

Copyright and Trademark: The Trading of Assets



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>>Artist's assets as a business

It is undisputable that artists are a valuable asset to society, not only in terms of the cultural benefits they create and spread, but also under an economic perspective, as a result of the revenues they generate to today's economy.

In this regard, it is important to point out that the valuation of an artist's intangible assets is much broader than the number of works of art sold, as it generally transcends the music industry. It is not rare to perceive artists as ultimate trend setters, as public admiration transforms them into a role model to be followed. Celebrities in general have the capacity to dictate fashion trends, hair styles, consumer behaviors, and also market growth.

Marketing researchers have long ago noted the strong advantage that the link between a publicly famous person and a specific product or service may create, which includes the reduction of costs to launch a new product or service, and make it known by consumers, extend a brand to a different market segment, and also the possibility of charging premium prices for the sponsored or endorsed goods or services.

A recently developed strategy to enhance the market value of a certain neighborhood and even promote real estate speculation that corroborates these assertions is the current donations or sales for lower prices of properties or lands to celebrities. It is believed that people would be willing to live in regions where known artists reside, and this would drive the economy of that area.

Beverage companies have also taken advantage of partnerships with music artists. Such deals may involve the funding of records and monthly compensation, and, in return, in addition to fixing its trademark to the released albums and public performances, the company would commission tracks for use in advertising and other promotional campaigns; or the organization of live music events named after the brand, hosted in several countries, where a specific musician is due to play.

Commissioning works from famous musicians for promotional campaigns is not a privilege held only by beverage companies. Television and radio advertisements of cars, clothing apparels, electronics and appliances also avail from music talents in this and different forms.

There are cases in which the songs were commissioned especially to a promotional campaign of a certain product, but, due to the enormous success amongst consumers, the artist later includes that song in his or her own regular album, and the hit is widely performed in radio and concerts.

Another example of a successful partnership between a brand and an artist that was mutually beneficial to both parties was the use of a reworked song composed by a relatively unknown artist in an advertising campaign of a beverage that became a hit or, more appropriately, an anthem during a major sports event. In addition to the enormous advertising, the tremendous success of this campaign was also because the company commissioned works from local artists in several countries to be played as national versions of that anthem.

As a final example, another common form of association between musicians and a particular brand that involves the trading of artist's assets results from the amendment of famous lyrics to include references and praises to the marks being promoted in an advertising campaign.

From the above, it may be noted that, in addition to the conventional forms of compensation offered to artists for allowing such partnerships, such as the offering

of goods and monetary compensation, those arrangements must also be seen as innovative ways to promote the artist's music for different types of consumers and otherwise unthinkable or unreachable markets.

The rationale behind the choice of a specific talent or song to promote a certain brand is whether that celebrity's personality or work may be related to the basic message to be conveyed to consumers, i.e., whether the values perceived by the consuming public in that artist are related to the values praised in the associated products or services.

On one hand, in order to preserve the benefits of connecting its goods or services to a specific talent, a party must be concerned in obtaining contractual assurances that the ideals associated with that artist will not change. An artist would undertake not to engage in activities or social conducts that could modify society's perception of him or her from attractive to repulsive, under the penalty of exposing the goodwill built around products or services through high investments and efforts to an enormous risk.

On the other hand, talents themselves must also analyze these partnerships with scrutiny, as poor choices can bring significant risks resulting in severely damaging his or her image. If the artist is associated with a bad quality product or service, consumers may refrain from purchasing any other product or service sponsored or endorsed by the talent, which could reduce artist's value and develop a negative reaction about the talent itself and his or her work.

If the commercial and contractual structure elected by the parties to govern their relationship are cautiously negotiated and drafted, the chances that the partnership between and artist and the brand owner will become successful are enormous.

Based on the above, in addition to the artistic performance and sale of the created work of art per se, the economic exploitation of an artist's celebrity status is usually done through the licensing of his or her intellectual property assets and rights of publicity. However, for purposes of this article, our analysis will be limited to the trading of copyright and trademark rights by an artist as a form of generating additional revenues.

>>Copyright and Trademark

A talent's financial resources most commonly derive from the exploitation of his or her artistic work, which may be protected by copyright law, if it constitutes an original work of authorship fixed in a tangible means of expression. Most jurisdictions do not require any formality, such as prior registration or publication of the work with a copyright notice, to afford full and international copyright protection.

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In this regard, lyrics, musical compositions, sound recordings, audiovisual works, and other works of art would be covered by copyright protection, which would also encompass its independent creative elements, such as, for example, an original and distinctive character described in a song or reproduced in a video clip.

In the music business, several independent individuals and organizations play different roles in the creation and proper exploitation of the final artistic work, and, thus, need to be connected to each other. Among them we find, for example, the musicians who compose and perform the music, and the professionals who help create and produce and sell the recorded music, such as music publishers, record labels, and producers, and the representatives who take care of an artist's professional life, such as agents, managers, business managers, and attorneys.

Therefore, the trading of copyright assets by talent is usually necessary for his or her revelation to the public, and later usually remains the primary source of his or her survival. Nevertheless, other intangible assets, such as trademarks, may also be considered as an important source of revenues to artists.

The name and likeness of the artist or his or her band, for example, may serve not only to endorse or sponsor a product or a service, but also to identify it and distinguish it from others. In the latter cases, it could be used as a trademark, and its economic value would depend on the artist's right to use or license it with exclusivity. Although there are other forms to prevent third parties from using a celebrity's name without his or her authorization, the protection afforded by trademark laws is of great importance because it facilitates the enforcement of such exclusivity.

“Building an artist’s brand as a business requires much more than hard work and creativity. It requires serious organization and planning”

Trademark laws are territorial, meaning that trademark protection will be limited to the place where the mark was used or registered, save some exceptions. Therefore, the lack of trademark registration in a certain country may result in the absence of protection of that sign in that place. Consequently, depending on the intensity of the artist’s use of his or her name as a trademark, it is advisable to evaluate the convenience of having it registered not only in his or her home country, but also in other important markets.

The registration of an artist’s trademark aggregates value to him or her, and facilitates the trading of such important assets to expand the artist’s influence into other categories of products or services than those related to the music industry, while building brand equity.

It is common to say that a brand is the most important asset a company has, and certainly it is possible to extend such importance to artists as well.

›The Trading of Assets

The exploitation of assets by an artist is usually performed through assignment and license agreements.

By means of an assignment, the ownership of a copyright or trademark is transferred to another party, and the initial owner may no longer use such copyrighted work or trademark without the assignee’s authorization, under the penalty of being liable for copyright or trademark infringement.

Most civil law jurisdictions, and some common law ones, differentiate the economic rights tied to copyrights from the moral rights of author, and do not permit the assignment or waiver of the latter. In such cases, even if an artist has assigned his or her copyrights to a work to a third party, he or she will necessarily retain the moral rights to the work, for example, the right of being recognized as the creator of the work, and to preserve its integrity. Notwithstanding, assignments of copyrights are very common in the music industry. An example of this form of asset trading is upon the execution of a publishing agreement between the songwriter and a publishing company. By means of this agreement, the

artist assigns the copyright (or a portion thereof) to his or her lyrics and music to the publisher who, in return, licenses it to third parties, receives payment out of commercial use of his or her work, and distributes them to the composer. The same type of deals are common in the recording industry.

The other form of trading these intellectual property assets is through licensing agreements. A copyright or trademark license is a grant of permission by the intellectual property owner to another party to use the trademark or reproduce, adapt, distribute or publicly perform the copyrighted work. However, it does not convey ownership rights, which remain with the licensor.

Licensing arrangements are also widespread in the music industry. By means of license agreements, a party is entitled to use an artist's trademark to identify a product or service, a record label is authorized to produce sound recordings, a film producer is able to synchronize a song to the picture, a company is permitted to use a song in its promotional campaign, amongst several other possibilities.

Although the parties are free to structure a license agreement to the particularities of each case, there are general and important provisions that may not be left aside in any licensing arrangement, such as those commented below.

The right of exclusivity foreseen in a license agreement permits licensee to become the sole authorized user of the licensed copyright or trademark during the agreed term. In this case, not even the licensor would be entitled to use the licensed object without licensee's consent. To the contrary, non-exclusive contracts oblige the licensee to use the licensed trademark or copyright jointly with the licensor and any other third party.

In order to avoid future controversies between the parties, it is highly recommended that a license agreement also expressly delimitates the territory in which the license is being granted, as it may be limited to a particular state or country, or it may have worldwide extension.

The extension of permitted use of the licensed object should also be foreseen in the agreement. In this regard, artists may wish to grant an exclusive license to a certain company to synchronize his or her musical composition in an advertising campaign to be promoted only on the Internet, while granting to a third party another exclusive license to use the same song to promote another brand in another media, such as, for example, in live music events or TV.

An important clause that deserves some special comments is the term clause, i.e., the contractual provision that establishes the duration of the license. A trademark or copyright license may be limited in time or can last in perpetuity, depending on the parties' will. However, some jurisdictions impose certain limitations in the term of duration of a copyright license, and determine that when overly broad, term clauses should be construed as limited to the extent necessary to make the contract achieve its purpose, and nothing more.

In order to preserve the artist's image and career, one of the most important clauses to be included in license agreements is known as the "quality control clause" or "approvals clause." By means of this contractual provision, the licensee would be required to observe some quality control standards imposed by the licensor to the goods or services to be promoted. This would assure the talent that his or her trademark or copyrighted work would not be associated to a poor quality good or service, which consequently would enhance the value not only of the licensed object, but also of other trademarks or copyrighted materials owned by talent because consumers would be used to seeing artist's assets only connected to high-quality products or services.

With the intention of preserving the licensee's goodwill, it is recommended that license agreements executed with celebrities contain an express undertaking that the celebrity licensor shall refrain from taking any action or omission that could adversely affect the image of the licensee, damage or jeopardize the project or the goods or services being promoted. This would constitute a way to diminish the risks the project be affected by a possible feeling of repulsion felt by the public towards the artist as a result of his or her actions. This clause is typically referred to as the "morals clause."

As a result of the same concern to preserve the project from adverse feelings society may develop against the talent, it is advisable to include a provision entitling the licensee to immediately terminate the agreement in case there is a possibility that a physical or mental illness or misbehavior of the musician licensor negatively impacts on the project.

So as to preserve the secrecy of the economic arrangements and business structure of the deal, the parties should also be concerned in keeping the terms of the agreement confidential, as well as any other information learned from a party by the other as a result of the license.

Lastly, as a matter of keeping the provisions of an agreement timely and well attended, strong penalties are always suggested.

>>Advising Talent

When traditional advertising becomes obsolete and ineffective, and entertainment is the key to capture the attention of the audience, artists are in the best position to take advantage from their fame. If well advised, talents may become not only successful in their métier, but also can be converted into a trend setter, a real role model to be followed by consumers worldwide.

Building a talent's brand as a business requires much more than hard work and creativity. It requires serious organization and planning. The potentiality of transforming a career of a creative artist into a real brand is intimately related to the level of expertise and attention of the talent's business team.

From a legal perspective, intellectual property laws are significant allies in the process of creating value to an artist's career and assets. In addition to the traditional sale of works and tickets for performances, the trading of copyrights and trademarks via licensing and assignment agreements can generate additional revenues to artists.

Although copyright and trademark laws follow similar characteristics in an international level, there are legal differences in each country, which must be well understood by the parties before executing licensing and assignment agreements. So as to avoid undesired implications for the interested parties, it is advised to verify in each jurisdiction the formalities to obtain legal protection, the term of validity thereof, the rights granted, and, most importantly, the requirements and limitations related to the transfer of rights.

Doing business in today's ever changing world requires thorough international copyright and trademark protection, as it will enable the safe and appropriate licensing and assignment of an artist's assets, and will ultimately open new opportunities for the development of his or her career.

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