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## Notice: Albums Are Dead - Sell Singles

Brian P. Nestor

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# NOTICE: ALBUMS ARE DEAD - SELL SINGLES

BRIAN P. NESTOR\*

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## I. THE PRELUDE

Remember the character Tevye from the production “Fiddler on the Roof”? One of Tevye’s most famous lines is “Traditions, Traditions (sic). Without our traditions our lives would be as shaky as . . . as . . . as a fiddler on the roof!”<sup>1</sup> This is the motto the major record labels<sup>2</sup> have committed themselves to for decades.

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\* Pepperdine University School of Law, J.D. Candidate 2011. Brian P. Nestor would like to sincerely thank: God, Mom, Pops, Brandon, Pepperdine School of Law, Professor Janet Kerr, Professor Mark Scarberry, Brian Chang, Joshua Krebs, Elizabeth Throne, Christopher Rhyme, Elizabeth Evans, Brandon Leavitt and the entire JBEL Staff for making this article something I am so proud and blessed to have authored.

<sup>1</sup> IMDB.com, Memorable quotes for *Fiddler on the Roof*, <http://www.imdb.com/title/tt0067093/quotes> (last visited Jan. 12, 2011).

<sup>2</sup> The four major record labels left in the music industry are EMI (distributor of Capitol and Virgin); Sony BMG (distributor of Columbia, Epic, J, Jive, and RCA Records); Universal (distributor

The major record labels unwaveringly committed themselves to the tradition that profits in the music industry were derived primarily from album sales. This traditional profit model began with the signing of musical artists to recording contracts; the artist signed to the major labels would then begin to record music that could be developed into a full album.<sup>3</sup> Once the album was completed, the artist and his or her album would be marketed to certain demographics in order to generate popularity and notoriety for the album.<sup>4</sup> Part of that marketing campaign would be the release of a “single” or individual song from the forthcoming album to the public.<sup>5</sup> The release of a single was to increase the targeted demographics appetite for the forthcoming album.<sup>6</sup> The marketed album would then be delivered to retailers who would then sell the album to the consumers in the targeted demographic.<sup>7</sup> This general cycle became the model and the tradition for how major records labels primarily generated revenue.<sup>8</sup> This traditional profit model was followed so heavily by the major record labels because it was effective and successful;<sup>9</sup> however, no matter how settled and solidified this profit model appeared,<sup>10</sup> it was still only a tradition.

With respect to traditions, generally, the proven axiom of “if it’s not broke, don’t fix it” seems to apply. But what happens if the “it” is broken? If a tradition is no longer serving an effective purpose for its followers, should the followers continue to keep following such tradition just because it is what they have always done? Put differently, should one keep going to a well to draw water, even though that well is empty, simply because that is the well one has always gone to? Traditions should be followed only as long as they serve an effective purpose. This concept should not come as a shock because traditions have never been ineradicable fortresses immune to the forces of change. They are not everlasting practices. No rule exists stating that traditions must be followed or, more importantly, that traditions cannot be replaced or adapted with new practices.

Recent monumental changes in the music industry shook the very foundation of the traditional profit model and have left the major record labels at a pivotal crossroad.<sup>11</sup> The major record labels can choose to follow a tradition that relies on album releases for profit, a format that is all but doomed in the current market,<sup>12</sup> or

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of Universal, Interscope/A&M/Geffen, MCA, Island/Def Jam, Motown); and WEA (distributors of Warner Bros., Elektra, Atlantic). DONALD S. PASSMAN, *ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS* 64 (6<sup>th</sup> ed. 2006).

<sup>3</sup> *Id.* at 61.

<sup>4</sup> TAD LATHROP, *THE BUSINESS OF MUSIC MARKETING & PROMOTION* 10 (2003); PASSMAN, *supra* note 2, at 61.

<sup>5</sup> *Id.* at 19.

<sup>6</sup> *See generally id.* at 25.

<sup>7</sup> *See* PASSMAN, *supra* note 2, at 61. Further marketing may take place after the initial release in order to maintain a high level of interest for the album. *See* LATHROP, *supra* note 4, at 19. An example of such marketing would be the release of additional singles. *See id.*

<sup>8</sup> *See* LATHROP, *supra* note 4, at 3.

<sup>9</sup> *See generally* PASSMAN, *supra* note 2, at 61.

<sup>10</sup> Mark F. Schultz, *Live Performance, Copyright, and The Future of the Music Business*, 43 U. RICH. L. REV. 685, 689-90 (2009).

<sup>11</sup> *See id.* at 690.

<sup>12</sup> *See infra* Part II.

they can focus primarily on releasing singles or an individual song in the digital music marketplace,<sup>13</sup> a format and market that has recently flourished with profits and opportunities.<sup>14</sup> This article explains why primarily releasing singles or individual songs should become the new profit model for major record labels. Moreover, this article describes how Barry Gordy's Motown Model provides the major record labels with the necessary concepts needed to develop a general strategy for success using this new profit model.

The general causes for the major record labels' decline in the recent past as well as the aftermath is discussed in Part II.<sup>15</sup> The reasons singles should become the basis of a new profit model for the major record labels is considered in Part III.<sup>16</sup> How Barry Gordy's Motown Model is a guide for major record labels in developing a successful game plan for primarily selling singles is explained in Part IV.<sup>17</sup> The concluding thoughts of the major record labels' reliance on this single-based profit model are found in Part V.<sup>18</sup>

## II. HERE LIES THE MAJOR RECORD LABELS

The infamous Napster predicament has been well touted as the funeral for the record labels that relied on the traditional profit model in the music industry.<sup>19</sup> The file-sharing technology first observed in Napster was an unstoppable force, which would author an inescapable fate for the record labels still relying on album releases to turn a profit.<sup>20</sup> If Napster was the funeral for the traditional profit model, the opinion by Judge Robert R. Beezer in that case was the eulogy.<sup>21</sup> Judge Beezer's opinion put forth a simple but chilling summary of the problem facing the music industry: "Napster users get for free something they would ordinarily have to buy."<sup>22</sup> Napster users were able to get free music by "the repeated. . . exploitat[ion] [of] unauthorized copies. . .[which] sav[ed] the expense of purchasing authorized copies."<sup>23</sup> Allowing users to obtain music for free damaged

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<sup>13</sup> For purposes of this paper, the digital music marketplace is defined as places on the Internet, such as iTunes and Amazon, which allow users to obtain music legally in a digital format.

<sup>14</sup> See *infra* Part III.

<sup>15</sup> See *infra* Part II.

<sup>16</sup> See *infra* Part III.

<sup>17</sup> See *infra* Part IV.

<sup>18</sup> See *infra* Part V.

<sup>19</sup> Brian Hiatt & Evan Serpick, *The Record Industry's Decline*, ROLLING STONE, Jun. 19, 2007, [http://msl1.mit.edu/furdlog/docs/2007-06-19\\_rollingstone\\_industry\\_decline.pdf](http://msl1.mit.edu/furdlog/docs/2007-06-19_rollingstone_industry_decline.pdf). It is important to note that the major record labels and Napster tried to negotiate a blanket licensing agreement, where Napster would agree to become a subscription based service and split the fee with the major record labels in exchange for the license to the songs. *Id.* However, the major record labels, despite seeing the potential of Napster's popularity among music consumers could not come to an agreement. *Id.* Some critics cite the pressure of the major record labels' artists and retailers badgering the major record labels to not agree to such terms as the explanation for why no agreement was reached. *Id.*

<sup>20</sup> Tom Zeller Jr., *Sharing Culture Likely to Pause but Not Wither*, N.Y. TIMES, Jun. 28, 2005, <http://www.nytimes.com/2005/06/28/technology/28peer.html>.

<sup>21</sup> *A&M Records v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001).

<sup>22</sup> *Id.* at 1015 (citing *A&M Records, Inc. v. Napster, Inc.* 114 F. Supp 2d. 896, 912 (N.D. Cal. 2000)).

<sup>23</sup> *Id.*

the music market by diminishing CD sales and obstructed the major record labels from gaining a foothold in the digital music market.<sup>24</sup> Thus, Judge Beezer commented that the “evidence of lost sales [was] probative of irreparable harm.”<sup>25</sup> While the major record labels that sued Napster emerged as the winners from the case before the Ninth Circuit,<sup>26</sup> the major record labels were far from victorious.

Napster opened a musical Pandora’s box as it created the potential for the emergence of an infinite number of file-sharing sites similar to the Napster site.<sup>27</sup> This allowed for the online theft of music to become an unstoppable force, devastating the profits of the major record labels who continued to rely on the traditional profit model.<sup>28</sup> Even as online music piracy appeared more and more irrepressible, the major record labels still elected to fight online piracy head-on. The major record labels proceeded by continuing to sue the different file-sharing sites, such as Kazaa, Grokster, or Morpheus on issues of copyright infringement.<sup>29</sup> The plan with these suits was to engage the file-sharing sites in such lengthy and expensive lawsuits that these sites would find it impossible to mount a successful defense.<sup>30</sup> The lawsuits brought forth under this plan proved successful in ruining the targeted sites’ profitability.<sup>31</sup> Furthermore, when the suits actually made it into court, they were widely successful as the targeted sites were ordered to shut down.<sup>32</sup> No matter how many file-sharing sites were shut down by financial warfare or the courts, the one constant has been that file-sharing technology continues to evolve and thrive, making it a never-ending threat to the major record labels who live according to the traditional profit model.<sup>33</sup>

The raw reality of this threat pushed the major record labels to open a new front in the war on online piracy: suing their consumers.<sup>34</sup> The major record labels, along with the Recording Industry Association of America (“RIAA”), filed over 20,000 lawsuits directed at individuals who illegally downloaded music by “demanding a settlement payment and threatening a legal battle.”<sup>35</sup> From 2003 to 2009, the number of lawsuits against consumers reached an astounding 35,000.<sup>36</sup>

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<sup>24</sup> *Id.* at 1017.

<sup>25</sup> *Id.* at 1016 (quoting *A&M Records v. Napster, Inc.*, 2000 WL 1170106 (N.D. Cal. 2000)).

<sup>26</sup> *Id.* at 1029.

<sup>27</sup> Zeller, *supra* note 20.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> See Zeller *supra* note 20, at 1. Major record label suits have seen appellate courts upholding the shutting down of file-sharing sites like Grokster and Streamcast. *Id.*

<sup>33</sup> See Hiatt & Serpick, *supra* note 19, at 2.

<sup>34</sup> See Marc Fisher, *Download Uproar: Record Industry Goes After Personal Use*, WASHINGTON POST, Dec. 30, 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/12/28/AR2007122800693.html>.

<sup>35</sup> *Id.* One of the more famous cases to emerge out of these lawsuits was the suit brought against Jammie Thomas. *Id.* In this federal case, a jury found for the record industry ordering Thomas to pay \$220,000 in damages to the major record companies for the 24 songs she downloaded illegally. *Id.* The mathematical breakdown of this remedy is that each of the 24 songs cost Thomas \$9,250. *Id.*

<sup>36</sup> See Sarah McBride & Ethan Smith, *Music Industry to Abandon Mass Suits*, WALL ST. J., Dec. 19, 2008, <http://online.wsj.com/article/SB122966038836021137.html>.

The suits resulted in the major record labels trying to persuade courts to make rulings that extremely restricted the ability of their consumers to download music content.<sup>37</sup> While suing the participants in the online piracy of music seemed to be the next logical step, this strategy seemed to do more harm than good.

These suits attracted numerous critics who saw this strategy as a failed attempt to combat online piracy.<sup>38</sup> In holding the strategy as a failure, the critics agreed that, even with legal proceedings, the file sharing of music over the Internet had grown consistently.<sup>39</sup> The failure of the lawsuits to hinder online piracy provided clear evidence that negative reinforcement, like legal consequences, would be found unpersuasive in influencing a majority of consumers to shun online piracy.<sup>40</sup> Rather, many critics agreed that more positive incentives would have to be used in order to coax consumers into obtaining their music legally.<sup>41</sup> Faced with this bleak realization, the major record labels and the RIAA abandoned their mass lawsuit strategy in December 2008.<sup>42</sup>

Allowing users to obtain music for free was not the only problem online piracy caused for the major record labels. Online piracy gave consumers a taste for acquiring music by individual song without having to buy those songs as part of an entire album.<sup>43</sup> The ability to purchase songs individually apart from an album was one that quickly became legal through online retail outlets like the Apple's iTunes store.<sup>44</sup> Consumers rapidly became infatuated with the notion of buying songs through such online outlets because it was inexpensive and convenient.<sup>45</sup> This love affair led consumers to collectively turn their backs on buying albums, which had traditionally been the major record labels' bread and butter for profit.<sup>46</sup>

Unable to effectively combat the theft of music online and timely adapt to

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<sup>37</sup> See Fisher, *supra* note 34. The restriction sought by the major record labels stretched to such an extreme as to prevent the consumer from even making a copy of a legally bought CD onto their personal computers. *Id.*

<sup>38</sup> See McBride & Smith, *supra* note 36.

<sup>39</sup> *Id.* Critics also highlighted the reckless manner in which the lawsuits were filed as certain suits were filed against a thirteen-year old and a person who was already deceased. *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> See *id.* The authors here were referencing the opinion of Eric Garland, the president of BigChampagne LLC, a piracy-consulting firm. *Id.* He stated that the failure of the lawsuits against consumers proved that “it has become abundantly clear that the carrot is far more important than the stick” when it comes to combating the online theft of music. *Id.*

<sup>42</sup> *Id.* Although the major record labels stated they were going to abandon the massive filing of suits against the consumer, they intended to continue suing those consumers who ignored multiple warnings to stop illegally downloading music as well as those who illegally downloaded in massive quantities. *Id.* The RIAA stated that they felt the lawsuits had been effective in bringing the problems of online piracy to the forefront and without the lawsuits, piracy would have been worse. *Id.* Thus, the major record labels and the RIAA have now incorporated the new strategy of partnering with internet service providers to combat online piracy. *Id.*

<sup>43</sup> See generally David Blackburn, On-line Piracy and Recorded Music Sales 3 (Dec. 2004), [https://docs.google.com/viewer?url=http://www.katallaxi.se/grejer/blackburn/blackburn\\_fs.pdf](https://docs.google.com/viewer?url=http://www.katallaxi.se/grejer/blackburn/blackburn_fs.pdf).

<sup>44</sup> See Mark Harris, *iTunes Store History-The History of iTunes Store*, ABOUT.COM, available at [http://mp3.about.com/od/history/p/iTunes\\_History.htm](http://mp3.about.com/od/history/p/iTunes_History.htm). More about the effect Apple's iTunes had on changing the musical taste of consumers is later discussed. See *infra* Part III B.

<sup>45</sup> Hiatt & Serpick, *supra* note 19, at 1.

<sup>46</sup> See *id.*

consumers' desires, the major record labels continued to suffer a constant decline year to year.<sup>47</sup> There exists no better example of the economic downturn suffered by the major record labels than the downturn of album sales since 2000.<sup>48</sup> In 2000, the total number of albums sold was 785.1 million including both digital albums and CDs.<sup>49</sup> By 2006, this number dropped to 588.2 million albums sold.<sup>50</sup> The freefall of sales continued in 2007 with only 500.2 million albums sold, which was equivalent to a 9.5% decrease of sales in just one year.<sup>51</sup> In 2008, the number of sales dipped well below the 500 million mark as total sales reached a mere 428 million albums sold, which was equal to a 14% decrease from 2007.<sup>52</sup> By the third quarter of 2009 sales had dropped to 368.5 million albums sold, proportionate to a 13.9% decrease from 2008.<sup>53</sup> This decline in sales did not play favorites either, as it affected nearly every genre of music across the music industry.<sup>54</sup> The swift descent of the major record labels' profit core has led many within the industry to pronounce its death.<sup>55</sup> Some detractors were so certain the major record labels had flat-lined that they believed that not even a major hit or superstar act could bring about their revival.<sup>56</sup> This belief was founded upon the idea that no matter how talented the act, the major record labels did not have a profit model that could turn them into a sustainable moneymaking venture.<sup>57</sup>

The major record labels that relied on the traditional profit model faced a bleak and uncertain future. But early claims that the major record labels faced extinction<sup>58</sup> may have been an overstatement. The major record labels tried to remedy their losses by signing musical acts to a specific kind of recording contract called a "360 deal."<sup>59</sup> "360 deals" are record deals in which the record labels earn profits from not only their artists' album sales but also their merchandising and touring.<sup>60</sup> In essence, to supplement the lack of album sales, the major record labels sign acts to recording contracts that enable them to take profits from

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<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> Hiatt & Serpick, *supra* note 19, at 1. From 2000 to 2006 even the top albums witnessed a decline in sales falling from 60 million to 25 million sold collectively for albums ranked in the top ten. *Id.*

<sup>51</sup> The Associated Press, *U.S. Albums Sales Fell 9.5% in 2007*, N.Y. TIMES, Jan. 4, 2008, <http://www.nytimes.com/2008/01/04/business/media/04music.html>.

<sup>52</sup> Ben Sisario, *Music Sales Fell in 2008, but Climbed on the Web*, N.Y. TIMES, Dec. 31, 2008, [http://www.nytimes.com/2009/01/01/arts/music/01indu.html?\\_r=1](http://www.nytimes.com/2009/01/01/arts/music/01indu.html?_r=1).

<sup>53</sup> Daniel Kreps, *Album Sales Down in 2009 Despite Huge Jackson, Beatles Number*, ROLLING STONE, Oct. 5, 2009, <http://www.rollingstone.com/rockdaily/index.php/2009/10/05/album-sales-down-in-2009-despite-huge-jackson-beatles-numbers/>.

<sup>54</sup> Dawn C. Chmielewski, *Digital Music Downloads Set Record but Fail to Make Up for Decline in CD Sales*, L.A. TIMES.COM, Jan. 1, 2009, <http://articles.latimes.com/2009/jan/01/business/fi-music1>.

<sup>55</sup> Hiatt & Serpick, *supra* note 19, at 1-2.

<sup>56</sup> *Id.* at 2.

<sup>57</sup> *Id.* at 1.

<sup>58</sup> *Id.*

<sup>59</sup> Gil Kaufman & James Montgomery, *If the Old Music Business is Dead, What's Next*, MTV.COM, Dec. 19, 2007, <http://www.mtv.com/news/articles/1576838/20071219/paramore.jhtml>.

<sup>60</sup> *Id.*



anything that encompasses their artists' career.<sup>61</sup> But these “360 deals” continued to incorporate core elements of the failing traditional profit model by requiring the release of albums into a consistently failing market.<sup>62</sup>

Yet, the major record labels seemed dependent on making album sales a formidable profit model in the digital age. Thus, the marketing of an album began to be re-envisioned in order to make an album more enticing to buy. One of the new marketing concepts was the release of albums in the CMX format.<sup>63</sup> The CMX format incorporates into the purchase of a digital album all related “songs, videos, images, lyrics, ringtones and other digital [items] into a comprehensive package . . . .”<sup>64</sup> The CMX format is also one that could potentially lead to a future collaboration between the major record labels and Apple's iTunes, although the details over this collaboration are still unsettled.<sup>65</sup> Aside from this collaboration, Apple's iTunes offers a similar function within its iTunes Store: the iTunes LP.<sup>66</sup> The iTunes LP offers music consumers the chance to have an “interactive experience” accompanying each album a consumer buys.<sup>67</sup> This interactive experience features “lyrics and liner notes” from the album as well as performance videos, photographs, and bonus materials related to the artist.<sup>68</sup> Another idea to reinvigorate consumer interest in buying albums (attempted mostly by more mature music acts rather than major record labels) has been to create exclusive release deals with major big box stores like Wal-Mart and Target.<sup>69</sup> While these deals provide the chance for better album sales, the artists are not relying on sales alone to make a profit.<sup>70</sup> These deals afford artists a six-figure paycheck upfront regardless of album sales in the stores.<sup>71</sup> The decision to invest in these re-envisioned album concepts seems to spell out the clear message that major record labels are clearly determined to keep fighting the notion that album sales are no longer the “rainmakers” of the music industry.<sup>72</sup>

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<sup>61</sup> Jeff Leeds, *The New Deal: Band as Brand*, N.Y. TIMES at 1-2, Nov. 11, 2007, available at <http://www.nytimes.com/2007/11/11/arts/music/11leed.html>.

<sup>62</sup> *See id.*

<sup>63</sup> Eliot Van Buskirk, *Apple, Record Labels Diverge Over Next-Generation Full Music Format*, WIRED.COM, Aug. 11, 2009, <http://www.wired.com/epicenter/2009/08/apple-record-labels-diverge-over-next-generation-full-album-music-format/>.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> iTunes LP, <http://www.apple.com/itunes/lp-and-extras/>.

<sup>67</sup> *Id.* Artists often collaborate on or create the interactive world of iTunes LP that accompany their albums. *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> Josh Tyrangiel, *Prince and Target: A Match Made in Discount Heaven*, TIME.COM, Mar. 3, 2009, <http://www.time.com/time/arts/article/0,8599,1882697,00.html>. Prince and Target signed an exclusive deal where Target would be the sole retail outlet for Prince's new three album set. *Id.* Prince was not the only musician to have such an exclusive deal: both The Eagles and AC/DC signed such deals with Wal-Mart, while Bruce Springsteen provided Wal-Mart with the chance to sell an exclusive greatest hits collection of his music. *Id.* The benefits to an artist agreeing to these type of deals, besides the upfront money, are that the stores agree to do major in-store promotions for the albums and give the physical CDs key shelf placement. *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *See* Van Buskirk *supra* note 63.



The “360 deals”, the interactive digital albums, and exclusive retail store deals will certainly provide aid to the major record labels. But these ideas still rest on the traditional profit model, which has been a consistent failure since 2005. The major record labels need a long lasting remedy to end their current losses. Unfortunately, no such remedy has been administered. Yet if the major record labels seek to develop such a remedy, a good place to start would be with the one product that has been witnessing unprecedented success despite the downward spiraling of the music industry. This product is the digital single<sup>73</sup> and the major record labels should use the digital single as the foundation upon which to build a new profit model.

### III. THE INVASION OF THE SINGLE

#### *A. The Traditional View of Singles*

Advocating the sale of the single as the foundation for the major record labels’ new profit model may strike some as a slightly radical idea. Singles are considered to have already had “their heyday in the 1950s and ‘60s.”<sup>74</sup> Traditionally, physical CD singles delivered very limited profits to the major record labels and therefore the major record labels barely, if at all, release singles on physical CDs.<sup>75</sup> Most critically, the majority of profits from physical singles have been perceived to come from the percentage of consumers who resist to purchasing a full album.<sup>76</sup> This perception is so important because the consumers who resist buying full albums have likely become the majority of music consumers in the current marketplace.<sup>77</sup> It logically follows that if the percentage of consumers who form the usual market for single purchases has expanded to become the majority of music consumers, the primary product to offer those consumers should be singles, not albums. Furthermore, if that large percentage has begun to purchase most of their music digitally<sup>78</sup> then the primary product to offer would be digital singles. The major labels have not fully embraced this concept, for reasons difficult to determine. Indeed, digital singles have been recognized by the major labels as being superior in quality to physical CDs<sup>79</sup> and are anticipated to replace the whole market for physical CD singles.<sup>80</sup> However, major record

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<sup>73</sup> A single in the digital market does not necessarily have to be confined to the traditional definition of a single being the lead or a “hit” song from an album. While many singles in the digital market do match the traditional definition of a single, the opportunity of the digital market place allowing consumers to download music on a song-by-song basis means a digital single could be just the downloading of an individual song.

<sup>74</sup> LATHROP, *supra* note 4, at 36.

<sup>75</sup> See PASSMAN, *supra* note 2, at 86.

<sup>76</sup> See LATHROP, *supra* note 4, at 36.

<sup>77</sup> See generally J. Freedom du Lac, *Downloads Make Singles a Hit Again*, THE WASHINGTON POST, Feb. 8, 2006, <http://www.washingtonpost.com/wp-dyn/content/article/2006/02/07/AR2006020702051.html>.

<sup>78</sup> See *IFPI Digital Music Report 2009: Summary*, 1 (2009), <http://www.ifpi.org/content/library/DMR2009-summary.pdf>.

<sup>79</sup> See *id.* at 3.

<sup>80</sup> See LATHROP, *supra* note 4, at 36.

labels are still focused on selling albums.<sup>81</sup>

*B. Numbers Don't Lie*

In 2012, digital music sales are predicated to reach revenues of \$4.8 billion.<sup>82</sup> This amount will likely far surpass the sale of physical CDs, which is projected to produce only \$3.8 million in 2012.<sup>83</sup> If digital music sales reach this benchmark it will likely be due to the surging sales of digital singles.<sup>84</sup> Since the year 2000, digital singles sales have been growing substantially, producing a total of \$3.7 billion to date.<sup>85</sup> 2005 was the first year in which digital single sales truly began its historic rise in profitable popularity.<sup>86</sup> During 2005, the sales of digital singles totaled about 352.7 million, which was a 150% increase from the previous year.<sup>87</sup> The following year saw an even better return with 582 million digital singles being bought in 2006.<sup>88</sup> In 2007, a record 844.2 million digital singles were sold.<sup>89</sup> And 2008 became a milestone year because the sales of digital singles reached one billion singles sold,<sup>90</sup> finishing the year at 1.1 billion within the United States and 1.4 billion worldwide.<sup>91</sup>

The digital single's lucrative nature has not been entirely lost on the major record labels. Seeing the potential profits for digital singles sales, the major record labels negotiated with iTunes in April 2009 to have digital singles and individual downloads sold on a variable pricing scale.<sup>92</sup> The scale sold digital singles at three different price points: \$1.29, \$0.99, and \$0.69.<sup>93</sup> The labels also retained control over deciding what songs were placed at which price point.<sup>94</sup> In an effort to maximize revenue, the more recently released, popular songs by the more popular artists would be priced at \$1.29, and the older, less popular songs would be priced at the two lower price points.<sup>95</sup> However, the new pricing structure and the rising sales of digital singles have yet to replace the monetary losses of albums sales<sup>96</sup>

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<sup>81</sup> See generally *supra* notes 58-72.

<sup>82</sup> See Mark Hefflinger, *Report: Digital Music Download Sales to Pass Sales by 2012*, DIGITAL MEDIA WIRE, Feb. 19, 2008, <http://www.dmwmedia.com/news/2008/02/19/report:-digital-music-download-sales-pass-cd-sales-2012>.

<sup>83</sup> See *id.*

<sup>84</sup> See *IFPI Digital Music Report 2009: Summary*, *supra* note 78, at 1.

<sup>85</sup> See Edna Gundersen, *The Decade in Music: Sales Slide, Pirate, Digital Rise*, USA TODAY, Dec. 28, 2009, [http://www.usatoday.com/life/music/news/2009-12-29-musicdecade29\\_CV\\_N.htm](http://www.usatoday.com/life/music/news/2009-12-29-musicdecade29_CV_N.htm).

<sup>86</sup> See Freedom du Lac, *supra* note 77.

<sup>87</sup> See *id.*

<sup>88</sup> See Hiatt & Serpick, *supra* note 19, at 1.

<sup>89</sup> Ken Barnes, *Digital Single Tracks Soar in Sales as Albums Drop*, USA TODAY, (Jan. 3, 2008, 10:51 PM), available at [http://www.usatoday.com/life/music/news/2008-01-03-digital-sales\\_N.htm](http://www.usatoday.com/life/music/news/2008-01-03-digital-sales_N.htm).

<sup>90</sup> Chmielewski, *supra* note 54.

<sup>91</sup> IFPI, *supra* note 78, at 1.

<sup>92</sup> Eliot Van Buskirk, *iTunes' New Pricing Structure Is A Band*, WIRED, Apr. 7, 2009, <http://www.wired.com/epicenter/2009/04/artists-react-t/>

<sup>93</sup> *Id.* Originally, iTunes had every digital single and individual song priced at \$0.99. *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> See *id.*

<sup>96</sup> *Cf.* Gundersen, *supra* note 85.

that the major record labels seemed determined to try to salvage.<sup>97</sup>

A statistical comparison of sales between albums and digital singles neatly summarizes that albums are a sinking ship when compared to the dominant sales of digital singles. Even as albums sold digitally continue to show promise, they have only reached a total of 65.6 million units sold in 2008, far behind the digital single's mountainous sales.<sup>98</sup> This dominance can best be exemplified by the hip-hop artist Flo Rida's young career. Flo Rida's first single, "Low," from his first album, "Mail on Sunday," was the biggest selling digital single of the decade with 5.2 million downloads.<sup>99</sup> Despite the champion success of "Low," "Mail on Sunday" sold only 381,000 copies total.<sup>100</sup> Flo Rida followed by releasing a second album, "R.O.O.T.S.," and the first single was "Right Round," which attained 2.4 million downloads in just a four-month span.<sup>101</sup> Even with such a hugely successful single in tow, "R.O.O.T.S." sold less than 100 thousand copies the first week it was released.<sup>102</sup> Flo Rida's current career sales are ten million singles sold compared to 500 thousand albums.<sup>103</sup> If the old adage of "numbers don't lie" is correct then the aforementioned overall singles sales and the Flo Rida example strongly supports that the major record labels' focus should be on selling digital singles not albums. Yet, sales are not the only evidence to endorse such a proposal.

### C. *An Apple A Day: The iTunes Factor*

The proposition to sell digital singles turns also on the changing taste of music consumers, who favor the benefits offered by the digital music market.<sup>104</sup> The digital music market is connected to multiple devices and services.<sup>105</sup> These devices and services provide consumers with a plentiful selection of music that is easily accessible and portable.<sup>106</sup> Essentially, the digital music market has provided consumers "maximum choice in the way music can be purchased and enjoyed."<sup>107</sup> The choice presented by the digital music market has given rise to its stunning growth and popularity amongst consumers for downloading music over buying it at traditional retail outlets.<sup>108</sup> And no digital music provider has been

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<sup>97</sup> See Van Buskirk, *supra* note 63.

<sup>98</sup> *Billboard/Soundscan: Digital Album Sales Up 32% In 2008*, NielsenWire, Jan. 7, 2009, <http://blog.nielsen.com/nielsenwire/consumer/billboard-soundscan-digital-album-sales-up-32-in-2008/>.

<sup>99</sup> Gundersen, *supra* note 85.

<sup>100</sup> Paul Grein, *Chart Watch: Week Ending April 5, 2009: A Prince Beats A King (Of Pop)* Yahoo! Music, April 8, 2009, [http://new.music.yahoo.com/blogs/chart\\_watch/32895/week-ending-april-5-2009-a-prince-beats-a-king-of-pop/](http://new.music.yahoo.com/blogs/chart_watch/32895/week-ending-april-5-2009-a-prince-beats-a-king-of-pop/).

<sup>101</sup> Todd Martens, *Competing CD Sales Strategies on Display*, L.A. TIMES, April 9, 2009, <http://articles.latimes.com/2009/apr/09/business/fi-cotown-music9>.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> See Gundersen, *supra* note 85.

<sup>105</sup> See ROBERT LIND ET AL., ENTERTAINMENT LAW: LEGAL CONCEPTS AND BUSINESS PRACTICES §2.30 (3d ed. 2009).

<sup>106</sup> See Gundersen, *supra* note 85.

<sup>107</sup> LATHROP, *supra* note 4, at 123.

<sup>108</sup> See GEORGE B. DELTA & JEFFREY H. MATSUURA, LAW OF THE INTERNET § 14-42 (2d ed.

able to capitalize on the consumer's thirst for choice more than Apple.<sup>109</sup>

Apple realized early during the emergence of the digital music market that consumers craved having maximum choice, accessibility and portability for their music.<sup>110</sup> Apple successfully satisfied all of these cravings with the iPod and the iTunes Store, which instantly became a match made in music fan heaven.<sup>111</sup> Both introductions revolutionized the way music could be experienced and consumed.<sup>112</sup> The iPod enabled music fans to carry an entire music catalog in a single handheld device, while the iTunes Store allowed consumers to buy digital songs individually without having to buy the whole album.<sup>113</sup> Therefore, a purchase that would normally cost from \$9.99 or \$18.00 could be reduced to \$2.00 to \$3.00 because the consumer could buy only the 2 or 3 songs he or she actually desired rather than the whole album.<sup>114</sup> Furthermore, “cherry-pick[ing]”<sup>115</sup> of single songs from albums is an ability that the iTunes Store fosters with its formats, applications, and design.

The homepage of the iTunes Store features three different lists of the top selling music on the site.<sup>116</sup> The first list to appear on the homepage is entitled “Top Charts-Single” and consists of the ten top digital singles currently sold on the site.<sup>117</sup> Users can place their cursor over a single on this list and purchase the song without ever coming in contact with the single's accompanying album. Users can also toggle between viewing the top-selling digital single and the top ten music videos being sold in the same list.<sup>118</sup> However, the list of the top ten albums sold on iTunes can only be seen after one scrolls down past the first two lists.<sup>119</sup> Furthermore, the “New and Noteworthy” section provides digital singles equal billing and placement alongside the newly-advertised digital albums.<sup>120</sup>

Once an artist, single, or album is selected by a user, a dual list on the left side of the page shows the top digital singles purchased from the artist's catalog, as well as the top digital albums that are available from that artist.<sup>121</sup> “Top Songs” is the preset view for the list, rather than “Top Albums.”<sup>122</sup> For the more established musical artists, those who have an extensive catalog of music, the iTunes Store will often compile an essential mix of a particular artist's catalog of music.<sup>123</sup>

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2009).

<sup>109</sup> See Gundersen, *supra* note 85.

<sup>110</sup> *See id.*

<sup>111</sup> *Id.*

<sup>112</sup> Delta & Matsuura, *supra* note 108.

<sup>113</sup> Gundersen, *supra* note 85.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> iTUNES STORE, <http://itunes.apple.com/> (last visited Oct. 31, 2010). The analysis of the iTunes Store format and design in this article uses the 9.0.2 version of the iTunes Store.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* A music video can be considered a digital single just in the audio-visual format.

<sup>119</sup> *See id.*

<sup>120</sup> *See id.* The “New and Noteworthy” section appears on the homepage of the iTunes Store but also on the homepage for each genre of music. *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> iTUNES, *supra* note 116.

<sup>123</sup> *See id.*

These mixes, called “iTunes Essentials,” are compilations of all the singles or individual songs that were either most popular or most significant during the artist’s career.<sup>124</sup> These singles are not organized by album but are arranged according to song type.<sup>125</sup> Moreover, anytime an artist’s catalog is displayed, such as in a general search of the artist’s name, each song is given a popularity ranking dependent upon the number of consumers purchases for that song.<sup>126</sup> Albums, in contrast, do not receive any popularity ranking.<sup>127</sup> Essentially, these lists allow customers to become familiar with an artist through his singles, without any deference paid to the artist’s albums.

Accordingly, even a cursory glance at the format and design of Apple’s iTunes Store shows a trend of developing consumer preferences for digital singles over albums. The manner in which the iTunes Store presents digital singles is significant because the iTunes Store is often thought of as “the biggest game in town when it comes to digital music sales.”<sup>128</sup>

#### *D. The Other Avenues*

More recently singles have been used in a variety of ways across multiple commercial avenues such as television, video games, ring tones, and advertising campaigns.

##### *1. Singles On Television*

Traditionally, television has been a powerful venue in which music, almost always in the forms of singles, has been showcased.<sup>129</sup> The reason this avenue has been so useful is that it allows audiences to experience, both audibly and visually, artists and their singles.<sup>130</sup> Specifically, late night talk shows through live performances, and MTV through the use of videos, have been the premiere venues for artists and their singles to gain exposure on television.<sup>131</sup> Recently, however, singles have prospered much more.<sup>132</sup>

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<sup>124</sup> *See id.*

<sup>125</sup> *Id.* The songs are broken down into three categories: “The Basics,” “The Next Step,” and “Deep Cuts.” Finally, the entire collection is offered as “The Complete Set.” *See id.*

<sup>126</sup> *Id.*

<sup>127</sup> *See id.*

<sup>128</sup> Van Buskirk, *supra* note 63.

<sup>129</sup> *See* LATHROP, *supra* note 4, at 183, 185.

<sup>130</sup> *See id.* at 183.

<sup>131</sup> *See id.* at 184. Late night talk show performances and MTV videos can directly impact sales, but the exposure and promotion among millions of viewers has been “an important indirect impact on solidifying and increasing sales.” *Id.* Notably, since they are sold by iTunes, music videos have recently become a direct source of profit for the artists. iTUNES, *supra* note 116.

<sup>132</sup> The traditional television formats likely only provide a limited opportunity for singles to gain exposure. Late night talk shows are insufficient because they only provide an artist and his single a one-time performance segment, rather than a commercial that runs numerous times on different channels. However, since late night talk shows provide exposure and promotion to millions of viewers, they should still be utilized for the promotion of singles. *See* LATHROP, *supra* note 4, at 184-85. Since music videos are the visual equivalent of a single, this medium is a premiere format to promote a single on television. MTV was the pioneer and leader in this field, but as of late, it has struggled to create

Singles have become an integral part of numerous television commercials. The television commercials for the 2009 NBA postseason incorporated the slogan “Where Amazing Happens.”<sup>133</sup> The use of this tag line led the NBA to seek out hip-hop artist Kanye West to play his single “So Amazing” as the commercial’s soundtrack and the theme song for the entire NBA playoffs.<sup>134</sup> Thus, West’s song had the opportunity to be exposed to the many millions of people who tuned in to the record-breaking<sup>135</sup> NBA playoffs over a period of forty-three games.<sup>136</sup> Singles are being used in television not only to promote events like the NBA playoffs, but also to promote the release of products. Another hip-hop artist, T.I., collaborated with General Motors Corp. (“GM”) to promote the release of GM’s new Chevrolet’s Impala SS.<sup>137</sup> The promotion had three different commercials set to music of T.I.’s single “Top Back (Remix),” featuring numerous odes to Chevrolet’s Impala SS.<sup>138</sup> Two of the three commercials featured a mixture of T.I.’s own music video for the single and new footage of T.I. racing the promoted car with NASCAR driver, Dale Earnhart Jr.<sup>139</sup> This one single provided T.I. with a multi-million dollar contract, exposure for the single, multiple videos used to further promote the single, and publicity to the NASCAR market.<sup>140</sup> Hip-Hop stars are not the only artists who prospered in this avenue. R&B artist, Beyonce Knowles collaborated with DirectTV by altering the video for her single “Upgrade U” to feature her encouraging consumers to “upgrade” to DirectTV’s cable services.

These examples illustrate that singles are not being used as mere musical backdrops in television. As a result, singles are allowing artists and their music to receiving prominent exposure, attention, and popularity. And the greater exposure, attention, and popularity a single receives, the more likely it will thrive in sales.<sup>141</sup> Beyond TV shows, singles have turned the television into further success with

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successful programs centered on music. Chris Harris, *MTV Loses Another Music Show, Fails to Renew “Alexa Chung”*, iMUSICALL.COM, Dec. 11, 2009, <http://imusicall.com/1287/download-music-mp3/mtv-loses-another-music-show-fails-to-renew-%e2%80%9calexa-chung%e2%80%9d/>.

<sup>133</sup> Shaheem Reid, *Kanye West’s “Amazing” Helps Kick Off NBA Playoffs*, MTV.COM, Apr. 15, 2009, [http://www.mtv.com/news/articles/1609290/20090415/west\\_kanye.jhtml](http://www.mtv.com/news/articles/1609290/20090415/west_kanye.jhtml).

<sup>134</sup> *Id.*

<sup>135</sup> Mike Reynolds, *TNT ESPN Close 2009 NBA Playoff with Record Rating*, Multichannel News (June 3, 2009), [http://www.multichannel.com/article/277997-TNT\\_ESPN\\_Close\\_2009\\_NBA\\_Playoffs\\_With\\_Record\\_Ratings.php](http://www.multichannel.com/article/277997-TNT_ESPN_Close_2009_NBA_Playoffs_With_Record_Ratings.php). ESPN and TNT both witnessed record-breaking ratings of viewership for the 2009 NBA playoffs. *Id.*

<sup>136</sup> *TNT Scores with Most Watch NBA Playoffs in Turner’s 25-Year History of Televising the NBA*, TIMEWARNER (June 1, 2009), <http://www.timewarner.com/corp/newsroom/pr/0,20812,1902140,00.html>.

<sup>137</sup> *T.I. Races to the Top with Chevrolet’s Impala SS*, NEW BLAZE (May 1, 2007), <http://newsblaze.com/story/2007050115244100002.mwir/topstory.html>.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* T.I.’s exposure to the NASCAR market is significant because that market is often seen as an untapped or even unreachable market for Hip-Hop artists. Raygan Swan, *NASCAR Looking To Expand Into The Hip-Hop Lifestyle*, NASCAR.COM, July 23, 2007, <http://www.nascar.com/2007/news/headlines/cup/07/23/nascar.hiphop/index.html>.

<sup>141</sup> See PASSMAN, *supra* note 2, at 234. Regardless of the effect on sales, these televised commercials may have to use singles in such a conspicuous manner as will likely lead to a higher price in licensing fees for the artist. *Id.*

their incorporation into video games.

## 2. Singles In Video Games

Video games have been licensing songs to be used as a backdrop to the actual gameplay, similar to a soundtrack in a film. Video game giant, Electronic Arts (“EA”), has incorporated full music soundtracks into its franchise sports titles.<sup>142</sup> Titles like “Madden NFL 10” feature select singles from musical acts 2Pac, Nirvana, Kid Rock, and Iron Maiden.<sup>143</sup> Moreover, EA has a function on its website that allows gamers to buy the digital singles from the game’s soundtrack.<sup>144</sup> While this function provides the single mass exposure, as well as another place to be purchased, the singles on these soundtracks are confined to the background of the games.<sup>145</sup> The sport, not the single, is the primary focus.<sup>146</sup>

However, singles within video games have recently broken free from the background, thanks to games like “Guitar Hero” and “Rock Band” making singles the primary focus of the games.<sup>147</sup> These games have had tremendous success with sales, equaling more than \$2.3 billion in just a three-year span.<sup>148</sup> Along with great monetary success, these games have also generated prevalent interest in musical acts and their singles both past and present.<sup>149</sup> This phenomenon is due in part to the extensive catalog of singles the games provide as choices for the gamer.<sup>150</sup> The surging interest and success for single in videogames has artists even considering these games to be a significant outlet for future singles.<sup>151</sup> Moreover, incorporating these new singles into the games is convenient because gamers can buy the digital singles from the games’ online websites.<sup>152</sup> Overall, the digital single downloaded for the games have come to realize an “iTunes-like popularity.”<sup>153</sup>

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<sup>142</sup> EA, EA Trax Game Music (Jul. 31, 2009), <http://www.ea.com/uk/music/the-official-madden-nfl-10-soundtrack>. Some of the other EA sports titles to include a licensed soundtrack are the *NHL*, *NBA Live*, *Fight Night*, and *Need for Speed* collections. *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> Jeff Howe, *Why the Music Industry Hates “Guitar Hero”*, WIRED, (Feb. 2, 2009), [http://www.wired.com/culture/culturereviews/magazine/17-03/st\\_essay](http://www.wired.com/culture/culturereviews/magazine/17-03/st_essay). The major record labels have shown little profits, as the license fees for the singles are very cheap. *Id.* Despite the low cost of the license fees, this marketing avenue for singles should still continued to be used and explored by the major record labels because of the vast popularity of games like *Madden*, which has sold over 65 million copies and lasted over two decades. *John Madden Retires from NBC’s Sunday Night Football*, CNBC.COM, (Apr. 16, 2009), <http://www.cnbc.com/id/30246302>.

<sup>148</sup> Howe, *supra* note 147.

<sup>149</sup> *Id.*

<sup>150</sup> GuitarHero.com, Guitar Hero Music Catalog, <http://hub.guitarhero.com/music-catalog>; *see also* Rockband.com, The Music, <http://www.rockband.com/music>.

<sup>151</sup> *Id.*

<sup>152</sup> Daniel Kreps, *Have “Guitar Hero” and “Rock Band” Peaked?*, ROLLING STONE, Dec. 12, 2008, <http://easymusicguides/page/335/>.

<sup>153</sup> *Id.* The iTunes popularity attained by single downloads for music games can be exemplified with the rock group, Motely Crue. Motely Crue released its single “Saints of Los Angeles” for



Musical acts like Aerosmith<sup>154</sup> and the Beatles<sup>155</sup> have also benefited from these games. They have generated renewed enthusiasm for their past catalogs by having an entire exclusive edition of the games dedicated solely to their music.<sup>156</sup> The publisher of “Guitar Hero,” Activision, also released “DJ Hero” in order to capture a different consumer demographic who purchase hip-hop, techno, and house music.<sup>157</sup> The profitable impact of these two Activision game collections was so impressive it prompted Universal Music Group to buy the Activision company.<sup>158</sup> The above video games analysis provides clear evidence that digital singles are the more exposed and bankable format in the current market.

### 3. Singles On Cellular Phones & PDA Devices

Singles have created additional revenue stream through their invasion of mobile devices like ring tones or ringbacks on cellular phones and PDA devices. Ring tones are digital singles that are heard in place of the ring on a consumer’s cell phone.<sup>159</sup> The sales statistics for this revenue stream witnessed a sharp fall of 24% from 2007 to 2008,<sup>160</sup> but ring tones in 2008 still grossed a sizable sum of \$541 million.<sup>161</sup> Ringbacks are digital singles a caller hears played from the phone of the person being called while waiting for the call to be answered and, as of 2009, total sales have reached \$235 million.<sup>162</sup> Accordingly, digital singles have turned a medium of personal human communication into profit for the major record labels.

### 4. Singles In Campaigns

Some artists are using their singles to create campaigns for themselves backed by large corporate entities. Hip-hop artist Young Jeezy serves as a premier illustration of this undertaking. Young Jeezy partnered with Belvedere Vodka to launch a nation-wide campaign entitled “America Reborn” promoting Young

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download on Rock Band before even distributing it on traditional music formats. Mike Smith, *Guitar Hero: Aerosmith outsells Aerosmith Album*, YAHOO! GAMES, July, 29, 2008, <http://videogames.yahoo.com/feature/guitar-hero-aerosmith-outsells-aerosmith-album/1233315>. This strategy paid off as the Rock Band downloadable single proceeded to outsell iTunes and Amazon downloads five to one. *Id.*

<sup>154</sup> Smith, *supra* note 153. The Guitar Hero Aerosmith edition, featuring a selection of Aerosmith’s individual songs, actually outsold Aerosmith’s latest studio album in just its first week of sales. *Id.*

<sup>155</sup> Kreps, *supra* note 152.

<sup>156</sup> Guitarhero.com, *supra* note 150; *see also* Roxckband.com, *supra* note 150.

<sup>157</sup> DJ Hero.com, DJ Hero Overview, <http://www.djhero.com/game/>.

<sup>158</sup> Howe, *supra* note 147. This purchase provided Universal with a method to circumvent the low licensing fees Activision paid to Universal. *Id.* Essentially, Universal bought Activision in order to increase its profitability with music and video games.

<sup>159</sup> PASSMAN, *supra* note 2, at 157-58.

<sup>160</sup> Mark Hefflinger, *Report: U.S. Ringtone Sales Fell 24% in 2008*, DIGITAL MEDIA WIRE, Aug. 6, 2009, <http://www.dmwmedia.com/news/2009/08/06/report:-u.s.-ringtone-sales-fell-24%25-2008>.

<sup>161</sup> *Id.*

<sup>162</sup> Bruce Houghton, *BMI Sues T-Mobile Over Ringbacks*, HYPEBOT.COM, Jan. 2010, <http://www.hypebot.com/hypebot/2010/01/bmi-sues-tmobile-over-ringbacks.html>.

Jeezy's musical endeavors simultaneously with the alcoholic beverage.<sup>163</sup> This campaign featured Belvedere Vodka as a sponsor for Young Jeezy's national tour with an entire website created dedicated to this campaign.<sup>164</sup> The website was titled "jeezycirculate" named after Young Jeezy's song, "Circulate," from his current album, "The Recession."<sup>165</sup> The website also housed a promotional music video for "Circulate," which doubled as a commercial for Belvedere's Vodka.<sup>166</sup> Thus, a single, especially one that was not one of the primary promotional singles for "The Recession," became the bedrock of a national advertising campaign and sponsorship. Belvedere continued this trend by enlisting hip-hop artist/producer, RZA, to create a downloadable theme song and video for its campaign, "Luxury Reborn."<sup>167</sup> The theme song single and video were also discussed extensively during interviews with RZA about being apart of Belvedere's "Luxury Reborn" campaign.<sup>168</sup> The foregoing examples reveal that singles, even ones not intended to be "hit" singles, can be and are being used as centerpieces in national advertising campaigns.

#### *E. The Singular Truth*

Singles have proven their continued dominance in the sales of digital music, reflecting the changing taste of consumers. They have also gained a significant foothold across vast business avenues. Albums have not had this impact and are likely not capable of doing so. Accordingly, the musical market has become centered on the sales of singles. Releasing albums into such a musical market makes album releases akin to salmon swimming upstream. Similar to the salmon, a few albums will make it successfully, but many albums will be consumed by the bear market standing savagely in the middle of the stream of commerce. The shift from albums to singles as a primary profit generator of major record labels is not just an interesting idea, but likely an absolute necessity for survival.

#### IV. THE RETURN TO HITSVILLE U.S.A.

The shift from albums to singles would without any doubt be viewed as a very significant and an extremely difficult change for the major record labels. Such an adjustment would have a rippling effect reaching nearly every department, artist, function, and schedule connected with the major record labels.<sup>169</sup> All those involved then, including the executives implementing this new directive, would likely develop numerous fears and questions. Fears and questions lead to

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<sup>163</sup> Elan Mancini, *Young Jeezy Partners with Belvedere Vodka, Launches New Website & Tour*, XXL.MAG.COM, Jan. 20, 2009, <http://www.xxlmag.com/online/?p=34929>.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> RZA Studio: RZA and Vincent Produce the Soundtrack, <http://belvedere-vodka.com/>.

<sup>168</sup> *Id.*

<sup>169</sup> It is important to recognize the tremendous effects such a shift would have on the operations of the major record labels. However, a detailed analysis of such effects would be far too extensive for the intentions and scope of this article.

uncertainty and uncertainty is a key ingredient for chaos. The major record labels accepting that such a shift to selling singles needs to be made, must determine how to prevent the potential mayhem that could result. One way to avoid the looming chaos would be to have a general strategy for how this new model would successfully operate. A general game-plan would provide a foundation upon which the finer details for success can be properly articulated. In short, the major record labels need a vision of success.

When creating a vision for a new profit model so diametrically opposed to the current one used, the best idea is to look for an already successful example of that model to use as a template. Fortunately, for the major record labels, there exists an example of a record label that reached outstanding success based primarily on selling singles: Barry Gordy's Motown. At the outset, it should be recognized that the model of Barry Gordy's Motown label (the "Motown model") is not offered as a completely comprehensive strategy, or to answer every concern for how the major record labels can survive by selling singles. Rather, the Motown model is being presented here because it can provide the major record labels with feasible suggestions, valuable insights and most importantly, a general vision for what is needed to succeed in the singles-dominated market. The following is an analysis of the Motown model and the concepts that can be learned to help the major record labels develop their general game plan for success using a single-based profit model.

#### *A. The Motown Model*

The Motown model is famous for being "a hit factory" of successful singles.<sup>170</sup> Motown mastered the production of hit singles because of founder Barry Gordy's vision for his record label to operate like a factory.<sup>171</sup> The factory idea came from Gordy's days of working at the Lincoln-Mercury automobile plant.<sup>172</sup> Gordy took notice that automobiles were nothing but a metal frame in their infancy but after those frames traveled along the plant's assembly line, the frames became pristine automobiles.<sup>173</sup> This experience helped him to envision each artist like an automobile at the Lincoln-Mercury plant.<sup>174</sup> Gordy believed that if he created a musical assembly line at Motown he could take anyone with the slightest frame of ability and turn that person into a superstar.<sup>175</sup> Gordy's "assembly line" operated on three different principles: family-like closeness, fruitful competition, and constant collaboration.<sup>176</sup> These three cogs would give life to Gordy's vision of Motown becoming "Hitsville U.S.A."<sup>177</sup>

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<sup>170</sup> BERRY GORDY, *TO BE LOVED: THE MUSIC, THE MAGIC, THE MEMORIES OF MOTOWN*, 140 (1994).

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> GORDY, *supra* note 170, at 140.

<sup>176</sup> *Id.* at 168, 170.

<sup>177</sup> *Id.* at 118. This was not only what Gordy envisioned in terms of Motown's success, but was also the name of the first Motown studios and offices. *Id.*

## B. The Concepts

### 1. Create Family-like Closeness

Berry Gordy attributed Motown's ability to churn out so many successful singles to the "atmosphere" surrounding the company.<sup>178</sup> Motown's atmosphere fostered an environment of experimental creativity and the elimination of the fear of making a mistake.<sup>179</sup> Every idea and goal was considered attainable.<sup>180</sup> There was no exception to this rule as every artist, idea, and song was pushed to reach its "full potential."<sup>181</sup> This atmosphere of fearless creativity promoted unity and pride among every Motown member, making everyone involved feel as though they were family.<sup>182</sup>

Every member of the Motown label, whether on the creative or business side, was sternly encouraged to be openly honest about each song considered for release.<sup>183</sup> This honesty was to ensure that Motown continued to produce music that showed growth and improvement with each release.<sup>184</sup> Hence, when Motown charted a single, everyone in the company felt like they were a part of its success. Under this process, Motown's strength and morale grew internally and externally at the same rate.<sup>185</sup> This honesty was made possible due to Gordy's belief in the ability of his talent pool as a collective unit.<sup>186</sup> The people in his creative talent pool were assured that even if they, individually, failed to produce a hit, Gordy would continue to work with each one of them until they all found success.<sup>187</sup> Therefore, no one had to be concerned about bringing forth an idea they did not feel positive about or be afraid of losing their job because their idea was not a hit.<sup>188</sup> Essentially, Gordy ensured productive teamwork by developing a comfortable, creative atmosphere where each record was not judged, but rather subjected to a family decision.

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<sup>178</sup> *Id.* at 168.

<sup>179</sup> *Id.* at 168-69.

<sup>180</sup> GORDY, *supra* note 170, at 169.

<sup>181</sup> *Id.*

<sup>182</sup> *Id.* Gordy's creation of a family-like environment within Motown was an organic process. *Id.* From the inception of the Motown label, most people involved with Motown at any level lived, ate, and created together. *Id.* In fact, at the weekly company meeting, everyone would sing the company theme song written by Smokey Robinson. *Id.*

<sup>183</sup> *Id.* at 151. These honest opinions were expressed every Friday morning at evaluation meetings, where the entire company would simply vote on which newly recorded song they thought was a hit. *Id.* A song that received a majority of the votes in favor of being a hit was then released. *Id.* It was this simple process that Motown used to decide which records were released. *Id.*

<sup>184</sup> GORDY, *supra* note 170, at 152.

<sup>185</sup> *Id.* at 152.

<sup>186</sup> *See id.* at 140.

<sup>187</sup> *Id.* at 147.

<sup>188</sup> *Id.* at 168. Gordy felt strongly that no idea was stupid or not worth considering. *Id.* at 169. He held firm to the belief that stupid ideas were what lead to the creation of such inventions like the light bulb and the airplane. *Id.*

## 2. Create Fruitful Competition

Motown's family-like closeness established a strong foundation upon which Gordy could cultivate fruitful competition. By 1963, Gordy communicated to his employees that "garbage" record would be "eliminated quickly" from being considered for release.<sup>189</sup> Gordy's standard of what constituted garbage was any record that did not have the potential to be in the Top 40.<sup>190</sup> Gordy followed with the announcement that if someone produced a hit for a particular artist, that person would get the first opportunity to produce the next hit for that artist before anyone else.<sup>191</sup> The competitive spirit among the talent inside the Motown studios and offices spilled over into the live performances.

All of the Motown acts performed together on the same bill, which Gordy promoted as "The Motown Revue."<sup>192</sup> Gordy promised "the feature star spot" of each showcase to whoever generated the most applause during his or her performance.<sup>193</sup> The competition for the feature star spot had each performer fervently trying to top the previous performance.<sup>194</sup>

Later, Gordy would take the concept of Battle of the Bands and apply it to the Motown Model.<sup>195</sup> On certain nights, Gordy would pit two of his artists against each other in a musical boxing match.<sup>196</sup> The first artist would come on stage and perform a song.<sup>197</sup> Then, the second artist would come on stage and perform a song.<sup>198</sup> This would continue for multiple rounds working the crowd into a bigger and bigger frenzy with each song performed.<sup>199</sup> While these processes became a type of musical Darwinism, the artists involved believed that performing in this structure would make all of them victorious in the marketplace.<sup>200</sup> These formats, combined with the large amount of hits created

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<sup>189</sup> Gordy, *supra* note 170, at 178. By 1963, the Friday evaluation meetings had become potentially life changing events. *Id.* at 177. Thus, the influx of records to be considered had become too long to be productive. *Id.* at 178. Gordy therefore decided to put serious restrictions on what records would be considered, therefore if a record did not sound like the next big Motown single immediately it would not be played in its entirety but would be "eliminated quickly." *Id.*

<sup>190</sup> *Id.* at 178.

<sup>191</sup> *Id.* at 180.

<sup>192</sup> *Id.* at 155.

<sup>193</sup> *Id.* at 163.

<sup>194</sup> GORDY, *supra* note 170, at 164.

<sup>195</sup> *Id.* at 173. Gordy recalled this idea from seeing a Battle of the Bands poster in a boxing gym from his youth. *Id.* Battle of the Bands is a format where two or more musical acts perform sequentially for the same crowd and the crowd decides, based on applause and cheering, which musical act performed better. *Id.* at 173-74. Gordy's Battle of the Bands featured only two acts per battle. *Id.* at 173-74.

<sup>196</sup> *Id.* at 173.

<sup>197</sup> *Id.* at 174.

<sup>198</sup> *Id.*

<sup>199</sup> GORDY, *supra* note 171, at 174. A couple of battles were great successes. *Id.* at 173. However, this idea was eliminated from the Motown live performance repertoire because of the night Marvin Gaye was pitted against a very young Stevie Wonder. *Id.* at 173-174. The crowd turned on Marvin Gaye seeing him as a bully going against a young blind kid. *Id.* at 175. Because this was not the intention, Gordy abandoned the idea completely. *Id.*

<sup>200</sup> GORDY, *supra* note 170, at 164.

between these competing artists, made the artists successful as both the revues and the battles produced sold-out performances.<sup>201</sup> These competition expectations amused the Motown talent pool and created highly motivated but still friendly competitors.<sup>202</sup> By fostering this competitive edge among all of the Motown artists, writers, and producers, Gordy inspired the talent pool to want to produce hit after hit.<sup>203</sup>

### 3. Create Constant Collaboration

The closeness and competitive drive of Motown's talent flourished into constant collaboration within the entire talent pool. The constant collaboration developed from Gordy's original management philosophy that he would build the label's structure around the people in the talent pool and not force an artist into a particular formation.<sup>204</sup> To ensure limitless collaboration, Gordy enlisted musicians from "the seediest of bars and hangouts" to form Motown's incredible in-house band.<sup>205</sup> Musicians from these underground locations provided essential grooves and various feels upon which the Motown sound was founded.<sup>206</sup> Therefore, the in-house band was not one-dimensional and Gordy could change the sound of the music to fit the style of any artist.<sup>207</sup> Gordy's vision for limitless collaboration spilled over into the structure of the entire label. Every specific element of what made an artist successful was broken down into a separate station.<sup>208</sup> Gordy acted as the collaborative glue between each station, and made sure that the overall vision for each artist was achieved.<sup>209</sup> Moreover, each station communicated constantly with each other to form a cohesively intricate strategy of success.<sup>210</sup> Thus, every artist that came from Motown was a product built with a plan to be nothing less than a star with multiple hits. The real catalyst for the constant collaborations was that every station and person involved with Motown was literally working in the same place at the same time.<sup>211</sup> This was possible as

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<sup>201</sup> See *id.* at 163, 173.

<sup>202</sup> *Id.* at 178-79.

<sup>203</sup> *Id.* at 180, 185. The biggest competition within the company was the string of hits created during the battle between Smokey Robinson and the writing team of Holland Dozer and Holland ("HDH"). *Id.*

<sup>204</sup> GORDY, *supra* note 170, at 124.

<sup>205</sup> See *id.*

<sup>206</sup> See *id.* at 124-25.

<sup>207</sup> See *id.* at 125.

<sup>208</sup> *Id.* at 144, 150, 176-77. Motown had an in-house station for every aspect including: promotion, advertisement, marketing, artist development, wardrobe, songwriting, production, recording, finance, make-up, table manners, choreography, quality control for record mixes, career guidance, booking gigs, negotiations, overall management, publishing, sales, vocal coaches, manufacturing and band arrangers. *Id.* Motown became a one-stop shop for an artist's needs, which was more than any company in the music industry had done for any artist up to that point. *Id.* at 188.

<sup>209</sup> GORDY, *supra* note 170, at 175. During the early days of Motown, Gordy would walk through the hallways of the various buildings in the neighborhood that made up Hitsville. *Id.* He would stop at every creative station "problem-solving, encouraging, motivating, teaching, challenging [and] complaining." *Id.*

<sup>210</sup> *Id.* at 177

<sup>211</sup> *Id.* at 175. Gordy would go from room to room finding Brian Holland (of HDH) in one place

Hitsville consisted of a couple of combined row houses in Detroit, Michigan.<sup>212</sup> The constant collaborations housed in the Motown Model truly embodied the musical assembly line that Barry Gordy had originally envisioned.

### *C. The Overall Vision*

Summarily, the environment fostered by the Motown model funneled every label employee's abilities and goals into a single belief that, as a team, they would create a label that could not miss when it came to achieving success with singles. This environment was the very core of the Motown model and therefore, the major record labels should focus on building a similar environment within the single-based profit model. The idea of creating such an environment may seem less than concrete because it is cemented in intangibles like faith, confidence, support, and growth. Yet, these intangibles allowed Motown to succeed in produce numerous and tangible superstars. Thus, these intangibles were Motown's tradition and should become the building blocks of the new tradition of major record labels using a single-based profit model.

## V. THE CODA

Logically, if a business does not survive it cannot succeed. A business should constantly be incorporating the strongest survival methods to ensure its success. The major record labels are not exempted from being subject to this simple business logic. Therefore, the major record labels must be willing to incorporate the strongest survival methods available regardless if those methods are radically different or against their traditional procedure.

The traditional profit model based on albums sales continues to fall steeply even within the current the digital realm.<sup>213</sup> Yet, the sales, uses and popularity of singles are enormously successful in comparison those of albums.<sup>214</sup> And the blueprint of a successful single-based profit model exists within Barry Gordy's Motown Model.<sup>215</sup> It is time for the major record labels to let go of methods that do not ensure their survival. It is time for the major record labels to push off from traditions that no longer ensure their success. It is time for the major record labels to embrace a new and stronger tradition. It is time for the major record labels to notice: Albums are dead – sell singles.

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creating a melody on the piano, in the next room seeing Smokey Robinson rehearsing with The Miracles, and then in another room finding Mary Wells working on a record. *Id.* at 176.

<sup>212</sup> *Id.* at 175.

<sup>213</sup> See *supra* Part II & III; see also *In The News: Digital Album Sales In Sustained Slump*, ROLLING STONE 22 (Nov. 25, 2010). Digital Album sales were “once a bright spot in the slumping music industry” has witnessed a steady decline in sales through the first three quarters of 2010. *Id.*

<sup>214</sup> See *supra* Part III.

<sup>215</sup> See *supra* Part IV.