RECORD LABEL AS MANAGER: AN UNINTENDED AGENCY

by
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At the turn of the 21st century, the online file sharing service Napster shook the foundation of the recorded music industry by providing music for free over the Internet. In order to survive, Record Labels had to find new sources of revenue to replace the loss of revenue from physical music sales. One of those new sources affected how Labels earned revenue by expanding Labels' contractual relationships with their artists. Standard Label agreements now give Labels an active or passive interest in nearly every aspect of an artist's career instead of only in their sound recordings.

This new relationship transforms the role of a Label in an artist's career into something similar to the traditional relationship between a personal manager and artist. This Article examines whether this relationship could be one of agency, which includes a fiduciary relationship. If a court were to find that such a relationship exists, this Article argues that it should give deference to the terms to which the parties agreed, including the shaping or disclaiming of any fiduciary duties. Additionally, a court should follow the cases that have evaluated a potential breach of a fiduciary duty through the lens of the unique nature of the music industry and its customs, which serve to benefit the artist, Label, and music listeners.

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I. INTRODUCTION

At the turn of the 21st century, the online file sharing service Napster shook the foundation of the recorded music industry by providing music for free over the Internet.[1] In order to survive, Record Labels[2] had to find new sources of revenue to replace the loss of revenue from physical music sales. One of those new sources that affects how Labels earn revenue is the 360 agreement, which expands Labels' contractual relationships with their artists. Typical Label agreements now give Labels an active or passive interest in nearly every aspect of an artist's career instead of only in the sound recordings. With this new relationship, the parties are confronted with new legal questions, including whether a fiduciary relationship arises.

This new relationship between Labels and artists transforms the role of the Label in an artist's career into something similar to the traditional relationship between a personal manager and an artist. This relationship could be fiduciary in nature because the relationship is one of agency. Courts evaluating a fiduciary relationship should do so in light of the terms in the agreement and industry norms and follow the cases that honor a waiver of agency and associated fiduciary duties.

[1] Tom Lamont, *Napster, the Day the Music was Set Free*, GUARDIAN (Feb. 23, 2013), https://www.theguardian.com/music/2013/feb/24/napster-music-free-file-sharing.

[2] In this Article, "Record Label" or "Label" refers to a type of label such as one of three major record labels (Universal Music Group, Sony Music Entertainment, or Warner Music Group). There are many independent record labels, but whether those types of independent labels follow the contracting practices discussed herein is outside the scope of this Article.

A. The Internet and Online Music

In the decades leading up to the 21st century, most people learned of new music by listening to the radio, watching MTV, or talking with friends. If a person wanted an album, she headed to her local record store to pick up that record, cassette, or CD. Maybe she had only heard the hit single on the radio, but she likely still bought the full album. She would do that every time there was a new band she wanted to check out or when a band she liked released a new album. The Internet changed that. Smartphones changed it even more. Gone are the days when teenagers (and lucky adults) spent hours in record stores looking at physical copies of albums, admiring cover art, and purchasing new music.

In 1999, Napster brought file sharing to the masses.[3] Napster made it extremely easy for users to upload, share, and subsequently find music—all for free.[4] Instead of paying $10 to $20 for an album in a record store, users could download the same album in a few minutes for free and from the comfort of their homes.[5] While Napster did not survive the Record Labels,[6] it did forever change the landscape of how we acquire and listen to recorded music. Physical record sales never recovered[7] and online services now dominate the industry.[8] Services such as Spotify, Pandora, iTunes, GooglePlay, YouTube, Amazon's Prime Music and Music Unlimited, and many others provide various ways to consume music from free streaming to paid downloads. Additionally, the unit that is purchased has changed; music fans now purchase or stream music by track rather than by album.[9]

While this change in technology has brought more music to many more listeners, it has had a detrimental effect on the companies responsible for getting music

[3] Richard Nieva, *Ashes to Ashes, Peer to Peer: An Oral History of Napster*, FORTUNE (Sept. 5, 2013), http://fortune.com/2013/09/05/ashes-to-ashes-peer-to-peer-an-oral-history-of-napster/.

[4] Jessica Hu et al., *Copyright vs. Napster: The File Sharing Revolution*, 2 U.C. IRVINE L.F.J. 53, 55 (2004).

[5] Corey Rayburn, *After Napster*, 6 VA. J.L. & TECH. 16, 18–19 (2001).

[6] In 2001, a court ordered Napster to shut down or start charging for music. Napster opted to charge for music and was purchased by Rhapsody in 2013. Lamont, *supra* note 1. Currently, it is not a major player in the streaming music market. *See* Steve Olenski, *The Battle for Supremacy in the Music Streaming Space and What It Means for Marketers*, FORBES (Dec. 13, 2017), https://www.forbes.com/sites/steveolenski/2017/12/13/the-battle-for-supremacy-in-the-music-streaming-space-and-what-it-means-for-marketers/#7ead195d574e.

[7] Total industry revenues in 2017 were less than 70% of what they were in 1999. *An Explosion in Global Music Consumption Supported by Multiple Platforms*, IFPI, http://www.ifpi.org/facts-and-stats.php (last visited Apr. 5, 2019).

[8] In 2017, physical sales of record music accounted for 30% of global music industry revenue, while streaming and digital revenue accounted for 54%. *Id.*

[9] *2014 Nielsen Music U.S. Report*, NIELSEN, https://www.nielsen.com/content/dam/corporate/us/en/public%20factsheets/Soundscan/nielsen-2014-year-end-music-report-us.pdf (last visited Apr. 5, 2019).

to listeners: Record Labels. Historically, Labels' revenue came from the sale of physical albums on vinyl, 8-tracks, cassettes, and CDs.[10] When consumers were no longer buying those things, Record Labels had to quickly find new revenue sources if they were to stay in business.

B. Record Label Response to the Shift in Music Consumption

Facing a sharp decline in physical music sales, Labels needed to find other revenue sources. One alternative revenue source is the 360 deal, sometimes called a multiple rights agreement.[11] In these deals, Record Labels no longer limit their revenue streams to an artist's recorded music; they also contract for a passive or active stake in the artist's other, usually non-musical activities.[12] These activities can include acting in television and film, writing books or other published materials (usually other than music publishing), games, merchandising, cartoons, and endorsements or sponsorships.[13] Record Labels justified the move to the 360 deal with their investment in the artist's recording career.[14] The Record Labels' point of view is that the artist is popular and in demand because of the investment the Label made in developing and promoting the artist, and it should share in the fruits of that investment.[15]

The 360 deal fundamentally changed the relationship between artists and Labels, and it specifically changed the role Labels have in artists' careers. That contractual relationship has grown from a relatively narrow grant of rights in sound recordings to a broad grant of rights in nearly every aspect of an artist's career. This change in relationship has the potential to transform what was seen as an ordinary business relationship into one of agency resulting in fiduciary duties.

C. Other Arguments for a Fiduciary Relationship

Some academics argue that the 360 deal could give rise to a fiduciary relationship under partnership law.[16] Douglas Okorocha argues that a fiduciary relationship

[10] Michael Margiotta, *Influence of Social Media on the Management of Music Star Image*, 3 ELON J. UNDERGRADUATE RES. COMMS. 5, 5 (2012).

[11] Tiffany Simmons-Rufus, *An Overview of the 360 Deal*, A.B.A. PRACTICE SERIES (June 5, 2012), https://www.americanbar.org/groups/young_lawyers/publications/the_101_201_practice_series/an_overview_of_the_360_deal/.

[12] 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, 12–13 (2011).

[13] DONALD S. PASSMAN, ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS 102 (9th ed. 2015).

[14] *Id.*

[15] *Id.*

[16] Partnership is a legal relationship which is fiduciary in nature. WILLIAM A. GREGORY, THE LAW OF AGENCY AND PARTNERSHIP § 188 (3d ed. 2001).

arises between Labels and artists through partnership law in a 360 deal because the parties "operate more like a partnership than two parties bound by contract."[17] Okorocha argues that under a 360 deal, the artist and Label share profits and jointly control the artist's career decisions as co-owners with the parties demonstrating their intent to do so in the language of their contract.[18] By sharing profits and control, and manifesting their intent to do so, the parties meet the elements of a partnership relationship and thus certain fiduciary duties attach to that relationship.[19]

In a similar argument, Bryan Lesser asserts that 360 deals expand the profits and losses that artists and Labels already agree to share, the parties share control over the business (the artist's career), and the parties contribute to the enterprise (the Label via advances and promotion and the artist through the time and effort of recording and touring).[20] Lesser argues that these facts give rise to a partnership relationship and the associated fiduciary duties.[21]

While compelling in some circumstances, those arguments are not sufficient primarily because in an active 360 deal the relationship would likely fail on the "joint control" requirement necessary for the formation of a partnership.[22] In active 360 deals, artists may be able to make some decisions or have some approval authority, but the Record Labels retain final approval for most decisions.[23]

Additionally, a partnership is more likely to be found when the parties share net profits, so that they have shared not only the profits but also the expenses of the business.[24] While the specific terms of each agreement will be different in active and passive 360 deals,[25] Labels most likely will share in each revenue stream differently,[26] which further complicates a finding of partnership. Indeed, as Okorocha notes, a partnership argument would not be persuasive in active 360 deals.[27]

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[17] Okorocha, *supra* note 12, at 3.

[18] *Id.* at 25.

[19] *Id.* at 25–26.

[20] Bryan Lesser, *Record Labels Shot the Artists, but They Did Not Share the Equity*, 16 GEO. J.L. & PUB. POL'Y 289, 309–10 (2018).

[21] *Id.*

[22] Okorocha, *supra* note 12, at 23.

[23] *Id.* at 24.

[24] *Id.* at 22.

[25] In passive 360 deals, Labels only take an interest in the revenue of certain rights. In active 360 deals, Labels take an interest in the revenue and control of the rights. For a discussion of the differences between the two types of 360 deals, *see infra* Sections IV.A, IV.B.

[26] Okorocha, *supra* note 12, at 22 (explaining that, historically, sound recording profits are typically defined as "net" profits, while music publishing proceeds are typically defined as "gross" profits). *See generally* PASSMAN, *supra* note 13 (covering the various accounting methods for sound recording, music publishing, touring, and merchandising proceeds, which include gross and net profit accounting).

[27] Okorocha, *supra* note 12, at 24.

There is another area of law that may give rise to a fiduciary relationship between artists and Labels. Agency, a close cousin to partnership, may provide grounds for a fiduciary relationship. This Article argues that a principal-agent relationship can arise between an artist and Label when they enter an active 360 deal. Such a relationship would be a fiduciary relationship and is similar in nature to a traditional manager-artist relationship.

Part II of this Article discusses the historical relationship between artists and Labels and the changes in the music industry that caused that relationship to expand and specifically focuses on the creation of active 360 deals. Part III provides an overview of agency law, the fiduciary duties that arise in an agency relationship, and the historical relationship between personal managers and artists.

Part IV argues that an active 360 deal can transform the relationship between the Label and an artist into a fiduciary one through agency principles. Part IV also argues that if a court finds that an agency relationship is present, the court should give deference to any terms the parties have used to shape their relationship, including the fiduciary duties and waivers of those duties, as the courts have done in similar circumstances. Additionally, Part IV argues that if a court finds any fiduciary duties, it should evaluate any potential breach of those duties in light of the customs and norms of the music industry like courts do in other areas of the music industry.

II. HISTORICAL RELATIONSHIP BETWEEN LABELS AND ARTISTS

In the decades preceding the 21st century, the relationship between Labels and artists has been centered on sound recording rights. New York courts have repeatedly refused to find a fiduciary relationship between the parties to a recording agreement when the parties had primarily contracted for an agreement for the Record Label to collect and pay royalties on the artists' behalf.[28] The courts repeatedly find recording agreements to be "garden variety" arms-length transactions that do not give rise to a fiduciary relationship, even when one party has superior bargaining power.[29]

[28] *E.g.*, Cooper v. Sony Records Int'l, No. 00 CIV. 233(RMB), 2001 WL 1223492, at *5 (S.D.N.Y. Oct. 15, 2002) ("Courts in this district have routinely failed to find a fiduciary duty between a recording artist and a record company."); Cafferty v. Scotti Bros. Records, Inc., 969 F. Supp. 193, 205–06 (S.D.N.Y. 1997); Carter v. Goodman Grp. Music Pub., 848 F. Supp. 438, 445 (S.D.N.Y. 1994); Rodgers v. Roulette Records, Inc., 677 F. Supp. 731, 739 (S.D.N.Y. 1988).

[29] *E.g.*, Faulkner v. Arista Records LLC, 602 F. Supp. 2d 470, 484 (S.D.N.Y. 2009); Sony Music Entm't, Inc. v. Robison, No. 01 CIV.6415(LMM), 2002 WL 272406, at *3 (S.D.N.Y. Feb. 26, 2002).

Prior to the Internet, record deals typically only involved the rights to the recorded music of an artist.[30] The Label would sign an artist, produce a record, and sell it to the public. The Label would own the rights in the sound recording, and the artist (or other songwriter) would own the rights to the music publishing. The Label would pay the artist an advance against future earnings and would cover the costs of producing and selling the album. The Label would commit to marketing and promoting the album. Typically, the Label would include an option right, permitting the Label to extend the deal for another album.

If the album flopped and did not make enough money to pay for itself, Labels would not usually ask the artist to repay any advances. If the album was a success, the Label would be repaid its advance, and the artist would receive royalty payments from the sound recording rights.[31] While sometimes described as one-sided,[32] courts have repeatedly found this arrangement to be an ordinary business transaction which does not give rise to a fiduciary duty.[33]

While recognizing that Labels owe fiduciary duties to artists may seem appealing to artists,[34] it is likely that some of those duties are benign or already addressed in recording agreements (such as the duty to account), or are at odds with the current structure of the music industry (such as the duty of loyalty). Labels are large and successful because they have a large roster of (sometimes competing) artists.[35] The relationships that Labels have established over the years give them the reputation and skills to market and promote newer, unknown artists.[36]

Acknowledgement of these unique industry practices and customs is apparent in the case law. Courts have only found a fiduciary duty between Labels and artists when confronted with the most extreme of facts.

A. Instances Where a Court Found a Fiduciary Relationship

In the rare circumstance where a court has found a fiduciary relationship between a Label and artist, they have found special circumstances rooted in "trust or confidence."[37] Courts have found such trust and confidence between a Label and

[30] What follows is a simplified discussion of recording agreements, which are notoriously long and complex. For a detailed presentation of a record deal and its many components, see PASSMAN, *supra* note 13.

[31] Despite the contractual changes discussed in this Article, this portion of a recording agreement—regarding sound recording rights—still functions in this same manner.

[32] Okorocha, *supra* note 12, at 2.

[33] *Id.* at 3.

[34] Fiduciary duties could give artists more leverage in legal disputes, *id.* at 2, and also prevent self-dealing by the Label. *See generally* Lesser, *supra* note 20.

[35] *See* Lesser, *supra* note 20, at 294.

[36] PASSMAN, *supra* note 13, at 73.

[37] *E.g.*, ABKCO Music, Inc. v. Harrisongs Music, Ltd., 722 F.2d 988, 995 (2d. Cir. 1983) (noting the "special trust" that attaches as manager or agent (quoting Meinhard v. Salmon, 249

artist when the Label commits to make financial investments on the artist's behalf,[38] when a "long enduring relationship" between the Label and artist spans decades,[39] or when the artist is also an executive at the Label and holds multiple roles in the agreement at issue.[40]

In *Apple Records, Inc. v. Capitol Records, Inc.*, the Beatles sued their record label, Capitol Records, for breach of fiduciary duty.[41] The Beatles alleged that Capitol sold records that it had claimed as scrap and excessively distributed promotional copies of the Beatles' albums.[42] The Beatles claimed that such actions diluted the market for their goods and that distributing so many promotional copies was for the benefit of Capitol, not the Beatles.[43] The court noted that at one point the Beatles made up "25 to 30 percent" of Capitol's business and the parties had worked together since 1962 (over two decades at the time of the suit).[44] These facts contributed to a "long enduring" relationship of "trust and confidence" and resulted in a fiduciary relationship.[45]

In *CBS v. Ahern*, defendant Scholz, a member of the band Boston, brought a counterclaim alleging that CBS (a record label at the time) breached its fiduciary duty to him in how it handled his royalties.[46] In its agreement with Boston (and Scholz), CBS agreed to hold royalties in "special accounts" that it would invest on behalf of Scholz.[47] Scholz alleged that CBS did just that for some time but at some point began appropriating the royalties for its own accounts.[48] The court noted that a fiduciary relationship is "founded on trust or confidence reposed by one person in the integrity and fidelity of another" and found Scholz's allegations sufficient to give

N.Y. 458, 467 (1928))); CBS, Inc. v. Ahern, 108 F.R.D. 14, 25 (S.D.N.Y. 1985) ("'[A] fiduciary relationship is one founded on trust or confidence . . . ." (quoting United States v. Reed, 601 F. Supp. 685, 707 (S.D.N.Y. 1985))); Universal-MCA Music Publ'g v. Bad Boy Entm't, Inc., No. 601935/02, 2003 WL 21497318, at *5 (N.Y. Sup. Ct. June 18, 2003) ("[S]pecial trust or confidence reposed between parties may create a fiduciary relationship.").

[38] *CBS, Inc.*, 108 F.R.D. at 25.

[39] Apple Records, Inc. v. Capitol Records, Inc., 529 N.Y.S.2d 279, 283 (N.Y. App. Div. 1988). *But see* Faulkner v. Arista Records LLC, 602 F. Supp. 2d 470, 483 (S.D.N.Y. 2009); Sony Music Entm't, Inc. v. Robison, No. 01 CIV.6415(LMM), 2002 WL 272406, at *3 (S.D.N.Y. Feb. 26, 2002) (recording artist's six-year relationship with the Label was not sufficient to show a long and lasting relationship to establish a fiduciary relationship).

[40] *Bad Boy*, 2003 WL 21497318, at *6.

[41] *Apple Records*, 529 N.Y.S.2d at 279.

[42] *Id.* at 283.

[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] CBS, Inc. v. Ahern, 108 F.R.D. 14, 24 (S.D.N.Y. 1985).

[47] *Id.*

[48] *Id.* at 25 (quoting United States v. Reed, 601 F. Supp. 685, 707 (S.D.N.Y. 1985)).

rise to a fiduciary relationship between CBS and Scholz.[49]

In *Universal-MCA Music Publishing v. Bad Boy Entertainment*, the court found that songwriters had pled sufficient facts to allege "special circumstances" where the defendant held several positions in relation to the songwriters.[50] In *Bad Boy*, the defendant, Sean Combs,[51] was a co-writer of the compositions, co-author of the sound recordings, and President and CEO of the record label that released the recordings, Bad Boy Entertainment.[52] Combs allegedly put his personal finances—and the finances of Bad Boy—above those of the plaintiff songwriters in deals concerning the co-authored material.[53] Combs was able to take such actions because of his role as President of Bad Boy.[54] The court found such allegations sufficient to support a fiduciary relationship.[55] The court went on to state that due to Combs's role as an executive at Bad Boy, his actions made not only him liable for breach of fiduciary duty, but also Bad Boy.[56]

Bad Boy is notable because it recognizes a "special circumstance" that transforms the relationship between the Label (Bad Boy) and artist through the interests and involvement of the president of that Label. There is no question that *Bad Boy* is unique in its facts; there are few major artists who also run record labels.[57] However, it is notable that holding multiple roles in a recording relationship could transform what courts have previously seen as an ordinary business relationship into a fiduciary relationship.

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[49] *Id.*

[50] Universal-MCA Music Publ'g v. Bad Boy Entm't, Inc., No. 601935/02, 2003 WL 21497318, at *5 (N.Y. Sup. Ct. June 18, 2003).

[51] A.k.a. Puff Daddy/P. Diddy/Puff/Puffy/Diddy/Love/Brother Love/B. Love. Hilary Weaver, *Sean Combs Says He Was "Only Joking" About Changing His Name*, VANITY FAIR (Nov. 7, 2017), https://www.vanityfair.com/style/2017/11/sean-combs-changed-his-name-again.

[52] *Puff Daddy's Bad Boy Entertainment Partners with Epic Records*, BILLBOARD (Oct. 15, 2015), https://www.billboard.com/articles/news/6715464/puff-daddy-bad-boy-partnership-epic-records.

[53] *Bad Boy*, 2003 WL 21497318, at *5.

[54] *Id.*

[55] *Id.* at *6.

[56] *Id.*

[57] *See, e.g.*, Rose Wythe, *20 Musicians Who Started Their Own Record Labels*, IHEARTRADIO (Mar. 23, 2018), https://www.iheart.com/content/2018-03-23-20-musicians-who-started-their-own-record-labels/ (listing major artists with their own music Labels, such as Kanye West, JAY-Z, and Eminem). *But see* Tom Flint, *Running Your Own Record Label: Part I*, SOUND ON SOUND (Sept. 2002), https://www.soundonsound.com/music-business/running-your-own-record-Label-part-1 (discussing the legal challenges for artists who run their own Record Labels).

III. AGENCY LAW AND PERSONAL MANAGERS

A. Distinction Between Agency, Managers, and Agents

The terminology used when discussing agency, managers, and agents can be confusing. These terms have specific and sometimes legal meanings in the entertainment industry. Agency is a legal relationship that individuals may enter into and appears in many industries.[58] In the entertainment industry, an artist hires a manager to develop his or her career and hires an agent to obtain employment.[59] While there may be some functional overlap in these two roles, the difference in the monikers is well understood.[60] In relationships with the artists they are representing, agents and managers will likely always meet the elements of an agency relationship.[61]

This Article focuses on agency under New York law[62] due to the presence of choice-of-law clauses in most recording agreements,[63] and because two of the three major Record Labels are headquartered in New York.[64]

B. Agency Under New York Law

Agency is a relationship between two parties who have agreed that one will act on behalf of the other.[65] It is a relationship of trust and confidence and gives rise to fiduciary duties.[66] Under New York law, it seems the parties are able to waive their fiduciary duties to one another, but that waiver will not extend to agreements with

[58] GREGORY, *supra* note 16, § 1.

[59] Hal I. Gilenson, *Badlands: Artist-Personal Manager Conflicts of Interest in the Music Industry*, 9 CARDOZO ARTS & ENT. L.J. 501, 507–08 (1991).

[60] *Id.* at 507.

[61] An agency relationship is created when the principal manifests consent to the agent that the agent may act on his or her behalf, and the agent agrees to do so. See *infra* Section III.C for a more detailed discussion of the creation of an agency relationship.

[62] New York law is somewhat more lenient than California law regarding procuring employment. Under California law, anyone procuring employment must be a licensed agent, whereas New York law allows for "incidental" procurement of employment. Gilenson, *supra* note 59 at 511, 514. Under California law, a principal-artist may terminate the agreement with his or her agent if the agent is procuring employment without a license, while New York law would allow for at least some procurement. *Id.* at 511. Because of this difference, the consequences of the contracts discussed herein may be different if analyzed under California law.

[63] Lesser, *supra* note 20, at 303; *see, e.g.*, Radioactive, J.V. v. Manson, 153 F. Supp. 2d 462, 471 (S.D.N.Y. 2001).

[64] The three major Record Labels are Sony Music Entertainment, Universal Music Group, and Warner Music Group. Sony and Warner are headquartered in New York, New York and Universal is headquartered in Santa Monica, California. However, Universal "regularly put[s] New York choice of law provisions in recording contracts." *Radioactive, J.V.*, 153 F. Supp. 2d at 471.

[65] 2A C.J.S. *Agency* § 1 (2019).

[66] RESTATEMENT (THIRD) OF AGENCY § 8.01 (AM. LAW INST. 2006).

third parties. New York courts have defined agency as:

> [A] legal relationship between a principal and an agent. It is a fiduciary relationship which results from the manifestation of consent of one person to allow another to act on his or her behalf and subject to his or her control, and consent by the other so to act. The agent is a party who acts on behalf of the principal with the latter's express, implied, or apparent authority.[67]

Whether a relationship is one of agency is a "mixed question of law and fact."[68] If the material facts regarding an agency relationship are not in dispute, the court should determine agency. If the facts are in dispute, the question should be submitted to a jury.[69]

Additionally, it does not matter if the parties understand their relationship to be one of agency. If the parties' words and conduct imply a relationship of agency, it is not significant that they do not understand the nature of their relationship.[70]

1. Element of Consent

Consent may be given in writing, orally, or by actions which a reasonable person would understand to be giving consent.[71] A principal may give consent directly to the agent (actual authority) or give consent directly to a third party with whom the agent will work on behalf of the principal (apparent authority).[72] A principal must have the actual power it confers on the agent for consent to be valid.[73] Unless the parties agree otherwise, incidental authority may be inferred when acts to an authorized transaction "are incidental to it, . . . accompany it, or are reasonably necessary to accomplish" an authorized transaction.[74]

2. Element of Control

Integral to the agency relationship is the ability of the principal to control the agent. The relationship gives the principal the right to control the agent[75] within the scope of the agency, and the principal may not act against the directions of the

[67] Maurillo v. Park Slope U–Haul, 606 N.Y.S.2d 243, 246 (N.Y. App. Div. 1993) (citations omitted).

[68] Mouawad Nat'l Co. v. Lazare Kaplan Int'l Inc., 476 F. Supp. 2d 414, 420–21 (S.D.N.Y. 2007) (quoting Lumbermens Mut. Cas. Co. v. Franey Muha Alliant Ins. Servs., 388 F. Supp. 2d 292, 301 (S.D.N.Y. 2005)).

[69] *Id.* at 421.

[70] Cerp Constr. Co. v. J.J. Cleary Inc., 299 N.Y.S.2d 560, 563 (N.Y. Sup. Ct. 1968).

[71] *Mouawad*, 476 F. Supp. 2d at 422.

[72] RESTATEMENT (SECOND) OF AGENCY § 27 (AM. LAW INST. 1958).

[73] *Mouawad*, 476 F. Supp. 2d at 423 (finding that a company could not be the principal in the sale of a diamond because it never owned the diamond in the first place).

[74] RESTATEMENT (SECOND) OF AGENCY § 35.

[75] *Id.* § 14.

agent.[76]

C. Duties that Arise out of an Agency Relationship

A number of fiduciary duties arise out of an agency relationship, many of which the agent owes to the principal.[77] The duties that are particularly relevant to 360 deals include the duties of care and skill,[78] to keep and render accounts,[79] to act only as authorized,[80] and the duties of loyalty.[81]

The element of consent plays an important role in determining how those duties attach and how they are shaped.[82] Because agency relationships are often (though not necessarily) made through contract, parties have the opportunity to agree what certain duties look like or choose to waive certain duties.

For instance, imagine an agent and principal have agreed for the agent to act on behalf of the principal on a particular matter. The agent discloses to the principal that the agent has no skill in that particular matter. If the agent subsequently mismanages the principal's business in that area, he has not violated his duty to the principal so long as he has made that disclosure and has exercised as much skill as he possesses.[83]

In the absence of an agreement stating otherwise, the default duties would apply.[84] The duties are applied in light of what reasonable people in the positions of the principal and agent would expect them to be.[85] The principal has duties to the agent, but they are fewer in number and are centered on the principal's duty to not interfere with the agent's work.[86]

D. Waivers of an Agency Relationship and Fiduciary Duties

There are two important consequences that arise from an agency relationship:

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[76] *Id.* § 14 cmt. a.

[77] *See generally id.* §§ 376–398 (describing duties of obedience and loyalty).

[78] This requires the agent to act with the standard of care and skill of the particular locality for the kind of work he is to perform, including using any special skill he has. *Id.* § 379.

[79] This requires the agent to keep and render an account of the money he has received or paid out for his principal. *Id.* § 382.

[80] This requires that the agent only act on behalf of the principal to the extent that the principal has consented. *Id.* § 383.

[81] The duties of loyalty generally require that the agent "act solely for the benefit of the principal in all matters connected with his agency." *Id.* § 387.

[82] *Id.* § 376 ("The existence and extent of the duties of the agent to the principal are determined by the terms of the agreement between the parties, interpreted in light of the circumstances under which it is made . . . .").

[83] *Id.* § 376 cmt. a.

[84] *Id.*

[85] *Id.*

[86] *Id.* §§ 432–437.

the attachment of fiduciary duties to the relationship and the ability of the agent to bind the principal in contracts with third parties.[87]

Cases over the past 100 years show that it is not clear in the New York courts whether disclaimers of an agency relationship (or other fiduciary relationship) should extend to the entire agency relationship or to just the fiduciary duties that arise from the relationship.[88]

In recent history, New York courts have enforced disclaimers of fiduciary duties as well as disclaimers of the fiduciary relationship itself such as agency.[89] This means that even if the factual characteristics of a relationship would give rise to an agency relationship, the parties can claim that their relationship is not one of agency or that certain or all of the associated fiduciary duties of such an acknowledged relationship do not attach.

However, earlier cases indicate that New York courts would not allow the disclaimer of the agency relationship—the ability of the agent to act on behalf of the principal.[90] While it is not clear whether the New York courts would allow parties to disclaim an entire agency relationship, it does seem clear that they will give great deference to the parties' choice to waive their fiduciary duties to one another within an agency relationship.

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[87] RESTATEMENT (THIRD) OF AGENCY §§ 3.05, 8.01 (AM. LAW INST. 2006).

[88] Even if enforced, such a disclaimer would not extend to claims made by a third party. Bd. of Trade of Chi. v. Hammond Elevator Co., 198 U.S. 424, 437 (1905) ("The fact, however, that the relations between the defendant and its correspondents are, as between themselves, expressly disclaimed to be those of principal and agent, is not decisive of their relations so far as third parties dealing with them upon the basis of their being agents are concerned."). If the rights of a third party are involved, "the relationship between contracting parties [the principal and agent] must be determined by its real character rather than by the form and color that the parties have given it." *In re* Shulman Transp. Enters., Inc., 744 F.2d 293, 295 (2d Cir. 1984).

[89] *E.g.*, Spinelli v. Nat'l Football League, 96 F. Supp. 3d 81, 133 (S.D.N.Y. 2015) ("[P]arties are bound by a contractual agreement that their relationship is *not one of agency*.") (emphasis added); BNP Paribas Mortg. Corp. v. Bank of Am., N.A., 866 F. Supp. 2d 257, 269 (S.D.N.Y. 2012) (finding that disclaimers "preclude a finding of a fiduciary *or other special relationship* . . . .") (emphasis added); Seippel v. Jenkens & Gilchrist, P.C., 341 F. Supp. 2d 363, 381–82 (S.D.N.Y. 2004) (enforcing a disclaimer of fiduciary duty).

[90] *E.g.*, Martin v. Peyton, 158 N.E. 77, 78 (N.Y. 1927) (setting aside a disclaimer that a relationship was not a partnership and instead looking at the actual characteristics of the relationship); Rubenstein v. Small, 75 N.Y.S.2d 483, 485 (N.Y. App. Div. 1947) ("The court is not bound by the disclaimer of partnership, joint venture or agency between the parties in determining their true relationship."); Gulf Ins. Co. v. Transatlantic Reinsurance Co., 886 N.Y.S.2d 133, 151–52 (N.Y. App. Div. 2009) (restating the holding in *Rubenstein* when declining to enforce a disclaimer).

E. Traditional Relationship and Duties Between Managers and Artists

Personal managers are agents for their artists (the principal), and thus the relationship between the parties is a fiduciary one. Artists hire managers primarily to help them develop their careers.[91] Historically, personal managers (sometimes referred to as "managers") have been the most significant players in developing artists' careers.[92] Personal managers are typically one of the first people an artist will hire and he or she will become involved in nearly every aspect of an artist's career.[93] Managers will help an artist decide whether to enter into an agreement with a record label, schedule concert tours, work with the artist's record label to ensure the Label fulfills its obligations (such as marketing commitments), and be the face of the artist with third parties—such as those offering endorsement deals, charitable requests, and personal appearances.[94]

Managers provide advice and counseling to the artist, but also develop the artist's career by working with third parties in the entertainment industry and other industries.[95] Especially for young, undeveloped artists, managers play a key role in developing an artist to the level where a Record Label will be interested in signing that artist.[96] The manager's responsibilities in developing and promoting an artist may result in significant personal financial investment of the manager.[97] Managers may also play a role in managing the business side of the artist's career.[98]

Because of their agency relationship, managers are subject to various fiduciary duties, including the duty of loyalty, the duty of good faith and fair dealing, the duty to use their best efforts to effect the purpose of the agency, and the duty to act only for the benefit of the principal.[99] Even so, personal management is a largely unregulated field.[100] There is no statutory guidance, though some trade organizations have attempted to provide ethics and standards for manager conduct.[101]

There are few cases of artists suing their managers.[102] Frequently, those cases

[91] Gilenson, *supra* note 59, at 507.

[92] PASSMAN, *supra* note 13, at 28.

[93] *Id.*

[94] *Id.* at 28–29.

[95] *See* Gilenson, *supra* note 59, at 509–10.

[96] *Id.* at 509.

[97] *Id.*

[98] *Id.* at 509–10.

[99] *Id.* at 520.

[100] *Id.* at 515 ("The absence of legislation directly governing personal managers, along with the loopholes in the current legislation, opens the door to unethical behavior by personal managers.").

[101] *About Managers*, NAT'L CONF. OF PERS. MANAGERS, http://ncopm.com/personal-manager/ (last visited Sept. 10, 2018).

[102] *See* Gilenson, *supra* note 59, at 505 (noting the lack of cases).

settle before a court can wade through the legal issues.[103] In the cases that have proceeded to trial, or at least beyond a motion to dismiss, courts have acknowledged that managers have fiduciary duties to the artists they represent, but the bar to breach those duties is very high.[104]

In *Cagle v. Hybner*, Cagle, a musician, entered into a management contract with Hybner.[105] The agreement provided that Hybner would be Cagle's manager, advise him on his career, and otherwise supervise his artistic endeavors.[106] The agreement allowed Hybner to conduct business that could conflict with Cagle's career, but required that Hybner consent before Cagle enter into any agreement related to "recording, production, merchandising, songwriting or music publishing."[107] The court noted that agency is a relationship of trust where one party agrees to effect some business of the other.[108] When it examined the nature of the relationship between Cagle and Hybner, the court found that Hybner was an agent of Cagle.[109]

In *ABKCO Music, Inc. v. Harrisongs Music, Inc.*, the court found that a business manager breached his duties as a *former* fiduciary.[110] In that case, Klein, after he had ceased to serve as the artist's manager, purchased an infringement claim against the artist, George Harrison.[111] Klein had intimate knowledge of the claim because he

[103] *See, e.g.*, Geraldine Fabrikant, *The Media Business; A Tangled Tale of a Suit, a Lawyer and Billy Joel*, N.Y. TIMES (May 3, 1995), https://www.nytimes.com/1995/05/03/business/the-media-business-a-tangled-tale-of-a-suit-a-lawyer-and-billy-joel.html (noting that Joel withdrew his case against his manager and that there were public rumors of a settlement deal); Kory Grow, *Johnny Depp Settles Multi-Million Dollar Lawsuit Against Managers*, ROLLING STONE (July 16, 2018), https://www.rollingstone.com/movies/movie-news/johnny-depp-settles-multi-million-dollar-lawsuit-against-managers-699770/; David McGee, *Bruce Springsteen Reclaims the Future*, ROLLING STONE (Aug. 11, 1977), https://www.rollingstone.com/music/music-news/bruce-springsteen-reclaims-the-future-179300/ (reporting that Springsteen settled his dispute with longtime manager).

[104] *See infra* text accompanying notes 105–121.

[105] Cagle v. Hyber, No. M2006-02073-COA-R3-CV, 2008 WL 2649643, at *1 (Tenn. Ct. App. July 3, 2008).

[106] *Id.* at *2.

[107] *Id.*

[108] *Id.* at *6 (quoting Gilenson, *supra* note 59, at 519).

[109] *Id.* at *7.

[110] ABKCO Music, Inc. v. Harrisongs Music, Ltd., 722 F.2d 988, 995 (2d. Cir. 1983). *But see* Vigoda v. DCA Prods. Plus Inc., 741 N.Y.S.2d 20, 23 (N.Y. App. Div. 2002) (holding that there was no reason to impose a fiduciary duty on the plaintiff's band's former personal manager after she had been terminated). *Vigoda* underscores the effort made by the court in *ABKCO Music* to only impose such a duty under extreme facts. It is a reminder that "[a]s in other branches of the law, a question of degree is often the determining factor." Martin v. Peyton, 158 N.E. 77, 80 (N.Y. 1927).

[111] *ABKCO Music*, 722 F.2d at 992–93.

had tried to negotiate a deal to settle that claim while serving as Harrison's manager.[112] The court found that because of Klein's knowledge obtained as Harrison's former manager, his actions were a breach of his duties as a former fiduciary.[113] The court found that he breached his duty not to compete and not to use confidential information against his principal.[114] However, the court took pains to note that they were not creating a "general 'appearance of impropriety' rule," noting the extreme facts of this case.[115] The court thought such a rule would not be workable in light of the "realities of the business world."[116]

In *Croce v. Kurnit*, Croce, a musician, signed multiple agreements with the defendants that provided that Croce would "perform and record exclusively" for the defendants and the defendants would provide all music publishing and management services.[117] The agreements also assigned all of Croce's rights in his sound recordings and compositions to the defendants.[118] The agreements did not require any action by the defendants, except to make an annual payment of $600 to Croce and to distribute royalties at an agreed upon rate which was based on sales of records.[119]

In evaluating the contracts, the court noted that they were free of fraud, and while one-sided, they were one-sided due to "the uncertainty involved in the music business and the high risk of failure of new performers."[120] The court found that the defendants associated with the management contracts did not breach a fiduciary duty.[121]

These cases illustrate that courts find the relationship of "trust and confidence" between a manager and entertainer is one of agency because of the responsibilities the manager undertakes on behalf of the entertainer. However, due to the nature of the entertainment industry, the bar to breach the fiduciary duties that attach is high.

IV. 360 DEALS AND THE FORMATION OF AN AGENCY RELATIONSHIP

The primary focus of a Label agreement, even in a 360 deal, is the sound recordings of the artist.[122] A 360 deal expands on that arrangement by including other

[112] *Id.* at 993.

[113] *Id.*

[114] *Id.* at 994.

[115] *Id.* at 995.

[116] *Id.*

[117] Croce v. Kurnit, 565 F. Supp. 884, 887 (S.D.N.Y. 1982).

[118] *Id.*

[119] *Id.*

[120] *Id.* at 893.

[121] *Id.*

[122] *See generally* PASSMAN, *supra* note 13 (detailing the various parts of a Label deal, primarily the sound recording rights).

rights in the artist's revenue-generating activities such as merchandising, music publishing, endorsements, sponsorships, and film and television appearances.[123] Generally speaking, there are two types of 360 deals: active and passive.[124] Sometimes an agreement will be a combination of active and passive rights.[125] In 360 deals, the Label takes a different role depending on whether it obtains passive rights, or active and passive rights. Active deals change the role of the Label in an artist's career.

A. Passive 360 Deals

In passive 360 deals, the artist undertakes revenue-generating activities unrelated to the sound recordings that are the primary concern of the contract, and the Label takes a percentage of the revenue the artist earns.[126] The Label does not take control of rights to those opportunities, nor participate in procuring those opportunities; its only involvement is passively receiving a percentage of income from the artist's activities.[127]

B. Active 360 Deals

In active 360 deals, the Label not only takes a percentage of income in those non-recording activities, but it also takes some level of control of the artist's rights to those activities.[128] For instance, the Label may require that an artist sign with a merchandise or music publishing company owned by the Label (or the Label's parent company).[129] Or it may require the artist to provide the Label with a first negotiation or matching right for those rights.[130] An active 360 deal can be described as an artist giving over control of most of the rights associated with her career.[131] By giving these rights to the Label, the Label becomes the key player in maximizing the revenue streams from those rights.

Historically, one of the major draws of a Record Label was its ability to get an artist's music heard—this is still a Label's major function and appeal. Labels have large marketing and promotional departments that are skilled at getting music into

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[123] *Id.* at 102.

[124] *Id.* at 105.

[125] *See id*. at 106 (advising artists on how to negotiate a contract with a Label that holds both active and passive rights).

[126] *Id.* at 105.

[127] *Id.*

[128] *Id.*; *see also* Edward Pierson*, Negotiating a 360 Deal: Considerations on the Promises and Perils of a New Music Business Model*, ENT. & SPORTS L., Winter 2010, at 34.

[129] PASSMAN, *supra* note 13, at 105.

[130] A first negotiation right means the artist must first try to enter into a deal with the Label. A matching right gives the artist the opportunity to negotiate with third parties, but requires the artist to allow the Label to match any deal offered so that it—not the third party—gets the deal. *Id.*

[131] Pierson, *supra* note 128, at 34.

the marketplace and the ears of consumers.[132] If a Label acquires additional rights from an artist, it is likely that it would use its industry power and knowledge to market those rights not only to build the artist's career, but also to maximize the additional revenue streams it has acquired through the active 360 deal.

In active 360 deals, the Label has the ability to increase its financial interest in an artist's career by having both a passive and an active interest in any given right.[133] For example, the Label could acquire a passive interest in an artist's merchandising rights (meaning, it gets a percentage of the merchandising income regardless of who the artist grants merchandising rights to), but also have an active interest in the merchandising rights by requiring the artist to sign with its merchandising company or at least negotiate with it first. In this scenario, the Label receives its percentage of the merchandising income through a passive interest and through the Label's ownership of the merchandise company.[134]

The 360 deal is becoming the industry norm for established artists as well as undeveloped artists.[135] Labels use 360 deals when developing a then-unknown artist with the hopes of a bigger payoff down the road.[136] With a promise of a greater return, a Label arguably has more incentive to promote the artist and ensure they are a success.[137]

Active and passive 360 agreements each give the Label a financial interest in an artist's career beyond typical sound recording rights. The significant difference between active and passive agreements is that in active agreements, the Label is the key player in obtaining revenue streams for its artists by retaining control over those additional rights. With these rights, the Label takes on a role where it develops and promotes an artist much like how managers have historically been the key players in developing and promoting artists.

To phrase it another way, an artist makes her living primarily off her music, her likeness, and incidental products of her music and her likeness (touring, merchandise, endorsements, fan clubs, etc.). Historically, she has turned over the rights to her sound recordings to a record label to exploit, but has kept the rights to exploit her own likeness, written words, and music. Thus, if she turns over control of those rights to the same entity, she has essentially turned over control of her entire career to one entity.[138]

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[132] PASSMAN, *supra* note 13, at 73.

[133] *Id.* at 105–06.

[134] Arguably, a Label might not directly benefit if it is the parent organization instead of the Label that owns the merchandise company.

[135] Pierson, *supra* note 128, at 31–32.

[136] Jeff Leeds, *The New Deal: Band as Brand*, N.Y. TIMES, (Nov. 11, 2007), https://www.nytimes.com/2007/11/11/arts/music/11leed.html.

[137] PASSMAN, *supra* note 13, at 102.

[138] Pierson, *supra* note 128, at 31.

C. Record Labels as Managers: An Unintended Agency

Active 360 deals have the ability to turn the previously ordinary business relationship between Labels and artists into one of agency—a fiduciary relationship. Active 360 deals give Labels rights and a financial interest in nearly every revenue-generating aspect of an artist's career.[139] This type of arrangement is similar to how management agreements have typically been structured.[140] As discussed in Part III.E, management relationships are ones of agency and thus fiduciary in nature.

Opponents to an agency relationship may point to the fact that artists still hire managers,[141] and thus a Label could not be a manager. No doubt some artists do still hire managers, but the role a manager plays may be changing.[142] Indeed, courts have noted in the past that the involvement of a manager in an artist's career is along a spectrum, depending on the needs of the artist.[143] If a Label takes rights traditionally left to an artist (and his or her manager) to exploit, the manager's role may be transforming to focus more on advising the artist and hounding the Label to maximize the rights it has obtained and less on development and marketing. Regardless, management deals can be non-exclusive by allowing both the manager and the Label to perform traditional managerial duties.[144]

Courts have been reluctant to find a fiduciary relationship between a Label and an artist when what is contracted for is a "garden-variety arm's length transaction" to collect royalties on behalf of the artist.[145] An active 360 deal changes that garden-variety relationship into something quite different.[146] That relationship begins to look more like modern-day management deals, or even deals from the 1970s. In

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[139] Simmons-Rufus, *supra* note 11.

[140] Justin M. Jacobson, *Part 1: The Artist & Manager Relationship - A Look at Recording Industry Management Agreements*, TUNECORE (Mar. 28, 2017), https://www.tunecore.com/blog/2017/03/part-1-artist-manager-relationship-look-recording-industry-management-agreements.html.

[141] PASSMAN, *supra* note 13, at 16.

[142] For an overview of a manager's role, see *id*. at 28–42.

[143] Croce v. Kurnit, 565 F. Supp. 884, 893 (S.D.N.Y. 1982) ("The significance of management contracts depends on the needs of artists, some of whom are entirely capable of performing all the business and promotion duties while others seek to concentrate solely on their artistic efforts.").

[144] Tyson v. Cayton, 784 F. Supp. 69, 71–72 (S.D.N.Y. 1992).

[145] *E.g.*, Faulkner v. Arista Records LLC, 602 F. Supp. 2d 470, 484 (S.D.N.Y. 2009); *see also* Cooper v. Sony Records Int'l, No. 00 CIV. 233(RMB), 2001 WL 1223492, at *5 (S.D.N.Y. Oct. 15, 2002); Sony Music Entm't, Inc. v. Robison, No. 01 CIV.6415(LMM), 2002 WL 272406, at *3 (S.D.N.Y. Feb. 26, 2002); Rodgers v. Roulette Records, Inc., 677 F. Supp. 731, 739 (S.D.N.Y. 1988).

[146] Additionally, the Third Restatement of Agency provides that agency may only attach to part of an overall relationship and not others. RESTATEMENT (THIRD) OF AGENCY § 1.01 cmt. b. (AM. LAW. INST. 2006). It is feasible that a court could evaluate the relationship involving the "new" rights found in a 360 agreement independently from the "old" (the sound recording rights) relationship.

those deals, managers took recording, publishing, and management rights.[147] When given the opportunity, courts found a fiduciary relationship in those types of deals.[148]

In active 360 deals, the Label can acquire all the rights traditionally left for an artist to exploit, such as the rights associated with their likeness (e.g., merchandise, fan clubs, endorsements) and music publishing. When the artist signs those rights over to the Label, it could be said that the artist is consenting for the Label to act on his or her behalf to exploit those rights, and that the Label is agreeing to do so. With such a strong financial incentive for the artist to succeed, it is reasonable to believe that a Label will use its vast resources to promote and market the artist to the best of its abilities in all mediums in which it has rights to do so.

In *Croce*, the managers took recording, publishing, and managerial rights.[149] That relationship was a fiduciary relationship.[150] In *Cagle*, the manager was hired to develop Cagle's career, but also required Cagle to sign to his publishing company. Hybner was paid a percentage of the income from Cagle's earnings.[151] This relationship was also a fiduciary relationship.[152]

The factual scenarios in *Croce* and *Cagle* are very similar to terms in active 360 deals where the Label takes many of the rights associated with an artist's career, exploits them for the benefit of the artist and the Label, and also takes a percentage of the overall income.[153] The artist consents to this relationship in order to get the benefit of the experience and financial resources of the Label, and the Label agrees to act on behalf of the artist. These actions appear to meet the elements of an agency relationship of consent and control.

The finding of an agency relationship is a factual inquiry and the specific terms of any two record agreements will not be the same. Typically, these agreements are heavily negotiated by learned attorneys on both sides. It is impossible to predict if any one agreement would give rise to an agency relationship without knowing the specifics of the particular deal. Case law shows that these relationships turn on "a

[147] In 1972, Bruce Springsteen infamously signed a deal with Mike Appel on the hood of a car. Pierson, *supra* note 128, at 33. The deal not only made Appel Springsteen's manager, but also made him the Label and publisher, which included the right to share in those and other revenue streams. *Id.* The Boss's boss enjoyed this ride until 1977, when Springsteen sued and the parties settled out of court. *Id; see also Croce*, 565 F. Supp. at 887 (Croce's managers took recording, management, and publishing rights).

[148] *See, e.g.*, *Croce*, 565 F. Supp. at 893 (finding that the defendant did not breach a fiduciary duty, but not that there was no fiduciary duty).

[149] *Id.* at 887.

[150] *Id.* at 893.

[151] Cagle v. Hyber, No. M2006-02073-COA-R3-CV, 2008 WL 2649643, at *2 (Tenn. Ct. App. July 3, 2008).

[152] *Id.* at *6–7.

[153] *Compare id.* at *2, *with* Okorocha, *supra* note 12, at 2.

question of degree."[154] In the entertainment industry, because of the nature of the business and the associated industry norms, courts have been reluctant to set any hard and fast rules or find a breach of fiduciary duties except in the most extreme of circumstances.[155]

D. Shaping Fiduciary Duties and Giving Effect to Waivers in Recording Agreements

If a court were to find that an agency relationship exists between a Label and an artist, it should give deference to the terms of the agreement, including any effort by the parties to shape the fiduciary duties, and any waiver of duties that the parties have agreed to. It is likely that Labels, as large and savvy corporations with robust legal departments, will include in their 360 agreements a clear statement that the relationship between the Label and artist is not an agency, partnership, or other special relationship that is fiduciary and will likely further disclaim any fiduciary duties that may arise.

The Label, presumably, will also take steps to manage what would be fiduciary duties, such as specifying accounting responsibilities (addressing the duty to keep and render accounts), spelling out steps that it will or will not take in marketing or promoting an album and the other rights it has obtained under an active 360 deal (addressing the duties of skill and care), agreeing to only act as agreed in the contract (addressing the duty to act only as authorized), and agreeing that the Label may, and will, represent competing artists (addressing the duty of loyalty).

If a court finds an agency relationship, and such relationship and accompanying fiduciary duties are disclaimed, the court should give effect to that waiver insofar as it applies to any fiduciary duties that would have attached. By doing this, the court will honor the parties' contractual intentions and protect third-party interests with whom the principal or agent has done business within the scope of the agency. This also allows the music industry to continue to operate in a manner that would otherwise be significantly hindered if Labels owed traditional fiduciary duties to each of their artists.

Indeed, that manner is beneficial to artists. By having a large roster of (sometimes competing) artists, Labels are able to grow and maintain important relationships throughout the industry, increase their bargaining power, and influence third

[154] Martin v. Peyton, 158 N.E. 77, 80 (N.Y. 1927).

[155] *See, e.g.*, ABKCO Music, Inc. v. Harrisongs Music, Ltd., 722 F.2d 988, 995 (2d. Cir. 1983); Apple Records, Inc. v. Capitol Records, Inc., 529 N.Y.S.2d 279, 283 (N.Y. App. Div. 1988); Universal-MCA Music Publ'g v. Bad Boy Entm't, Inc., No. 601935/02, 2003 WL 21497318, at *5 (N.Y. Sup. Ct. June 18, 2003). *But see* Faulkner v. Arista Records LLC, 602 F. Supp. 2d 470, 483 (S.D.N.Y. 2009) (disapproving of the precedential value of *Apple*).

parties in ways that benefit their artists.[156] Through these relationships, Labels are able to get songs on the radio or television shows or secure a spot for the artist as an opener on a big tour.[157] By having so many artists, Labels have been able to develop extensive experience in and knowledge of effectively promoting an artist in an environment saturated with those attempting to be the next YouTube or Spotify star.

There is the additional argument that fiduciary duties between Labels and artists are just unworkable in the music industry. Record Labels are successful precisely because they have competing artists.[158] They could never honor the duty of loyalty to any one artist because they would have a competing artist that they also must promote and support. Indeed, in finding a manager breached one of the duties of loyalty he owed his artist, a court plainly stated that it was not "establish[ing] a general 'appearance of impropriety' rule with respect to the artist/manager relationship."[159] The court further explained that such a strict application of the rule would not "suit the realities of the business world."[160] The court took care to note that it only found a breach in that case because of the specific "extreme" facts of that situation.[161]

Courts have supported one-sided agreements in the recording industry because of the nature of the business. In denying a claim for breach of fiduciary duty, a court noted that while returns on a successful record are "unbelievably high," there is also a high risk (on the Label's side) of failure.[162] The recording industry is a high-risk industry where one party (the Label) invests large sums of money and knowledge in another party (the artist) in the hopes that the party will succeed without ultimately demanding a repayment of the money if the artist does not. If the artist is successful and his or her music takes off, the Label will be repaid its initial investment and then some. If the album is a dud and does not even pay for itself, the Label will not ask the artist for any unrecouped advance and the parties will likely just part ways.

If a court were to find an agency relationship between a Label and one of its artists, it should follow the reasoning in prior cases, which only acknowledges a breach of fiduciary duties when the facts are so extreme as to be outside industry norms.[163] This would still protect artists from extreme behavior by their Labels, but

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[156] Heather McDonald, *Understanding the Pros and Cons of Label Record Deals*, BALANCE CAREERS (Jan. 7, 2019), https://www.thebalancecareers.com/major-Label-record-deals-understanding-the-pros-and-cons-2460377.

[157] *Id.*

[158] *See* Lesser, *supra* note 20, at 294 ("Occasionally an artist becomes popular enough to pay for the financial losses of all the other artists.").

[159] *ABKCO Music*, 722 F.2d at 995.

[160] *Id.*

[161] *Id.*

[162] Croce v. Kurnit, 565 F. Supp. 884, 889 (S.D.N.Y. 1982).

[163] *See, e.g.*, *ABKCO Music*, 722 F.2d at 995 (finding impropriety when a business manager purchased a known claim against his former client); Apple Records, Inc. v. Capitol Records,

would allow the music industry to continue operating in a mutually beneficial manner.

V. CONCLUSION

Technology has drastically changed the way Record Labels do business. A significant change is the rise of active 360 deals which increase the Record Labels' role in artists' careers and change how Labels contract with artists. The nature of that increased role changes the legal relationship between the parties to one that appears to result in an agency relationship similar to that between a personal manager and an artist. Because the finding of an agency relationship is a factual question, there is no sure way to predict whether any active 360 deal will give rise to such a relationship. The nature and structure of 360 deals provide the environment for all the elements of an agency relationship to be found. It is likely that the more rights and control a Label has—and the more trust and confidence an artist has placed with the Label—the more likely it is that an agency relationship will be found.

If a court were to find such a relationship exists, it should give deference to the terms the parties have agreed to, including the shaping or disclaiming of any fiduciary duties. Additionally, a court should follow the cases that have evaluated a potential breach of a fiduciary duty through the lens of the unique nature of the music industry and its customs, which serve to benefit the artists, Record Labels, and music listeners.

Inc., 529 N.Y.S.2d 279, 283 (N.Y. App. Div. 1988) (finding a breach of duty based on an informal fiduciary relationship involving one party placing trust in the integrity of another party based on friendship or previous business dealings); Universal-MCA Music Publ'g v. Bad Boy Entm't, Inc., Index No. 601935/02, 2003 WL 21497318, at *5 (N.Y. Sup. Ct. June 18, 2003) (finding breach of fiduciary duty when Combs sacrificed royalty income due to all artists by invoking the cap in his Recording Agreement on Compositions that he co-wrote with them).