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## The Non-Recording, Non-Artist" Recording Artist": Expanding the Recording Artist's Brand into Non-Music Arenas

Suzanne Kessler

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# The Non-Recording, Non-Artist “Recording Artist”: Expanding the Recording Artist’s Brand into Non-Music Arenas

*Suzanne Kessler\**

## ABSTRACT

*The changing nature of the music business presents earnings challenges for both record labels and recording artists. Historically, labels and artists entered into recording contracts pursuant to which the artists created music which the labels funded, distributed, marketed, and promoted. Many artists made good livings from music sales, earning dollars per album, while the labels profited even more. However, as digital delivery, especially streaming, now supplants physical records as the primary music consumption manner, the money that labels and artists realize from music sales has significantly decreased. In particular, artists earn fractions of pennies per track streamed. Labels, too, are dissatisfied with their returns on digital sales, which are insubstantial compared to the returns on physical product.*

*In response to the lower revenue from recorded music sales, labels instituted so-called “360” deals. Under 360 recording contracts, which increasingly are standard, the labels share in artists’ income streams beyond recorded music alone, such as touring, merchandise, sponsorships, endorsements, music publishing, and more. Labels justify this participation by claiming that but for their investments in the artists’ careers, the artists would not have achieved the success required to generate that additional income. Artists, however, generally view 360 deals as unfair—as just another way that labels take financial advantage of them.*

*Struggling to make livings solely from sales of recorded music and wary of sharing their ancillary income with labels, savvy “artist brand entrepreneurs” are steering clear of confining or overreaching recording contracts and are expanding into non-music areas. These artists do not identify primarily as “recording artists” but as multifaceted “brands,” undertaking ventures completely outside of the music industry (e.g.,*

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\* Entertainment and intellectual property law practitioner and Adjunct Professor at Vanderbilt Law School, J.D. Stanford Law School, M.A. Stanford University, and A.B. Brown University. I am grateful to Thomas Johnson, Nicole Keefe, and the editorial team of the *Vanderbilt Journal of Entertainment & Technology Law* for their tremendous support, encouragement, and dedication.

restaurants, alcoholic beverages, cookware lines, fashion lines, and television shows). While the initial source of the artists' popularity may be the music business, the non-music branding endeavors sustain the artists' long-term fame and fortune.

This Article examines how artist brand entrepreneurs use trademark law to construct, reinforce, and maintain the artists' brands apart from conventional recorded music-centric means. Artist brand entrepreneurs develop non-music goods and services and non-music-related trademark portfolios, extending their music-based personas into broader lifestyle brands. While not necessarily entirely relinquishing their music careers, artist brand entrepreneurs re-focus their ambitions and pursuits to remain relevant and profitable.

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## I. INTRODUCTION

The law informs and affects the music industry on a variety of levels. Intellectual property law, contract law, music business litigation (e.g., infringement actions and contract disputes), and other areas of law intersect with creative music-makers to efficiently merge art and commerce. In the broadest sense, the music industry is like any other business that relies on legal principles and communities of attorneys to consummate deals, protect property, resolve disputes, and characterize and document relationships between parties.

The heart of the modern music business has been the recording side, and the defining relationship has been the contractual one between record label (label) and recording artist (artist).<sup>1</sup> These two parties enter into a contract pursuant to which the artist generates sound recordings that the label then manufactures, sells, and advertises. The contract specifies each party's respective rights and obligations—most notably, who owns the recordings and how much money each party earns from those recordings.<sup>2</sup> With a bit of luck, the contract serves for many years as the basis of and blueprint for a lucrative, creatively rewarding association.

This Article broadly reviews the traditional and current artist-label relationships, based in contract law, before exploring the model of the more independently minded, ever-emerging artist brand entrepreneur.<sup>3</sup> For savvy artists, the artist brand entrepreneur model

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1. See James Barton & Brian Message, *Lessons from the Industry Formerly Known as "The Record Business"*, HARV. BUS. REV. (Oct. 24, 2011), <https://hbr.org/2011/10/lessons-from-the-industry-form> [<https://perma.cc/BK46-TGUW>]; see also Matt Stahl, *Popular Musical Labor in North America*, in THE SAGE HANDBOOK OF POPULAR MUSIC 135, 143 (Andy Bennett & Steve Waksman eds., 2015) ("In conventional usage, a recording artist is a performer who is 'signed' to an exclusive recording contract, and whose job mainly involves the production and promotion of recordings.").

2. See Tuneen E. Chisolm, *Whose Song Is That? Searching for Equity and Inspiration for Music Vocalists Under the Copyright Act*, 19 YALE J.L. & TECH. 274, 307 (2017).

3. Merriam Webster's Collegiate Dictionary defines "entrepreneur" as "one who organizes, manages, and assumes the risks of a business or enterprise" and defines "brand" as "a mark made by burning with a hot iron to attest manufacture or quality or to designate ownership" or "a printed mark made for similar purposes"—i.e., a trademark. *Brand, entrepreneur*, MERRIAM WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2003). By extension, an "artist brand entrepreneur" organizes, manages, and assumes the risks of his or her own branding business—using his or her trademark as a designation of quality and ownership as applied to products and services beyond musical ones—because the artist brand entrepreneur trades on the same quality and goodwill associated with the artist's records to appeal both to established fans who embrace the artist's brand extension and to general non-music consumers. See *id.*

is the present and, likely, the future.<sup>4</sup> For a new class of artists, it is no longer the norm to rely solely on the sales of sound recordings to sustain their careers. Investment of one's own sweat equity and capital (whether self-invested or contributed by family, friends, fans, and even strangers)<sup>5</sup> has replaced primary dependence on corporate entities in forging ahead to record music. Furthermore, making one's own independent opportunities to diversify artist-branded products and income streams has largely replaced hopes or desires for grabbing the golden ring of a major label deal.<sup>6</sup>

More and more, artists have come to rely on live performance income instead of income from sales of their recordings.<sup>7</sup> Historically, artists made albums and then toured to support them, with the concerts serving to advertise the new music projects and spur the projects' sales.<sup>8</sup> Today, touring has become a true end in itself, with the album serving to enhance the tour.<sup>9</sup> However, as the live concert

4. See Joe Satran, *Musicians' Income Can Still Be Huge—With the Right Brand, Team*, HUFFINGTON POST (Aug. 2, 2012), [https://www.huffingtonpost.com/2012/07/30/musicians-income\\_n\\_1719908.html](https://www.huffingtonpost.com/2012/07/30/musicians-income_n_1719908.html) [<https://perma.cc/5W9G-UDB2>] (“Today, according to industry experts, the only way to make money in the music business is to turn an artist into a brand—then do everything in your power to maximize that brand’s value.”); see also Tom Roland, *Toby Keith, Florida Georgia Line, Luke Bryan Among Country Acts Who Take Business Beyond Music*, BILLBOARD (Sept. 26, 2016), <http://www.billboard.com/articles/columns/country/7518963/toby-keith-florida-georgia-line-luke-bryan-among-country-acts-who> [<https://perma.cc/3FJR-6272>].

5. Online crowdfunding enterprises such as Kickstarter, PledgeMusic, and Indiegogo serve as means through which artists reach out to family, friends, fans, and strangers to help finance their recording projects. See *Learn*, PLEDGEMUSIC, <https://www.pledgemusic.com/learn/fans> [<https://perma.cc/TYX4-MB9Z>] (last visited Nov. 12, 2017); *Start a Project*, KICKSTARTER, <https://www.kickstarter.com/learn?ref=nav> [<https://perma.cc/SD4Z-VFUS>] (last visited Nov. 12, 2017); *What We Do*, INDIEGOGO, <https://www.indiegogo.com/about/what-we-do> [<https://perma.cc/9ECU-EQ9P>] (last visited Nov. 12, 2017).

6. See Eamonn Forde, *Chance the Rapper Is the World's First Truly Independent Artist*, GUARDIAN (May 19, 2016, 11:21 AM), <https://www.theguardian.com/music/2016/may/19/chance-the-rapper-album-coloring-book-mixtape-billboard-charts-stream-music> [<https://perma.cc/8L9L-2RGW>] (noting that Chance the Rapper turned down label deals and instead “is ploughing an independent furrow, making most of his money on the hoof from branding deals and touring”).

7. Hannah Karp, *Music Industry Sees Growth in Concert Revenue*, WALL ST. J. (Sept. 16, 2016, 3:51 PM), <https://www.wsj.com/articles/music-industry-sees-growth-in-concert-revenue-1474250642> [<https://perma.cc/DG59-9EAS>].

8. Dave DiMartino, *Live Nation Leads the Charge in Concert Business' Booming Revenue*, VARIETY (Feb. 8, 2017, 10:00 AM), <http://variety.com/2017/music/features/live-nation-concert-business-1201979571/> [<https://perma.cc/WL7U-YAGF>].

9. *Id.* (describing 2016 live concert revenue generated by promoter Live Nation on track to reach \$8.5 billion, exceeding “the combined revenue generated by the top two record companies, Universal and Sony, during the same period”). *Variety* quoted Ray Waddell, senior vice president of a live-business consultancy and development company, as saying, “It used to be that you toured to help sell the record. . . . Now the record helps support the tour.” *Id.*

business has become more intensive, expensive,<sup>10</sup> and physically taxing<sup>11</sup>—and earnings from recorded music sales have decreased<sup>12</sup>—many artists look beyond the boundaries of the music world for their livelihood.<sup>13</sup>

The entrepreneurial artist takes his or her career—and, in many ways, the law—into his or her own hands when striving to create a new identity. In effect, these artists are dropping the narrow “recording” qualification and even, to an increasing degree, the music “artist” moniker—opting instead to be perceived as a multifaceted “brand”<sup>14</sup> by undertaking an assortment of ventures completely outside of the music industry. Non-music branded endeavors include restaurants, alcoholic beverages, cookware lines, fashion lines, and television shows, among others.<sup>15</sup> While the initial basis for the

10. Ray Waddell, *Why Are Opening Acts for Superstars Losing Money?*, BILLBOARD (Oct. 3, 2014), <http://www.billboard.com/articles/business/6273989/opening-acts-losing-money> [<https://perma.cc/97QP-T959>] (describing the high costs of travel, production, and personnel involved in touring).

11. See Mike Errico, *Touring Can't Save Musicians in the Age of Spotify*, N.Y. TIMES MAG. (Jan. 25, 2016), [https://www.nytimes.com/2016/01/25/magazine/touring-cant-save-musicians-in-the-age-of-spotify.html?\\_r=0](https://www.nytimes.com/2016/01/25/magazine/touring-cant-save-musicians-in-the-age-of-spotify.html?_r=0) [<https://perma.cc/5UN5-7DVT>] (noting the fragility of the vocal instrument and the prevalence of tour cancellations due to artist injuries and health issues—including cancellations by Sam Smith, Miranda Lambert, Little Big Town, Meghan Trainor, the Black Keys, and Kelly Clarkson).

12. Steve Knopper, *Nine Ways Musicians Actually Make Money Today*, ROLLING STONE (Aug. 28, 2012), <http://www.rollingstone.com/music/lists/9-ways-musicians-actually-make-money-today-20120828> [<https://perma.cc/G2QF-E4BM>] (“Over the past decade-plus, the old-fashioned way of making money in the music business—selling recorded albums—has dropped off a cliff.”); see also Satran, *supra* note 4 (“[E]ven top artists are selling far fewer records than they used to.”).

13. See Knopper, *supra* note 12. Of course, there are exceptions to this trend. Big-name acts, such as Beyoncé, Bruce Springsteen, Drake, Adele, and Kenny Chesney continue to prosper within the old music industry parameters, having radio hits and earning good money from recorded music sales in addition to touring. *Billboard's Top 50 Money Makers of 2016*, BILLBOARD (July 13, 2017), <http://www.billboard.com/photos/7865108/highest-paid-musicians-2016-money-makers> [<https://perma.cc/5SJX-47QD>].

14. See *Brand*, MERRIAM WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2003).

15. See, e.g., Alison Millington, *How Drake and an Ex-Banker Created a Luxury Whiskey That Looks Like High-End Champagne and Is Hot on Instagram*, BUS. INSIDER (July 19, 2017, 11:09 AM), <http://www.businessinsider.com/drake-virginia-black-whiskey-looks-like-high-end-champagne-and-is-big-on-instagram-following-2017-7> [<https://perma.cc/68BG-UZRT>]. Drake launched his Virginia Black whiskey brand in 2016. *Id.* Little Big Town band member Kimberly Schlapman has cookware line “Love & Daisies” and home goods and kitchenware line “Oh Gussie!” See CRACKER BARREL, <http://shop.crackerbarrel.com/collections/oh-gussie> [<https://perma.cc/9AQQ-Y7FL>] (last visited Nov. 6, 2017); Kimberly Schlapman, HSN, <https://www.hsn.com/shop/kimberly-schlapman/16146> [<https://perma.cc/M4JL-3PCC>] (last visited Nov. 6, 2017). Sheryl Crow has an eponymous clothing line. *Sheryl Crow*, HSN, <https://www.hsn.com/shop/sheryl-crow/16123> [<https://perma.cc/VZ9E-DTEJ>] (last visited Nov. 6, 2017). Trisha Yearwood has television show “Trisha’s Southern Kitchen” on the Food Network. See *Trisha’s Southern Kitchen*, FOOD NETWORK, <http://www.foodnetwork.com/shows/trishas->

artists' renown may emanate from the music business, the extension into non-music efforts represents a new frontier for the artists' continuing fame and fortune.

This Article examines how the artist brand entrepreneur uses the law—trademark law in particular—to construct, reinforce, and maintain the artist's brand apart from conventional recorded music-centric means. Part II of this Article presents the historical relationship between labels and artists and how that relationship shifted due to artist entrepreneurship. Part III examines the general provisions in a typical recording contract (a.k.a. record contract, record deal, or label deal), paying particularly close attention to its legal and financial implications for artists. Part IV, meanwhile, provides an overview of music in the digital sphere and its monetary impact on artists, along with the impact of so-called “360 deals” on artists. Part V then discusses examples of artists who have remade themselves from purely “recording artists” into “artist brand entrepreneurs,” reaching beyond music fans to target lifestyle consumers. Instead of the label relationship serving as the dominant association of the artist's career, this Article submits that an artist brand entrepreneur develops greater autonomy that catapults the artist into a broader business environment. The artist, not the label, serves as the general career command center.

## II. THE RISE AND FALL OF RECORD LABEL DOMINANCE

While the artist brand entrepreneur model has gained momentum and popularity in non-music areas as an alternative for artists who no longer have or want a label deal, the conventional artist-label relationship and its attendant record contract are not entirely irrelevant. Even now, these established music industry staples provide springboards to careers and identity foundations for artist brand entrepreneurs, impart lessons learned from ostensibly

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southern-kitchen [<https://perma.cc/NRX2-Z22A>] (last visited Nov. 6, 2017). Florida Georgia Line, Jimmy Buffett, and Blake Shelton have branded restaurants and bars. See FGL HOUSE, <http://fglhouse.com/> [<https://perma.cc/2TCX-9NKF>] (last visited Nov. 6, 2017) (Florida Georgia Line's establishment drawing its name from the duo's abbreviation); MARGARITAVILLE, <https://www.margaritaville.com/dine> [<https://perma.cc/CJT7-NC6W>] (last visited Nov. 6, 2017) (Jimmy Buffett's establishment drawing its name from Buffett's signature song); OLE RED, <http://www.olered.com/> [<https://perma.cc/Y5HM-UZY9>] (last visited Nov. 6, 2017) (Blake Shelton's establishment drawing its name from Shelton's popular song). Besides restaurants, Buffet's “Margaritaville” brand includes hotels. Adam Sichko, *Look, Another Music-Themed Hotel in Nashville! Margaritaville CEO States His Case for Authenticity*, NASHVILLE BUS. J. (Dec. 5, 2017, 2:14 PM), <https://www.bizjournals.com/nashville/news/2017/12/05/look-another-music-themed-hotel-in-nashville.html> (reporting on the groundbreaking for the \$82 million Margaritaville hotel in downtown Nashville).

one-sided transaction practices, and loom large in both history and dreams.<sup>16</sup>

### A. Evolution of “Recording Artist” and “Record Label”

The term “recording artist” is hardly new, but its origins do not date very far back.<sup>17</sup> In the late nineteenth century, the live music business grew as musical performers regularly played in concert halls, theaters, restaurants, burlesque shows, circuses, skating rinks, and other venues.<sup>18</sup> Musical performances were never “new”; they were a natural part of life across all manners of activities.<sup>19</sup> The act of recording, however, was indeed an innovation—the ability to capture a musical performance for repeated listening, public sale, and posterity.<sup>20</sup>

The term “record label,” too, has been around for years, but only in the “recording” age.<sup>21</sup> Once sound recording technology developed in the nineteenth century, businesses grew to accommodate the new medium and distribute and profit from the resulting products.<sup>22</sup> Thus, the modern music industry was born, and the terms “recording artist” and “record label” became part of the vernacular.

16. See Chisolm, *supra* note 2, at 307.

17. Stahl, *supra* note 1, at 144. “Although the *Oxford English Dictionary* finds uses of ‘recording artist’ and ‘artiste’ appearing in the first quarter of the twentieth century, the contemporary figure of the recording artist is of relatively recent origin.” *Id.*

18. See Matt Brennan, *Live Music History*, in THE SAGE HANDBOOK OF POPULAR MUSIC, *supra* note 1, at 209 (“[M]usic had always been performed live before the advent of recording technology. Indeed, the term ‘live’ music was only created after the rise of mass media in order to distinguish music that was disseminated through performance rather than by recording or broadcasting[.]”).

19. See *id.* at 209–12.

20. Edouard-Léon Scott de Martinville invented the first sound recording device, the phonograph, in 1857. Scott’s invention recorded, but could not play back, sound. See *Origins of Sound Recording: The Inventor*, NAT’L PARK SERV. (July 17, 2017), <https://www.nps.gov/edis/learn/historyculture/origins-of-sound-recording-the-inventors.htm> [<https://perma.cc/3CKF-CB4N>] (stating that in 1877, Thomas Edison invented the phonograph, which both recorded and played back sound). “Thomas Alva Edison is the patron saint . . . of music-on-demand[.]” RANDALL E. STROSS, *THE WIZARD OF MENLO PARK: HOW THOMAS ALVA EDISON INVENTED THE MODERN WORLD 1* (2007). Early advertisements for Edison’s phonograph touted its ability to bring outside professional musical performances, which previously enjoyed only live and not necessarily accessible to the masses, into the home. *Id.* at 218–19.

21. See RICHARD OSBORNE, *VINYL: A HISTORY OF THE ANALOGUE RECORD 45* (2012). The term “record label,” a synonym for “record company,” derives from the circular paper label attached to a sound recording disc (e.g., a vinyl record). See *id.*

22. Columbia Records, the oldest record label, began in 1887 as the American Graphophone Company and remains in business. See *125 Years of Columbia Records*, COLUMBIA RECORDS <http://www.columbiarecords.com/timeline#!panel=425038!> [<https://perma.cc/73M5-D2FN>] (last visited Oct. 30, 2017). Among Columbia’s earliest recording artists was the US



Historically, the most fortunate artists found homes at labels under the control of a handful of behemoth umbrella companies such as Warner Music Group, EMI Group, Sony Music, BMG Entertainment, Polygram, and Universal Music Group.<sup>23</sup> Artists signed exclusive contracts with these companies' labels, which recorded, manufactured, distributed, publicized, marketed, and promoted the artists' recordings.<sup>24</sup> A label fronted money to an artist (including a sizable advance upon execution of the contract) on a nonreturnable basis to create recordings for which the label provided a menu of supporting services.<sup>25</sup> The label generally paid royalties to the artist on a per-recording-unit-sold basis after recouping recording and other advanced costs.<sup>26</sup> Landing an exclusive recording contract with a major company became the realization of an artist's ambition.

Labels had money and power and were one-stop shops for artists: in-house artist and repertoire (A&R) executives scouted and signed the talent and suggested which songs to record and which producers to hire;<sup>27</sup> in-house salespeople pushed the recordings into stores and online sites, and radio promotion executives pushed the recordings out to radio stations for airplay, hoping for "hits" that flew up the *Billboard* and other charts that tracked the most-played songs;<sup>28</sup> in-house publicists pitched publications, television shows, and

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Marine Band, signed to an exclusive contract with Columbia. GARETH MURPHY, COWBOYS AND INDIES: THE EPIC HISTORY OF THE RECORD INDUSTRY 10 (2014). Columbia sold the Band's records to dealers on a wholesale basis and sold other records by mail order. *Id.* Columbia soon developed a ten-page catalogue of music offerings. *Id.*

23. See, e.g., *Our Labels & Brands*, UNIVERSAL MUSIC GROUP, <http://www.universalmusic.com/labels/> [<https://perma.cc/5XMR-EUQJ>] (last visited Oct. 30, 2017). The umbrella companies, now and then, owned a variety of labels, some of which specialized in certain musical genres. For example, Universal Music Group currently owns jazz label Verve, pioneering hip-hop label Def Jam Recordings, country music labels MCA Nashville, Mercury Nashville, Capitol Records Nashville, and more. See *id.* In addition, some of the umbrella companies merged with each other or bought smaller, independent companies. See, e.g., Adam Sandler, *A&M Duo Can Sue U Music*, VARIETY (Aug. 19, 1999, 12:00 AM), <http://variety.com/1999/biz/news/a-m-duo-can-sue-u-music-1117750529/> [<https://perma.cc/BHB7-PQUF>]. In 1989, moreover, the Polygram conglomerate bought the independent A&M Records (founded in 1962) from Herb Alpert and Jerry Moss. *Id.* When Universal Music Group purchased Polygram in 1998, A&M Records became an imprint of Universal Music Group. See *id.*

24. DONALD S. PASSMAN, ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS 65–68 (9th ed. 2015).

25. *Id.* at 86–89.

26. The record royalties paid to artists, however, never matched the amount of money that the labels earned on record sales. See Mike Masnick, *RIAA Accounting: Why Even Major Label Musicians Rarely Make Money from Album Sales*, TECHDIRT (July 13, 2010, 9:06 AM), <https://www.techdirt.com/articles/20100712/23482610186.shtml>.

27. PASSMAN, *supra* note 24, at 65–67.

28. *Id.*

other media to cover the release of the recordings;<sup>29</sup> in-house creative and marketing executives produced artist photographs, album artwork, music videos, and other collateral items;<sup>30</sup> in-house attorneys represented the labels in the negotiation and execution of the initial recording contracts, amendments and extensions thereto, terminations of the recording contracts, and more;<sup>31</sup> and, as the music industry entered the digital age, in-house “new media” gurus handled everything related to online and other digital services.<sup>32</sup> Once at such labels, artists had ready-made teams working diligently toward turning profits and turning artists into stars.<sup>33</sup>

Throughout the most profitable and fast-paced decades of the music industry, trade publications would commonly proclaim the latest lucrative multialbum record deal between a label and an artist.<sup>34</sup> About as recently as twenty-five years ago, big artists were still regularly signing big deals. In 1992, Prince signed a \$100 million contract with Warner Bros. Records, and in 1993, U2 signed a \$200 million contract with Polydor Records.<sup>35</sup> The 2000s started off with massive transactions as well: In 2001, Whitney Houston signed a \$100 million contract with Arista Records, and in 2005, Bruce Springsteen signed a \$150 million contract with Columbia Records.<sup>36</sup> Adele’s \$130 million contract with Sony Music, signed in 2016, is a recent and increasingly rare example of a headline-making deal.<sup>37</sup>

Over time, blockbuster deals and the superstar artists who secured them became scarcer.<sup>38</sup> Midlevel and new artists became the norm. These classes of artists often struggled to acquire major label

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29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.* at 65–67. Many artists seeking mainstream success still desire the personnel and resources provided by labels. *See id.* at 73

34. *See, e.g., Whitney Houston Inks \$100 Million Arista Deal*, BILLBOARD (Aug. 3, 2001), <http://www.billboard.com/articles/news/78888/whitney-houston-inks-100-million-arista-deal> [<https://perma.cc/9UPK-KL7Z>]. Music industry publication *Billboard* frequently reported artist signings. *See, e.g., id.*

35. Paul Schrodt, *The 10 Biggest Record Deals of All Time, Ranked*, BUS. INSIDER (May 24, 2016, 3:12 PM), <http://www.businessinsider.com/biggest-record-deals-2016-5> [<https://perma.cc/962E-9TQV>].

36. *Id.*

37. *See id.*

38. *See* Jonah Weiner, *Spinning in the Grave: The Three Biggest Reasons Music Magazines Are Dying*, SLATE (July 28, 2009, 6:47 AM), [http://www.slate.com/articles/arts/culturebox/2009/07/spinning\\_in\\_the\\_grave.html](http://www.slate.com/articles/arts/culturebox/2009/07/spinning_in_the_grave.html) [<https://perma.cc/WZM2-6CQV>] (ascribing the demise of music-themed magazines, in part, to a shrinking pool of superstar artists who saturate the media).

or other viable record contracts, to keep such contracts in full force and effect once acquired (due to, for example, poor record sales), or to extricate themselves from seemingly perpetual contracts without the labels releasing the artists' music or setting the artists free to record elsewhere.<sup>39</sup> These circumstances paved the way for the appearance of the artist brand entrepreneur.

### *B. The Rise of the Artist Brand Entrepreneur*

The artist brand entrepreneur has emerged in recent years out of necessity. As the number of artist signings at the major labels shrank and as these labels contracted, merged, or disappeared,<sup>40</sup> artists were compelled to work outside of the mainstream music industry and take on more direct responsibility—not only for the creative aspects of music-making but also for the business and marketing sides of their careers, along with the artist-consumer connection.<sup>41</sup> No longer are artists able to focus entirely on the creative music-making process. Today, even the most head-in-the-clouds artists must understand and appreciate the business, legal, and promotional aspects of their careers in order to survive.

At the upper echelons of the music industry are wealthy and famous artists such as Adele, Beyoncé, Kanye West, Taylor Swift, Justin Bieber, Rihanna, Drake, Luke Bryan, and a privileged handful

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39. See Aylin Zafar, *What It's Like When a Label Won't Release Your Album*, BUZZFEED (May 12, 2013, 9:06 PM), [https://www.buzzfeed.com/azafar/what-happens-when-your-favorite-artist-is-legally-unable-to?utm\\_term=.vu023dLm1#.wkEaLzgx6](https://www.buzzfeed.com/azafar/what-happens-when-your-favorite-artist-is-legally-unable-to?utm_term=.vu023dLm1#.wkEaLzgx6) [https://perma.cc/B349-72DF] (describing the plights of artists who spend years under contract to labels that neither release the artists' albums nor release the artists from their deals). For example, Sky Ferreira signed with EMI when she was a fifteen-year-old new artist. *Id.* She delivered five albums to EMI that the label rejected, during which time Ferreira remained under contract to the label, unable to record for another entity. See *id.* Additionally, JoJo, who signed a seven-album contract with Blackground Records as a twelve-year-old new artist, became a rising star, only to see her music career stall after the label failed to release her third album despite several do-overs and failed to release JoJo from her contract. *Id.*

40. Jeff Leeds, *Sony Hopes Cuts Won't Give Rivals Pop's Next Star*, L.A. TIMES (May 13, 2003), <http://articles.latimes.com/2003/may/13/business/fi-sony13> [https://perma.cc/NXC5-4MTT]. Various factors have contributed to the shrinking pool of major labels and shrinking artist rosters at these labels, including global music piracy and bloated industry costs. *Id.*

41. See Cherie Hu, *The Record Labels of the Future Are Already Here*, FORBES (Oct. 15, 2016, 5:42 PM), <https://www.forbes.com/sites/cheriehu/2016/10/15/the-record-labels-of-the-future-are-already-here/#2a7ca8c872af> [https://perma.cc/UKY6-NMXN]. Some artists “want complete independence from mediators and control over their economic fate, overseeing all aspects of developing, marketing and distributing their work.” *Id.* The artists become “CEO[s] of their own artistic empire[s].” *Id.*

more.<sup>42</sup> Artists in this top class still record under major label deals (or major label-distributed deals), still sell millions of albums, and still make millions of dollars from their recorded music sales.<sup>43</sup> The major label machinery pours hundreds of thousands—or even millions—of dollars into these artists' careers, which proves worthwhile for the labels due to the substantial returns on their investments.<sup>44</sup>

At the other end of the spectrum are determined artist brand entrepreneurs: the artists who either have lost, cannot procure, or do not want to procure major label deals, and the artists who choose to forego more accessible deals with independent labels that may lack the desired financial or personnel resources.<sup>45</sup> These artists try to go it alone, developing networks of music business contacts and collaborators (such as cowriters of songs, producers, personal managers, and marketing and publicity professionals), finding appropriate distribution channels for their recorded music, and forming personal (or pseudopersonal) bonds with their fan consumers through social media.<sup>46</sup>

Indeed, these artists are recording music for sale, but their income from those sales can be scant. As pennies realized from the streaming of music have chiefly replaced dollars earned from physical record sales (e.g., sales of compact discs, or CDs),<sup>47</sup> entrepreneurial

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42. See *Billboard's Top 50 Money Makers of 2016*, *supra* note 13; see also Kastalia Medrano, *These Are the Highest-Paid Women in Music*, *TIME* (Nov. 3, 2016), <http://motto.time.com/4556887/forbes-highest-paid-women-music/> [<https://perma.cc/3U3R-Q4Y9>]. Legacy acts such as Barbra Streisand, Paul McCartney, Elton John, Billy Joel, Garth Brooks, and Guns N' Roses are also top earners. See *Billboard's Top 50 Money Makers of 2016*, *supra* note 13.

43. *Billboard's Top 50 Money Makers of 2016*, *supra* note 13; see, e.g., UNIVERSAL MUSIC GROUP NASHVILLE, <https://www.universalmusic.com/label/universal-music-group-nashville/> [<https://perma.cc/7UN9-C5G5>] (last visited Nov. 15, 2017); see also Keith Caulfield, *Taylor Swift's 'Reputation' Debuts at No. 1 on Billboard 200 Albums Chart*, *BILLBOARD* (Nov. 20, 2017), <https://www.billboard.com/articles/columns/chart-beat/8039679/taylor-swift-reputation-debuts-no-1-billboard-200-albums> [<https://perma.cc/TY8S-684N>]. Swift's latest album, *Reputation*, was released on November 10, 2017, and in its first week of release already became the best-selling album of 2017 with 1.216 million albums sold (507,000 of which were compact discs and 709,000 of which were digital albums). *Id.*

44. See IFPI's *Investing in Music' Report Shows Record Labels Invest US\$4.5 Billion Annually in A&R and Marketing*, IFPI (Nov. 30, 2016), <http://www.ifpi.org/news/IFPIs-Investing-in-Music-report-2016> [<https://perma.cc/VWT4-T6V4>].

45. See Chisolm, *supra* note 2, at 306. Even if some of these artists sign to small or independent labels, they understand that the distribution and promotional resources at such labels are limited—meaning, primarily, that the amount of money such labels invest in creating, marketing, publicizing, and promoting the artists' recordings is limited. *Id.*

46. See PASSMAN, *supra* note 24, at 70–73.

47. See Ben Sisario & Karl Russell, *In Shift to Streaming, Music Business Has Lost Billions*, *N.Y. TIMES* (Mar. 24, 2016), <https://www.nytimes.com/2016/03/25/business/media/music-sales-remain-steady-but-lucrative-cd-sales-decline.html> [<https://perma.cc/GR75-RK7V>].

artists need to branch out career-wise and explore ancillary income streams—in the main, by reimagining and reinventing themselves as well-rounded brands instead of being mere “recording artists.” Their continued career existence demands such flexibility and versatility.

To successfully venture into branding arenas outside of the music industry, an artist ideally will have already developed an identifiable, appealing persona—perhaps fueled by the publicity and marketing machinery at a major label or simply by plain hard work—that can translate to products other than recorded music. As this Article demonstrates, the artist brand entrepreneur uses trademark law to hone his or her non-music image and further his or her non-music entrepreneurship—the enterprise of being, so to speak, a “non-recording” artist.<sup>48</sup>

Before exploring how forward-thinking trendsetters are sustaining their non-music branding efforts through the utilization of trademark law, it bears visiting the traditional manner in which artists journey through their careers—following the template of a label’s contract, which delineates artists’ rights in and to their sound recordings, revenue earned therefrom, and even aspects of their personas. An examination of the recording contract, including the later insertion of so-called “360 deal” clauses (granting labels participation rights in artists’ non-record income from touring, merchandise, and more),<sup>49</sup> will show why artists often feel creatively and financially trapped or constrained within the confines of the contract and why they welcome alternative non-music associated means of income.<sup>50</sup>

### III. KEY PROVISIONS OF A TRADITIONAL MAJOR LABEL EXCLUSIVE RECORDING CONTRACT

The following discussion is not intended to be a comprehensive summary of all of the principal provisions of a recording contract.<sup>51</sup>

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48. The term “non-recording” is used tongue in cheek; obviously, even artists who explore non-music branding may still make records, but their emphasis may shift, by varying degrees, to other enterprises.

49. See discussion *supra* Part IV.

50. See generally Ashley Iasimone, *Prince Compares Record Contracts to Slavery*, BILLBOARD (Aug. 9, 2015), <http://www.billboard.com/articles/news/6656774/prince-compares-record-contracts-to-slavery> [https://perma.cc/A7D3-2UG8]. Prince told a group of journalists that “[r]ecord contracts are just like—I’m gonna say the word—slavery.” *Id.* Prince stated that artists have little control over how labels exploit the artists’ music and that the labels profit handsomely from the music. *Id.*

51. The below synopsis does not include numerous standard record contract provisions addressing licenses for musical compositions; warranties and representations; indemnifications; defaults, suspensions, and force majeure events; termination rights; accounting and auditing;

Instead, the included material is used by way of example, mainly to familiarize the reader generally with the traditional recording contract and its business, legal, and financial impacts on artists, which will stand in contrast to the more free-spirited manner in which artists seek non-music branding platforms.

Once a label decides to sign an artist, the label issues a recording contract to that artist. The artist, hopefully and wisely, retains an experienced music attorney to review and negotiate the contract. Without such an attorney, the artist may sign a contract that invariably contains a plethora of terms disadvantageous to the artist, since the first draft of a recording contract largely favors the label. Even with representation by an experienced music attorney, an artist without sufficient leverage (e.g., a new artist) would likely enter into a contract favoring the label. After all, label deals do not come along every day, and even a one-sided contract is significantly better than no contract at all. Besides, the lion's share of financial risk initially resides with the label (as mentioned above, the label advances the recording and other costs associated with making recordings on a nonreturnable basis),<sup>52</sup> which therefore incorporates solid means of cost recoupment and potential for label profit into the contract.

Throughout music industry history, artists have ranted and vented about the inequities contained in recording contracts. Artists felt "ripped off" and bonded in servitude to corporate conglomerates.<sup>53</sup> In the artists' minds, but for the labels' influence, they would have more creative musical freedom, own and control their recordings, be able to release albums more frequently, and generally be happier and wealthier. Notwithstanding these views, the artists might not have fully understood that without the labels, they may not have had the means to fund and promote their projects and achieve the levels of fame and wealth they enjoyed. On the other hand, some artists might argue that they would not have achieved the same levels of obscurity and poverty without those same labels and recording contracts.<sup>54</sup> For

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definitions; notices; and miscellaneous other issues such as governing law, independent contractor status, assignment, confidentiality, etc.

52. See PASSMAN, *supra* note 24, at 86. The initial financial investment of a label for a particular album could be hundreds of thousands of dollars, up to a million or two million dollars. *Id.* After advancing recording costs of thousands of dollars, a label would spend an equal or greater amount of money on marketing, promotion, and publicity—often in the form of making expensive music videos and offering tour support dollars to an artist. *Id.* at 86, 189–97.

53. Iasimone, *supra* note 50.

54. See Nick Messitte, *Five Truly Terrible Record Deals Compiled for Your Convenience*, FORBES (Apr. 30, 2015, 12:20 PM), <https://www.forbes.com/sites/nickmessitte/2015/04/30/five-truly-terrible-record-deals-compiled-for-your-convenience/2/#258d36b33258> [https://perma.cc/ZF3F-5NGA]. Youth metal band Unlocking the Truth signed with Sony Music Entertainment in 2014, only to go thousands of dollars in the red prior to leaving the label. *Id.*

better or worse, the recording contract embodied the artist-label relationship. Sections A–G below highlight several core provisions of a traditional major label recording contract that shed light on that relationship.

### A. Exclusivity

Traditional record contract provisions include, first and foremost, exclusivity language. The label signs the artist to a multialbum contract on an exclusive basis for the territory of “the universe.”<sup>55</sup> That is, the artist is bound to record music only for the label and no other entity for the duration, or “term,” of the contract.<sup>56</sup> The label requires such exclusivity for several reasons: the label wants to be exclusively identified with the artist, wants to control the distribution schedule of the artist’s records without conflicting artist music released by another label, and wants to maximize the benefits of its investment in the artist.<sup>57</sup>

### B. Contract Term and Recording Product Commitment

The multialbum contract term is actually a mixture of at least one “firm” album plus optional albums.<sup>58</sup> “Firm” here means that during the initial period of the contract the label commits to allow the artist to make only that album. If that album becomes successful, or if the label wants to proceed in any event with the artist’s contract after a first-album critical or commercial disappointment, the label “picks up” the option for a subsequent album during the next consecutive optional period. A given contract can consist of quite a few successive optional periods for an additional album in each such period, ranging from typically five to six optional albums after the firm album (altogether, the product commitment), but at the label’s sole option to elect (meaning, the “commitment” part of product commitment is not absolute).<sup>59</sup> If at any point the label does not pick up an optional

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55. PASSMAN, *supra* note 24, at 197–99. Artists with enough clout and perhaps other record deals in foreign countries can sometimes negotiate to restrict the territory to the United States, or at least the United States and Canada. *See id.* However, a label usually tries to get the rights to the artist’s exclusive recording services for the universe, giving itself the broadest chance to recoup its investment in the artist. *See id.*

56. *Id.* at 183. From time to time, and under certain circumstances, the label gives the artist express permission to record under the auspices of another label while still being under exclusive contract to the artist’s home label, thus “waiving” exclusivity—for example, when the artist records a duet with an artist who is signed to another label. *Id.* at 188–89.

57. *Id.* at 184.

58. *Id.* at 108–10.

59. *Id.*

album, then the recording contract is effectively terminated. So, while the artist may in theory sign a so-called multialbum contract, in practice, the firm album may be the sole one recorded.

### *C. Release Commitment*

In any event, once recorded, an artist's album might never be distributed by the label. Under the typical record contract, the label's "release commitment" is often no such thing. The contract language governing the album release usually allows the label to considerably delay or avoid releasing the album at all, effectively shelving it.<sup>60</sup>

Contractually, the label has a certain time period, usually several months, within which to release the artist's album after the artist delivers the completed, satisfactory album to the label. After that particular passage of time and upon contract-specified written notice from the artist indicating the label's failure to release the album, the label either has to release the album within a certain postnotice timeframe or take no action whatsoever—and thus passively "fail" to put the album out. In that case, the artist can terminate the contract after a certain contract-specified passage of time but will not necessarily get the album back to release on another label should the artist attract another record deal. Even if the label permits an artist to walk away with the artist's recorded music in hand, that would come at a prohibitive price, such as the artist's reimbursing all recording costs to the label. Therefore, even if an artist records a firm album under the record contract, the label could decline to release it, the contract could be terminated, and the artist could leave the label empty-handed, entirely without the musical fruits of the artist's labor.<sup>61</sup>

The relatively good news? If the label spent thousands or millions of dollars on the artist's recordings, promotion, publicity, and related activities, the departing artist would not have to reimburse the label for those expenses because such advanced monies—while recoupable from the sale of the artist's recorded music—were not returnable.<sup>62</sup>

### *D. Creative Control and Delivery*

Creative control provisions in a recording contract often have the label and artist mutually choose the recording studio, the dates

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60. *Id.* at 119–21.

61. *Id.*

62. *Id.* at 88–89.



and times of recording, the producer, the musical compositions to be recorded, and other similar elements. With a new artist, however, the label might insist on nearly complete creative control—or at least control over the final determination in the case of an impasse with the artist regarding any specific production-related component.<sup>63</sup>

In each contract period, the artist is required to deliver a technically and commercially satisfactory<sup>64</sup> album—fully edited, mixed, and mastered.<sup>65</sup> “Technically satisfactory” means that the album and related documentation meet various technical and professional standards so that the recordings are ready for reproduction for sale in various formats. “Commercially satisfactory” generally means that in the minds of the A&R executives and head of the label the album contains enough hits for large sales potential—whether as individually released singles or the album as a whole—or for steady mainstream radio play. If the label deems the delivered album not to be commercially satisfactory, the label often requires the artist to record additional material to substitute for certain initially delivered album tracks, whereby the artist might incur further recoupable recording costs, or the label might “shelve” the album altogether and require the artist to start the recording process over with another producer and different songs.<sup>66</sup>

### *E. Artist Compensation*

Though the label and artist often wrangle over creative matters, compensation matters frequently become another source of contention. As mentioned above, various costs that the label expends on the artist’s behalf (like actual recording costs or predetermined recording funds, music video costs, independent publicity and radio promotion costs, and tour support costs) are recoupable before the

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63. PETER M. THALL, *WHAT THEY’LL NEVER TELL YOU ABOUT THE MUSIC BUSINESS* 147 (3d ed. 2016) (“[E]ven when a contract says that approval of certain matters shall be subject to mutual approval by the record company and the artist, the record company always has the last word.”).

64. PASSMAN, *supra* note 24, at 114–15. Established artists may be held to a lower standard, bound only to deliver “technically” satisfactory albums, or perhaps albums that are substantially in the same style as the artists’ previous ones. *Id.*

65. *Id.* at 74. After recording the music on separate tracks (multitracks), recording engineers mix the tracks together into a cohesive final album and then prepare, or master, the album for production. *Id.*

66. *Id.* at 114–15. MCA Records initially rejected Tom Petty’s *Full Moon Fever* album because the label staff did not hear a single. The album, later released by MCA, contained Petty’s big radio hit “Free Fallin.” Christopher R. Weingarten et al., *Tom Petty’s 50 Greatest Songs*, *ROLLING STONE* (Oct. 2, 2017), <http://www.rollingstone.com/music/lists/tom-petty-50-greatest-songs-w506653/free-fallin-w506665> [<https://perma.cc/M4U9-SHLH>].

artist begins to realize royalties from the sale of records.<sup>67</sup> In many cases, an artist is never in a recouped position throughout the entire duration of the artist's recording contract and therefore never earns record royalties under that contract. By the time the label terminates the contract, the artist's unrecouped position could be hundreds of thousands or even millions of dollars.<sup>68</sup> This is not money that the artist must repay the label,<sup>69</sup> but the specter of the hefty unrecouped balance could haunt the artist if it became known in the music industry—potentially affecting the artist's ability to procure another record deal.

Artists usually believe that their contractual royalty rates on the sale of records<sup>70</sup> are unfairly low and that the labels keep the majority of revenue. This could initially be true, but after an artist has sizeable commercial success, the label and artist could potentially renegotiate the rates based on the artist's climbing clout, increasing the rates to be more in line with star status. Additionally, contract language could provide that after a certain threshold amount of sales per album, or for each subsequent (optional) album under the contract, the album royalty rate escalates in line with the ongoing label-artist relationship and success.<sup>71</sup>

The album royalty rate for a new artist, for instance, could be 13–16 percent of the published price to dealers (PPD),<sup>72</sup> which rate may increase several percentage points over time due to escalated record sales, optional album pick-ups, or contract renegotiations. On a CD album with a PPD of \$9.00, for example, a new artist with a 15 percent royalty rate could earn \$1.35 per album to start and possibly quite a bit more as the artist's stature rises over time.<sup>73</sup> A superstar artist's royalty rate, by contrast, could be 18–20 percent of PPD,

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67. PASSMAN, *supra* note 24, at 86–88.

68. See JIMMY WEBB, TUNESMITH: INSIDE THE ART OF SONGWRITING 400–01 (1999). In the 1970s, artist Jimmy Webb was under contract to Reprise Records. *Id.* When label president Mo Ostin terminated Webb's contract (at Webb's request), Webb was about a quarter of a million dollars unrecouped. *Id.*

69. PASSMAN, *supra* note 24, at 88–89.

70. The term "records" includes both audio-only and audiovisual media such as albums, singles, videos, and digital downloads and streams. *Id.* at 73–74.

71. *Id.* at 95–96. Generally, royalty-rate escalations based on sales only apply to those albums sold after the relevant threshold is reached and are called "prospective" escalations in the recording contract. Artists with significant clout, however, may be able to get the escalations applied to prior sales, i.e., "retroactive" escalations. *Id.*

72. *Id.* at 93. The PPD is also considered the wholesale price. *Id.* at 77.

73. *Id.* at 94.

translating to as much as \$1.80 earned per CD album with a \$9.00 wholesale price.<sup>74</sup>

Still, record label earnings outpace artist earnings. If an artist earns \$1.35–\$1.80 per CD album, the label earns many dollars more—several times the artist’s take.<sup>75</sup> Labels defend this imbalance in various ways. The labels take all of the risk, effectively serving as banks that loan artists funds to make, distribute, and market their albums, and if the venture fails, the labels lose all of the money.<sup>76</sup> Along the way, if albums in fact make any money, the labels feel justified in keeping the bulk of the revenue from sales so that they can make back their investment gambles faster. Furthermore, the sooner that labels can regain their money, the more readily they can invest in artists’ subsequent albums.

### F. Sound Recording Ownership and Rights

Artists create recordings under recording contracts as “works made for hire” for the labels, and as such, the labels—as purported authors—own all rights in and to the recordings, including, without limitation, the actual physical ownership of the original recordings (the “masters”<sup>77</sup>) and the copyrights therein.<sup>78</sup>

Artists, of course, are entitled to earn money from their recordings; however, as non-owners, artists do not have the ultimate say over the manners of exploitation of their recordings—labels

74. *Id.* Artists’ royalties from digital music sales are discussed below. See discussion *infra* Part IV.A.

75. Steve Knopper, *The New Economics of the Music Industry*, ROLLING STONE (Oct. 25, 2011), <http://www.rollingstone.com/music/news/the-new-economics-of-the-music-industry-20111025> [https://perma.cc/6CGW-88E3].

76. PASSMAN, *supra* note 24, at 88–89 (explaining that while recoupable against artists’ record royalties, *if* record sales generate any, the monies loaned are not returnable, i.e., repayable, by the artists).

77. *Id.* at 74–75. The final sales-ready version of the recordings are “masters,” but labels also claim ownership of all outtakes, alternate versions of tracks, and tracks that do not wind up on the final sales-ready albums. *Id.*

78. The US Copyright Act of 1976 defines a “work made for hire” as either a work made pursuant to one’s employment, in which case the employer is the owner of the work, or certain categories of commissioned works. See Copyright Act of 1976, Pub. L. No. 94-533, §§ 101, 201, 90 Stat. 2541, 2544, 2568 (1976) (codified as amended at 17 U.S.C. §§ 101, 201 (2012)). Sound recordings are not included in the list of eligible commissioned works. See 17 U.S.C. § 101 (2012). Therefore, in the rights and ownership provisions of a recording contract, the language states that the artist creates the sound recordings as works made for hire for the record label, but if for any reason the recordings are deemed not to be works made for hire, the artist accordingly assigns all right, title, and interest in and to the recordings to the label. Either way, the label is the owner.

control all such exploitation. As the copyright owners, labels enjoy the bundle of exclusive rights in the recordings accorded to such owners:

[T]he owner of copyright . . . has the exclusive rights to do and to authorize any of the following: (1) to reproduce the copyrighted work in copies or phonorecords; (2) to prepare derivative works based upon the copyrighted work; (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending; (4) in the case of . . . motion pictures and other audiovisual works [i.e., music videos], to perform the copyrighted work publicly; (5) in the case of . . . the individual images of a motion picture or other audiovisual work [e.g., music videos], to display the copyrighted work publicly; and (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.<sup>79</sup>

One potential consequence of a label's ownership of the masters is that, in order to generate the utmost revenue, a label can license the masters to third parties for use in television commercials, films, video games, or other similar media.<sup>80</sup> Unless an artist has negotiated that the label must obtain the artist's consent prior to so licensing the masters, the artist has no power to stop the label from entering into such deals.<sup>81</sup> So, an artist may discover that his or her music has been used in a television commercial for a product with which the artist would not otherwise have chosen to be associated, like alcohol or political advertisements, or in a film rated NC-17.

Furthermore, long after the artist leaves the label's active roster, the label still owns the recordings, which may have been deleted from the label's current catalogue (i.e., no longer being sold to the public) and fallen into the heap of unsold inventory on a shelf. Commonly, the artist is not able to reclaim the recordings, either physically or copyright-wise, in order to re-release them on another label or even independently.<sup>82</sup>

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79. 17 U.S.C. § 106. Neither the public performance right nor the public display right extends to sound recordings. *See id.* § 106(4)–(5). “Sound recordings” are recorded versions of artists singing or playing musical compositions. *See id.* § 101. They are embodied on “phonorecords,” which the Copyright Act defines as “material objects in which sounds . . . are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.” *Id.* These include vinyl albums, CDs, digital music files, and more. *See also id.* § 106(6) (covering the performance of sound recordings by means of digital audio transmission only); *id.* § 114 (covering the scope of exclusive rights in sound recordings).

80. PASSMAN, *supra* note 24, at 202.

81. *Id.* Note, however, that the label risks damaging its relationship with the artist by not obtaining the artist's prior consent for such licensing, regardless of contractual language that may not require the label to do so.

82. An artist may want to release his or her album independently via digital means or as CDs to sell at his or her live shows. *Id.* at 72; *see also* Ed Christman, *Inside the Secretive, Difficult Struggle Between Artists & Labels Over Album Copyrights*, BILLBOARD (Sept. 28, 2017), <https://www.billboard.com/articles/business/7981597/album-copyrights-master-recordings-1976->

### G. Use of Artist's Name and Likeness

Labels traditionally exercise maximum control over the use of artists' names, likenesses, photographs, voices, biographies, and other personal indicia (including, when commercially exploited, the artists' "right of publicity"<sup>83</sup>) in connection with that artist's musical recordings and the advertising and marketing related thereto. In consultation with the artists, the marketing and publicity divisions of labels work hard to fashion or reinforce specific images for the artists.<sup>84</sup>

Typically, the recording contract states that for the duration of the contract, the label can use such artist material exclusively in direct connection with the artist's recordings and perhaps also in connection with the label's general business or for any other trade purpose (however, an artist with bargaining power would usually be able to narrow the usage).<sup>85</sup> Taken to the extreme, and absent contractual language to the contrary, a label could license the artist's name and likeness for product endorsement purposes without having to procure the artist's permission (though a label would risk damaging its relationship with the artist through such action).<sup>86</sup> After the termination of the recording contract, the label could—per contractual language—continue to use the artist's name and likeness to market the recordings made under the contract.

Moreover, during the term of the contract, the label has control over the content and design of the artist's official website, social media sites (e.g., Facebook and Twitter), and other similar online uses of the artist's name, likeness, and trademarks.<sup>87</sup>

law [<https://perma.cc/JPH4-MED5>] (discussing how "giving back copyrights is anathema to the major record companies").

83. The right of publicity, an intellectual property right, acknowledges individuals' inherent right to control the commercial exploitation of their personal attributes or identities. J. THOMAS MCCARTHY, *THE RIGHTS OF PUBLICITY AND PRIVACY* § 1:3 (2d ed. 2017) (defining the right of publicity as "the inherent right of every human being to control the commercial use of his or her identity").

84. See PASSMAN, *supra* note 24, at 102. New artists were more susceptible to the image-making machinery. See *id.* at 102–03. Artists who signed record deals when already established were able to exercise more control over their images. *Id.*; see also AMY MACY ET AL., *RECORD LABEL MARKETING: HOW MUSIC COMPANIES BRAND AND MARKET ARTISTS IN THE DIGITAL ERA* 197 (3d ed. 2016).

85. RICHARD SCHULENBERG, *LEGAL ASPECTS OF THE MUSIC INDUSTRY* 149–51 (1999).

86. See Jennifer E. Rothman, *The Inalienable Right of Publicity*, 101 *GEO. L.J.* 185, 228 (2012). Aspiring artists may fall prey to signing "oppressive, blanket, long-term (even perpetual) assignments and licenses of their publicity rights." *Id.* at 188, 198. Holders of these rights could force commercial product associations onto such artists and create merchandise using the artists' names and likenesses. *Id.* at 215, 228.

87. PASSMAN, *supra* note 24, at 186.

Record contracts often compel artists to register trademarks in their own professional stage names, usually for recorded music goods (whether physical or digital) and possibly entertainment services in the form of live concert performances; alternatively, the labels reserve the right to so register the artists' names.<sup>88</sup> In exceptional cases, the contracts state that the labels could register the artists' trademarks with the labels as owners, or if the artists were the owners, the contracts might require the artists to assign ownership to the labels during the terms of the contracts.<sup>89</sup> In any event, while the artists are on the labels' rosters, the labels have broad usage rights in these trademarks, which could even be in the form of artists' logos.

Relatedly, labels may try to secure merchandising rights from artists, which the labels occasionally might exploit without the artists' prior consent as to the merchandise designs and products (but, again, labels risk damaging their relationships with the artists through such actions).<sup>90</sup>

#### IV. THE NORMALIZATION OF THE 360 DEGREE RECORDING CONTRACT

Over time, the traditional recording contract expanded its reach beyond the realm of sound recordings as the primary contract subject matter. As revenue from sound recordings diminished, labels sought to augment their coffers through supplementary means, essentially dipping into other artist revenue streams (including touring, merchandising, endorsements, and songwriting).<sup>91</sup> Today, these so-called "360" label recording contracts are common.<sup>92</sup>

To understand the rationale behind the rise of the 360 recording contract, it bears exploring the shift in recorded music from

88. Oftentimes, artists may not want to go to the expense of registering their names as trademarks. STEVE GORDON, *THE FUTURE OF THE MUSIC BUSINESS* 79 (4th ed. 2015); see PASSMAN, *supra* note 24, at 388. "Practically speaking[,] . . . paying rent and covering basic necessities (e.g., eating, maintaining a tour van) are major concerns for [artists], so a trademark registration understandably may rank low on the priority list." GORDON, *supra*, at 79. Costs involved include attorneys' fees and registration fees with the US Patent and Trademark Office (USPTO). See *id.* Besides registering their trademarks in connection with recordings and live performances, artists may want to register their trademarks for other music career-related goods and services, such as clothing bearing their names and likenesses and concert souvenirs. *Id.* at 388–91. For a detailed discussion of artists' music and non-music trademark usages, see *infra* Part V.

89. SCHULENBERG, *supra* note 85 at 143 ("Sometimes, a record company will attempt to claim ownership of an artist's name. This should be unequivocally rejected by the artist as it is a ticket for the artist to ultimately be ripped off by the label.").

90. PASSMAN, *supra* note 24, at 193–95.

91. *Id.* at 102–03.

92. *Id.* ("The name comes from the 360 degrees in a circle, because record companies now want to share in the total pie of an artist's income . . .").

the physical to the digital world. This shift, accompanied by declining sound recording revenue, proved the catalyst for the new all-encompassing label deal.

#### A. *The Change from Physical to Digital Music; Changing Fortunes*

For most of the history of the music business, physical recordings were the customary product produced and sold—including cylinder phonographs, vinyl records, eight-track tapes, compact cassette tapes, and CDs, to name a few.<sup>93</sup> Yet as new physical technologies cannibalized older ones, the music business continued to reap steady profits.<sup>94</sup>

In the early 1980s, when the CD first appeared on the market (some fifty years after the vinyl record), music fans gradually replaced their analog vinyl record and compact cassette tape collections with digital CDs, which claimed much higher audio fidelity that did not degrade over time and did not scratch or break as easily.<sup>95</sup> Unlike the

93. Andrew Flanagan, *When the World First Met the LP, Cassettes, CD and Other Physical Formats*, BILLBOARD (Aug. 16, 2013, 4:15 PM), <http://www.billboard.com/biz/articles/news/digital-and-mobile/5657586/when-the-world-first-met-the-lp-cassettes-cd-and-other> [<https://perma.cc/9HV6-EK78>].

94. Bobby Owsinski, *How the Music Industry Created Its Own Worst Nightmares*, FORBES (Aug. 7, 2014, 11:00 AM), <https://www.forbes.com/sites/bobbyowsinski/2014/08/07/how-the-music-industry-created-its-own-worst-nightmares/#5c371f031957> [<https://perma.cc/P7S2-PEUV>] (“From adopting the vinyl record to replace the fragile shellac discs that were its original core business, to welcoming the cassette and its new-found portability, to the random access and digital sound of the CD, the industry managed to rise to greater and greater sales heights with each successive tech breakthrough that it incorporated.”).

95. See David Goldman, *Music’s Lost Decade: Sales Cut in Half*, CNN (Feb. 3, 2010, 9:52 AM), [http://money.cnn.com/2010/02/02/news/companies/napster\\_music\\_industry/](http://money.cnn.com/2010/02/02/news/companies/napster_music_industry/) [<https://perma.cc/24C7-UAMD>]; Lily Rothman, *Why Music Fans of the 1980s Ditched Vinyl for CDs*, TIME (Aug. 17, 2015), <http://time.com/3971914/cd-history-music/> [<https://perma.cc/N5BB-FYBY>]; Callie Taintor, *Chronology: Technology and the Music Industry*, PBS: FRONTLINE (May 27, 2004), <http://www.pbs.org/wgbh/pages/frontline/shows/music/inside/cron.html> [<https://perma.cc/T2A5-6QAR>]. The fragility of analog media, both physically and sound-wise, was well known among music companies and consumers. See Taintor, *supra*. Once scratched, vinyl records would “pop” or crackle, sometimes skipping over entire songs or repeating the same lines of songs over and over again until the listener moved the stylus needle over the scratched part to resume listening. Paul D. Lehrman, *Does Music Sound Better on Vinyl Records Than on CDs?*, TUFTS NOW (July 11, 2016), <http://now.tufts.edu/articles/does-music-sound-better-vinyl-records-cds>. For their part, compact cassette tapes had welcomed portability. See BRUCE HARING, BEYOND THE CHARTS: MP3 AND THE DIGITAL MUSIC REVOLUTION 42, 112 (2000); Taintor, *supra*; see also Owsinski, *supra* note 94. The Sony Walkman was a best-selling portable cassette player and, later, a best-selling CD player—along with portable boomboxes. See Meaghan Haire, *The Walkman*, TIME (July 1, 2009), <http://content.time.com/time/nation/article/0,8599,1907884,00.html> [<https://perma.cc/P94Z-XL8T>]; see also Taintor, *supra*. However, upon each play of the cassettes, the magnetic polyester plastic film that comprised the audio part degraded and stretched, causing muffled,

owners of prior analog media, moreover, the CD consumer did not have to turn over the record or cassette to listen to the other “side” of the album. The CD played continuously from beginning to end, providing an uninterrupted album-listening experience. As a result of consumers’ purchasing the same set of music but in a new and different format, the labels experienced a windfall of profits.<sup>96</sup> If the average vinyl album or cassette tape sold for \$8 in the 1970s, the average CD in the early 1980s sold for \$15.<sup>97</sup> CDs cost the music companies only about \$1.00 each to manufacture, so the profit margin was gigantic.<sup>98</sup> In other words, business was good.

CD sales remained strong throughout the 1990s, but seismic change was approaching. In the late 1990s, compressed digital audio in the form of MP3s<sup>99</sup> began to appear on the Internet, most notoriously via piracy-based systems like the popular free peer-to-peer file-sharing network Napster.<sup>100</sup> Pirates appropriated, or “ripped,” music from CDs onto smaller and shareable MP3s and distributed those files online at no charge to the user, who could speedily download the files.<sup>101</sup> To rising generations of music fans, music was

distorted sound; worse yet, cassette tapes would occasionally snag in the players and tear. See Dennis Hartman, *Advantages and Disadvantages of Magnetic Tapes*, OUR PASTIMES, <https://ourpastimes.com/advantages-and-disadvantages-of-magnetic-tapes-12336245.html> [<https://perma.cc/GF7G-V9VP>] (last visited Nov. 12, 2017); Taintor, *supra*.

96. See Goldman, *supra* note 95.

97. Joel Rose, *The Legacy of the CD: Innovation That Ate Itself*, NPR (Mar. 9, 2011, 2:00 PM), <http://www.npr.org/sections/therecord/2011/03/09/134391895/the-legacy-of-the-cd-innovation-that-ate-itself> [<https://perma.cc/B5V8-PFPW>].

98. See Dorian Lynskey, *How the Compact Disc Lost Its Shine*, GUARDIAN (May 28, 2015, 1:39 PM), <https://www.theguardian.com/music/2015/may/28/how-the-compact-disc-lost-its-shine> [<https://perma.cc/Q355-H5F2>].

99. Merriam Webster’s *Collegiate Dictionary* defines an MP3 as “a computer file format for the compression and storage of digital audio data” and “a computer file (as of a song) in the MP3 format.” MP3, MERRIAM WEBSTER’S COLLEGIATE DICTIONARY (11th ed. 2003).

100. Richard Nieva, *Ashes to Ashes, Peer to Peer: An Oral History of Napster*, FORTUNE (Sept. 5, 2013), <http://fortune.com/2013/09/05/ashes-to-ashes-peer-to-peer-an-oral-history-of-napster/> [<https://perma.cc/K28W-AUC6>]. Launched in 1999, Napster “became a phenomenon, shaping the cultural lexicon; ‘downloading’ became a household term, and ‘sharing’ became more than an elementary school lesson.” *Id.*

101. Because the audio data on the MP3s was compressed, the files were easily shareable and downloadable. Loren Shokes, Note, *Financing Music Labels in the Digital Era of Music: Live Concerts and Streaming Platforms*, 7 HARV. J. SPORTS & ENT. L. 133, 142–43 & n.60 (2017). Using personal computers with fast processors and modems, one could download an MP3 music file in seconds. *Id.* Like CDs, MP3s could be played on portable devices. See Peter Dockrill, *It’s Official: The MP3 Is Dead, After Even Its Creators Abandon It*, SCI. ALERT (May 15, 2017), <https://www.sciencealert.com/the-mp3-is-officially-dead-after-its-creators-abandoned-it> [<https://perma.cc/Z8NH-XP9E>] (“[B]efore the music industry had established legal avenues to sell digital content, such as Apple’s iTunes Store and modern streaming services, the MP3 was perfect for file sharers, because what it may have lost in audio fidelity, it made up in portability,



no longer a cherished bought-and-sold commodity; it was plentiful, easily accessible, and free. The music industry faced true danger. Its model, after all, was the *sale* of sound recordings. Yet, to budding music consumers, sound recordings were as free as air.<sup>102</sup> Consequently, if consumers were not paying for music, then labels made no money from those recordings, and artists earned no royalties. With every passing year, the downward turn of recorded music sales became more apparent.<sup>103</sup>

Increasingly, however, labels were able to shut down some of the most egregious free digital music file-sharing offenders, such as Napster and Grokster, through landmark lawsuits,<sup>104</sup> and the rising trend into the 2000s was the creation and distribution of even more refined and ubiquitous digital recordings via legally valid sources. Apple, for example, introduced iTunes in 2001 as a legitimate online vehicle for the sale of digital music downloads,<sup>105</sup> charging \$0.99 per single track and \$9.99 per album.<sup>106</sup> Later, the digital download format waned and authorized digital music streaming became more prevalent; at present, this is arguably the preferred manner in which

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thanks to its high compression.”). Compressed MP3 files reduced “CD-quality files up to 95 percent in size.” *Id.*

102. See Dockrill, *supra* note 101. Besides finding free music on pirated sites, listeners gravitated in droves to the free music on YouTube after its inception. See Steve Knopper, *Inside YouTube's War with the Music Industry*, ROLLING STONE (Aug. 15, 2016), <http://www.rollingstone.com/music/features/inside-youtubes-war-with-the-music-industry-w433914> [<https://perma.cc/ZW49-LJAQ>]. Note that YouTube's latest attempt at a paid music service, currently called Remix, has a planned mid-March 2018 launch as an on-demand streaming subscription service. Colin Stutz, *YouTube to Launch New Subscription Music Streaming Service Next Year*, BILLBOARD (Dec. 7, 2017), <https://www.billboard.com/articles/business/8062650/youtube-new-music-streaming-subscription-service-next-year-remix>.

103. Goldman, *supra* note 95.

104. See *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 941 (2005); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1027 (9th Cir. 2001); see also J.D. Lipton, *Copyright, Plagiarism, and Emerging Norms in Digital Publishing*, 16 VAND. J. ENT. & TECH. L. 585, 586 (2014).

105. Apple officially debuted iTunes 1.0 on January 9, 2001 at Macworld San Francisco. Press Release, Apple, *Apple Introduces iTunes—World's Best and Easiest to Use Jukebox Software* (Jan. 9, 2001), <https://www.apple.com/newsroom/2001/01/09Apple-Introduces-iTunes-Worlds-Best-and-Easiest-To-Use-Jukebox-Software/> [<https://perma.cc/9PXU-VVP6>].

106. Josh Lowensohn, *Apple's iTunes Store at 10: A Visual Timeline*, CNET (Apr. 25, 2013, 9:05 AM), <https://www.cnet.com/news/apples-itunes-store-at-10-a-visual-timeline/> [<https://perma.cc/ML25-5P6F>]; Neil Strauss, *The Pop Life: Online Music Business, Neither Quick nor Secure*, N.Y. TIMES (Oct. 29, 2003), <http://www.nytimes.com/2003/10/29/arts/the-pop-life-online-music-business-neither-quick-nor-sure.html> [<https://perma.cc/N4D2-XNM5>]. After its launch, iTunes began charging \$1.29 per download for the most popular current hits and \$0.69 per download for older songs. See Lowensohn, *supra*.

consumers listen to music.<sup>107</sup> Generally speaking, online streaming platforms, such as Spotify, Apple Music, and Pandora, dominate the music-listening experience.<sup>108</sup>

Many music fans listen to Spotify and Pandora as free services that are ad-supported, but there is growing demand for premium versions (i.e., at a subscription cost to the end user) of these streaming services.<sup>109</sup> For a monthly individual subscription fee (for instance, typically \$9.99 for each month of Spotify's service<sup>110</sup> and \$9.99 for

107. Marc Schneider, *How We Listen: IFPI Finds Global Uptick in Both Legal Streaming and MP3 Ripping*, BILLBOARD (Sept. 19, 2017), <http://www.billboard.com/articles/business/7968829/ifpi-global-music-consumer-trends-report> [<https://perma.cc/3JBY-76UD>]. In general, music streams are non-permanent; that is, they are not downloaded and stored on the listener's computer hard drive like iTunes songs. David von Wiegandt, *Spotify: Incentivizing Album Creation Through "The Facebook" of Music*, 2 BERKELEY J. ENT. & SPORTS L. 180, 183 (2013). Instead, after the music plays, the stream disappears. See *id.* If the listener wants to hear the music again, he or she must re-stream it. *Id.* By contrast, once downloaded, a listener can recall iTunes songs on demand from his or her hard drive and also transfer the songs to portable devices. *Id.*

108. Kevin Murnane, *The US Music Industry Crossed a Threshold in 2016*, FORBES, (Jan. 18, 2017, 12:43 PM), <https://www.forbes.com/sites/kevinmurnane/2017/01/18/the-us-music-industry-passed-a-milestone-in-2016/#319fe1b45a90> [<https://perma.cc/A48K-ZE8H>]; Schneider, *supra* note 107. In 2016, for the first time ever, "on-demand audio streaming accounted for the largest share of total audio music consumption." Murnane, *supra*. Other music streaming services include Amazon Music Unlimited, Google Play Music, Tidal, Soundcloud, and Deezer. See Reuters, *A Quick Guide to Apple Music, Spotify, and More Top Music Streaming Services*, FORTUNE (Sept. 11, 2017), <http://fortune.com/2017/09/11/spotify-apple-music-tidal-streaming/> [<https://perma.cc/2PA3-VVXK>]. Furthermore, streaming services can be interactive or non-interactive. Erin M. Jacobson, *Spotify's Ongoing War with the Music Industry*, (Sept. 26, 2017); <http://www.hypebot.com/hypebot/2017/09/spotify-s-war-with-the-music-industry.html> [<https://perma.cc/8EPT-QD4V>]. While discussion about interactive versus non-interactive streaming services is beyond the scope of this Article, it is important to note these two types of services, since the service type impacts artists' royalties. Spotify, for example is an interactive service, meaning that a user can choose and stream specific songs on demand. Ricardo Hernandez, Note, *A Fair Stream: Recommendations for the Future of Fair Trade Music*, 19 VAND. J. ENT. & TECH. L. 747, 764–65 (2017). Conversely, Pandora is a non-interactive service, meaning that a user cannot pick particular songs to stream on demand. *Id.* at 765. Pandora is akin to terrestrial radio, in which the user listens to what is playing at a particular time. Jacobson, *supra*. Note, however, that Pandora recently launched an on-demand subscription streaming service. Robert Levine, *New Pandora CEO Roger Lynch on the Future of On-Demand Subscriptions and Taking on Radio*, BILLBOARD (Sept. 29, 2017), <http://www.billboard.com/articles/business/7980816/pandora-ceo-roger-lynch-future-streaming-radio-interview> [<https://perma.cc/N8N3-7VN3>].

109. See Dan Rys, *U.S. Music Industry's Revenue Growth Accelerates as Paid Streaming Subscriptions Rise 50 Percent*, BILLBOARD (Sept. 20, 2017), <http://www.billboard.com/articles/business/7972868/us-music-industry-revenue-growth-accelerates-paid-streaming-50-percent> [<https://perma.cc/P8T6-UAZ9>].

110. See *Go Premium*, SPOTIFY, <https://www.spotify.com/us/premium/?checkout=false> [<https://perma.cc/JRB7-RRDB>] (last visited Nov. 16, 2017). But see *Spotify Premium for Students, Now with Hulu*, SPOTIFY, <https://www.spotify.com/us/student/> [<https://perma.cc/C87M-M69B>] (last visited Nov. 16, 2017) (stating that Spotify's monthly subscription cost for students is \$4.99

Apple Music<sup>111</sup>), consumers have access to extensive catalogues of music without the interruption of commercials.<sup>112</sup>

Labels make money from online digital download and streaming services in disparate ways. For example, labels make money from on-demand streaming subscription services by licensing their vast music inventories to the services for multimillion-dollar advances against the labels' royalties (in main, labels are paid hefty royalties based on usage of their music and the services' advertising and subscription revenue) usually expressed as minimum guaranteed revenue.<sup>113</sup> If the advances exceed the royalties earned by the labels during a given license period, the labels retain the difference, which they purportedly share with their artists.<sup>114</sup> This unallocated surplus revenue is called "breakage," which the current three major recording companies—Sony Music Entertainment, Warner Music Group, and Universal Music Group—maintain that they distribute to their artists.<sup>115</sup> However, these labels do not transparently detail how much of the breakage they share with their artists, and in any event, an individual artist's recording contract may have the ultimate say in what that artist receives from such unallocated monies.<sup>116</sup> The recording contract language could state that the label is not required

and includes access to Hulu, a TV streaming service); *Premium for Family*, SPOTIFY, <https://www.spotify.com/us/family/> [<https://perma.cc/42BU-MA6N>] (last visited Nov. 16, 2017) (stating that Spotify's monthly subscription cost for families is \$14.99).

111. *Apple Music*, APPLE, <https://www.apple.com/apple-music/plans/> [<https://perma.cc/ZXH7-TMYZ>] (last visited Nov. 16, 2017) (listing Apple Music's monthly subscription costs as \$9.99 for individuals, \$4.99 for students, and \$14.99 for families). Note that Apple Music has no free service. *Id.*

112. *See id.*; Gary Suarez, *The End of the Streaming Holdout*, FORBES (June 30, 2017, 11:31 PM), <https://www.forbes.com/sites/garysuarez/2017/06/30/the-end-of-the-streaming-holdout/1> [<https://perma.cc/3ZMH-VE5Z>] (explaining that notwithstanding the vast selections on the streaming services, some artists (e.g., Taylor Swift, Garth Brooks, The Beatles, and Neil Young) were initially reluctant to make their music available on them, but many of those artists have since relented); *Go Premium*, *supra* note 110.

113. PASSMAN, *supra* note 24, at 155–56; *see* Sophie Sassard, *Spotify Is Pushing to Sign a New Royalty Deal with Warner Music to Lower Its Costs—And Get Ready for an IPO*, BUS. INSIDER (July 24, 2017), <http://www.businessinsider.com/ahead-of-us-listing-spotify-pushes-to-make-warner-music-royalty-deal-2017-7> [<https://perma.cc/EE47-EX5X>]; Ben Sisario, *Sony Terms with Spotify Uncovered in Contract*, N.Y. TIMES (May 24, 2015), <https://www.nytimes.com/2015/05/25/business/media/sony-terms-with-spotify-uncovered-in-contract.html> [<https://perma.cc/6TKM-MRXM>] (covering a leaked 2011 contract between Spotify and Sony Music revealing that Spotify paid Sony Music "up to \$42.5 million in advance payments and a \$9 million advertising credit").

114. *See* Tim Ingham, *Universal: Yes, We Share Digital Breakage Money with Our Artists*, MUSIC BUS. WORLDWIDE (June 2, 2015), <https://www.musicbusinessworldwide.com/universal-yes-share-breakage-payments-artists/> [<https://perma.cc/NS5N-PQXX>].

115. *Id.*

116. *See id.*

to share any of the breakage with the artist—another earnings inequity codified in a recording contract.<sup>117</sup>

In relation to the labels' share, earnings by artists for digital music are paltry. For example, the royalty received by a label from iTunes for a digital download of a particular track is 70 percent of the retail price; so, for a \$1.29 download,<sup>118</sup> the label receives approximately \$0.91.<sup>119</sup> The label then pays the artist the same royalty that artist earns from other types of exploitations under the artist's contract. If, for instance, the artist's contractual royalty rate is 10 percent, then the artist receives \$0.091 for a single iTunes download.<sup>120</sup> For a \$9.99 album download, iTunes pays the label \$7.00, and the artist with a 10 percent royalty rate earns \$0.70 per such album download.

As mentioned above, streaming services pay labels sizable guaranteed upfront payments and royalties—but have “extremely low” payouts to artists.<sup>121</sup> Per stream of a particular track on Napster (now a legitimate platform), the estimated artist payout rate is only \$0.0167; on Tidal, \$0.0110; on Apple Music, \$0.0064; on Google Play, \$0.0059; on Spotify, \$0.0038; on Pandora, \$0.0011; and on YouTube, \$0.0006.<sup>122</sup>

So, artists are earning only pennies or fractions of pennies per download or stream of their recorded music calculated based on their existing royalty rates, as opposed to dollars from the sales of physical product as in the past. When physical product dominated the marketplace, artists could arguably make a living from their record royalties. Since the amount of physical product sold has dramatically shrunk of late (CDs are still sold in the marketplace, but such sales have precipitously declined<sup>123</sup>), artists have been unable to rely on

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117. See Jeff John Roberts, *Record Labels' Ties to Spotify Draw Fire in American Idol Lawsuit*, FORTUNE (June 24, 2015), <http://fortune.com/2015/06/24/sony-spotify-royalties/> [<https://perma.cc/BGH7-ZCU2>]. To further compound the earnings inequity between labels and artists, the labels actually have ownership interests in some of the digital music services. *Id.*

118. This is for the upper tier of the price range of iTunes downloads. See PASSMAN, *supra* note 24, at 153. For a \$0.99 download, the label's share is \$0.69 and the artist's share (assuming a 10 percent royalty rate) is \$0.069. *Id.*

119. *Id.*

120. *Id.* at 152.

121. Hugh McIntyre, *What Do the Major Streaming Services Pay Per Stream?*, FORBES (July 27, 2017, 8:15 AM), <https://www.forbes.com/sites/hughmcintyre/2017/07/27/what-do-the-major-streaming-services-pay-per-stream/#4223b534448c> [<https://perma.cc/FF72-T9ZP>].

122. *Id.*

123. In 2016, CD sales were down 16.3 percent from 2015. Murnane, *supra* note 108. During the first half of 2017, CD sales fell 3 percent compared to the first half of 2016. Rys, *supra* note 109. Interestingly, vinyl sales were up 3 percent, representing “29 percent of all

record royalties as a solid source of income. Even the top-tier artists have seen their physical sales and earnings diminish and are displeased with their digital music earnings, as well.<sup>124</sup> From the 1980s through the early 2000s, it was commonplace for numerous music stars to sell millions of physical copies of their albums and earn millions of dollars from these sales. Today, however, millions of digital streams do not necessarily translate to millions of dollars earned. In fact, one million streams on Spotify may pay under \$5,000 to the artist.<sup>125</sup> Even for an extremely high number of streams—in the multimillions—artists reap less than a million dollars. Over 45 million Spotify streams of a song may pay only \$280,000–\$390,000.<sup>126</sup>

Artists continually assert that their current digital music earnings situation is especially dire and unfair, so much so that some of the biggest artists in the music industry for years boycotted the online downloading and streaming music services by refusing to offer their music in such formats at all, whether for free or at a cost to the consumer. The services, the artists argued, devalue their music by not charging consumers sufficiently for the product and not according the artists enough proceeds, whether directly or through their respective labels. Such holdouts from streaming services included The Beatles,

physical sales revenue, its highest share of the sector since the mid-1980s . . . While its growth is slowing, the [vinyl] format is still gaining, long after many claimed it had peaked.” *Id.*

Vinyl records have made somewhat of a comeback, but the average artist does not earn much in vinyl record sales. *See id.* Cassette tapes, too, are reappearing on the market as “special” or collectors’ items. *See* Hugh McIntyre, *Cassettes Are Making a Comeback, But Which Artists Are Actually Selling Them?*, FORBES (May 8, 2017, 1:55 PM), <https://www.forbes.com/sites/hughmcintyre/2017/05/08/cassettes-are-making-a-comeback-but-which-artists-are-actually-selling-them/> [<https://perma.cc/2AX7-E3WB>].

124. *See* Hugh McIntyre, *These Were the 10 Best Selling CDs in the U.S. in 2016*, FORBES (Jan. 15, 2017, 8:45 AM), <https://www.forbes.com/sites/hughmcintyre/2017/01/15/these-were-the-10-best-selling-cds-in-the-u-s-in-2016/#48422d487212> [<https://perma.cc/9KX4-2HLM>]. CD sales, while down, are not extinct and remain fairly substantial for some artists. *Id.* For example, Adele’s 25 album (which was released in late 2015) was the bestselling album in the CD format in 2016 at 1.1 million CDs. *Id.* The group Pentatonix came in second place, selling 640,000 CDs in 2016. *Id.* Nonetheless, in years past, these sales figures would have been a great deal more. *See id.*

125. *See* Paul Resnikoff, *My Band Has 1,000,000 Spotify Streams. Want to See Our Royalties?*, DIGITAL MUSIC NEWS (May 26, 2016), <https://www.digitalmusicnews.com/2016/05/26/band-1-million-spotify-streams-royalties/> [<https://perma.cc/L454-DDNG>].

126. *See* David Johnson, *See How Much Every Top Artist Makes on Spotify*, TIME (Nov. 18, 2014), <http://time.com/3590670/542spotify-calculator/> [<https://perma.cc/WYH5-XN7Y>]. Spotify has a stated pay range per stream (based on the free-to-consumer ad-supported service or the paid premium service), so the range of payouts is affected accordingly. *Id.* Also, the payouts are to the rights holder (e.g., the label, if an artist is signed to one), so the artist may receive less. For example, 46.2 million Spotify streams of Taylor Swift’s song “Shake It Off” paid \$280,000 to \$390,000 to the rights holder. *Id.*

Garth Brooks, Taylor Swift, and Jay-Z.<sup>127</sup> Notably, though, all of these cited artists have recently relented, and their music is now available on various streaming platforms (e.g., Spotify, Apple Music, Amazon, and Tidal).<sup>128</sup> As the streaming platform has taken precedence with consumers, the antistreaming stance seems more and more out of step and self-defeating. In other words, “if you can’t beat them, join them”—even if reluctantly.

Labels, too, are not especially pleased with the digital music landscape. Despite an uptick in paid streaming subscriptions<sup>129</sup>—and while labels indeed are making more than artists from digital music<sup>130</sup>—for both labels and artists, the monies realized from digital music are not nearly as much as former, plentiful physical sales.<sup>131</sup> In particular, labels and artists still endure lower per-play revenue from free-to-consumer ad-supported streaming<sup>132</sup> and zero revenue from piracy.<sup>133</sup> As with artists, labels have contended that they are likewise struggling for survival and have felt pressure to devise ways of replacing past means of income; increases in paid streaming revenue have a long way to go to counteract the decline in physical music and digital download revenue and to restore the music industry back to a flush position.<sup>134</sup>

In recent years, labels changed the long-established recording contract to address fading record-sales income. Contractually, artists now grant broader rights to the labels. Instead of depending almost solely on the sale of sound recordings for their fortunes, labels now

127. Suarez, *supra* note 112.

128. *Id.*; see also Dan Rys, *Tidal's Sprint Deal: The Good, the Bad, the Unknown*, BILLBOARD (Jan. 13, 2017), <http://www.billboard.com/articles/business/7662726/tidal-sprint-deal-future> [<https://perma.cc/6ABS-H3JF>] (indicating that Jay-Z is one of the owners of Tidal, an artist-owned and self-proclaimed artist-friendly streaming service launched in March 2015). Among Tidal's twenty artist owners are Beyoncé, Kanye West, and Nicki Minaj. *Id.* Tidal prides itself on offering exclusive streaming experiences. *Id.* Sprint bought a 33 percent stake in Tidal in 2017. *Id.*

129. Rys, *supra* note 109.

130. See McIntyre, *supra* note 121.

131. See Sisario & Russell, *supra* note 47 (demonstrating that streaming now accounts for the majority of total music sales revenue, but has not yet “saved the music business”). “[M]uch money has vanished from the music business as consumers have abandoned its most profitable product: the CD.” *Id.* In 2006, US CD sales were \$9.4 billion, which is more than total music sales revenue presently. *Id.* In 2015, CD sales were \$1.5 billion, an 84 percent drop from 2006. *Id.*

132. See Rys, *supra* note 109.

133. See Marc Schneider, *RIAA Submits List of 'Notorious' Sites, Calls Out Russian Counterfeiters*, BILLBOARD (Oct. 10, 2017), <http://www.billboard.com/articles/business/7990529/riaa-submits-list-notorious-markets-sites-infringers> [<https://perma.cc/EW27-YW32>].

134. Sisario & Russell, *supra* note 47 (“[I]t seems doubtful that [the music industry] will ever earn back what it has lost from the CD.”).

participate in other artist-related income streams, taking some of the monies artists earn from touring, merchandising, endorsements, songwriting, and more.<sup>135</sup> Faced with diminishing record-sales profits and challenges to their traditional business model, labels invented the all-encompassing “360 deal.”<sup>136</sup>

### *B. The 360 Deal*

Favored by the major labels and, increasingly, independent labels, 360 recording contracts (sometimes called “360°,” “multiple-rights,” or “collateral entertainment activities” contracts) include provisions allowing the labels to participate in artists’ revenue sources other than merely sound recordings.<sup>137</sup> This participation is usually expressed as the labels’ taking percentages of the artists’ receipts from ancillary entertainment (i.e., non-record) income streams. For example, a label’s rights under a 360 deal might include taking 10–35 percent of the artist’s net monies from live performance, music publishing (i.e., songwriting), merchandise (e.g., t-shirts, ball caps, coffee mugs, or keychains bearing the artist’s name and likeness), product endorsement, sponsorship, fan club, and acting income.<sup>138</sup>

The precise percentages realized by the labels, along with which particular ancillary activity rights are folded into the contract, are subject to negotiation. As opposed to beginning artists, superstar artists may be able to limit the number of collateral entertainment activities included in the contract and negotiate lower label participation percentages.<sup>139</sup> Furthermore, established songwriters signing 360 deals may be able to exclude music publishing revenue from the contracts, established actors signing 360 deals may be able to exclude acting income from the contracts, and so on.<sup>140</sup> Nonetheless, even superstar artists are not immune to the pervasive reality of 360 deals.<sup>141</sup> Madonna, Lady Gaga, and Jay-Z are among the big-name

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135. PASSMAN, *supra* note 24, at 102–06.

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.* A superstar may even be able to negotiate a traditional record deal, i.e., with no ancillary income participation by the label. *See id.*

140. *See* Steve Gordon, *How to Avoid Getting Completely Screwed by a 360 Degree Deal*, DIGITAL MUSIC NEWS (July 2, 2013), <https://www.digitalmusicnews.com/2013/07/02/threesixty/> [<https://perma.cc/X4T7-893V>] (asserting that if prior to signing with a label, an artist is earning money from certain sources, these sources should be carved out from that label’s 360 participation because the label is not helping to create these revenue streams).

141. *See id.* (“The first reported [360 deal] was English recording star Robbie Williams’ deal with EMI in 2002.”)

artists who have signed such all-inclusive contracts, albeit in exchange for huge advances against future royalties or other enticing financial incentives.<sup>142</sup>

While 360 deals have become the norm in terms of recording contracts offered to artists, they are nonetheless controversial. Labels reach into artists' ancillary revenue streams, they contend, because they invest so much in developing and marketing artists' career identities,<sup>143</sup> and but for the labels' investment, the artists would not rise to stardom and attract show offers, endorsements, sponsorships, fans, acting jobs, and other types of lucrative opportunities.<sup>144</sup> Therefore, the labels think it is only fair that they share in all of the revenue streams that they help generate.<sup>145</sup>

Recording artists, however, view 360 deals as "cash grabs" by the labels in the climate of dwindling record sales. By reaching deeper into artists' pockets, the labels try to compensate for lost recorded music revenue. For the most part, artists dispute labels' entitlement to their income related to collateral entertainment activities.<sup>146</sup> Artists assert that they have worked hard to create their own career opportunities, especially in conjunction with other members of their teams, such as personal managers, business managers, attorneys, and independent publicists.<sup>147</sup> To artists, 360 deals are just another vehicle for labels to financially oppress them.

Regardless of his or her opinion on 360 deals, if an aspiring artist wants to sign a major (or even perhaps an independent) label

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142. Gil Kaufman, *Jay-Z About to Sign \$150 Million Deal with Live Nation: Report*, MTV (Apr. 3, 2008), <http://www.mtv.com/news/1584696/jay-z-about-to-sign-150-million-deal-with-live-nation-report/> [<https://perma.cc/9R2U-XKZW>] (reporting that both Madonna and Jay-Z signed 360 deals worth over \$100 million each with Live Nation (not a traditional label)); see also Johnnie L. Roberts, *Why Lady Gaga's 'Born This Way' May Save the Music Industry*, WRAP (Nov. 4, 2013, 4:22 PM), <https://www.thewrap.com/lady-gagas-360-ways-midwife-music-industrys-rebirth-27264/> [<https://perma.cc/T75X-LP2J>] (reporting on Lady Gaga's especially successful 360 deal with Universal Music Group's Interscope Records, which has proven lucrative for both the label and the artist—raking in millions of dollars in record, live show, and merchandise sales, and endorsements).

143. PASSMAN, *supra* note 24, at 102; Gordon, *supra* note 140.

144. See Gordon, *supra* note 140.

145. See *id.*

146. *Id.* ("Many artists and their representatives would contend that it isn't their fault that the labels are making less money from their records. 360 deals, they would maintain, are just a cynical money grab by record companies who are facing dwindling income from recorded music because they have failed to react appropriately to the changing industry. Asking artists to foot the bill hardly seems fair."); see also PASSMAN, *supra* note 24, at 102 ("[M]any people see [360 deals] simply as a land grab, arguing that the company brings no value to the party beyond their record business expertise.").

147. See *id.*



contract, a 360 deal may be the only type of agreement offered.<sup>148</sup> Even a veteran artist seeking a new label might not be able totally to escape the multirights model; however, with enough bargaining power, such an artist may limit the label's ancillary income participation both in types of activities and percentages.<sup>149</sup>

Still, other artists may choose to look beyond outright reliance on any kind of recording contract whatsoever. These "non-recording"<sup>150</sup> artists may not even wholly consider themselves "artists," but rather their own general brands, seeking opportunities completely outside of the recorded music industry that could prove more stable and financially rewarding than banking on evermore overreaching label contracts and meager music sales.

## V. THE ARTIST BRAND ENTREPRENEUR AND NON-MUSIC ENTERPRISES

Faced with limited income from recorded music and with hard-to-find, overreaching, and inequitable recording contracts, many artists seek to increase their professional and revenue prospects through other conventional and emerging music industry avenues—such as live concerts (including trendy house concerts and music-themed cruises); tour-driven merchandise (e.g., t-shirts, ball caps, keychains, koozies, and various other trinkets sold at shows bearing the artist's name, likeness, album, or tour name); tour sponsorships; music-related product endorsements or ownership (e.g., microphone,<sup>151</sup> instrument, and equipment endorsements and the founding of companies<sup>152</sup>); music licenses for films, television shows, and television commercials; roles on music-themed shows (e.g., "American Idol" and "The Voice"<sup>153</sup>); and crowdfunding ventures to

148. PASSMAN, *supra* note 24, at 102–03.

149. *Id.* at 103; Gordon, *supra* note 140.

150. See *supra* note 48 (noting that the term "non-recording" is used nonliterally because even artists who explore non-music branding may still make records).

151. Artists who endorse Shure Microphones include Jennifer Lopez, Miguel, Sheryl Crow, and Panic! at the Disco. *Artists Index*, SHURE, <http://www.shure.com/americas/artists/artists-index> [<https://perma.cc/Y734-ETBE>] (last visited Nov. 16, 2017).

152. See David Browne, *'The Defiant Ones': Dr. Dre and Jimmy Iovine's Wild Adventure*, ROLLING STONE (July 7, 2017), <http://www.rollingstone.com/tv/features/the-defiant-ones-dr-dre-and-jimmy-iovines-wild-adventure-w491039> [<https://perma.cc/manage/create>]. Rapper Dr. Dre and music executive and producer Jimmy Iovine founded headphone company Beats Electronics in 2006 and sold the company to Apple in 2014 for \$3 billion. *Id.*

153. See Devon Maloney, *Mariah Carey's \$18 Million 'Idol' Deal: How Does It Measure Up to Stars' TV Paydays?*, SPIN (July 24, 2012), <https://www.spin.com/2012/07/mariah-careys-18-million-idol-deal-how-does-it-measure-stars-tv-paydays/> [<https://perma.cc/9ZQ5-VCFL>]. The purported salaries of artist judges in certain seasons of "American Idol," "The Voice," and "The X Factor" were: \$18 million for Mariah Carey to participate in one season of "American Idol"; \$15 million for Britney Spears to be on one season of "The X Factor"; and \$10 million for Christina

cover the costs of recording, manufacturing, distributing, publicizing, and promoting their own recording and music video projects (for example, via PledgeMusic, Kickstarter, and Indiegogo campaigns).

A growing number of artists are, though, exploring their identities outside of the music industry by extending, or even reinventing, themselves as non-music lifestyle brands.<sup>154</sup> These artists are using trademark law to propel their careers into areas of fashion, kitchenware, perfume, restaurants, cooking and talk television shows, sitcoms, and more.<sup>155</sup> Some of these artists are arguably achieving longer-standing financial stability and celebrity with their non-music projects than in their music careers.<sup>156</sup> In most

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Aguilera to be in two seasons of "The Voice." *Id.*; see also Variety Staff, 'American Idol' Premiere Date Revealed, VARIETY (Nov. 6, 2017, 6:53 AM), <http://variety.com/2017/music/news/american-idol-abc-premiere-date-1202607674/> (remarking that Katy Perry joined ABC's 2018 "American Idol" reboot for a \$25 million salary).

154. See *Moving Beyond Musical Success*, ENTREPRENEUR (May 27, 2010), <https://www.entrepreneur.com/slideshow/205899> [<https://perma.cc/2FM4-JDCZ>]; see also Kacie Lynn Jung & Matthew Merlin, *Lifestyle Branding: As More Companies Embrace It, Consumer Opposition Grows*, J. INTEGRATED MARKETING COMM., 2002–03, at 40, 40 ("Lifestyle branding can be defined as a product or service that provides consumers with an emotional attachment to an identifiable lifestyle—the rugged outdoorsman, the posh executive or an urban hipster, for example. The consumer then projects this lifestyle to society by purchasing and using particular brands.").

155. Reba McEntire, for instance, has USPTO trademark registrations for the mark REBA in connection with, among other things, International Class (IC) 3 for lipstick, REBA, Registration No. 4,910,035; IC 8 for kitchen flatware, REBA, Registration No. 4,186,530; IC 21 for cookware, REBA, Registration No. 4,298,384; IC 24 for bed linens, REBA, Registration No. 3,428,523; and IC 25 for women's footwear, REBA, Registration No. 3,485,700. On the whole, McEntire's registrations are owned by her trust with her as trustee. See, e.g., REBA, Registration No. 4,910,035 (listing the owner as "(REGISTRANT) The Trustee of The Smith Trust, a Tennessee Trust, the trustees comprising Reba McEntire Blackstock"). Justin Bieber, too, has multiple trademark registrations for the mark JUSTIN BIEBER in connection with IC 3 for perfume, cosmetics, and bath gels; IC 14 for jewelry; IC 18 for bags and luggage; IC 24 for bed linens; IC 28 for toy action figures and board games. JUSTIN BIEBER, Registration No. 4,516,933; JUSTIN BIEBER, Registration No. 4,396,533. Bieber's company owns the marks. See JUSTIN BIEBER, Registration No. 4,516,933 (listing the trademark owner as Bieber Time Holdings, LLC); JUSTIN BIEBER, Registration No. 4,396,533 (same). Additionally, Kid Rock has applied with the USPTO for the mark KID ROCK'S MADE IN DETROIT in IC 43 for "[r]estaurant and bar services." U.S. Trademark Application Serial No. 87/448,326 (filed May 12, 2017) (listing Kid Rock's companies Bobby Moscow LLC and Top Dog Records, Inc., as owners).

156. See Amy Larocca, *The \$1 Billion Girl: Jessica Simpson Is Laughing All the Way to the Fashion Bank*, N.Y. MAG., (Feb. 13, 2011), <http://nymag.com/fashion/11/spring/71664/> [<https://perma.cc/AJ76-EUHY>] (discussing pop star Jessica Simpson's "Jessica Simpson Collection" fashion lines, which involve "a dizzyingly enormous amount of stuff" generating "a staggering amount of money," and which yield about the same annual sales volume as Michael Kors' lines); see also Roberto A. Ferdman, *Music Made Sean 'Diddy' Combs Famous, But Here's What Made Him Rich*, WASH. POST (Oct. 2, 2015), [https://www.washingtonpost.com/news/wonk/wp/2015/10/02/sean-p-diddy-combs-donald-trump-is-not-the-only-person-who-is-a-model-mogul/?utm\\_term=.212f4ad27f30](https://www.washingtonpost.com/news/wonk/wp/2015/10/02/sean-p-diddy-combs-donald-trump-is-not-the-only-person-who-is-a-model-mogul/?utm_term=.212f4ad27f30) [<https://perma.cc/KAR7-GTFT>] (discussing the massive earnings by Sean "Diddy" Combs and Jay-Z from non-music sources). "Though some [artists] still

instances, however, established music careers provide the platform from which these artists derive their fame and public personas, allowing them to try to transfer such fame and public personas to non-music enterprises.<sup>157</sup>

*A. Living in a Material World:  
Trademarks and Artists' Non-Music Goods and Services*

Depending on the nature of the artist's non-music activity, he or she may register the brand name associated with the activity as a trademark or a service mark. A trademark is "a word, phrase, symbol, or design, or a combination thereof, that identifies and distinguishes the source of the goods of one party from those of others."<sup>158</sup> A service mark, meanwhile, "is the same as a trademark, except that it identifies and distinguishes the source of a service rather than goods."<sup>159</sup> An artist's professional name, for example, may be a trademark applied to audio recordings and a service mark applied to live musical performance services—indicating that the artist is the source of the recordings and the performances.<sup>160</sup> For simplicity's sake, this Article will refer to both trademarks and service marks as "trademarks" or "marks."<sup>161</sup>

The Lanham Act,<sup>162</sup> which codifies US trademark law, requires that a mark be used in commerce<sup>163</sup> prior to its registration with the

earn plenty for it, music has become a much less lucrative realm in recent years, thanks in large part to how it's shared." Ferdman, *supra*. Certain savvy artists, however, "have harnessed their own personal brands into more successful careers than music alone could ever have allowed for." *Id.*

157. Fame achieved as an artist, however, is no guarantee of success in non-music lifestyle branding. See Rachel Dodes, *Recession Dims Stars' Style Power*, WALL ST. J. (Sept. 15, 2009, 12:01 AM), <https://www.wsj.com/articles/SB10001424052970203917304574415002423638752> [<https://perma.cc/8C5T-5ZDM>] (discussing Jennifer Lopez's defunct Sweetface fashion line, among other such celebrity fashion failures).

158. U.S. PATENT & TRADEMARK OFFICE, PROTECTING YOUR TRADEMARK: ENHANCING YOUR RIGHTS THROUGH FEDERAL REGISTRATION 2 (2016), <https://www.uspto.gov/sites/default/files/documents/BasicFacts.pdf> [<https://perma.cc/RWD6-XW4Z>].

159. *Id.*

160. For a discussion regarding classes of goods and services in which artists register their marks, see *infra* notes 171–78 and accompanying text.

161. See also U.S. PATENT & TRADEMARK OFFICE, *supra* note 158, at 2 (using "trademark" and "mark" for service marks).

162. Lanham Act, Pub. L. 79-489, 60 Stat. 427, 427–46 (1946) (codified as amended at 15 U.S.C. §§ 1051–127 (2012)).

163. 15 U.S.C. § 1127 (2012) ("The term 'use in commerce' means the bona fide use of a mark in the ordinary course of trade, and not made merely to reserve a right in a mark. For purposes of this chapter, a mark shall be deemed to be in use in commerce (1) on goods when (A) it is placed in any manner on the goods or their containers or the displays associated therewith or on the tags or labels affixed thereto, or if the nature of the goods makes such placement

US Patent and Trademark Office (USPTO).<sup>164</sup> Such registration affords the markholder exclusive ownership and usage rights in the mark throughout the United States regarding the registration certificate–specified goods or services.<sup>165</sup> After registration, the markholder can prevent others from using and registering the same or similar mark in connection with the same or similar goods or services, as applicable, which might “cause confusion” for consumers as to the source of the goods or services.<sup>166</sup>

While not mandatory, trademark registration with the USPTO protects the markholder’s valuable intellectual property and puts the public on notice as to the markholder’s assertion of rights.<sup>167</sup> Provided the markholder maintains the registration by proving continuous use of the mark in commerce and timely filing registration renewal documents, the duration of the markholder’s rights to that mark is perpetual.<sup>168</sup>

impracticable, then on documents associated with the goods or their sale, and (B) the goods are sold or transported in commerce, and (2) on services when it is used or displayed in the sale or advertising of services and the services are rendered in commerce, or the services are rendered in more than one State or in the United States and a foreign country and the person rendering the services is engaged in commerce in connection with the services.”)

164. *See id.* § 1051(a).

165. *Id.* § 1057(b) (“Certificate as prima facie evidence[—]A certificate of registration of a mark upon the principal register provided by this chapter shall be prima facie evidence of the validity of the registered mark and of the registration of the mark, of the owner’s ownership of the mark, and of the owner’s exclusive right to use the registered mark in commerce on or in connection with the goods or services specified in the certificate, subject to any conditions or limitations stated in the certificate.”).

166. *Id.* § 1052(d).

167. *Id.* § 1111. The use of the ® symbol affixed to the trademark, which use is permitted after USPTO registration, puts the public on notice as to the owner’s assertion of rights to the mark. Instead of the ® symbol, the owner may use the words “Registered in U.S. Patent and Trademark Office” or “Reg. U.S. Pat. & Tm. Off.” with the mark. *Id.*; *see also Trademark Process*, USPTO (Oct. 18, 2017, 11:50 AM), <https://www.uspto.gov/trademarks-getting-started/trademark-process#last-anchor> [<https://perma.cc/7H4H-KVLP>]. The USPTO application-to-registration process involves various steps and takes between several months to over a year. *See Trademark Process*, *supra*.

168. *See* 15 U.S.C. §§ 1058–59; U.S. PATENT & TRADEMARK OFFICE, *supra* note 158, at 27–28. Starting between the fifth and sixth years after the registration date of a mark, the owner must file declarations with the USPTO at prescribed intervals attesting that the mark continues to be in use in commerce (and, therefore, is still a valid trademark). 15 U.S.C. §§ 1058–59; U.S. PATENT & TRADEMARK OFFICE, *supra* note 158, at 27–28. Starting between the ninth and tenth years after the registration date and then every subsequent ten years thereafter, the owner again affirms continuous use of the mark and renews the registration. 15 U.S.C. §§ 1058–59; U.S. PATENT & TRADEMARK OFFICE, *supra* note 158, at 27–28. If the owner fails to timely file these trademark maintenance documents, the registration cancels or expires and cannot be reinstated. 15 U.S.C. §§ 1058–59; U.S. PATENT & TRADEMARK OFFICE, *supra* note 158, at 27–28. If the owner still wants federal registration of the canceled or expired mark, he or she would need to file a new USPTO application for the mark. 15 U.S.C. §§ 1058–59; U.S. PATENT & TRADEMARK OFFICE, *supra* note 158, at 27–28. There is, however, no guarantee that the mark

A trademark applicant typically registers the mark with the USPTO in whichever particular “international class”<sup>169</sup> (IC) of goods or services the applicant is utilizing the mark in commerce. An applicant may register the mark in as many ICs as that mark is used.<sup>170</sup>

An artist typically registers his or her professional stage name with the USPTO in IC 9 and IC 41. IC 9 includes “apparatus for recording, transmission or reproduction of sound or images . . . [like] recording discs, compact discs, DVDs and other digital recording media” (i.e., for music industry purposes, recorded goods).<sup>171</sup> IC 41 includes “services intended to entertain or to engage the attention,” particularly “services having the basic aim of the entertainment, amusement or recreation of people” (i.e., for music industry purposes, live performance services and allied services, such as non-downloadable digital music on the Internet and artists’ websites).<sup>172</sup> For instance, Stefani Germanotta, professionally known as “Lady Gaga,”<sup>173</sup> owns the LADY GAGA mark in IC 9 in connection with “[s]eries of musical sound recordings, audio-visual recordings featuring music and musical-based entertainment; downloadable musical sound recordings and audio-visual recordings featuring music and musical-based entertainment”;<sup>174</sup> and in IC 41 in connection with “[e]ntertainment services, namely, performances and public appearances by a live musical artist and providing non-downloadable

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would again successfully attain registration. See 15 U.S.C. §§ 1058–59; U.S. PATENT & TRADEMARK OFFICE, *supra* note 158, at 27–28.

169. The USPTO’s *Trademark Manual of Examining Procedure* lists forty-five international classes of goods and services. International classes 1 to 34 are for goods and 35 to 45 for services. U.S. PATENT & TRADEMARK OFFICE, TRADEMARK MANUAL OF EXAMINING PROCEDURE § 1401.02(a) (2017) [hereinafter TMEP]. Used by many countries, including the United States, the international classes provide uniformity for trademark applicants and examining authorities. Cf. *International Patent Classification: Frequently Asked Questions*, WIPO, <http://www.wipo.int/classifications/ipc/en/faq/> [<https://perma.cc/CV72-V5C4>] (last visited Nov. 12, 2017).

170. 15 U.S.C. § 1112; TMEP, *supra* note 169, § 801.01(b) (“Combined (Multiple Class) Application”).

171. TMEP, *supra* note 169, § 1401.02(a).

172. *Id.*

173. See Mike Koplow & Gary Nelson, *Lady Gaga: Famous Performer; Not So Famous Trademark*, FASHION INTELL. PROP. BLOG (Sept. 1, 2017), <https://blog.lrrc.com/fashion/2017/09/01/lady-gaga-famous-performer-not-famous-trademark/> [<https://perma.cc/QW3N-QDL3>]. Germanotta’s marks are registered in her name or the name of her corporation, Ate My Heart Inc., a California-registered corporation. See, e.g., LADY GAGA, Registration No. 3,960,468 (listing as the trademark owner, “(REGISTRANT) Ate My Heart Inc. CORPORATION CALIFORNIA.”).

174. LADY GAGA, Registration No. 3,960,468.

prerecorded music online and information regarding a musical artist online via a global computer network.”<sup>175</sup>

Occasionally, an artist will register marks in additional ICs of goods or services related to his or her music career, such as IC 16 for “[p]aper goods and printed matter” and IC 25 for “[c]lothing.”<sup>176</sup> For instance, Lady Gaga’s Ate My Heart Inc. owns IC 16 LADY GAGA trademarks in connection with, among other things, “decalcomanias; stickers; folders; notebooks; temporary tattoos; posters; lenticular posters; calendars; [and] souvenir programs concerning musical events;”<sup>177</sup> and IC 25 LADY GAGA trademarks in connection with, *inter alia*, “[s]hirts, t-shirts, tank tops, hooded jackets, hooded sweatshirts; headwear and hats; [and] clothing accessories, namely raglans.”<sup>178</sup>

Artist brand entrepreneurs further extend their trademark usage and ownership. As one might diversify one’s portfolio of investments to minimize the risk of having too much money in any particular type of investment (i.e., spreading the risk over a variety of sectors and financial instruments), savvy artists in recent years have broadened their trademark portfolios beyond music business-focused goods and services.<sup>179</sup> This allows artists to continue promoting products (and themselves) and earning livings even when their music sales are down.

These entrepreneurs have expanded their brands, and hence their trademark collections, into a range of lifestyle products and services. Consumers can utilize goods and services bearing the artists’ trademarks across a cohesive line the same way that such consumers can utilize the goods and services of any other retail lines. For

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175. LADY GAGA, Registration No. 3,695,038.

176. TMEP, *supra* note 169, § 1401.02(a); *see also* *Rockin’ the Trademark*, USPTO (June 28, 2016, 8:46 AM), <https://www.uspto.gov/trademark/laws-regulations/rockin-trademark#top> [<https://perma.cc/R63Z-QHUA>] (describing procedural matters along with relevant goods and services in IC 9, IC 16, IC 25, and IC 41 to assist artists who are applying for trademark registrations); GORDON, *supra* note 88, at 78 (describing how artists who are “[m]ore sophisticated retailers” may register marks in IC 35 for “retail store services” and IC 38 for “online streaming services,” in addition to IC 9, IC 16, IC 25, and IC 41).

177. LADY GAGA, Registration No. 5,116,758.

178. *Id.*

179. *See Taylor Swift, Trademarks and Music’s New Branding Model*, KNOWLEDGE@WHARTON (Mar. 4, 2015), <http://knowledge.wharton.upenn.edu/article/taylor-swift-trademarks-and-musics-new-branding-model/> [<https://perma.cc/9U8V-9ZSW>] (describing Taylor Swift’s trademark portfolio growth for non-music products: “Taylor Swift turned to the trademark law because what she wants to do is to pull little, short phrases out of her lyrics and have some kind of property right in them when they are applied to products and services—products like knitting needles, Christmas stockings, baby bibs and sweepstakes contests . . . She’s gotten imaginative, and her lawyers have cooked up this scheme.”).

example, country music star Trisha Yearwood's non-music offerings include cookbooks, cookware, furniture, and a television show, and she has been compared to well-known lifestyle guru Martha Stewart.<sup>180</sup>

It is important to note the difference between an artist brand entrepreneur's coordinated non-music branding efforts and a traditional artist endorsement deal. In an endorsement situation, an artist generally licenses his or her name and likeness to an already existing company for its advertising in connection with a specific product or service.<sup>181</sup> The artist serves as a pitchman and not much more.<sup>182</sup> The relationship between the artist and the company is typically that of a licensor-licensee with respect to the artist's right of publicity and trademarks and to the company's commercial use thereof.<sup>183</sup> Justin Timberlake, Pitbull, Snop Dogg, Shakira,

180. Zack O'Malley Greenburg, *Can Trisha Yearwood Become Country's Martha Stewart?*, FORBES (July 29, 2015, 9:50 AM), <https://www.forbes.com/sites/zackomalleygreenburg/2015/07/29/can-trisha-yearwood-become-countrys-martha-stewart/#2a6f35213c13> [<https://perma.cc/GLL8-KJNU>].

181. See Grant McCracken, *From Celebrity Pitchman to Creative Director*, HARV. BUS. REV. (Mar. 9, 2011), <https://hbr.org/2011/03/beyond-the-celebrity-pitchman> [<https://perma.cc/ZG8N-36FT>]; see also Oliver Herzfeld, *Prince's Post-Mortem Publicity Rights*, FORBES (May 16, 2016, 09:12 AM), <https://www.forbes.com/sites/oliverherzfeld/2016/05/16/princes-post-mortem-publicity-rights/#3a35b08a23da> [<https://perma.cc/ABF8-Z8GB>] (“[I]f a company wishes to use a photograph of Beyoncé for an advertisement, it must negotiate a copyright license from the photographer, but it may also have to secure a license from Beyoncé herself to commercially exploit her image and likeness pursuant to her publicity rights.”).

182. See McCracken, *supra* note 181. Notwithstanding the typical fronting by a celebrity of a third-party brand, some companies deem superstar artists with especially high-profile, long-term, and lucrative endorsement deals “brand ambassadors,” “partners,” or even “creative directors,” particularly in relation to campaigns and lines for fashion, electronics, and beverages. Andrew Barker, *Branding Deals with Pop Stars Go Beyond the Casual Endorsement*, VARIETY (Apr. 16, 2013, 8:15 AM), <http://variety.com/2013/music/features/endorsement-deals-1200334594/> [<https://perma.cc/3WDY-UE46>]. These artists are not merely one-off pitchmen; rather, for the often long and extended durations of the advertising campaigns, they are truly the global public faces of the companies' brands, or they have discrete product lines under the companies' umbrella brands. See *id.* Adidas, for example, and Kanye West partnered for the shoes Yeezy Boosts. Hayley Phelan, *How Fashion Became Music's New Income Stream*, BILLBOARD (Sept. 11, 2015), <http://www.billboard.com/articles/news/6693279/fashion-music-clothing-brands-style-income-business> [<https://perma.cc/36WS-235C>]. Adidas paid West \$10 million for the deal plus royalties on sales. *Id.* Moreover, Puma paid Rihanna approximately \$10 million to offer input into Puma's female athletic wear lines as a “creative director” and to appear in Puma's campaigns. *Id.* On the beverage side, Pepsi hired “brand ambassador” Beyoncé, whose face appeared on Pepsi cans and in whose career Pepsi invested as a sponsor with a “creative development fund.” Barker, *supra*. 50 Cent partnered with Vitamin Water on his signature flavor, Formula 50. *Id.*

183. See Herzfeld, *supra* note 181; see also Sam Phillips, *Music and Celebrity Licensing*, LICENSE GLOBAL (June 1, 2004), <http://www.licensemag.com/license-global/music-and-celebrity-licensing> [<https://perma.cc/FDC3-AQT3>] (describing the pros and cons of licensing an artist's name and likeness for both the artist-licensor and company-licensee).

Macklemore, Carrie Underwood, Katy Perry, and will.i.am, for instance, have all endorsed food and soda products and have appeared in advertisements for those products.<sup>184</sup> While endorsing Dr. Pepper, however, Macklemore does not necessarily have any significant input into the creation of the beverage or major financial interest in Dr. Pepper Snapple Group, Inc. beyond receiving an almost \$2 million license fee for his services.<sup>185</sup> Moreover, the product is still branded as “Dr. Pepper,” not as an extension of Macklemore’s persona as his own branded business.

An artist brand entrepreneur, however, is more vested in the products and services, having substantial creative input into their development and receiving more financial reward from their exploitation. For the artist brand entrepreneur, the process involves a focused effort on brand growth and protection through federally registered trademark acquisition and collaboration with designers, marketers, publicists, and distributors. The artist is not pitching someone else’s goods and services under that entity’s brand as a spokesperson for hire; rather, the artist is selling his or her self-branded goods and services as a business owner or active, hands-on partner.<sup>186</sup>

Numerous artists have embarked on some type of piecemeal brand expansion into non-music areas, but few have evolved into full-fledged authentic lifestyle brands. Among these few are Jessica Simpson, Trisha Yearwood, and Sean “Diddy” Combs, each of whom built a non-music empire with the assistance of trademark law.

### *B. The Artist Brand Entrepreneur in Action*

Pop music star Jessica Simpson exemplifies the height of an artist brand entrepreneur operating in a non-music arena. The

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184. Allison Aubrey, *This Is How Much Celebrities Get Paid to Endorse Soda and Unhealthy Food*, NPR (June 7, 2016, 5:57 PM), <http://www.npr.org/sections/thesalt/2016/06/07/481123646/this-is-how-much-celebrities-get-paid-to-endorse-soda-and-unhealthy-food> [<https://perma.cc/T76V-XCYA>].

185. See *id.* Macklemore received \$1.8 million to endorse Dr. Pepper; will.i.am was paid \$1 million to endorse Doritos; and Justin Timberlake was paid \$6 million to endorse McDonald’s. *How Much Are Stars Paid to Endorse Junk Food? You’ll Be Shocked*, VOLTEA LA PAGINA (Sept. 12, 2017), <http://voltealapagina.com/how-much-are-stars-paid-to-endorse-junk-food-youll-be-shocked-2/> [<https://perma.cc/MQ83-CJ4G>].

186. The artist brand entrepreneur often partners with other persons or entities via joint ventures or licensing arrangements, but nonetheless remains actively involved in his or her non-music brand development. See, e.g., Millington, *supra* note 15. Drake, for instance, partnered with an ex-banker to create Virginia Black whiskey, but Drake “is fully involved in the ‘creative process’ and . . . the partnership is ‘authentic.’” Drake is a bona fide partner, not simply an endorser of the product. *Id.*



“Jessica Simpson Collection” consists of adult and children’s clothing, shoes, fragrances, sunglasses, jewelry, handbags, home goods, and other wares, and achieves over \$1 billion annually in sales.<sup>187</sup> Simpson, who last released music in 2010,<sup>188</sup> launched her lifestyle company in 2006.<sup>189</sup>

In the late 1990s, the teenaged Simpson’s image was that of a proverbial “dumb blonde” who sold millions of records and had radio hits.<sup>190</sup> As Simpson matured and struggled with her weight and personal life (becoming tabloid press fodder), and also became a mother—and as her music stardom began to fade—she connected with so-called everyday women who could relate to her life. Simpson credits the success of her lifestyle brand to this relatability. The hallmark of Simpson’s lifestyle brand, says Simpson, is her ability to “make every woman feel confident in what they’re wearing.”<sup>191</sup> She notes, “I have been every size on the planet and I understand women . . . I know there’s all different kinds. There’s life in the whole world beyond LA and New York. I understand Middle America and their mindset.”<sup>192</sup> Simpson has parlayed such understanding into a personal fortune of \$150 million.<sup>193</sup>

While Simpson (or her corporate entity) holds USPTO registrations for the JESSICA SIMPSON mark in IC 9 for “audio and

187. Samantha Schnurr, *The Art of the Side Gig: How Jessica Simpson, Bethenny Frankel and More Turned Passions into Paychecks*, E! NEWS (June 27, 2016, 6:00 AM), <http://www.eonline.com/news/775860/the-art-of-the-side-gig-how-jessica-simpson-bethenny-frankel-and-more-turned-passions-into-paychecks> [https://perma.cc/PA5J-4QNX]. Note, too, that Jessica Simpson has pursued other “side gigs.” See, e.g., Lisa Respers France, *Newlyweds: Nick & Jessica’ Was Real, Producer Says*, CNN (July 12, 2017, 12:24 PM), <http://www.cnn.com/2017/07/12/entertainment/jessica-simpson-nick-lachey-newlyweds/> [https://perma.cc/D4QV-C3Y2]. During the height of her music career, Simpson and her then-husband Nick Lachey (himself an artist at the time with the boy band 98 Degrees) starred in the MTV reality television show “Newlyweds: Nick & Jessica,” which ran from 2003 to 2005. *Id.*

188. Jocelyn Vena, *Is Jessica Simpson Returning to Music?*, BILLBOARD (Mar. 18, 2015), <http://www.billboard.com/articles/news/6502459/is-jessica-simpson-returning-to-music> [https://perma.cc/4V8Q-QTP9].

189. Schnurr, *supra* note 187.

190. Natalie Sancimino, *What Is Jessica Simpson’s Net Worth?*, ENTITY (May 29, 2017), <https://www.entitymag.com/jessica-simpson-net-worth/> [https://perma.cc/5292-JM4D] (describing a famous scene from “Newlyweds: Nick & Jessica” that shows “dumb blonde” Simpson mistaking a can of Chicken of the Sea tuna for chicken).

191. Clare O’Connor, *Jessica Simpson’s \$1 Billion Retail Empire: ‘I Understand Women’*, FORBES (May 16, 2014, 3:12 PM), <https://www.forbes.com/forbes/welcome/?toURL=https://www.forbes.com/sites/clareoconnor/2014/05/16/jessica-simpsons-1-billion-retail-empire-i-understand-women/&refURL=&referrer=#2a47a4de17ad> [https://perma.cc/CMF5-RK8J].

192. O’Connor, *supra* note 191; see also Sancimino, *supra* note 190.

193. Sancimino, *supra* note 190.

video discs featuring music and movies; audio and video tapes featuring music and movies . . . [and] prerecorded vinyl records featuring music”<sup>194</sup> and IC 41 for “ENTERTAINMENT SERVICES IN THE NATURE OF LIVE SINGING PERFORMANCES BY AN INDIVIDUAL,”<sup>195</sup> her non-music trademark registrations throughout the years have outnumbered her music-related ones.<sup>196</sup> Among Simpson’s non-music-related trademark registrations with the USPTO are: GET MOVIN’ BY JESSICA SIMPSON in IC 25 for “[a]ctivewear, namely, shorts, pants, leggings, shirts, jackets, sweatshirts, vests and sports bras”;<sup>197</sup> FANCY GIRL JESSICA SIMPSON in IC 3 for “[f]ragrances for personal use, perfumes; bath and body products, namely, body lotions, body creme, body mist, hand creme, bath and shower gel, dusting powder and bath soap”;<sup>198</sup> JESSICA SIMPSON in IC 20 for “[b]ed pillows; fashion and basic bedding, namely, decorative pillows”;<sup>199</sup> JESSICA SIMPSON in IC 25 for “[a]thletic shoes; bathing suits; beachwear; belts; blazers; blouses; . . . denim jeans; dresses; fleece tops; fleece vests; flip-flops . . . pajamas; . . . shirts; shoes; shorts; skirts; [and] slacks”;<sup>200</sup> and JESSICA SIMPSON in IC 14 for “[a]larm clocks; ankle bracelets; ashtrays of precious metal; badges of precious metal; . . . figurines, sculpture, statues; . . . candle holders; . . . costume jewelry; . . . [and] watches[.]”<sup>201</sup>

As demonstrated by her trademark portfolio, the goods promulgated by Simpson reach far past the tangential tour “merch” of an artist.<sup>202</sup> In fact, Simpson’s lifestyle brand and its soaring level of achievement draw comparisons to bona fide powerhouse retail merchandisers like Michael Kors,<sup>203</sup> with some calling Simpson the

194. JESSICA SIMPSON, Registration No. 3,593,274.

195. JESSICA SIMPSON, Registration No. 2,793,751.

196. See Simpson’s current (live) and past (dead) USPTO registrations for various goods and services at Registered and Pending Marks, UNITED STATES PATENT AND TRADEMARK OFFICE, <https://www.uspto.gov/trademark> [<https://perma.cc/Y2XH-XADS>] (last visited Nov. 12, 2017) (follow “Search TESS” hyperlink; then select “Basic Word Mark Search (New User)” hyperlink; in the “Search Term” field, search for “Jessica Simpson”).

197. GET MOVIN’ BY JESSICA SIMPSON, Registration No. 4,744,067.

198. FANCY GIRL JESSICA SIMPSON, Registration No. 4,846,547.

199. JESSICA SIMPSON, Registration No. 4,837,236.

200. JESSICA SIMPSON, Registration No. 3,455,865.

201. JESSICA SIMPSON, Registration No. 3,455,870.

202. Tour merchandise, also known as tour “merch,” is sold at artists’ concerts and includes t-shirts, posters, bumper stickers, and the like bearing the artist’s name, likeness, album, or tour name. Concertgoers often purchase such merch as souvenirs of the live show experience. PASSMAN, *supra* note 24, at 423.

203. See Larocca, *supra* note 156.

“singer-turned-mogul”<sup>204</sup>—a far cry from Simpson’s relying solely on music-related income. Simpson herself notes that some may be surprised at the legitimate nature of her non-music businesses, perhaps since, as she says, she was “a cheesy pop star back in the day.”<sup>205</sup>

The metamorphosis of Jessica Simpson from artist into “style icon”<sup>206</sup> is further evidenced by Sequential Brands Group’s 2015 acquisition of a majority interest in the “Jessica Simpson Collection,”<sup>207</sup> placing Simpson’s brand alongside such other Sequential Brands Group–owned fashion and lifestyle lines like Ellen Tracy, Martha Stewart, and Avia.<sup>208</sup>

Simpson’s “signature lifestyle concept”<sup>209</sup> brand has reached the pinnacle of success, but other artists, such as Trisha Yearwood, are likewise developing into non-music magnates. Soon after Yearwood signed her first record deal with major label MCA Nashville in 1990,<sup>210</sup> her music career skyrocketed with her first number-one hit, “She’s in Love with the Boy,”<sup>211</sup> coming in 1991 from her eponymous debut album.<sup>212</sup> After leaving MCA Nashville in 2007, Yearwood

204. Michelle Coffey, *The Secret Behind Jessica Simpson’s Billion-Dollar Brand*, MARKET WATCH (Apr. 3, 2015), <http://www.marketwatch.com/story/the-secret-behind-jessica-simpsons-billion-dollar-brand-2015-04-02> [<https://perma.cc/99CZ-BN7H>].

205. Kelly Lawler, *Jessica Simpson Explains Why Her Fashion Line Is Size-Inclusive*, USA TODAY (May 18, 2017, 12:06 PM), <https://www.usatoday.com/story/life/entertainthis/2017/05/18/jessica-simpson-explains-why-her-fashion-line-size-inclusive/101826672/> [<https://perma.cc/TJJ8-RA9H>].

206. *Jessica Simpson*, SEQUENTIAL BRANDS GROUP, [http://sequentialbrandsgroup.com/portfolio\\_page/jessica-simpson/](http://sequentialbrandsgroup.com/portfolio_page/jessica-simpson/) [<https://perma.cc/4JCR-JAKW>] (last visited Oct. 26, 2017) (“The Jessica Simpson® Collection is a signature lifestyle concept inspired by and designed in collaboration with Jessica Simpson, the American entertainment, music and style icon.”).

207. Nicole Adlman, *Sequential Buys Jessica Simpson’s Brand, Plans to Turn Her Line into a \$3 Billion Business—Get the Scoop!*, E! NEWS (Apr. 2, 2015, 1:01 PM), <http://www.eonline.com/news/642365/sequential-buys-jessica-simpson-s-brand-plans-to-turn-her-line-into-a-3-billion-business-get-the-scoop> [<https://perma.cc/C6KF-7LTG>].

208. *See Our Brands*, SEQUENTIAL BRANDS GROUP, <https://sequentialbrandsgroup.com/our-brands/> [<https://perma.cc/MB29-25FB>] (last visited Oct. 26, 2017).

209. *Jessica Simpson*, *supra* note 206.

210. *New Exhibit Trisha Yearwood: The Song Remembers When Opens July 3 at Country Music Hall of Fame® and Museum*, NASHVILLE MUSIC CITY (June 17, 2015), [http://www.visitmusiccity.com/pr\\_CMHOFtrisha061715](http://www.visitmusiccity.com/pr_CMHOFtrisha061715) [<https://perma.cc/7WVN-MATC>].

211. *Id.*; see also *Trisha Yearwood: Biography*, TRISHAYEARWOOD.COM, <http://www.trishayearwood.com/bio> [<https://perma.cc/TQ6D-URUA>] (last visited Oct. 26, 2017) (indicating that Yearwood’s “She’s in Love With The Boy” was number one on the Billboard Country Singles Chart).

212. Steve Huey, *Artist Biography*, ALL MUSIC, <https://www.allmusic.com/artist/trisha-yearwood-mn0000749476/biography> [<https://perma.cc/2NRJ-EE3D>] (last visited Oct. 25, 2017).

made one album for the independent label Big Machine Records and then went on “an extended hiatus from music.”<sup>213</sup>

For the next several years, Yearwood wrote best-selling cookbooks, which led to the debut in 2012 of her cooking show “Trisha’s Southern Kitchen” for cable television channel Food Network.<sup>214</sup> In 2014, Yearwood released her most recent solo album, *Prizefighter: Hit After Hit*, as a joint venture between Sony Music Nashville and her own imprint, Gwendolyn Records.<sup>215</sup> A mix of Yearwood’s previous hits and new songs, *Prizefighter* sold 13,000 units in its first week of release.<sup>216</sup> By comparison, Yearwood’s final album with MCA Nashville, released nearly a decade earlier, sold more than 117,000 units in its first week.<sup>217</sup>

As Yearwood has continued to make records and tour intermittently, her attention has meaningfully shifted from the music business to developing her lifestyle brand.<sup>218</sup> As with her music, Yearwood’s lifestyle brand exemplifies her accessibility, authentic

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213. *Id.*

214. *Trisha Yearwood: Biography*, *supra* note 211.

215. Deborah Evans Price, *Trisha Yearwood Signs with Sony, Announces New Album*, BILLBOARD (Aug. 19, 2014, 7:35 PM), <http://www.billboard.com/articles/columns/the-615/6221919/trisha-yearwood-signs-with-sony-announces-new-album> [<https://perma.cc/G4SJ-EWWN>]; see also Wade Jessen, *Trisha Yearwood’s ‘Prizefighter’ Punches Way onto Top Country Album Chart*, BILLBOARD (Nov. 26, 2014), <http://www.billboard.com/articles/columns/chart-beat/6327843/trisha-yearwood-prizefighter-country-albums-chart> [<https://perma.cc/9F4R-5GDQ>]. Garth Brooks, Yearwood’s husband, also signed with Sony in 2014 at about the same time as Yearwood, but he exited the label in 2016 after the release of only one (commercially disappointing) album. Brooks and Yearwood occasionally tour and record together. See Jeremy Burchard, *Garth Brooks Leaves Label, Announces Independent Albums*, WIDE OPEN COUNTRY (Aug. 9, 2016), <http://www.wideopencountry.com/garth-brooks-leaves-label-announces-independent-albums/> [<https://perma.cc/G58B-MPG7>]; Chuck Dauphin, *Trisha Yearwood Talks ‘Christmas Together’ Duet Album and Working With Garth Brooks*, BILLBOARD (Dec. 14, 2016), <https://www.billboard.com/articles/columns/country/7624516/trisha-yearwood-christmas-together-duet-album-garth-brooks> [<https://perma.cc/9D68-Z65S>] (reporting on the 2016 release of a Brooks and Yearwood Christmas album); Calvin Gilbert, *Garth Brooks Signs New Label Deal, Agrees to Digital Downloads of Past Recordings*, CMT (July 10, 2014), <http://www.cmt.com/news/1729039/garth-brooks-signs-new-label-deal-agrees-to-digital-downloads-of-past-recordings/> [<https://perma.cc/ZJX6-LZ7Y>]. Note that, like Brooks, Yearwood is off the Sony Music Nashville roster; she is not among the artists currently appearing on Sony Music Nashville’s website. See *Artists*, SONY MUSIC NASHVILLE, <https://www.sonymusicnashville.com/artist/?label=all> (last visited Dec. 14, 2017).

216. See Jessen, *supra* note 215; see also Thomas Erlewine, *Prizefighter: Hit After Hit*, ALL MUSIC, <https://www.allmusic.com/album/prizefighter-hit-after-hit-mw0002764381> [<https://perma.cc/D5QY-XDZL>] (last visited Nov. 16, 2017).

217. Calvin Gilbert, *Trisha Yearwood’s Jasper County Tops Country Albums Chart* (Sept. 23, 2005), [www.cmt.com/news/1510280/trisha-yearwoods-jasper-county-tops-country-albums-chart/](http://www.cmt.com/news/1510280/trisha-yearwoods-jasper-county-tops-country-albums-chart/) [<https://perma.cc/NEC2-ZQRK>]; see also Huey, *supra* note 212.

218. *Trisha Yearwood: Biography*, *supra* note 211.

Southern personality, and casual, “everywoman appeal”;<sup>219</sup> she is the “CEO with Southern Charm.”<sup>220</sup> Yearwood connects with non-music consumers the same way as with music fans: by being herself.<sup>221</sup>

Building on the success of her cookbooks and the Emmy-winning “Trisha’s Southern Kitchen,” still on-air and popular with both music followers and culinary aficionados,<sup>222</sup> Yearwood has pursued other non-music ventures. Such recent ventures include cookware under her “Trisha’s Precious Metals” line and furniture, rugs, and home accessories under her “Trisha Yearwood Home Collection” line, in addition to a “Trisha Yearwood” fragrance.<sup>223</sup> Furthermore, Yearwood and Williams Sonoma have partnered on her first food line, consisting of five food products based on Yearwood’s recipes—including Trisha’s Biscuit Mix and Trisha’s “Summer in a Cup” cocktail mix.<sup>224</sup>

Like Jessica Simpson, Yearwood, who has sold over 15 million albums in her music career and won three Grammys, is involved in the creation and design of the products bearing her trademarks, concentrating on all details and ensuring that the products reflect her personal style.<sup>225</sup> Yearwood’s next non-music product venture may be designing jewelry.<sup>226</sup>

219. Greenburg, *supra* note 180.

220. *Williams Sonoma Launches Food Collaboration with Trisha Yearwood*, BUS. WIRE (Apr. 27, 2017, 8:30 AM), <http://www.businesswire.com/news/home/20170427005617/en/WILLIAMS-SONOMA-LAUNCHES-FOOD-COLLABORATION-TRISHA-YEARWOOD> [<https://perma.cc/6AC8-67E3>].

221. Dana Feldman, *How Trisha Yearwood Has Reinvented Herself as a Lifestyle Guru*, FORBES (Dec. 22, 2016, 1:02 PM), <https://www.forbes.com/sites/danafeldman/2016/12/22/how-trisha-yearwood-has-reinvented-herself-as-a-lifestyle-guru/#1db57c258b78> [<https://perma.cc/U7R6-59SG>] (“Country music has always been a very accessible genre. I learned quickly that it didn’t work for me to pretend to be somebody else. I have to be myself. I have a conversation with my audience. It’s who I am. It’s what works for me.”); *see also* *Trisha Yearwood: Biography*, *supra* note 211 (quoting Yearwood as stating that her ventures into her cooking show, cookbooks, furniture, cookware, and home accessories “really just happened when I began doing the things I love,” and further quoting Yearwood as saying, “[m]ost of the things in my life that have been successful have been because I had a passion and let it guide me”).

222. Yearwood describes her television show as “a full time job” with twelve-hour production days. Chuck Dauphin, *Trisha Yearwood on ‘Prizefighter’ Album: ‘It Feels Like a Long Time Coming’*, BILLBOARD (Nov. 17, 2014, 3:56 PM), <http://www.billboard.com/articles/columns/the-615/6319890/trisha-yearwood-prizefighter-hit-after-hit-interview> [<https://perma.cc/GN5K-E9C8>].

223. *See* Feldman, *supra* note 221; *Trisha Yearwood: Biography*, *supra* note 211.

224. *Williams Sonoma Launches Food Collaboration with Trisha Yearwood*, *supra* note 220 (describing Williams Sonoma’s “new and exclusive food collaboration with Trisha Yearwood, the country star, television host, and three-time *New York Times* bestselling cookbook author whose home and lifestyle empire continues to grow”).

225. Feldman, *supra* note 221; *see also* Jeryl Brunner, *Trisha Yearwood on What Feeds Her Passion*, FORBES (July 16, 2017, 6:47 AM), <https://www.forbes.com/sites/>

Like Simpson, as well, Yearwood uses trademark law to facilitate her non-music brand-building and protection. The majority of Yearwood's over twenty-five actual USPTO trademark registrations and pending trademark registration applications are for non-music products.<sup>227</sup> While her Trisha Yearwood Enterprises, LLC owns the TRISHA YEARWOOD mark in IC 41 for “[e]ntertainment services in the nature of live musical performances” and “[e]ntertainment services, namely, live, televised and movie appearances by a professional entertainer,”<sup>228</sup> Yearwood's non-music-related marks and applied-for registrations include TRISHA YEARWOOD in IC 3 for “[f]ragrances; perfumes”;<sup>229</sup> TRISHA YEARWOOD in IC 8 for “[b]lades for household knives; knives; carving forks; . . . cheese slicers; cutlery; knife sharpeners”;<sup>230</sup> TRISHA YEARWOOD in IC 11 for “[b]roiling pans; electric frying pans; electric pressure cookers; electric slow cookers; multi-purpose, electric countertop food preparation apparatus for cooking, baking, broiling, roasting, toasting, searing, browning, barbecuing and grilling food; . . . bread making machines; baking ovens; . . . microwave ovens; . . . electric egg cookers; [and] electric rice cookers”;<sup>231</sup> TRISHA YEARWOOD in IC 30 for “[m]ixes making batters for fried foods; biscuit mix; seasoning mixes; food seasoning; barbeque sauces; cake mixes; cookie mixes; seasoned coating mixtures

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jerylbrunner/2016/07/16/trisha-yearwood-on-what-feeds-her-passion/#131364fa57dc [https://perma.cc/5G4D-AT5R] (“All of [Yearwood's] choices to create her blossoming empire stems from love. ‘Everything that I have done has led to these other careers. And they have all come out of something that I enjoy doing. That's why it works,’ she says. ‘You can never say “yes” to something just because you think it might be a hit song or it might make you a lot of money. If you can make choices based on what feeds your soul then you'll be okay.”); Megan O'Neill, *Trisha Yearwood: The Brand Builder*, NASHVILLE LIFESTYLES, <http://www.nashvillelifestyles.com/entertainment/trisha-yearwood-the-brand-builder> [https://perma.cc/V5JP-CK29] (last visited Nov. 12, 2017) (“[T]he music maven is hands on in the representation of her name. She's on every call, in every meeting. She pores over reports with her accountant and is active in every step of product development. She filters through collaboration offers and retail opportunities—plenty come her way—choosing only those that feel authentic.”).

226. Feldman, *supra* note 221.

227. See Yearwood's USPTO registrations for various goods and services at *Registered and Pending Marks*, U.S. PATENT & TRADEMARK OFFICE, <https://www.uspto.gov/trademark> [https://perma.cc/Y2XH-XADS] (last visited Nov. 16, 2017) (follow “Search TESS” hyperlink; then select “Basic Word Mark Search (New User)” hyperlink; in the “Search Term” field, search for “Trisha Yearwood”).

228. TRISHA YEARWOOD, Registration No. 4,392,102. In addition to the enumerated marks, Yearwood owns the TY mark in IC 41 for live musical performance services and in connection with various non-music goods in other ICs. TY, Registration No. 4,943,025.

229. TRISHA YEARWOOD, Registration No. 5,164,919.

230. TRISHA YEARWOOD, Registration No. 5,069,063.

231. U.S. Trademark Application Serial No. 86/223,695 (filed Mar. 17, 2014).

for foods; sauces, and other products”;<sup>232</sup> TRISHA YEARWOOD in IC 32 for “[n]on-alcoholic cocktail bases; non-alcoholic cocktail mixes; fruit flavored beverages; fruit-based beverages, and other products”;<sup>233</sup> TRISHA YEARWOOD HOME COLLECTION in IC 11 for “[l]amps; lighting fixtures”;<sup>234</sup> TRISHA YEARWOOD HOME COLLECTION in IC 14 for “[c]locks”;<sup>235</sup> TRISHA YEARWOOD HOME COLLECTION in IC 20 for “[f]urniture”;<sup>236</sup> TRISHA YEARWOOD HOME COLLECTION in IC 21 for “[t]rays for domestic purposes; ceramic figurines; baskets for domestic use; bowls; candle holders; canister sets; cheese and knife board set[s]; . . . portable beverage container holder[s]; servingware for serving food and drinks; [and] dishes”;<sup>237</sup> and TRISHA YEARWOOD HOME COLLECTION in IC 27 for “[r]ugs; floor mats; [and] floor coverings.”<sup>238</sup>

Indeed, Yearwood’s

earning potential goes beyond her success as a country music star. She’s tipped the scales past music into culinary success and all things home. As her brand keeps growing, taking her far beyond a dependence on music sales, she’s on trend as the music industry continues its shift away from physical product into digital streaming, and artists continue to depend on earnings such as merchandise, as well as branding.<sup>239</sup>

As with Simpson and Yearwood, artist Sean “Diddy” Combs (a.k.a. “Puffy,” “Puff Daddy,” and “P. Diddy”<sup>240</sup>), has not consistently released records in recent years,<sup>241</sup> concentrating more on non-music than music ventures. Combs, who announced his retirement from the music business in 2016 to focus on acting,<sup>242</sup> routinely tops Forbes’ list

232. U.S. Trademark Application Serial No. 87/428,012 (filed Apr. 27, 2017).

233. U.S. Trademark Application Serial No. 87/428,025 (filed Apr. 27, 2017).

234. TRISHA YEARWOOD HOME COLLECTION, Registration No. 5,203,497.

235. TRISHA YEARWOOD HOME COLLECTION, Registration No. 5,203,498.

236. TRISHA YEARWOOD HOME COLLECTION, Registration No. 5,042,013.

237. TRISHA YEARWOOD HOME COLLECTION, Registration No. 5,203,501.

238. TRISHA YEARWOOD HOME COLLECTION, Registration No. 5,203,502.

239. Feldman, *supra* note 221.

240. Chloe Melas, *Sean ‘Diddy’ Combs on the Evolution of His Many Name Changes*, CNN (Sept. 9, 2016, 3:41 PM), <http://www.cnn.com/2016/09/09/entertainment/diddy-name-changes-timeline/index.html> [<https://perma.cc/EKW9-PX7N>]. Growing up, Combs was called “Puff,” and a friend called him “Puffy” because of Combs’s temper. *Id.*

241. Francesca Bacardi, *Sean ‘Diddy’ Combs Announces Retirement from Music to Focus on Acting*, E! NEWS (May 2, 2016, 2:57 PM), <http://www.eonline.com/news/761458/sean-diddy-combs-announces-retirement-from-music-to-focus-on-acting> [<https://perma.cc/PY2R-Z2UK>].

242. *Id.* Combs announced plans to retire after the release of one more album and a tour reuniting artists from Bad Boy Records, a label he founded in 1993; Combs, however, delayed the release of his *No Way Out 2* “final” album due to shoulder and knee surgeries, and as of mid-2017 was uncertain if the album will come out at all. Carl Lamarre, *Puff Daddy Talks ‘Can’t Stop Won’t Stop’ Documentary, 20<sup>th</sup> Anniversary of ‘No Way Out’ & The Importance of Black Excellence*, BILLBOARD (June 20, 2017), <http://www.billboard.com/articles/columns/hip->

of wealthiest hip-hop artists, although most of his earnings are not from music.<sup>243</sup> In the one-year period from June 2016 through June 2017, Combs earned \$130 million, largely from his active interests in Ciroc vodka, DeLeon tequila, and Aquahydrate water<sup>244</sup> and from selling a \$70 million stake in his popular Sean John clothing line (“John” is Combs’s middle name).<sup>245</sup> Additionally, his Bad Boy Records reunion tour added to his income.<sup>246</sup>

From the beginning of his over twenty-five-year music career, Combs—worth a purported \$820 million, making him the richest artist in the country<sup>247</sup>—understood the value of cultivating his brand. He recently said:

Since I was 12 years old, I have always seen my job as providing a product. As I’ve gotten older, that’s shifted to providing a lifestyle. I wanted to make the records that you woke up in the morning to. I wanted to make the clothes you got into after taking a shower. I wanted to make the cologne you put on after that, while you listened to more of my music while driving to your job. I wanted to make the water that you drink, Aquahydrate, when you’re at the gym. And then when you’re back home, I want you to be able to turn on the TV and watch one of the television shows I produce. Then when you go out for the night and party, I want you to switch out of your suit and into a more casual outfit I offer. And one of the final touches is that you can go to the bar and order Ciroc. All of that is well thought

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hop/7840891/puff-daddy-cant-stop-wont-stop-documentary-interview-no-way-out [https://perma.cc/4QS5-ZWEJ]; see also Sarah Weldon, *Sean ‘Diddy’ Combs ‘Was Only Joking’ About Changing Name to Brother Love*, ENT. WKLY. (Nov. 6, 2017, 9:48 AM), <http://ew.com/music/2017/11/06/diddy-changes-name-to-brother-love/> (noting that *No Way Out 2* is purportedly “due” for a December 2017 release, without offering any additional release details). Combs’s most recent album releases were his *Last Train to Paris* album in 2010 and *MMM (Money Making Mitch)* in 2015, initially released as a free download. Christie D’Zurilla, *Sean ‘Diddy’ Combs Says What He Really Wants to Do Is Act (So Adios, Music, Again)*, L.A. TIMES (May 2, 2016), <http://www.latimes.com/entertainment/music/la-et-ms-sean-combs-diddy-retirement-20160502-snap-htmstory.html> [https://perma.cc/9FRY-CZMY].

243. Ferdman, *supra* note 156. Jay-Z, consistently near the top on Forbes’ annual list, also earns much of his millions outside of the music business. *Id.*; see also Zack O’Malley Greenburg, *The World’s Highest-Paid Hip-Hop Artists 2017*, FORBES (Sept. 27, 2017, 9:52 AM), <https://www.forbes.com/sites/zackomalleygreenburg/2017/09/27/the-worlds-highest-paid-hip-hop-artists-2017/#38771cf715d1> [https://perma.cc/7TTU-V656].

244. Greenburg, *supra* note 243 (“[Combs] involve[s] himself in every aspect of the [beverage] product down to the font of each logo.”).

245. Zack O’Malley Greenburg, *Why Diddy Is No. 1 on the 2017 Celebrity 100 List*, FORBES (June 12, 2017, 8:51 AM), <https://www.forbes.com/sites/zackomalleygreenburg/2017/06/12/why-diddy-is-no-1-on-the-2017-celebrity-100-list/#5c4615633faf> [https://perma.cc/P48K-DVMQ]. Global Brands Group bought a majority interest in Sean John, which does approximately half a billion dollars in sales each year. *Id.* Combs retains 20 percent of the company. *Id.* Contrast Sean John’s annual sales with the Jessica Simpson Collection’s \$1 billion in annual sales. See Schnurr, *supra* note 187; see also Sean Combs, ENCYCLOPAEDIA BRITANNICA, <https://www.britannica.com/biography/Sean-Combs> (last updated Nov. 1, 2017) (noting Combs’s middle name is “John”).

246. Greenburg, *supra* note 243.

247. Greenburg, *supra* note 245.



out. That was my dream. I just think that because of my earlier experiences, watching my mom work four or five jobs at a time, I'm wired like that. I have never been one to put all my eggs into one basket. Music was never going to be enough.<sup>248</sup>

Combs's non-music pursuits consist of fashion (he founded his Sean John clothing line in 1998),<sup>249</sup> alcohol and bottled water, cologne, television and film production, acting, and more.<sup>250</sup> Combs describes his lifestyle brand as aspirational and especially in tune with youth culture.<sup>251</sup> As a young man growing up in Harlem, Combs envisioned a better life. He eventually realized his goals through determination and hard work. His lifestyle brand celebrates dreamers like him, appealing to consumers who likewise are self-made achievers wanting the best that life offers. Combs connects, he says, as "one of them," his identity creating the overall image of his lifestyle brand.<sup>252</sup> Combs's trademark portfolio reflects his diverse endeavors, along with music.

Among Combs's music-related trademarks and pending trademark registrations are: (1) PUFF DADDY in IC 9 for "[m]usical sound recordings";<sup>253</sup> (2) PUFF DADDY in IC 9 for "[d]ownloadable musical sound recordings";<sup>254</sup> (3) PUFF DADDY in IC 41 for "[e]ntertainment services, namely, live musical performances by an individual" and IC 38 for "[s]treaming of audio and visual recordings

248. Ferdman, *supra* note 156.

249. Robin Givhan, *They Laughed When Diddy Launched a Fashion Line. Then He Changed the Industry.*, WASH. POST (Apr. 21, 2016), [http://www.washingtonpost.com/sf/style/2016/04/21/they-laughed-when-diddy-launched-a-fashion-line-then-he-changed-the-industry/?utm\\_term=.fc53bca03785](http://www.washingtonpost.com/sf/style/2016/04/21/they-laughed-when-diddy-launched-a-fashion-line-then-he-changed-the-industry/?utm_term=.fc53bca03785) [https://perma.cc/26TW-N2CU]. Sean John, "Combs's full-throated, built-from-the-ground-up fashion venture," had a mass-market goal. *Id.*

250. See COMBS ENTERPRISES, <http://www.combsenterprises.com/company-portfolio/> [https://perma.cc/E3UT-DWHX] (last visited Oct. 26, 2017); see also Bacardi, *supra* note 241. In November 2017, Fox Entertainment announced Combs's participation as a judge on *The Four: Battle for Stardom*, premiering in January 2018. Shirley Halperin, *Diddy, DJ Khaled, Meghan Trainor, Charlie Walk to Judge Fox's 'The Four'*, VARIETY (Nov. 17, 2017, 2:00 PM), <http://variety.com/2017/music/news/diddy-dj-khaled-meghan-trainor-charlie-walk-judges-the-four-1202616246/>.

251. *I Am American Business: Sean Combs*, CNBC, <https://www.cnn.com/id/100000505> [https://perma.cc/V7ZC-S2GK] (last visited Oct. 26, 2017).

252. *Id.* Combs stated in an interview that his

whole portfolio of brands represents aspiration. It's about wanting the better things in life, whether it's the better music, or whether you're watching my television shows, and you want to watch the best. You want to wear the best. You want to drink the best. I pride myself on being the king of celebration, and all of my brands kind of have a synergy in celebration.

*Id.*

253. PUFF DADDY, Registration No. 2,266,899.

254. PUFF DADDY, Registration No. 3,959,449.

featuring music . . . over a global computer network”;<sup>255</sup> (4) SEAN PUFFY COMBS in IC 9 for “[a] series of musical sound recordings; audio-visual recordings featuring music,” “downloadable audio-visual recordings featuring music,” and “downloadable musical sound recordings,” and in IC 38 for “[s]treaming of audio and visual recordings featuring music . . . over a global computer network”;<sup>256</sup> (5) PUFFY in IC 41 for “[e]ntertainment services, namely, providing a website featuring information about entertainment, recording artists and popular culture”;<sup>257</sup> (6) P.DIDDY in IC 9 for sound and video recordings featuring music and downloadable visual musical sound recordings;<sup>258</sup> and (7) DIDDY in IC 9 for sound and video recordings featuring music and downloadable recordings of the same; in IC 38 for “[s]treaming of audio and visual recordings featuring music . . . over a global computer network”; and in IC 41 for “[e]ntertainment services, namely, live musical performances” and Internet services providing a website featuring information concerning a musical performer.<sup>259</sup>

Additionally, Combs has applied for the PUFF DADDY mark in relation to the following non-music goods and services: IC 3 for personal fragrances, cosmetics, and hair, bath, and skin care preparations; IC 14 for “[j]ewelry and watches”; IC 18 for handbags, leather accessories (including wallets, purses, and cosmetic bags), backpacks, and sport bags; IC 25 for clothing; IC 38 for “[w]ebcasting services”; providing online message boards and chat rooms related to music, entertainment, and popular culture; and telecommunications services; and IC 45 for “[p]roviding a website featuring fashion information.”<sup>260</sup>

Furthermore, Combs has applied for the DIDDY mark in connection with the following mostly non-music goods and services<sup>261</sup>: IC 3 for personal and room fragrances, cosmetics, and hair, bath and skin care preparations; IC 9 for sunglasses and eyeglasses, audio and electronic equipment for personal and musical instrument use, cellular phones and accessories, and portable digital audio electronic players (e.g., MP3 players); IC 14 for “[j]ewelry and watches”; IC 16 for posters, printed materials, personal diaries, “souvenir programs”

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255. PUFF DADDY, Registration No. 4,760,484. In recent years, some artists have added IC 38 services related to streaming, webcasting, and the like to their music business trademark portfolios—in addition to mainly IC 9 and IC 41. *See, e.g., id.*

256. U.S. Trademark Application Serial No. 87/055,129 (filed May 31, 2016).

257. PUFFY, Registration No. 4,177,479.

258. P.DIDDY, Registration No. 3,109,611.

259. DIDDY, Registration No. 4,708,477.

260. U.S. Trademark Application Serial No. 86/571,595 (filed Mar. 20, 2015).

261. U.S. Trademark Application Serial No. 86/355,589 (filed Aug. 1, 2014). IC 9, IC 16, IC 38, and IC 41 contain some music-related goods and services. *Id.*

featuring entertainment and information concerning a musical performer, concert schedules, and party and desk supplies; IC 25 for clothing; IC 35 for online, mail-order, and brick-and-mortar retail services featuring personal care and home products, jewelry, audio equipment, cellular phones and accessories, clothing and accessories, and sound and audiovisual recordings; IC 38 for “[p]roviding online chat rooms and online bulletin boards for transmission of messages” in the fields of music and entertainment and telecommunications services; and IC 41 for “[e]ntertainment services, namely,” hosting and performing music at live and recorded awards shows and television events; “production and distribution of motion pictures and television shows”; and “production of musical sound recordings and audiovisual recordings.”<sup>262</sup>

Finally, Combs owns registrations for the SEAN JOHN mark in connection with a variety of non-music goods and services such as, generally: IC 3 for cosmetics and fragrances; IC 9 for sunglasses; IC 18 for backpacks, all-purpose sports bags, toiletry bags sold empty, and wallets; IC 20 for home furnishings and home furnishing accessories, namely, pillows, mirrors, and picture frames; IC 24 for towels, bed linen, pillow cases, and bedspreads; IC 25 for men’s, women’s, and children’s clothing; and IC 35 for retail store services featuring clothing.<sup>263</sup>

No doubt, as Combs continues expanding his non-music lifestyle branding program across even more goods and services, his trademark portfolio will expand accordingly.

Collectively, Simpson, Yearwood, and Combs exemplify the artist brand entrepreneur—passionate, involved, and forward-thinking in relation to the use of their trademarks in the non-music arena. Balancing the challenges of waning music activity and income with burgeoning non-music businesses, these three artists thrive on brand-building and commodification as natural outgrowths of their personas.

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262. *Id.*

263. *See* SEAN JOHN, Registration No. 5,286,469 (for IC 3, 9, and 18, and 25); SEAN JOHN, Registration No. 5,266,669 (for IC 9, 18, and 25); SEAN JOHN, Registration No. 4,049,507 (for IC 20 and 24); SEAN JOHN, Registration No. 3,733,421 (for IC 35); SEAN JOHN, Registration No. 3,419,686 (for IC 18 and 25); SEAN JOHN, Registration No. 3,342,213 (for IC 3, 9, 18, and 25); SEAN JOHN, Registration No. 3,164,179 (for IC 3); SEAN JOHN, Registration No. 2,778,092 (for IC 35); SEAN JOHN, Registration No. 2,466,699 (for IC 3); SEAN JOHN, Registration No. 2,409,545 (for IC 25).

## VI. CONCLUSION

Changing times demand changing strategies. Confronted with decreasing income from recorded music sales, uncertainty regarding other customary music revenue streams, and generally unattractive or non-existent record contracts—in addition to a music industry constantly in flux due to changing technologies and patterns of music consumption—some artists have astutely cultivated new opportunities to ensure their continued livelihoods. In particular, these artist brand entrepreneurs have pursued the development of non-music goods and services, capitalizing on their music-related images by extending them into broader lifestyle brands. While not necessarily abandoning their music careers totally, artist brand entrepreneurs shift the focus of their interests and attentions to remain relevant and profitable.

Using trademark law to construct, protect, and grow their lifestyle brands, artist brand entrepreneurs break away from the constraints of music-centric identities and deals, embracing a far-reaching business environment and a wider consumer base. As demonstrated in this Article, artist brand entrepreneurs decisively take control of their careers and their futures by employing trademark registration as a strategy central to their brand-building. As the artists' non-music empires enlarge, so do their trademark assets.



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