Ethan Smith, U.S. Album Sales Fell by 13% During 2009, Wall Street Journal, Jan. 7, 2010, available at http://online.wsj.com/article/NA_WSJ_PUB:SB10001424052748703882804574642764293968586.html [hereinafter "Smith"].

⁷ Nielsen SoundScan refers to the official method of tracking sales of music products in the United States and Canada. Nielsen aggregates data on sales weekly and serves as the source for the Billboard Magazine music charts.

albums were sold in the United States in 2000.⁹ In 2009,¹⁰ by contrast, only 373.9 million albums were sold,¹¹ a drop of approximately 52 percent from 2000.¹² In other words, album sales at the end of the 2000s were less than half of what they were at the beginning of the decade. Moreover, 2009 sales were approximately 14 percent lower than they were in 2008.¹³ To make matters worse, 2009's sales figures include an atypical "bump" due to the death of pop singer Michael Jackson.¹⁴ In fact, Jackson sold more music than any other artist in 2009, shifting 8.3 million units.¹⁵

With respect to individual artist's album sales, 2009 was also dramatically worse than 2000. Taylor Swift's "Fearless" was the number one album of 2009 in the United States, selling 3.2 million copies.¹⁶ While these numbers earned Swift multi-platinum status,¹⁷ they are less than one third the sales of 2000's number one album, N Sync's "No Strings Attached," which sold 9.9 million copies.¹⁸

There were some bright spots in 2009. Overall music sales¹⁹ were 2.1 percent higher in 2009 than in 2008, mostly due to an increase in sales of individual digital tracks.²⁰ Nevertheless, 2010 sales continue the overall downward trend. While 2010's total figures will not be released

For more information, see Nielsen's official website at <http://en-us.nielsen.com/> or http://en.wikipedia.org/wiki/Nielsen_SoundScan.

⁸ Goodman, *supra* note 2.

⁹ *Id.*

¹⁰ 2009 is the last full year for which music sales data is available.

¹¹ Nielsen SoundScan 2009 Annual Report, available at http://www.businesswire.com/portal/site/home/permalink/?ndmViewId=news_view&newsId=20100106007077&newsLang=en [hereinafter "SoundScan 2009 Annual Report"].

¹² Goodman, *supra* note 2.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ SoundScan 2009 Annual Report, *supra* note 11.

¹⁶ *Id.*

¹⁷ A "platinum" record is one that has sold 1,000,000 units.

¹⁸ Smith, *supra* note 6.

¹⁹ Overall music sales include sales of albums and singles, in both physical and digital formats, as well as music videos.

²⁰ SoundScan 2009 Annual Report, *supra* note 11.

until the first quarter of 2011, the current year has witnessed some of the worst sales to date. For example, for the first time since SoundScan began tracking data, United States album sales for a given week dropped below 5 million the week ending May 30, 2010, with total album sales totaling just 4.98 million.²¹ This record was quickly beaten by an even lower weekly sales figure of 4.95 million during the week ending August 14, 2010.²² Moreover, digital sales, one area that had shown steady growth the last few years,²³ flattened during the first half of 2010.²⁴

B. How We Got Here from There

Music industry insiders and commentators suggest a variety of potential causes for the decrease in sales during the last decade. This Section discusses three of the most common: the proliferation of illegitimate downloading, the proliferation of legitimate downloading, and the reduction of gatekeeper channels.²⁵

i. Proliferation of Illegitimate Downloading

Unauthorized music downloading²⁶ is a major cause of the reduction in sales during the 2000s. Since their inception, record labels existed to make and sell recorded music via physical objects containing that music.²⁷ Depending on the era, vinyl records, cassette tapes, and compact discs comprised record labels' sole product. Once computer technology allowed consumers to

²¹ Daniel Kreps, Album Sales Hit a New Low Last Week, Rolling Stone Magazine, Aug. 19, 2010, available at <http://www.rollingstone.com/music/news/17386/192536>.

²² *Id.*

²³ Digital sales increased 13% in 2009 and 28% in 2008. See Nielsen: US Digital Music Sales Flat in 1H 2010, Wall Street Journal, Sept. 27, 2010, available at <http://online.wsj.com/article/BT-CO-20100927-709039.html> [Hereinafter "Wsj.com – 1H 2010"].

²⁴ See Wsj.com – 1H 2010, *supra* note 23.

²⁵ This Section only provides a cursory overview of the reasons record sales have decreased as these reasons are only included to provide a backdrop for the invention of the 360 model. For more information on the effect of new technologies on the music business, see *e.g.*, Henry H. Perritt, Jr., New Architectures for Music: Law Should Get Out of the Way, 29 Hastings Comm. & Ent. L.J. 259, 293-97 (2007) [hereinafter "Perritt – New Architectures"].

²⁶ "Downloading" refers to the process of saving a file (including one that contains music) onto one's computer from another source, like the Internet.

²⁷ For more detail on the traditional record label structure, see Section III ("The Traditional Record Label Model") *supra*.

download music files on their own, however, labels were faced with the choice of continuing to primarily promote tangible products or finding a way to lead the transition to downloading.

It is widely accepted that labels were, and continue to be, slow and stubborn about transforming their model in the wake of the advent of downloading.²⁸ In the meantime, technology continued to advance and sharing music over the Internet became easier and more widespread. For example, the website Napster became operational in 1999, providing a means for individuals to share downloaded music files with others illegally via the Internet.²⁹ Although Napster was ultimately prohibited from continuing in its original form,³⁰ the site's model had quickly pervaded the Internet.³¹

Consumers are generally reluctant to pay for something that they can get for free. According to Sonal Gandhi, an analyst with Forrester Research, only approximately 44% of United States Internet users believe that music is worth paying for.³² Further, the International Federation of the Phonographic Industry³³ estimates that approximately 95% of music downloads in 2008 were unauthorized and made without compensation.³⁴ As the practice of illegal downloading has grown, therefore, it has become increasingly difficult for the music industry to monetize digital music.

²⁸ See *e.g.*, David Goldman, Music's Lost Decade: Sales Cut in Half in 2000s, *cnn.com*, Feb. 3, 2010, available at http://money.cnn.com/2010/02/02/news/companies/napster_music_industry/ [hereinafter "Goldman"]; <http://www.techdirt.com/articles/20100203/0255108023.shtml>.

²⁹ <http://en.wikipedia.org/wiki/Napster> [hereinafter "Wikipedia - Napster"].

³⁰ See *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001) (holding that Napster could be held liable for contributory infringement and vicarious infringement of record label copyrights).

³¹ Napster's model was based on "file sharing," the process of making one's computer files available to others for download via the Internet, often via a specialized file sharing network or "peer-to-peer" software.

³² Goldman, *supra* note 28.

³³ The International Federation of the Phonographic Industry [hereinafter "IFPI"] is an organization that represents the interests of the recording industry worldwide. See www.ifpi.org/content/section_about/index.html for more information.

³⁴ IFPI 2009 Digital Music Report, available at <http://www.ifpi.org/content/library/DMR2009-real.pdf>.

ii. Proliferation of Legitimate Downloading and the Return of the Single

In addition to illegitimate downloading, legal downloading has contributed to the reduction in album sales. In 2001, Apple Inc. introduced iTunes, a free computer application that allows users to play and organize their digital audio and video files.³⁵ In April of 2003, Apple released the iTunes Store, an online sales facility where iTunes users pay for music files that are immediately downloaded into their respective iTunes libraries.³⁶ Prior to the iTunes Store's launch, Apple contracted with the then five major record labels³⁷ to ensure that the bulk of the labels' catalogues would be included for sale in the iTunes Store.³⁸ By June of 2003, over 2,000 independent labels had formed similar contracts with Apple.³⁹ Within months of its launch, the iTunes Store had become a major avenue for music sales and by the end of the 2000s, iTunes accounted for 26.7% of United States music sales, making it the number one seller of music in the United States in any format.⁴⁰ Moreover, sales of physical music formats accounted for just 49.3% of music sales in 2009, down from 57.5% only a year earlier.⁴¹

While iTunes' ability to monetize downloading was seemingly a good thing for record labels, online music sales severely decreased music revenues overall. This paradox has a simple explanation: Online music purchasers frequently buy singles instead of full albums and the total revenues from singles do not compensate for the amount of album sales they effectively

³⁵ <http://en.wikipedia.org/wiki/iTunes>. The iTunes application is itself free but downloading songs to iTunes is not.

³⁶ http://en.wikipedia.org/wiki/iTunes_Store [hereinafter "Wikipedia - iTunes Store"].

³⁷ As of 2003, the five major record labels were Universal Music Group, Sony Music, Warner Music Group, EMI, and Bertelsmann Music Group [hereinafter "BMG"]. In 2004, however, Sony and BMG merged to form the Sony Music Group. As a result, there are now only four major record labels.

³⁸ Wikipedia – iTunes Store, *supra* note 36.

³⁹ *Id.*

⁴⁰ Ed Christman, Digital Divide: Apple Solidifies Among U.S. Music Accounts, As Mobile Merchants Fade, *Billboard Magazine*, May 22, 2010, available at http://www.billboard.biz/bbbiz/content_display/magazine/upfront/e3i12fe2557a9382597671a522cc1cc901d [hereinafter "Christman - Digital Divide"].

⁴¹ *Id.*

replace.⁴² According to Anita Elberse, Associate Professor at Harvard Business School, for every 1% increase in online music purchasing, there is a corresponding 6% decrease in album sales.⁴³ As a result, between 2005 and 2007, average weekly album sales dropped by approximately 47%.⁴⁴ Furthermore, recent efforts to bolster album sales by increasing the total number of tracks on albums without increasing the total price have not succeeded.⁴⁵ Therefore, while iTunes and other online outlets⁴⁶ have succeeded in getting some consumers to pay for downloaded music, legitimate downloading has greatly contributed to the drop in album sales.

iii. The Limited Role of Gatekeepers

The decreased role of certain gatekeeper channels is also frequently cited as a cause of the drop in music sales. The rise of the Internet as a medium for entertainment consumption, coupled with a general social shift towards individuals selecting and consuming entertainment in a more solitary manner, has decreased the influence of music industry gatekeepers like radio, MTV, and Rolling Stone Magazine. Rick Rubin, acclaimed music producer and co-President of Columbia Records,⁴⁷ summarized this trend as follows:

“Until very recently, there were a handful of channels in the music business that the gatekeepers controlled. They were radio, Tower Records, MTV, certain mainstream press like Rolling Stone. That's how people found out about new things. Every record company in the industry was built to work that model. There was a time when if you had something that wasn't so good, through muscle and lack of other choices, you could push that not very good product through those channels. And that's how the music business functioned for 50 years. Well, the world has changed. And the industry has not.”⁴⁸

⁴² Anita Elberse, *Bye Bye Bundles: The Unbundling of Music in Digital Channels*, *Journal of Marketing* 74, no. 3, May 2010, available at http://www.people.hbs.edu/aelberse/papers/Elberse_2010.pdf [hereinafter “Elberse”].

⁴³ *Id.* Online music consumers purchase more individual tracks but fewer complete albums.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ This paper focuses only on iTunes because it is by far the largest retailer of digital music. However, other digital music sellers exist. See Christman – *Digital Divide*, *supra* note 40, for information on other retailers.

⁴⁷ See Natalie Maines, *The Time 100 – Rick Rubin*, *Time Magazine*, May 3, 2007, available at http://www.time.com/time/specials/2007/article/0,28804,1595326_1595332_1616413,00.html; http://en.wikipedia.org/wiki/Rick_Rubin.

⁴⁸ Lynn Hirschberg, *The Music Man*, *N.Y. Times*, Sept. 2, 2007, available at http://www.nytimes.com/2007/09/02/magazine/02rubin.t.html?_r=1&oref=slogin.

As Rubin noted, record labels used to be able to *will* a hit album by navigating its release through certain gatekeeper channels. Those channels have a modicum of the influence they once had.

Certain new gatekeepers have arisen, but their spheres of influence are far more limited than the traditional gatekeepers. For example, reviews on the website Pitchfork⁴⁹ are widely noted as holding tremendous influence over consumers of “indie rock” music.⁵⁰ Steve Sowley, the product manager for Chicago’s Reckless Records store claims that Pitchfork has “an unshakable control over the indie-music scene,” noting that if Pitchfork “rate[s] an album an 8.5 or above⁵¹ and you’re an indie store, you’d best be ready to stock a lot of those albums.”⁵² As Josh Rosenfeld, co-owner of popular “indie” label Barsuk Records put it, “a Rolling Stone review doesn’t necessarily sell a single record for us. But with Pitchfork, you get a review, and you can see the impact on sales.”⁵³

Pitchfork, however, is an example of the difference between modern gatekeepers and those who existed in the traditional era: during the traditional era, there were reliable gatekeepers who could sway the purchasing decisions of the masses; today’s gatekeepers, on the other hand, influence smaller, more genre-specific groups. Pitchfork caters to consumers of “indie rock,” a genre that while popular, only appeals to a limited amount of music consumers.⁵⁴ MTV, by contrast, influenced the mainstream music consuming public.⁵⁵ During the traditional era,

⁴⁹ See <http://pitchfork.com/>.

⁵⁰ See *e.g.*, Jon Caramanica, Upstart Music Site Becomes Establishment, N.Y. Times, July 14, 2010, available at <http://www.nytimes.com/2010/07/15/arts/music/15pitchfork.html>; Dave Itzkhoff, The Pitchfork Effect, Wired, September 2006, available at <http://www.wired.com/wired/archive/14.09/pitchfork.html>; Greg Kot, Pitchfork E-zine Tells Indie Fans What’s Hot and Not, Knight Ridder News Service, May 8, 2005, available at <http://the.honoluluadvertiser.com/article/2005/May/08/il/il22p.html> [hereinafter “Kot - Pitchfork”].

⁵¹ Pitchfork rates each album it reviews on a scale of 0-10.

⁵² Kot – Pitchfork, *supra* note 50.

⁵³ *Id.*

⁵⁴ See http://en.wikipedia.org/wiki/Indie_rock for a general definition of indie rock as a genre and see http://en.wikipedia.org/wiki/Pitchfork_Media for a summary of the music discussed on Pitchfork.

⁵⁵ See <http://en.wikipedia.org/wiki/MTV>.

MTV's programming choices were directly connected to music sales.⁵⁶ For example, a study by the Merchandising Committee of the National Association of Recording Merchandisers⁵⁷ found that of the 40 music videos MTV deemed "buzzworthy" between January 1994 and May 1996, 75% of the accompanying records became certified gold or platinum.⁵⁸ By contrast, despite the often-noted Pitchfork-influenced success of the 2005 debut album by the band Clap Your Hands Say Yeah, as of late 2009, the album had only sold approximately 125,000 copies total.⁵⁹

Furthermore, Pitchfork is simply one of the largest of the new gatekeepers. Attention from a sufficient mass of music blogs has the most influence over sales.⁶⁰ According to a study by researchers at New York University's Stern School of Business, if a release receives attention from more than 40 blogs, sales increase to approximately three times the average.⁶¹ And if an album appears on over 250 blogs, sales increase to approximately six times the average.⁶² These statistics show that as a group, blogs significantly impact music sales. Major commercial success via blog attention, however, requires a plethora of blogs to simultaneously tout the same release. Therefore, such success is rare. For example, pop band Vampire Weekend is often cited as an example of a band who achieved commercial success largely from a groundswell of blogger support.⁶³ But few, if any, artists have been able to channel blog support into album sales like Vampire Weekend has. During the traditional era, by contrast, an artist had an

⁵⁶ Anonymous, Culture Trends, Brandweek, May 13, 1996 [hereinafter "Brandweek – Culture Trends"].

⁵⁷ See <http://www.narm.com/>.

⁵⁸ Brandweek – Culture Trends.

⁵⁹ http://en.wikipedia.org/wiki/Clap_Your_Hands_Say_Yeah_%28album%29.

⁶⁰ Heather Green, Study Shows How Blog Chatter Helps Music Sales, Bloomberg Businessweek, Feb. 8, 2008, available at http://www.businessweek.com/the_thread/blogspotting/archives/2008/02/study_shows_how.html. Examples of popular music blogs include Stereogum (see <http://stereogum.com/>) and Brooklyn Vegan (see <http://www.brooklynvegan.com/>).

⁶¹ Vasant Dhar and Elaine Chang, Does Chatter Matter? The Impact of User-Generated Content on Music Sales, New York University Leonard H. Stern School of Business, CeDER-07-06, May 2007, available at <https://archive.nyu.edu/bitstream/2451/23783/2/CEDER-07-06.pdf> [hereinafter "Dhar and Chang"].

⁶² *Id.*

⁶³ For more information on Vampire Weekend and the role of blogs in their success, see Henry H. Perritt, Jr., New Business Models for Music, ___ Vill. Sports & Ent. L. J. ___ (2010).

approximately 75% chance of achieving a gold or platinum record simply by being called “buzzworthy” by MTV.⁶⁴

In the modern era, therefore, there are no longer singular reliable channels through which record labels can steer a new release to dramatically increase sales. The reduced role of the old gatekeepers has contributed to the decrease in album sales.

III. The Traditional Record Label Model

This Section explains the traditional relationship between record labels and artists, briefly summarizes the key components of traditional record label contracts, and describes the role of various other industry players, like managers and booking agents, in the traditional model.

A. The Traditional Record Contract

i. Introduction

The traditional role of record labels centered on the release and sale of recorded music. Broadly speaking, record labels traditionally performed the following tasks: selecting artists with promise, funding and supervising the production of musical recordings; manufacturing, distributing and marketing recordings; loaning money to artists in connection with the promotion of recordings, including tour support in some cases; and handling the accounting related to the sales of recordings.⁶⁵ In exchange, artists agreed to exclusively record music for their labels⁶⁶ and to give their labels a sizeable cut of revenues from music sales.⁶⁷ Not surprisingly, therefore,

⁶⁴ Brandweek – Culture Trends.

⁶⁵ David Byrne, David Byrne’s Survival Strategies for Emerging Artists – and Megastars, *Wired*, Dec. 18, 2007, available at http://www.wired.com/entertainment/music/magazine/16-01/ff_byrne?currentPage=all [hereinafter “Byrne”].

⁶⁶ Donald S. Passman Donald S. Passman, *All You Need to Know About the Music Business*, 148. (Simon & Schuster 2000) [hereinafter “Passman”].

⁶⁷ *Id.* at 109.

the traditional source of record label revenue was record sales.⁶⁸ Thus, the traditional record label model relied on the assumption that recorded music was profitable.⁶⁹ A secondary assumption was that record labels were economically efficient for artists.⁷⁰

To appreciate why 360 Deals represent such a dramatic change to the music industry, one must understand what comprised a traditional record deal. The items briefly discussed below comprised the key components to traditional record contracts.⁷¹ Each of these items is connected to making and selling recorded music, as was the focus under the traditional model.

ii. Recording Fund; Advances; Cross-Collateralization

A “recording fund” included money advanced by the record label to cover the costs of recording an album.⁷² If recording costs exceeded the recording fund, the artist typically had to pay the balance.⁷³ If the entirety of the fund was not used for recording, however, the unused monies, like recording costs in general, were treated as an advance to the artist.⁷⁴ Therefore, the label was entitled to recoup this money from the artist.⁷⁵

Unlike a traditional bank loan, however, advances only needed to be paid back from the artist’s would-be share of album profits.⁷⁶ Therefore, if artists did not sell enough albums to fully pay back their advances, their label simply lost the advanced money.⁷⁷ Recording costs were not the only items that were treated as recoupable advances. For example, funds for producing music videos, certain marketing costs, and miscellaneous advance monies paid to

⁶⁸ *Id.* at 100-05.

⁶⁹ Sara Karubian, 360 Deals: An Industry Reaction to the Devaluation of Recorded Music, 18 S. Cal. Interdisc. L.J. 395, 421 (2009) [hereinafter “Karubian”].

⁷⁰ See Section VII (“Economic Efficiency and the 360 Model”) *supra* for a discussion of economic efficiency.

⁷¹ This paper provides only a broad overview of traditional record label contracts. For more detailed information, see *e.g.*, Karubian, *supra* note 69, 406-59, and Passman, *supra* note 66.

⁷² Karubian, *supra* note 69, at 409.

⁷³ *Id.* at 409.

⁷⁴ *Id.* at 408.

⁷⁵ *Id.* at 409-10.

⁷⁶ Passman, *supra* note 66, at 102.

⁷⁷ *Id.*

artists at different stages in the terms of their contracts⁷⁸ were all recoupable from an artist's share of album sale proceeds.⁷⁹

Additionally, most traditional record contracts included the concept of cross-collateralization, which means that if advances in connection with one album were unrecouped, the label could recoup those advances out of profits from past or future albums.⁸⁰ Furthermore, if an artist signed a new deal with the same label, proceeds from albums made from the latter deal could be cross-collateralized with proceeds from the former.⁸¹

iii. Tour Support

Because touring is often prohibitively expensive for artists, labels traditionally provided financial support to some artists in connection with touring.⁸² Tour support was only provided, however, if the label felt that touring would sufficiently increase album sales.⁸³ As such, tour support was often hard for artists to obtain and limited, both in amount and duration. At one point, tour support payments were non-recoupable, but as touring became an independent means for artists to make money,⁸⁴ the industry shifted to tour support being 100% recoupable from album sales.⁸⁵

iv. Ownership of Master Recordings; Mechanical Royalties

Record labels traditionally owned the copyrights to an artist's master recordings⁸⁶ in perpetuity.⁸⁷ Regardless of whether the label recouped all of the money they advanced to an

⁷⁸ E.g., signing bonuses.

⁷⁹ Karubian, *supra* note 69, at 410

⁸⁰ Passman, *supra* note 66, at 103-04.

⁸¹ *Id.*

⁸² *Id.* at 159.

⁸³ *Id.*

⁸⁴ See Karubian, *supra* note 69, at 414-17, for a discussion of the potential profitability of touring.

⁸⁵ Passman, *supra* note 66, at 159.

⁸⁶ Master recordings are the original recordings made in the recording studio from which copies are made.

artist, they still owned the artist’s recordings. As entertainment attorney Bob Donnelly notes, this arrangement is akin to “taking out a mortgage on a house, repaying the mortgage in full, but the bank winds up owning your house.”⁸⁸

The copyright in a master recording is distinct from the copyright in the musical composition underlying that recording. Copyrights in compositions have traditionally been owed by artists themselves or by music publishers via assignment of the rights from the artists.⁸⁹ Music publishers administer copyrights, license songs, and collect royalties.⁹⁰ Under the traditional model, record labels came into contact with compositional copyrights vis-à-vis “mechanical royalties,” which are royalties paid for the reproduction of songs on, for example, a compact disc.⁹¹ Therefore, music publishers collected mechanical royalties from record labels,⁹² and then distributed an agreed upon share to the artist.⁹³

v. Royalties; Free Goods; Reserves; Rates

Record labels pay artists royalties for albums sold.⁹⁴ Thus, money advanced to an artist was recouped from his or her potential royalties. Most labels traditionally computed royalties as a percentage of the record’s suggested retail list price (the “SRLP”), which is theoretically the price received by an album’s retailer.⁹⁵ Others computed royalties based on the wholesale price the label received.⁹⁶ Before arriving at the artist’s actual royalty, however, a deduction for

⁸⁷ Bob Donnelly, Why Artists Should “Do a 180” on ‘360 Deals,” available at <http://www.lommen.com/pdf/Bob-Donnelly-360-Article.aspx> [hereinafter “Donnelly”].

⁸⁸ *Id.*

⁸⁹ Alan Korn, Music Publishing – An Overview, available at http://www.alankorn.com/articles/publishing_1.html [hereinafter “Korn”].

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² The amount labels pay for mechanical licenses is set by a Copyright Royalty Tribunal. For more information, see <http://www.cni.org/docs/infopols/US.Copyright.Royalty.Trib.html>.

⁹³ Korn, *supra* note 89.

⁹⁴ Karubian, *supra* note 69, at 411.

⁹⁵ Passman, *supra* note 66, at 90.

⁹⁶ *Id.*

packaging costs was made from the SRLP.⁹⁷ Therefore, if the label computed royalties based on the SRLP, the SRLP minus the packaging deduction yielded the “royalty base.”⁹⁸ Moreover, royalties were traditionally only paid on albums that were actually sold, so artists did not collect royalties on copies that were given away for free.⁹⁹ Additionally, because retailers were permitted to return unsold albums to labels for a full refund, labels “reserved,” or held back, a portion of artists’ royalties until they were certain albums would not be returned.¹⁰⁰ Finally, the actual percentage an artist stood to receive in royalties generally depended on the artist’s relative bargaining power and ranged from approximately 10% to 20%.¹⁰¹

vi. Term

In the early days of the record business, contracts were for periods of one year, with labels having the option to renew artists’ contract for additional one-year periods.¹⁰² Later, a record deal’s term came to be based on the number of albums an artist was obligated to record for the label.¹⁰³ Typically, a contract bound an artist to make a certain number of albums for the label, with the label having options for subsequent albums.¹⁰⁴

vii. Exclusivity

Record contracts traditionally stated that an artist could not record music for any other entity than his or her label.¹⁰⁵ Under these agreements, artists were restricted from re-recording songs they recorded for their labels, typically for a period of five years from the date of the

⁹⁷ *Id.* at 90-91.

⁹⁸ *Id.*

⁹⁹ *Id.* at 91-95.

¹⁰⁰ *Id.* at 96.

¹⁰¹ *Id.* at 109.

¹⁰² *Id.*, at 119.

¹⁰³ *Id.* at 120.

¹⁰⁴ *Id.* at 116-18.

¹⁰⁵ *Id.*, at 148.

recording, with a minimum of three to five years from the end of the contract's term.¹⁰⁶ However, artists could sometimes negotiate exclusions to this exclusivity or get permission from their labels to record in different forums.¹⁰⁷ Nevertheless, exclusivity was at the heart of the traditional record contract structure.

B. Other Industry Players in the Traditional Model

Because the role of record labels was limited to making and selling recordings, a variety of other music industry professionals were traditionally involved in artists' careers. The roles of the most prominent of these players are briefly described below.

i. Personal Managers

Personal managers are involved in all aspects of an artist's career so they typically receive a percentage of all of an artist's gross earnings.¹⁰⁸ Thus, the contractual arrangement between artists and personal managers shares a similarity with the 360 model because managers receive revenue streams from all of an artist's activities.

Personal managers generally serve the following functions: helping artists navigate career decisions like which label to sign with, which producer to use, and whether to make a publishing deal; helping select the other members of artists' professional teams and supervising those other team members' work; coordinating the logistics of artists' schedule; and serving as a buffer between artists and their labels.¹⁰⁹

¹⁰⁶ *Id.*

¹⁰⁷ E.g., A label may grant an exclusion so that an artist can appear on a movie's soundtrack album or to appear as a "sideman" on another's artists recording. See Passman, *supra* note 66, at 149-53 for more information on exclusions to exclusivity clauses in record contracts.

¹⁰⁸ Personal managers are generally paid 15% to 20% of an artist's gross earnings. See Passman, *supra* note 66, at 48.

¹⁰⁹ *Id.* at 47-48.

ii. Business Managers

Unlike personal managers, business managers' role is limited to managing an artist's finances.¹¹⁰ Business managers' functions generally include the following: tracking artists' income and spending, paying artists' bills, budgeting, and reporting on financial matters to artists and their personal managers.¹¹¹ Some business managers also perform tasks for artists like preparing and filing tax returns, and making and monitoring investments.¹¹² Some business managers are paid a percentage of an artist's gross income,¹¹³ while others are paid hourly or via a flat fee.¹¹⁴

iii. Booking Agents

Booking agents traditionally book and negotiate live appearances on behalf of artists.¹¹⁵ Included in this job are the following tasks: making arrangements with promoters and venues, negotiating performance agreements, and ensuring that an artist's requirements in connection with his or her performance¹¹⁶ are met. Because their role is limited to live performances, agents are only paid a percentage¹¹⁷ of artists' income from those performances.¹¹⁸

iv. Promoters and Venues

Promoters perform the following tasks in connection with live music performances: booking the venue, guaranteeing the rental fee, paying for advertising, and generally supervising

¹¹⁰ *Id.* at 61.

¹¹¹ *Id.* at 63-66.

¹¹² *Id.*

¹¹³ Business managers who are paid a percentage fee generally receive around 5% of an artist's gross earnings. See Passman, *supra* note 66, at 66.

¹¹⁴ Passman, *supra* note 66, at 66.

¹¹⁵ *Id.* at 74.

¹¹⁶ E.g., lighting, sound equipment, security, and meals.

¹¹⁷ A typical booking agent fee is 15% of what an artist is paid for a performance.

¹¹⁸ Passman, *supra* note 66, at 74.

the overall production of the event.¹¹⁹ As a result, promoters often take the largest financial risk of any entity involved with live performances.¹²⁰ A promoter's contract is usually with the venue, though promoters sometimes contract directly with artists.¹²¹ Promoters are typically compensated via some form of revenue sharing arrangement.¹²²

Less popular artists' performances often do not involve promoters. Rather, those artists are hired directly by venues where their performances will be held, which are frequently clubs that can hold 100 to 1,500 people. Therefore, smaller artists depend on venues to perform the roles that promoters execute for larger-scale performances.

v. Attorneys

Artists' attorneys work on a variety of legal issues for their clients. Attorneys draft and negotiate various contracts for artists, from publishing agreements to endorsement contracts, and handle intellectual property matters, including helping artists collect the licensing fees and royalties owed to them.¹²³ In addition, some music lawyers are general industry "power players," doubling as managers or agents, and assisting in various elements of their clients' careers.¹²⁴ Artists' attorneys either charge an hourly fee or receive a percentage based on the size of the deal in question and the attorney's contribution thereto.¹²⁵

¹¹⁹ *Id.* at 341-42.

¹²⁰ *Id.*

¹²¹ Heather McDonald, What is a Music Promoter, available at <http://musicians.about.com/od/otherindustry careers/p/Promoter.htm>.

¹²² *Id.*

¹²³ Heather McDonald, Entertainment Lawyers: Music Industry Specialization, available at <http://musicians.about.com/od/otherindustry careers/p/musiclawyer.htm>.

¹²⁴ Passman, *supra* note 66, at 68.

¹²⁵ *Id.*

vi. Publishers

Music publishers are the assignees of artists' copyrights in musical compositions. See Section III(A)(iv) ("Ownership of Master Recordings; Mechanical Royalties") for more detail discussion of the role of publishers.

IV. The 360 Model: Common Components

The 360 model is a dramatic departure from the traditional model because it involves labels receiving forms of revenue, and theoretically playing a broader role in artists' careers, than ever before. 360 Deals are made between artists and record labels, both majors and independents. In some cases, 360 Deals are made between artists and a large promoter like Live Nation Entertainment.¹²⁶ To the extent that 360 Deals with Live Nation differ from 360 Deals with traditional record labels, those differences will be noted herein.

Because the 360 model is so new, a contractual standard has not yet been established.¹²⁷ For example, as discussed above, the company involved could be either a record label or a promoter, and core deal points, like payment arrangements and the extent of the company's participation, can vary greatly depending on the deal.¹²⁸ Nevertheless, some common themes set the new structure apart from traditional record deals. While the bulk of the basic elements of traditional record contracts are also found in 360 contracts, 360 Deals include some important variations. These key differences are discussed below.

¹²⁶ Live Nation, the predecessor company to Live Nation Entertainment, spun off from Clear Channel Communications in 2005 and merged with Ticketmaster in 2010 to become Live Nation Entertainment. The company's primary function is promotion. However, since 2007, Live Nation has signed 360 Deals with popular artists like Madonna, Jay-Z, Nickleback, and Shakira. The differences between Live Nation's 360 Deals and record labels' 360 Deals will be discussed throughout this Section. For more information, on Live Nation, see *e.g.*, http://www.livenation.com/h/about_us.html, and http://en.wikipedia.org/wiki/Live_Nation (hereinafter "Wikipedia - Live Nation").

¹²⁷ Karubian, *supra* note 69, at 426.

¹²⁸ *Id.*

A. Touring

360 Deals' treatment of touring differs from traditional record contracts. For established artists, the label essentially pays the artist an upfront fee in exchange for part of the artist's future touring revenues.¹²⁹ These artists, however, are generally not contractually obligated to perform a certain number of shows.¹³⁰ For example, according to Billboard Magazine, hard rock band Korn's touring endurance was an essential reason for EMI entering into a 360 Deal with the group.¹³¹ Pursuant to the terms of their contract, however, Korn is not required to tour a certain number of days per year; they may instead elect to tour less but give EMI a larger percentage of the total touring revenues they receive.¹³²

Live Nation's 360 Deals, unlike 360 Deals made with traditional record labels, typically require that Live Nation be the exclusive promoter of an artist's tours.¹³³ For example, a noteworthy component to Madonna's highly publicized \$120 million 360 Deal with Live Nation was the pop star's promise to exclusively work with Live Nation on her tours.¹³⁴

360 Deals' touring provisions may have the great impact on newer artists, who tend to need more tour support than established artists. Whereas under the traditional model, tour support was not always available, often inadequate, and usually limited to touring specifically aimed at promoting an album, tour support under the 360 model is often greater in amount and duration.¹³⁵ For example, Paramore's singer said of the tour support provided in connection with her group's 360 Deal, "We were given all the time in the world, and all the support we could ever ask for, to basically do nothing but play shows ... [But for having signed a 360 Deal], I

¹²⁹ *Id.* at 431.

¹³⁰ *Id.*

¹³¹ Todd Martens and Brian Garrity, Back On Top, Billboard Magazine, June 2007.

¹³² Karubian, *supra* note 69, at 432.

¹³³ *Id.* at 440.

¹³⁴ Marcus Leroux, Madonna Ditches her Long-Term Record Label, The Sunday Times, Oct., 2007, available at http://business.timesonline.co.uk/tol/business/industry_sectors/media/article2636261.ece [hereinafter "Leroux"].

¹³⁵ Karubian, *supra* note 69, at 433.

don't know that we would've been given that lenience.¹³⁶ In addition to giving their label a percentage of tour revenues, however, Paramore granted the label the right to approve tour schedules, as well as the salaries of certain tour-related employees.¹³⁷

B. Other Participation

As discussed above, the most notable difference between traditional record deals and 360 Deals is the amount of additional revenue streams that may flow to the label. Under the traditional model, record labels stood to profit solely from an artist's recorded music sales. But under in a 360 Deal, a label may take a portion of any or all of an artist's income.

Most 360 Deals provide that the label will receive a percentage of the following revenue streams: recorded music sales, touring income, and merchandise sales.¹³⁸ Some deals provide that the label will also receive a percentage of income from the following sources: publishing, licensing, endorsements, rights to Internet-based business like fan clubs, other forms of e-commerce, personal appearances, book sales, acting, ringtones, and modeling.¹³⁹

The 360 concept, therefore, is essentially that any and all of an artist's income could potentially be shared with its label. Which income is included and what percentage of that income the label is entitled to receive is deal specific. For example, in the 360 Deal between Paramore, a fairly new artist, and major label Atlantic Records, Atlantic takes 30% of income from record sales, touring, merchandising, endorsements, and fan club fees.¹⁴⁰ In the 360 Deal between Korn, a more established artist, and major label EMI, EMI takes 70% of income from

¹³⁶ Jeff Leeds - Band as Brand, The New Deal: Band as Brand, N.Y. Times, Nov. 11, 2007, available at <http://www.nytimes.com/2007/11/11/arts/music/11leed.html> [hereinafter "Leeds - Band as Brand"].

¹³⁷ *Id.*

¹³⁸ See *e.g.*, Ivan Hoffman, The All Around 360 Deal, 2008, available at <http://www.ivanhoffman.com/allaround.html> ; <http://lawyer4musicians.com/2010/05/06/what-does-your-360-deal-really-mean/>; <http://musicians.about.com/od/ah/g/360deals.htm>; <http://musicians.about.com/od/musiccontracts/bb/signa360deal.htm>; Karubian, *supra* note 69, at 441.

¹³⁹ *Id.*

¹⁴⁰ Karubian, *supra* note 69, at 441.

record sales, and 30% of income from touring, merchandising, publishing, and licensing.¹⁴¹ And in the 360 Deal between Madonna, a superstar artist, and promoter Live Nation, Live Nation takes an unreported percentage of income from record sales, 10% of touring income, 30% of merchandising revenues, and 50% of licensing fees.¹⁴² Finally, in the 360 Deal between Company of Thieves, a new band, and independent label Wind-up Records, Wind-up takes an unreported percentage of income from record sales, touring, publishing, and merchandising.¹⁴³

C. Record Royalties and Copyrights

Another difference between traditional record contracts and 360 Deals is the amount of royalties some artists receive. In the 360 context, artists give up more potential revenue than in traditional record deals. In exchange, some artists have been able to contract for higher record royalties.¹⁴⁴ For example, Paramore's royalty percentage under their 360 Deal with Atlantic Records is close to double what they would have received under a traditional record contract.¹⁴⁵

Live Nation's 360 Deals differ from record labels' deals in that in some of its contracts, Live Nation does not own the copyright to the artist's master recordings made during the term of the contract. For example, Live Nation's 360 Deal with Madonna does not include a copyright to Madonna's future recordings, while Live Nation's 360 Deal with Jay-Z does.¹⁴⁶

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ <http://mgmt.secondwavemusic.com/roster/>.

¹⁴⁴ Karubian, *supra* note 66, at 431.

¹⁴⁵ *Id.* ("Atlantic will pass thirty percent of its profits (if there are any) from albums to Paramore under its 360 terms, compared to the traditional thirteen to sixteen percent royalties for new artists.")

¹⁴⁶ Wikipedia – Live Nation.

D. Term

The variety of revenue sources from which a label stands to profit during various stages of artists' careers in the 360 context incents labels to increase the term of 360 Deals.¹⁴⁷ For example, if a label stands to make money off of a relatively unknown band's potential endorsements, the label needs the term to be long enough that they will still be under contract with the band when it achieves enough success to warrant endorsement deals. A similar example is found with touring revenues. New, unknown bands do not tend to earn much performing, but well known artists often make a tremendous amount of money touring. Therefore, it is in a label's interest to make the term of a 360 Deal with a new artist long enough that the label may profit from the band's potential touring success.

V. Rationales for the 360 Model

Although many music industry insiders zealously criticize 360 Deals,¹⁴⁸ the new model has its supporters. The relative merits of these arguments are assessed in Sections VII ("Economic Efficiency and the 360 Model") and VIII ("Predictions for the Industry's Future"). This Section discusses the various rationales for the 360 model.

A. Variety

360 proponents argue that the model's emphasis on multiple revenue streams allows labels to contract with a wider variety of artists.¹⁴⁹ This rationale asserts that if labels are not hamstrung to profiting only from hit records, they can contract with a broader range of artists.

¹⁴⁷ Karubian, *supra* note 69, at 440.

¹⁴⁸ See *e.g.*, Peter Kafka, Big Music's "360" Plans Blow Up. Next?, Business Insider, June 21, 2008, available at <http://www.businessinsider.com/2008/6/big-music-s-360-plans-blow-up-next-> [hereinafter "Kafka"]; Bob Lefsetz, 360 Deals, The Lefsetz Letter, November 11, 2007, available at <http://lefssetz.com/wordpress/index.php/archives/2007/11/11/360-deals/> [hereinafter "Lefsetz"].

¹⁴⁹ See *e.g.*, Emily Steele, The Spin on 360 Deals, dreamrow.com, Aug. 9, 2010, available at <http://dreamrow.com/2010/08/the-spin-on-360-deals/>; Jonathan Ostrow, The Musician's Guide to 360 Deals,

Jam bands are an example of an artist type that would arguably benefit from 360 Deals. Jam bands are known for performing extended improvisational music that spans multiple genres.¹⁵⁰ Because of this emphasis on of improvisation, fans of jam bands tend to be primarily interested in live performances rather than studio recordings.¹⁵¹ As a result, jam bands have historically not sold many records. For example, the Grateful Dead, who are widely regarded as the most successful jam band to date,¹⁵² did not appear in Billboard's top ten until 1987, twenty-two years into the band's career.¹⁵³

Because of jam bands' historic inability to generate sizeable record sales, major labels hesitated to sign them under the traditional model. Craig Kallman, the Chairman and Chief Executive Officer of Atlantic Records, said of his label's opinion of jam bands in the pre-360 context: "We used to look at jam bands as bands that absolutely we shouldn't sign."¹⁵⁴ However, with the advent of the 360 model, Kallman explains that "all of a sudden I'm saying: 'Guys, you absolutely must find the next hottest jam band. I need the next Phish.'¹⁵⁵ Urgently."¹⁵⁶

It makes sense, then, that jam bands would interest labels like Kallman's in the 360 world. Many of these groups have always operated their businesses under some of the core tenets of the 360 structure. For example, jam bands have long ignored the traditional music business practice of making fans pay for recordings. Instead, going back to the late 1960s, jam bands have embraced the practice of allowing fans to record and circulate copies of their

musicthinktank.com, June 8, 2010, available at <http://www.musicthinktank.com/blog/the-musicians-guide-to-the-360-record-deal.html> [hereinafter "Ostrow"].

¹⁵⁰ http://en.wikipedia.org/wiki/Jam_band.

¹⁵¹ *Id.*

¹⁵² http://en.wikipedia.org/wiki/Jam_band#1960s.E2.80.93mid_1980s_and_the_rise_of_the_Grateful_Dead.

¹⁵³ http://en.wikipedia.org/wiki/Grateful_Dead_discography.

¹⁵⁴ Leeds - Band as Brand, *supra* note 136.

¹⁵⁵ Phish is a popular jam band.

¹⁵⁶ Leeds - Band as Brand, *supra* note 136.

performances for free.¹⁵⁷ Popular jam bands, including the Grateful Dead and Phish, have gone so far as to offer tickets for designated “taper” sections at their concerts.¹⁵⁸ Moreover, as music downloading gained steam in the late 1990s and 2000s, many jam bands began posting digital recordings of their performances online, sometimes within hours of the end of the show.¹⁵⁹

Therefore, jam bands are ideal targets for 360 Deals. As Kallman notes, under the traditional model, these artists were typically not profitable for labels; but without the demand of record sales, jam bands are more attractive.¹⁶⁰ Therefore, there is a reasonable argument that the 360 model’s ability to free record labels from reliance on record sales will yield greater variety in the types of artists with which labels deal.

B. Artist Development

Supporters of 360 Deals also argue that the model fosters greater, more long-term commitments by labels to their artists.¹⁶¹ Traditionally, when artists failed to sell enough records to pay back the money advanced to them, their labels would simply not recoup the money because advances were nonreturnable.¹⁶² As a result, labels alone bore the financial risk associated with advancing money to artists.¹⁶³ Therefore, labels’ financial interests were best served by “dropping” artists whose records failed to sell.

When a jam band, for example, signed with a major record label in the traditional era, the band’s likely dismal record sales rendered them a prime candidate for being dropped early in its

¹⁵⁷ http://en.wikipedia.org/wiki/Jam_band#Taping [hereinafter “Wikipedia – Taping”].

¹⁵⁸ Wikipedia –Taping, *supra* note 157; <http://en.wikipedia.org/wiki/Phish>.

¹⁵⁹ *Id.*

¹⁶⁰ Leeds - Band as Brand, *supra* note 136.

¹⁶¹ See *e.g.*, Ostrow, *supra* note 149; Richard Salmon, The New Music Business: Deal or No Deal, *Performing Musician*, Oct. 2008, available at www.performing-musician.com/pm/oct08/articles/thenewmusicbusiness.htm; Heather McDonald, 360 Deals, April 5, 2008, available at <http://musicians.about.com/b/2008/04/05/360-deals.htm> [hereinafter “McDonald - 360”].

¹⁶² Passman, *supra* note at 102.

¹⁶³ *Id.*

career. If labels can exploit multiple revenue streams, however, they can theoretically afford to work with artists over a longer period of time.¹⁶⁴ For example, if a label signs an artist to a 360 Deal in which the label shares endorsement income with the artist, the label wants the artist to be sought after for endorsements. But because endorsements are generally reserved for artists with a wide following,¹⁶⁵ labels may have to commit themselves to artists for longer than single album cycles. Thus, there is a reasonable argument that where the traditional recorded music model incented labels to drop an artist if his or her first release was unprofitable, the 360 model promotes longer term involvement by labels.

C. Record Label Survival

Supporters of 360 Deals also argue that the model represents the only viable means for record labels to continue contracting with artists in the modern era. This argument asserts that given the state of the music industry,¹⁶⁶ 360 Deals are the only plausible means for record labels to survive.¹⁶⁷ For example, Edgar Bronfman, Jr., the Chief Executive Officer of Warner Music Group, has said that from now on, his company will only sign new artists to 360 Deals, or some variation thereof.¹⁶⁸ Bronfman's reasoning for making the 360 model mandatory is that absent additional revenue streams, investing in new artists would be prohibitively risky.¹⁶⁹

¹⁶⁴ See note 161 *supra*.

¹⁶⁵ Ryan Van Etten, Musicians, Brands, Endorsements, and Partnerships (Part 2), Nov. 21, 2009, available at <http://virtualmusic.tv/2009/11/musicians-brands-endorsements-partnerships-part-2/>.

¹⁶⁶ See Section II ("The Current State of the Recorded Music Business") *supra* for a more detailed description of the status of the traditional model.

¹⁶⁷ See *e.g.*, Kafka, *supra* note 148; Michael Arrington, "360" Music Deals Become Mandatory As Labels Prepare For Free Music, *techcrunch.com*, Nov. 8, 2008, available at <http://techcrunch.com/2008/11/08/360-music-deals-become-mandatory-as-labels-prepare-for-free-music/> [hereinafter "Arrington"].

¹⁶⁸ Andrew Edgecliffe-Johnson, Digital is music to media chief's ears, *Financial Times*, June 22, 2009, available at <http://www.ft.com/cms/s/0/90ccf130-5ec4-11de-91ad-00144feabdc0.html>; Arrington.

¹⁶⁹ *Id.*

Given the rapid decline in music sales during the last decade,¹⁷⁰ record labels require alternate revenue streams. Furthermore, recent increases in income from sources that are ancillary to music provide even more incentive for labels to expand their businesses. For example, a recent article in *The Economist* claims that “the supposedly doomed music” is “healthy, and becoming more so,” citing the growth of earnings from touring, publishing, and merchandising.¹⁷¹ Touring profits are up, primarily due to a mammoth increase in ticket prices over the last fifteen years.¹⁷² In 1996, the average price of a ticket to a “top 100” concert tour was \$25.81; that same ticket cost \$62.57 in 2009, an increase of \$27.27 from where prices would have been if they had simply grown with inflation.¹⁷³ Profits from merchandising are also on the rise, mainly due to an increase in the variety of products being offered.¹⁷⁴ For example, when the Rolling Stones rereleased their 1972 album “Exile on Main Street” in May 2010, over 100 different types of memorabilia were released and marketed with it at retailers as diverse as Target and Bloomingdale’s.¹⁷⁵ Therefore, it makes sense that labels would want to cash in on these alternate profit sources.

The argument that record labels should do 360 Deals, however, relies on the assumption that valid and economically efficient reasons exist for artists to continue contracting with labels. Further, this rationale implies that the music business in general, from consumers to other industry players,¹⁷⁶ is better served by record labels thriving than dying off. The relative merits of these assumptions are discussed in Sections VI (“Arguments against the 360 Model”), VII (“Economic Efficiency and the 360 Model”), and VIII (“Predictions for the Industry’s Future”).

¹⁷⁰ See Section II(A) (“Sales of Recorded Music: Then and Now”) *supra*.

¹⁷¹ What’s Working in Music: Having a Ball: In the Supposedly Benighted Music Business, A lot of Things are Making Money, *The Economist*, October 7, 2010, available at <http://www.economist.com/node/17199460>.

¹⁷² *Id.*

¹⁷³ *Id.* (“If prices had increased in line with inflation, the average ticket would have cost \$35.30 last year.”)

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *E.g.*, music publishers, filmmakers, promoters, booking agents, and sellers of recorded music.

VI. Arguments against the 360 Model

Despite the growth of the 360 model, many industry players and commentators argue that the structure is objectively harmful.¹⁷⁷ The relative merits of these arguments are assessed in Sections VII (“Economic Efficiency and the 360 Model) and VIII (“Predictions for the Industry’s Future”). This Section discusses the various arguments against 360 Deals.

A. Ineffectiveness of Record Labels

Many commentators argue that record labels have been rendered functionally useless, particularly when it comes to doing things outside of their traditional roles.¹⁷⁸ Supporters of this argument opine that in their current form, record labels can only succeed at promoting recorded music via traditional means like terrestrial radio and MTV.¹⁷⁹ They argue that record labels were built, and their business structure was defined, during the reign of the traditional model; thus, their abilities are limited to the functions they performed within that model.

360 opponents also contend that labels are inept – or at best, inexperienced – at managing the other elements of an artist’s career from which labels stand to profit under the 360 model, like touring, endorsements, and merchandising.¹⁸⁰ This argument ultimately centers on the idea that having a record label participate in non-traditional record contract roles is economically inefficient. This paper assesses the economic efficiency of 360 Deals in Section VII (“Economic Efficiency and the 360 Model”).

Supporters of this argument feel that labels’ lack of responsibility for the successful music business advancements of the past decade¹⁸¹ makes them unqualified to meet the demands

¹⁷⁷ See *e.g.*, Kafka, *supra* note 148; Lefsetz, *supra* note 148.

¹⁷⁸ *Id.*

¹⁷⁹ See *e.g.*, Lefsetz, *supra* note 148.

¹⁸⁰ *Id.*

¹⁸¹ *E.g.*, iTunes, Napster, MySpace.

of 360 Deals.¹⁸² Many of these critics would counter the argument discussed in Section V(C) (“Record Label Survival”) by saying that if record labels have been unprofitable and inefficient in the modern era, then they do not deserve to survive.¹⁸³

B. Unfairness

Another objection to 360 Deals is that they are unfair. Critics of the model argue that 360 Deals are simply an unfair “money grab” by record labels,¹⁸⁴ with some going so far as to suggest that the deals may be legally “unconscionable.”¹⁸⁵ Each of these claims is discussed below.

The basic fairness argument asserts that 360 Deals are simply a reaction by labels to reduced sales.¹⁸⁶ Supporters of this belief contend that 360 Deals are an unmerited and unfair attempt by labels to usurp undeserved profits in the face of a changing industry. In essence, this argument says that labels are forcing artists to “save” them from their own mistakes and ineptitude. These commentators argue that 360 Deals represent labels taking additional revenues to which they have never been entitled in the past, but without providing meaningful additional services in return.¹⁸⁷

The legal unconscionability argument, on the other hand, takes the basic fairness argument further by suggesting that 360 Deals should be voidable or unenforceable as a matter

¹⁸² See *e.g.*, Lefsetz, *supra* note 148.

¹⁸³ See *e.g.*, Gizmodo.com, Record Labels: Change or Die, March 11, 2010, available at <http://gizmodo.com/5481545/record-labels-change-or-die>.

¹⁸⁴ See *e.g.*, McDonald - 360, *supra* note 161.

¹⁸⁵ Ian Brereton, The Beginning of a New Age?: The Unconscionability of the “360-Degree” Deal, *Cardozo Arts and Entertainment Law Journal*, 27 CDZAJELJ 167 (2009) [hereinafter “Brereton”]

¹⁸⁶ See *e.g.*, McDonald - 360, *supra* note 161; For a more thorough discussion of the state of the music business, see Section II (“The Current State of the Recorded Music Business”) *supra*.

¹⁸⁷ See *e.g.*, McDonald - 360, *supra* note 161; Lefsetz, *supra* note 148.

of law.¹⁸⁸ The 1751 English case, *Earl of Chesterfield v. Janssen*¹⁸⁹ contains one of the earliest discussions of unconscionability. The court described an “unconscientious” bargain as one where “it may be apparent from the intrinsic nature and subject of the bargain itself such as no man in his sense, and not under delusion, would make on the one hand, and as no honest and fair man would accept on the other.”¹⁹⁰

During the 19th and 20th Centuries, the doctrine of unconscionability was incorporated into United States law.¹⁹¹ United States courts recognize two distinct forms of unconscionability: procedural and substantive.¹⁹² Procedural unconscionability involves “unfair surprise” in the bargaining process.¹⁹³ Courts have recognized procedural unconscionability in an array of circumstances, including where, for example, a contract includes unreasonably small or illegible printing, or incomprehensible language.¹⁹⁴ Courts recognize substantive unconscionability where “contract terms ... are unreasonably favorable to the other party”¹⁹⁵ because they “reallocate the risks of the bargain in an objectively unreasonable or unexpected manner.”¹⁹⁶ Additionally, pursuant to § 2-302(1) of the Uniform Commercial Code, “[i]f the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made, the court may refuse to enforce the contract, or it may

¹⁸⁸ Restatement (Second) of Contracts § 208 (1981) (“If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result.”) [hereinafter “Restatement”].

¹⁸⁹ (1751) 2 Ves. Sen. 125.

¹⁹⁰ *Id.* At155.

¹⁹¹ See *e.g.*, *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965) [hereinafter “*Williams v. Walker-Thomas*”]; *Johnson v. Mobil Oil Corp.*, 415 F. Supp. 264 (D. Mich. 1976) [hereinafter “*Johnson v. Mobil Oil*”]; Restatement, *supra* note 188; *Gillman v. Chase Manhattan Bank*, 534 N.E.2d 824, (N.Y. 1988) [hereinafter “*Gillman v. Chase*”]; U.C.C. § 2-302(1) (2003) [hereinafter “U.C.C.”].

¹⁹² Brereton, *supra* note 185, at 173-74.

¹⁹³ *Id.* at 173.

¹⁹⁴ *Id.*

¹⁹⁵ *Williams v. Walker-Thomas*, *supra* note 191 at 449.

¹⁹⁶ *Johnson v. Mobil Oil*, *supra* note 191, at 268.

enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.”¹⁹⁷

It is unlikely that courts would find a 360 Deal to be procedurally unconscionable because procedural unconscionability requires the absence of a meaningful choice on the part of a contracting party.¹⁹⁸ Although one could argue that labels’ bargaining power over new artists leaves those artists without a meaningful choice, such an argument seems like a stretch. Artists can ultimately choose whether to contract with a label or not, particularly given how easy recording and releasing music on one’s own has become.¹⁹⁹ Therefore, it is unlikely that the procedural unconscionability argument would succeed.

There are stronger arguments, however, that a 360 Deal could be found to be substantively unconscionable. For example, 360 Deals often require artists to pay shares of revenues with record labels related to businesses in which the labels are not actively engaged, like concert promotion.²⁰⁰ Like the procedurally unconscionable argument, however, the substantive unconscionability argument ultimately seems like a stretch. In reality, record labels are somewhat connected to all aspects of an artist’s career, even if only in an ancillary manner. Further, a reasonable artist entering into a 360 Deal could easily comprehend the variety of revenue streams in which the label will have an interest. Therefore, it is unlikely that a claim of substantive unconscionability would succeed.

Despite the ineffectiveness of the unconscionability arguments, the more general claim that the 360 model is inherently unfair is strong. The notion of unfairness is at the heart of many

¹⁹⁷ U.C.C., *supra* note 191.

¹⁹⁸ *Gillman v. Chase*, *supra* note 191, at 828.

¹⁹⁹ See Perritt – New Architectures, *supra* note 25,

²⁰⁰ Brereton, *supra* note 185, at 194-95.

of the critiques of 360 Deals; opponents of the new model are offended by what they perceive to be greed on the part of record labels.²⁰¹

C. Encouragement of Inartistic Branding

Critics of 360 Deals also argue that the model's focus on exploiting as many revenue streams as possible leads to inartistic "band branding." They contend that the 360 structure removes the emphasis from musicians' music and redirects it towards artists as "brands" that can be sold in a variety of forms. As media theorist Douglas Rushkoff²⁰² notes, "Artists are finding the only way to achieve any financial safety is to become a lapdog of the great corporations."²⁰³

For example, Lordi, a Finnish heavy metal band who signed a 360 Deal with a Sony label²⁰⁴ has its own signature soft drink and credit card.²⁰⁵ A more widely disparaged example of branding is seen with the United States pop group, the Pussycat Dolls, an artist signed to a 360 Deal with Interscope Records.²⁰⁶ In addition to their recorded music output, the Pussycat Dolls have had their own reality television series, *Pussycat Dolls Present*,²⁰⁷ and various lines of merchandise bearing their likeness, including an array of clothing, workout DVDs, and toys.²⁰⁸

360 critics argue that this degree of branding is inartistic and devalues music.²⁰⁹ They contend that the model incents labels to explore revenue streams that have little or nothing to do with an artist's music. While some observers may not oppose this type of exploitation in the case of a seemingly "made-for-commoditization" group like the Pussycat Dolls, they may object

²⁰¹ See e.g., McDonald - 360, *supra* note 161; Lefsetz, *supra* note 148.

²⁰² See <http://rushkoff.com/>; http://en.wikipedia.org/wiki/Douglas_Rushkoff.

²⁰³ Ben Sisario, Looking to a Sneaker for a Band's Big Break, N.Y. Times, October 6, 2010, available at http://www.nytimes.com/2010/10/10/arts/music/10brand.html?_r=1 [hereinafter "Sisario"].

²⁰⁴ <http://en.wikipedia.org/wiki/Lordi>.

²⁰⁵ Leeds - Band as Brand, *supra* note 136.

²⁰⁶ http://en.wikipedia.org/wiki/Pussycat_Dolls [hereinafter "Wikipedia – Pussycat Dolls"].

²⁰⁷ *Id.*

²⁰⁸ See Wikipedia – Pussycat Dolls, *supra* note 206; The Pussycat Dolls official website store, available at <http://pussycatdollshop.bravadousa.com/?src=BUSAPSCT0001>.

²⁰⁹ See e.g., McDonald - 360, *supra* note 161; Lefsetz, *supra* note 148.

to a more “music-centric” artist being exploited for additional revenue streams. For example, proponents of this viewpoint would likely object to a musician like Neil Young²¹⁰ having his own reality television show or product line. Generally, 360 opponents argue that the model encourages inartistic branding.

D. Staffing

Critics of 360 Deals also argue that record labels are promising to undertake more duties, but with fewer staff members.²¹¹ As sales of recorded music have declined during the last decade,²¹² record labels have dramatically reduced their staffs accordingly.²¹³ Influential music industry commentator Bob Lefsetz wrote in a scribe against the 360 model, “Have you been to the major label’s office recently? There’s nobody working there!”²¹⁴ Thousands of jobs within the four major record label groups have been cut during the last five years alone.²¹⁵ 360 Deals, however, theoretically require record labels to do more work than under the traditional model.²¹⁶ Moreover, 360 opponents argue that artists will still have to hire the traditional non-record label players²¹⁷ to supervise their careers. As Lefsetz wrote, labels “want more of YOUR money for doing less work. You’ve still got to hire a manager, an agent, pay them, and also pay the label

²¹⁰ Neil Young, who began performing professionally in 1960, is widely considered to be one of the most influential popular musicians of the last 50 years; See http://en.wikipedia.org/wiki/Neil_Young.

²¹¹ See *e.g.*, McDonald - 360, *supra* note 161; Lefsetz, *supra* note 148.

²¹² See Section II (“The Current State of the Recorded Music Business”) *supra*.

²¹³ See *e.g.*, Billboard staff, Sony Music Cuts Label Staff, Billboard.biz, March 25, 2010, available at http://www.billboard.biz/bbbiz/content_display/industry/e3i68c9747cd968ca8dc4987214a74cf067; Ed Christman, Layoffs Begin Across Universal Music Group, Billboard.biz, Jan. 14, 2010, available at http://www.billboard.biz/bbbiz/content_display/industry/e3ie77b4ee401b87ca16293464199780935; Billboard staff, Layoffs Hit Capitol, Virgin, Billboard.biz, April 23, 2008, available at http://www.billboard.biz/bbbiz/content_display/industry/e3i50885cdbc3e92d88425a6306f86584e1; Ed Christman, Warner Music Group To Restructure, Layoff 400, Billboard.biz, May 7, 2007, available at http://www.billboard.biz/bbbiz/content_display/industry/e3ie9108c1dc34a16ea64eae62497a3e106 [collectively, hereinafter “Billboard - Layoffs”].

²¹⁴ Lefsetz, *supra* note 148.

²¹⁵ Billboard Layoffs, *supra* note 213.

²¹⁶ See Section IV (“The 360 Model: Common Components”) *supra*.

²¹⁷ See Section III(B) (“Other Industry Players in the Traditional Model”) *supra*.

which is doing no more than before.”²¹⁸ This scenario begets questions of economic efficiency, which is discussed in Section VII (“Economic Efficiency and the 360 Model”).

VII. Economic Efficiency and the 360 Model

Ultimately, much of the debate over 360 Deals can be resolved by answering a single question: Does the 360 model work effectively? An analysis of the economic efficiency of the model provides the most direct and objective means of assessing this question. This Section defines and discusses the principal of economic efficiency, and assesses whether the 360 model is presently economically efficient. Whether 360 Deals may be efficient in the future is assessed in Section VIII (“Predictions for the Industry’s Future”).

A. Definition and Disclaimer

Economic efficiency is defined as a state of affairs in which resources are used in a manner that maximizes their utility.²¹⁹ Thus, a system is more efficient when the optimal amount of goods and services are produced using the optimal amount of resources to produce them. For example, an ice cream manufacturer’s business is maximally efficient when he or she makes the most ice cream, using the fewest resources²²⁰ – possible. In a state of total economic efficiency, therefore, no entity can derive additional benefits without depriving another entity of something. Essentially, economic efficiency describes a situation in which nothing more can be accomplished given the amount of resources present.²²¹

Absolute economic efficiency, however, is only theoretical. A system cannot actually be completely efficient in the real world because motivations beyond simple “efficiency” are always

²¹⁸ Lefsetz, *supra* note 148.

²¹⁹ See <http://www.businessdictionary.com/definition/economic-efficiency.html>.

²²⁰ E.g., ingredients, machinery, money, and units of manpower.

²²¹ For more detailed definitions of economic efficiency, see David D. Friedman, *Price Theory: An Intermediate Text*, South-Western Publishing Co. (1990); http://en.wikipedia.org/wiki/Economic_efficiency [hereinafter “Wikipedia - Economic Efficiency”]; http://economics.about.com/od/productivity/f/economic_eff.html.

present. In the specific case of the music business, for example, the objective of all parties is not necessarily to maximize efficiency. The prospect of fame and fortune or even simply making a career out of something as emotionally fulfilling as playing music makes many artists accept a system that is not efficient *per se*, but that they nevertheless find beneficial. Such has been the state of affairs since the dawn of the music business. Criticisms of the record label structure are not new, nor a product of the advent of the 360 model. Artists, however, have chosen to operate within the industry structure because they have deemed it the best means to achieve their goals.

Despite these limitations, an efficiency analysis is useful for assessing the 360 model because in the modern music industry, artists have more alternatives to signing with record labels than they ever had before. These options are discussed more thoroughly in Section VIII (“Predictions for the Industry’s Future”). Because of these alternatives, while there will never be perfect economic efficiency in the music industry structure, the 360 model is only sustainable if it is reasonably efficient.

Another potential flaw in an economic efficiency analysis is that it does not take into account some of the non-economic criticisms of 360 Deals discussed above, like the charge that the model encourages inartistic branding. While there is validity to those criticisms, they will not ultimately impact the success or failure of the 360 model because the music industry has always been, and always will be, vast enough to include artists with a variety of objectives. For example, regardless of what contracting structure the music business employs, there will always be a place for artists like the Pussycat Dolls, just as there always has been a place for musical groups that were “inorganically” developed by industry insiders.²²²

²²² See *e.g.*, The Monkees (http://en.wikipedia.org/wiki/The_Monkees); Menudo (http://en.wikipedia.org/wiki/Menudo_%28band%29); New Kids on the Block (http://en.wikipedia.org/wiki/New_Kids_on_the_Block); Spice Girls (http://en.wikipedia.org/wiki/Spice_Girls).

Therefore, despite its limitations, an assessment of the efficiency of 360 Deals' is crucial for ascertaining the sustainability of the new model. Given the amount of change the music business has experienced over the last decade and the potential for more dramatic metamorphosis in the future, for labels to stay relevant, their contracts and services must be relatively efficient.

B. A Closer Look at Economic Theory

The 360 model is a shift towards horizontal integration in the music industry. The term “horizontal integration” describes a situation in which a company broadens the scope of its business to include a wider variety of products that are related to its core product.²²³ An example of horizontal integration is the above-referenced ice cream maker expanding his or her business to include the manufacture of ice cream cones. 360 Deals are a type of horizontal integration because they involve record labels, whose roles were previously limited to recorded music,²²⁴ expanding their businesses to include other elements of the music industry.²²⁵

In theory, horizontal integration begets both economies of scale and economies of scope, each of which promote economic efficiency.²²⁶ The term “economies of scale” refers to cost benefits that accompany a business expansion because the business’s average cost per unit produced theoretically decreases as the “scale” of the total production output increases.²²⁷ An example of economy of scale is a situation in which it costs \$10 to make one pint of ice cream per hour, but \$15 to manufacture two pints of ice cream per hour. The term “economies of scope,” on the other hand, refers to cost benefits that accompany a business expansion in which

²²³ For a more detailed definition of horizontal integration, see http://en.wikipedia.org/wiki/Horizontal_integration [hereinafter “Wikipedia - Horizontal Integration”].

²²⁴ See Section III (“The Traditional Record Label Model”) *supra*.

²²⁵ See Section IV (“The 360 Model: Common Components”) *supra*.

²²⁶ Wikipedia – Horizontal Integration, *supra* note __; <http://www.quickmba.com/strategy/horizontal-integration/>.

²²⁷ http://en.wikipedia.org/wiki/Economies_of_scale; http://www.investorwords.com/1653/economy_of_scale.html.

the business produces multiple products.²²⁸ A simple example of an economy of scope is a situation in which it costs one company less to manufacture both ice cream and ice cream cones than it costs two companies to manufacture those items separately.

By their definitions, economies of scale and scope increase economic efficiency. As a result, a record label's shift towards horizontal integration via 360 Deals could theoretically yield efficiency by creating economies of scale and scope. Subsection C ("Present Efficiency of the 360 Model") assesses whether these benefits are seen in practice.

C. Present Efficiency of the 360 Model

Record labels' 360 Deals are only economically efficient if they beget each of the following: (1) artists receiving beneficial services from their label that are commensurate with the income streams they are giving up; (2) artists not paying other industry professionals out of revenues from which labels also take a cut; and (3) artists not being able to achieve more desirable results by not contracting with labels at all.²²⁹

As of 2010, it does not appear that record labels have adequately shifted their business models in response to the additional revenue streams they stand to receive from 360 Deals.²³⁰ Rather, it seems that labels are simply contracting for additional income in the wake of reduced album sales.²³¹ There is little evidence that record labels have, for example, added new divisions to handle responsibilities relating to touring and merchandising. Don Bartlett, the head of artist management firm No Door Agency, says the following of the labels' staffing model: "There aren't many labels out there adding to their staffs. It's quite the opposite. It's cheaper for them to

²²⁸ http://en.wikipedia.org/wiki/Economies_of_scope; http://www.articlealley.com/article_38647_15.html.

²²⁹ Certain of these principles share similarities with the theories advanced in Ronald Coase's 1937 article, "The Nature of the Firm." Coase argues, *inter alia*, that certain transaction costs accompany one entity contracting services out to other entities. Therefore, the true cost of obtaining those services exceeds the simple price of those services. See Ronald Coase, "The Nature of the Firm," *Economica*, Blackwell Publishing, 4 (16): 386-405.

²³⁰ See *e.g.*, Kafka, *supra* note 148; Lefsetz, *supra* note 148.

²³¹ See Section II ("The Current State of the Recorded Music Business") *supra*.

outsource the marketing end of things to third parties. And at that point, speaking strictly financially, I can do the same thing directly with the same third parties.”²³²

Moreover, 360 artists still have to pay the varied professionals detailed in Section III(B) (“Other Industry Players in the Traditional Model”), despite the fact that, in theory, their labels should be handling much of that work. Doug Lefrak, the head of artist management firm Feisty Management, says that he cannot foresee a realistic scenario in which labels improve their structure to the point where artists would not need managers.²³³ While Lefrak says that if labels “specialized in the areas of revenue beyond music – touring publishing, merchandising, digital, etc. – then I [would] feel more confident about doing [a 360] deal,” he explains that managers “are the 360 deal as it is,” noting that managers are “independent” and always “have the artist’s best interest in mind.”²³⁴

Additionally, many artists have found that in the modern era, they do not need to sign with a label to be successful. For example, after they had fulfilled their contractual obligations for EMI, the successful band Radiohead did not sign with a new label, but rather self-released their next album.²³⁵ The group uploaded the album, *In Rainbows*, to their website and instructed fans to pay whatever fee they wanted to download it digitally.²³⁶ Conservative estimates suggest that several million people downloaded the album from Radiohead’s site and that the band’s profits from those sales exceeded \$6.5 million.²³⁷ Radiohead eventually contracted with iTunes

²³² Don Bartlett, e-mail message to author, November 18, 2010 [hereinafter “Bartlett”].

²³³ Doug Lefrak, e-mail message to author, October 24, 2010 [hereinafter “Lefrak”].

²³⁴ *Id.*

²³⁵ Jeff Leeds, In Radiohead Price Plan, Some See a Movement, N.Y. Times, Oct. 11, 2007, available at <http://www.nytimes.com/2007/10/11/arts/music/11album.html>.

²³⁶ *Id.*

²³⁷ Karubian, *supra* note 69, at 395.

and a physical distributor to sell *In Rainbows* and the album quickly rose to the top of the charts.²³⁸

Artists who lack the built-in fan base of Radiohead have also found success without contracting with a label. Singer-songwriter Jim Bianco, for example, has released six studio albums, placed songs in multiple films, television shows, and commercials, and has toured several months per year, all without the assistance of a label.²³⁹ For his latest release, Bianco sought funding from his fans via Kickstarter, a website that facilitates artists' solicitation of monetary support from the general public.²⁴⁰ Bianco asked fans to contribute \$15,000 and ended with \$31,500 in commitments.²⁴¹ Bianco offered various incentives in exchange for those contributions, from handwritten notes to songs written about the donors.²⁴²

Don Bartlett's artist Joe Pug²⁴³ has also chosen to avoid many of the traditional elements of record label deals.²⁴⁴ Bartlett believes that Pug's career will ultimately benefit from limiting his involvement with labels, noting the following: "If you believe in your music, and have some decent objective evidence that it is commercially viable, you are probably going to be better off spending your own money and keeping the ownership of your album ... [and] once you've paid yourself back, you will have a nice little revenue stream."²⁴⁵

Furthermore, because of technological advances, a professional quality album can be recorded for a fraction of what it cost even a decade ago.²⁴⁶ Additionally, given the rise of

²³⁸ *Id.*

²³⁹ See http://en.wikipedia.org/wiki/Jim_Bianco [hereinafter "Wikipedia - Jim Bianco"].

²⁴⁰ See <http://www.kickstarter.com/> [hereinafter "Kickstarter.com"].

²⁴¹ <http://www.kickstarter.com/projects/2070231717/you-release-jim-biancos-new-record> [hereinafter "Kickstarter - Bianco"].

²⁴² *Id.*

²⁴³ See <http://www.joepugmusic.com/>.

²⁴⁴ For his latest release, Pug's contracting relationship with a label is limited to the album being licensed to a small, independent label for a one-record deal only.

²⁴⁵ Bartlett, *supra note* 232.

²⁴⁶ See Perritt – New Architectures, *supra note* 25.

digital downloading as the primary means of music consumption, the capital costs associated with releasing one's music are extremely low. Artists can easily release music on iTunes and other digital sales outlets via digital aggregators.²⁴⁷ Major record labels were successful, in part, because they had a virtual monopoly on the points of entry to the system. These changes in cost and access narrow the differences between labels and individual artists when it comes to making and releasing music. For all of these reasons, record labels' 360 Deals are inefficient.

VIII. Predictions for the Industry's Future

This paper offers more questions than answers, but that is inevitable given the newness of the 360 model. Nevertheless, enough time has lapsed that it is not premature to offer predictions for the future. This Section contemplates the extent to which the 360 model may be sustainable and discusses alternate models that may succeed in the future.

As discussed in Section VII(C) ("Present Efficiency of the 360 Model"), record label's 360 Deals are inefficient. For the near future, however, labels and their 360 Deals will likely continue to exist because they offer something to artists that cannot be readily obtained anywhere else: money. For example, younger bands like Paramore and Company of Thieves may feel that their careers are better served by the extra tour support they receive from a label than by maximizing efficiency. Additionally, the present 360 model will presumably continue to appeal to established artists like Madonna, whose careers are now focused on large scale concert tours that are mainly attended by existing fans. Madonna likely values a close contractual relationship with a promoter as influential as Live Nation Entertainment, not to mention the \$120 million with which the promoter provided her.²⁴⁸ These 360 Deals are still viable because presently,

²⁴⁷ Lefrak, *supra* note 233 ("Digital aggregators distribute your music instead of needing specialized distribution from a record label.").

²⁴⁸ See Leroux, *supra* note 134.

labels remain the primary source of venture capital money available to musicians. While some innovative music financiers²⁴⁹ have emerged during the last decade, they are not in a position to replace labels. Therefore, although inefficient, the present 360 model will likely be a fixture in the music industry through the next decade at least.

Long term, labels' 360 Deals may only be efficient for artists whose images and objectives are unusually broad and commercial. These artists profit from a variety of revenue streams beyond music. For example, the aforementioned pop group the Pussycat Dolls, with their reality television series and various lines of consumer products,²⁵⁰ may find value in the 360 structure. The same may be said of pop star Lady Gaga, whose career and image include, in addition to music, partnerships with companies like Estée Lauder and Polaroid.²⁵¹ For artists like the Pussycat Dolls and Lady Gaga, a powerful major label may be an ideal and efficient business partner, particularly if those labels can expand their capabilities to better serve these types of artist.

For the bulk of artists, however, a more efficient model may include dispensing with labels altogether.²⁵² Instead, the core of an artist's team would be comprised of his or her manager and agent. In the early stages of the artist's career, funding would come from the manager or from a third party financier.²⁵³ Managers would have primary responsibility for all

²⁴⁹ See e.g., Brad Stone, Artists Find Backers as Labels Wane, N.Y. Times, July 21, 2009, available at <http://www.nytimes.com/2009/07/22/technology/internet/22music.html> (Venture capital firm "Polyphonic ... will look to invest a few hundred thousand dollars in new and rising artists who are not signed to record deals and then help them create their own direct links to audiences over the Internet.") [hereinafter "Stone"]; Kickstarter.com, *supra* note 240; Sisario, *supra* note 203 (Large corporations, including Levi's, Nike, Motel 6, Converse, and Mountain Dew, provide funding and services to music artists in an effort to tie their brands to those artists.).

²⁵⁰ See Wikipedia - Pussycat Dolls, *supra* note 206.

²⁵¹ John Jurgensen, The Lessons of Lady Gaga, The Wall Street Journal, Jan. 29, 2010, available at <http://online.wsj.com/article/SB10001424052748704094304575029621644867154.html>.

²⁵² See e.g., Radiohead and Jim Bianco, discussed in Section VII(C) ("Present Efficiency of the 360 Model") *supra*.

²⁵³ Funding could come from a standard small business bank loans, or via arrangements with other third party financiers like Polyphonic (see Stone, *supra* note 249) or from capital raised on websites like Kickstarter (see Kickstarter.com, *supra* note 240).

aspects of their artists' careers. In addition to their traditional responsibilities,²⁵⁴ managers would arrange an array of digital distribution options and generally promote and market the artist. Managers would likely continue to lean heavily on booking agents to arrange the artist's tour schedule and contracts. This arrangement would itself be a form of a "360" deal, but unlike the contracts being made by record labels and Live Nation, it would be between an artist and a team of specialists. Joe Pug and Don Bartlett operate under a similar partnership. According to Bartlett, he and Pug "have what amounts to a 'net' deal, meaning that I essentially have a stake in his business."²⁵⁵ Bartlett notes that "[w]ith this arrangement, Joe and I run the business as a joint venture and when the company makes a profit, I get my cut ... When I want to drop a few thousand dollars on a marketing idea, I'm not spending Joe's money, I'm spending our money so I better make sure I believe in the idea."²⁵⁶

IX. Conclusion

Given the dreary state of the recorded music business, shifting to a business model that involves diversified revenue streams is seemingly sensible for record labels. Unless labels can sufficiently alter their structures to provide meaningful services in exchange for those new income sources, however, 360 Deals will not be efficient for most artists. Although the model is relatively new, a plethora of viewpoints have been voiced in favor of, and in opposition to, 360 Deals. Strongly held opinions about the music industry, however, are hardly new. In the end, like the traditional record label model, 360 Deals will be sustainable if they work for artists, music consumers, and the other members of the industry. If labels fail to dramatically change, their 360 Deals may eventually be made only with artists whose personas are uniquely positioned

²⁵⁴ See Section III(B)(i) ("Personal Managers") *supra*.

²⁵⁵ Bartlett, *supra note* 232.

²⁵⁶ *Id.*

to exploit a variety of income sources. Artists whose careers center on music alone, on the other hand, may avoid labels altogether, choosing instead to pursue 360-type arrangements with managers and other more adept and efficient industry players. For now, however, 360 Deals with labels will likely continue because labels remain the primary source of venture capital money that is available to artists. Regardless of the shape the music industry takes in the future, the traditional recorded music-centric model is over. Success will require adaptability and the ability to effectively navigate the ever-changing structure of the business.