

NYSBA Entertainment – Arts & Sports Law Journal – 360 Deals: The Wave of the Future or Has the Future Come and Gone?

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There is an undeniable air of uncertainty in the entertainment field today and its relationship with Intellectual Property law. This is exhibited within the music and poker industries. Historically the output of the music industry was described by the catchall phrase “content.”¹ Content includes productions like “motion pictures, television programs, and music, as well as the output of related industries such as radio, newspapers, magazines, books, and, of course, online materials.”² The power struggle between the music’s content based industry and the developing technology based industry has steered the trade into unfamiliar territory. Another area of uncertainty regarding music and poker concerns Tiger Woods’ fall from grace. Tiger’s precipitous fall has left a vacancy at the top of the branding chain. Consequently, this has caused people in the entertainment field to explore new avenues in search of the wave of the future. As an up and coming industry, poker is primed to fill that void.

360 Deals

The music industry is struggling to attain the revenues it once produced. In particular, content’s value today is being driven into the ground. The industry’s inability to adapt the new technologies to their advantage preceded a drop in profits. Album sales in 2008 (CDs and downloads combined) fell 14 percent from 2007, and about 30 percent from 2006.⁴ Furthermore, CD sales were down for the seventh time in eight years.⁵ In addition, the increased popularity of downloads has not offset the revenue lost from declining CD sales.⁶ Some of the factors that have lead to this decline are supply and demand, the decline of tangible media, reduced transaction costs, the rise of free content, market forces in the technology industry and a culture of piracy.⁷

The new age rock band Radiohead responded to this problem by releasing the album “In Rainbows” without a record label. Radiohead made the album available online and instructed fans to “pay-what-you-want” for the download.⁸ However, this is not an approach that should be emulated by bands all over the globe. Thom Yorke, front man for Radiohead, stated that the only reason this strategy worked for them “is the fact that [Radiohead has] gone through the whole mill of the business in the first place... It was simply a response to a situation. We’re out of contract. We have our own studio. We have this new server. What the hell else would we do?”⁹ The music industry might have found an answer to that rhetorical question through “the emergence of the ‘360’ model as a basis for artists’ contracts with record labels and with promoters.”¹⁰ A 360 deal is “a legal contract between a musical artist and one company.”¹¹ Further, it brings together, under one contract the various aspects of an artist’s career that “have traditionally been handled by separate contracts with different companies” like merchandising, publishing, endorsements, and touring.¹² 360 deals essentially expand the scope of areas in which record labels can earn revenue

from their clients.¹³ The deals encompass non-traditional as well as traditional areas of revenue for the bands.¹⁴ In exchange the record companies provide the bands with more money up front.¹⁵

This new model as a basis for artists' contracts with record labels and promoters has the advantage of creating a new revenue stream for the music industry.¹⁶ In addition, 360 deals "will also benefit artists by allowing record labels to invest more patiently in an artist's career by freeing the labels from the 'tyranny of megahits.'" ¹⁷ What is more, new artists will almost certainly enjoy the receipt of more money upfront.¹⁸ Consequently, the 360 deals will be enjoyed by bands and artists that need to tour to develop their images and fan bases because of the support in the form of money and patience given by the record companies and promoters.¹⁹

Some, however, are questioning the 360 deals viability. The all encompassing nature of the 360 deals raises the question of unconscionability. The basic test for unconscionability is "whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the term or contract involved is so one-sided as to be unconscionable under the circumstances existing at the time of making the contract."²⁰ This test applies to both the procedural and substantive part of the contract. Procedural unconscionability refers to the bargaining process leading up to the contract formation.²¹

There are several ways a contract could be procedurally unconscionable such as duress and other "steep bargaining practices", incomprehensible language, or undue influence.²² Substantive unconscionability refers to the unfairness of the provisions of the deal.²³ Further, substantive unconscionability is generally upheld when the terms of the contract unreasonably favor the stronger bargaining side.²⁴ The issues that will inevitably be argued over in court with regards to substantive unconscionability are: 1) whether the bargaining process in a music contract lacks a realistic alternative for the artist despite the fact that there are a plethora of labels and/or representation available; and 2) whether the terms of the deal unreasonably favor the music recording labels despite the fact that no one side is significantly stronger than the other.

Many music industry experts are questioning the viability of the 360 deal. As more and more artists are remaining (or reinventing themselves as "indy"), releasing new music via itunes, newly-launched Songza, or other social networking media outlets, experts are questioning whether the 360 deal and even the major labels will soon become the dinosaurs of the past. The internet has changed the face of the music business to the discontent of the major labels. Distribution via indy channels used to be via street teams, but recently has come a long way to compete with the major labels. Adventurous younger artists and creative artist management are trending away from the 360 deal in an effort to maximize the bottom line.

Notwithstanding, a critical inquiry regarding 360 deals is whether the concept will make its way into other areas of the entertainment field. This prospect seems likely for the game of poker. The 360 provision was born out of desperation on both sides of the table. The record labels were becoming stale and needed a new source of revenue. Musicians were losing money as well due to the new technologies being employed. As such, the musicians were more willing to sign away rights and revenues that they would not normally give up in times of prosperity. On the other hand, poker is an industry that could use the 360 deals in order to bring the game to the forefront. The rise in popularity of poker has brought wealth and recognition to the players. However, the game seems to have more room for growth. New businesses could be established that book tournaments for players as well as main stream advertising deals. Moreover, these firms could establish merchandising markets and fan clubs. In exchange for bringing the players into new areas of wealth the players might be willing to give these firms a percentage of all of their

revenues. The negative connotation of 360 deals would not sting as much in these circumstances. Rather, the concept here would be to bring the players into a new market. Consequently, new doors would be opened up for the players and a new revenue stream would be created for both parties.

Branding

Branding is the process by which a company will try to associate a particular image, design, face or personality with a particular product or the company in general. In particular, branding is a very effective way for a company to reach out to consumers and form a positive and memorable relationship. Indeed, the concept of branding is no stranger to the entertainment industry. In fact, branding through the use of athlete spokespersons has proven to be a very effective means of branding as an advertising tool. Thus, the critical inquiry is not about the topic of branding itself, rather what is the next step in this area?

Since the days of Michael Jordan, athletes have been at the forefront of endorsement deals. In the generations that have followed athletes like George Forman, Lance Armstrong, and LeBron James have lent their images to grills, revolutionary movements, and sports apparel respectively. This generation's top brand name was Tiger Woods. Seemingly perfect in every way, Tiger established a front that gave anything associated with his name a lift. However, in the shadow of Kobe Bryant's similar fall from grace, Tiger's front came tumbling down recently. As such, a void has been left at the top. It would be easy to say that this generation's next most popular athlete, LeBron James, will step in and fill that void. Yet, the idea of newer "niche" sport personalities as a source of brand names is a novel one.

The game of poker has increased in popularity over the past decade. The increase in popularity corresponds with the realization of poker as a spectator sport. Poker tournaments can be viewed on networks like NBC, ESPN, the Travel Channel, GSN, and Fox Sports Net. Moreover, the World Poker Tour and the World Series of Poker, two rival tours, are flourishing at the moment. Notably, ESPN has customized their World Series of Poker "Main Event" broadcast into condensed versions that follow star players throughout the tournament. Accordingly, the increasing coverage of poker events has caused poker pros to become celebrities. The resulting celebrity status, however, has not produced mainstream branding opportunities for these athletes. They are ostensibly stuck in the poker niche. Thus, there could be an avenue to get a popular poker playing celebrity as a brand name similar to the major sports stars like the aforementioned LeBron James.

The branding prospects are numerous. There is an opportunity for a poker player to come out with his own line of clothing-related items or market an already existing line. For example, a star poker player could potentially obtain a sponsorship contract with Adidas for agreeing to exclusively wear their hats and sweatshirts at his live events. Additionally, food and drink are items that are overtly apparent with a poker player. The most common food and drink item that are aligned with poker players are energy drinks. However, it is also pretty common for a poker player to have something like an alcoholic beverage in their hand while playing. Major soft drink, alcoholic beverage, and energy drink brands could be potential candidates for sponsorship agreements with the players. Further, poker tournaments are usually played in casinos within hotels that feature top of the line restaurants. One concept connects the player with a restaurant that calls one of these casinos home. Jewelry is an item that is not as obvious a match with poker players. However, since a lot of the action is focused around the players' hands, an opportunity might exist for rings, bracelets, and watches to be marketed. A very popular item that accompanies a poker player is a set of headphones. In fact, most of the pictures on the internet of poker players are with

the player at a table donning headphones. Consequently, all a player would have to do is wear their usual attire (i.e. contract with Sony or Bose) and get paid for it. Furthermore, a marketing staple involves an athlete marketing his sport's equipment. Why should poker be any different? An opportunity exists to connect poker players with poker sets, card protectors, decks of cards, trading cards, video games, etc. All of these opportunities would enhance the company's brand by bringing the player closer to the target audience and familiarizing themselves with the player's name and face.

Conclusion

In the modern age it is tough to stay in front of the perpetually changing technologies. However, new opportunities are being born as a result. Instead of looking at 360 deals as an evil that needs to be addressed, the entertainment industry could see who will be benefited most by these provisions. Poker is one such potential benefactor. In addition, the lack of a marquee front man for advertising purposes has created the need for new faces. Poker players, backed by their huge following and cool lifestyles can fill the void. Necessity is, after all, the mother of invention.

¹*Uneasy Lies the Head That Wears the Crown: Why Content's Kingdom is Slipping Away*, 11 Vand. J. Ent. & Tech. L. 597, 2009.

²*Id.* at 598.

³*Id.*

⁴*Id.* at 606.

⁵*Id.*

⁶*Id.*

⁷*Id.* at 610-615.

⁸*360 Deals: An Industry Reaction to the Devaluation of Recorded Music*, 18 S. Cal. Interdisc. L.J. 395, 395 (2009).

⁹*Id.* at 396.

¹⁰*Id.* at 399

¹¹*Id.*

¹²*Id.*

¹³*The Beginning of a New Age?: The Unconscionability of the "360-Degree" Deal*, 27 Cardozo Arts & Ent. L.J. 167, 193 (2009).

¹⁴*Id.* at 194.

¹⁵*Id.*

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