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The 360 Deals, The Frienemy.

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I. Introduction: The customer is always right, right?

The music industry is in the middle of a revolution that threatens the old-powers-that-be with the real possibility of extinction. Surely, the digitalization of music has changed the way people across the global listen to music, but it has not changed the demand for it, quite the opposite. People are listening to music in record numbers. At first glance, it seems that music has ceased to be something that should be hoarded and bought; many believe that music, much like information, should be free and accessible to all. The recording companies are not only faced with a new format for distributing music but also a new consumer that deems themselves entitled to the music they listen to regardless of whether he/she breaks copyright laws to obtain said music.

As children of the information age, Generation Y and all subsequent generations, have singlehandedly and knowingly, altered an industry worth over $40 billion dollars.[i] Through the monopolization and mass production of overpriced compact discs the major record labels were able to have exorbitantly large profits while leaving many artists bankrupt and indebted.[ii] Moreover, the record label’s inability to connect with the average consumer from their comfy executive chairs made it nearly impossible to engage these generations into their music-selling Ponzi scheme. From recording music from the radio on to blank cassette tapes to burning blank CDs and sharing them with friends, this generation (the same generation which created Napster, Limewire, Torrents and other illegal ways of distributing music) is a direct result of the greed that seemingly sealed the doom for the traditional record label.

Currently, recording labels are seeing their revenues decline rapidly, yet the demand for music is higher than it has ever been. Interestingly enough, the industry has been looking for a new business model that would capitalize on that demand. The answer came in the form of a new type of recording contract which encompasses more than just the distribution of music. This contract is more commonly known as the 360 Deal. The 360 Deal was thought to be the saving grace of the music industry by allowing the major labels to tap into a revenue stream that they were not able to previously access.

The traditional recording contracts used by the major labels usually only incorporated provisions pertaining to the production and distribution of an artist's album. This model was criticized by many as being crafted to leave the artist in debt by making almost everything a recoupable advance. On the other hand, this type of contract also gave the artist free reign when choosing and creating their own ancillary initiatives such as merchandizing, concert ticket sales and endorsements. This is where most artists were able to make their money. Unfortunately, only a few artists were able to finally pay back their advances and truly capitalize on any ancillary initiative.

For the few artists whose fame led to fortune, the payout of these ancillary initiatives proved to be very lucrative and created megastars out of the lucky few. The record labels, being faced with the stark decline of CD sales saw these gains as an opportunity. Premised on the idea that capitalizing on these ancillary initiatives record labels would be able to boost their quarterly earnings, the 360 Deal was born. This, however, did not address the fundamental problems within the recording industry.

The fundamental shift in how the children of the information age interact with music as compared to previous generations is the true underlying issue.[iii] Generation Y, and all the generations that follow, seem to feel a true connection, arguably an even deeper connection than previous generations, to the music they listen to. They want to listen to their favorite music whenever, wherever and however they want. Music is embedded into their daily lives, in their commutes to school or work, into their social interactions with their friends -whether this interaction is virtual or physical. Music is what they turn to when they are alone in their rooms. Their favorite artists are their heroes, more so than those who many consider traditional heroes. They carry their music on their phones, in their laptops and on their tablets. It's their escape from reality. However, the difference with this generation is that they are unwilling to compromise. This generation wants variety, accessibility and connectivity; they want to hear Jay Z followed by Florence and the Machine, the Artic Monkeys and then Avicii. They want to hear these artists when and where they want. In essence, this generation feels a sense of entitlement to the music produced by their favorite artist. We are a spoiled generation, but the music industry (and consumer culture, in general) made us this way.

Interestingly enough, this generation's entitlement rivaled, and some will argue, is a reaction to that same entitlement felt by corporate executives who deemed themselves responsible for producing, introducing and distributing these artists to consumers.[iv] And although this premise is correct, it created an exaggerated self-opinion. The record companies grew too big for their own good. In the eyes of this generation, their beloved artist fell victims, and in a way they were right.[v] The artists as work-for-hire are simply employees who create content for the sole purpose of selling albums in the hopes of repaying their advances. Once the artists are indebted (which a vast majority are) they are at the whim of the record companies that demand more albums or the artist faces being dropped from the label. However, the artists are the people the consumers fall for. When the record labels grew too big, the creativity in the work they put out and in the artist they funneled through commercial streams dwindled.[vi] People did not want to buy albums because one or two songs were worth it.[vii] It became easier to illegally download the two songs then pay 99 cents for it on Itunes or buying the whole physical album.[viii]

But the industry adopted a top-down approach to selling music and grew intolerant of the consumption patterns. Instead of listening to their customers, the industry initiated harsh litigations against their own customers. And while some people were deterred from illegally downloading, the vast majority of people were not. Many people in fact saw this as a manifestation of the arrogance of t industry and further demonized them.

Many scholars deem the 360 Deal as an admission by the record labels that there is no money to be made in selling or distributing of music. When in reality this premise is completely false. Instead of creating new avenues, innovating and listening to what their consumers demand, the industry as a whole took a hostile stance and thereby thwarting their potential growth. What websites like Itunes, Amazon Music, Spotify and Pandora have shown the record labels is that through innovation, creativity and by simply thinking outside of the box, there are still ways to profit from the distribution and selling of music.

More importantly, the 360 Deal itself opens the labels to a slew of problems that were not anticipated during its creation. By transforming the relationship between the artist and the record company into a sort of partnership, there are new fiduciary duties that are required from each party. Moreover, due to the lack of expertise in the areas of these ancillary rights record labels can mismanage an artist career or waste a significant amount of money, effort and time in acquiring the expertise required. Further, these all inclusive contracts can leave new and established artist at the mercy of record companies, which can spell disaster for both sides.

As this unimaginative, and quite frankly, weak attempt to increase revenue can easily fail; the only answer is go back to basics. By revisit the reasons why these companies exist in the first place the record labels may have a glimmer of hope. As the Master Copyright owners, record companies are able to control the distribution and use of music. By phasing out CDs and focusing on digital and online initiatives, record labels can regain the power. As the licensors of music they are the ones who are needed by the third party distributors; not the other way around. Thus, there is little to no reason why the majors cannot create proper avenues and even present a united coalition to stream and sell their own music. Moreover, through direct corroboration with social networking giants, a direct integration of music into this generations' online social lives can be possible.

II. The Evolution Of Recorded Music

The history of the music industry tells the story of how music became personal to the consumer, how it became something you did alone and in a group, and more importantly, how it became an inseparable part of our lives.

Recorded music revolutionized how the human race enjoyed music. The invention of the phonograph by Thomas Edison in his New Jersey laboratory in 1877, allowed people to record and playback sound for the first time in human history.[ix] Once adopted by artists and record labels, recorded music pushed publishing and live concerts into the background, where once they were the only way to listen to music.[x] With the invention of the phonograph, and its widespread dissemination, music was invited into people's homes. That, in turn, bred a new society centered on the personalization of one's preference in music. Before this innovation, there was no such thing as consuming music for personal and exclusive use. Music was essentially a social activity because people went to concert halls or for some lucky few to lavish private homes to be able to listen to an artist play his or her music.[xi] Music was a communal activity that forced people into clusters for the sake of efficiency.[xii]

The consumption of music made music a more personal activity. [xiii] Families gathered around the phonograph to hear their favorite music, and eventually their favorite artists. While still communal in nature the phonograph brought music into the home and made it a more intimate familial affair. This family affair was geared by the family's taste and choice of music. People bought the records they liked and listened to the artist that attracted them. Yet the phonograph was an expensive for the average person. The technology of recorded music was still a luxury that is, until the radio was introduced.

Through radio, recorded music was easily disseminated and made more accessible to the common person. By the 1920s most of Americans owned a radio in their home for entertainment and leisure.[xiv] Radio came with its cost, people were not able to pick the songs that were played and were only limited to use it within the home.[xv] However, through the use of radio record labels were able to reach a broad section of the America population. It allowed recorded music to enter the main stream and create a popular culture within America. This centralization of music industry and allowed for the creation of the industry as we know now it. At this point in history, everyone listened to the same artist and the same music. Artist became sensations and people all over the world fawned over their music. Radio was a catalyst of this type of behavior. Music was profitable because people listened to the radio and then were able to like or dislike a certain artist. Then, once the record player technology became cheaper, people know who and what records to by.

The next big advance in the history of recorded music was the development of portable music.[xvi] This happened in on a large scale in the 1950s when cars were manufactured with radios in them. This advancement allowed people to listen to music outside of the home and firmly embedded music into American culture. Not only did this increase the demand for music but it created a cultural dependency on it as well. Moreover, with the introduction of portable transistor radios also introduced in the latter part of the 1950s, the demand for music was higher than ever.[xvii] Mobility increased the listener's connection to the artist and his/her music by adding music to activities that empirically had none associated. For example, now driving to work or school was made more enjoyable with your favorite tune in the background. It started creating the soundtrack to people's lives.

While touring was a big part of making an artist famous and even rich, if an artist wanted to disseminate his/her music to a wider audience, recorded music was the only way to do it. Making and distributing records was at this time, and still is, a very expensive endeavor. Access to the market was held by record labels through their connections with radio executives. Moreover, at the time, very few people even knew how to edit a master tape.[xviii] Thus, to truly reach the American people, artist had to go through the "gatekeepers," namely, the record labels. This created the label/artist relationship as we understand it today. Radio would give artist the fan base but in order to play one's music on the radio a recording had to be created and distributed to the radio stations by the record label. This formula made the record labels indispensable.

The development and introduction of new technology, from this point in history forward, happened at a much accelerated rate. With the introduction of cassette tapes and CDs in the 1960's and 70's, music became increasingly more compact and portable. Cassettes were originally used as a dictation medium but were readily adopted as cheap and portable substitutions to LPs.[xix] The cassette tape made it easy to record music off of the radio, CD or even other cassette tapes, an innovation that made record labels have a true disdain for the medium.[xx] This accounts for its short lived embrace from the record labels.

This huge piracy pitfall was probably why the next innovation, the CD, was so eagerly adopted by the record labels as the new medium for distributing music. CDs were then introduced in the 1980s with a portable player to match in the 1990s.[xxi] A CD at its height cost about $20 for an album and $10 for a single.[xxii] These prices, however, were actually just a result of price-fixing and not of clear cut market driven forces of supply and demand.[xxiii] The CD, like the cassette tape, had short lived predominance. Everything changed once music was transferred into digital format.

In early 2000, a file-sharing company went viral and within a short span it attracted about 60 million users.[xxiv] The name of that company is Napster.[xxv] Napster's founder, Shawn Fanning stated that his intention was to “"to build communities around different types of music" and that “[f]ile-sharing was almost an afterthought.”[xxvi] This mentality is exactly what he did and with his vision he molded how the aforementioned generations interact with music. The creators of Napster understood that while people truly connect to their music, and thereby making it habitually personal, they are also connected to others via their computers and the internet, which also speaks to people's innate need to be social. This gives music an arguably duality, where it is incredibly personal and at the same time remarkably communal.

With the accessibility of “inexpensive portable music players, the introduction of digital formats and compression software pre-installed on almost every personal computer, and the ubiquity of the Internet destroyed the control exercised by traditional gatekeepers [namely the record labels and radio stations]… [And] made intellectual property in recorded music essentially unenforceable.” [xxvii] The music industry had been evolving for 120 years and these new technologies were just another form of innovation as the phonograph, CDs, record labels and radio were once.[xxviii] Throughout the history of the music industry the innovations came and gone. However, the industry's conformist approach to developing music has left it wondering where it went wrong.

III. The Impact Of Digital Format On The Recording Industry

Record labels have seen a drop in profitability of their primary product, recorded music, because they have not been creative or innovative enough to contemplate better ways to distribute their product. As a renowned record executive, David Geffen, stated "the [recording labels] are now in a new role as music sells and distributes itself on peer-to-peer networks, but in a way that can be influenced by social sites, touring, celebrity activities, etc." [xxix] However, the industry has not fully embraced its new roll precisely because it does not know what it is or what it should be. Record label's business model, its contracts and its interactions with artist and consumers alike, have not changed much in the last 50 years. [xxx] The basic business model of the recording industry has always been making and selling recorded music which to industry executives simply meant the selling of the physical manifestation of these sound recordings. With the digitalization of music the tangible form is no longer what is important to the consumer, while the content still reigns king. Record labels' focus on one product, more poignantly on one medium for distributing that product, left them "exposed to the decreased demand for legitimately purchased recorded music, which is largely a reaction to the dramatic increase in the accessibility of free, 'illegitimate' music." [xxxi]

In the last 50 years the music business model functioned in a very top-down approach where the industry told to consumer what to buy, even forced upon them products that were not that great.[xxxii] As legendary producer and record executive, Rick Rubin stated "[t]here was a time when if you had something that wasn't so good, through muscle and lack of other choices, you could push that not very good product through those channels… Well, the world has changed. And the industry has not."[xxxiii] It would thereby be economically sound for computer savvy teenagers to simply illegally download the one-hit wonder's track, or the couple of songs he/she likes from their favorite artist's latest album. At the time when peer-to-peer ("P2P") networks emerged these teenagers only other viable option would have been to purchase a $20 CD, a price that was being artificial created through price-fixing activities among the major record labels.[xxxiv] The drive to maximizing profits above all else, created industry giants that grew out of touch with the world, its consumer and what those consumers were and continue to demand. Moreover, it created an inefficient business model.[xxxv]

The illegal price-fixing, releasing subpar content, as well as a general disdain for the maladministration of artist royalties, can all be used as explanations for the rise of illegal downloads. Moreover, these pitfalls found in the previous business model clearly explain why "[t]here is no wondering why the music industry is growing; however the recorded industry is not."[xxxvi] These are more commonly cited reasons for why these teenagers did not feel it was morally wrong to download and break copyright laws.

Yet, most of these explanations neglect to embrace the digital formats appeal. Illegal downloading's true appeal was its sheer *convenience*. These teenagers were already hooked on the internet, no matter how slow it was at first, and then with the innovation of the DSL modem, you can have a new song in 4 to 5 minutes. In an survey taken in 2003 (during the early years of illegal downloading), 75 percent of 12-16 listen to music frequently while using a computer, while 41 percent use exclusively the computer to play music and 35 percent use the computer as often as a stereo or portable music player.[xxxvii] For teenagers who had computers at home downloading was not a huge deal. For any teenager with little to no money Napster, Kaazam or Limewire were just programs that allowed them to share the music they already own with people who want to share their own, similar to the burning of a CD for a friend or creating a mix-tape of your favorite songs on a cassette tape. Those programs made it as easy as a click of a mouse to download the new Black Eyed Peas or Outkast singles and respective albums.[xxxviii]

Still, the impact of illegal downloading was heavily felt by the industry. The sad reality is that music piracy causes $12.5 billion of economic losses every year, 71,060 U.S. jobs lost, a loss of $2.7 billion in workers' earnings, and a loss of $422 million in tax revenues, $291 million in personal income tax and $131 million in lost corporate income and production taxes.[xxxix] Further, in the decade since P2P file-sharing site emerged in 1999 through the launching of Napster, music sales in the U.S. have dropped 47 percent, from $14.6 billion to $7.7 billion. The Record Industry Association of America (“RIAA”) reports that from the period of 2004 through 2009, approximately 30 billion songs were illegally downloaded on file-sharing networks.[xl] Consumer market research shows that in 2009 only 37 percent of music attained by U.S. consumers was paid for.[xli] It was recently estimated that U.S. Internet users annually consume between $7 and $20 billion worth of digitally pirated music.[xlii]

Although the music business has increased its digital revenues by 1,000 percent from 2004 to 2010, digital music piracy is still a main factor behind the overall global market decline of about 31 percent in the same period.[xliii] Many P2P sites usage has flattened in recent years, a figure that is reassuring to the music industry, but newer more elusive programs have emerged.[xliv] Moreover, digital storage lockers, such as DropBox and Megaupload, have now been used to distribute music illegally.[xlv] While digital storage locker downloads constitute only 7 percent of all Internet traffic and only about 3 percent of the U.S. Internet consumers rely on digital storage generally, of the links posted about 91% were for copyrighted material -10% of which were specific links to illegal music, specifically.[xlvi] However, “peer-to-peer systems like BitTorrent, which have little central coordination and are harder to stop, still have about three times as much usage among consumers as digital lockers” and still remain at the forefront of piracy issues.[xlvii]

When faced with more dismal quarters and dwindling profits, consolidation among themselves became a viable solution for the major record labels. However, piracy was not the sole reason for mergers.[xlviii] The heavy consolidation from six major labels to three is also a result of a “maturing industry falling into the general business pattern of growth through acquisition and consolidation, a trend that has set the radio and concert industries reeling in recent years.”[xlix] The consolidation happened very rapidly. From 1988 through 1998, there were six majors: Sony BMG Music Entertainment (“Sony BMG”), EMI Recorded Music (“EMI”), Universal Music Group (“Universal”), BMG Music and Polygram. Between 1998 through 2006, Polygram merged with Universal. Shortly after, Sony first created a joint-venture with BMG Music, creating Sony BMG, but then absorbed BMG share in order to become being Sony Music Entertainment (“SME”).

In 2006, the four largest major record companies were SME, EMI, Universal and WMG, which accounted for approximately 73% of the worlds recorded music sales.[l] As of November 2012, however, EMI has since been bought and absorbed by Universal Music Group, and its publishing arm was absorbed into Sony/ATV Publishing.[li]

The desperation within the record labels has not subsided, and as a result they have re-evaluated their recording contracts. The majors are now turning to a new business model in hopes of using their *artist* to supplement their lost revenue.

IV. Introducing The Frienemy, the 360 Deal.

A 'frienemy' is a "portmanteau of 'friend' and 'enemy' that can refer to either an enemy disguised as a friend or someone who [is] both a friend and a rival."[lii] The 360 Deal can be qualified as, and analogized with the former of the two types. The frienemy who disguises himself/herself as a friend is a toxic individual who subconsciously, or even consciously, wishes harm upon the person he/she is pretending to befriend. The 360 Deal befriend the industry moguls and executive with promises of riches and balanced budget. With this guise, it painted the land of milk and honey. As a result, the frienemy was received with open arms and adopted on widespread scale. All the major record labels have their own version of a 360 Deal, and although the contractual language is not yet uniform, all the different versions can have the same devastating effects. There has been no litigation on the matter which allows the 360 to keep its prominence. However, as with any frienemy, their true intentions are exposed sooner or later. Thus, the 360 Deal should arguably be the newest member to join the hefty list of frienemy that can potentially bring the music industries to its knees.

A 360 deal can also be referred to as a "multi right" deal, "artist brand" agreements, "revenue-sharing models," or artist/label "joint ventures." [liii] It is best defined as, a type of contract "where the artist grants the label a portion of all revenue garnered by the artist (i.e. from live performances, merchandise sales, endorsements) in exchange for monetary support such as advances, funds for marketing, and tour support."[liv] This deal was set to shift the focus from the sale of records to revenue the artist made through "touring, licensing, merchandising, endorsements, and sponsorships."[lv]

The idea behind a 360 Deal is premised on the notion that our music consumption culture was crafted to be one where the customer feels connected to the music and artist he/she listens too. This is evidenced by the personalization and solitary turn music interaction took in its history. The devotion by their loyal fans, allowed the artist to create brands out of themselves and essentially, make themselves the product. By attending their favorite artists' concerts, buying their merchandise, their books and even paying fees to be part of their fan clubs, fans seek to be closer to the artist themselves. Such devotion translates into fans wanting to see their favorite artists do well. The phenomenon of the artists as brands helped paved the way for 360 Deals, mainly, because the industry realized consumers are not just buying into the music but rather buying into the artists themselves. Interestingly, the bigger the artist brand, the more opportunities, such as endorsements, sponsorship money, promotional ventures, motion picture acting, or even owning a restaurant, are available to the artist.

Although there have been few instances in music history, some as early as the 1950s, when 360 Deals have been used, the reality is these type of deals were never an industry standard until now.[lvi] The prior 360s have not pushed as far as recent ones have. Moreover, Sara Karubian in "360 Deals: An Industry Reaction to the Devaluation of Recorded Music" chronicles the early 360 Deals that shaped the newer versions used today:

> British pop star Robbie Williams's 2002 contract with EMI was an early 360 deal. The trend continued when Warner included merchandizing in its contract with the band My Chemical Romance in 2003 on the thought that a merchandising venture "might be a nice little addition to the pot." In 2005, EMI and KoRn signed a more publicized 360 deal, leading *Rolling Stone* to report that "[s]o far, few labels have been as bold as EMI, but some have been testing the waters." [lvii]

The model gained a significant credibility when Live Nation, a concert promotion giant, signed a highly publicized, $120 million deal with superstar Madonna.[lviii] In 2007, Live Nation did it once more by signing Jay Z to a $150 million with his deal.[lix] The goal of Live Nation, a ticket sales giant and concert promoter, was states as, "to partner with musicians to manage their diverse rights and provide global distribution and marketing." Since Live Nation is not a traditional record label, it came as a shock that megastars like Madonna and Jay Z engaged in 360 Deals with the promoter. Live Nation's use of the model, which originated with labels in order “to expand their power and strengthen their threatened position in the industry, further exacerbates labels' problems by manipulating the 360 model with the intention of cutting the label out.”[lx]With exbordently large figures at stake, these deals scream hostility towards record labels on behalf of the promoter. This promoter 360 Deal, although different, still illustrates how all-encompassing versions of 360 Deals can be.[lxi]

a. Traditional Contracts Compared 360 Deals

A traditional contract has several uniform provisions that varied only slightly from company to company. The most important of these contract provisions and the ones that are affected by the 360 Deals are: the term of the contract, record royalties, tour support, and lastly, the financial arrangement such as in the recoupable advances, the recording fund.

The term of the contract is perhaps one of the most fundamental provisions in any contract, for it “sets forth the period of time during which the contract is in force between the parties.”[lxii] Moreover, it is in the best interest of the major record label to exacerbate the term because it will allow for an artist to remain exclusive to the recording company for that period.[lxiii] In a traditional recording contract, the average term for a new artist would be for 5 to 7 album cycles which allows for one firm commitment of an album and followed by options to renewal the remain cycles.[lxiv] Yet, for established artist the term would have one firm commitment consisting of one or two of albums followed by a few number of renewable options, compared to new artist.[lxv]

A recording contract begins the day the contract is signed and expires 6 to 9 months after either: “(1) the recording and delivery of a long-playing album, known as an LP, or (2) the commercial release of that album."[lxvi] At the end of each term an option can be exercised by the recording company to engage in the same contract term as the initial term.[lxvii] If no option is exercised then the record label also retains the "sole right to terminate the agreement at any time without further obligation to the artist."[lxviii]

On the hand, a 360 record contract there is more of an incentive to increase the term and these contracts are longer on scale than traditional recording contracts.[lxix] Newer artist may get longer terms while artist with more clout can negotiate for other incentives.[lxx] For example, Madonna's deal with Live Nation is for a whopping 10 years but she has higher percentages shares of other important ventures. For a new artist, the longer term simply translates into the label wanting to develop the new artist, which requires a longer than usual term in order to properly build the new artist's brand.[lxxi] But like everything in the negotiation, it is a trade off, so longer contract translates into higher royalties or advances. The major difference in the 360 for an established artist is that they are now giving the option to terminate their contracts.[lxxii] This is done because such long terms can be disastrous if the relationship goes south and the label is not performing at the level it should.

The second fundamental contract term is the royalty provision. "Royalty provisions determine an artist's monetary compensation from the sale of physical sound recordings, including digital phonorecord deliveries ("DPDs") and audiovisual works."[lxxiii] For new artists, royalties are usually between 10-16% of the suggested retail list price for those recordings sold through normal retail channels.[lxxiv] Established artist can command up to 20% royalty rate.[lxxv] Royalties, however, are subject to numerous deductions such as: normal vs. "abnormal" retail channels, container fees, budget records deductions, marketing budget fees and the recoupable recording budget, just to name a few. These deductions, when coupled with other recoupable advances to the artist, usually spell financial trouble for the artist. Most artists declare bankruptcy and tend to owe the record label and the IRS large sums of money due to the unfair distribution of royalties.[lxxvi]

When compared to traditional contracts, the royalty rates for 360 contracts are usually much higher.[lxxvii] For new artist this means royalty rates as high as 30%.[lxxviii] Established artist can negotiate the level of royalty up to 50% or more, depending on their clout during negotiation rounds.[lxxix] For example, Jonathan Davis, KoRn's front man explained, "It works better for someone who is selling records. . . . We're going to see more money with this deal because we get 70% of the record sales. That is 70% of the revenue that we have never seen."[lxxx] Moreover, the amount of royalties allocated during the contract will have a direct effect on the level of participation the record label assumes, which is something to truly analyze for a new artist.[lxxxi] The royalties in 360 are largely unreported; however, theoretically, "participation would lead to increased royalties because artists should be able to argue for higher royalties in return for giving the company additional interests in other areas."[lxxxii]

The financial arrangement between the artist and the label in traditional record contract encompasses not only the royalties allotted to each side, but also the Advance that are given and the amount of money allocated for the Recording Fund. The Recording Fund is "a sum of money provided by the record companies to artists when they begin recording a new album," this money is used to "pay for the costs of recording; any money left over is kept by the artist as an advance fee."[lxxxiii] Artists and producers push for more money in the Fund, while record companies seek to minimize their obligations.[lxxxiv] However, the recording fund would usually be capped at about $300,000 for new artist and about $1.5 million or more for established artist. The recording fund is usually referred to as a loan because it is given with the premise that it will be paid back in full.

An advance, on the other hand, is essentially “a prepayment of royalties….the lable may recoup Advances from royalties to be paid to or on the artist’s behalf.”[lxxxv] The major difference between the traditional contract and a 360 can be found in the advances provision of the contracts. While artist will not see any significant change in the amount of money they receive for the recording fund, they will see the astronomical difference between the advances.[lxxxvi] Upfront money, such as advances, will not only be larger in 360 Deals than they have ever been in traditional contracts, but the advances will also be unrecoupable.[lxxxvii] This is because in return for the unrecoupable larger sum the artist gets upfront, she is granting the company tremendous access to various other revenue streams.[lxxxviii] However, this is perhaps the biggest demonstration of what little faith labels’ have in the future of the selling and distribution of music.

Lastly, as artists were kept in debt through traditional royalty provisions, they turned more and more often to live performances, concerts and tours in order to make ends meet. The more establish a brand and following the better ticket sales, which in turn means the more money going directly into the artist’s pockets. The record company keeps about “eighty to ninety-five percent of a record's earnings on top of recouping its initial investment; the artist controls most of the income from her tour.” [lxxxix] Empirically, touring provisions were not usually incorporated into the traditional recording contract. However, in fairly rare instances an artist was provided with recoupable tour support.[xc] These provisions were justified by the awakened and late arriving view that touring was a “catalyst to increase record sales.”[xci]

The 360 Model makes label more supportive of tours and in return they want a percentage of the revenues it creates. Support not only means financially, but also with planning, promoting, and for some new artist this even means moral support. However, the type and level of support for touring is highly dependent on what level in their career an artist is. [xcii] For newer artists this could mean more participation from the recording labels. New artist can gain two important advantages of labels' new interest in tour revenues. First, the label might be more inclined to subsidize tours to a much greater extent than the measly recoupable tour support previously done.[xciii] Secondly, the label involvement can facilitate the better marketing and promotion of the album and the tour, which can lead to higher album and ticket sales.[xciv] For established artist, however, it is unlikely that the 360 will significantly change the level of participation by the label.[xcv] However, the 360 deal does allow for the label to buy in to a portion of the established artist's touring revenue in exchange for a larger upfront fee that is determined by a projection based on the success of past tours.[xcvi]

These new contract terms are the biggest changes that the 360 bring into the label/artist recording contract, but more importantly, in their relationship. However, what these terms do best is put on display the record labels attempt to desperately shift their focus from selling and distributing music and their willingness to venture into uncharted territory. Labels are willing not only to grant higher royalty rates of the sale of music, and advances, which were usually just a prepayment of royalties, because they have essentially admitted defeat –such self-doubt makes the frienemy’s appeal even greater. The fact that record labels believe that helping with touring, merchandizing and the like will supplement the loss of revenue displays what little faith they have in the selling and distributing of music.

b. Negotiation and Clout

As mentioned above, there is no uniform provision or format for the 360 deal, it takes many forms and is quite different depending on who the artist is, what leverage he/she has when negotiating the contracts and which major record label it is.[xcvii] As illustrated in the previous section, depending on where an artist is in his or her career can drastically change the make-up of the 360 Deal. Everything is negotiable in a 360 Deal.[xcviii] As in any negotiation, the party who fairs better is usually the party with a proven record of success. Thus, it is crucial at the negotiation level for all artists, new or seasoned to try to show, in whichever manner possible, the power of their brand. For new artist this means describing and glorifying their market appeal or future potential appeal. For a seasoned artist it is about showcasing how much she has previously made in merchandizing, concerts, endorsements, sponsorships or the proven success of any other ancillary initiative she have undertaken.[xcix] As in all business transactions, depending on the amount of clout one has would be reflected in the ultimate agreement among the parties.[c]

Therefore, a new artist, for example, has little to no leverage when negotiating and thus, can lend to the 360 Deal being all encompassing, overbearing and over extensive.[ci] A new artist is a very risky investment for the record label and the record label surely contracts for a high reward in order to be willing to sign an artist. The label offers new artist a higher advance than under traditional recording contracts in order to offset the artist loss of rights.[cii] However, for a new artist who yearns for a record deal it would seem advantageous at the time of signing the contract to share in all revenues with the record label. As the record labels gamble on the future of new artist, the artist essentially loses the rights to their own futures.

The band Paramore signed a 360 Deal with Atlantic Records, a label under Warner Music Group in 2005. Paramore was an unknown band and grew to a music industry success story.[ciii] The band received a higher advance than they would have under a traditional contract, $300,000, and thirty percent of its profits (if there are any) from albums, compared to the traditional thirteen to sixteen percent royalties for new artists.[civ] However, in return they are sharing the profits of their other ventures as well as giving the label a degree of control and approval rights to things like tour schedule(s) and the salaries of employees working for the tour.[cv] Lastly, Paramore will be guaranteed one album with an option for the label to drop the artist if they do not perform.

Paramore has been taken by the hand and guided through every aspect of their career. The band was told not only who to produce their music with, this is normal, but also how to tour, what to wear, how to brand themselves. They became puppets. The fact that the lead singer was 16 allowed for such micromanaging but what will happen if an artist does not want to follow precisely what the label says to do? Or even worse, what if the label mismanages a new artist and skewed their future potential? Paramore is success story but for every Paramore there are several others who do not even make, and will undoubtedly owe double the amount than they would have had to under the original contract.

Like the Genie in the 1992 Disney movie *Aladdin*, new artists, at the inception of their careers are promised the world when being presented with a recording contract, *phenomenal cosmic powers* perhaps. However, as soon as they sign on the dotted line the artists is essentially shackled to and forced to share in all their revenue streams, with overbearing participation (or even ill-fated participation) and are given little to no rights in their own futures, analogous to perhaps the Genies's *itty-bitty living space*. With the 360, an artist who experiences tremendous success is still at the whim of the record company forced to follow orders and share in ventures that perhaps the label had no part in creating. At this juncture the artists can find themselves uttering something along the lines of, *"[b]ut oh, to be free. Not to have to go "Poof! Whaddaya need," "Poof! Whaddaya need," "Poof! Whaddaya need?". To be my own master. Such a thing would be greater than all the magic and all the treasures in all the world. But what am I talking* *about? Let's get real here, that's never gonna happen. Genie, wake up and smell the hummus.*"[cvi] And, although the Genie was able to gain his freedom when Aladdin wished him free at the end of the film, it is highly unlikely that the record companies will set successful new artist free before the end of their long drawn out contracts. The new artist seals their fate even before they begin their careers.

On the other hand, an established artist has more clout and can negotiate for less label involvement and control. Depending on the artist and their particular strengths, a 360 deal might emphasize certain revenue streams over others.[cvii] For example, rock bands typically make more money touring while rap artists often obtain more endorsements, and their contracts will reflect this.[cviii] Past record sales, concert tickets and other physical manifestation of their prominence would factor into assessing the value of the artist's brand and can give the artist an upper hand when negotiating.

What this ultimately boils down to for the established artist is a much bigger advance payment. Artist like Jay-Z and Madonna each received $150 and $120 million, respectively from Live Nation on their 360 Deals. However, what does this mean for other artist of that caliber? More importantly, what does this mean for the record labels? Live Nation, a concert promoter not a record label, is promising not just better concert sales, merchandizing revenue and sponsorships but also better distribution of their music than the labels can offer.[cix] Whether or not promoters can perform the duties of record labels is a tough question that has yet to be answered. However, by the looks of Madonna's new "rejuvenated" image and the backlash it ensued on social media outlets, their branding arm is not doing that great of a job.[cx]

Live Nation paid Madonna $90 million as an upfront fee for her loss of rights in certain revenue streams. Furthermore, although the royalty rate in Madonna's contract were not disclosed the revenue percentage of Live Nation was as follows: 10% touring revenue, 30% of her merchandising revenue and 50% of licensing sales.[cxi] Perhaps, higher royalties and a larger upfront fee Madonna justified these figures. Licensed sale refers to mostly digital sales that hold high royalties than traditional sales, and traditionally commanded higher royalty rates for artist, are now shared right down the middle. Live Nation seems to have understood how important digital sales are, a largely untapped revenue stream for record labels. Lastly, Madonna will likely be locked into the agreement for 10 years, or around the time she qualifies for senior citizen status.

When negotiating with established artist, the record label or in this case the promoter, needs to come in with figures so absorbedly large in order to counter the loss of some rights on the artist end. With offers this large, however, it was very easy for Jay Z and Madonna to be wooed away from the record companies. Live Nation's action should be considered hostile, perhaps even a retaliation to prior 360s that put their promoting capacities in the hands of labels. However, when Beyonce's contract with Sony ends, wouldn't it be reasonable for her to ask for similar figures? It would, being as her husband commanded that amount. The real question then becomes, would record labels be able to offer such amounts? At this juncture in their histories, probably not.

c. Passive v. Active Interest

There are essentially two types of 360s. There are the "passive interest" deals and the "active interest" deals. Each requires different levels of participation and control from the record label. However, both spell disaster for them, as well.

A "passive interest" deal is one where the record label has no ownership in or little control over the additional rights involved (i.e., merchandising rights)--the artist simply pays the record label a negotiated percentage of the revenue derived from the additional sources.[cxii] In these types of deals the artist is responsible for accounting to the label their non-recording income which when the right is exercised must be shared with the record label.[cxiii] The passive interest is usually written into the contract as a simple option, and the record label can choose to exercises that option or not. However, this kind of deal opens the record label to a moral conundrum.

This contract is essentially the same contract as a traditional record contract, *sans* the new revenue stream options. In these passive deals, artists are given bigger advances and perhaps even some tour support, but it essentially leaves the relationship between the artist and the label intact. There is no help from the record labels in obtaining ancillary ventures; this is left to the artist. There is little to no help with the branding or marketing of an artist other than for purposes of selling records. The artist is given full reign of their brand and their public persona. How is it reasonable or even possible then for a record company to demand or exercise an option to share in the revenues of the artist ancillary rights? This becomes an issue of possible unjust enrichment, and can translate into equitable estoppel. It would be entirely unfair for the record company who had no active role in creating the avenue streams to then partake in fruits of that labor. As a contractual option, the passive interest 360 leaves little to be desired and falls flat when trying to give record labels a viable substitute for loss of revenue.

On the other hand, an “active interest” deal, is “one in which the label actually acquires and manages some of the rights involved (e.g., merchandising rights, fan club rights), instead of just taking a financial piece of the artist's outside deals, giving the label more control--arguably--over the packaging, promotion, and exploitation of all entertainment-related content and services.” [cxiv] This means that contract for a grant of rights rather than just a split of net income.[cxv] This deal at first glance seems to alleviate the problems with the passive rights deals.

It gives record labels a right to manage other aspects of the artist career other than just their sound recordings.

This is the type used mostly by Warner Music Group, which:

> [G]rants…. a right to participate in "collateral entertainment activities," defined as the artist's "activities in and throughout the entertainment industry, as a performer, singer, musician, writer, composer, author, publisher, lyricist, producer, mixer, remixer, DJ, producer or otherwise, including in connection with Tour Events, songwriting and music publishing, and Visual Performances, and the exploitation of all rights related to such activities, including Personality Exploitations, Merchandising Rights and Fan Club Rights."[cxvi]

This contract is all encompassing of an artist career. Here a recording company can help market, brand and even create ventures that can lead to endorsements or sponsorships. However, in the same token these contracts are more invasive. Moreover, "'right to share" clauses grants the record company control over all the activity they are or can potentially be involved with. A "right to share" is usually expressed "as a right to *approve* a particular activity before the artist undertakes, rather than as a positive obligation to assist the artist in obtaining."[cxvii] Essentially, the artist has to ask the label for permission before undertaking any "new" activity, or risk breaching the contract.[cxviii] This can become onerous to the artist, when perhaps they want to go in a different direction with their brand and persona than the record label.

For a new artist, it might seem at first prudent to give up control to obtain perhaps more money upfront or more comprehensive support. For example, Paramore's lead singer, who was 16 at the time the band was signed, stated that the "band's deal makes it feel like the staff at its label are more invested in Paramore's future--and had the group not cut this kind of deal, the label may not have been as patient with their slow-blossoming success."[cxix] However, the level of participation can become overbearing in their later years. Again, as stated before, her age perhaps had a lot to do with her ease in being micromanaged. When the record labels take on a role similar to that of a parent, a 16 year old would not be the kind of person to have a biggest problem with authority.

Problems with authority aside, these active interest deals can create even bigger issues. They transform the artist's relationship with the label from a merely contractual relationship into a partnership that can require high levels of fiduciary duties from each party.[cxx] In the past the contractual relationship between a label and an artist was clear: an "artists grant labels the right to manufacture and distribute their recordings in exchange for a percentage of net income received from the sale of those recordings."[cxxi] The artist was a work-for-hire who was adequately paid in the form of record royalties and advances.[cxxii] However, a 360 Deal gives record labels "a right to a percentage of net income from non-record sale earnings."[cxxiii] Most labels set up for themselves a 10 to 35% cut of their artist's net income from the enumerated ancillary activities mentioned above.[cxxiv] More importantly, it gives the label rights in these actives, which translates into a say in what an artist can and cannot do in their professional careers.[cxxv]

Such power, control and investment resemble a makeup of a partnership as outlined in the Revised Uniform Partnership Act ("RUPA"). Section 202 of the RUPA defines a partnership as "the association of two or more persons to carry on as co-owners a business for profit".[cxxvi] Partnerships are categorized by co-ownership, which is "[t]o state that partners are co-owners of a business is to state that they each have the power of ultimate control."[cxxvii] Another characteristic of a partnership is profit sharing. As Section 202(c)(3) of the RUPA states, if "A person who receives a share of the profits of a business is presumed to be a partner in the business"[cxxviii] However, it is not necessary for partners to share profits equally, they may just simply agree on any proportion or formula.[cxxix] Partners, under RUPA, are co-owners if they can exhibit control over the business.[cxxx]

Once a partnership can be established, several duties are asked of each party. The most important to the issues at hand within the music industry, are fiduciary duties of loyalty and care. While RUPA does allows for partners to pursue self-interests, it has to be done in a way that violates the fiduciary duties.[cxxxi] For starters, arm's length dealings are forbidden to those bound by fiduciary ties because fiduciaries are held to a stricter standard than a simple contract can establish.[cxxxii] Loyalty is defined in Section 404(b) of RUPA in three parts. First, partners have a duty “to account to the partnership” for any property, profits or benefits which results from conducting partnership business or from the use of partnership property.[cxxxiii] Second, a partner has a duty “to refrain from dealing with the partnership” that has interest adverse to the partnership.[cxxxiv] And lastly, a partner has a duty “to refrain from competing” with the partnership.[cxxxv] The second fiduciary duty, care, is defined in RUPA 404(c), as “refraining from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law.[cxxxvi]

Active rights’ deals grant the labels a right to share in the profits of all aspects of an artist’s career. Moreover, in granting an active right, this usually means, “the labels have ultimate control over the rights granted, which typically include final approval over rights such as the right to approve tour schedules, the right to set the salaries of certain tour and merchandise sales employees and the right to insist with whom the artist contracts for publishing and merchandising.”[cxxxvii] The level of control the record label can exercise with this deal over the ancillary interest, and thus with the careers their artist, can be interpreted by the court as a partnership, where the artist and the label are co-owners of an artist brand. Although artist maintain some level of control, like for example, “the right to hire and fire managers, book tour gigs, contract with various third parties (merchandisers, publishers, sponsors), and the power to make other decisions that substantially affect their brand,” the artist lose the final say in any important matter regarding their brand.[cxxxviii] This final say detail can translates into the control factor required to establish a partnership.

Moreover, by arranging the division of revenue within the 360 deal, whether its 10% or 30% and differing among different stream, it is essentially setting up profit share mechanisms. Moreover, the huge upfront fees in trade for rights in revenue stream can be seen as the initial monetary investment.

Lastly, RUP’s intent requirement is simply that the parties intended the factors of the partnership to be valid, not that the relationship in and of itself was intent to be a partnership.[cxxxix] Thus, just because the parties did not intend for the 360 Deal to morph their relationship into a partnership, the fact that it its provisions satisfy the definitions set form in RUPA, that they agreed upon these terms and that they followed through with the agreement, creates a partnership.

Once a partnership can be determined, the obligations ensue. The fiduciary duties required by the partnership are what can cause the most problems for the record label. Several things can happen. As there is a duty of loyalty, the record label owes the artist an account of any benefit derived from the use of their brand, i.e. any use publicity right, their name and likeness, as well as refrain from competing with or doing business with another person or entity with competing interest. As a record label with many artists, there is bound to be someone who the label is in a contract with that can breach this duty. Moreover, pervious issues in regards to unfair royalties might have to be reevaluated because they are largely one sided in favor of the record labels. As 1L's contracts classes taught, a breach of a fiduciary duty such as loyalty can spell disaster for the record labels.

As for the duty of care to not conduct any reckless activity that can endanger the interest of the partner, it creates a whole other slew of problems. This relationship gives the record labels power over areas of their artist careers that they are not experts in. This can lead to one of two things: (1) the labels attempt at filling the gaps in their expertise and cause themselves more harm than good by spending millions of dollars they do not currently have in obtaining them; or, (2) they can carelessly mismanage an artist career and be potentially liable for breaching the duty of care. With the rise of 360s, there has also been a rise in the majors labels acquiring and/or creating specialized branches in order to be able offer the kind of expertise they need to develop their artist brand and fulfill their end of the 360 Deal. Sony for example has created its own in house advertising agency, Arcade Creative Group. This agency will not only help with in house operations but it is a completely independent, full service advertising agency that will compete with all the other "Mad Men" on Madison Avenue. Arcade prides itself on "creating culture."[cxl]

However, innovations like these are coming at a lamentably slow pace and cost a pretty penny to create. The price tag associated with creating these ventures for the sake of diversifying their role in the music industry. Although, it is commendable attempt at defining a new role for themselves as perhaps, branding/marketing/advertising specialist, it is a step in the wrong direction. The labels are major record labels. They hold the Masters to the content. They create the content. Although their role as distributors might be on the decline, by innovating in the areas in which they have expertise they can craft a new role for themselves with in the realm of creating, producing and distributing music.

V. Back to Basics: Refocusing On Music, Digital Music

The underpinning logic behind a 360 Deal is the premise that there is no money left in the selling and distributing of music. This premise is not only false but also self-destructive. By directing their attention to obtaining more money from their artist and venturing into facets of the industry that they have historically never partook in, the record labels are misdirecting all their energies and efforts. Not only do the potentially negative legal ramifications of 360 Deals pose grave danger, but their potentially positive qualities are slow coming. The new model has not balanced the budget sheets of the record labels in the way that they wanted. Moreover, with other non-record labels partaking in 360s it leaves them more vulnerable to losing talent.

The record labels have been painted as evil monsters that use, abuse and then dispose of talents while leaving them indebted and broke. And although, those allegations are true to a certain degree, the record labels are better described as dinosaurs. Too large for their own good, slow moving and clumsy, like the Brontosaurus, whose sheer weight and size was so big scientist believed they lived their lives partially submerged in waters. The record labels' executives disconnected with the average consumer and their inability to innovate with the digital age by offering a new product, all because they have grown too large to care and too arrogant to give in to digital formats. Like the Brontosaurus who lives partially submerged because its size and eventually became extinct, the record labels refuse to evolve with the rest of the world and remain entrenched in their old ways, and thus faces extinction.

In January of 2012, for the first time in history, digital music sales topped the physical sale of music.[cxli] According to a Nielsen and Billboard report, digital music purchases accounted for 50.3% of music sales in 2011.[cxlii] Moreover, digital sales were up 8.4% from the previous year, while physical album sales declined 5%. [cxliii] With the 8.4% increase in digital music sales globally in 2011, revenue was an estimated US$5.2 billion.[cxliv] Moreover, digital channels are now a whomping 32% of record company revenues globally, up from 29% in 2010.[cxlv]

However, this is merely the tip of the iceberg; analyst forecast that by 2015 digital sales will surpass physical sales on a global basis.[cxlvi]

Today, over 58 countries are able to purchase music digitally worldwide with the existence of iTunes.[cxlvii] In a 2010 survey shows that among 15- to 18-year-olds, just under half, about 45%, say they have ever listened to the radio through the Internet, and eight in ten, 81%, say they have downloaded music from the Internet.[cxlviii] Moreover, this demographic spends 23% of their time listening to music on a computer, 29% from an Ipod, 12% from a cell phone, and 12% and 23% for CDs and Radio, respectively.[cxlix] This, however, were the figures prior to services like Spotify being available in the United States.

Two main factors are responsible for such growth, “ownership” and “access.” By giving the consumer the option to purchase or stream music, the differing ways to make money are astounding.[cl] There has been a rise in subscription services. Spotify, for example, has capitalized on popularity of other social networking sites, nameingly such as Facebook, and created partnerships which helped the Swedish reach new audiences.[cli] There has also been a lot of activity in the realm of ISP offerings, with services being bundled and offered with cell phone planes, the most notable was MetroPCS and Rapsody.[clii] And while, developments in cloud technology can pose piracy threats they are also transforming the way fans manage and store their music.[cliii]

When speaking of the duality between ownership and access, Rob Wells, president, Global Digital Business at Universal Music Group, stated, “[t]he fact that these two models of consumption can co-exist speaks volumes about the future. In fact, we have really only scratched the surface of digital music in the last decade - now we are starting the real mining, and on a global scale." However, the mining is being done by these third corporations that are not truly even part of the music industry. What all of these corporations have in common is that they employ engineer, programmers, and software and web developers. These are the people doing the mining, while the music industry is just idly standing by and relying on their content to supply them with revenue. Reinforcing these statements about technology is Edgar Berger, President and CEO, International, Sony Music Entertainment, who stated that, "[t]he technology infrastructure is being put in place in a way that we have never seen before and that is one major reason why we feel positive about digital music going into 2012."

As these third party corporations show, there is still money to be made in the music industry. The digital distribution that supplies the two basic options of ownership or access has created a flowing stream of revenue once again. However, these innovations are all created through source code programming, they are all patented and they are all a utility, a technological invention. With the creation of the MP3, music has been penetrated by technology and forever altered. However, that does not have to spell the end for the recording labels.

VI. All the worlds a game, and we are all merely players: Enter the Social Music Site

Wired magazine wrote an article in 2011, about a little known Swedish company at the time, Spotify.[cliv] In the article it explains how Spotify has transformed itself into an important player within the music industry. With its expansive selection of music, its interactive yet still simply userability, its sleek design and its crucial partnership with Facebook, Spotify changed the *streaming game*. Spotify transformed music from a product to a *service* more efficiently other companies has. Spotify did to streaming what iTunes did for downloading. When describing its founder, Daniel Ek the article in Wired Magazine says, "[he] didn't know much about the music business. All he knew was technology." Furthermore, Ek himself stated that he did no create the program because he loved music, that was just ancillary for him, he created it because he saw an *opportunity*. Surely every executive at a major corporation rolled their eyes while reading that.

Although Ek's statement is accurate and undeniably true, it also points to the obvious deficiencies of the recording industry. It puts on displays for the world to see how ineffective, unimaginative and uncooperative the people who really do love music have become. Music is no longer just about content, although there is no denying it still reigns kings. Music is about innovation, creativity and smarts; essentially it's about computer science.

The music industry has to get into the *development game.* The first step needs would be the incorporation of research and development ("R&D") teams within their corporate structure. The music industry should not be looking to get into advertisement like Sony has, that industry is already well formed. The music industry should join an industry that is still in its infancy, one that has enough room for growth. Why shouldn't the record companies bridge their innate love for music with engineering, programming and development? It surely makes much more sense to direct their effort to activities that can help expand into new horizons, because not doing so was the reason they found themselves in this predicament in the first place. Moreover, the more the industry pursues nonsensical alternatives like the 360 deal, the less market share of the digital distribution market they will be able.

Music is still about content and as the master copyright holders they still hold the power. But how long will this last? Promoter, Live Nation, already wooed two of the biggest names in music away from the record labels. Are the record labels waiting for other mediums to grown big enough to push them out of their own industry?

Yet, research and development would not matter if the record companies do not listen to what the consumers actually want and constantly innovate to keep them. Consumers want access to their music everywhere they are. Consumers want to connect with their favorite artist. They want the freedom to listen uninhibited and with little or no distraction. Consumers want to discovery new and interesting artist that are as diverse as their already famous favorites.

As CD sales diminish so should their manufacturing and distribution. Labels still spend millions of dollars producing a dying medium, an ineffective business practice. CDs should be limited to limited edition box sets and other collectibles. By ending the production of CDs and turning their focus on improving digital formats, record labels can innovate on more important things such as HD audio files, or similar alternatives to M4 formats. The M4 format gives the listener the kind of experience comparable to vinyl, a valued commodity in the age of really bad quality. By focusing on improving the infamous MP3 format, in the hopes of perfecting a the digital medium, the opportunities can be endless.

Record companies can quite frankly create revenue through the digital distribution of their own music. This can be and should be done by taking a page out of Napster's book in trying to "to build communities around different types of music," perhaps even a new Facebook solely dedicated to music that does not have the bad reputation that MyScpace has, which unfortunately, prevents it's growth. By cutting out intermediaries like iTunes and Spotify, they can create label specific alternatives to online streaming and downloading by creating a social music site, comparable to social networking site but solely dedicated to music. The key would be to make it as separate from Facebook as possible. The reason for this is simple: Facebook has intermingled family, with wild college friends, with potential employers and colleagues, and

Spotify’s integration into that melting pot of awkwardness makes most users opt out of their Spotify/Facebook integration options.

However, the social music site should be as clean, sleek and user friendly as the Ipads, tablets and websites we are already used to. In our digital world, aesthetics are key. But aesthetics can only be beautifully crafted through the recruitment of the brightest minds in computer science America has to offer. Perhaps this can spur a new campaign “Digitally Programmer and Beautifully Crafted in America.” But more importantly, by placing a dedicated team on the relevant issues, the answer can come in the form of a technology from within the industry, a feat which will probably win back the hearts of Americas.

The most important aspects of this social music site would be that it allows for the streaming of music with an option to directly purchase music and have them appear on everywhere: on one’s phone, car, lap top, and will hold it forever on your own cloud (to erase issues of losing your music forever if you devise is lost or stolen). We can live in a world where one’s phone contains an App which gives more than just listen capabilities but perhaps, private concerts by your favorite artist; as the content holders, this can be possible. But even futther innovation into a car App, which fills your car stereo with streaming options; however, it would be your purchased tracks will give access to random acapella tracks, or even outtakes of your favorite artist in the studio. The basic feature would be all access.

A foreseeable issue with the social music site would be to present and provide a unified major label front through collaborating on cross-links, cross-collaborations and all in all a good artist rivalry. If you are listening to Beyoncé, Universal should casually and respectfully suggest artist comparable to Beyoncé while still letting them have the undisturbed access to Beyoncé’s track. This can only be done through technological innovations. Moreover, pinning the record labels against each other might cause some controversy; however, capitalism taught us that competition spurs creativity and innovation; thus, when Universal Music sees that their artist is not doing well against artist whom are comparable to her, that will incentivize creativity within Universal. Moreover, the sheer fact that the labels are providing and casually suggesting to consumers alternate artist that are similar to their favorites can provide the label with the information they need to target certain demographic beter, and in turn attract advertisements. This information is so unique and precise it can only be compare to that of Facebook's for its click by click information. This itself can be a new revenue stream.

Moreover, a this social music site powered by label powered artist profiles for streaming and downloading can expose consumers to artist that were under their radar, a quality consumers appreciate. This satisfies the consumer's demand for new and interesting music, while giving the website more hits.

Furthermore, by adding options to purchase music directly on the streaming site, it will further eliminate the middle man. The problem with the recording industry is that it did not know how to sell its content without its tangible form. Research and development can cure that self-inflicted ill. In a world driven by the digitalization of nearly all aspects of our lives, from our social interactions, to our music, to even our professional lives, the overarching theme at its core is technology. It is, therefore, essential we technologically *socialize* the way we listen to music. By creating an interactive, social network medium dedicated exclusive to music with its corresponding Apps (for mobility and accessibility) that feeds off of the likes and dislikes of its consumer, can the industry can rejuvenate itself. Moreover, the sky is the limit once technology is introduced to the equation; from music videos embedded with options to buy clothes (a phenomenon that is around and barely used) to the collaboration efforts between this social music site with other lifestyle choices like fashion, fitness, and even social change advocates. The key for the music industry, however, would be to never become submerged into it complacency ever again.

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[i] Benny Evangelista. "Music industry changing its tune: Teenagers who download from Internet finally forcing record industry to adapt." June 16, 200. Available at: http://www.sfgate.com/business/article/Music-industry-changing-its-tune-Teenagers-who-2608978.php#ixzz2E6sW8GT3 .
[ii] *Id*.
[iii] Benny Evangelista. "Music industry changing its tune: Teenagers who download from Internet finally forcing record industry to adapt." June 16, 200. Available at: http://www.sfgate.com/business/article/Music-industry-changing-its-tune-Teenagers-who-2608978.php#ixzz2E6sW8GT3
[iv] The article portrays how the industry was slow moving with CD prices and portrays their arrogance when saying trying to show people is that music is a good value, even if you have to pay for it. Vance, Ashlee. "Universal's CD price cut comedy gets five stars Revolution - twenty years in the making." Found at: http://www.theregister.co.uk/2003/09/05/universals_cd_price_cut_comedy/
[v] http://www.techdirt.com/articles/20110707/03264014993/riaa-accounting-how-to-sell-1-million-albums-still-owe-500000.shtml . Detailing the accounting of royalties and how the record companies use tricky advance and slick maneuvering to keep the artist in debt.
[vi] Sara Karubian, 360 Deals: An Industry Reaction to the Devaluation of Recorded Music, 18 S. Cal. Interdisc. L.J. 395, 397 (2009). Quoting Rick Rubin, producer, stated "[t]here was a time when if you had something that wasn't so good, through muscle and lack of other choices, you could push that not very good product through those channels… Well, the world has changed. And the industry has not."
[vii] Benny Evangelista. "Music industry changing its tune: Teenagers who download from Internet finally forcing record industry to adapt." June 16, 200. Available at: http://www.sfgate.com/business/article/Music-industry-changing-its-tune-Teenagers-who-2608978.php#ixzz2E6sW8GT3. "Like young Eagon Brown said to the Chronical: "I used to buy CD singles when I was in middle school, but now that they have it through Kazaa I don't need to do it anymore. I download the one-hit wonders. But if it's an album I know is really good, I'll buy it. I couldn't give it up and start going to the store and spending $20 on a CD with one song I want to hear."
[viii] *Id.*
[ix] Greg Milner, *Perfecting Sound Forever: An Aural History of Recorded Music*
[x] Henry H. Perritt, Jr., New Business Models for Music, 18 Vill. Sports & Ent. L.J. 63, 71 (2011).
[xi] Id.
[xii] Henry H. Perritt, Jr., New Business Models for Music, 18 Vill. Sports & Ent. L.J. 63, 72 (2011).
[xiii] *Id*.
[xiv] http://transition.fcc.gov/omd/history/radio/documents/short_history.pdf
[xv] *Id*.
[xvi] *Id*.
[xvii] *Id*.
[xviii] Henry H. Perritt, Jr., New Business Models for Music, 18 Vill. Sports & Ent. L.J. 63, 74 (2011).
[xix] Hawking, Tom. From LP to App: A Brief History of the Evolution of Recorded. Jul 6, 2011. Found at: http://www.flavorwire.com/192303/from-lp-to-app-a-brief-history-of-the-evolution-of-recorded-music#2
[xx] *Id.* Bow Wow Wow's "C30, C60, C90, Go!," which came out as a cassingle in 1980 had a blank side B for fans to record their own music onto. The latter innovation didn't amuse their record company, who fired them for encouraging piracy.
[xxi] Henry H. Perritt, Jr., New Business Models for Music, 18 Vill. Sports & Ent. L.J. 63, 74 (2011).
[xxii] Vance, Ashlee. "Universal's CD price cut comedy gets five stars Revolution - twenty years in the making." Found at: http://www.theregister.co.uk/2003/09/05/universals_cd_price_cut_comedy/
[xxiii] *Id*.
[xxiv] "The death spiral of Napster begins." 2001. http://www.history.com/this-day-in-history/the-death-spiral-of-napster-begins
[xxv] *Id*.

[xxvi] http://www.thedailybeast.com/newsweek/2000/06/04/the-noisy-war-over-napster.html. This article describes the phenomenon that was Napster during its heyday in June 2000.
[xxvii] Henry H. Perritt, Jr., New Business Models for Music, 18 Vill. Sports & Ent. L.J. 63, 75 (2011).
[xxviii] *Id*.
[xxix] Daniel J. Gervais, Kent M. Marcus, Lauren E. Kilgore, The Rise of 360 Deals in the Music Industry, 3 Landslide 40 (2011).
[xxx] Sara Karubian, 360 Deals: An Industry Reaction to the Devaluation of Recorded Music, 18 S. Cal. Interdisc. L.J. 395, 397 (2009).
[xxxi] Id.
[xxxii] Benny Evangelista. "Music industry changing its tune: Teenagers who download from Internet finally forcing record industry to adapt." June 16, 200. Available at: http://www.sfgate.com/business/article/Music-industry-changing-its-tune-Teenagers-who-2608978.php#ixzz2E6sW8GT3
[xxxiii] Sara Karubian, 360 Deals: An Industry Reaction to the Devaluation of Recorded Music, 18 S. Cal. Interdisc. L.J. 395, 397 (2009).
[xxxiv] Although, the price-fixing was cited as a reaction to P2P activity, the price of CDs were still inflated in the mid to late 90's. "CD Price Fixing Suit Settled For $143 Million" Available at: http://www.billboard.com/news/cd-price-fixing-suit-settled-for-143-million-1727380.story#/news/cd-price-fixing-suit-settled-for-143-million-1727380.story
[xxxv] Benny Evangelista. "Music industry changing its tune: Teenagers who download from Internet finally forcing record industry to adapt." June 16, 200. Available at: http://www.sfgate.com/business/article/Music-industry-changing-its-tune-Teenagers-who-2608978.php#ixzz2E6sW8GT3.
[xxxvi] Sara Karubian, 360 Deals: An Industry Reaction to the Devaluation of Recorded Music, 18 S. Cal. Interdisc. L.J. 395, 397 (2009).
[xxxvii] Benny Evangelista. "Music industry changing its tune: Teenagers who download from Internet finally forcing record industry to adapt." June 16, 200. Available at: http://www.sfgate.com/business/article/Music-industry-changing-its-tune-Teenagers-who-2608978.php#ixzz2E6sW8GT. Citing a study by Harris Interactive Inc.
[xxxviii] Outkast had the song in 2003 with their single "Hey Ya," while Black Eyed Peas had the second spot with "Where is the love?" Available at: http://top40.about.com/od/top100lists/ss/top100songs2003_10.htm
[xxxix] Available at: http://www.riaa.com/faq.php.
[xl] Available at: http://www.riaa.com/faq.php.
[xli] *Id*.
[xlii] *Id.*
[xliii] *Id.*
[xliv] *Id.*
[xlv] Joseph Menn. "Digital lockers a growing piracy concern." Jan 2012. Available at: http://www.reuters.com/article/2012/01/21/us-digital-piracy-idUSTRE80K05120120121
[xlvi] The Reuters proclaims that only 3% of Americans use digital storage lockers whether for legitmate or piracy purposes. Joseph Menn. "Digital lockers a growing piracy concern." Jan 2012. Available at: http://www.reuters.com/article/2012/01/21/us-digital-piracy-idUSTRE80K05120120121.
While the RIAA paints a scary picture by showing that 90% of links on digitial lockers are to copyrighted material, and thus illegal. Available at: http://www.riaa.com/faq.php.
[xlvii] Joseph Menn. "Digital lockers a growing piracy concern." Jan 2012. Available at: http://www.reuters.com/article/2012/01/21/us-digital-piracy-idUSTRE80K05120120121.
[xlviii] Neil Strauss. "Music Mergers Herald a Shift to the Internet." Jan 2000. Available at: http://partners.nytimes.com/library/tech/00/01/biztech/articles/26time-emi.html.
[xlix] *Id*.
[l] Henry H. Perritt, Jr., New Business Models for Music, 18 Vill. Sports & Ent. L.J. 63, 75 (2011).
[li] Ben Sisario, "U.S. and European Regulators Approve Universal's Purchase of EMI", NY Times (Sept. 21, 2012) available: http://www.nytimes.com/2012/09/22/business/global/ universal-takeover-of-emi-music-is-approved.html?_r=0.
[lii] http://en.wikipedia.org/wiki/Frenemy.
[liii] Daniel J. Gervais, Kent M. Marcus, Lauren E. Kilgore, The Rise of 360 Deals in the Music Industry, 3 Landslide 40, 41 (2011).
[liv] Douglas Okorocha, A Full 360: How the 360 Deal Challenges the Historical Resistance to Establishing A Fiduciary Duty Between Artist and Label, 18 UCLA Ent. L. Rev. 1, 2 (2011).

[lv] Doug Bouton, The Music Industry in Flux: Are 360 Record Deals the Saving Grace or the Coup De Grace?, 9 Va. Sports & Ent. L.J. 312, 318 (2010).
[lvi] Daniel J. Gervais, Kent M. Marcus, Lauren E. Kilgore, The Rise of 360 Deals in the Music Industry, 3 Landslide 40, 41 (2011).
[lvii] *Id* at 423.
[lviii] *Id.*
[lix] " In Rapper's $150 Million Deal, New Model for Ailing Business" Published: NY TIMES (April 3, 2008), available: http://query.nytimes.com/gst/fullpage.html?res=9A0CE4DF1E31F930A35757C0A 96E9C8B63&scp=1&sq=Jay-Z+%22Live+Nation%22&st=nyt.
[lx] *Id.*
[lxi] "Madonna announces Live nation deal," Associated Press, 2007 http://today.msnbc.msn.com/id/21324512#.UFjEoI2PXjs.
[lxii] Ian Brereton, The Beginning of A New Age?: The Unconscionability of the "360-Degree" Deal, 27 Cardozo Arts & Ent. L.J. 167, 180 (2009)
[lxiii] *Id.*
[lxiv] Sara Karubian, 360 Deals: An Industry Reaction to the Devaluation of Recorded Music, 18 S. Cal. Interdisc. L.J. 395, 440 (2009).
[lxv] Sara Karubian, 360 Deals: An Industry Reaction to the Devaluation of Recorded Music, 18 S. Cal. Interdisc. L.J. 395, 440 (2009)
[lxvi] Ian Brereton, The Beginning of A New Age?: The Unconscionability of the "360-Degree" Deal, 27 Cardozo Arts & Ent. L.J. 167, 180 (2009)
[lxvii] *Id.*
[lxviii] *Id.*
[lxix] Sara Karubian, 360 Deals: An Industry Reaction to the Devaluation of Recorded Music, 18 S. Cal. Interdisc. L.J. 395, 440 (2009).
[lxx] *Id.*
[lxxi] Sara Karubian, 360 Deals: An Industry Reaction to the Devaluation of Recorded Music, 18 S. Cal. Interdisc. L.J. 395, 429 (2009).
[lxxii] *Id.*
[lxxiii]Ian Brereton, The Beginning of A New Age?: The Unconscionability of the "360-Degree" Deal, 27 Cardozo Arts & Ent. L.J. 167, 182 (2009)
[lxxiv] *Id.*
[lxxv] *Id.*
[lxxvi] Dennis Cauchon. "Music: A fickle industry leads to uneven earnings." http://usatoday30.usatoday.com/life/people/story/2012-04-17/musician-tax-troubles/54319528/1.
[lxxvii] Sara Karubian, 360 Deals: An Industry Reaction to the Devaluation of Recorded Music, 18 S. Cal. Interdisc. L.J. 395, 399 (2009).
[lxxviii] *Id.*
[lxxix] *Id.*
[lxxx] Sara Karubian, 360 Deals: An Industry Reaction to the Devaluation of Recorded Music, 18 S. Cal. Interdisc. L.J. 395, 431 (2009)
[lxxxi] Sara Karubian, 360 Deals: An Industry Reaction to the Devaluation of Recorded Music, 18 S. Cal. Interdisc. L.J. 395, 431 (2009)
[lxxxii] *Id.*
[lxxxiii] *Id* at 408-409.
[lxxxiv] *Id.*
[lxxxv] Sara Karubian, 360 Deals: An Industry Reaction to the Devaluation of Recorded Music, 18 S. Cal. Interdisc. L.J. 395, 455-56 (2009).
[lxxxvi] *Id* at 432.
[lxxxvii] Id.
[lxxxviii] *Id.*
[lxxxix] Sara Karubian, 360 Deals: An Industry Reaction to the Devaluation of Recorded Music, 18 S. Cal. Interdisc. L.J. 395, 419 (2009)
[xc] *Id.*
[xci] *Id.*

[xcii] Sara Karubian, 360 Deals: An Industry Reaction to the Devaluation of Recorded Music, 18 S. Cal. Interdisc. L.J. 395, 431 (2009)
[xciii] *Id*.
[xciv] *Id*.
[xcv] *Id* at 432.
[xcvi] *Id*.
[xcvii] Sara Karubian, 360 Deals: An Industry Reaction to the Devaluation of Recorded Music, 18 S. Cal. Interdisc. L.J. 395, 399 (2009).
[xcviii] Daniel J. Gervais, Kent M. Marcus, Lauren E. Kilgore, The Rise of 360 Deals in the Music Industry, 3 Landslide 40, 41 (2011).
[xcix] Sara Karubian, 360 Deals: An Industry Reaction to the Devaluation of Recorded Music, 18 S. Cal. Interdisc. L.J. 395, 399 (2009).
[c] Daniel J. Gervais, Kent M. Marcus, Lauren E. Kilgore, The Rise of 360 Deals in the Music Industry, 3 Landslide 40, 41 (2011).
[ci] *Id.*
[cii] *Id.*
[ciii] Sara Karubian, 360 Deals: An Industry Reaction to the Devaluation of Recorded Music, 18 S. Cal. Interdisc. L.J. 395, 429-30 (2009).
[civ] Sara Karubian, 360 Deals: An Industry Reaction to the Devaluation of Recorded Music, 18 S. Cal. Interdisc. L.J. 395, 431 (2009).
[cv] *Id*.
[cvi] Quoting the Genie, played by Robin Williams in the 1992 film, Aladdin, copyright of Disney Corporation.
[cvii] Doug Bouton, The Music Industry in Flux: Are 360 Record Deals the Saving Grace or the Coup De Grace?, 9 Va. Sports & Ent. L.J. 312, 318 (2010).
[cviii] *Id*.
[cix] *Id*.
[cx] Fehintola Betiku. “Most embarrassing, cringe-worthy, desperate moment in the history of music': Madonna receives backlash for being too old following nip-slip controversy.” Jun 2012. http://www.dailymail.co.uk/tvshowbiz/article-2157724/Madonna-receives-backlash-old-following-nip-slip-controversy.html.
[cxi] Sara Karubian, 360 Deals: An Industry Reaction to the Devaluation of Recorded Music, 18 S. Cal. Interdisc. L.J. 395, 441 (2009).
[cxii] Daniel J. Gervais, Kent M. Marcus, Lauren E. Kilgore, The Rise of 360 Deals in the Music Industry, 3 Landslide 40, 41 (2011).
[cxiii] *Id*.
[cxiv] *Id*.
[cxv] Douglas Okorocha, A Full 360: How the 360 Deal Challenges the Historical Resistance to Establishing A Fiduciary Duty Between Artist and Label, 18 UCLA Ent. L. Rev. 1, 13 (2011).
[cxvi] Daniel J. Gervais, Kent M. Marcus, Lauren E. Kilgore, The Rise of 360 Deals in the Music Industry, 3 Landslide 40, 41 (2011).
[cxvii] *Id.*
[cxviii] *Id.*
[cxix] *Id*.
[cxx] *Id*.
[cxxi] Douglas Okorocha, A Full 360: How the 360 Deal Challenges the Historical Resistance to Establishing A Fiduciary Duty Between Artist and Label, 18 UCLA Ent. L. Rev. 1, 16 (2011).
[cxxii] *Id*.
[cxxiii] *Id*.
[cxxiv] *Id*.
[cxxv] Id.
[cxxvi] Rev. Uniform Partnership Act Section 202 (2011-2012 ed.).
[cxxvii] Okorocha, A Full 360: How the 360 Deal Challenges the Historical Resistance to Establishing A Fiduciary Duty Between Artist and Label, at 4 (2011).
[cxxviii] Rev. Uniform Partnership Act Section 202 (2011-2012 ed.).
[cxxix] *Id*.

[cxxx] Okorocha, A Full 360: How the 360 Deal Challenges the Historical Resistance to Establishing A Fiduciary Duty Between Artist and Label, at 5 (2011).
[cxxxi] *Id* at 8.
[cxxxii] Quoting Justice Cardozo. *Id* at 8.
[cxxxiii] Rev. Uniform Partnership Act Section 404 (2011-2012 ed.).
[cxxxiv] *Id*.
[cxxxv] *Id*.
[cxxxvi] *Id*.
[cxxxvii] *Id* at 13.
[cxxxviii] *Id*.
[cxxxix] "[T]he association of two or more persons to carry on as co-owners a business for profit forms a partnership, whether or not the persons intend to form a partnership." Rev. Uniform Partnership Act Section 202 (2011-2012 ed.).
[cxl] Arcade's Facebook, available: http://www.facebook.com/arcadecg?rf=111674235534877.
[cxli] Laurie Segall, "Digital music sales top physical Sales," CNN Money (January 5, 2012) available at: http://money.cnn.com/2012/01/05/technology/digital_music_sales/index.htm.
[cxlii] Id.
[cxliii] Id.
[cxliv] "Digital Music Report: Expandig Choice, Going Global." http://www.ifpi.org/content/library/DMR2012.pdf.
[cxlv] Id.
[cxlvi] Georg Szalai, "Forecast: U.S. Digital Recorded Music Sales to Top Physical Sales This Year," Hollywood Reporter (August 15, 2012), available at: http://www.hollywoodreporter.com /news/download-music-streaming-digital-revenue-362799.
[cxlvii] Digital Music Report 2012. http://www.ifpi.org/content/library/DMR2012.pdf
[cxlviii] Publication: Generation M$^{2:}$ Media in the lives of 8-18 Year Olds, A Kaiser Family Foundation Study. Jan 2010. http://www.kff.org/entmedia/upload/8010.pdf.
[cxlix] Id.
[cl] Id.
[cli] Id
[clii] Id.
[cliii] Id.
[cliv] Neal Pollack. "Spotify Is the Coolest Music Service You Can't Use.". Dec 2010. http://www.wired.com/magazine/2010/12/mf_spotify/.