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Entertainment Law: Redefining the Role of Transactional Attorneys

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Link to Item	https://hdl.handle.net/20.500.14849/5072

ENTERTAINMENT LAW: REDEFINING THE ROLE OF TRANSACTIONAL
ATTORNEYS

A Thesis Presented

by

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to

The Faculty of the Honors College

of

The University of Vermont

In Partial Fulfillment of the Requirements
for the Degree of Bachelor of Arts and the Honors College
Specializing in Jazz Studies

May 2017

Defense Date: Tuesday, May 9th
Thesis Examination Committee:

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Abstract

This thesis will examine how the role of transactional lawyers and their relationships with artists in the music industry first developed and then have adapted to changes in the industry to stay relevant. This evolution is due to a number of reasons: the diminishing power of the record industry; the failure of anti-file sharing laws; and the progress of technology to make music more accessible than it has ever been around the world. Therefore, the role of what a transactional entertainment lawyer needs to do to be successful has shifted. This research is significant because while there has been extensive research on how record labels have consolidated and artists have gained more independence, there is little research offering analysis of the transformation of the legal, transactional side of the industry.

Table of Contents

Introduction.....	1
Chapter 1: The Emergence of the Transactional Music Attorney	6
Chapter 2: Transactional Entertainment Attorneys in the 21 st Century	16
Chapter 3: The Future of the Music Industry and the Role of the Attorney.....	26
Conclusion	31
Interviews.....	33
Works Cited	34

Introduction:

There is little debate that attorneys will continue to have a role in the music industry. One traditional role of attorneys is as litigators who defend clients against lawsuits or protect their interests and maintain a presence in the courtroom. However, this thesis will focus on another role: transactional lawyers. These attorneys are usually involved in negotiating and drafting agreements, making deals and ensuring that parties honor their obligations. I became particularly interested in this topic because I want to pursue a career in transactional entertainment law, and I will evaluate how this traditional role first became established and has recently changed.

Contract negotiation between the record label and artists, while necessary during the Tin Pan Alley era¹, became much more prominent towards the middle of the 20th century because of the shift from the central focus of composers writing songs to be performed by many different artists to the singer-songwriter model. Composers in this model, such as Bob Dylan, Joni Mitchell, James Taylor, Bruce Springsteen and many others, wrote with the intention of recording and performing their songs themselves.

Music publishing became vital to the industry because publishers owned the intellectual property rights of the composition and licensed these rights to the record companies. When artists release an album they receive a percentage of royalties on each song for a set value, known as mechanicals. This percentage is then split between the artist and the publisher. Therefore, attorneys would negotiate with the publishing companies for what percentage of the mechanicals an artist would receive. Lawyers

¹ Between 1880 and 1950, although the end of Tin Pan Alley is highly debated (Scheurer, 2)

would also negotiate with the record companies to help the artist obtain a large amount of upfront money to be used to record their music in a recording studio. After a record was produced, these artists had access to the record company's extensive distribution networks to hopefully become popular, repay the label for the recording costs, and generate wealth for all of the parties involved.

Why then has the need of contract negotiations between record labels and new artists diminished and the role of transactional lawyers shifted in recent history? At the turn of the 21st century, recording artists and the entire industry were struggling due to the inadequacy of the Digital Millennium Copyright Act to prevent illegal downloading of music. Internet piracy was at its peak and caused the U.S. record industry to fall from \$20.6 billion in revenue during 1998 to \$7 billion in 2014.² What was damaging to the music industry also caused harm and the need for adaptation in the transactional entertainment attorney's role.

Along with the emergence of the internet, the impact of digital recording and artists' access to cheap, efficient recording technology, more and more emerging artists tended to stay away from both publishing companies and the large record labels. This took away revenue that record companies thought was automatically theirs only a few decades earlier. At the same time, it also reduced the number of up-and-coming artists that required attorneys to negotiate contract agreements with the labels.

This thesis will further explore how this change emerged at the turn of 21st century and outline how because of the record companies' lessened control of the

² Friedlander, 1

industry, transactional lawyers have struggled to stay relevant within the industry. They have needed to diversify into negotiations with other parties outside of the traditional record label-artist model.

Previous scholarly works have documented the history of the music industry in general. In “The Rise and Fall of Record Labels,” Ilan Bielas gives a comprehensive analysis of how the record labels have lost relevance in the music industry today. This work provides a strong understanding of one of the areas that shaped the role of the transactional attorney and is one of several works that has focused on this topic.

Other works have also evaluated the changing role of individual recording artists and their increased independence in the music industry, such as “Historical Changes in the Music Industry Supply Chain: A Perception of the Positioning of the Artist Musician,” by Renard, Goodrich and Fellman.

Even though there is a substantial amount of information on the development of these different facets of the music industry, there is very little offering in-depth specifics of how the role of attorneys has evolved due to these changes.

While it has become an obvious fact that the record industry is struggling to stay profitable and that file sharing has significantly diminished the sales of records, there is little scholarly, in-depth analysis of how transactional lawyers have adapted to this change. This work will utilize research from a number of areas: the emergence of artist and attorney relationships in the 1960s; the consolidation of record labels; data on file sharing infringements; and the emergence of new, recent technology, ranging from actual recording hardware to the internet, social media and other ways of distributing and

promoting music.

Many articles today discuss what changes that record labels and individual artists face, but my research will be utilized to provide new information on how the legal side of the industry has also had to change in order to maintain relevance by turning its attention to other forms of contract negotiations, including clients outside of the music industry.

My preparation for this thesis began with extensive research. I selected a variety of texts to use as a basis for my research and I was fortunate enough to interview eight transactional entertainment lawyers. Their opinions have had a great influence on the development of this project and provided a first-person view into the day-to-day lives of attorneys currently involved in the music industry.

The paper will begin with an introduction of the birth of rock 'n roll in the mid-1950s and how and why transactional music attorneys became such a vital part of the music industry shortly after in the 1960s. It will also include how the recording artist, along with the attorney, navigated the terrain dominated by publishing and record companies. This first section will define the role and responsibilities that attorneys developed during this period, including their role as contract negotiators, counselors and sometimes managers. In addition, it will discuss what other roles these attorneys were able to utilize to their advantage during this time and their influence on changing laws in the industry, such as copyright laws.

The next section will discuss how copyright law, influenced by music attorneys, tried to discourage music piracy and illegal peer-to-peer downloads. This section will

provide an overview of how the music industry suffered tremendously because of the dramatic decrease in album sales and the overall less willingness for people to pay for music. Although iTunes was partially successful in remedying this, many music attorneys lost their jobs and music law became thought of as a specialization practice in some areas.

Chapter three will outline how today's attorneys became interested in entertainment law and how they believe it is possible to get into the field today. Prior to the 2000s it was relatively easy to break into the music industry. However, because the overall market share of the music industry declined, many workers in the industry were laid off and it became much more difficult to secure a job in the field. This chapter will discuss how lawyers' role in the music industry, once established, has changed.

Finally, the last section will utilize the opinions of transactional music attorneys in order to both predict the future direction of the music industry and predict the future of the transactional attorneys' role in the industry. I will then conclude with a summary of my research and an evaluation of how the current transactional music attorney's role differs today than it has in the past.

Chapter 1: The Emergence of the Transactional Music Attorney

The birth of rock 'n roll in the mid-1950s influenced the music industry in a variety of ways and provides a solid baseline for evaluating the role of transactional attorneys from this period until today.

Due to the post-World War II economic boom, consumers enjoyed access to more disposable income and were much more willing to spend on musical recordings and listening equipment, such as phonograph players. In addition, the 33.3 rpm long play vinyl record, introduced by Columbia less than a decade earlier, had recently become a standard for recorded music. While initially suited for classical music because of the 22-minute recording capacity per side, it was quickly utilized to hold a collection of ten or more songs of popular music.³ Even with the vast technological changes of the music industry in the 21st century, it is still commonplace for an album to be released as a collection of songs, although the focus has returned somewhat to single songs, especially because of iTunes.

In addition to the greater consumption of music in the household, jukeboxes spread to restaurants and bars at this time. Due to all of the increased demand, new record labels emerged and established ones grew. The birth of rock 'n roll ended the tight oligopoly that four major record labels (Columbia, Capitol, Mercury and RCA Victor) held only two years earlier. The four major labels' market share of record music was 78 percent of Billboard charted records, but by 1958 independent record labels accounted for

³ Hull, 2

76 percent.⁴ Overall, record sales tripled from \$189 million in 1950 to \$600 million in 1960 and ushered in a new business model for many players in the industry.⁵

Transactional attorneys now started to gain a major role through both assisting managers with contract negotiations between artists and record labels and even sometimes acting as managers themselves. Because there were so many different record labels at the time and they controlled similar shares of the recorded music marketplace, these attorneys and managers could shop artists around in order to receive better deals. This managerial role and contract negotiations in general became more commonplace in the 1960s when the singer-songwriter model started to emerge.

Unlike the traditional 9-to-5 job of writing songs under the Tin Pan Alley model, composers in the singer-songwriter model wrote with the intention of both recording and performing the songs themselves. Although some of these composers worked in the Brill Building⁶, songwriting began to transition out of a job where composers would get paid on a per song composition basis.

In addition, some artists decided songs were more genuine if they were both written and performed by the same artist or group and many wrote lyrics with deep emotional and personal connections. However, what many artists also gained by doing this is that they tried to retain ownership of the musical composition copyright.⁷

⁴ Hull, 123-124

⁵ Hull, 2

⁶ The songwriters and producers in the Brill Building allied to produce a musical product that blended the feel of early rock with the craftsmanship of the songwriters of the Tin Pan Alley era. (Scheurer, 90).

⁷ The owner of the copyrighted work is granted five exclusive rights; The ability to reproduce the work, distribute copies of the work, perform the work publicly, make a derivative work and display the work publicly (Passman, 208-209).

Even though the sound recording copyright did not yet exist, the only way to share in the income generated by a song was to own all or a portion of the musical composition copyright and anyone who owned this copyright had the opportunity to profit significantly. In order to attain this composition copyright artists needed to develop an original song⁸ and publish their work in a tangible medium, such as sheet music or a phonorecord.

These artists would typically work with music publishing company by assigning the company the rights of their song and in return receive licensing benefits, distribution and access to royalties. The publishing companies successes were keyed directly to how well they were able to market and promote music and generate royalties from recordings, performances and other licensing fees for both the company and the artist.⁹ Usually, an artist would only receive writer's income¹⁰ during the Tin Pan Alley era; however, once the singer-songwriter model was established these artists typically entered into some kind of publishing agreement, such as a copublishing agreement.¹¹

While the even 50-50 split was typical for publishing contracts between artists and publishing companies, it was also possible for artists to receive either a higher or lower percentage of the publishing through negotiation. In addition, other factors such as the term under exclusivity, potential sharing of advances, areas of promotion, the amount

⁸ "Not copied" (The Copyright Act of 1976, 101)

⁹ Baskerville and Baskerville, 49

¹⁰ Also known as "works made for hire," these were contracts on a single song basis, receiving no recurring royalty (Baskerville and Baskerville, 36)

¹¹ Also known as "splitting the publishing" – the two parties usually share equally in the publisher's income (Baskerville and Baskerville 68)

of songs required to be composed and delivered by the writer and also writing with other artists, could all be negotiated under this agreement.

Many of these factors were and still are determined by the artist's clout. Having a history of sales, being an established artist and having successful live performances all pull the agreement in the artists' favor.

During the 1960s, music publishing companies were comparable to record labels in the fact that there were many of them and they were on a level playing field in the publishing market. Because separate negotiations between artist to publisher and artist to record label were necessary, it was definitely helpful to have a publisher behind you when going to a record label for a recording deal. Once a publishing agreement was finalized, the next step was for artists to record their songs in order to start generating money for both themselves and the music publisher

Because recording equipment was so expensive, it was only possible to record music as a new artist in a recording studio. Renting studio time was very expensive, costing up to hundreds of dollars per hour, therefore it was very unlikely for artists to be able to record their own music without the help of a large amount of upfront money, also known as an advance, from a record label.

At the same time, labels had a great opportunity to generate income from the discovery of new artists and the sale of their albums. This was possible due to the Artist and Repertoire (A&R) team that developed a sense of which artists had potential and should be signed by the label. Once a new artist was discovered, the artist and record label would enter into a recording agreement. Because of the many negotiable

factors in this agreement, attorneys were also necessary to be present for both the artist and the record label at the time of contract negotiations for record deals.

At its most basic level, a recording agreement between an artist and a label is a contractual arrangement between the two parties based on an exchange of promises. The artist must record for the label in exchange for royalties if and when those sales occur with the objective of maximizing profits on both ends.¹²

Some of the negotiable factors at this time included the length of time under contract, options¹³, how many recordings must be released, national royalty rates, advances and other costs that either the record company or artist must pay.¹⁴ The level of clout of artists also greatly affected the contract negotiations and were directly related to the influence they had over publishing agreements. However, because record labels were taking a risk on mostly new and unknown artists, they were usually able to dictate the many aspects of the agreements.

One of the most important negotiable factors during the 1960s was the advance for an artist. The artists' attorney would often negotiate to get the largest possible advance for that artist because the attorney would most likely take a portion of it as his or her fee.¹⁵ This had benefits and drawbacks. By receiving such a large advance, artists could make sure all of their recording and promotion costs were covered. Unfortunately, artists would not receive any income at all until these outstanding costs were recouped

¹² Hull, 143

¹³ One or more parties may reserve the right to enforce a contract option, which may renew the contract for another term and may require additional consideration (Moore, 391)

¹⁴ Brabec and Brabec, 70

¹⁵ Baskerville and Baskerville 33

from album sales, and it was not uncommon for the costs to never be completely paid back. If they were paid in full, the artist would then receive a mechanical royalty on the sale of the album, which was distributed by the Harry Fox Agency¹⁶ and then split based on the publishing agreement between the artist and publisher.

Another major licensing opportunity and source of income was from performance rights organizations (PROs). These organizations such as the American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music Inc. (BMI), were and still are responsible for controlling and collecting royalties from public performances.¹⁷ While PROs are an important part of the music industry, these organizations typically issue blanket performance licenses covering entire catalogues of musical recording and are therefore frequently non-negotiable. However, it was possible for the artist and publisher to negotiate the terms of the performance royalty split from these agreements as well.

Outside of licensing songs to the record labels, publishing companies were also responsible for printing sheet music, synchronizing music to film or videos and issuing other special permit licenses.

Since the process for receiving income for an artists' recorded music was so convoluted even during the 1960s, another major role of the transactional music attorney that developed during this time was the role of counselor or advisor. Because these

¹⁶ Established by the National Music Publishers' Association in 1927 to provide an information source, clearinghouse and monitoring service for licensing musical copyrights including mechanical licensing, royalty distribution and later on digital licensing (Baskerville and Baskerville, 74-75).

¹⁷ Baskerville and Baskerville, 111

attorneys had grown accustomed to the industry, they developed a wealth of both knowledge and connections.

Because most well respected attorneys had been involved with the music industry for a significant period of time, they had developed a comprehensive understanding of how all of the different businesses and organizations worked. This led attorneys to develop a counseling role with their clients. Some common counseling points include, whether or not to sign a second recording contract when one has expired, ideal touring destinations and how to deal with intra-band disagreements. In addition, any question the client had, the attorney was knowledgeable enough to be able to either answer the question him or herself, or contact someone who did know the answer.

In some cases, attorneys for several reasons could become arguably the artists' single most important person in their professional life: their personal manager. Some of the most crucial aspects of managing an artist include helping the artist with major career decisions, developing compositions and recordings, promoting the artists' career, assembling other members of the professional team and acting as a general buffer between the artist and all other points of contact.¹⁸

Although the responsibilities of a manager are quite extensive, in general, management contracts are often vague and other than giving advice and counsel during the term of the management contract, the manager could do very little.¹⁹ This can be especially risky since a personal manager usually makes between 15 and 20 percent of the gross artist income.

¹⁸ Passman, 47-48

¹⁹ Moore, 369

Hiring an attorney as a personal manager can be beneficial because he or she can stay removed from any truly personal connections, such as family members or friends, acting as personal managers instead.

While artist and attorney relationships stayed mostly unchanged throughout the rest of the 20th century, the Copyright Act of 1976 expanded the counseling role that attorneys had previously had. This act codified fair use into federal law and allowed the use of a copyrighted work, including reproduction in copies or phonorecords for criticism, comment, news reporting, teaching, scholarship or research, where in other cases it would be an infringement of copyright.²⁰

This was further refined by what the purpose of the use was, the nature of the work, the amount of the work and the effect on the potential market value of the work. Because of the plethora of variable factors relating to fair use and its determination on case by case bases, it was necessary to have an attorney to discuss any infringement possibilities.

Copyright infringement became even more prevalent once digital recording became the norm and ushered in digital sampling. In addition, this act extended the life of copyright so that copyright material would stay out of public domain longer. It also introduced the sound recording copyright, which became a portion of the recording agreement and was often granted to the record labels for producing records.

This new technology opened up many questions about licensing, business models, and copyright in general.²¹ While digital recording became an industry standard

²⁰ The Copyright Act of 1976, 107

²¹ Licensing in the Shadow of Copyright

practice in the third quarter of the 20th century, digital consumption of music did not become possible until the introduction of Napster in June 1999.

Illegal file sharing and peer-to-peer downloading became an issue because instead of purchasing compact discs to listen to music, consumers were instead using Napster to download music. Since it was free and much more convenient than going to a record store, Napster grew to popularity and one attorney went on to characterize that the Napster shift was so dramatic that there are only pre-Napster and post-Napster eras in the modern music business.²²

The record industry quickly started to falter and the record sales dropped tremendously. In response, the Recording Industry Association of America launched a full-scale litigation campaign against everyone partaking in copyright infringement. Even when Napster was declared unlawful and required to shut down, the code was open sourced and many other Napster clones emerged.

Eventually the litigation was so unsuccessful that the record industry had no other options, but to submit to the losses until Apple emerged with a solution: iTunes. Apple, a company with no ties to the music industry previously, was able to create a new business model by releasing iTunes as a digital platform where consumers could pay for single song downloads. Almost instantly, the industry was transformed from focusing on selling entire albums to selling individual songs, which lessened the stringent control of distribution that the record companies previously had.

Although, iTunes was able to remedy the music industry to a certain extent, it

²² Ramona DeSalvo

had a devastating impact on everyone employed in the music industry, including a dramatic decrease to entertainment lawyers that practiced law strictly in the music industry.

Chapter 2: Transactional Entertainment Attorneys in the 21st Century

Many of the transactional music lawyers in the industry today developed their interest in entertainment law because they either grew up as musicians or have a great passion for music and the arts in general. The music industry also has a fondness for keeping business in the family and genetics is debatably the easiest way to become involved in the industry. One lawyer said “when I came out of law school I actively decided to do something else because it seems like everybody in the business is somebody’s kid” and it was not until later on that he decided to become involved in the music industry because of his distaste for labor and employment law.²³ Switching from a different type of law practice to entertainment law was a common recurring theme from the interviews I conducted.

It is unusual for transactional music attorneys to get involved in the music industry immediately after finishing law school in today’s society. Occasionally this is possible, but competition and lack of work experience prevents someone from instantaneously securing a job in this field. The music industry is one of the hardest fields to break into because of the increased need to have close connections and the extreme competitiveness overall. Typically the path is that you do something else, such as working for a corporate law firm, and through networking you are able to transition to a music type of practice.²⁴

Transactional music attorney careers demand a high level of knowledge and commitment to continuing education in the music industry in order to be successful. This

²³ Jeff Biederman

²⁴ Steve Plinio

learning process is comparable to learning a foreign language; You must immerse yourself in the language and be around it all the time in order to fully comprehend what is being said.²⁵ It is extremely difficult to learn a language by only practicing once a month or a few times a year and the same thing can be said about learning the intricacies of the music business and its laws.

In addition, once you have a full understanding of the music industry, terms such as “points,” “mechanicals,” and “cut-ins” all make sense in context, and therefore you do not have to spend time dissecting the meaning of each one. This significantly increases how efficiently things work in the music industry.

In general, you still need to be well versed in copyright, intellectual property and contract law to be successful in the music industry. While these skills are developed in law school and from internships and you can learn copyright by reading case law, you don’t really learn how the industry works by learning copyright law, which is why work experience is crucial to the industry.²⁶ While the music industry has struggled in recent years, there is still a demand for transactional entertainment lawyers, and we will discuss their current roles below.

Today, while it is clear that lawyers are still a crucial piece of the music and entertainment industries there are essentially two major ways to secure a job practicing as a transactional music lawyer: You can either work as an attorney at a law firm, whether it is a major corporate firm with an entertainment department or an entertainment-only focused practice, or work on the legal teams of varying music business companies.

²⁵ Ramona DeSalvo

²⁶ Ramona DeSalvo

Although working on the legal teams of music business companies has a significant impact on the music industry, transactional attorneys working at law firms typically work closer with artists.

I acquired information regarding the lives of music attorneys most easily from those who worked at law firms. As an associate or partner at a firm, there are many opportunities to work with multiple facets of the music industry in a variety of ways. This is both the easiest and most common way to practice transactional music law today. Typically, these lawyers represent talent, such as artists, actors and athletes, and even some of the most prominent and powerful music attorneys are employed by corporate law firms because of the resources these firms have and their ability to utilize attorneys from other media departments or departments outside of that if necessary.

Surprisingly, there are a lot of commonalties that transactional music attorneys face on a day-to-day basis since the 1960 business model was introduced, even with all of the recent technological developments. Some of the most common work responsibilities directly related to the music industry include drafting and negotiating both contracts and licensing agreements, as well as counseling clients on a variety of issues. Contracts can be further simplified into record deals with the major labels, which includes all of the subsidiaries they own, touring deals, sponsorship deals, commercial deals and endorsement agreements.

Regarding record contracts, it may at first seem likely that these 25-100 page documents are structured differently because of the cheap and accessible technology artists have to record and promote their music today. However, because record

companies still hold an enormous amount of resources, capital, and wealth of knowledge relating to the industry, this is not the case. For the most part if you're an artist signing a record deal, that agreement is very similar to a deal you would have signed in 1980 or earlier. The contracts themselves haven't changed because artist to label relationships are, at their core, essentially the same.²⁷

A tight oligopoly still constricts artists from having a large variety of record labels to negotiate with in order to record and promote their music on a major scale. The Big Three – Warner Music Group, Universal Music Group and Sony Music Group – controlled approximately 88.5% of the recorded music in 2012.²⁸ This number has only grown as record labels do what ever they can to remain in control of the recorded music market.

In addition, while record labels and publishing companies were separate entities in the middle 20th century, now the major record labels own major publishing companies, which control a similar market share of published music and control vast distribution and marketing networks. Because of this, many of the contracts include agreements that encircle the other businesses that the record labels own. Therefore, attorneys do not have to go through as many stages of negotiations between different parties in order to help an artist release his or her music.

Overall, the contracts still remain highly negotiable, especially based on an artists clout, and attorneys are still necessary for contract negotiations in general. One major change to the recording contract is how record labels now very rarely offer large

²⁷ Steve Plinio

²⁸ The Nielsen Company & Billboard's 2012 Music Industry Report

advances to record music. This is due to the fact that record labels both typically own studios and how today's recording equipment has dramatically reduced the cost of recording.

As mentioned earlier, illegal P2P downloads and iTunes disrupted the music business model that was established in the 1960s. Technology enables anyone with a laptop, internet and basic recording software to record and promote their own music today; creating an enormous amount of new music.

For these reasons, new artists will often stay away from the major record labels. They are able to post music to YouTube, SoundCloud and use social media websites, such as Facebook, Twitter and Instagram, to provide updates about album releases, touring dates and news about themselves in general. This digitally direct approach can be very beneficial for new artists and costs significantly less than the traditional way to record an album.

Even though new artists may shy away from record labels, the labels still continue to have a major influence on the music industry. These record labels have remained vital by evolving into a filter role: the marketing and promotion functions of a label the filtering function that they've always served is more important now than its ever been and it is still the case that the biggest artists need the help of the major record companies to break globally.²⁹ Instead of solely selling records, they guide the general public into what they consider or want to be good music. While the technology available to artists discourage the newer artists from seeking record deals, the few that do enter into an

²⁹ Ryan Lehning

agreement may receive little or no advance. In addition, most record labels try to receive all portions of an artists' income known as cross collateralization or a "360 deal."

With lessened revenue due to a lack of album sales and miniscule royalties from streaming, artists have relied more and more on touring. Because artists make so little revenue from mechanicals, music streaming royalties and even iTunes, they are more and more geared towards playing live shows. This has caused attorneys to increasingly serve as managers in trying to negotiate venues for where their artists can perform, but this creates a new problem: various restrictions limit attorneys acting as managers to also act as booking agents. Booking agents also already provide this service to artists today.

Artists today have so many resources, including the benefit of producing, promoting and distributing their own music, that there is a much lessened need of transactional attorneys to individual artists to a certain extent. Lawyers, often in a law firm or corporate setting, will work with artist managers and agents to first negotiate their contracts with the artist. Just as how it is important for an artist to secure a solid recording contract, it is necessary to negotiate proper contracts for agents and managers to make sure they are giving the artist the best opportunities and greatest exposure that they can get.

Attorneys will negotiate on compensation or commission, duration, key person,³⁰ power of attorney³¹ and exclusivity to the artist. By letting the attorney negotiate the terms of these agreements between the artist and their agent and manager, it greatly

³⁰ Since the personal manager is so personally connected to the artist, if the manager leaves the firm he/she is currently hired at then the agreement is terminated (Hull, 105)

³¹ The manager will usually ask for power to enter into agreements on the artist's behalf and is generally advised for the artist to limit this role since it is completely based on trust (Hull, 104)

reduces conflicts of interest. Once these contracts are finalized, then the manager and agent will take over the majority role of developing the tour plan.

However, it is also possible and common for attorneys to remain within the negotiating process and both help and act in a managerial role during the negotiated tour process. Some of these negotiable factors include the location and general region of the tours, compensation per show, location of the tour in general and each individual show, merchandise and transportation. The attorney is most crucial in this negotiating phase to make sure that the manager and agent do not negotiate deals that will benefit themselves more than the artist.

In addition to the increased role of attorneys negotiating artists touring, one attorney believes that there is nowhere near as much involvement negotiating with record label personnel and that there is instead more negotiability with direct-to-consumer digital providers.³² Companies such as Spotify, Pandora, Apple Music and others have risen to popularity and can be considered the second wave of iTunes convenience. Streaming has dramatically overtaken digital downloading and instead of signing a recording contract with a record label, artists are able to record music themselves and then work with an attorney to negotiate the terms of release of their album on these platforms.

Attorneys will also work with artists in all of their other contractual needs, such as sponsorships, endorsements and commercials, and have emerged as another vital part of revenue generation. This will be discussed in depth further below because it directly ties

³² Clair Burrill

into how attorneys in the music business need to explore other areas to fully support their artists and is why one attorney referred to the artist almost as its own brand itself.

Counseling clients has also remained vital throughout an attorneys' career and has increased in importance parallel to how technology has made the industry more and more convoluted. In addition to executing each deal, attorneys need to have an advisory role on how to keep the artist successful and out of any potentially harmful agreements, especially when the attorney is unable to be present, such as when touring.

One attorney believes she gives as much advice about options in engaging partners and what the "standard" terms are in such situations as she is in giving legal advice on traditional industry agreements.³³ She also goes on to explain how although who you negotiate contracts with can naturally progress as your career does, the industry itself has caused the role of the transactional attorney to expand.

Another attorney makes sure to take the counseling part of the job seriously and explains that receiving an economic benefit takes some of the shine off of the counseling aspect. Even though it's a business, he makes sure to treat his clients like people and many of them are dear friends of his, which can also make it difficult to bill them for his service.³⁴

A third attorney spends a lot of his workday counseling clients for licensing and fair use counseling.³⁵ The counseling he does on compulsory licenses refers to how the copyright owner must permit the use of a work if the user conforms to the requirements

³³ Tiffany Dunn

³⁴ Jeff Biederman

³⁵ Mark Avsec

of the statute regarding payments of royalties and so on.³⁶ Between what is acceptable in a fair use definition and how easy it can be to illegally download and sample someone's work, this an area that has significant impact on an artist's livelihood and a large settlement from a copyright infringement can greatly benefit an artist that has been infringed upon.

In addition to the breadth of knowledge required to be a successful transactional music attorney, there is an increasing shift for these attorneys to expand their roles into other media industries, including film and television as well as sports and fashion, and is where attorneys have made the biggest shift overall. While there is some overlap, especially in the media industries regarding contracts and licensing, this requires even greater knowledge to be a successful attorney.

The music business today involves multi-platform exploitation and diversification into other areas of entertainment and media.³⁷ Because of this and how enormously the music industry shrank at the start of the 21st century, it is frequently insufficient for a transactional attorney to only be involved in the music industry and many will have clients involved in a broad spectrum of industries.

By expanding their clients into this broad range of categories, lawyers are able to create a brand out of an artist and will therefore be able to maximize earnings for both their client and themselves. The simplest way to expand a client into a brand is through merchandising. Creating clothing and other accessories directly related to the artist can easily introduce another revenue stream.

³⁶ Hull, 360

³⁷ Grubman, Shire and Meislas

This can be further exploited depending on which media outlet the artist is directly involved in. For example, in music an artist may have a signature guitar or amplifier, while a basketball player may have signature basketball sneakers. Attorneys must work with artists to capitalize on as many merchandising streams as they can, and it is common to either receive initial income or royalty payments for licensing their name on these items.

Outside of merchandising, an artist that traditionally may only sing can potentially be involved in commercials. Advertising is such a large influential industry and it can easily further artists into the next stages of popularity and their career just through promotion. In addition, some traditionally musical artists are able to act, although the opposite is much more likely, and this creates another revenue stream.

Because of all of these potential sources for income, some lawyers have begun to categorize themselves as content lawyers³⁸ or lawyers for the creative class.³⁹ As media platforms work further to vertically integrate into singular platforms such as; as many some gaming systems or cable subscriptions have, this will only continue to increase in likelihood for the boundaries of entertainment law to become blurred.

³⁸ Jeff Biederman

³⁹ Mark Avsec

Chapter 3: The Future of the Music Industry and the Role of the Attorney

I was able to interview a variety of entertainment lawyers on both their opinion on what the future of the music industry will look like and the future transactional music lawyer role. These findings are explained below.

Going forward, all interviewed lawyers agree that Napster and illegal peer-to-peer downloads changed the music industry permanently. Once people were able to get music for free, they adjusted and did not want to go back to paying \$17 for a Compact Disc. One attorney described this adjustment to someone getting hooked on a government welfare program;⁴⁰ Once you are entitled to receiving essentially free money, it is hard to find the motivation to go to work again. While this comparison does draw some similarities to the how the consumption of music changed, welfare is not usually a choice and doing something out of a need to survive is much different than choosing to illegally download songs.

Many believe that the music industry will never completely recover, but they do recognize how iTunes and streaming have healed the industry to a certain extent. Immediate, high-quality, single-song downloads greatly enticed people to purchase songs on iTunes instead of scouring the internet and using virus-ridden websites for downloads.

Peer-to-peer file sharing has been further combated by the streaming service model that we have today. Platforms such as Spotify, Pandora and Apple Music have revolutionized the industry by providing free music streams directly to your laptop or mobile device. These services are able to provide free music due to advertisements and

⁴⁰ Ramona DeSalvo

offer premium features for a recurring monthly fee.

At the same time, they hurt artists because the royalties they receive per single song stream is miniscule compared to downloads from iTunes. Although there are often more streams than downloads per song, people that use streaming services must listen to the song many more times to generate the same amount royalty value as a download.

However, because streaming is so convenient, some attorneys encourage the business model and believe that these streaming services have “won out” for now. One attorney is hopeful and fairly confident that consumption of music will continue to rise and be easier to access going forward. Whether on your phone or in your car, the whole process will continue to be streamlined.⁴¹

In addition, one unique idea for future consumption is the idea of a national blanket license for all 318 million Americans. This idea would cover all media for a monthly flat fee similar to streaming services or many other bills and in doing so you would receive “all you can eat media.”⁴² The idea behind this is that all Americans would have access to a plethora of media. This would further vertically integrate the media industries and is a direction that the media industries are already moving towards.

While this does seem like a great idea, it would be very difficult to execute for a multitude of reasons. First, a platform needs to be developed that enables all of these services on one platform. While many of the videogame systems try to integrate these different media services by having many different apps, this does not include every service combined into one platform.

⁴¹ Steve Plinio

⁴² Jeff Biederman

Another difficulty regarding this is how the portion of royalties will be distributed to each media company. This would be very difficult to calculate without the help and integration of Nielsen and SoundExchange.

In addition, there definitely has to be some sort of funding, whether through venture capital or otherwise, and extreme promotion to bring the service to all American households. Currently, only a fraction of the population currently use streaming services and video services, such as Netflix, so there needs to be significant period of development and promotion required to make this idea a successful one.

Going forward, attorneys have varying opinions on the vitality of record labels in the music industry. One attorney believes that their role will not be as overarching, but they will fight hard to somehow develop, morph and adapt to remain involved.⁴³ This ties back into how they have already somewhat morphed into a filter role instead of a strictly distribution and sale role.

Another attorney has a similar belief that record companies will always have a role in the industry, but she does believe the definition of "record company" will change and look different.⁴⁴

A third attorney believes that record labels only truly matter for artists that fit a "pop mold," such as the artists that are featured on the Grammy Awards.⁴⁵ However, if an artist does not fit this mold, the major labels will most likely not be interested and the artist will not have an interest in signing with the label either. In general, it is a hard path

⁴³ Clair Burrill

⁴⁴ Tiffany Dunn

⁴⁵ Mark Avsec

for an upcoming artist, especially one that does not want to conform to a typical pop music style.

Overall, all attorneys agree that there will be less and less attorneys that are based strictly in the music profession. One lawyer can count the lawyers practicing only music and entertainment law in Nashville on one hand. Music law existed as an area of practice considered to be mainstream less than two decades ago, but has now been downgraded to a niche market according to her.⁴⁶

She additionally believes that the music industry has developed back into a corporate profession, where it will remain. The major corporate law firms will represent artists going forward as well as record labels and other major music business professions.

Another lawyer continually stresses that music law no longer exists as a profession in and of itself, and instead lawyers will be strictly based in content and media going forward.⁴⁷ Whether it is music, television, film, print or clothing, clients will be brands. This is the way that clients will be most successfully utilized in generating income and as an attorney, you want to help your client succeed in being as successful as possible and maximize their value. The successful attorney in the music industry will be as much of an intellectual property attorney as well as an advanced media attorney.

The advent of newer technology will also play a major role in the future development of the music industry. New technology will not stop being invented and if anything it will only increase at a faster rate. Another attorney believes that there is always going to be a profession for people who are fascinated by copyright and will

⁴⁶ Ramona DeSalvo

⁴⁷ Jeff Biederman

respond to the technological developments by helping both respond to copyright disputes through litigation and write new copyright law as it becomes necessary.⁴⁸ He additionally believes that music is the most complex area of copyright law and attorneys will always be necessary to interpret the complexity. In addition, the fundamental principles of an artist to attorney relationship will not change, but the business model will keep evolving.⁴⁹

⁴⁸ Ryan Lehning

⁴⁹ Mark Avsec

Conclusion:

Through all the major shifts in the music industry, artists and attorneys have been able to maintain a relatively similar relationship to the one that had first developed in the 1960s with the singer-songwriter model. A typical transactional music attorney still negotiates contracts between varying parties and counsels their clients on a variety of issues.

However, the dramatic decrease in purchase of music because of Napster and illegal peer-to-peer downloading at the beginning of the 21st century has had a resounding effect on transactional music entertainment lawyers. Many of these attorneys lost their jobs and the ones that did not have absolutely expanded their roles.

Today, many attorneys practicing entertainment law do not specialize exclusively in their practice. As media becomes more and more vertically integrated it makes sense for attorneys to be able to navigate the different mediums of entertainment. Because entertainment attorneys must develop a deep understanding of the contract laws, copyright laws and intellectual property laws surrounding multiple media industries, the expanded role that they now face makes their lives much more difficult.

Contract negotiations between artists and record labels have been increasingly less common at a new artist level. This is due to the ability for new artists to access technology and social media more efficiently and more conveniently than any generation before to get their music heard. On the other hand, established artists and artists seeking to be successful globally still need record labels to be successful and still need an attorney to negotiate these recording contracts.

Only a few years ago, predictions were that record labels' role in the marketplace would be in perpetual decline, but this was not to be. Labels have proven to be more resilient through their overarching reach on the music industry in general and their ability to pivot to acting as a filter role for artists, although their role in the future of the music industry is not clearly defined.

While contract negotiations between new artists and labels has decreased, it does not mean that transactional music attorneys negotiate fewer contracts or are less involved in the music industry. If anything, their ability to counsel clients and negotiate deals for them involving touring, streaming services and sponsorships has involved them in the music and entertainment industries more than ever before.

Transactional music attorneys need to be much more active in their relationships with their clients in order to make their clients successful and success requires utilizing the artist a multitude of ways. It is no longer enough to only negotiate a record deal and reap the royalties of album sales. Instead, many of these attorneys treat their artists as brands so they can generate income from as many media and sponsorship opportunities as possible.

Overall, no matter what direction the music industry goes in the future, attorneys will be necessary as they continue to adapt to the progress of technology, continue to negotiate contracts and counsel their clients in order to make them as successful and profitable as possible.

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