27th Annual

CUTTING EDGE ENTERTAINMENT LAW SEMINAR

August 22 - 24, 2019

InterContinental Hotel

New Orleans

"A Brave New World in Entertainment Law"

Covering Recording Contracts, Publishing Contracts, Termination of Transfer, Copyrights, Neighboring Rights, Entrepreneur Crowdfunding (JOBS Act), Filmmakers Agreements, VR/Interactive laws,

Thursday, August 22, 2019

9:00 – 10:00 AM

Professionalism – The Ornery Adversary [Legal/ CLE 1.0 cr. hr.]

What do you do when the attorney on the other side is being unprofessional, or nasty, or simply impossible? What do you do when you have an adversary who stalls, doesn't return calls, or simply delays matters? How do you get the most out of your negotiation? How do you save a deal from going south?

Speakers:

- **Judith DeFraites, Esq.,** New Orleans, LA
- **David Dalia, Esq.,** New Orleans, LA

10:15 – 12:15 PM

Legal and Business Considerations when Advising Clients Creating and Operating Music Labels. [Legal/Business CLE 2.0 cr. hr.]

Part I: Covering the legal considerations in record label management and creation.

Part II: A review of label-artist, label-producer, and label distributor agreements

Entrepreneurs and musicians are among those seeking success by signing artists or self-releasing music. This panel will cover legal issues that arise when organizing and operating an independent record label, including the organization

structure, income streams, standard agreements, and organizations that can help with the independent label's success.

Speakers:

- **Marc D. Stollman, Esq.,** Stollman Law PA, Boca Raton, FL
- **Edgar "Dino" Gankendoff, Esq.,** Provosty & Gankendoff, LLC, NOLA
- **Matthew Wilson, Esq**., Greater Thinking Music Group, Atlanta, GA (Moderator)
- **Peter J Strand, Esq.,** Partner, Mandell Menkes, Chicago, IL

Noon – Lunch

1:30 – 2:30 PM

Ethics after #MeToo [Legal/CLE 1.0 cr. hr.]

This panel will cover rules of professional conduct when engaged in the discovery process, including best practices for preservation, the collection of electronic documents and protecting client's information.

Speakers:

- **Judith DeFraites, Esq.,** New Orleans, LA
- **Nadine Ramsey, Esq.,** New Orleans, LA
- **Magdalen Bickford, Esq.** McGlinchey Stafford, New Orleans, LA

2:45 – 3:45 PM

Damage Control: Dealing with high profile Talent – What happens when an artist, athlete or celebrity has a run in with the law? [Legal/ CLE 1.0 cr. hr.]

The discussion will center on the analysis of the legal issues related to representing athletes and entertainer involved in contract negotiations when there is a crisis, and representation is needed with the media and in the courtroom. The panel will also cover changes in legal business issues under various collective bargaining agreements

Speakers:

- **Brian Caplan, Esq.,** Reitler Kailas & Rosenblatt, New York, NY (Moderator)
- **Mikhael Bortz, Esq**, Chicago, IL
- **Richard D. French**, Chairman & CEO, French/West/Vaughan
- **Darryl Cohen, Esq.** Cohen, Cooper Estep & Allen, Atlanta, GA

4:00 – 5:15 PM

Trademark: Branding – Considerations in Gaming and Cannibiz [Legal/ CLE 1.25 cr. hr.]

This panel will cover trademarks, piracy, combating counterfeit goods, and strategies for proper licensing and derivatives products.

Speakers:

- **Gregg Zegarelli, Esq.,** Zegarelli Technology & Entrepreneurial Ventures Law Group, PC, Pittsburgh, GA (Moderator)
- **Wallace Collins, Esq.,** New York, NY
- **Lillian Taylor, Esq.,** Miami, FL
- **Mikhael Bortz, Esq**, Chicago, IL

Friday, August 23, 2019

9:00 – 10:30 AM

Funding Deals and How to Successfully Finance Ventures – Advising entertainment entrepreneurs [Legal/ CLE 1.5 cr. hr.]

This panel will address various funding methods and deal points entrepreneurs can pursue when seeking financing. Including traditional banking, equity investors, and crowdfunding.

Speakers:

- **Gregg Zegarelli, Esq.,** Zegarelli Technology & Entrepreneurial Ventures Law Group, PC, Pittsburgh, GA (Moderator)
- **Marc D. Stollman, Esq.,** Stollman Law PA, Boca Raton, FL
- **Morris L Kahn,** Morris L Kahn & Associates
- **Lillian Taylor, Esq.,** Miami, FL

10:45 – 12:15 PM

Copyrights Changes in the Age of the Music Modernization Act [Legal/ CLE 1.5 cr. hr.]

From the impact of the MMA, the latest on the "Mechanical Licensing Collective," and termination of copyrights.

Speakers:

- **Stephen J. Easley, Esq.,** Song Research & Recovery Services, LLC (Moderator)
- **Jay Rosenthal, Esq.,** Mitchell Silberberg & Knupp, Washington, DC

- **Wallace Collins, Esq.,** New York, NY
- **Richard W. Perna,** Austin, TX

11:45 AM – Lunch

12:30 – 1:15 PM

Legislative Updates [Legal/CLE 1.0 cr. hr.]

Covering the Music Modernization Act, content distribution, and the new technologies

Speakers:

- **Jay Rosenthal, Esq.,** Mitchell Silberberg & Knupp, Washington, DC

1:30 – 2:30 PM

Litigation Updates [Legal/CLE 1.00 cr. hr.]

Latest case law - Current Trends and Hot Topics

Speakers:

- **Brian Caplan, Esq.,** Reitler Kailas & Rosenblatt, New York, NY (Moderator)
- **Robert Besser, Esq.** Law Offices of Robert Besser, Los Angeles, CA
- **Peter J Strand, Esq.,** Partner, Mandell Menkes, Chicago, IL

2:45 – 3:45 PM

Legal and Business Issues in Independent Films – Financing – Tax Credits – Production – Distribution [Legal/Film CLE 1.00 cr. hr.]

This panel will provide an overview of completing and launching an independent film.

Speakers:

- **Darryl Cohen, Esq.** Cohen, Cooper Estep & Allen, Atlanta, GA (Moderator)
- **Peter J. Dekom, Esq.** Peter J Dekom, A Law Corporation, Los Angeles, CA
- **Richard "Rick" French,** CEO, French/West/Vaughan, Filmmaker, Board Member, Buddy Holly Foundation
- **Christoper Szapary, Esq,** Provosty & Gankendoff, LLC, New Orleans, LA

4:00 – 5:15 PM

Music, $$ and Synch Licensing: a Brave New World [Legal / CLE 1.25 cr. hr.]

This panel, by the authors of the best selling music business book “Music, Money and Success” (8th edition), will explain the ins and outs of what the deals look like, the short and long term money that can be made and where this area is heading in the future.

Speakers:

- **Jeffery Brabec, Esq.,** Vice President, BMG Chrysalis, Los Angeles, CA
- **Todd Brabec, Esq.,** Co-Author (w brother Jeff), Music Money and Success: the Insiders Guide to Making Money in the Music Business

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Saturday, August 24, 2019

9:00 – 10:00 AM

Legal Practice Management: Do’s and Don’s of Building a Successful Entertainment Law Practice [Legal / CLE 1.0 cr. hr.]

New Orleans has become a hub for music, film and TV industries, but what does that mean for an attorney and their independent music and filmmaking clients. This panel will walk you through the process of maintaining communication with clients, client funds management, making sure the filmmaker/client engagement letters are correct. Review user-generated content rights and procedures with filmmaker clients. Establishing a disbursement system for staff fees payment. Review intellectual property agreements, tax credit financing incentives, and distribution.

Speakers:

- **David Dalia, Esq.,** New Orleans, LA (Moderator)
- **Vernon W. Thomas, Esq.** Law Offices of Vernon P. Thomas, New Orleans, LA

10:15 – 11:45 AM

Broadway Musicals: the Contracts, Royalties, and Economics [Legal / CLE 1.5 cr. hr.]

Whether you are a creator, producer or investor, the Broadway Musical is the surest way to "rags or riches" This panel will discuss the many different types of

music licensing deals, contracts, and practices that come into play when dealing with the four basic types of musicals.

Speakers:

- **Jeffery Brabec, Esq.,** Vice President, BMG Chrysalis, Los Angeles, CA (Moderator)
- **Todd Brabec, Esq.,** Co-Author (w brother Jeff), Music Money and Success: the Insiders Guide to Making Money in the Music Business
- **Marc D. Stollman, Esq.,** Stollman Law PA, Boca Raton, FL
- **Jay Rosenthal, Esq.,** Mitchell Silberberg & Knupp, Washington, DC
- **Richard W. Perna,** Austin, TX

12:00 - 1:15 PM

Building Music Communities: Public Policy, Non-Profits and Music Businesses in Partnership [Legal/Business CLE 1.25 cr. hr.]

Public/Private partnerships to build, maintain and sustain the important business of music in our communities.

Speakers:

- **Stephen J. Easley, Esq.,** Song Research & Recovery Services, LLC (Moderator)
- **Hon. Joel Robideaux:** Mayor of Lafayette, Louisiana
- **Mark Falgout:** Warehouse 515/Blue Moon Saloon and Founder, SOLO Songwriters Festival and Workshop
- **Brendon Anthony,** Director, Texas Music Office in the Office of the Governor

1:30 – 3:00 PM

Presentation: Honoring Attorney Ellis Jay Pailet – Presentation and reception honoring the career of pioneer entertainment law attorney.

Book Signing **- MUSIC, MONEY AND SUCCESS, 8th Edition –** Celebrating of the release of Todd and Jeffrey Brabec's best-selling book on the entertainment industry.

2019 BIOS

Jeffrey Brabec, Esq. is Vice President of Business Affairs for the Chrysalis Music Group (representing the catalogues of OutKast, Velvet Revolver, Blondie, Paul Anka, Billy Idol, Jethro Tull, The Yeah Yeah Yeahs, A3 ("The Sopranos" theme) Cy Coleman, Dan Wilson, TV on the Radio and Ray LaMontagne). Brabec is the co-author with his twin brother Todd of the book MUSIC, MONEY, AND SUCCESS: The Insider's Guide To Making Money In The Music Industry and has been awarded the Deems Taylor Award for excellence in music journalism.

Todd Brabec, Esq. is co-author of Music, Money and Success: The Insider's Guide to Making Money In the Music Business Formerly Executive Vice President for the American Society of Composers Authors and Publishers (ASCAP) where he was in charge of all of the Society's membership operations throughout the world, Brabec is the current Budget Chair as well as former Division Chair for the American Bar Association's Forum on the Entertainment and Sports Industries.

John F. Bradley, Esq: John F. Bradley is the founding partner of the Bradley Legal Group, P.A., located in the heart of downtown Fort Lauderdale, Florida. Since 1988, Mr. Bradley has focused his practice on intellectual property litigation, entertainment law, new media law, complex litigation, and corporate and business law. His work has been conducted at both the trial, appellate, and transactional levels. John has served as lead counsel in thousands of litigation cases in both State and Federal Courts for a broad range of clients including startups to multi-million dollar corporations. John's entertainment practice includes representation of artists, arts organizations, musicians, bands, authors, photographers, models, record and publishing companies, management companies, production companies, actors, internet companies and many other creative types.

Mr. Bradley received his Juris Doctor Degree from Stetson University College of Law in 1988 and a Bachelor of Arts Degree, cum laude, in Political Science from St. Thomas University in 1985. He is licensed to practice law in the states of Florida and Tennessee, Southern and Middle Districts of Florida, United States Court of Appeals Federal and Eleventh Circuits, and is a mediator, having completed his Circuit Civil Mediator's Course. Currently, John is a member of American Bar Association, Broward County Bar Association, National Academy of Recording Arts and Sciences, and formerly, served on the Board of Directors for the Fort Lauderdale Rotary Club, the Fort Lauderdale Jaycees, and is a past member of the American Federation of Musicians. Mr. Bradley is also the former Chairman of the Florida Bar Entertainment, arts, and Sports law section.

Mr. Bradley is a frequent lecturer on the subjects of entertainment and intellectual property at numerous universities, law schools, continuing legal educational seminars, music festivals, and other industry events. John is also an accomplished musician, singer, and songwriter with over twenty five years of performance experience. In 2008, John opened EchoXS Entertainment, LLC, which is a cutting edge entertainment based media and creative management company. John, his wife Alejandra, and son make their home in Hollywood, Florida.

Darryl Cohen, Esq – Cohen Cooper Estep & Allen

An Entertainment attorney, Cohen appeared regularly on WXIA-TV/Channel 11, the NBC affiliate, and on the Fox News Channel. He currently provides on-air legal commentary for CNN/HNN. His Entertainment practice includes representation of on-air network talent, including anchors, actors, photographers, models, recording artists, and talent agencies.

Cohen founded and is permanent chair of the Southern Regional Entertainment and Sports Law Conference, which currently includes Florida, Georgia, New York, and Tennessee. He currently serves as Legal Committee Chair of NATAS, Legal Chairman of the Northern California and Southeast Chapters; Past President of the Southeast Chapter; and a voting member of the Academy of Television Arts & Sciences (ATAS) based in Hollywood, California.

He has served as President and National Board Member of the Screen Actors Guild, Georgia branch, and previously served on the Atlanta Board of the American Federation of Television and Radio Artists (AFTRA). Mr. Cohen has also co-hosted several local television telethons and was an on-camera spokesperson for WPBA-TV's pledge drives and Master of Ceremonies for numerous local events.

Cohen was previously a partner of Katz, Smith & Cohen in Atlanta, Georgia.

Brian Caplan, Esq., Reitler Kailas & Rosenblatt, LLP New York, and has more than 27 years' experience litigating a broad range of entertainment, intellectual property, and commercial matters. His clients have included recording artists and producers, publishing companies, record labels, personal managers, business management, accounting firms, professional athletes, and dealers in fine art.

David Dalia, Esq., New Orleans, LA

Judith DeFraites, Esq., New Orleans, LA

Peter J Dekom, Esq. Peter J Dekom, a Law Corporation Noted author & lecturer, Peter Dekom focuses on film and television. Formerly with Bloom, Dekom & Hergott, his clients have included George Lucas, Keenen Ivory Wayans, John Travolta, Ron Howard, Andy Davis, Sears & JVC. As an advisor to New Mexico, he was an architect of their film incentives. Listed in Forbes in the top 100 U.S. lawyers & in Premiere Magazine in 50 most powerful people in Hollywood. Entertainment Lawyer of the Year by Beverly Hills & Century City Bar Associations.

Peter J. Dekom was "of counsel" with the Beverly Hills law firm of Weissmann Wolff Bergman Coleman Grodin & Evall. He formerly was a partner in the firm of Bloom, Dekom, Hergott, and Cook. Mr. Dekom's clients include or have included such Hollywood notables as George Lucas, Peter Chernin, Paul Haggis, Keenen Ivory Wayans, John Travolta, Ron Howard, Rob Reiner, Andy Davis, Robert Towne and Larry Gordon among many others, as well as corporate clients such as Sears, Roebuck and Co., Pacific Telesis and Japan Victor Corporation (JVC). He has been listed in Forbes among the top 100 lawyers in the United States and in Premiere Magazine as one of the 50 most powerful people in Hollywood. In September of this year, Daily Variety named Dekom as one of the 15 top dealmaker-attorneys in the entertainment/media industry.

Mr. Dekom has been a management/marketing consultant, and entrepreneur in the fields of entertainment, Internet, and telecommunications. As a Film Advisor to the New Mexico State Investment Council, he is and was a principal architect involved in creating, writing and implementing legislation to encourage film and television production in the state and currently supervises the film loan program portion of that incentive structure. He also advises Governor Bill Richardson on film and television-related matters. New Mexico’s film incentive program has been touted as one of America’s most successful state programs, resulting in significant infrastructure development, job creation, and sustainable economic development. Mr. Dekom has also been instrumental in structuring off-balance sheet, insurance-backed financing for major motion picture studios.

Mr. Dekom served on the board of directors of Imagine Films Entertainment while the company remained publicly traded and was a board member of Will Vinton Studios and Cinebase Software, among others, leaving upon change of ownership. He has also served as a member of the Academy of Television Arts and Sciences and Academy Foundation, Board of Directors, Chairman (now Emeritus) of the American Cinematheque, and on the Advisory Board of the Shanghai International Film Festival. He is currently on the Board of Governors for the America Bar Assn.’s Sports and Entertainment Law Section, where he has often authored articles and delivered lectures.

The Beverly Hills Bar Association honored Mr. Dekom as Entertainment Lawyer of the Year in 1994, the Century City Bar Association accorded him the same honor

in 2004, and the Family Assistance Program named him Man of the Year in 1992 for his work with the homeless. Author of dozens of scholarly articles, Mr. Dekom also is the co-author of the book Not on My Watch; Hollywood vs. the Future (New Millennium Publishing, 2003) with Peter Sealey. He has served as an adjunct professor in the UCLA Film School, a lecturer (entertainment marketing) at the University of California, Berkeley Haas School of Business as well as being a featured speaker at film festivals, corporations, universities and bar associations all over the world.

Mr. Dekom graduated from Yale in 1968 (BA) and graduated first in his class in 1973 from the UCLA School of Law (JD). He is married to Kelley Choate and has a son, Christopher (b. 1983), who is a 2006 graduate of Duke University and is an investment officer with the Department of Energy in Washington, D.C.

Stephen J. Easley, Esq., Song Research & Recovery Services, LLC, Austin, TX

Stephen J. Easley serves as Counsel to the Foundation, and maintains offices in Austin, Texas and Washington, D.C. Mr. Easley is an attorney and practices primarily in the Intellectual Property, Corporate, Entertainment, and Non-Profit areas.

He serves as counsel to Maria Elena Holly and the Estate of Buddy Holly in all areas, including licensing, merchandising, trademarks, and litigation. Over the years he has worked in various capacities in the entertainment area, and counseled, worked with, represented, managed, promoted concerts for, or booked artists such as 2012 Grammy Nominee Seth Glier, The Bruce Smith Band, The Sweater Set, Monte Warden, radioBlue, Eddie Hinton, Roy Buchanan, R.E.M., the Skip Castro Band, and Tinsley Ellis, amongst others. In the non-profit area, Mr. Easley served as counsel to the Community for Creative Non-Violence (CCNV), served as co-lead counsel in the successful Atchison v. Barry homeless class action case, and taught non-profit law seminars at Washington area law schools.

Mr. Easley also currently serves as counsel to or General Counsel at a number of successful technology companies, including F2 Technologies and Heartland Networks, and formerly served as VP for Business Affairs and General Counsel at American Cellular Corporation and PriCellular Corporation, amongst others. Prior to that he practiced law, and was Law Clerk to the Hon. William S. Sessions, Chief Judge, United States District Court in San Antonio, Texas. Prior to law school, Mr. Easley served as a Certified Public Accountant with Price Waterhouse & Co.

Steve was introduced to Buddy Holly's music at a Rolling Stones concert in 1969 when he first heard "Not Fade Away," and since then has spent as much time as possible listening to Buddy Holly, the Crickets, and any musician wise enough to

cover Buddy, all the while preaching to his friends about the greatest Rock & Roller of all time.

Edgar "Dino" Gankendoff, Esq., Provosty & Gankendoff, LLC, NOLA - Edgar D. Gankendorff, born Lafayette, Louisiana, 1965; admitted to bar, 1991, Louisiana. Licensed to practice before all Louisiana State Courts, the United States District Court for the Middle, Eastern and Western Districts of Louisiana, the United States Court of Appeals for the Fifth Circuit, and the United States Supreme Court. Employment: Managing Partner/Shareholder with Provosty & Gankendorff, L.L.C., New Orleans, Louisiana, 2006-present; Director, Edgar D. Gankendorff Professional Law Corporation, 1998-present; Co-Manager with Provosty, Sadler, deLaunay, Fiorenza & Sobel – New Orleans, LLC, New Orleans, Louisiana, 2002-2006; Partner with Oats & Hudson, New Orleans, Louisiana, 1997-2002, and Associate, Lafayette, Louisiana, 1991-1997; Abstractor of Titles, Gankendorff Abstract and Title Company, Lafayette, Louisiana, 1983-1997; Abstractor of Titles, Lawyer's Title Insurance Corporation, New Orleans, Louisiana, 1985. Appointments: Louisiana Music Commission, 2007 to date; Class Counsel, "In Re: Vitamins Anti-Trust Litigation," Docket No. 99-197 (TFH), MDL 1285, United States District Court, District of Columbia; Class Counsel, "In Re: Air Cargo Shipping Services Litigation," MDL 1775, United States District Court, Eastern District of New York; Class Counsel, "In Re: NCAA Student-Athlete Name & Likeness Licensing Litigation," Docket No. 4:09- cv-01967-CW, Northern District of California; Co-Chair, Litigation Committee, "In Re: Blue Cross Blue Shield Antitrust Litigation," Multi-District Litigation No. 2406; and Special Assistant Attorney General, State of Louisiana, 1991-present. Teaching: Lecturer, University of Louisiana at Lafayette, College of Business Administration and School of Music, Lafayette, Louisiana; Loyola University, New Orleans, Louisiana; Music Business Institute, New Orleans, Louisiana; Tulane University School of Law, New Orleans, Louisiana; Various Continuing Legal Education Seminars regarding entertainment law topics. Education: Tulane University, College of Arts and Sciences, New Orleans, Louisiana (B.A., Political Science and Sociology, 1987); and Tulane University School of Law, New Orleans, Louisiana (J.D., 1990); Honors, Awards and Publications: Phi Sigma Alpha, Political Science Honor Society, 1985- 1987; Tulane Environmental Law Journal, 1988-1990; Tulane Environmental Law Clinic, 1989-1990; Author: "Recent Developments in Environmental Law," 41 Louisiana Bar Journal 2, August 1993; Author: "How to Get in on the Information; (Under the Louisiana Public Records Act and the Freedom of Information Act), Chapter 3, A Citizens Guide to Environmental Activism in Louisiana; Best Music Attorney, Offbeat Magazine, 2001, 2003-07. Member: Louisiana State, New Orleans and American Bar Associations. Languages: English. Concentration: Entertainment Law, Intellectual Property Law, Class Action, Corporate, Commercial, Environmental and Toxic-Tort Litigation, Products Liability, Casualty Defense and

Corporate Governance. BV Peer Review Rated Email: egankendorff@provostylaw.com

Scott Keniley, Esq.: former Vice President of Business & Legal Affairs for Compendia Music Group, a master recording independent record label and 2012distribution company. He is now director of the entertainment law practice "the Keniley Law Firm." He also chairs the Southeastern Regional Entertainment & Sports Law Conference.

Linda Mensch, Esq., Linda Mensch has practiced Entertainment Law in Chicago and New York for more than 40 years and now serves as of counsel at Mandell Menkes LLC where she consults and advises on multimedia projects.

Linda serves as legal counsel for a variety of entertainment projects, including film, television and music ventures. She is currently serving as Executive Producer of The Ella Jenkins Story and provided production and legal services on the 2016 documentary Maya Angelou: And Still I Rise.

She received a local Illinois Emmy for her co-production efforts for the documentary Find Yourself a Dream! The Bob Love Story in 2008, and a Midwest and Heartland Emmy for producing The Wayman Tisdale Story in 2012.

Over the years Linda has served as president of the Chicago Chapter of The Recording Academy (GRAMMYs) as well as National Vice President, Trustee, and of counsel to the local board. She is a member of Rotary 1, a Lifetime Member of The Recording Academy, and a member of both the Illinois and American Bar Associations. She is also a past president and current board member of Lawyers for the Creative Arts.

She is named a Leading Lawyer in Illinois, a Super Lawyer in Entertainment Law, included in Best Lawyers in America and is AV rated by Martindale-Hubbell.

Mike Olsen, Esq. Mike Olsen is currently the EVP Operations and Business & Legal Affairs at Entertainment One Music Nashville. He was President/CEO of Sheridan Square Entertainment for more 4 years as CEO and CEO of IndieBlu Music

Richard W. Perna, Austin, TX - Richard Perna, is a veteran journeyman well travelled in the world of Music.

Starting his career in 1976, In Nashville, Tennessee Richard found employment with Dane Bryant's and Steve Singleton's OAS Music Group, an independent publishing company, as an administrative assistant.

In 1978, Richard took a position as a songplugger at Ray Stevens Music. In 1979, Richard started his own company, Music Publishing Consultants. The company specialized in the administration of copyrights, and provided consultation services for songwriters, singer/songwriters, independent music publishers, and producer/publishers. Some of the company's more prominent clients included: Steve Wariner, The Oak Ridge Boys, Silverline Goldline Music, The Statler Brothers, and Leon Russell.

In 1983, Richard took a full-time position as General Manager of Leon Russell's Teddy Jack Music. After Mr. Russell sold his company in 1985, Richard took a position as Director of Consultation at Copyright Management, Inc. During this period he was responsible for acquiring the accounts of: The Statler Brothers, The Oak Ridge Boys, Steve Wariner, The Bellamy Brothers, Dennis Morgan, and Hamstein Music Company (ZZ Top).

In 1987, Richard moved to Houston, Texas and took a position with Bill Ham's Hamstein Music (ZZ Top) as its Vice President & Chief Operating Officer. During his tenure with Hamstein he was actively involved in the signings of: Clint Black, Hayden Nicholas, Jerry Lynn Williams, Frankie Miller, Little Texas, Tom Shapiro, Chris Waters, Rick Giles, Chuck Jones, Tommy Barnes, Stephen Allen Davis, Billy Kirsch, and Tony Martin, all writers of #1 songs!

Artist development was a major focus of Hamstein's marketing strategy. During his tenure with the company, Richard played a major role in the signing of and the development of such artists as Clint Black, Little Texas, and Van Stephenson of Black Hawk. Additionally, Richard was instrumental in signing writers who produced artists such as Terry Clark (Tom Shapiro and Chris Waters).

During Richard's tenure with HMG, the company evolved into one of the most successful independent music publishing companies in North America, with over 10,000 copyrights of which 2500 were active. Of these 2500 active songs, over 120 of them achieved a top ten singles status, 60 #1's, and several hundred were contained on platinum selling LPs. The company was very successful in all genres of music and achieved major recordings with numerous artist including: ZZ Top, Cher, Celine Dion, Andreas Bocelli, Brittany Spears, Tim McGraw, Eric Clapton, The Doobie Brothers, Ringo Starr, Rod Stewart, Bonnie Raitt, The Fabulous Thunderbirds, BB King, Johnny Lang, Johnny Halladay, Paul Rogers, Hall & Oates, Meatloaf, Cher, Sheryl Crow, Utopia, and many, many, more.

In January of 2002 Bill Ham sold all of Hamstein's copyrights and publishing assets to Mosaic Media Group in a multi-million dollar transaction($50M). By the time the company sold in 2002 Richard had become a minority partner in the company.

In 2004 Richard along with David Schulhof and Joel Katz founded Evergreen Copyrights, which was subsequently funded in 2005 by Lehman Brothers Merchant Banking Partners (LBMB subsequently merged into Trilantic Capital Partners). In October of 2010 BMG Rights Management purchased Evergreen in a successful multi-million dollar transaction ($80M+). During his tenure with Evergreen, Richard served as CO-CEO and focused his energies on copyright management and acquisitions. During its five-year existence, Evergreen purchased the rights from 24 pre-existing companies and became one of the top independent music publishing companies in the world.

Rights acquired or administered by Evergreen during this period included the works of: Bill Monroe, JJ Cale, Nick Drake, Todd Rundgren, Teddy Riley, MC Hammer, Tupac Shakur, Richard Thompson, John Martyn, BB Winans, Bunny Siegler, Bruce Fischer ("You Are So Beautiful") Sidney Cox (Allison Krauss), Michael Bradford (Uncle Kracker), Stephen Jenkins (Third Eye Blind), Mark Leonard ("Missing You") Roy Orbison, Warren Zevon, The Ramones, Taylor Swift, and many more.

Since the sale of Evergreen Richard has operated his own company, RPMC, LLC. This company provides consulting services to: Songwriters, Music Publishers, Record Producers, and Recording Artists. Copyright Aggregators, and New Media Services, with a focus on both the business and creative process.

Richard currently resides in Austin, Texas with his wife, Kathryn. He has been actively involved with NARAS (The Grammy Organization) since 1994 and in 2009 completed serving his second term as its National Secretary Treasurer. Richard continues to serve on the Finance Committee for NARAS. His interests include: History, Reading, Travel, Cooking, Wine Collecting, Chess, and Music. Mr. Perna has studied music most of his life and is proficient on the guitar and the piano.

With over 40 years of "hands on" experience in the music industry, Richard is considered an expert on copyright, copyright administration, song marketing, copyright acquisition, talent development, and all facets of music publishing and master recording rights.

Jay Rosenthal, Esq. is a partner in the Washington, D.C. office and a member of the Entertainment & New Media Practice Group. He concentrates his practice in public policy, transactional, and litigation matters in all sectors of the entertainment industry, but with special emphasis on the music industry. Most recently, Mr. Rosenthal served as Senior Vice-President and General Counsel at

the National Music Publishers' Association (NMPA). In that role, Mr. Rosenthal represented the interests of, and worked extensively with, almost all of the major and independent music publishers in the United States. Most significantly, and in addition to the standard responsibilities of, general counsels, Mr. Rosenthal worked extensively on developing and implementing the NMPA Late Fee and Modernization Programs; worked with stakeholders like the Recording Industry Association of American, and other domestic and international stakeholders and organizations, on national and international anti-piracy matters, and counseled NMPA on copyright policy and reform in Washington, D.C.

Prior to joining NMPA, Mr. Rosenthal was a partner with the law firm of Berliner, Corcoran & Rowe, and served as General Counsel to the Recording Artists' Coalition (RAC), which was founded by Don Henley, Sheryl Crow, and other prominent featured recording artists. Mr. Rosenthal has also represented, and in some instances continues to represent recording artists, songwriters, record companies, publishing companies, actors, and others in the entertainment industries. His present clients include actor/pro wrestler David Bautista, Thievery Corporation, Rare Essence, and ESL Music. In the past, he has represented artists like Salt N Pepa, Don Henley, Mya, Sweet Honey in the Rock, Mary Chapin-Carpenter, Comedian Robert Schimmel, and monument maker Robert Berks, on transactional, litigation and/or public policy matters.

Julia Scott, Esq. With over 20 years of working in the film and television industry, Julia has a unique combination of business, creative and legal experience that gives her an in-depth understanding of entertainment business and legal affairs.

Before attending law school, she worked as an award-winning Documentary Filmmaker, Production Executive, Director's Associate, Production Coordinator, and Assistant to Director. After graduating from law school, she worked as an Associate Attorney at a boutique entertainment law firm where she represented producers, financiers, and distributors in a broad range of acquisition, development, production, distribution, and finance transactions. Julia later joined The Walt Disney Company, where she worked exclusively on Marvel and DreamWorks matters for Walt Disney Studios Distribution and as Counsel to The Baby Einstein Company. While there, she gained extensive experience in development, production, distribution, marketing and advertising, consumer protection, product development, intellectual property, privacy, and antitrust matters.

In addition to her current work as Principal of LOJS, Julia is Of Counsel to Peter J. Dekom, a Law Corp., a Contributing Author for Lexis Practice

Advisor by Lexis/Nexis, and a Board Member of the Southwestern Law School Alumni Association.

Education

Juris Doctor, Southwestern University School of Law, SCALE Program

Bachelor of Arts, Linguistics, University of California, Santa Barbara

Professional Legal Career

Principal, LOJS

Partner, LOJS/Rufus-Isaacs, Acland & Grantham LLP

Counsel, The Walt Disney Company

Associate Attorney, Business Affairs, Inc.

Professional Non-Legal Career

Producer, Solaris Films

Freelance Production Executive, Director's Associate, Production Coordinator and Assistant to Director: Alcon Entertainment, Atlas Entertainment, Kintop Pictures, MDP Worldwide, New Line Cinema, and Touchstone Pictures

Admissions

U.S. District Court for Central District of California

California

Civic Associations and Volunteer Activities

Board Member, Southwestern Law School Alumni Association

Volunteer Mediator, Civil Harassment/Domestic Violence Restraining Orders, and Unlawful Detainer Actions, Los Angeles Superior Court

Volunteer Guardian Ad Litem, Public Counsel

Community Volunteer, Legal Aid Foundation of Los Angeles

Publications

Lexis Practice Advisor, Entertainment Transactions: Author with Peter Dekom: Negotiating and Drafting Motion Picture Production Agreements and Documents: Production Risk Management, Key Boilerplate Provisions, and Common Provisions in Talent Agreements

Lexis Practice Advisor, Entertainment Transactions: Author, Annotated Literary Option Purchase Agreement Template with Alternative Language

Lexis Practice Advisor, Entertainment Transactions: Author, Annotated Producer Agreement Template with Alternative Language

Lexis Practice Advisor, Entertainment Transactions: Author, Annotated Actor Agreement Template with Alternative Language

Lexis Practice Advisor, Entertainment Transactions: Author, Annotated Key Crew Agreement Template with Alternative Language

Lexis Practice Advisor, Entertainment Transactions: Author, Annotated Location Agreement Template with Alternative Language

Lexis Practice Advisor, Entertainment Transactions: Author, Annotated Location Release Template with Alternative Language

Lexis Practice Advisor, Entertainment Transactions: Author, Annotated Clearance Release Template with Alternative Language

Marc Stollman, Esq. Stollman Law PA, Boca Raton, FL. worked with Michael Cohl and Grand Entertainment, which became part of Live Nation for a year or so, before spinning off as S2BN Entertainment, S2BN, opened and managed the Rock and Roll Hall of Fame Annex in NYC, we sold-out MSG for Pete Seegers's 90th birthday celebration (which aired on PBS, with Springsteen, Mellencamp, Dave Matthews, etc.), opened the 60-show Fall Tour for Yo Gabba Gabba: "There's a Party In My City", the live touring version of the smash hit Nickelodeon show, released our concert DVD's of the Rolling Stones and Barbra Streisand (from our tours with them), continue to operate "Bodies, the Exhibition" around the world, managed international Scottish superstar Paolo Nutini, and finished full length feature film documentaries on Harry Belafonte and Phil Ochs. Marc Stollman also acted as general counsel of S2BN and handled all corporate and day-to-day legal matters for the company, such as employment issues, real estate, and corporate structure.

Christopher Szapary, Esq., Provosty & Gankendoff, L.L.C., New Orleans, LA

Vernon W. Thomas, Esq.: Law Office of Vernon P Thomas, specialize in civil litigation with extensive experience in ncriminal law. Vernon Wesley is a Reserve JAG Officer.

Matthew Wilson, Esq.: Greater Thinking Music Group, Atlanta, GA - Matthew V. Wilson is of counsel in the Corporate practice group. Matt works primarily in the areas of entertainment, technology, life sciences, new media, advertising, promotions and marketing law.

Mr. Wilson is the leader of the firm's Sports and Entertainment Industry Team and his practice involves the representation of a wide-variety of participants in the music, film and television industries. He focuses his practice on transactional entertainment matters, intellectual property matters, corporate matters and business representations in the entertainment and media industries. He has experience negotiating and drafting agreements for recording artists, songwriters, music publishers, producers, managers, distributors, and concert promoters. Mr. Wilson also advises clients on copyright, licensing and other intellectual property matters and counsels his artist-clients in connection with their career decisions. In addition, Matt has extensive experience with all aspects of the festival and event industry and has assisted his clients with the production of festivals and events on the domestic and international stage including the Railroad Revival Tour (2011), Shaky Knees/Shaky Boots Festivals (2013-present), and Mempho (2017), among others. Matt's film and television experience includes the representation of creative and business focused clients within the motion picture, television and media industries.

Mr. Wilson's technology, life science and new media-focused practice includes counseling clients regarding general corporate and commercial issues, electronic commerce and intellectual property matters, including content licenses, electronic advertising, website development, hosting and service agreements, electronic terms-of-use, privacy policies, and data use and protection policies, and legal and regulatory compliance concerning such matters, including trade and industry self-regulation guidelines.

Mr. Wilson's promotions, marketing and advertising practice consists of the representation of clients on matters concerning legal and regulatory compliance, in addition to industry guidelines, relating to media, sponsorship, advertising and promotional campaigns, sweepstakes, skill contests and other games.

In June 2011, the Daily Report published a feature article about Mr. Wilson titled "AGG lawyer helps bands manage joint tour."

Recognition

Innovative Idea Award, Arnall Golden Gregory LLP, 2008

Education

University of San Diego School of Law, Juris Doctor, 2004, Cum Laude

Emory University, Bachelor of Arts, 1999, Magna Cum Laude

Admissions

State of Georgia, 2004

Gregg R. Zegarelli, Esq: Gregg R. Zegarelli has enjoyed a distinguished career as an attorney, business professional, speaker and public servant. He has earned superb ratings that objectively demonstrate the ethical conduct and integrity in the practice of law.

Licenses; Academic Degree

Mr. Zegarelli has practiced law for more than 25 years and is admitted to practice law in Washington D.C., the Commonwealth of Pennsylvania, and the State of Illinois. He is a graduate of Duquesne University with dual major areas of study in Accounting and History and dual minors in Philosophy and Political Science. Mr. Zegarelli is a graduate of the Duquesne University School of Law, and he is qualified to sit for the C.P.A. examination in Pennsylvania.

Legal Area of Concentration; Clients

Prior to establishing the law office of Zegarelli Law Group in July, 1990, Mr. Zegarelli was associated with one of the largest law firms in the City of Pittsburgh, concentrating in the corporate law and "emerging companies" section.

Mr. Zegarelli practices in transactional areas of law. Representation includes entrepreneurial ventures, commercial and corporate litigation, venture capital, franchising, mergers and acquisitions, real estate, wealth-transfer and succession planning, licensing of technology and information, employee and independent contractor agreements, and intellectual property matters such as copyright, social media, trade secret and trademark law.

Mr. Zegarelli serves as general corporate counsel for businesses ranging from the startup stage to large well-established enterprises. His client list includes "INC. 500" companies, and software developers with products nationally rated #1. Mr. Zegarelli has also been retained as special counsel for technology development contracts, such as for the automated parking facility at the Pittsburgh International Airport. Mr. Zegarelli has directly performed legal work and negotiated contracts with well-known companies including Acclaim, Borland, Coca-Cola, Disney, General Electric, Intel, Mattel, Metro-Goldwyn-Mayer (MGM), Microsoft, Sony and Xerox.

Mr. Zegarelli has also earned a very unusual credential: not only does he have distinguished corporate law experience, but he also has strong litigation experience. Mr. Zegarelli has represented clients in Federal as well as state courts, and he has successfully litigated technology disputes with extremely

complicated deliverable logistics. Mr. Zegarelli has litigated technology-related emergency injunctions and has worked with the FBI on technology investigations.

Mr. Zegarelli was lead counsel in Borings v. Google, the first case against Google and its Street View program for infringement, with a successful appellate overturn that resulted in the only known final judgment against Google as an intentional trespasser. [Read Preamble to Petition for U.S. Supreme Court Certiorari now.] In another ground-breaking case, Mr. Zegarelli was successful at the Trademark Trial and Appeals Board against Facebook, In re Facebook, in obtaining an overruling of Facebook's motion to dismiss an opposition of Facebook's application to register "Facebook" as a U.S. trademark.

CUTTING EDGE ENTERTAINMENT LAW CONFERENCE
August 22-24th, 2019

Attorney Ethics and Professionalism-CLE OUTLINE: Professionalism and the Ornery Opponent:

David A. Dalia
Attorney at Law
830 Union Street, Suite 302
New Orleans, LA 70112
Phone: (504)-524-5541
E-Mail: davidadalia@gmail.com

With Judith A. DeFraites and David A. Dalia

Dedicated to Vernon P. Thomas, Esq., a truly great man.

OUTLINE

I. Some Louisiana Supreme Court disciplinary cases- August 2018 - July 2019
II. Pertinent Disciplinary Rules
III. Professional Rules Governing Escrow Accounts

TEXT

I. Some Louisiana Supreme Court disciplinary cases- August 2018 - July 2019

"IN RE: M G. S
NO. 2019-B-0908
SUPREME COURT OF LOUISIANA
June 26, 2019..." In re S (La., 2019)

Motion filed by the Office of Disciplinary Counsel ("ODC") against respondent, M G. S. The motion seeks to revoke respondent's probation and make the previously-deferred portion of his suspension executory based on allegations that respondent failed to comply with the conditions of probation imposed in In re: S, 17-1043 (La. 10/16/17), 226 So. 3d 1102 ("S I").

The record in S I demonstrated that respondent mismanaged his client trust account, neglected a legal matter, failed to communicate with a client, and failed to cooperate with the ODC in two

investigations. For this misconduct, the court suspended respondent from the practice of law for one year and one day, with all but sixty days deferred, followed by a two-year period of supervised probation with the following conditions: (1) respondent shall successfully complete Trust Accounting School; (2) respondent shall successfully complete Ethics School; and:

(3) respondent shall provide the ODC with quarterly audits of his client trust account.

The ODC alleged that respondent failed to submit quarterly audits of his client trust account, as required by his probation agreement.

After a hearing, at which respondent failed to appear, the disciplinary board concluded that respondent failed to comply with the terms and conditions of his probation by failing to provide the ODC with the name of a CPA for approval and by failing to provide any quarterly audits of his client trust account as required by the court's order in S I a.

"DECREE

For the reasons assigned, respondent's probation is revoked and the previously-deferred portion of the one year and one day suspension imposed in In re: S, 17-1043 (La. 10/16/17), 226 So. 3d 1102, is hereby made immediately executory." In re S (La., 2019)

"IN RE: P. G.
NO. 2018-B-1646
SUPREME COURT OF LOUISIANA
June 26, 2019
ATTORNEY DISCIPLINARY PROCEEDING..." In re G (La., 2019)

"On February 3, 2016, the ODC received an overdraft notice regarding a November 23, 2015 overdraft in respondent's client trust account. The overdraft resulted from respondent's attempt to pay a third-party medical provider for services rendered to a client who had no funds in the trust account." In re G (La., 2019)

Thereafter, the ODC's forensic auditor conducted an audit of respondent's trust account for the period of August 1, 2015 through January 31, 2016. The audit revealed that respondent regularly paid non-client expenses and made cash withdrawals from his trust account; these non-client expenses and cash withdrawals totaled $33,219.33 during the audit period. The audit also revealed that, on January 31, 2016, the trust account balance to satisfy pending client expenditures should have been at least $16,345.62. Instead, the balance on that date was $3,235.61, resulting in a deficit of $13,110.01.

On March 17, 2016, respondent informed the ODC that he was addicted to OxyContin, explaining that "the cost of the medication coupled with its effects on me overwhelmed my finances and I eventually began to take money from my Trust account." He also informed the

ODC that he had contacted the Judges and Lawyers Assistance Program ("JLAP") and was preparing to enter inpatient treatment. He further informed the ODC that "I have also gone through my files and paid all outstanding debts that had been previously withheld from client settlements." This last statement was confirmed by the ODC's audit of respondent's trust account. Finally, during his October 26, 2016 sworn statement to the ODC, respondent admitted that he regularly used his trust account as a second operating account in 2015.

On July 7, 2016, respondent completed a ninety-day inpatient treatment program at Palmetto Addiction Recovery Center. Palmetto's medical director diagnosed respondent with severe opioid use disorder, among other diagnoses. On July 12, 2016, respondent signed a five-year JLAP recovery agreement.

Regarding mitigating factors, the committee noted that the ODC had stipulated to the following: absence of a prior disciplinary record, timely good faith effort to make restitution or to rectify the consequences of the misconduct, and full and free disclosure to the disciplinary board and a cooperative attitude toward the proceedings.

In light of the above findings, the committee recommended respondent be suspended from the practice of law for one year and one day, fully deferred, subject to the following conditions:...

1. Respondent shall continue to be bound by the terms of his JLAP recovery agreement for at least two years;

2. Respondent shall obtain regular audits of his trust account, to be performed by a CPA approved by the ODC;

3. Respondent shall submit the findings of the audits on a quarterly basis to the ODC for two years;

4. Respondent shall take at least six hours of continuing legal education in the area of law office practice/client trust account management; and

5. Respondent shall successfully complete the Louisiana State Bar Association's Trust Accounting School within one year.

The ODC objected to the leniency of the committee's recommended sanction, arguing that the period of deferment is not supported by the record.

"The board recognized the sole aggravating factor of multiple offenses." In re Giraud (La., 2019) "Based on this reasoning, we will suspend respondent from the practice of law for one year and one day, with all but six months deferred, subject to two years of probation with the conditions set forth in the board's report,..."

IN RE: J F. O, JR.
NO. 2019-OB-0985
SUPREME COURT OF LOUISIANA
June 26, 2019

ORDER

The Office of Disciplinary Counsel ("ODC") filed formal charges against respondent, alleging that he failed to file federal tax returns on behalf of his law firm and failed to remit funds withheld from his employees' paychecks to the federal government. Respondent now seeks to permanently resign from the practice of law in lieu of discipline. The ODC has concurred in respondent's petition.

IT IS FURTHER ORDERED that J F. O. Jr. shall be permanently prohibited from practicing law in Louisiana or in any other jurisdiction in which he is admitted to the practice of law; shall be permanently prohibited from seeking readmission to the practice of law in this state or in any other jurisdiction in which he is admitted; and shall be permanently prohibited from seeking admission to the practice of law in any jurisdiction.

IN RE: T A. H
NO. 2019-B-0827
SUPREME COURT OF LOUISIANA
June 17, 2019
ATTORNEY DISCIPLINARY PROCEEDING

PER CURIAM

Respondent, T A. H, was arrested for alcohol-related misconduct on four occasions, three of which involved driving while intoxicated. For this misconduct, we accepted a joint petition for consent discipline filed by respondent and the Office of Disciplinary Counsel ("ODC") and suspended respondent for a period of one year and one day, with all but six months deferred, subject to a period of probation to coincide with respondent's recovery agreement with the Judges and Lawyers Assistance Program ("JLAP").1 In re: H, 17-0726 (La. 9/15/17), 224 So. 3d 963

IN RE: A D P
NO. 2019-B-0901

SUPREME COURT OF LOUISIANA
June 17, 2019
ATTORNEY DISCIPLINARY PROCEEDING

PER CURIAM

The Office of Disciplinary Counsel ("ODC") commenced an investigation into allegations that respondent neglected a legal matter, failed to communicate with a client, and engaged in a personal relationship with a current client. Following the filing of formal charges, respondent and the ODC submitted a joint petition for consent discipline in which respondent admitted that his conduct violated Rules 1.3, 1.4(a)(3), 1.7, and 8.4(a) of the Rules of Professional Conduct. Having reviewed the petition,

IT IS ORDERED that the Petition for Consent Discipline be accepted and that A D P, Louisiana Bar Roll number 25815, be and he hereby is suspended from the practice of law for a period of one year.

IT IS FURTHER ORDERED that all costs and expenses in the matter are assessed against respondent in accordance with Supreme Court Rule XIX, § 10.1, with legal interest to commence thirty days from the date of finality of this court's judgment until paid.

IN RE: K L J
No. 2019-B-0653
SUPREME COURT OF LOUISIANA
June 3, 2019
ATTORNEY DISCIPLINARY PROCEEDING

Crichton, J., would reject the petition for consent discipline.

I dissent from the per curiam, because, in my view, the discipline of one year and one day, with only thirty days deferred, is too lenient. Respondent herself stipulated that she as grossly negligent in the mismanagement of her client trust account. Further, I find respondent's failures to respond the Office of Disciplinary Counsel in its investigations of that mismanagement to be egregious.

With respect to Count I, Respondent initially failed to respond to the ODC's notice of a June 2017 overdraft of her client trust account. After ODC issued a formal complaint, respondent submitted a request for an extension of time to respond, but the account was again overdrawn. She was then sent notice of the second overdraft, but failed to respond to that notice, requiring the ODC to send a second request for a response. At that point, by now months later in October 2017, respondent again requested another extension of time. The ODC granted her that courtesy, but she again failed to respond. After a third request for a response from the ODC, respondent provided some materials, but it was incomplete. Thus, ODC had to request additional documentation, leading to a similar circle of events in which respondent again requested additional time, which was granted by ODC, but did not submit the supplemental materials.

IN RE: G C
NO. 2019-B-0406
SUPREME COURT OF LOUISIANA

June 3, 2019
ATTORNEY DISCIPLINARY PROCEEDING

PER CURIAM

Respondent, G C, engaged in a conflict of interest. For this misconduct, we suspended respondent for a period of six months, with all but thirty days deferred, subject to one year of unsupervised probation. In re: C, 18-1076 (La. 12/5/18), 2018 WL 6390368 ("C I"). Respondent did not file a request for a rehearing, and the order of suspension became final and effective on December 20, 2018. In the instant matter, the Office of Disciplinary Counsel ("ODC") seeks to make the deferred suspension executory, based upon allegations that respondent engaged in the unauthorized practice of law during his suspension and made false representations in his affidavit for reinstatement.

UNDERLYING FACTS AND PROCEDURAL HISTORY

On February 8, 2019, respondent telephoned the ODC to discuss his probation. Both during this telephone call and thereafter in writing, respondent admitted that he regularly engaged in the practice of law after the effective date of his suspension.

The ODC has verified numerous actions taken by respondent during his suspension which constitute the practice of law:...

We agree that these circumstances constitute misconduct. Although the ODC has requested that that the previously-deferred portion of the suspension be made executory, we find no evidence that respondent has served any part of the active portion of his suspension. To the contrary, the record reveals respondent continued to practice law between the finality of our decree on December 20, 2018 through January 31, 2019. Accordingly, we will make the entire six-month suspension imposed in C I immediately executory, to commence from the date of this decree.

WHAT WAS THE CONFLICT OF INTEREST?:

IN RE: G C
NO. 2018-B-1076
SUPREME COURT OF LOUISIANA
December 5, 2018
ATTORNEY DISCIPLINARY PROCEEDING

PER CURIAM

This disciplinary matter arises from formal charges filed by the Office of Disciplinary Counsel ("ODC") against respondent, G C, an attorney licensed to practice law in Louisiana.

UNDERLYING FACTS

In February 2016, Cedric Duncan and his sisters, Pamelian Norwood and Angela Freeman, hired respondent to handle the succession of their mother, Ethel Duncan, who died intestate on February 11, 2016. Respondent charged a flat fee of $1,800, and the siblings agreed to split the fee three ways. Respondent was paid the entire $1,800 and provided Cedric with a receipt for $600. Nevertheless, respondent claimed he never received any money directly from Cedric, asserting that Angela paid Cedric's portion of the fee.

The petition for possession respondent prepared and filed excluded Cedric as an heir to Ethel's estate. Respondent claimed Pamelian and Angela told him Cedric no longer wished to be a part of the succession. However, respondent never verified this with Cedric. In June 2016, the judge signed the judgment of possession splitting Ethel's property equally between Pamelian and Angela.

When Cedric received a copy of the judgment of possession, he hired attorney Kristina Shapiro to reopen the succession, paying her $3,000 for the representation.

Ms. Shapiro filed a petition to annul the judgment of possession and for damages, naming Pamelian, Angela, and respondent as defendants. Ms. Shapiro also filed a motion to reopen the succession.

Respondent filed an answer to the petition to annul the judgment of possession and for damages on behalf of Pamelian, Angela, and himself. Respondent also appeared at the December 1, 2016 hearing to reopen the succession and argued on behalf of Pamelian and Angela. The judge reopened the succession and named Cedric as the administrator. Shortly thereafter, respondent withdrew from the representation of Pamelian and Angela.

[See Disciplinary Proceedings in this case above]

IN RE: C J. W
NO. 2019-B-0663
SUPREME COURT OF LOUISIANA
June 3, 2019
ATTORNEY DISCIPLINARY PROCEEDINGS

PER CURIAM

The Office of Disciplinary Counsel ("ODC") commenced an investigation into allegations that respondent committed serious attorney misconduct, including neglect of his clients' legal matters, failure to communicate with his clients, failure to refund unearned fees, failure to placed advanced deposits for costs and expenses into his client trust account, and failure to return his clients' files upon the termination of the representation. Respondent also practiced law while he was ineligible to do so, failed to cooperate with the ODC in its investigation, and was charged with issuing worthless checks. Following the filing of formal charges, respondent and the ODC submitted a joint petition for consent discipline. Having reviewed the petition,

IT IS ORDERED that the Petition for Consent Discipline be accepted and that C J. W, Louisiana Bar Roll number 29017, be suspended from the practice of law for a period of three years, which suspension commences from the effective date of this order.

IT IS FURTHER ORDERED that respondent shall make full restitution to all clients to whom refunds are owed.

IT IS FURTHER ORDERED that all costs and expenses in the matter are assessed against respondent..

IN RE: M. F
NO. 2018-B-1483
SUPREME COURT OF LOUISIANA
May 28, 2019
ATTORNEY DISCIPLINARY PROCEEDING

PER CURIAM

Pursuant to Supreme Court Rule XIX, § 21, the Office of Disciplinary Counsel ("ODC") has filed a petition seeking the imposition of reciprocal discipline against respondent, M R. F, an attorney licensed to practice law in Louisiana, Tennessee, and Colorado, based upon discipline imposed by the Supreme Court of Colorado.

UNDERLYING FACTS AND PROCEDURAL HISTORY

In 1987, respondent maintained a law office in Denver, Colorado, wherein he accepted new legal cases and collected retainers until October 21, 1987. On October 23, 1987, respondent essentially abandoned his law practice when he moved to Ireland without notice to most of his clients. Thereafter, respondent failed to file his 1988 annual registration statement or pay the $90 registration fee.

Seven of respondent's clients filed grievances with the Colorado Disciplinary Counsel. Respondent failed to appear and answer a multiple count disciplinary complaint. The Supreme Court of Colorado ultimately found that respondent abandoned his law practice, converted his clients' funds to his own use, and failed to cooperate in the disciplinary proceedings. For this misconduct, the Supreme Court of Colorado disbarred1 respondent and ordered him to make restitution to the seven clients in the total amount of $14,750.36.

After receiving notice of the Colorado order of discipline on January 27, 2017, the ODC filed a motion to initiate reciprocal discipline proceedings in Louisiana, pursuant to Supreme Court Rule XIX, § 21. A copy of the Final Judgment and Order issued by the Supreme Court of Colorado was attached to the motion.

On September 7, 2018, this court rendered an order giving respondent thirty days to demonstrate why the imposition of identical discipline in this state would be unwarranted. Respondent did not file a response to the court's order.

DISCUSSION

The standard for imposition of discipline on a reciprocal basis is set forth in Supreme Court Rule XIX, § 21(D). That rule provides:

Discipline to be Imposed. Upon the expiration of thirty days from service of the notice pursuant to the provisions of paragraph B, this court shall impose the identical discipline ... unless disciplinary counsel or the lawyer demonstrates, or this court finds that it clearly appears upon the face of the record from which the discipline is predicated, that:

(1) The procedure was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; or
(2) Based on the record created by the jurisdiction that imposed the discipline, there was such infirmity of proof establishing the misconduct as to give rise to the clear conviction that the court could not, consistent with its duty, accept as final the conclusion on that subject; or
(3) The imposition of the same discipline by the court would result in grave injustice or be offensive to the public policy of the jurisdiction; or
(4) The misconduct established warrants substantially different discipline in this state;
If this court determines that any of those elements exists, this court shall enter such other order as it deems appropriate. The burden is on the party seeking different discipline in this jurisdiction to demonstrate that the imposition of the same discipline is not appropriate.

In the instant case, respondent has made no showing of infirmities in the Colorado proceeding, nor do we discern any from our review of the record. Furthermore, we find there is no reason to deviate from the sanction imposed in Colorado as only under extraordinary circumstances should there be a significant variance from the sanction imposed by the other jurisdiction. In re: Aulston, 05-1546 (La. 1/13/06), 918 So. 2d 461. See also In re Zdravkovich, 831 A.2d 964, 968-69 (D.C. 2003) ("there is merit in according deference, for its own sake, to the actions of other jurisdictions with respect to the attorneys over whom we share supervisory authority").

Under these circumstances, it is appropriate to defer to the Colorado judgment imposing discipline upon respondent. Accordingly, we will impose reciprocal discipline in the form of disbarment.
Footnotes:

1. According to the Colorado Rules of Civil Procedure, Rule 251.6(a), disbarment is the revocation of an attorney's license to practice law in the state for at least eight years, subject to readmission as provided by Rule 251.29(a), which provides in pertinent part that "[a] disbarred attorney may not apply for readmission until at least eight years after the effective date of the

order of disbarment."...
In re Franks (La., 2019)

BAR FORGIVENESS IS POSSIBLE:

IN RE: S J. H
NO. 2019-OB-0459
SUPREME COURT OF LOUISIANA
May 20, 2019
ON APPLICATION FOR REINSTATEMENT

PER CURIAM

This proceeding arises out of an application for reinstatement to the practice of law filed by petitioner, S J. H, a suspended attorney.

UNDERLYING FACTS AND PROCEDURAL HISTORY

In May 2001, petitioner was arrested and charged with driving while intoxicated ("DWI"), speeding, and improper lane usage. Ultimately, the DWI charge was dismissed, and petitioner pleaded guilty to the traffic charges.

In September 2001, petitioner vandalized a truck belonging to his ex-wife's boyfriend while it was parked at his ex-wife's home. He was arrested and charged with simple criminal damage to property and violation of a restraining order. He was also cited for failure to yield to an emergency vehicle for refusing to stop his car when the police ordered him to do so.

In December 2002, petitioner was arrested and charged with DWI second offense, hit and run, disobeying a red light, reckless driving, and failing to maintain proof of insurance. In February 2005, petitioner pleaded guilty to failing to report an accident, disobeying a red light, and reckless driving. In June 2005, the record of petitioner's arrest was expunged.

In June 2005, petitioner gave a sworn statement to the Office of Disciplinary Counsel ("ODC") regarding the three matters set forth above. In response to the ODC's questions, petitioner asserted his Fifth Amendment privilege against self-incrimination. The ODC insisted that he answer on the ground that all criminal charges against him had either been declined or resolved via plea agreement. Nevertheless, petitioner continued to refuse to answer, thereby failing to cooperate with the ODC's investigation.

For the above misconduct, we suspended petitioner from the practice of law for three years. In re: H, 09-0116 (La. 6/26/09), 15 So. 3d 82.

In June 2015, petitioner pleaded no contest to domestic abuse battery. In May 2016, we

accepted a joint petition for consent discipline filed by petitioner and the ODC and suspended petitioner from the practice of law for one year. In re: H, 16-0686 (La. 5/27/16), 193 So. 3d 124.

In August 2018, petitioner filed an application for reinstatement with the disciplinary board, alleging he has complied with the reinstatement criteria set forth in Supreme Court Rule XIX, § 24(E). The ODC took no position regarding the application for reinstatement. Accordingly, the matter was referred for a formal hearing before a hearing committee.

Following the hearing, the hearing committee recommended that petitioner be reinstated to the practice of law on a conditional basis for one year, subject to the following conditions:

1. Petitioner shall continue diagnostic monitoring with JLAP during the one-year probationary period. If his JLAP diagnostic monitoring agreement terminates by its own terms during the probationary period, then he shall execute a new agreement to satisfy this condition;

2. Petitioner shall maintain good standing pursuant to his JLAP agreement;

3. Petitioner shall maintain compliance with the Rules of Professional Conduct;

4. Petitioner shall cooperate with the ODC in the event of an inquiry as to his fitness to practice law; and

5. Petitioner shall satisfy all requirements to practice law pursuant to the rules governing attorneys in the State of Louisiana.

Neither petitioner nor the ODC objected to the hearing committee's recommendation.

DISCUSSION

After considering the record in its entirety, we find petitioner has met his burden of proving that he is entitled to be reinstated to the practice of law on a conditional basis. Accordingly, we will order that petitioner be reinstated to the practice of law, subject to a one-year period of probation governed by all of the conditions recommended by the hearing committee.
In re H (La., 2019)

IN RE: Y J K
NO. 2019-B-0356
SUPREME COURT OF LOUISIANA
May 20, 2019
ATTORNEY DISCIPLINARY PROCEEDING

This disciplinary matter arises from formal charges filed by the Office of Disciplinary Counsel ("ODC") against respondent, Y J K, an attorney licensed to practice law in Louisiana

but currently on interim suspension based upon her conviction of a serious crime. In re: K, 16-0331 (La. 3/14/16), 186 So. 3d 649 (Johnson, C.J., recused).

UNDERLYING FACTS

In February 2013, respondent qualified to run for Orleans Parish Juvenile Court, representing in her qualifying documents that she was domiciled in Orleans Parish. Respondent subsequently prevailed in a runoff election. In March 2014, a grand jury in Orleans Parish indicted respondent on two felony criminal charges arising out of allegations that she was actually domiciled in St. Tammany Parish and that she made false representations about her domicile when she qualified to run for judicial office.

Following the indictment, this court disqualified respondent from exercising any judicial function during the pendency of further proceedings. In re: K, 14-0924 (La. 5/15/14), 140 So. 3d 711 (Johnson, C.J., recused). Prior to a final adjudication of the judicial discipline matter against respondent, she lost the status of a judge when she was defeated in the fall 2014 elections. As a result, the ODC assumed jurisdiction over respondent.

In November 2015, a jury found respondent guilty of both counts of the indictment. She was sentenced in February 2016 to a suspended jail sentence and probation.

Thereafter, respondent filed a motion for an out of time appeal of her criminal conviction, which motion was granted. The court of appeal then remanded the case to the trial court with instructions to conduct an evidentiary hearing on a claim of ineffective assistance of counsel. State v. K, 17-0123 (La. App. 4th Cir. 10/27/17), 231 So. 3d 110.

Following remand, on December 18, 2017, respondent entered into a plea agreement, whereby the original convictions were vacated. In exchange, respondent pleaded guilty to a misdemeanor violation of La. R.S. 18:1461.3(C)(4) (disobeying any lawful instruction of a registrar, deputy registrar, or commissioner).1

DISCIPLINARY PROCEEDINGS

In March 2016, the ODC filed formal charges against respondent, alleging that her conduct violated the following provisions of the Rules of Professional Conduct: Rules 8.4(a) (violation of the Rules of Professional Conduct), 8.4(b)

(commission of a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer), and 8.4(c) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation).

Respondent initially failed to answer the formal charges, and the factual allegations contained therein were deemed admitted and proven by clear and convincing evidence. Eight months later, respondent, through counsel, filed an unopposed motion to recall the deemed

admitted order. She also sought a stay of the formal charge proceedings pending her criminal appeal. The motion and request for a stay were granted, and the deemed admitted order was recalled.
In re K (La., 2019)

In her submission, respondent indicated that she is the sole caregiver for her eighty-eight year old mother and fifty-six year old brother, both of whom are disabled and in need of constant care. After respondent's sister passed away in November 2015, respondent moved to Atlanta, Georgia to take care of them. In May 2018, respondent was forced to move with them back to Louisiana due to financial hardship. During the process, they have been without any home healthcare or transportation assistance services.

Respondent argued that she possesses good character and reputation. In support, she submitted three character reference letters as well as a transcript of her deposition, wherein she testified about her lifetime involvement in church and volunteer work with various juvenile agencies.

Respondent suggested that this matter is guided by the court's ruling in In re: Richmond, 08-0742 (La. 12/2/08), 996 So. 2d 282, wherein an attorney was found to have knowingly made false statements under oath regarding his domicile when he qualified as a candidate for public office. For his misconduct, the court suspended the attorney for six months, and in light of the mitigating factors present, deferred all but sixty days of the suspension. Respondent indicated that a similar sanction would be appropriate here, although, unlike Mr. Richmond, respondent did not occupy a position of public trust at the time of her conduct.2 Respondent requested that any sanction be made retroactive to the date of her interim suspension, and requested that all costs and expenses associated with this proceeding be waived as she has been unemployed since December 2015.

In its submission on sanction, the ODC indicated that it could not stipulate to the presence of "personal problems" as a mitigating factor, inasmuch as there appeared to be no correlation between the acts of dishonesty by respondent in falsifying her domicile in the qualifying process and her mother's health problems and her brother's care needs. The ODC agreed that this matter is guided by Richmond, but noted that unlike respondent, Mr. Richmond was not criminally prosecuted for his conduct. The ODC suggested that respondent be suspended from the practice of law for one year, retroactive to the date of her interim suspension.

Hearing Committee Report

After considering the record, the hearing committee made factual findings consistent with the underlying facts set forth above. Based on those facts, the committee determined respondent violated the Rules of Professional Conduct as alleged in the formal charges.

The committee determined that respondent violated duties owed to the public of this State. Her actions were knowing and intentional when she falsified her domicile in an attempt to be

elected as a juvenile court judge in Orleans Parish. Her actions caused harm to the public's trust in individuals seeking a position such as a judgeship. Respondent admitted that her behavior caused an undue burden on the legal system and shed a "negative light on the judiciary and legal profession." After considering the ABA's Standards for Imposing Lawyer Sanctions, the committee determined the baseline sanction is suspension.

Upon review of the findings and recommendations of the hearing committee and disciplinary board, and considering the record, it is ordered that Y J K, Louisiana Bar Roll number 22096, be and she hereby is suspended from the practice of law for a period of one year, retroactive to March 14, 2016, the date of her interim suspension.

II. Pertinent Disciplinary Rules:

A. Louisiana Rules of Professional Conduct With amendments through July1, 2016:

Rule 1.15.
Safekeeping Property
(a)
A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. ...*[holding of client funds, see III, Escrow Section, below...]*... Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.

Rule 3.2.
Expediting Litigation
A lawyer shall make reasonable efforts to expedite
litigation consistent with the interests of the client.

Rule 3.4.
Fairness to Opposing Party and Counsel
A lawyer shall not:
(a)
unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;
(b)
falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;
(c)

knowingly disobey an obligation under the rules of a tribunal, except for an open refusal based on an assertion that no valid obligation exists;
(d)
in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;
(e)
in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or
(f)
request a person other than a client to refrain from voluntarily giving relevant information to another party unless:
(1)
the person is a relative or an employee or other agent of a client, and
(2)
the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

Rule 4.1.
Truthfulness in Statements to Others
In the course of representing a client a lawyer shall not knowingly:
(a)
make a false statement of material fact or law to a third person; or
(b)
fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

Rule 8.4.
Misconduct
It is professional misconduct for a lawyer to:
(a)
Violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
(b)
Commit a criminal act especially one that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
(c)
Engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
(d)
Engage in conduct that is prejudicial to the administration of justice;
(e)
State or imply an ability to influence improperly a judge, judicial officer, governmental

agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law;
(f)
Knowingly assist a judge or judicial officer in conduct that is a violation of applicable Rules of Judicial Conduct or other law; or
(g) Threaten to present criminal or disciplinary charges solely to obtain an advantage in a civil matter.

III. Professional Rules Governing Escrow Accounts:

A. Louisiana Rules of Professional Conduct
With amendments through July1, 2016:

Rule 1.15.
Safekeeping Property
(a)
A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Except as provided in (g) and the IOLTA Rules below, funds shall be kept in one or more separate interest bearing client trust accounts maintained in a bank or savings and loan association: 1) authorized by federal or state law to do business in Louisiana, the deposits of which are insured by an agency of the federal government; 2) in the state where the lawyer's primary office is situated, if not within Louisiana; or 3) elsewhere with the consent of the client or third person. No earnings on a client trust account may be made available to or utilized by a lawyer or law firm. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.
(b)
A lawyer may deposit the lawyer's own funds in a client trust account for the sole purpose of paying bank service charges on that account or obtaining a waiver of those charges, but only in an amount necessary for that purpose.
(c)
A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred. The lawyer shall deposit legal fees and expenses into the client trust account consistent with Rule 1.5(f).
(d)
Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. For purposes of this rule,
the third person's interest shall be one of which the lawyer has actual knowledge, and shall be limited to a statutory lien or privilege, a final judgment addressing disposition of those

funds or property, or a written agreement by the client or the lawyer on behalf of the client guaranteeing payment out of those funds or property. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly liver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

(e)

When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

(f)

Every check, draft, electronic transfer, or other withdrawal instrument or authorization from a client trust account shall be personally signed by a lawyer or, in the case of electronic, telephone, or wire transfer, from a client trust account, directed by a lawyer or, in the case of a law firm, one or more lawyers authorized by the law firm. A lawyer shall not use any debit card or automated teller machine card to withdraw funds from a client trust account. On client trust accounts, cash withdrawals and checks made payable to "Cash" are prohibited.

A lawyer shall subject all client trust accounts to a reconciliation process at least quarterly, and shall maintain records of the reconciliation as mandated by this rule.

[Last sentence added 1/13/2015 and effective 4/1/2015]

(g)

A lawyer shall create and maintain an "IOLTA Account," which is a pooled interest bearing client trust account for funds of clients or third persons which are nominal in amount or to be held for such a short period of time that the funds would not be expected to earn income for the client or third person in excess of the costs incurred to secure such income.

(1)

IOLTA Accounts shall be of a type approved and authorized by the Louisiana Bar Foundation and maintained only in "eligible" financial institutions, as approved and certified by the Louisiana Bar Foundation. The Louisiana Bar Foundation shall establish regulations, subject to approval by the Supreme Court of Louisiana, governing the determination that a financial institution is eligible to hold IOLTA Accounts and shall at least annually publish a list of LBF approved/certified eligible financial institutions. Participation in the IOLTA program is voluntary for financial institutions. IOLTA Accounts shall be established at a bank or savings and loan association authorized by federal or state law to do business in Louisiana, the deposits of which are insured by an agency of the federal government or at an open end investment company registered with the Securities and Exchange Commission authorized by federal or state law to do business in Louisiana which shall be invested solely in or fully collateralized by U.S. Government Securities with total assets of at least $250,000,000 and in order for a financial institution to be approved and certified by the Louisiana Bar Foundation as eligible, shall comply with the following provisions:

(A)

No earnings from such an account shall be made available to a lawyer or law firm.
(B)
Such account shall include all funds of clients or third persons which are nominal in amount or to be held for such a short period of time the funds would not be expected to earn income for the client or third person in excess of the costs incurred to secure such income.
(C)
Funds in each interest bearing client trust account shall be subject to withdrawal upon request and without delay, except as permitted by law.
(2)
To be approved and certified by the Louisiana Bar Foundation as eligible, financial institutions shall maintain IOLTA Accounts which pay an interest rate comparable to the highest interest rate or dividend generally available from the institution to its non-IOLTA customers when IOLTA Accounts meet or exceed the same minimum balance or other eligibility qualifications, if any. In determining the highest interest rate or dividend generally available from the institution to its non IOLTA accounts, eligible institutions may consider factors, in addition to the IOLTA Account balance, customarily considered by the institution when setting interest rates or dividends for its customers, provided that such factors do not discriminate between IOLTA Accounts and accounts of non IOLTA customers, and that these factors do not include that the account is an IOLTA Account. The eligible institution shall calculate interest and dividends in accordance with its standard practice for non IOLTA customers, but the eligible institution may elect to pay a higher interest or dividend rate on IOLTA Accounts.
(3)
To be approved and certified by the Louisiana Bar Foundation as eligible, a financial institution may achieve rate comparability required in (g)(2) by:
(A)
Establishing the IOLTA Account as:
(1) an interest bearing checking account; (2) a money market deposit account with or tied to checking; (3) a sweep account which is a money market fund or daily (overnight) financial institution repurchase agreement invested solely in or fully collateralized by U.S. Government Securities; or (4) an open end money market fund solely invested in or fully collateralized by U.S. Government Securities. A daily financial institution repurchase agreement may be established only with an eligible institution that is “well capitalized” or “adequately capitalized” as those terms are defined by applicable federal statutes and regulations. An open end money market fund must be invested solely in U.S. Government Securities or repurchase agreements fully collateralized by U.S. Government Securities, must hold itself out as a “money market fund” as that term is defined by federal statutes and regulations under the Investment Company Act of 1940, and, at the time of the investment, must have total assets of at least $250,000,000. “U.S. Government Securities” refers to U.S. Treasury obligations and obligations issued or guaranteed as to principal and interest by the United

States or any agency or instrumentality thereof.

(B)

Paying the comparable rate on the IOLTA checking account in lieu of establishing the IOLTA Account as the higher rate product; or

(C)

Paying a "benchmark" amount of qualifying funds equal to 60% of the Federal Fund Target Rate as of the first business day of the quarter or other IOLTA remitting period; no fees may be deducted from this amount which is deemed already to be net of "allowable reasonable fees."

(4)

Lawyers or law firms depositing the funds of clients or third persons in an IOLTA Account shall direct the depository institution:

(A)

To remit interest or dividends, net of any allowable reasonable fees on the average monthly balance in the account, or as otherwise computed in accordance with an eligible institution's standard accounting practice, at least quarterly, to the Louisiana Bar Foundation, Inc.;

(B)

To transmit with each remittance to the Foundation, a statement, on a form approved by the LBF, showing the name of the lawyer or law firm for whom the remittance is sent and for each account: the rate of interest or dividend applied; the amount of interest or dividends earned; the types of fees deducted, if any; and the average account balance for each account for each month of the period in which the report is made; and

(C)

To transmit to the depositing lawyer or law firm a report in accordance with normal procedures for reporting to its depositors.

(5)

"Allowable reasonable fees" for IOLTA Accounts are: per check charges; per deposit charges; a fee in lieu of minimum balance; sweep fees and a reasonable IOLTA Account administrative fee. All other fees are the responsibility of, and may be charged to, the lawyer or law firm maintaining the IOLTA Account. Fees or service charges that are not "allowable reasonable fees" include, but are not limited to: the cost of check printing; deposit stamps; NSF charges; collection charges; wire transfers; and fees for cash management. Fees or charges in excess of the earnings accrued on the account for any month or quarter shall not be taken from earnings accrued on other IOLTA Accounts or from the principal of the account. Eligible financial institutions may elect to waive any or all fees on IOLTA Accounts.

(6)

A lawyer is not required independently to determine whether an interest rate is comparable to the highest rate or dividend generally available and shall be in presumptive compliance with Rule 1.15(g) by maintaining a client trust account of the type approved and authorized by the Louisiana Bar Foundation at an "eligible" financial institution.

(7)

"Unidentified Funds" are funds on deposit in an IOLTA account for at least one year that after reasonable due diligence cannot be documented as belonging to a client, a third person, or the lawyer or law firm.

(h)

A lawyer who learns of Unidentified Funds in an IOLTA account must remit the funds to the Louisiana Bar Foundation. No charge of misconduct shall attend to a lawyer's exercise of reasonable judgment under this paragraph (h).

A lawyer who either remits funds in error or later ascertains the ownership of remitted funds may make a claim to the Louisiana Bar Foundation, which after verification of the claim will return the funds to the lawyer.

IOLTA Rules

(1)

The IOLTA program shall be a mandatory program requiring participation by lawyers and law firms, whether proprietorships, partnerships, limited liability companies or professional corporations.

(2)

The following principles shall apply to funds of clients or third persons which are held by lawyers and law firms:

(a)

No earnings on the IOLTA Accounts may be made available to or utilized by a lawyer or law firm.

(b)

Upon the request of, or with the informed consent of a client or third person, a lawyer may deposit funds of the client or third person into a non IOLTA, interest bearing client trust account and earnings may be made available to the client or third person , respectively, whenever possible upon deposited funds which are not nominal in amount or are to be held for a period of time long enough that the funds would be expected to earn income for the client or third person in excess of the costs incurred to secure such income; however, traditional lawyer client relationships do not compel lawyers either to invest such funds or to advise clients or third persons to make their funds productive.

(c)

Funds of clients or third persons which are nominal in amount or to be held for such a short period of time that the funds would not be expected to earn income for the client or third person in excess of the costs incurred to secure such income shall be retained in an IOLTA Account at an eligible financial institution as outlined above in section (g), with the interest or dividend (net of allowable reasonable fees) made payable to the Louisiana Bar Foundation, Inc., said payments to be made at least quarterly.

(d)

In determining whether the funds of a client or third person can earn income in excess of costs, a lawyer or law firm shall consider the following factors:

(1)

The amount of the funds to be deposited;

(2)

The expected duration of the deposit, including the likelihood of delay in the matter for which the funds are held;

(3)

The rates of interest or yield at financial institutions where the funds are to be deposited;

(4)

The cost of establishing and administering non IOLTA accounts for the benefit of the client or third person including service charges, the costs of the lawyer's services, and the costs of preparing any tax reports required for income accruing to the benefit of the client or third person;

(5)

The capability of financial institutions, lawyers or law firms to calculate and pay income to individual clients or third persons;

(6)

Any other circumstances that affect the ability of the funds of the client or third person to earn a positive return for the client or third person. The determination of whether funds to be invested could be utilized to provide a positive net return to the client or third person rests in the sound judgment of each lawyer or law firm. The lawyer or law firm shall review its IOLTA Account at reasonable intervals to determine whether changed circumstances require further action with respect to the funds of any client or third person.

(e)

Although notification of a lawyer's participation in the IOLTA Program is not required to be given to clients or third persons whose funds are held in IOLTA Accounts, many lawyers may want to notify their clients or third persons of their participation in the program in some fashion. The Rules do not prohibit a lawyer from advising all clients or third persons of the lawyer's advancing the administration of justice in Louisiana beyond the lawyer's individual abilities in conjunction with other public spirited members of the profession. The placement of funds of clients or third persons in an IOLTA Account is within the sole discretion of the lawyer in the exercise of the lawyer's independent professional judgment; notice to the client or third person is for informational purposes only.

(3)

The Louisiana Bar Foundation shall hold the entire beneficial interest in the interest or dividend income derived from client trust accounts in the IOLTA program. Interest or dividend earned by the program will be paid to the Louisiana Bar Foundation, Inc. to be used solely for the following purposes:

(a)

to provide legal services to the indigent and to the mentally disabled;

(b)

to provide law related educational programs for the public;

(c)

to study and support improvements to the administration of justice; and

(d)

for such other programs for the benefit of the public and the legal system of the

state as are specifically approved from time to time by the Supreme Court of Louisiana.

(4)

The Louisiana Bar Foundation shall prepare an annual report to the Supreme Court of Louisiana that summarizes IOLTA income, grants, operating expenses and any other problems arising out of administration of the IOLTA program. In addition, the Louisiana Bar Foundation shall also prepare an annual report to the Supreme Court of Louisiana that summarizes all other Foundation income, grants, operating expenses and activities, as well as any other problems which arise out of the Foundation's implementation of its corporate purposes. The Supreme Court of Louisiana shall review, study and analyze such reports and shall make recommendations to the Foundation with respect thereto.

B. Rules for Lawyer Disciplinary Enforcement (Louisiana Supreme Court Rule XIX) With amendments through January 27, 2016

Section 28. Maintenance of Trust Accounts by Lawyers; Access to Lawyers' Financial Account Records; Overdraft Notification.

A. Clearly Identified Trust Accounts in Financial Institutions Required.

(1) Lawyers who practice law in Louisiana shall deposit all funds held in trust in a bank or similar institution in this state, or elsewhere with the consent of the client or third party, in accounts clearly identified as "trust" or "escrow" accounts, referred to herein as "trust accounts," and shall take all steps necessary to inform the depository institution of the purpose and identity of the accounts. Funds held in trust include funds held in any fiduciary capacity in connection with a representation, whether as trustee, agent, guardian, exec
utor or otherwise. Lawyer trust accounts shall be maintained only in financial institutions that execute the agreement described in paragraph D below.

(2) Every lawyer engaged in the practice of law in Louisiana shall maintain and preserve for a period of at least five years, after final disposition of the underlying matter, the records, check stubs, vouchers, ledgers, journals, closing statements, accounts or other statements of disbursements rendered to clients or other parties with regard to trust funds
or similar equivalent records clearly and expressly reflecting the date, amount, source, and explanation for all receipts, withdrawals, deliveries and disbursements of the funds or other property of a client.

B. Access to Lawyers' Financial Account Records.

Every lawyer practicing or admitted to practice law in Louisiana shall, as a condition thereof, be conclusively deemed to have consented to the production by the depository institution of records of all financial accounts maintained by the lawyer in any bank or similar institution, and

the overdraft reporting requirements mandated by this rule.

C. Request for Production of Records.

A request by disciplinary counsel directed to a bank or other financial institution for production of records pursuant to this Section shall certify that the request is issued in accordance with the requirements of this Section and Section 29 of these Rules of Lawyer Disciplinary Enforcement.

D. Overdraft Notification Agreement Required.

A financial institution shall be approved as a depository for lawyer trust accounts if it files with the Board an agreement, in a form provided by the Board and approved by the Court, to report to the Office of Disciplinary Counsel whenever any properly payable instrument is presented against a lawyer trust account containing insufficient funds, irrespective of whether or not the instrument is honored. The Board shall administer securing participation of the financial institutions, and shall annually publish a list of the financial institutions that have executed overdraft notification agreements with the Board. No trust account shall be maintained in any financial institution that does not agree to so report. Any such agreement shall apply to all branches of the financial institution and shall not be cancelled except upon thirty (30) days notice in writing to the Board. Notification of trust or escrow account overdrafts shall be made in accordance with La. R. S. 6:332 and La. R. S. 6:333(F)(16).

Section 29. Verification of Financial Accounts.

A.

Generally.

Whenever disciplinary counsel has probable cause to believe that financial accounts of a lawyer that contain, should contain, or have contained funds belonging to clients or third parties have not been properly maintained or that the funds have not been properly handled, disciplinary counsel shall request the approval of the chair of a hearing committee selected in order from the roster established by the board to initiate an investigation for the purpose of verifying the accuracy and integrity of all accounts maintained by the lawyer in any bank or similar institution. If the reviewing member approves, counsel shall proceed to verify the accuracy of the financial accounts. If the reviewing member denies approval, counsel may submit the request for approval to one other chair of a hearing committee selected in order from the roster established by the board.

B. Confidentiality.

Investigations, examinations, and verifications shall be conducted so as to preserve the private and confidential nature of the lawyer's records insofar as is consistent with these rules and the lawyer client privilege.

Appendix F to Disciplinary Rules: Supreme Court of Louisiana Trust Account Disclosure & Overdraft Notification Authorization

Pursuant to the inherent, plenary and Constitutional authority of the Louisiana Supreme Court to regulate the practice of law, and in accordance with Supreme Court Rule XIX, every attorney

licensed to and engaged in the practice law in Louisiana is required to disclose the existence of a trust or escrow account (or declare that because of the nature of his/her practice that he/she is not required to maintain such an account). Every attorney who maintains a trust or escrow account as required by the Rules of Professional Conduct is required to maintain such account with a federally insured financial institution with whom the attorney has executed an agreement which authorizes the financial institution to provide written or electronic notification to the Office of Disciplinary Counsel of any account overdraft. Use of this form complies with the rules of the Louisiana Supreme Court.

C. From the Trust Account Disclosure & Overdraft Notification Authorization Form:

A. All attorneys holding funds of clients or third persons must maintain a separate account for such funds (commonly referred to a trust or escrow account);

B. Every attorney maintaining a qualified pooled trust or escrow account must participate in the
Interest on Lawyers Trust Account (IOLTA) Program administered by the Louisiana Bar Foundation; and

C. All attorneys who are required to maintain trust or escrow accounts must do so with federally insured financial institutions with which they have executed agreements requiring the financial institutions to provide to the Office of Disciplinary Counsel written or electronic notification of any overdraft incident created on such accounts.

(Notice to Financial Institution:
Pursuant to Legislative Act 249 of the 2005 Regular Session, notice to the Office of Disciplinary Counsel shall be issued after five (5) business days have passed from the date of notice to the attorney, and whether or not the account remains in overdraft status; but such notice will not issue where the overdraft was created solely by bank charges imposed or when charges are imposed through bank error. Costs associated with providing this notice may be charged to the attorney and deducted from the interest created on the trust or escrow account. The act provides that no civil or criminal action may be based upon a disclosure or non-disclosure of financial records made pursuant to the Act.)

_____ ("Company")
_____
_____

Dated as of: _____, 2019

_____
_____

Dear _____:

This agreement shall confirm and memorialize our discussions with reference to you and Company entering into an exclusive artist recording and production agreement regarding your performances as a musical recording artist. (You and Company are sometimes referred to herein as the "parties".) Although the parties contemplate the execution of a more formal long form recording agreement (the "Long Form Agreement"), this Letter Agreement, when signed by both you and Company, shall constitute a binding and enforceable agreement regardless of whether the Long Form Agreement is ultimately executed.

Following are the major terms and conditions which the parties agree shall form the basis of our contractual arrangement and which shall be incorporated in the Long Form Agreement (it being understood that such Long Form Agreement shall not be limited to these terms):

1) **Artist**: _____('you" or "your")

2) **Territory**: World

3) **Term**: The "Initial Contract Period" shall run for fifteen (15) months from the completion and satisfactory delivery of the Initial Album hereunder. Each subsequent Contract Period, if any as provided for below, shall run for the longer of i) 15 months from the completion and satisfactory delivery of the Masters to be delivered to Company during such Contract Period and ii) 18 months from the commencement date of such respective Contract Period. At all times during the Term, you shall render your exclusive recording services to Company for the purpose of making Masters (as hereinafter defined) and for all other purposes as provided for herein.

4) **Recording Commitment/Future Options**: During the Initial Contract Period, you shall record one full-length studio album comprised of not less than ten (10) previously unreleased songs featuring your performances (the "Initial Album"). Thereafter, Company shall have an option, to be exercised by Company, for up to four (4) consecutive additional Contract Periods, comprised of one (1) full-length album during each Contract Period, each such option to be exercised, if at all, not later than the expiration of the then current Contract Period, subject to a ninety (90) day written notice and cure period in the event Company fails to exercise any such option. (The Initial Album, any and all additional audio only masters recorded hereunder or during the Term hereof, all audio-visual products, and all other recordings or other formats now or hereafter known embodying your musical performances recorded or otherwise produced during the Term hereof are sometimes referred to individually and collectively herein as the "Master(s)".) Selection of the Masters to be recorded hereunder shall be subject to the mutual cooperation and agreement of the parties, it being understood and agreed that Company shall have the final word with respect to selection of Masters and for all other creative matters, including, but not limited to, the selection of the producers of Masters and album artwork.

5) **Recording Costs/Advances**: Company shall administer and pay all pre-approved recording costs in connection with the production of the Masters. All master recording costs, video production costs, independent marketing and promotion costs, all other sums paid by Company to you or on your behalf, (whether related to Other Music Activities or otherwise) and all other typically recoupable costs and expenses incurred by Company hereunder shall constitute "Advances", fully recoupable by Company from any royalties or other sums to be paid to you (or on your behalf) by us or any third party (excluding mechanical royalties) under this Agreement or any other agreement between you and Company.

6) **Royalties**: As your sole and complete consideration of your services rendered hereunder, Company shall pay you a sum equal to ___ (--%) percent of the net revenues received by or credited to Company in connection with the exploitation of the Masters (other than performance or other royalties for which you were paid your share directly), after recoupment of all Advances, recording costs and expenses and all other chargeable costs related to the distribution and/or exploitation of the Masters, including, but not limited to manufacturing costs, third party distribution fees and charges, and marketing and promotional expenses, it being understood that there shall be no so-called "double-dipping" and such recoupable expenses shall only be charged to your royalty account once. It is understood and agreed that Company's otherwise standard policies

would apply to the calculation and payment of all royalties (e.g., free goods, program discounts, reserves, reductions, etc.). You acknowledge and agree that no royalties of any kind nor any other compensation (other than mechanical royalties, if any) shall be due to you except as provided in this paragraph. Company shall account and pay you any sums due not semi-annually, within ninety days after the end of each semi-annual period ending on June 29th and December 31st. Company shall be entitled to withhold any and all taxes as required by law with respect to any sums payable to you hereunder.

7) **Name and Likeness Rights/Website:** Company shall have the perpetual right, which such right shall be exclusive during the term and non-exclusive thereafter, without liability to any person, to use and to authorize other persons to use your name, likeness and biographical material for purposes of advertising, marketing, promotion and trade in connection with making and/or exploitation of Maters, recordings, audio-visual materials, and all other materials hereunder. You hereby grant to Company the exclusive right, during the Term (and the non-exclusive right thereafter, with respect to an alternate name), to establish and maintain all Artist-branded digital sites and social networking sites, including a website having the URL "____.com" or any similar designation based on or containing your professional name. You shall make yourself available at Company's reasonable request and expense and upon reasonable notice to appear for photographs, posters, cover art, interviews with representatives of the media and publicity personnel and to perform other reasonable promotional functions.

8) **Representation/Warranty/Indemnity:** You warrant and represent that you have been, are and shall continue to be possessed of the full right to enter into this agreement and perform hereunder and that your entering into this agreement and performing hereunder shall not infringe upon the rights of any person or entity. Upon the expiration or other termination of this Agreement, you agree not to re-record any composition embodied on a Master hereunder until the date that is the later of i) three years after the end of the Term and iii) five years from the completion of recording of such Master hereunder. You indemnify us against any losses or damage (including reasonable attorneys' fees) arising out of any claims by any third parties which are inconsistent with any warranty made by you herein or any condition contained herein. You shall promptly pay us on demand any sums for which you are liable under the proceeding sentence and, alternatively, Company shall be entitled to withhold any such sums from monies otherwise payable to you hereunder.

9) **Ownership**: The Masters (including, but not limited to, any audio-visual recordings related thereto), all duplicates and derivatives thereof, all records made therefrom or duplicates or derivatives (including the copyright and renewal and/or extension of such copyright), and all artwork and other intellectual property created or obtained by Company, together with the performances embodied therein, all in any form, manner, or medium now or hereafter known, shall be exclusively and perpetually property of Company, free from any claim whatsoever by you or any person deriving any rights from you. The Masters shall be deemed a work made for hire within the meanings of the United States Copyright Act. If the Masters are determined not to be a work made for hire, they will be deemed transferred to Company by this agreement, together with all rights in it. Accordingly, the Masters, together with yours and all the performances embodied on them, shall be the sole property of Company, its assignees and successors in perpetuity and throughout the world, free from any claims by you or any other person; and Company shall have the exclusive right to copyright the Master in its name as the author and owner thereof and to secure any and all renewals and extensions of such copyright throughout the world. You will execute and deliver to Company such instruments of transfer and other documents regarding the rights of Company in the Master as Company may reasonably request to carry out the purposes of this Agreement, and Company may sign such documents in your name and make appropriate disposition of them.

Without limiting the generality of the foregoing, Company, or any person authorized by Company shall have the perpetual unlimited, exclusive right, throughout the world: (i) to manufacture records, video-records, and any derivatives thereof derived from the Master in any form, in any medium, and/or by any method now or hereafter known; (ii) to sell, transfer or otherwise deal in the same under any trademarks, trade names and labels; (iii) to reproduce, adapt, transmit, distribute, broadcast, perform, communicate and otherwise use the Master in any medium or in any manner, including but not limited to use in physical, digital, electronic, mobile and internet formats; (iv) to cause or permit the public performance of the Master, or derivatives thereof, through any and all media; (v) to add to, delete from, edit, mix and otherwise alter the Master without restriction; and (vi) to exploit the Master and derivatives therefrom through any and all means, whether now or hereafter known, all without payment of any compensation to you except the royalties as described in this Agreement. In the alternative Company may, at its election, refrain from doing any or all of the foregoing.

10) **Mechanical License**: With respect to any musical compositions embodied on the Masters which are owned or controlled by you or your designees (the "Songs"), you (or your publishing designees) hereby grant to us and our designees the irrevocable non-exclusive right to reproduce the Song on records (including digitally delivered reproductions) and to distribute any of those records in the United States and Canada. Mechanical royalties shall be payable on a maximum of ten (10) songs on each album, on net sales of such records at the following rates: (i) on such records sold in the United States, the rate shall be the United States mechanical rate.

The "United States mechanical rate" shall mean the amount equal to seventy-five percent (75%) of the minimum statutory royalty rate (without regard to playing time) provided for in the United States Copyright Act which is applicable to the reproduction of musical compositions as of the date of initial release of the Master concerned; and (ii) on such records sold in Canada, the rate shall be the Canadian mechanical rate. The "Canadian mechanical rate" shall mean the amount equal to seventy-five percent (75%) of the minimum statutory royalty rate (without regard to playing time) provided for in the Canadian Copyright Act which is applicable to the reproduction of musical compositions as of the date of initial release of the Master concerned; (iii) the mechanical royalty rate for a Song contained on a mid-price record or budget record shall be three-fourths (3/4ths) of the United States mechanical rate or the Canadian mechanical rate; as applicable; and no mechanical royalties shall be payable on any phonograph records for which no royalties are payable by Company. If the copyright in a musical composition is owned or controlled by a person, firm or corporation other than you, you shall cause that person, firm or corporation to grant to us and our designees the same rights as you are required to grant to us and our designees hereunder. You hereby grant to us and our designees at no fee, royalty or other cost to us or our designees, the irrevocable, non-exclusive, worldwide right to reproduce and publicly perform each Song on audio-visual recordings, to distribute audio-visual records embodying those audio-visual recordings, and otherwise to exploit in any manner and through any media those audio-visual recordings. You grant to us and our designees, or shall cause to be granted to us, the irrevocable right to print and reproduce, at our election, the title and lyrics to the Song on the packaging of phonograph records embodying Masters throughout the world in perpetuity, without payment to you or any other person, firm or corporation of any monies or other consideration in connection therewith. Any assignment, license or other agreement made with respect to the Song shall be subject to the terms hereof.

11) **Co-Publishing**. The parties agree that you (or your affiliated publishing company) and Company's designated publishing affiliate shall be perpetual worldwide co-publishers with respect to music and lyrics of all compositions written, owned, or controlled by you during the Term of this Agreement whether such compositions are recorded pursuant to this Agreement or otherwise. Accordingly, you (or your affiliated publishing company) hereby irrevocably and absolutely assign, convey and set over to Company (or its designee), or will cause Company (or its designee) to receive an assignment, of fifty (50%) percent of all right, title and interest (including the worldwide copyright and all extensions and renewals thereof) in and to each and every controlled composition during the Term hereof. You agree to execute and deliver to Company, or to cause to be executed and delivered to Company (or its designee) a separate Co-publishing Agreement with respect to each such controlled composition in accordance with standard forms of such agreements. If you shall fail to promptly execute such agreements, you hereby grant to Company the right to sign same on your behalf, though Company's failure to exercise the rights granted to use such authority shall not diminish Company's rights as set forth within this Agreement. Regardless of whether such additional separate Co-Publishing Agreements are executed, Company shall be the exclusive administrator of 100% of all rights in and to such controlled compositions, and it (and/or its designees) shall be entitled to exercise any and all rights with respect to the control, exploitation and administration of such compositions including, without limitation, the sole right to grant licenses, collect all income and to use the name, likeness and biographical material of each composer, lyricist and songwriter hereunder in connection with such composition for the full term of copyright (including all renewals and extensions thereof) in and to such Composition. From all sums actually earned and received by Company in the United States of America from the exploitation of such Composition throughout the world (the "Gross Receipts"), Company (or its designees) shall: (i) deduct and/or retain all out-of-pocket costs incurred by Company in connection with the exploitation and protection of such Composition; (ii) deduct and pay royalties payable to the writers (including you) of the Composition (which you warrant and represent shall not exceed fifty (50%) percent of the Gross Receipts); and (iii) pay to you an amount equal to fifty (50%) percent of the balance remaining after deducting the aggregate sums set forth in subparagraphs (i), (ii) and (iii) above, and the remaining fifty (50%) percent thereof shall be retained by Company for its sole use and benefit. Accountings for such royalties shall be rendered semi-annually subject to all the terms and provisions of Paragraph 11 hereof.

12) **Other Music Activities.** You shall pay to Company a sum equal to ___ (%) percent of all OMA Income ("the OMA Payment") . You authorize Company to collect all OMA Income on your behalf but to the extent such is not collected by Company, within fifteen (15) days of the end of each calendar quarter of the Term, you will send Company a detailed written account of all OMA Income received by you or on your behalf during such accounting period and the amount of the OMA Payment accordingly payable to Company. On receipt of each such accounting statement, Company will elect either to deduct the OMA Payment from monies (including royalties) due to you hereunder or to receive payment, in which case you shall pay the amounts shown to be due in each accounting statement within ten (10) days of the date of such statement. You agree to maintain complete and accurate books and records relating to OMA Income. At any time within two (2) years after any accounting statement is rendered to Company hereunder, Company shall have the right to inspect such books and records on reasonable notice but not more than once during each year. As used herein, "Other Music Activities" shall mean all of your professional activities connected to the entertainment industry including, without limitation, merchandising, advertising, sponsorship, endorsements and tie-ins, touring and all other live performances, and TV or film appearances (but specifically excluding music publishing at any such times as Company is your co-

publisher, any fees or royalties you receive for acting as a “producer” of records for others, record royalties hereunder, and any other income payable to you which Company is otherwise participating in (i.e., there shall be no “double dipping” with respect to OMA Income). “OMA Income” shall mean all gross sums paid or payable to you with respect to your “Other Music Activities” during the Term or with respect to any and all agreements related thereto entered into during the Term and for a period of three months thereafter (whether received during the term or thereafter), after deduction of third party out-of-pocket expenses or deductions reasonably incurred in connection with the Other Music Activities, including booking agent commissions, monies payable to third party co-publishers and co-writers of musical compositions written by you and reimbursement for actual out-of-pocket expenses incurred by you in connection therewith (but which such deduction shall not apply to production, travel, musician, or other show related costs for your live performance activities or management commissions). Upon request by Company, you hereby agree to execute standard Letters of Direction authorizing and directing any third parties to pay any such OMA Payments directly to Company.

13) **Miscellaneous.** This agreement is the entire agreement between the parties with respect to the contents hereof, supersedes all prior agreements, understandings, negotiations and discussions, whether oral or written, of the parties, and shall not be modified, except by an instrument in writing, signed by each of the parties duly authorized to execute such modification. Company may assign its rights under this Agreement in whole or in part. For the avoidance of doubt, in the event Company “up-streams” this Agreement, which it may do in its discretion, the terms and conditions hereof shall continue to apply and all references herein to “Company” shall apply to such assignee or upstream label. You may not assign this agreement or your rights or responsibilities hereunder without the prior approval of Company, such approval not to unreasonably withheld with respect to a so-called “furnishing company” owned or controlled by you which is exclusively entitled to your recording services. A waiver by either party of any term or condition of this agreement shall not be deemed or construed as a waiver of such term or condition for the future, or of any subsequent breach thereof. All remedies, rights, undertakings, obligations, and agreements contained herein shall be cumulative and none of them shall be in limitation of any other remedy, right, undertaking, obligation or agreement of either party. No breach of this agreement by either party shall be deemed material, unless the non-breaching party shall have given the other party notice of such breach and such breaching party shall fail to cure such breach within 30 days after receipt of such notice. If any part of this agreement shall be determined to be invalid or unenforceable, the remainder of this agreement shall remain in full force and effect. This Agreement has been entered into in the State of _____ and the validity, interpretation and legal effect of this Agreement shall be governed by the laws of _____ applicable to contracts entered into and performed entirely within _____, with respect to the determination of any claim, dispute or disagreement which may arise out of the interpretation, performance or breach of this Agreement. All claims, disputes or disagreements which may arise out of the interpretation, performance or breach of this Agreement shall be submitted exclusively to the jurisdiction of the appropriate court in _____. You acknowledge that Company has given you the right and opportunity to have this Agreement reviewed by an attorney of your choice having competence in the music industry, and you have done so. You further acknowledge that said attorney has reviewed with you the terms of this Agreement and that he/she has advised you as to all legal ramifications and consequences of your entering into this Agreement. You acknowledge that your services hereunder are of a special, unique, unusual, extraordinary and intellectual character and in the event of a breach by you of any material term, condition, representation, warranty or covenant herein, Company will be caused irreparable injury and damage. You expressly agree that Company shall be entitled to the remedies of injunction and other equitable relief to prevent or remedy a breach, which relief shall be in addition to any other rights or remedies, for damages or otherwise, which Company may have. If you do not fulfill any portion of your recording commitment for any reason or if Company reasonably determines that your vocal abilities to perform as a recording artist have become materially impaired, Company will have the option i) to suspend the running of the Term of this Agreement and/or Company’s obligations to make payments to you hereunder until you have cured such default or remove such impairment; ii) to terminate the Term of this Agreement by written notice to you, by certified mail, return receipt requested (or otherwise standard verifiable overnight delivery service), whether or not you have commenced curing the default before such termination occurs; and iii) in the event of a termination in accordance with the terms hereof, to require you to repay to Company the amount, not then recouped, of any Advance made to you in connection with the then current Contract Period or Master being then currently recorded, but only if the reasons for such termination are the result of your acts or omissions constituting a material breach of this Agreement and are not conditions or circumstances outside of your reasonable control or not reasonably foreseeable by you (such as, by way of example, your death or disability or other standard force majure reasons). If Company terminates the Term, all parties will be deemed to have fulfilled all of their obligations under this agreement except those that survive the end of the Term. No exercise of an option under this paragraph will limit Company's rights to recover damages by reason of your default, its rights to exercise any other option under this paragraph, or any of its other rights. If because of: an Act of God, inevitable accident; fire; lockout; strike or other labor dispute; riot or civil commotion; act of public enemy; enactment, rule, order or act of any government or governmental instrumentality (whether federal, state, local or foreign); failure or delay of transportation facilities; or other cause of a similar or different nature not reasonably within Company's control, Company is materially hampered in the recording, manufacture, distribution or sale of records, then, without limiting Company's rights, Company shall have the option by giving

you notice to suspend the running of the then current Contract Period for the duration of any such contingency plus such additional time as is necessary so that Company shall have no less then sixty (60) days after the cessation of such contingency in which to exercise its option, if any, to extend the Term of this Agreement for the next following Option Period.

The parties agree that, upon both of our signatures below, this letter shall constitute a valid and binding agreement regarding the exclusive rights to your services. Notwithstanding the contemplation of the Long Form Agreement, all legal and equitable rights, obligations and remedies of both parties attach hereto with no limitation. Counterpart signed copies of this Agreement, and electronically transmitted copies thereof, shall be deemed original, valid, and binding for all purposes.

Accepted and Agreed To:

Company:

_____ _____

SS#: An Authorized Signatory

Legal and Business Considerations when Advising Clients Creating and Operating Music Labels

Edgar "Dino" Gankendoff, Esq., Provosty & Gankendoff, LLC, NOLA
Marc Stollman, Esq. Stollman Law, Boca Raton, FL
Peter J. Strand, Esq., Mandell Menkes, Chicago, IL
Matthew V. Wilson, Esq., Arnall Golden Gregory, LLP / Greater Thinking Music Group, Atlanta, GA

I. Record Labels – Legal and Business Matters

1. Starting a Label
    a. The "Frank Thomas" story
    b. Why start a label in 2019?
    c. Income streams (physical, digital, streaming, ancillaries)?
2. Management and Legal Matters
    a. Organization / structure
    b. Internal contracts
    c. Branding / promotions
    d. Team Members (A&R, Marketing, Licensing)
    e. Third party partners (radio, publicists, distribution, licensing)
    f. Publishing

II. Standard Label Agreements

1. Recording Agreements
    a. Common Terms
    b. Label Goals
    c. Artist Goals
    d. Trends
2. Producer Agreements
    a. Common Terms
    b. Label Goals

c. Producer Goals

d. Trends

3. Distribution Agreements

a. Common Terms

b. Label Goals

c. Producer Goals

d. Trends

BINDING LETTER OF AGREEMENT FOR PRODUCER WORK FOR HIRE SERVICES

DATE: , 2019

TO:
COMPANY:

FROM: ("Company", "we", or "us")

==========
Re: producing

MESSAGE: Dear :

This binding deal memo will confirm our discussions and understanding with regard to ____ () master recordings (individually and collectively, the "Master(s)") embodying the performances of _____, to be released by _____ ("Record Company") or otherwise. _____ ("you" or "your") hereby agree to furnish the services of _____ ("Producer"), who will provide services as "producer" (as such term is commonly understood) to us and/or Record Company with respect to the Masters. You will be solely responsible for all payments to Producer and you agree that you are solely responsible for all payments of all recording costs and other sums to all musicians, engineers, and all others who render services in connection with the Masters, and you and Producer each agree that neither Company nor Record Company will have any responsibility therefore. The term of this contract shall commence as of the date hereof and shall continue until such time as you shall have completed your services hereunder. You shall diligently, competently and to the best of your ability perform the services required to be performed by you hereunder.

1) **Recording Fund**: You have submitted a budget of $____ per each Master with respect to your services in connection with the production of all Masters, inclusive of all recording costs and all producer fees and advances, if any. Such budget is attached hereto and approved. Any excess recording costs, regardless of source, must be pre-approved by us in writing or shall otherwise be your sole responsibility. Such budget shall be payable one-half after the full execution hereof and one-half upon the satisfactory delivery of the Master(s) to us or Record Company. (Notwithstanding any of the foregoing, any payments made pursuant to such budget by Record Company, including, but not limited to, payments to musicians or applicable unions, shall be deducted from the so-called "back-end payment due to you hereunder, if any.)

2) **Royalty**: Your royalty shall be equal to i) --% (wholesale, pro-rata as appropriate, with no escalations) with respect to standard exploitations of the Masters and ii) __ percent (--%) of our or Record Company's net receipts with respect to any flat fees, master licenses, synch licenses, or other third party receipts, with all other standard royalty reductions, calculation, and accounting and payment provisions as are applicable by virtue of any agreement with the Record Company. We shall execute the attached Letter of Direction with respect to SoundExchange royalties. Royalties shall be payable from "record one", subject to recoupment of a $_____ advance, after our recoupment of all recording costs and you hereby acknowledge and agree that no additional fees, royalties, or other consideration shall be payable to you or Producer with respect to your services hereunder. Accountings shall be rendered by us or Record Company semi-annually and you shall be accorded standard audit rights with respect to the books and records of Company.

3) **Misc.:** a) We shall use best efforts to provide standard producer credit to you on all records embodying the Master in substantially the form: .

b) As between you and us, all Masters produced by you hereunder, all phonograph records and reproductions made therefrom, together with the performances embodied therein and all copyrights therein (including all renewals and extensions thereof), and all duplicates and derivatives thereof, shall be exclusively and perpetually property of Company, free from any claim whatsoever by you or any person deriving any rights from you. The Master shall be deemed a work made for hire within the meanings of the United States Copyright Act. If the Master is determined not to be a work made for hire it will be deemed transferred to Company by this Agreement, together with all rights in it. Without limiting the generality of the foregoing, Company, or any person authorized by Company shall have the perpetual unlimited, exclusive right, throughout the world: (i) to manufacture records, video-records, and any derivatives thereof, derived from the Master, in any form, in any medium, and by any method now or hereafter known; (ii) to sell, transfer or otherwise deal in the same under any trademarks, trade names and labels; (iii) to reproduce, adapt transmit, distribute, communicate and otherwise use the Master in any medium or in any

manner now or hereafter known, including but not limited to use in all digital and mobile formats, audiovisual works and video-records; (iv) to cause or permit the public performance of the Master, or derivatives thereof, through any and all media; (v) to add to, delete from, edit, mix and otherwise alter the Master without restriction; and (vi) to exploit the Master and derivatives therefrom through any and all means, whether now or hereafter known, all without payment of any compensation to you except the royalties, if any, which may be expressly prescribed in this Agreement. In the alternative Company may, at its election, refrain from doing any or all of the foregoing.

c) We and our designees shall have the world-wide right in perpetuity to use and to permit others to use your name (legal and professional, and whether presently or hereafter used by you), likeness, and biographical material concerning you, for purposes of trade and otherwise without restriction in connection with the Master, phonograph records derived therefrom, and our record business and products.

d) No Master shall be made by, or include, unauthorized Sampling. ("Sampling", as used herein, refers to the use and/or reproduction of pre-existing musical material owned or controlled by any person other than you.)

e) You and Producer warrant and represent that you have the right to enter into this agreement and that doing, so, and that our or Record Company's exploitation of its rights hereunder shall not infringe upon the rights of any third parties. You further warrant and represent that you or Producer shall not produce or otherwise record any master recorded hereunder for a period of five (5) years from the date hereof.

f) You warrant, represent, acknowledge and agree that the Song was written by the parties set forth on Schedule A, and the copyright therein will be owned by the parties respective publishing entities in the shares set forth on such Schedule A. The writers (and their publishing designees) shall each have the sole and exclusive right throughout the universe in perpetuity to exploit and to authorize the exploitation their respective ownership share of the Song.

4) Mechanical License: To the extent written, owned, or controlled by you (or your publisher), with respect to the musical compositions embodied on the Master (the "Song(s)"):

(a) You hereby grant to us and/or Record Company the irrevocable non-exclusive right to reproduce the Song on records (including digitally delivered reproductions) and to distribute any of those records in the United States and Canada;

(b) Mechanical royalties shall be payable on net sales of such records at the following rates:

(i) on such records sold in the United States, the rate shall be the United States mechanical rate. The "United States mechanical rate" shall mean the amount equal to seventy-five percent (75%) of the minimum statutory royalty rate (without regard to playing time) provided for in the United States Copyright Act which is applicable to the reproduction of musical compositions as of the date of delivery to us of the Master; and

(ii) on such records sold in Canada, the rate shall be the Canadian mechanical rate. The "Canadian mechanical rate" shall mean the amount equal to the greater of (a) seventy-five percent (75%) of the minimum statutory royalty rate (without regard to playing time) provided for in the Canadian Copyright Act which is applicable to the reproduction of musical compositions as of the date of delivery to us of the Master and (b) two (2) cents Canadian

(iii) the mechanical royalty rate for a Controlled Composition contained on a mid-price record or budget record shall be three-fourths (3/4ths) of the United States mechanical rate or the Canadian mechanical rate; as applicable; and no mechanical royalties shall be payable on any phonograph records for which no royalties are payable by Record Company; and

(c) If the copyright in the Controlled Composition is owned or controlled by a person, firm or corporation other than you, you shall cause that person, firm or corporation to grant to us and our designees the same rights as you are required to grant to us and our designees hereunder;

(d) You hereby grant to us and our designees at no fee, royalty or other cost to us or our designees, the irrevocable, non-exclusive, worldwide right to reproduce and publicly perform each Song on audio-visual recordings, to distribute audio-visual records embodying those audio-visual recordings, and otherwise to exploit in any manner and through any media those audio-visual recordings. You grant to us and our designees, or shall cause to be granted to us, the irrevocable right to print and reproduce, at our election, the title and lyrics to the Song on the packaging of phonograph records embodying Masters throughout the world in perpetuity, without payment to you or any other person, firm or corporation of any monies or other consideration in connection therewith.

(e) Any assignment, license or other agreement made with respect to the Song shall be subject to the terms hereof.

This Agreement constitutes the entire agreement between the parties pertaining to the subject matter thereof and supersedes all prior agreements, understandings, negotiations and discussions, whether oral or written, of the parties. A waiver by either party of any term or condition of this agreement shall not be deemed or construed as a waiver of such term or condition for the future, or of any subsequent breach thereof. All remedies, rights, undertakings, obligations, and agreements contained herein shall be cumulative and none of them shall be in limitation of any other remedy, right, undertaking, obligation or agreement of either party. No breach of this agreement by either party shall be deemed material, unless the non-breaching party shall have given the other party notice of such breach and such breaching party shall fail to cure such breach within 30 days after receipt of such notice. If any part of this agreement shall be

determined to be invalid or unenforceable, the remainder of this agreement shall remain in full force and effect. The Agreement shall be governed by and construed in accordance with the laws of Florida, applicable to contracts executed, delivered and fully performed in Florida. The parties represent that they each have the full right power and authority to enter into this Agreement and that doing so shall not infringe upon the rights of any third party. The terms and conditions of this Agreement are strictly confidential and neither party will disclose such terms to any other party, except their employees, legal counsel, accountants and/or except as may be required by law or to enforce the provisions hereof.

Please confirm that the above is acceptable as soon as possible. It is our intention to execute a standard long form producer agreement but until such time, this Deal Memo shall represent a valid and binding contract with respect to the contents hereof. Counterpart signatures of this Agreement and electronically transmitted copies hereof shall be deemed original and fully binding.

Best regards, Accepted and Agreed:

_____ _____

SCHEDULE A

EXHIBIT A

soundexchange

SoundExchange, Inc.
Letter of Direction

Solely as a service and accommodation to those featured artists entitled to royalties under 17U.S.C. § 114(g)(2)(D) who specifically authorize SoundExchange to collect and distribute royalties on their behalf, SoundExchange permits such featured artists to designate that a percentage of the royalties due them from SoundExchange relating to certain sound recordings be remitted to creative personnel credited or recognized publicly for the commercially released sound recording on which the featured artist performs or other usual and customary royalty participants in such sound recording.

Please note that a performer **need not execute this Letter of Direction in order to be paid statutory royalties by SoundExchange.**

To make such a designation, the performer submitting this Letter of Direction ("LOD") must be registered with SoundExchange.

Sections with asterisks are required.

*Name of Solo Artist or Group on recording(s):

*Legal Name of Performer(s) for this LOD:

*Name of LOD Recipient ("Payee"):

*Payee Address:

Payee Telephone Number: _____

*Payee E-Mail:

*Track Name(s): The Repertoire Chart is required to complete the LOD, please submit with this form.

*Effective Date: (**choose one**)

☐Check here if LOD applies as of _____ [date]
■ Check here if LOD applies retroactively to all available SoundExchange royalties, for all LOD tracks
☐Check here if the Effective Date varies by track. Enter the Effective Dates on the Repertoire Chart.

*Payment Percentage ("Percentage"): check applicable box
☐ ____% of Performer royalties are applicable to all LOD tracks
■ Percentage varies by each track covered by this LOD. Enter percentages on the Repertoire Chart.

By signing this Letter of Direction and submitting it to SoundExchange, Performer agrees as follows:

1. Performer represents and warrants that Performer is the featured recording artist who performed on the sound recording(s) identified on the "Repertoire Chart" attached hereto as Schedule 1 (the "Recordings").

2. Performer represents and warrants that Payee is an individual credited or recognized publicly for the commercially released sound recording identified on the Repertoire Chart or is another usual and customary royalty participant in such sound recording.

3. Performer requests and authorizes SoundExchange to pay to and in the name of Payee an amount equal to Percentage of the royalties otherwise payable by SoundExchange to Performer in respect of the Recordings, thereby reducing the payments from SoundExchange to Performer. If a previous "Royalty Distribution Information for Featured Artist" or other letter of direction has been provided to SoundExchange that conflicts with this Letter of Direction, then any and all previous letters of direction or similar documents conflicting herewith are hereby revoked.

4. All monies becoming payable under this Letter of Direction shall be remitted to Payee at the address identified above or as Payee otherwise directs SoundExchange in writing. If SoundExchange requires additional information (e.g., Payee tax information) to remit payments under this Letter of Direction, then Performer and Payee shall be responsible for providing SoundExchange with such information promptly. To the extent SoundExchange is not provided with sufficient or correct information to remit payment to Payee, or checks mailed to Payee's last known address are returned, SoundExchange may hold the monies pending receipt of such information or pay the royalties to Performer.

5. SoundExchange will honor a written revocation by Performer of the designation made by this Letter of Direction. In the event of such a revocation, SoundExchange may, but need not, mail notice of the revocation to the last known address of Payee. The foregoing is without prejudice to any other contractual arrangements between Performer and Payee requiring payment of the Percentage by Performer. SoundExchange has no responsibility for Performer's performance or nonperformance of any such obligation.

6. SoundExchange may discontinue making payments under this Letter of Direction at any time, including if checks mailed to Payee's last known address are returned, Performer ceases to be a registrant of SoundExchange, or SoundExchange modifies its policies concerning letters of direction. If it does so, then SoundExchange may, but need not, mail notice thereof to the last known address of Performer and Payee, and monies that otherwise would have been payable under this Letter of Direction will be paid to Performer.

7. Performer acknowledges that SoundExchange is providing payments to Payee solely as an accommodation to Performer but that all royalties distributed by SoundExchange to Payee are taxable to Performer. Performer shall be solely responsible for providing Payee with tax paperwork required by any governmental agency, including the Internal Revenue Service, and SoundExchange shall have no obligation to provide such information to Payee.

8. SoundExchange may rely conclusively, and shall have no liability when acting, upon any written notice, instruction, other document or signature that is reasonably believed by SoundExchange to be genuine and to be authorized by Performer. SoundExchange shall not be responsible for failure to act as a result of causes beyond the reasonable control of SoundExchange. SoundExchange shall not be liable to Performer, Payee or to any third party for, and Performer agrees to defend (with counsel satisfactory to SoundExchange), indemnify and hold harmless SoundExchange from, any damages or loss (including reasonable attorney's fees) in any way related to this Letter of Direction, unless such loss is caused by SoundExchange's gross negligence or willful misconduct. The provisions of this Paragraph 8 shall survive the revocation or other termination of this Letter of Direction.

9. This Letter of Direction shall be governed by and construed in accordance with the substantive laws of the District of Columbia. Any dispute relating to or arising from this Letter of Direction shall be subject to the exclusive jurisdiction of courts sitting in the District of Columbia.

ACKNOWLEDGED AND ACCEPTED BY:

(The signature of each Performer or Authorized Signatory for each Performer is required.)

Performer Signature: _____

*Performer Printed Legal Name:_____

OR, Authorized Signatory:_____

Authorized Signatory Printed Name: _____

Date of Signature: _____

Return the original of this form to:
SoundExchange, Inc.

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Schedule 1: Repertoire Chart for Featured Artist Letter of Direction

*** Name of Solo Artist or Group on Recording(s):**
*** LOD Recipient Name:**

*** indicates a Required Field. Other fields are optional, but assist in identifying reported performances.**

	*** Sound Recording Track Name(s)**	*** Percentage Share of artist royalties, for this track, to be assigned to the LOD recipient (as a % only, do not use "points" or fractions)**	Effective Date of the LOD for this track (required if tracks have different effective dates)	Track Version (e.g., studio, re-mix version, etc)	Sound Recording Track ISRC	Album or Release Name	Label	Release Date	Other artists on this track (if applicable)
Track 1									
Track 2									
Track 3									
Track 4									
Track 5									
Track 6									
Track 7									

CUTTING EDGE ENTERTAINMENT LAW CONFERENCE
August 23-25, 2018

Attorney Ethics and Professionalism-CLE OUTLINE: Professionalism, Escrow Accounts, and the Ethics of Discovery:

David A. Dalia
Attorney at Law
830 Union Street, Suite 302
New Orleans, LA 70112
Phone: (504)-524-5541
E-Mail: davidadalia@gmail.com

With Judith A. DeFraites, Nadine Ramsey and David A. Dalia

Dedicated to Vernon P. Thomas, Esq., a truly great man.

OUTLINE

I. Some Louisiana Supreme Court disciplinary cases-July, 2017-August, 2018

II. The Ethics of Discovery
Professional Rules Which Can Affect the Ethics of Discovery

III. Professional Rules Governing Escrow Accounts

I. Some Louisiana Supreme Court disciplinary cases-July, 2017-August, 2018:

IN RE: MICHAEL M*****, NO. 17-B-1288, SUPREME COURT OF LOUISIANA**
October 16, 2017
CRICHTON, J., dissents and assigns reasons:

I dissent from the majority's imposition of discipline in this case and would suspend Respondent from the practice of law for three years—as recommended by the Hearing Committee and Justice Clark's dissent. See In Re: Michael M*****, 17-B-1288 (Clark, J., dissenting). Without question, Respondent committed serious misconduct by mismanaging his

trust account. However, what I strongly believe exacerbates Respondent's conduct is his total lack of responsiveness to the disciplinary proceedings. Specifically, Respondent did not respond to the formal charges filed by the Office of Disciplinary Council ("ODC"), forward his trust account statements to the ODC (as he said he would), object to the Hearing Committee's report and recommendation, or object to the Disciplinary Board's report and recommendation. In light of the scant evidence that Respondent cares about his bar license, I believe a harsher, three-year suspension is more appropriate.

IN RE: Ali S******, 232 So.3d 549 (Mem)**
January 9, 2018
ON APPLICATION FOR REINSTATEMENT
PER CURIAM:

This proceeding arises out of an application for reinstatement filed by petitioner, Ali S****, an attorney currently suspended from the practice of law in Louisiana.
Petitioner instructed a client to sign petitioner's name on the attorney and notary lines of pleadings to be filed with a court, failed to return a client's file, failed to provide two clients with accountings, failed to refund unearned fees to two clients, and failed to cooperate with the Office of Disciplinary Counsel ("ODC") in an investigation. For this misconduct, we suspended petitioner from the practice of law for one year and one day and ordered her to "refund in full the legal fees paid by" the two clients. In re: S**** , 14-2473 (La. 2/27/15), 161 So.3d 614.

Petitioner subsequently filed an application for reinstatement with the disciplinary board, alleging she has complied with the reinstatement criteria set forth in Supreme Court Rule XIX, § 24(E). Included with petitioner's application were documents indicating that she refunded in full the legal fees paid by the two clients who were the subjects of her disciplinary proceeding.

After considering the record in its entirety, we will adopt the adjudicative committee chair's recommendation and reinstate petitioner to the practice of law.

IN RE: HAROLD R*******, NO. 2017-B-1547, February 14, 2018**
PER CURIAM*:

This disciplinary matter arises from formal charges filed by the Office of Disciplinary Counsel ("ODC") against respondent, Harold R*******, an attorney licensed to practice law in Louisiana but currently on interim suspension pursuant to a joint petition filed by the parties in April 2017. In re: R*****, 17-0691 (La. 4/27/17), 218 So. 3d 94.
UNDERLYING FACTS
Count I - The LeDay Matter

In December 2009, while respondent was representing LeDerian LeDay in a criminal matter, Mr. LeDay was involved in an automobile accident. In August 2010, Mr. LeDay hired respondent on a contingency fee basis to represent him in his personal injury matter. The case settled in April 2011 for $10,000, at which time respondent endorsed the settlement check and

deposited it into his client trust account. However, respondent did not disburse any funds to Mr. LeDay or provide him with a settlement disbursement statement. Respondent also did not pay Mr. LeDay's medical providers or satisfy a lien for Mr. LeDay's outstanding child support. In July 2013, Mr. LeDay filed a complaint against respondent with the ODC.

Count II - The Glaude Matter

This matter arises from litigation relative to the seizure of $129,852 in currency by the United States government, and regarding which the government later initiated a civil forfeiture complaint. The currency was seized from the son of Dianne Glaude, who subsequently died. In March 2008, Ms. Glaude paid respondent $1,200 to represent her interests in her claim (as the heir to her son) for the return of the seized currency.

In November 2011, Ms. Glaude filed a complaint against respondent with the ODC. Ms. Glaude asserted that respondent failed to communicate with her in a timely fashion throughout the representation, and when she did receive a text message from him, he indicated that he was "on top of this situation." Ms. Glaude also stated that respondent failed to notify her of the proceedings in the district court or of the ruling granting the motion to strike. In response to the complaint, respondent indicated that Ms. Glaude's case was complex and despite his best efforts he could not "change the position of the Federal Government." Respondent noted that he had filed a motion seeking reconsideration of the district court's ruling in order to protect Ms. Glaude's interests, but the motion was denied.1

Respondent gave a sworn statement to the ODC in August 2012. He could not recall whether he had filed an opposition to the motion to strike and despite repeated requests, did not produce a copy of any such pleading. Asked why he did not appear in court for the hearing on the motion, respondent stated that the date was not marked on his calendar. Respondent indicated that he made efforts to effectively represent Ms. Glaude, but he also admitted that his efforts were not sufficient to obtain a positive outcome.

In 2012, Ms. Glaude filed a legal malpractice suit against respondent. The suit was settled in Ms. Glaude's favor in March 2015.

The ODC alleged that respondent's conduct violated Rules 1.1(a) (failure to provide competent representation to a client), 1.3 (failure to act with reasonable diligence and promptness in representing a client), and 8.4(a) (violation of the Rules of Professional Conduct) of the Rules of Professional Conduct.

Having found evidence of professional misconduct, we now turn to a determination of the appropriate sanction for respondent's actions. In determining a sanction, we are mindful that disciplinary proceedings are designed to maintain high standards of conduct, protect the public, preserve the integrity of the profession, and deter future misconduct. Louisiana State Bar Ass'n v. Reis, 513 So. 2d 1173 (La. 1987). The discipline to be imposed depends upon the facts of each case and the seriousness of the offenses involved considered in light of any aggravating and mitigating circumstances. Louisiana State Bar Ass'n v. Whittington, 459 So. 2d 520 (La. 1984).

Respondent knowingly violated duties owed to his clients, causing actual harm. The baseline sanction for this type of misconduct is suspension.

The record supports the following aggravating factors: a prior disciplinary record, multiple offenses, substantial experience in the practice of law, and indifference to making restitution. The record supports the following mitigating factors: remorse and remoteness of prior offenses.

Turning to the issue of an appropriate sanction, in Louisiana State Bar Ass'n v. Hinrichs, 486 So. 2d 116 (La. 1986), we conducted an extensive review of the jurisprudence in conversion cases in order to determine the appropriate sanctions for different types of conversion. We reserved disbarment, then the most serious sanction available, for conversion cases in which one or more of the following elements are present:

[T]he lawyer acts in bad faith and intends a result inconsistent with his client's interest; the lawyer commits forgery or other fraudulent acts in connection with the violation; the magnitude or the duration of the deprivation is extensive; the magnitude of the damage or risk of damage, expense and inconvenience caused the client is great; the lawyer either fails to make full restitution or does so tardily after extended pressure of disciplinary or legal proceedings.

Here, respondent's conduct falls within the scope of disbarment. The length of the deprivation in the LeDay matter is extensive (more than six years), and respondent has failed to make restitution, causing great expense and inconvenience to Mr. LeDay and to third parties. Coupled with respondent's misconduct in the Glaude matter, we find there is no justification for a downward deviation from disbarment.

JOHNSON, Chief Justice, dissents and assigns reasons.

I disagree with the majority's decision to impose disbarment in this case. Based on the record, I find a more appropriate sanction to be suspension. I agree with the hearing committee's recommendation that respondent should be suspended from the practice of law for three years, subject to two years of supervised probation with conditions.

IN RE: STEVEN G***, No. 2017-OB-1885, March 2, 2018**
ON APPLICATION FOR REINSTATEMENT:

CRICHTON, J., additionally concurs and assigns reasons:

I wholeheartedly agree with the Court's decision to deny petitioner's application for reinstatement. However, I write separately to point out petitioner's abhorrent behavior toward the disciplinary process, as well as his personal attacks against a deputy disciplinary counsel assigned to his case. Petitioner, employing inflammatory and derogatory language, accused the deputy disciplinary counsel of being a "conniving liar" and of opposing his application for reinstatement for purely personal reasons.1 This type of communication with ODC, during the pendency of his application for reinstatement, is unprofessional and unacceptable.2 In addition to this conduct, and as reflected by the record before us, petitioner has had a troublesome history with alcohol abuse and has displayed irresponsible, obnoxious, and vulgar behavior towards his daughter and her mother. In light of all of this, not only has petitioner engaged in "conduct prejudicial to the administration of justice" as found in Rule 8.4(d) of the Rules of Professional Conduct, I find petitioner has woefully failed to demonstrate he has met the criteria for reinstatement to the practice of law as required by La. Sup. Ct. R. XIX, §24 (E).

IN RE: Mark S********, 226 So.3d 1102**
PER CURIAM, NO. 2017–B–1043, October 16, 2017

UNDERLYING FACTS

The Client Trust Account Matter

The ODC received notice from respondent's bank that his client trust account was overdrawn on September 6, 2012. Despite receiving notice of the overdraft from the ODC via certified mail, respondent failed to respond to the ODC's request for an explanation and request for copies of records related to the account.
Eventually, the ODC was able to audit the account for the period from May 2012 to June 2013. The audit revealed that, on June 30, 2013, respondent had not yet disbursed at least $5,296.29 to clients or third parties. At that time, the balance in the account was $1,696.31, indicating that respondent had converted $3,599.98 in funds belonging to clients or third parties.
The ODC alleged respondent's conduct violated the following provisions of the Rules of Professional Conduct: Rules 1.15 (safekeeping property of clients or third persons), 8.1(c) (failure to cooperate with the ODC in its investigation), and 8.4(a) (violation of the Rules of Professional Conduct).

The Cormier Matter

In April 2010, Patricia Cormier hired respondent to represent her regarding an EEOC claim against the Lafayette Parish School System. She paid respondent a total of $2,000 for the representation. Respondent participated in mediation in the matter and corresponded with a representative of the school system in an attempt to present Ms. Cormier's demands to the full school board....Thereafter, respondent took no meaningful action regarding the matter. Ms. Cormier tried to contact respondent several times via e-mail, telephone, text message, and letter to obtain the status of the matter, but respondent failed to respond.

In April 2013, Ms. Cormier filed a disciplinary complaint against respondent. Despite receiving notice of the complaint via certified mail, respondent failed to respond. The ODC issued a subpoena to obtain respondent's sworn statement. Respondent was personally served.... Respondent did not appear at the sworn statement.

The ODC alleged respondent's conduct violated the following provisions of the Rules of Professional Conduct: Rules 1.3 (failure to act with reasonable diligence and promptness in representing a client), 1.4 (failure to communicate with a client), 1.16(d) (obligations upon termination of the representation), 8.1(c), and 8.4(a)....

The committee then determined that respondent acted negligently, except when he intentionally failed to cooperate with the ODC's investigations. The committee also determined that respondent's actions or omissions generally relate to his inattention to detail and failure to clearly and timely communicate with his clients and the ODC.

In light of the above, the committee recommended respondent be suspended from the practice of law for one year and one day, fully deferred, subject to two years of probation with the following conditions: (1) respondent successfully complete trust account management training; (2) respondent successfully complete at least one hour of continuing legal education on the subject of law office practice; and (3) respondent's trust account be audited and found to be in compliance on a quarterly basis.

Neither respondent nor the ODC filed an objection to the hearing committee's report.

Disciplinary Board Recommendation

After review, the disciplinary board found that the hearing committee's factual findings are not manifestly erroneous, except for its finding in the client trust account matter that respondent did not convert client funds. The board noted that, during the hearing, respondent stipulated to the findings of the ODC's audit in the client trust account matter. The audit concluded that respondent converted, commingled, and misused the funds in his client trust account and that there were procedural and accounting errors in the account records. The audit further revealed that the client trust account balance fell below the amount necessary to honor funds deposited and that respondent failed to properly document his records to ensure he was handling the account properly. Finally, the audit indicated that the total amount of funds converted was $3,599.98 because funds due to nine parties at the end of the audit period had not yet been disbursed and the funds in the account were insufficient to cover all of these pending disbursements. Based on these facts, the board determined that respondent violated the Rules of Professional Conduct as charged.

The board then determined that respondent violated duties owed to his clients and the legal profession. He acted negligently with respect to his client trust account management and his handling of Ms. Cormier's legal matter but acted knowingly and intentionally when he failed to cooperate with the ODC in its investigations. The board determined that, while no clients were harmed by respondent's mismanagement of his client trust account, the potential for harm was great. Furthermore, Ms. Cormier suffered great frustration and possible injury due to respondent's failure to properly communicate with her or properly terminate the representation following the mediation process. After considering the ABA's Standards for Imposing Lawyer Sanctions , the board determined that the baseline sanction is suspension.

In aggravation, the board found multiple offenses, bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with the rules or orders of the disciplinary agency, and substantial experience in the practice of law (admitted 1990). In mitigation, the board found only the absence of a prior disciplinary record.

After further considering this court's prior jurisprudence addressing similar misconduct, the board recommended respondent be suspended from the practice of law for one year and one day, with all but sixty days deferred, followed by two years of supervised probation with the following conditions: (1) respondent successfully complete the Louisiana State Bar Association's

("LSBA") Trust Accounting School; (2) respondent successfully complete the LSBA's Ethics School; and (3) respondent's trust account be audited on a quarterly basis.

In light of this case law, we will adopt the board's recommendation and suspend respondent from the practice of law for one year and one day, with all but sixty days deferred, followed by two years of supervised probation with the following conditions: (1) respondent successfully complete the LSBA's Trust Accounting School; (2) respondent successfully complete the LSBA's Ethics School; and (3) respondent's trust account be audited on a quarterly basis.

IN RE: LOUISE K***, NO. 2018-B-0093**
March 23, 2018

CRICHTON, J., additionally concurs and assigns reasons:

I agree with the Court's imposition of a one year and one day suspension for respondent in this matter. However, I write separately to point out the troublesome manner in which respondent has blatantly ignored the serious and proven allegations against her. Despite numerous attempts by the Office of Disciplinary Counsel to reach respondent during the course of its investigation, respondent maintained her indifference and consistent refusal to cooperate. In my view, respondent's disdain for the disciplinary process, her negligence in maintaining her client trust account, and her disregard for the Rules of Professional Conduct absolutely warrant the suspension imposed.

IN RE: TRISHA W*, NO. 2018-OB-1057, July 3, 2018**
ON APPLICATION FOR REINSTATEMENT

PER CURIAM

This proceeding arises out of an application for reinstatement to the practice of law filed by petitioner, Trisha W***, a suspended attorney.
UNDERLYING FACTS AND PROCEDURAL HISTORY

On December 28, 2013, petitioner intentionally entered the home of S.S. and his wife, J.H., without authorization.1 During her sworn statement to the Office of Disciplinary Counsel ("ODC"), petitioner acknowledged that she did not have express permission to enter the residence. Petitioner was arrested and charged with unauthorized entry of an inhabited dwelling, a felony. This charge was dropped as part of a plea bargain. On October 30, 2015, petitioner pleaded guilty to stalking and to violation of a protective order, both misdemeanors.

On December 1, 2016, the court interimly suspended petitioner from the practice of law pursuant to a joint petition by the parties. In re: Ward, 16-2003 (La. 12/1/16), 207 So. 3d 397. On September 29, 2017, the court considered petitioner's misconduct, as set forth above, and suspended her from the practice of law for one year and one day, retroactive to the date of her interim suspension. In re: W****, 17-1047 (La. 9/29/17), 227 So. 3d 251.

DECREE

Upon review of the recommendation of the hearing committee, and considering the record, it is ordered that Trisha W****, Louisiana Bar Roll number 31485, be immediately reinstated to the practice of law in Louisiana, subject to a five-year period of probation governed by the conditions set forth herein. The probationary period shall commence from the date petitioner and the ODC execute a formal probation plan. Should petitioner fail to comply with the conditions of probation, or should she commit any misconduct during the period of probation, her conditional right to practice may be terminated immediately, or she may be subjected to other discipline pursuant to the Rules for Lawyer Disciplinary Enforcement, as appropriate. All costs of these proceedings are assessed against petitioner.

IN RE: ADAM A********, NO. 2017-B-0453, October 18, 2017**
ATTORNEY DISCIPLINARY PROCEEDING

This disciplinary matter arises from formal charges filed by the Office of Disciplinary Counsel ("ODC") against respondent, Adam A********, an attorney licensed to practice law in Louisiana but currently on interim suspension pursuant to a joint petition filed by the parties in October 2014. In re: A*****, 14-2142 (La. 10/22/14), 149 So. 3d 1222.
UNDERLYING FACTS

Respondent was formerly employed by the Lafayette law firm of Andrus, Boudreaux, Landry & Coussan (the "firm"). In September 2014, the ODC received a complaint alleging that respondent had converted funds from the firm. Specifically, the complaint alleged the following facts, to which the parties herein have stipulated:

1. Respondent wrote three unauthorized checks to himself out of the client escrow account. The checks were made payable to Orange Ocean, LLC, a single member LLC with respondent listed as the sole member, in the amounts of $5,125, $2,500, and $5,000. These funds were being held in escrow as part of a commercial transaction on behalf of a client.

2. Respondent wrote two unauthorized checks to himself out of the client escrow account. The checks were made payable to A****** Enterprises, LLC, a single member LLC with respondent listed as the sole member, in the amounts of $2,000 and $800. These funds were held in escrow pursuant to an Escrow Agreement, signed by respondent, which stated that the firm would be compensated $2,500 by the client for its services. Although fees were due to the firm, no checks were made payable to the firm.

3. Respondent wrote an unauthorized check to Belle Realty of Lafayette, LLC ("Belle") in the amount of $5,910.86 from the firm's operating account, an account on which he never had signing authority. Belle is a commercial real estate company owed by respondent's parents. Respondent claimed the check was for rent payable to Belle and written on behalf of a firm client, and that the firm would be reimbursed by the client through a corresponding invoice. Respondent never billed any client for the corresponding amount paid to Belle.

4. A client wrote a $1,000 check to "Adam - Boudreaux" as a retainer for legal services. Respondent endorsed the check and deposited it into his personal account. Respondent never tendered these funds to the firm, and the firm continued to provide legal services to the client.

5. Respondent created fraudulent invoices on fictitious firm letterhead for two clients for legal services rendered. One client paid respondent $11,500 by check made payable to respondent.1 Respondent never tendered these funds to the firm, and the firm continued to provide legal services to the client.

6. Respondent performed legal services for three clients, including formation of corporate entities and drafting of resolutions, and instructed the clients to pay him cash directly for those services. The clients paid respondent cash in the total amount of $1,250. Respondent never tendered these funds to the firm.

7. A client, Blanc Bridal, LLC, paid respondent in cash for legal services rendered through the firm. Respondent created a $3,500 invoice, which he then voided. The firm did not receive the funds for the legal work performed by respondent.

8. A client, Corey Devan Willis, paid respondent $500 in cash for legal services. Respondent marked a $500 invoice to Mr. Willis as paid in full, but he never turned over these funds to the firm.

The parties stipulated to the following aggravating factors: a pattern of misconduct and multiple offenses. The board also recognized the additional aggravating factors of a dishonest or selfish motive and illegal conduct. The parties stipulated to the following mitigating factors: the absence of a prior disciplinary record, personal or emotional problems, timely good faith effort to make restitution or to rectify the consequences of the misconduct, full and free disclosure to the disciplinary board or a cooperative attitude toward the proceedings, and remorse.

DECREE

Upon review of the findings and recommendations of the hearing committee and disciplinary board, and considering the record, briefs, and oral argument, it is ordered that Adam A*********, Louisiana Bar Roll number 30370, be and he hereby is disbarred, retroactive to October 22, 2014, the date of his interim suspension. His name shall be stricken from the roll of attorneys and his license to practice law in the State of Louisiana shall be revoked. All costs and expenses in the matter are assessed against respondent in accordance with Supreme Court Rule XIX, § 10.1, with legal interest to commence thirty days from the date of finality of this court's judgment until paid.

And there are dozens of other disciplinary cases handed down by the Louisiana Supreme Court in the past year. Just search keywords “In re” AND “disciplinary”

II. The Ethics of Discovery [Legal/CLE 1.0 cr. hr.]
Rules Which Can Affect Discovery:

A. Louisiana Rules of Professional Conduct
With amendments through July1, 2016:

Rule 1.15.
Safekeeping Property
(a)
A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. ...*[holding of client funds, see III, Escrow Section, below...]*... Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.

Rule 3.2.
Expediting Litigation
A lawyer shall make reasonable efforts to expedite
litigation consistent with the interests of the client.

Rule 3.4.
Fairness to Opposing Party and Counsel
A lawyer shall not:
(a)
unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;
(b)
falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;
(c)
knowingly disobey an obligation under the rules of a tribunal, except for an open refusal based on an assertion that no valid obligation exists;
(d)
in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;
(e)
in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or

(f)
request a person other than a client to refrain from voluntarily giving relevant information to another party unless:
(1)
the person is a relative or an employee or other agent of a client, and
(2)
the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

Rule 4.1.
Truthfulness in Statements to Others
In the course of representing a client a lawyer shall not knowingly:
(a)
make a false statement of material fact or law to a third person; or
(b)
fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

Rule 8.4.
Misconduct
It is professional misconduct for a lawyer to:
(a)
Violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
(b)
Commit a criminal act especially one that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
(c)
Engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
(d)
Engage in conduct that is prejudicial to the administration of justice;
(e)
State or imply an ability to influence improperly a judge, judicial officer, governmental agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law;
(f)
Knowingly assist a judge or judicial officer in conduct that is a violation of applicable Rules of Judicial Conduct or other law; or
(g) Threaten to present criminal or disciplinary charges solely to obtain an advantage in a civil matter.

III. Professional Rules Governing Escrow Accounts:

A. Louisiana Rules of Professional Conduct
With amendments through July1, 2016:

Rule 1.15.
Safekeeping Property
(a)
A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Except as provided in (g) and the IOLTA Rules below, funds shall be kept in one or more separate interest bearing client trust accounts maintained in a bank or savings and loan association: 1) authorized by federal or state law to do business in Louisiana, the deposits of which are insured by an agency of the federal government; 2) in the state where the lawyer's primary office is situated, if not within Louisiana; or 3) elsewhere with the consent of the client or third person. No earnings on a client trust account may be made available to or utilized by a lawyer or law firm. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.
(b)
A lawyer may deposit the lawyer's own funds in a client trust account for the sole purpose of paying bank service charges on that account or obtaining a waiver of those charges, but only in an amount necessary for that purpose.
(c)
A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred. The lawyer shall deposit legal fees and expenses into the client trust account consistent with Rule 1.5(f).
(d)
Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. For purposes of this rule,
the third person's interest shall be one of which the lawyer has actual knowledge, and shall be limited to a statutory lien or privilege, a final judgment addressing disposition of those funds or property, or a written agreement by the client or the lawyer on behalf of the client guaranteeing payment out of those funds or property. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly liver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.
(e)
When in the course of representation a lawyer is in possession of property
in which two or more persons (one of whom may be the lawyer) claim interests, the property

shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

(f)

Every check, draft, electronic transfer, or other withdrawal instrument or authorization from a client trust account shall be personally signed by a lawyer or, in the case of electronic, telephone, or wire transfer, from a client trust account, directed by a lawyer or, in the case of a law firm, one or more lawyers authorized by the law firm. A lawyer shall not use any debit card or automated teller machine card to withdraw funds from a client trust account. On client trust accounts, cash withdrawals and checks made payable to "Cash" are prohibited.

A lawyer shall subject all client trust accounts to a reconciliation process at least quarterly, and shall maintain records of the reconciliation as mandated by this rule.

[Last sentence added 1/13/2015 and effective 4/1/2015]

(g)

A lawyer shall create and maintain an "IOLTA Account," which is a pooled interest bearing client trust account for funds of clients or third persons which are nominal in amount or to be held for such a short period of time that the funds would not be expected to earn income for the client or third person in excess of the costs incurred to secure such income.

(1)

IOLTA Accounts shall be of a type approved and authorized by the Louisiana Bar Foundation and maintained only in "eligible" financial institutions, as approved and certified by the Louisiana Bar Foundation. The Louisiana Bar Foundation shall establish regulations, subject to approval by the Supreme Court of Louisiana, governing the determination that a financial institution is eligible to hold IOLTA Accounts and shall at least annually publish a list of LBF approved/certified eligible financial institutions. Participation in the IOLTA program is voluntary for financial institutions. IOLTA Accounts shall be established at a bank or savings and loan association authorized by federal or state law to do business in Louisiana, the deposits of which are insured by an agency of the federal government or at an open end investment company registered with the Securities and Exchange Commission authorized by federal or state law to do business in Louisiana which shall be invested solely in or fully collateralized by U.S. Government Securities with total assets of at least $250,000,000 and in order for a financial institution to be approved and certified by the Louisiana Bar Foundation as eligible, shall comply with the following provisions:

(A)

No earnings from such an account shall be made available to a lawyer or law firm.

(B)

Such account shall include all funds of clients or third persons which are nominal in amount or to be held for such a short period of time the funds would not be expected to earn income for the client or third person in excess of the costs incurred to secure such income.

(C)

Funds in each interest bearing client trust account shall be subject to withdrawal upon request and without delay, except as permitted by law.

(2)

To be approved and certified by the Louisiana Bar Foundation as eligible, financial institutions shall maintain IOLTA Accounts which pay an interest rate comparable to the highest interest rate or dividend generally available from the institution to its non-IOLTA customers when IOLTA Accounts meet or exceed the same minimum balance or other eligibility qualifications, if any. In determining the highest interest rate or dividend generally available from the institution to its non IOLTA accounts, eligible institutions may consider factors, in addition to the IOLTA Account balance, customarily considered by the institution when setting interest rates or dividends for its customers, provided that such factors do not discriminate between IOLTA Accounts and accounts of non IOLTA customers, and that these factors do not include that the account is an IOLTA Account. The eligible institution shall calculate interest and dividends in accordance with its standard practice for non IOLTA customers, but the eligible institution may elect to pay a higher interest or dividend rate on IOLTA Accounts.

(3)

To be approved and certified by the Louisiana Bar Foundation as eligible, a financial institution may achieve rate comparability required in (g)(2) by:

(A)

Establishing the IOLTA Account as:

(1) an interest bearing checking account; (2) a money market deposit account with or tied to checking; (3) a sweep account which is a money market fund or daily (overnight) financial institution repurchase agreement invested solely in or fully collateralized by U.S. Government Securities; or (4) an open end money market fund solely invested in or fully collateralized by U.S. Government Securities. A daily financial institution repurchase agreement may be established only with an eligible institution that is “well capitalized” or “adequately capitalized” as those terms are defined by applicable federal statutes and regulations. An open end money market fund must be invested solely in U.S. Government Securities or repurchase agreements fully collateralized by U.S. Government Securities, must hold itself out as a “money market fund” as that term is defined by federal statutes and regulations under the Investment Company Act of 1940, and, at the time of the investment, must have total assets of at least $250,000,000. “U.S. Government Securities” refers to U.S. Treasury obligations and obligations issued or guaranteed as to principal and interest by the United States or any agency or instrumentality thereof.

(B)

Paying the comparable rate on the IOLTA checking account in lieu of establishing the IOLTA Account as the higher rate product; or

(C)

Paying a “benchmark” amount of qualifying funds equal to 60% of the Federal Fund Target Rate as of the first business day of the quarter or other IOLTA remitting period; no fees may be deducted from this amount which is deemed already to be net of “allowable reasonable fees.”

(4)
Lawyers or law firms depositing the funds of clients or third persons in an IOLTA Account shall direct the depository institution:
(A)
To remit interest or dividends, net of any allowable reasonable fees on the average monthly balance in the account, or as otherwise computed in accordance with an eligible institution's standard accounting practice, at least quarterly, to the Louisiana Bar Foundation, Inc.;
(B)
To transmit with each remittance to the Foundation, a statement, on a form approved by the LBF, showing the name of the lawyer or law firm for whom the remittance is sent and for each account: the rate of interest or dividend applied; the amount of interest or dividends earned; the types of fees deducted, if any; and the average account balance for each account for each month of the period in which the report is made; and
(C)
To transmit to the depositing lawyer or law firm a report in accordance with normal procedures for reporting to its depositors.
(5)
"Allowable reasonable fees" for IOLTA Accounts are: per check charges; per deposit charges; a fee in lieu of minimum balance; sweep fees and a reasonable IOLTA Account administrative fee. All other fees are the responsibility of, and may be charged to, the lawyer or law firm maintaining the IOLTA Account. Fees or service charges that are not "allowable reasonable fees" include, but are not limited to: the cost of check printing; deposit stamps; NSF charges; collection charges; wire transfers; and fees for cash management. Fees or charges in excess of the earnings accrued on the account for any month or quarter shall not be taken from earnings accrued on other IOLTA Accounts or from the principal of the account. Eligible financial institutions may elect to waive any or all fees on IOLTA Accounts.
(6)
A lawyer is not required independently to determine whether an interest rate is comparable to the highest rate or dividend generally available and shall be in presumptive compliance with Rule 1.15(g) by maintaining a client trust account of the type approved and authorized by the Louisiana Bar Foundation at an "eligible" financial institution.
(7)
"Unidentified Funds" are funds on deposit in an IOLTA account for at least one year that after reasonable due diligence cannot be documented as belonging to a client, a third person, or the lawyer or law firm.
(h)
A lawyer who learns of Unidentified Funds in an IOLTA account must remit the funds to the Louisiana Bar Foundation. No charge of misconduct shall attend to a lawyer's exercise of reasonable judgment under this paragraph (h).
A lawyer who either remits funds in error or later ascertains the ownership of remitted funds may make a claim to the Louisiana Bar Foundation, which after verification of the

claim will return the funds to the lawyer.

IOLTA Rules

(1)

The IOLTA program shall be a mandatory program requiring participation by lawyers and law firms, whether proprietorships, partnerships, limited liability companies or professional corporations.

(2)

The following principles shall apply to funds of clients or third persons which are held by lawyers and law firms:

(a)

No earnings on the IOLTA Accounts may be made available to or utilized by a lawyer or law firm.

(b)

Upon the request of, or with the informed consent of a client or third person, a lawyer may deposit funds of the client or third person into a non IOLTA, interest bearing client trust account and earnings may be made available to the client or third person , respectively, whenever possible upon deposited funds which are not nominal in amount or are to be held for a period of time long enough that the funds would be expected to earn income for the client or third person in excess of the costs incurred to secure such income; however, traditional lawyer client relationships do not compel lawyers either to invest such funds or to advise clients or third persons to make their funds productive.

(c)

Funds of clients or third persons which are nominal in amount or to be held for such a short period of time that the funds would not be expected to earn income for the client or third person in excess of the costs incurred to secure such income shall be retained in an IOLTA Account at an eligible financial institution as outlined above in section (g), with the interest or dividend (net of allowable reasonable fees) made payable to the Louisiana Bar Foundation, Inc., said payments to be made at least quarterly.

(d)

In determining whether the funds of a client or third person can earn income in excess of costs, a lawyer or law firm shall consider the following factors:

(1)

The amount of the funds to be deposited;

(2)

The expected duration of the deposit, including the likelihood of delay in the matter for which the funds are held;

(3)

The rates of interest or yield at financial institutions where the funds are to be deposited;

(4)

The cost of establishing and administering non IOLTA accounts for the benefit of the client or third person including service charges, the costs of the lawyer’s services, and the costs of preparing any tax reports required for income accruing to the benefit of the client or third person;

(5)
The capability of financial institutions, lawyers or law firms to calculate and pay income to individual clients or third persons;
(6)
Any other circumstances that affect the ability of the funds of the client or third person to earn a positive return for the client or third person. The determination of whether funds to be invested could be utilized to provide a positive net return to the client or third person rests in the sound judgment of each lawyer or law firm. The lawyer or law firm shall review its IOLTA Account at reasonable intervals to determine whether changed circumstances require further action with respect to the funds of any client or third person.
(e)
Although notification of a lawyer's participation in the IOLTA Program is not required to be given to clients or third persons whose funds are held in IOLTA Accounts, many lawyers may want to notify their clients or third persons of their participation in the program in some fashion. The Rules do not prohibit a lawyer from advising all clients or third persons of the lawyer's advancing the administration of justice in Louisiana beyond the lawyer's individual abilities in conjunction with other public spirited members of the profession. The placement of funds of clients or third persons in an IOLTA Account is within the sole discretion of the lawyer in the exercise of the lawyer's independent professional judgment; notice to the client or third person is for informational purposes only.
(3)
The Louisiana Bar Foundation shall hold the entire beneficial interest in the interest or dividend income derived from client trust accounts in the IOLTA program. Interest or dividend earned by the program will be paid to the Louisiana Bar Foundation, Inc. to be used solely for the following purposes:
(a)
to provide legal services to the indigent and to the mentally disabled;
(b)
to provide law related educational programs for the public;
(c)
to study and support improvements to the administration of justice; and
(d)
for such other programs for the benefit of the public and the legal system of the state as are specifically approved from time to time by the Supreme Court of Louisiana.
(4)
The Louisiana Bar Foundation shall prepare an annual report to the Supreme Court of Louisiana that summarizes IOLTA income, grants, operating expenses and any other problems arising out of administration of the IOLTA program. In addition, the Louisiana Bar Foundation shall also prepare an annual report to the Supreme Court of Louisiana that summarizes all other Foundation income, grants, operating expenses and activities, as well as any other problems which arise out of the Foundation's implementation of its corporate

purposes. The Supreme Court of Louisiana shall review, study and analyze such reports and shall make recommendations to the Foundation with respect thereto.

B. Rules for Lawyer Disciplinary Enforcement (Louisiana Supreme Court Rule XIX) With amendments through January 27, 2016

Section 28. Maintenance of Trust Accounts by Lawyers; Access to Lawyers' Financial Account Records; Overdraft Notification.

A. Clearly Identified Trust Accounts in Financial Institutions Required.

(1) Lawyers who practice law in Louisiana shall deposit all funds held in trust in a bank or similar institution in this state, or elsewhere with the consent of the client or third party, in accounts clearly identified as “trust” or “escrow” accounts, referred to herein as “trust accounts,” and shall take all steps necessary to inform the depository institution of the purpose and identity of the accounts. Funds held in trust include funds held in any fiduciary capacity in connection with a representation, whether as trustee, agent, guardian, exec
utor or otherwise. Lawyer trust accounts shall be maintained only in financial institutions that execute the agreement described in paragraph D below.

(2) Every lawyer engaged in the practice of law in Louisiana shall maintain and preserve for a period of at least five years, after final disposition of the underlying matter, the records, check stubs, vouchers, ledgers, journals, closing statements, accounts or other statements of disbursements rendered to clients or other parties with regard to trust funds
or similar equivalent records clearly and expressly reflecting the date, amount, source, and explanation for all receipts, withdrawals, deliveries and disbursements of the funds or other property of a client.

B. Access to Lawyers' Financial Account Records.

Every lawyer practicing or admitted to practice law in Louisiana shall, as a condition thereof, be conclusively deemed to have consented to the production by the depository institution of records of all financial accounts maintained by the lawyer in any bank or similar institution, and the overdraft reporting requirements mandated by this rule.

C. Request for Production of Records.

A request by disciplinary counsel directed to a bank or other financial institution for production of records pursuant to this Section shall certify that the request is issued in accordance with the requirements of this Section and Section 29 of these Rules of Lawyer Disciplinary Enforcement.

D. Overdraft Notification Agreement Required.

A financial institution shall be approved as a depository for lawyer trust accounts if it files with the Board an agreement, in a form provided by the Board and approved by the

Court, to report to the Office of Disciplinary Counsel whenever any properly payable instrument is presented against a lawyer trust account containing insufficient funds, irrespective of whether or not the instrument is honored. The Board shall administer securing participation of the financial institutions, and shall annually publish a list of the financial institutions that have executed overdraft notification agreements with the Board. No trust account shall be maintained in any financial institution that does not agree to so report. Any such agreement shall apply to all branches of the financial institution and shall not be cancelled except upon thirty (30) days notice in writing to the Board. Notification of trust or escrow account overdrafts shall be made in accordance with La. R. S. 6:332 and La. R. S. 6:333(F)(16).

Section 29. Verification of Financial Accounts.

A.

Generally.

Whenever disciplinary counsel has probable cause to believe that financial accounts of a lawyer that contain, should contain, or have contained funds belonging to clients or third parties have not been properly maintained or that the funds have not been properly handled, disciplinary counsel shall request the approval of the chair of a hearing committee selected in order from the roster established by the board to initiate an investigation for the purpose of verifying the accuracy and integrity of all accounts maintained by the lawyer in any bank or similar institution. If the reviewing member approves, counsel shall proceed to verify the accuracy of the financial accounts. If the reviewing member denies approval, counsel may submit the request for approval to one other chair of a hearing committee selected in order from the roster established by the board.

B. Confidentiality.

Investigations, examinations, and verifications shall be conducted so as to preserve the private and confidential nature of the lawyer's records insofar as is consistent with these rules and the lawyer client privilege.

Appendix F to Disciplinary Rules: Supreme Court of Louisiana Trust Account Disclosure & Overdraft Notification Authorization

Pursuant to the inherent, plenary and Constitutional authority of the Louisiana Supreme Court to regulate the practice of law, and in accordance with Supreme Court Rule XIX, every attorney licensed to and engaged in the practice law in Louisiana is required to disclose the existence of a trust or escrow account (or declare that because of the nature of his/her practice that he/she is not required to maintain such an account). Every attorney who maintains a trust or escrow account as required by the Rules of Professional Conduct is required to maintain such account with a federally insured financial institution with whom the attorney has executed an agreement which authorizes the financial institution to provide written or electronic notification to the Office of Disciplinary Counsel of any account overdraft. Use of this form complies with the rules of the Louisiana Supreme Court.

C. From the Trust Account Disclosure & Overdraft Notification Authorization Form:

A. All attorneys holding funds of clients or third persons must maintain a separate account for such funds (commonly referred to a trust or escrow account);

B. Every attorney maintaining a qualified pooled trust or escrow account must participate in the
Interest on Lawyers Trust Account (IOLTA) Program administered by the Louisiana Bar Foundation; and

C. All attorneys who are required to maintain trust or escrow accounts must do so with federally insured financial institutions with which they have executed agreements requiring the financial institutions to provide to the Office of Disciplinary Counsel written or electronic notification of any overdraft incident created on such accounts.

(Notice to Financial Institution:
Pursuant to Legislative Act 249 of the 2005 Regular Session, notice to the Office of Disciplinary Counsel shall be issued after five (5) business days have passed from the date of notice to the attorney, and whether or not the account remains in overdraft status; but such notice will not issue where the overdraft was created solely by bank charges imposed or when charges are imposed through bank error. Costs associated with providing this notice may be charged to the attorney and deducted from the interest created on the trust or escrow account. The act provides that no civil or criminal action may be based upon a disclosure or non-disclosure of financial records made pursuant to the Act.)

25th Annual

Cutting Edge CE Conference

2017 Annual Meeting

"Damage Control: Representing Athletes and Celebrities in the Media and the Courtroom"

New Orleans, Louisiana
Thursday, August 24, 2017
2:45-3:45pm

Sabrina Ment, Esq. / LaPolt Law, P.C.
Supplemental CLE Materials

CONFIDENTIALITY AND NON-DISCLOSURE AGREEMENT

THIS CONFIDENTIALITY AND NON-DISCLOSURE AGREEMENT ("Agreement") is made on this___ day of _____, 20__ by _____ ("you" or "your").

You hereby agree as follows:

1. Any and all information disclosed to or obtained by you concerning or relating to _____ p/k/a "_____" ("I" "me" or "my") or my family, pursuant to your communications with me or otherwise (collectively, the "Confidential Information"), shall be strictly confidential, and you hereby agree not to disclose any such Confidential Information to any individual or entity. You agree that in the event of any disclosure in violation of this Agreement, I shall have the right to seek, among other things, (a) injunctive relief and (b) monetary damages including without limitation recovery or disgorgement of the monies or other consideration received in connection with such disclosure, if any.

2. (a) Given the unique situation of my celebrity status, you recognize and acknowledge any other information obtained by you during the course of business dealings (or otherwise) with me, including all information about my life stories and experiences, friends, family members, and business ventures, is Confidential Information. You further acknowledge that I have taken precautions, such as this Agreement, to keep such information confidential.

(b) You agree that you shall not ever disclose or communicate to any person, firm, or corporation, in any manner, any Confidential Information. Accordingly, you agree to hold in strictest confidence any information related to me and my family and shall not, directly or indirectly, use, disclose, publish, disseminate, or cause to be used, disclosed, published, or disseminated, or otherwise make accessible to any person or entity (including, without limitation, newspapers, periodicals, magazines, publications, television stations, publishers, weblogs, websites and any other media entity or enterprise involved in the print or electronic media, including individuals working for, or on behalf of, any of said entities). This obligation applies both during the term of this Agreement and subsequently whether or not you continue to do business (or otherwise) with me.

(c) You acknowledge that the Confidential Information referred to in this Agreement is sufficiently secret so that I derive personal and economic value from the information remaining confidential and not being available to others who could obtain economic value from its disclosure or use. You further acknowledge that the matters covered in this Agreement are important, material, confidential, and greatly affect the successful business, life, and goodwill of me and my family and you hereby acknowledge that I will suffer irreparable and substantial damages and injury in the event you disseminate any information whatsoever about me, my family or Confidential Information or otherwise violate the terms of this Agreement. You agree that I may enforce this Agreement by seeking equitable and injunctive relief, as well as monetary damages, attorneys' fees and costs of a suit.

AGREED AND ACCEPTED, as of the date first referenced above.

_____
Signature

_____
Print name

_____
Phone number

_____
Email address

_____
Position/Relationship

MUTUAL BUSINESS NON-DISCLOSURE AGREEMENT

Date: _____

	VENDOR (the "Vendor")	**COMPANY** (Each of the below shall be collectively referred to herein as the "Company")
NAME		
ADDRESS		

In order to pursue discussions regarding the mutual business purpose identified in Section 2 below ("Business Purpose"), Vendor and Company (each, a "Party" and collectively, the "Parties") recognize that there is a need to disclose to each other Confidential Information (as defined herein) and to provide for mutual agreements to protect such Confidential Information and restrict its use strictly to the pursuit of said Business Purpose. In consideration of the mutual promises contained herein, the Parties agree as follows:

1. Effective Date; Term. This Mutual Non-Disclosure Agreement ("Agreement") shall become effective on and as of the date listed above and continue for as long as the Parties continue to pursue the Business Purpose (the "Term"). In the event the Parties no longer pursue the Business Purpose, this Agreement shall terminate, subject to the provisions of Section 13 hereof.

2. Mutual Business Purpose of Disclosure. The Parties desire to receive Confidential Information from one another for the following reason(s) (the "Business Purpose"): discussion of a possible business transaction and all purposes incidental or related thereto.

3. Definition of Confidential Information and Exclusions.

a. For the purposes of this Agreement, "Confidential Information" shall mean any and all information or material of a Party, whether revealed orally, visually, or in tangible or electronic form, that is not generally known to the public, including, information relating to personnel, employees, consultants and contractors, marketing strategies, sales and marketing data, financial information, customer lists (including the identity of actual and potential customers), supplier lists (including the identity of actual and potential suppliers), operations, business procedures, future technical, business, and marketing plans, product strategies, trade secrets, know-how, capabilities, product designs, drawings, specifications, program code, notes, analyses, compilations, studies, forecast, interpretations, and any Work Product (as defined herein). For purposes of this Agreement, "Work Product" shall mean any notes or documents prepared by any Party containing, that derive from, reflect or are based on, in whole or in part, any Confidential Information of a Disclosing Party. In addition to the foregoing, Confidential Information includes all information in tangible form and marked "confidential" or with words of similar effect and all information identified as confidential at the time of oral disclosure, although such markings and disclosures are not required for such information to be deemed Confidential Information hereunder.

b. For the purposes of this Agreement, any Party receiving Confidential Information hereunder is referred to as the "Receiving Party" and any Party disclosing Confidential Information hereunder is referred to as the "Disclosing Party". Confidential Information shall not include information which: (i) is in or has entered the public domain through no breach of this Agreement or other act by the Receiving Party; (ii) Receiving Party rightfully knew prior to the time that it was disclosed to Receiving Party hereunder; or (iii) Receiving Party received from a third party lawfully possessing and lawfully entitled to disclose such information without breach of this Agreement.

4. Obligations of Confidentiality. Each Receiving Party understands and agrees that it will be deemed to be in a relationship of confidence with respect to the Confidential Information disclosed to it by any Disclosing Party. Each Receiving Party will maintain the Disclosing Party's Confidential Information in the strictest confidence and will not disclose such Confidential Information to any third party or use or reproduce such Confidential Information except as is reasonably necessary in furtherance of the Business Purpose, without the prior written consent of the Disclosing Party. Each Receiving Party will keep and maintain the Disclosing Party's Confidential Information in a safe and secure location. Each Receiving Party will use reasonable steps to protect the Disclosing Party's Confidential Information from unauthorized or inadvertent disclosure. Any

Receiving Party may disclose the Disclosing Party's Confidential Information to its affiliates, officers, directors, partners, employees, accountants, lawyers, advisors and other representatives (collectively "Related Persons"), but only to the extent necessary to pursue the Business Purpose. Each Receiving Party will instruct all such Related Persons to carry out their respective obligations under this Agreement not to disclose such Confidential Information to third parties and not to use it for any purpose (other than to pursue the Business Purpose), without the prior written consent of the Disclosing Party. Each Receiving Party shall be responsible for any acts or omissions of its Related Persons that result in a breach of this Agreement. Each Receiving Party understands and agrees that (a) the Disclosing Party has not made and is not making any representations or warranties, express or implied, as to the accuracy, completeness or fitness for any particular purpose of any Confidential Information of such Disclosing Party, and (b) a Disclosing Party shall not have any liability to Receiving Party relating to or resulting from Receiving Party's use of any Confidential Information of such Disclosing Party or any inaccuracies or errors therein or omissions therefrom.

5. Return of Materials. Upon the written request of a Disclosing Party at any time, the Receiving Party will promptly return to the Disclosing Party all Confidential Information and copies thereof in the possession of the Receiving Party or its Related Persons, and promptly return or destroy any Work Product in the possession of that party or its Related Persons unless otherwise specifically instructed in writing by the Disclosing Party.

6. Notification of Disclosure. If a Receiving Party discovers any actual or threatened disclosure or publication of any of Disclosing Party's Confidential Information to any third party by any of the Receiving Party's Related Persons, the Receiving Party shall promptly notify the Disclosing Party of such disclosure or publication and will, at the Receiving Party's own expense, use all reasonable efforts to prevent any future disclosure or publication.

7. Excluded Confidential Information. The obligations imposed by this Agreement shall not apply with respect to any portion of Confidential Information which: (i) has been approved for release by written authorization of the Disclosing Party; or (ii) is required to be disclosed pursuant to a final and binding order of a governmental agency or court of competent jurisdiction; provided that the Disclosing Party has been given reasonable notice of the pendency of such an order and the opportunity to contest such order, the Receiving Party discloses only such Confidential Information required to be disclosed by such order, and the Receiving Party uses its commercially reasonable efforts to secure confidential treatment of such Confidential Information.

8. Injunctive Relief. The Parties acknowledge and agree that the unauthorized disclosure, use or disposition of Confidential Information of a Disclosing Party would cause irreparable harm and significant injury to such Disclosing Party which would be difficult to ascertain and that each Party derives economic value from its own Confidential Information remaining confidential and unavailable to others who could obtain economic value from its disclosure or use. Accordingly, the Parties agree that the Disclosing Party may seek an ex parte restraining order, preliminary injunction, and/or permanent injunction without the need to post a bond in the event of any breach or threatened breach of the obligations set forth in Section 4 of this Agreement, in addition to any other remedies that may be available to the Disclosing Party at law or in equity, including without limitation recovery or disgorgement of the monies or other consideration received in connection with such disclosure, if any.

9. Ownership of Confidential Information. Nothing in this Agreement shall convey to any Receiving Party any rights in or to the Confidential Information of the Disclosing Party, whether rights of ownership, license, patent, copyright, trademark, trade secret or other proprietary right and interest therein.

10. Governing Law and Attorneys Fees. This Agreement will be governed and construed in accordance with the laws of the State of California, without regard to or application of choice of law rules or principles. Any legal suit, action or proceeding arising out of or relating to this Agreement shall be commenced in a state or federal court of or in the State of California and all Parties irrevocably submit to the jurisdiction and venue of such court in any such suit, action or proceeding between or among the Parties and any of their respective Related Persons. If any litigation or other proceeding between or among the Parties and their respective Related Persons is commenced in connection with or related to this Agreement, the prevailing Party may seek reasonable attorneys' fees and costs and expenses incurred in connection therewith.

11. Severability. The provisions of this Agreement are severable, and if any provision hereof shall be found invalid, illegal, void or unenforceable, in whole or in part, the remaining provisions or portions thereof shall remain in full force and effect to the maximum extent permissible.

12. No Waiver. No breach of any covenant, condition, agreement, warranty or representation made herein shall be deemed waived unless expressly waived in writing by the Disclosing Party. No waiver shall be deemed to be a waiver or any other matter, whenever occurring and whether identical, similar or dissimilar to the matter waived.

13. **Duration.** All obligations imposed hereunder shall continue in force throughout the Term; ***provided, however,*** that Vendor's obligations pursuant to Section 4 hereof shall survive indefinitely after any termination of this Agreement. Further, after any termination of this Agreement, the provisions of Sections 6, 8, 9, 10, 11, 12, and 14 shall also survive indefinitely.

14. **No Limitations of Other Protections.** The protections this Agreement provides to the Parties as to their respective Confidential Information hereunder shall be in addition to, and not in limitation of, any other protection provided to the Parties as to such Confidential Information under applicable law or in equity relating to trade secrets, unfair competition, intellectual property or otherwise.

15. **Counterparts.** The Agreement may be executed in counterparts each of which when executed by the Parties shall be deemed to be a complete original document. An electronic or facsimile copy of the executed Agreement or counterpart thereof shall be deemed, and shall have the same legal force and effect as, an original document.

16. **Entire Agreement.** This Agreement constitutes the entire agreement of the Parties regarding the subject matters hereof and may not be modified except by a written instrument signed by an authorized representative of each Party.

17. **Assignment.** Company shall have right to assign any of Company's rights hereunder, in whole or in part. Vendor shall not have the right to assign any of Vendor's rights hereunder.

18. **No Joint Liability.** The obligations of the Parties hereunder are several and not joint, and each Party shall be solely and separately liable for complying with its respective obligations or any liabilities associated with any failure to comply.

IN WITNESS WHEREOF, the Parties hereto have caused this Agreement to be executed by their duly authorized representatives.

VENDOR	**COMPANY**
By: _____	**By:** _____
Name: _____	**Name:** _____
Title: _____	**Title:** _____
Date: _____	**Date:** _____

Varying Morals Clauses

- If during the Term, Artist is **charged with, or has committed a crime, or engages in any actions involving moral turpitude or is arrested for driving under the influence, arrested for any crime involving public intoxication, or brings Company into public disrepute, contempt, scandal or ridicule, engages in any immoral or scandalous actions tending to bring Artist into public disrepute, contempt, scandal or ridicule, or tending to shock, insult or offend the people of this nation or any class or group thereof**, then Company has the right to terminate this Agreement and Artist will not be entitled to any fee whatsoever, and Artist must return any fees paid pursuant to this Agreement within five (5) business days after Agreement termination and Company is no longer responsible for any future payments. Company's decision to terminate hereunder must be exercised, if at all, no later than forty-five (45) days after the facts giving rise to such right under this paragraph are brought to Company's attention.

- Company may terminate this Agreement without cause at any time upon fifteen (15) days' written notice, provided that the monies payable to Artist pursuant to Section __ shall nevertheless be promptly paid to Artist if Artist has rendered the Services as of such termination date or has incurred costs in reliance on this Agreement. In the event of Artist's material, uncured breach of the Agreement, Company may immediately terminate this Agreement and shall also have the right to pursue any and all other legal remedies, including without limitation the right to injunctive or other equitable relief. If Artist **becomes involved in a media scandal or is charged with a felony,** Company shall have the right to immediately terminate the Agreement and Artist shall be entitled to retain all monies previously paid hereunder. Upon any early termination pursuant to this Section, the exclusivity restrictions of Section 8 shall immediately cease.

- Company shall have the right but not the obligation to terminate this Agreement at any time upon ten days prior written notice to the Artist if Artist is **found by public opinion to have engaged in acts that are morally reprehensible, or are convicted of a felony**. The Artist shall have the right but not the obligation to terminate this Agreement at any time upon ten days prior written notice to Company if any officers or employees of Company are found by public opinion to have engaged in acts that are morally reprehensible or are convicted of a felony, or if Company disbands or changes its name, or if Company becomes subject to any restrictions on its ability to distribute and/or sell its products in the United States.

- Company shall in its sole discretion have the right to terminate this Agreement for cause if Artist is **convicted or pleads guilty or nolo contendere to criminal misconduct constituting a felony or gross misdemeanor involving a breach of ethics, moral turpitude or other immoral conduct which reflects adversely upon the reputation or interests of the Company**, its Contracted Parties or Channels of Trade. This Section expressly excludes any conduct, behavior, incidents or actions which tend to be in conformance with the current persona of the Artist.

Survey of Intellectual Property
Branding, Trademarks, Domains and Product Launching

By Gregg R. Zegarelli, Esq.

Biography

Gregg R. Zegarelli, Esq.

Mr. Zegarelli has practiced law for more than 25 years and is admitted to practice law in the Commonwealth of Pennsylvania, District of Columbia and State of Illinois. He is a graduate of Duquesne University with dual major areas in Accounting and History and dual minors in Philosophy and Political Science. He is a graduate of the Duquesne University Law School and is qualified to sit for the C.P.A. examination.

Mr. Zegarelli is Adjunct Professor in the Duquesne University McAnulty Graduate School teaching in the Master of Leadership graduate degree program. His courses include *The Leader as Entrepreneur* and *Developing Leadership Character Through Adversity.*

Mr. Zegarelli remains a practicing attorney. He practices in all transactional areas of law, with a concentration in technology and media law, and the law of corporate and business transactions. His representation includes advising on business formation and entrepreneurial ventures, commercial and corporate litigation, venture capital, franchising, mergers and acquisitions, licensing of technology and information, employee and contractor agreements, and intellectual property matters such as copyright, media, trade secret and trademark law.

Mr. Zegarelli serves as general counsel for businesses ranging from the startup to large enterprises. He has been retained as special counsel for technology development contracts, such as for the automated parking facility at the Pittsburgh International Airport. He has personally negotiated with a wide-range of well-known companies, including Acclaim, Borland, Coca-Cola, Disney, Facebook, General Electric, Google, Intel, Lion's Gate, Mattel, McKesson, Metro-Goldwyn-Mayer (MGM), Microsoft, Sony and Xerox.

Mr. Zegarelli has also earned a very unusual credential: Mr. Zegarelli represents clients in federal and state courts and has successfully litigated disputes with extremely complicated deliverable logistics. Mr. Zegarelli has been selected several times as an Arbitrator (Judge) for the American Arbitration Association, and has presided over more than 100 arbitrations in the largest class action settlement in history. Mr. Zegarelli was appointed to the panel of neutrals for the United States Copyright Arbitration Royalty Panel for two years prior to the statutory internalization and was appointed by the United States District Court for the Western District of Pennsylvania as an Early Neutral Evaluator. Mr. Zegarelli was lead counsel in *Borings v. Google,* the first case against Google for Street View trespass, with a successful reversal at the Third Circuit that resulted in the only known judgment against Google as an intentional trespasser.

Mr. Zegarelli was appointed as the first Chairman of the ACBA Allegheny Lawyers Online program—the first telecommunications service to be sponsored by a local bar association. Mr. Zegarelli has been interviewed by television and Internet media, such as CBS-affiliate KDKA (Internet gambling), CNN (electronic privacy), and USLive (getting inventions to market), and he is author of the article on the *Computer Fraud and Abuse Act* for the *MacMillan (Gale Group) Encyclopedia*, and *Current Technology Issues* by the *Ohio CPA Journal*. Mr. Zegarelli also was interviewed by on *TBC Today* regarding entrepreneurism and appeared on WMNY Pittsburgh Business Radio discussing intellectual property issues and ethics. Mr. Zegarelli was Councilman in the Municipality of Penn Hills, and President of the Student Government Association of Duquesne University. Mr. Zegarelli was authored and published *The Sunshine Act,* republished by the *Pittsburgh Legal Journal* at 135 P.L.J. 39, 1988, and cited by the Pennsylvania Statutes (Purdon Supp. 65 P.S. § 271). He was chosen by the *Pittsburgh Post-Gazette* as "Ones to Watch in the 90's."

Mr. Zegarelli is a frequent lecturer for accredited continuing education series on technology, social media, entrepreneurship, law office management and intellectual property issues. He has the distinction of being a member of the faculty for attorney CLE and accountancy CPE courses. Mr. Zegarelli is the author of ONE®, the Unified Gospel of Jesus, in which he has systematically unified the four Gospels with a new 3,000 item reference system. He is a member of the District of Columbia, Illinois and Allegheny County

Bar Associations. He is admitted to the U.S. Third Circuit and the U.S. Supreme Court. He is a member of the Duquesne University McAnulty College and Graduate School of Liberal Arts Alumni Advisory Committee. He is a board member of the MLR Charitable Foundation Advisory Board. Mr. Zegarelli is listed in Who's Who in Practicing Attorneys. Mr. Zegarelli's personal website is http://www.greggzegarelli.com.

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I. Interplay of Law and Accountancy.

To start at the beginning, the subject-matter of intellectual property and branding is fundamentally about the legal acquisition, maintenance and protection of certain less-traditional types of property. Bringing this subject-matter to the accountancy profession is not to suggest that licensed accountants should be providing advice on such things. The purpose is to acclimate members in the accountancy profession to certain pervasive fundamental issues affecting client commercial enterprises, adding value and perspective to commercial client teams. Lawyers and accountants serve a fundamental role in helping clients achieve their goals in an increasingly competitive marketplace. Whether a tax question is introduced by the lawyer, or an intellectual property question is introduced by the accountant, the important thing is that the professional team helps the mutual client achieve the client's personal and professional goals.

A. Practicing Law.

1. **Pennsylvania Statute.**

   42 Pa.C.S.A. § 2524. Penalty for unauthorized practice of law.

   (a) General rule.—[Except as generally relating to services in a law firm], any person, including, but not limited to, a paralegal or legal assistant, who within this Commonwealth shall practice law, or who shall hold himself out to the public as being entitled to practice law, or use or advertise the title of lawyer, attorney at law, attorney and counselor at law, counselor, or the equivalent in any language, in such a manner as to convey the impression that he is a practitioner of the law of any jurisdiction, without being an attorney at law or a corporation complying with 15 Pa.C.S. Ch. 29 (relating to professional corporations), commits a misdemeanor of the third degree upon a first violation. A second or subsequent violation of this subsection constitutes a misdemeanor of the first degree.

2. **Pennsylvania Bar Association.**

   ...The Unauthorized Practice of Law Committee of the Pennsylvania Bar Association ("Committee") has opined that "the counseling, preparation and/or filing of real estate tax assessment appeal forms and/or representation of real property owners by persons not licensed to practice law in Pennsylvania . . . such as tax consultants, certified public accountants, public accountants, real estate brokers and/or salespersons and state certified real estate appraisers and other appraisers before the various county boards of assessment appeals throughout Pennsylvania constitutes the Unauthorized Practice of Law."...Only attorneys-at-law licensed to practice in the Commonwealth of Pennsylvania may represent aggrieved parties at the appeal hearings before the Board.... *Westmoreland County v. RTA Group,* (PA Ct Comm. Pleas, 1998).

3. **Cases.**

   a. Under Pennsylvania law, the question of whether a particular activity of an attorney not licensed in the Commonwealth constitutes the practice of law depends upon whether the activity involves the exercise of legal judgment. *Haymond v. Lundy,* E.D.Pa.2001, 174 F.Supp.2d 269, vacated 91 Fed.Appx. 739, 2003 WL 22426920.

   b. Under Pennsylvania law, the "practice of law" is not confined to services rendered in relation to a particular court proceeding; rather, the practice of law may also include other aspects of rendering legal advice regardless of whether a matter is pending in a court, such as preparing legal instruments and contracts which secure legal rights. *In re Benninger,* Bkrtcy.W.D.Pa.2006, 357 B.R. 337.

c. Under Pennsylvania law, standard for when person is engaged in practice of law is whenever and wherever services require legal knowledge, training, skill, and ability beyond those possessed by average man. *In re Campanella,* Bkrtcy.E.D.Pa.1997, 207 B.R. 435.

d. Under Pennsylvania law, preparation of pleadings and other types of legal papers and giving advice in legal matters constitutes practice of law, because all of these activities require familiarity with legal principles which are beyond layperson's knowledge. *In re Campanella,* Bkrtcy.E.D.Pa.1997, 207 B.R. 435.

e. Under Pennsylvania law, determination of whether person has engaged in unauthorized practice of law focuses on whether activity in question involves exercise of legal judgment. *In re Stone,* Bkrtcy. W.D.Pa.1994, 166 B.R. 269.

f. Legal assistant's arrangement with attorney by which attorney would review assistant's work did not shield legal assistant from contempt liability pursuant to order prohibiting unauthorized practice of law, where attorney merely checked documents for glaring mistakes and had no way of knowing what legal advice assistant had given or whether that advice was proper. *In re Stone,* Bkrtcy.W.D.Pa.1994, 166 B.R. 269.

g. Furnishing advice concerning insurance, road, vehicle, and labor laws and regulations, and drafting contracts of sale, lease, assignment, and similar instruments constitutes the practice of law. *Blair v. Motor Carriers Service Bureau,* 40 Pa. D. & C. 413 (1941).

h. Habitual drafting of legal instruments for hire constitutes the practice of law even though the individual so engaged makes no attempt to appear in court or to give the impression he is entitled to do so. *Northampton County Bar Ass'n v. Young,* 1 Monroe L.R. 94, 26 Northam. 363 (1939).

i. Where the application of legal knowledge and technique is required, the activity constitutes the practice of law, no matter what the tribunal. Real estate men may draw deeds if such action be routine and only where the drafting of deeds is an incident of their business. *Kountz v. Rowlands,* 90 Pitts.L.J. 193 (1942).

j. Application for corporation charters, for merger, consolidation or dissolution of corporations, for the increase or decrease of capital stock, and for the issuance of corporate securities, constitutes the unauthorized practice of law. *Blair v. Service Bureau,* 87 Pitts.L.J. 155 (1939).

k. Respondent's habitual or regular preparation of legal documents for a fee indicated that, not being a member of any bar nor authorized to practice law in any jurisdiction, he was actively engaged in the unauthorized practice of law. *Matter of Arthur,* Bkrtcy.E.D.Pa.1981, 15 B.R. 541, stay denied 18 B.R. 626.

l. Stenographer making practice of drafting legal instruments for hire was layman engaged in "practicing law" within prohibition thereof by 17 P.S. § 1608 (repealed). *Childs v. Smeltzer,* 171 A. 883, 315 Pa. 9, Sup.1934.

m. Practice of law by drafting legal instruments was prohibited only when drafting thereof was not connected with immediate business of person preparing them who, though not member of bar, held himself out as specially qualified. *Childs v. Smeltzer,* 171 A. 883, 315 Pa. 9, Sup.1934.

n. Drafting of partnership agreements constitutes practice of law. *Blair v. Motor Carriers Service Bureau,* 40 Pa. D. & C. 413 (1941).

o. The mere filling out in behalf of applicants of applications for issuance or for renewal of restaurant, hotel, or club liquor licenses was a simple matter requiring simple answers to simple questions. In and by itself such filling out of forms did not constitute the practice of law. Such clerical action, however, could not be accompanied by an interpretation of the law or by an application of the law to the particular facts of a particular applicant. The defendant was required to be careful to prevent the impression from arising that he was giving legal advice. *Walker v. Kahn,* 31 Pa. D. & C. 620, 86 Pitts.L.J. 173 (1938).

p. Furnishing advice concerning tax laws and methods of business organization and operation likely to reduce the amount of tax liability constitutes unauthorized practice of law. *Blair v. Service Bureau,* 87 Pitts.L.J. 155 (1939).

q. Where defendants through extensive advertising solicited the patronage of the general public, represented themselves as utility and interstate commerce consultants and as tax experts, and conducted a corporation service, were engaged in the unauthorized practice of law. *Blair v. Service Bureau,* 87 Pitts.L.J. 155 (1939).

B. Legal Privilege?

1. *See United States v. Bowman*, 358 F.2d 421 (3rd Cir. 1966) "The Pennsylvania statute [63 P.S. § 9.11a.] provides as follows:

"Except by permission of the client or person or firm or corporation engaging him or the heirs, successors or personal representatives of such client or person or firm or corporation, a certified public accountant or a person employed by a certified public accountant shall not be required to, and shall not voluntarily, disclose or divulge information of which he may have become possessed relative to and in connection with any professional services as a certified public accountant other than the examination of audit of or report on any financial statements, books, records or accounts, which he may be engaged to make or requested by a prospective client to discuss. The information derived from or as the result of such professional services shall be deemed confidential and privileged: Provided, however, That nothing herein shall be taken or construed as modifying, changing or affecting the criminal or bankruptcy laws of this Commonwealth or of the United States.

"The Pennsylvania statute excludes from the privilege which it creates, in the terms italicized, the material to which the summons here relates. Bowman's counsel during the hearing below specifically stated 'that all the pertinent information in the possession or custody of Mr. Bowman, or anyone at Main, LaFrentz & Company, all the pertinent facts, were derived from the books and records of the taxpayer corporation by the Respondent (Bowman) or people working under his supervision and direction. * * *'

"Since the statute is in derogation of the common law which does not accord an accountant-client privilege the privilege which it accords must be strictly construed. It has long been settled in Pennsylvania that changes in the common law effected by statute must be clearly evidenced therein. *Buradus v. General Cement Products Co.*, 159 Pa. Super. 501, 48 A.2d 883 (1946), *aff'd per curiam*, 356 Pa. 349, 52 F.2d 205 (1947). Further, as we said in *City of Newark v. United States*, 254 F.2d 93 (1958), at page 97: '* * * it has long been a fundamental canon of statutory construction that the intention of the lawmakers is paramount in determining the meaning of an act. A situation not within the intention of the enacting body, though it is within the letter of the statute, is not within the statute.'

"On this score it is significant that Pennsylvania alone among the fifteen states which have enacted accountant-privilege statutes chose to incorporate in its privilege statute an exclusionary clause. The Michigan privilege statute, enacted in 1957, four years prior to the enactment of the Pennsylvania act, specifically privileges information 'relative to and in connection with

any examination of, audit of, or report on, any books, records, or accounts.' Similarly, the Louisiana privilege statute enacted in 1951, specifically embraces communication made to the accountant by any person employing him 'to examine, audit, or report on any books, records, or accounts,' and 'any information derived from such books, records, or accounts.' The Pennsylvania statute excludes, in almost identical terms, the privileges which these two states have created."

2. *See Rubin v. Katz*, 347 F.Supp. 322 (U.S.D.C. E.D. 1972) "The theory of defendants' motion is that the information is protected by the accountant-client privilege and that dismissal of the entire action is the only means which adequately preserves the interests of the clients. They base their claim of privilege on the Code of Professional Ethics of the Pennsylvania Institute of Certified Public Accountants (hereinafter Code of Ethics), the Rules of Professional Conduct of the Pennsylvania State Board of Examiners of Public Accountants (hereinafter Rules of Conduct) and the Pennsylvania C.P.A. Law, 63 P.S. § 9.11a.

   "The Court is without jurisdiction to enforce provisions of the Code of Ethics and Rules of Conduct which are applicable to accountants. Defendants claim that the Court should enforce these rules just as it would the Canons of Ethics for attorneys. The jurisdiction to enforce canons for attorneys, however, is based on the regulatory power of courts over members of the bar. *Richardson v. Hamilton Int'l. Corp.*, 333 F.Supp., 1049, 1052 (E.D.Pa.1971). There is no similar basis for the Court to enforce the Code of Ethics and Rules of Conduct for accountants.

   "Defendants' other basis for dismissal is section 11.1 of the Pennsylvania C.P.A. Law. 63 P.S. § 9.11a They argue that this section creates an accountant-client privilege which prohibits an accountant from disclosing any information told to him while employed in a confidential relationship with a client. It would, therefore, be improper to permit the accountant to maintain a lawsuit which would inevitably require illegal disclosure of such confidences.

   "There is reason to question whether the privilege created by state law is applicable to a suit based on federal securities law. *See United States v. Bowman*, 358 F.2d 421 (3rd Cir. 1966); *United States v. Jaskiewicz*, 278 F.Supp. 525 (E.D.Pa.1968). It is not necessary to reach that issue, however, since the Pennsylvania statute does not cover the situation involved in this case.

   "Common law did not recognize an accountant-client privilege similar to the attorney-client privilege. Pennsylvania and a number of other states have adopted statutes which in some circumstances create a privilege analogous to the attorney-client privilege established at common law. Since the statute is in derogation of common law, it must be strictly construed, and any change in the common law effected by the statute must be clearly indicated. *United States v. Bowman, supra* at 423 of 358 F.2d.

   "The Third Circuit noted in *Bowman* that Pennsylvania alone among the fifteen states which had adopted accountant-client privilege statutes by 1966, had an exclusionary clause. This clause excludes from coverage by the privilege any information a certified public accountant might obtain relative to and in connection with "... the examination of audit of or report on any financial statements, books, records or accounts, which he may be engaged to make ..." This type of information had been specifically included in the privilege in other states which adopted similar laws previous to Pennsylvania. *United States v. Bowman, supra* at 423. Thus, the information divulged in paragraph 36 is excluded from the privilege created by the statute. Sophian was examining the books of Container Leasing, Inc. when he asked what a $500 entry represented. He was told it represented 50% of the capital stock of Integrated Container Service. Although the information was not taken directly from the books, it was received in the answer to a question in connection with his examination of the books. A strict interpretation of the statute requires the conclusion that information obtained in this manner is excluded by the statute from the privilege.

"The statute does not require that the suit be dismissed because of the possibility that Sophian will use information acquired in an accountant-client relationship. Defendants' attempt to draw an analogy to the broad, stringent protections of the attorney-client privilege as enforced in *Richardson v. Hamilton Int'l. Corp., supra* and *John Doe v. A Corp.*, 330 F.Supp. 1352 (S.D.N.Y.1971) cannot succeed. The Pennsylvania statute as described above was clearly intended to make a limited change in the law, and not to extend the common law attorney-client privilege to accountant-client relationships. Defendants have not shown that the prophylactic rule established by common law in the attorney-client relationship has now been extended to the accountant-client case.

II. The Intellectual Properties.

A. The Traditionals.

The various intellectual properties are, such as all property, "a bundle of legal rights." These legal rights find their source in a body of law, which is federal, state or both. Patents and copyrights derive from federal law, trade secrets and privacy rights generally from state law, and trademarks from state and federal law. This is important, particularly in the sense that rights derived from state law can be different in and for each state.

1. Copyright.

a. The Foundation of Copyright Law.

Most people do not realize that copyright law has its foundation in the Constitution of the United States. At the very inception of our nation, our forefathers recognized that the best way to encourage creativity is to give authors legal rights to their works. Article I, Section 8, Clause 8 of the Constitution states: "The Congress shall have the Power . . . To promote the Progress . . . of useful Arts, by securing for limited Times to Authors . . . the exclusive Right to their respective Writings . . . ." This is frequently called the "copyright clause" of the Constitution.

b. What is a Copyright.

i. A legal "right" to "copy" — it is not to "write" "copy." A copywriter is someone who writes copy. A document is not "copywritten," it is "copyrighted."

ii. According to the Copyright Act of 1976, copyright protection exists for original works of authorship fixed in any tangible medium of expression which can be communicated either directly or with the aid of a machine or device. A work does not need to be a novel or unique in order to satisfy the originality requirement. It needs only to be the original work of independent creation of the author and not copied from other works. Artistic or scholastic merit is not a prerequisite to a finding of originality. To be an original work of authorship, a work must be the product of some creative intellectual or aesthetic labor, however slight or obvious.

iii. A copyright does not protect an idea itself, but it protects the *expression* of an idea. For example, the idea of a story about the terrors and hardships of a family in the Civil War cannot be copyrighted. But the expression of that idea in a tangible form, such as *Gone with the Wind*, is copyrightable. However, if there is only one way to express an idea, then actually that expression is the idea. Courts will not grant an author a monopoly to an idea even if it is original.

c. Acquiring a Copyright.

i. An author obtains a copyright in a work as soon as the work is fixed in a tangible medium expression. Pursuant to recent amendments to the Copyright Act, an author is not required to register the copyright or to use a copyright notice. However, it is usually the best practice to put the general public on notice that proprietary rights are being claimed in the work. Use of a copyright notice prevents an infringing party from claiming that the infringement was innocent.

ii. In the United States, a copyright notice has three parts: 1) the © symbol, the word "Copyright," OR the abbreviation "Copr."; 2) the year of first publication; and 3) the name of the owner of the copyright. For example: "Copr. 2018 John Doe" or "Copyright 2018 John Doe." For unpublished works, add the phrase "Unpublished Work" to the beginning of the notice. The phrase "All rights reserved" is not required but recommended as an informality.

The © symbol is preferable to the words "Copyright" or "Copr." because it complies with both the Copyright Act and the requirements of most European countries. Although additional language such as "Reproduction prohibited, except with the prior express written consent of the author" does not affect the validity of the copyright notice, it is often used as a deterrent to unauthorized copying. The copyright notice should be in an obvious location.

d. Legal Rights Granted.

i. Copyright is spelled "right" rather than "write" because it is a legal right to copy. In fact, a copyright grants the author five exclusive legal rights. These include the rights of: 1) Reproduction; 2) Derivation; 3) Distribution; 4) Performance; and 5) Display.

1. Reproduction. The reproduction right allows the copyright owner the exclusive right to reproduce the work. However, in the case of computer software, there are certain exceptions.

2. Derivative Works. The derivation right gives the copyright owner ownership of all works which have been derived from the original. This includes all translations, modifications, condensations, or any other form in which a work may be recast, transformed or adapted. To qualify for protection as a derivative work, it must contain "some substantial, not trivial, originality." In general, a work consisting of editorial revisions, annotations, elaborations, or other modifications that, as a whole, represent and original work of authorship is a derivative work.

3. Distribution. The distribution right allows the copyright owner to prohibit others from distributing the work. However, in light of the First Sale Doctrine, once the copyright owner makes a sale of a copy of the work, the new owner is permitted to transfer that copy of the work. Selling the material in which a copyright is embodied is not the same as transferring the copyright itself. For example, if you purchase a copy of *Gone with the Wind,* you own that copy of the work, and you may re-sell it when you are finished reading it. Even though you purchased a copy of the book, you did not purchase the copyright. However, the author's right prevents the purchaser from copying the work.

4. Performance. The right of performance prevents the user from publicly performing literary, musical, dramatic, choreographic, pantomime, motion picture, and other audiovisual works. The right is not applicable to pictorial, graphic, and sculptural works or recordings.

5. Display. The right of display prevents owners of a copy of a copyrighted work from displaying that work to "more than one image at a time . . . ." For example, over terminals of a computer network.

ii. It is important to note that the aforementioned rights are severable. Therefore, a copyright owner has complete control as to whether to sell or license all or any portion of any of the legal rights.

iii. "Moral Rights." Authors who create works not as a work made for hire may transfer the copyright and still retain the rights of attribution and integrity. Basically, this provides that an author may retain the right to claim authorship of the work, and may prevent certain mutilations of the work. The law also provides that transferring the ownership of a copyright will not automatically transfer the rights of attribution and integrity. Those rights must be expressly and specifically transferred or waived.

e. Ownership.

i. Ownership of a copyright can be addressed in terms of who has ownership, and for how long. According to the Copyright Act, copyright ownership "vests initially in the author or authors of the work." As a general rule, the author is the party who actually creates the work, i.e. the person who translates an idea into a fixed, tangible expression. It is fundamentally important to note that the law does not provide that the person paying for the work is the owner of the work. However, the Copyright Act carves out an important exception if the work is considered a "work made for hire." If the work is made for hire, then ownership will be in the person for whom the work was prepared.

ii. **Works Made for Hire.** The Act defines a "work made for hire" as: 1) a work prepared by an employee within the scope of his or her employment; OR 2) a work specially commissioned for: a) use as a contribution to a collective work; b) part of a motion picture or audiovisual work; c) a translation; d) a supplemental work; e) a compilation; f) instructional text; g) answer material for a test; or h) an atlas; AND it must also be expressly agreed in writing that the work is "a work made for hire."

In other words, an independent contractor who is the author of a work owns the work, unless the work falls within one of the enumerated categories and there is a writing that identifies the work as made for hire. You could call it a "caveat-emptor" market: if you're the purchaser of a work of authorship, the burden is on you to ensure that you own the work-product. You will want to avoid the "what do you mean I don't own it, I paid for it, didn't I?" scenario. Therefore, if you are purchasing a work and you intend to own it, then consider the following:

a. **1. Is the author an employee?** If so, then the work is made for hire and the employer will be the owner. Whether a person is an "employee" for purposes of copyright law, is a function of many factors, including: the right to control performance of the work; whether the author is in a separate and distinct occupation or business; the extent of supervision; the level of skill; ownership of equipment; length of service; method of payment; payroll withholdings; and whether the parties believed that they were creating a master-servant relationship. No one factor is controlling.

b. **2. Is the type of work in one of the enumerated categories?** If so, and if there is also a writing describing the work as made for hire, then the purchaser will be the owner.

iii. Often, the best way is to obtain ownership of a copyright is to have pre-development transfer language in a written agreement. For example, an agreement that the author, who would otherwise own the work, will waive all rights and assign all right, title and interest in the work to the purchaser. The writing must bind the developer and his or her heirs and assigns. Other ways include providing in the agreement that the work shall be a "work made for hire," or creating an arrangement for joint ownership of the work.

iv. Term of Ownership. The term of copyright for a particular work depends on several factors, including whether it has been published, and, if so, the date of first publication. As a general rule, for works created after January 1, 1978, copyright protection lasts for the life of the author plus an additional 70 years. For an anonymous work, a pseudonymous work, or a work made for hire, the copyright endures for a term of 95 years from the year of its first publication or a term of 120 years from the year of its creation, whichever expires first.

f. § 203 . [Select Summary] Termination of transfers and licenses granted by the author

(a) CONDITIONS FOR TERMINATION. — In the case of any work other than a work made for hire, the exclusive or nonexclusive grant of a transfer or license of copyright or of any right under a copyright, executed by the author on or after January 1, 1978, otherwise than by will, is subject to termination under the following conditions: [by the author or estate]...

> (3) Termination of the grant may be effected at any time during a period of five years beginning at the end of thirty-five years from the date of execution of the grant...
>
> (5) Termination of the grant may be effected notwithstanding any agreement to the contrary, including an agreement to make a will or to make any future grant.

(b) EFFECT OF TERMINATION. — Upon the effective date of termination, all rights under this title that were covered by the terminated grants revert to the author, authors, and other persons owning termination interests ... but with the following limitations:

> (1) A derivative work prepared under authority of the grant before its termination may continue to be utilized under the terms of the grant after its termination, but this privilege does not extend to the preparation after the termination of other derivative works based upon the copyrighted work covered by the terminated grant.
>
> (2) The future rights that will revert upon termination of the grant become vested on the date the notice of termination has been served as provided by clause (4) of subsection (a). ...

g. Infringement.

i. If the work is copyrightable, then the author will have obtained copyright protection at the time of fixing the work in a tangible medium of expression. Registering the copyright with the Copyright Office is not necessary to obtain copyright protection. However, if registered, a copyright owner may bring suit against an alleged infringer in federal court. Basically, the owner will have the burden to prove that the alleged infringer had access to the original and that there is a substantial similarity between or among the works in question. In computer software cases, the courts have evaluat-

ed the "look and feel" of the user interface, rather than the traditional approach of reviewing the similarity of the program code, in order to determine whether infringement has occurred. If the work is registered within three months after the date of first publication, then statutory damages and attorney fees are available. Statutory damages are between $750 and $30,000. If the infringement is intentional, statutory damages can be as much as $150,000. Statutory damages, unlike actual damages, do not require proof of actual loss. The mere fact that the infringement was proved is sufficient.

ii. If the work is not registered within three months after the date of first publication, statutory damages and attorney's fees are not available. The claimant must then prove actual damages. If the was first published in the United States and not registered before the time of the infringement, then the copyright owner must register the copyright before filing a lawsuit.

h. Registering a Copyright.

i. In order to register a copyright one must: 1) complete the appropriate copyright form; and 2) pay the fee, which is $35-$55 for online filing; and 3) the author must generally make a deposit of two copies of the "best edition" of the work in the Library of Congress.

i. **Copyright Circulars.** The Copyright Office publishes a number of excellent primers on copyright issues, known a Copyright Circulars. http://www.copyright.gov/circs/

j. **Online Registration.** The Copyright Office has an online method of registering a copyright, in its eCo system, located at http://www.copyright.gov/eco/. The eCo system permits online filing, storage of drafts, template creation and status review.

k. **U.S. Customs and Border Protection Recordation.** A copyright, 19 CFR 133.31, *et seq.*, and/or trademark, 19 CFR 133.1, *et seq.*, registration, as well as trade names, can be recorded with U.S. Customs and Border Protection for the purpose of preventing the import of counterfeit goods. https://iprr.cbp.gov/ The current fee is $190, 20 year term. (Title 19: Customs Duties, Part 133—Trademarks, Trade Names, And Copyrights)

2. **Patent.**

a. The Foundation of Patent Law.

Patent law has its foundation in the Constitution of the United States. At the very inception of our nation, our forefathers recognized that the best way to encourage creativity is to give inventors legal rights to their works. Article I, Section 8, Clause 8 of the Constitution states: "The Congress shall have the Power . . . To promote the Progress . . . of useful Arts, by securing for limited Times to . . . Inventors the exclusive Right to their respective . . . Discoveries." This is frequently called the "patent clause" of the Constitution. Under this power Congress has from time to time enacted various laws relating to patents.

b. What is a Patent.

i. Basically, a patent is a grant made by the federal government of a property right "to exclude others from making, using, or selling the invention." Generally, the term of a utility patent is twenty (20) years from the date on which the application for the patent was filed in the United States, design patents are fourteen (14) years from the date of issue. Patent protection is generally considered the strongest protection of intellectual property in the United States. Specifically, patent protection extends past

the actual expression of the invention to all functional equivalents of the invention achieved through substantially similar means.

The government grants this "monopoly" in return for public disclosure of how the invention operates. Thus, the public benefits by having the opportunity to review, and presumably improve upon, the invention, and the inventor benefits by receiving a legal monopoly on the patented work.

Design patents, unlike utility patents, are granted on the ornamental design of a functional item. Design patents are a type of industrial design right. Ornamental designs of jewelry, furniture, beverage containers, such as the coca-cola bottle, and computer icons are examples of objects that are covered by design patents.

c. Acquiring a Patent.

In order for a developer to obtain a patent, the work must qualify as an "invention." In this regard, the Patent Act establishes five requirements:

i. The applicant must be the inventor;
ii. The invention must be "patentable subject matter";
iii. The invention must be novel;
iv. The invention must be useful; and
v. The invention must not be obvious, i.e. "nonobvious."

i. **The applicant must be the inventor.** As a general rule, the person who applies for a patent must be the first person to conceive of the invention and reduce it to practice. An invention is conceived when there is a definite idea of the complete invention and all of the steps necessary to create it. An invention is reduced to practice when it is actually created or when the patent application is filed with the Patent Office.

There is an exception if a person is hired for the purpose of inventing or if employees have assigned their rights to the patent. In those cases, the employer, rather than the actual inventor, may be given ownership of the patent. In addition, if an employee used the employer's facilities in order to create the invention, then the employer may be given a non-exclusive license to use the invention through Shop Rights. The Shop Rights Doctrine provides that although the employee retains the patent, the employer has a royalty free license to use the invention.

It is also common practice for inventors to join together in developing inventions - for example when each inventor is responsible for a certain part or module. If the inventors seek a patent jointly, then each must have made some original contribution to the invention. Mere cooperation in a project will not qualify all parties as inventors.

ii. **The invention must be "patentable subject matter."** The Patent Act lists the categories of patentable subject matter as "any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof . . .." Ideas are specifically not patentable, although the application of ideas are patentable. For example, Einstein's formula "E=MC2" is merely an idea; it is not a particular concrete application of the principle of atomic energy, but the very idea itself. This is sometimes referred to as a "law of nature." A law of nature, even if written as a mathematical formula, is not patentable. It is believed that mathematical formulas are the fundamental building blocks of science and should not be monopolized.

The law provides that a patent may be granted for developments in the following categories:

(1) Process. A process in the patent law sense is a method of producing a new and useful result. The technique does not need to be absolutely new. It may be an improvement upon existing methods, or a combination of old techniques in a novel manner.

(2) Machine. A machine is an apparatus which will perform a function and produce a definite result. It may be simple or it may be complicated.

(3) Manufacture. A manufacture is any article which is produced.

(4) Compositions of matter. This may include chemical compounds and mechanical mixtures.

There are some things that the Patent Office deems as *per se* unpatentable. Some examples of unpatentable subject matter are: perpetual motion machines, laws of nature, and promotional advertising schemes.

iii. **The invention must be novel.** To be patentable, the invention must be "novel," *i.e.* new and different from any prior processes. If an invention was previously disclosed to the public, then it is considered to be "anticipated" by the prior art—and thus, it is not novel. The Patent Office considers an invention to be previously disclosed if it was publicly known or used by others in the United States or was patented or described in a printed publication in any country more than one (1) year prior to the date of filing the application. Thus, inventors should be extremely cautious when publicly testing potentially patentable subject matter.

Novelty is a patent requirement because it would benefit only the inventor, rather than the public, if a patent were granted in exchange for disclosing information which is already public. In order for an invention to be patentable it must be new as defined in the patent law, which provides that an invention cannot be patented if: "(a) the invention was known or used by others in this country, or patented or described in a printed publication in this or a foreign country, before the invention thereof by the applicant for patent," or "(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country more than one year prior to the application for patent in the United States . . ."

If the invention has been described in a printed publication anywhere in the world, or if it was known or used by others in the United States before the date that the applicant made the invention, a patent cannot be obtained. If the invention has been described in a printed publication anywhere, or has been in public use or on sale in the United States more than one year before the date on which an application for patent is filed in the United States, a patent cannot be obtained. In this connection, it is immaterial when the invention was manufactured, or whether the printed publication or public use was by the inventor or by someone else. If the inventor describes the invention in a printed publication or uses the invention publicly, or places it on sale, the inventor must apply for a patent before one year has expired, otherwise any right to a patent will be lost. The inventor must file on the date of public use or disclosure, however, in order to preserve patent rights in many foreign countries. In other words, there is no one (l) year grace period in the United States. If the Patent Office issues a patent in ignorance of any information which would make the invention not novel, the patent could be declared invalid in litigation.

Even if the subject matter sought to be patented is not exactly shown by the prior art, and involves one or more differences, a patent may still be refused if the differences would be obvious. The subject matter sought to be patented must be sufficiently different from what has been used or described before that it may be said to be nonobvious to a person having ordinary skill in the area of technology related to the invention. For example, the substitution of one color for another, or changes in size, are ordinarily not patentable.

iv. **The invention must be useful.** The utility requirement is derived from the United States Constitution which gives protection to "useful" arts. The utility of an invention must be affirmatively demonstrated in the patent application because otherwise the patent would give such broad protection that it would be protecting the idea itself rather than the application of the idea.

v. **The invention must be nonobvious.** "Nonobviousness" means that the process embodied in the claim represents more than merely the next obvious step in the development of the art to which the claim relates. The difference between novelty and nonobviousness is that novelty asks whether the invention "existed" before; nonobviousness asks whether a person could or would have thought of the invention given exposure to the prior art.

That which was known before the subject matter sought to be patented is referred to as the "prior art." In order to be patentable, the differences between the invention and the prior art must not have been obvious to a person having ordinary skill in the field.

An invention may be an improvement, but every improvement is not a patentable invention. An invention need not, however, be complicated--it may be simple. Factors which may be used to determine questions of obviousness are: commercial success attributable directly to the inventive feature of the device or process, the filling of a long-felt want, and the production of a stir in the market. Commercial success, however, is by no means a requisite to patentability.

For example, an economist devised a method of avoiding taxes by using a credit card to borrow money from a 40l(k) fund. The method did not exist previously and differed substantially from previous methods of tax minimization. Since the method was new and was not obvious to accountants or tax experts, the economist acquired a patent (U.S. Pat. No. 5,206,803).

d. What "Right to Exclude Others" Means.

The grant of a patent confers "the right to exclude others from making, using, offering for sale, or selling the invention throughout the United States or importing the invention into the United States" and its territories and possessions. The term of the patent is generally 20 years from the date on which the application for the patent was filed in the United States or, if the application contains a specific reference to an earlier filed application under 35 U.S.C. 120, 121 or 365(c), from the date of the earliest such application was filed, and subject to the payment of maintenance fees as provided by law.

The exact nature of the right conferred must be carefully distinguished, and the key is in the words "right to exclude" in the phrase just quoted. The patent does not grant the right to make, use, offer for sale or sell or import the invention but only grants the exclusive nature of the right. That is, the patent does not grant the fundamental right to do something, but grants the right to exclude from exploiting the patentable subject-matter. Since the patent does not grant the right to make, use, offer for sale, or sell, or import the invention, the patentee's own right to do so is dependent upon the rights of others and whatev-

er general laws might be applicable. A patentee is not thereby authorized to make, use, offer for sale, or sell, or import the invention if doing so would violate any law.

e. Provisional Filing and Fees.

i. A "standard" non-provisional application, $625, establishes the filing date of a patent application and begins the substantive United States Patent and Trademark Office ("USPTO") examination process. However, a "provisional" application, $125, only establishes the filing date and expires automatically after one year. A provisional application establishes a filing date at a lower cost for a first patent application filing in the United States. A provisional application allows the term "Patent Pending" to be applied to your invention. The issuance fee is approximately $870 The maintenance fees for utility patents are due 3 1/2 years for $565, 7 1/2 years for $1,425, and 11 1/2 years for $2,365 from the date of the original patent grant.

ii. Provisional patent application ("provisionals") have been popular in the United States since their introduction by Congress in 1994. Unlike other types of United States patent applications, a provisional is not examined by the. As a result, a provisional can be drawn to multiple inventions or include informal drawings without consequence. A provisional does not become a patent, and is automatically abandoned one year after it is filed.

iii. A provisional requires the same amount of information as a non-provisional as held in *New Railhead*. They must both (a) include an adequate written description of the invention, (b) enable a person of "ordinary skill in the art" to make and use the invention, and (c) reveal what the inventor considers to be the best way of practicing the invention.

f. How Patented Inventions are Enforced.

A patentee has the exclusive right to make, use, or sell the invention for a period of 20 years from the date of filing the application. During this period, an infringement will occur if someone develops, or induces another person to create a work that performs substantially the same function, in substantially the same way, to achieve substantially the same result as the patented work.

If there is an infringement of a patent, the Patent Act allows: 1) injunctive relief, 2) damages which may be trebled; 3) attorney fees; and 4) court costs. The Patent Act authorizes damages "in no event less than a reasonable royalty for the use made of the invention by the infringer." When there is an established royalty amount, there is little problem setting a minimum amount. However, if the royalties are depressed because of the infringement then the court may issue treble damages or adjust the amount accordingly.

Before damages will be granted, however, the inventor must show that the alleged infringer was on notice that the invention was patented. Notice of the patent is provided by marking the invention with the word "patent" or the abbreviation "pat." followed by the number of the patent. Although the notice is not required to have a valid patent, if the notice has not been used, then the patent owner will be allowed to recover damages only for the period subsequent to the date on which the infringer received actual notice that the invention was patented.

3. **Trade Secrets.**

a. The Foundation of Trade Secret Law.

Trade secret protection originated in the first century when the definition of "kidnapping" was expanded to encompass the pirating of literary works. Throughout ancient history,

the law strictly curtailed the dissemination of trade secrets. During the Middle Ages, the guild systems evolved, under which only guild members were entrusted with trade secrets. By the seventeenth century, statutory protection for some types of intellectual property had begun to develop. In the United States, trade secret protection arose from the common law, rather than constitutional or statutory regulation. While there is disagreement as to whether trade secret protection actually evolved from the law of confidential relationships or from more basic property law principles, most courts will not allow parties to "reap where they have not sown."

b. What is a Trade Secret.

i. Generally, a trade secret is "any formula, pattern, process or device which is used in one's business and which gives one the opportunity to obtain advantage over competitors who do not know or use it." For example, a specific computer program using generally known ideas can contain trade secrets because of the unique logic and coherence by which it is designed. In other words, while generally known concepts cannot be protected, a specific implementation involving a unique combination of general concepts may be a trade secret. Trade secret law requires only that the particular architecture of a program is valuable and that it is not a matter of common knowledge or readily duplicated.

ii. The law of trade secrets differs substantially from both patent and copyright law. While the law of copyrights and patents is determined by federal law, the law of trade secrets is determined by state law.

iii. Trade secrets can last forever.

iv. Trade secret protection, unlike copyright and patents, can extend to ideas, algorithms and procedures. Therefore, trade secret protection is a very important method of protecting aspects of computer software not otherwise protectible by copyright or patent. Copyright protects the author from illegal copying of a creative work. A trade secret protects only unauthorized use when done in violation of a confidential relationship whether implied or expressed in contract.

v. Trade secrets do not require compliance with general statutory formalities. Furthermore, a trade secret is not subject to the same requirements as a patent. There is no registration of trade secrets, and the only time that a judgment would be made whether or not a particular idea, invention, or other item of intellectual property is a trade secret is if the question should come to litigation.

vi. Many states define a trade secret as: "The whole or any portion or phase of any scientific or technical information, design, process, procedure, formula or improvement which is: 1) of value; 2) has been specifically identified by the owner as of a confidential character; and 3) which has not been published or otherwise become a matter of general public knowledge."

By the same statute, there is a rebuttable presumption that scientific or technical information has not been published or otherwise become a matter of general public knowledge when the owner takes measures to prevent the information from becoming available to persons other than those selected to have access for limited purposes.

c. Acquiring a Trade Secret.

i. Trade secret laws will not protect any item of information. To qualify as a trade secret, the information must have two basic characteristics: 1) it must be secret; and 2) it must provide its owner with an advantage over competitors who do not have it. Al-

so, many states add a third requirement that the information be "specifically identified" as confidential.

ii. Generally, courts have developed a number of factors to determine whether a trade secret exists. Among these factors are the following: 1) the extent to which the information is known outside of the business; 2) the extent to which it is known by employees involved in the business; 3) the extent of measures taken to guard the secrecy of the information; 4) the value of the information to the business owner and to the competitors; 5) the expense of developing the information; and 6) the difficulty with which the information could be legally duplicated by others.

iii. A trade secret need not be unique and may be clearly anticipated by "prior art." Nevertheless, it must be "valuable." Generally, value is a function of whether the trade secret affords the owner a competitive advantage. Courts frequently analyze the competitive advantage of a trade secret by looking at the time and effort that has gone into its development. It is the development time and money that goes into a finished product that frequently gives the owner a "head start" over competitors. The essence of trade secret law is to protect the value of this head start by requiring competitors to spend their own resources to create a competing product.

d. **Maintaining a Trade Secret.**

i. Because a trade secret must be, in fact, a secret, businesses should take every precaution to ensure that their employees are on notice of the secret nature of the information. For example, the owner should put its employees on notice that the owner considers the information to be a valuable trade secret. A trade secret notice might read as follows:

WARNING: THIS MATERIAL IS A PROPRIETARY TRADE SECRET OF BEST SOFTWARE, INC. AND IS TO BE KEPT CONFIDENTIAL AT ALL TIMES. ANYONE WHO WRONGFULLY USES OR DISCLOSES THIS INFORMATION MAY BE SUBJECT TO CIVIL AND CRIMINAL PENALTIES.

The trade secret notice should be in an obvious location. In cases of software development, the owner should program the software so that the notice is displayed to the user: 1) at sign-on/startup; 2) continually at every menu screen; 3) in hardcopy printouts; and 4) as a data element during memory dumps or decompiling. The notice also should be on the diskette label and throughout the humanly readable source code. Providing such notices should comply with the state criminal statute requirements for notification of trade secrets.

Also, anyone who does not directly work with the trade secrets should not have access to the secrets. Employers should use passwords, restrict access levels and generally secure storage. Although a shredder often has negative implications, it is a valuable method to ensure that company secrets are not being removed from the trash.

ii. **Restrictive Covenants.**

a. One of the best methods to ensure that employees understand the secret nature of certain materials is to have a written agreement. It should be noted, however, that employees will often be considered to have obtained the information as a secret even without a written agreement, if it is reasonable that the employee should have known of the confidentiality. As a result, even without specific contractual provision, employees must generally respect the confidentiality of his or her employer's trade secrets.

b. Restrictive covenants may also prevent employees from pursuing their vocation after termination of employment. A covenant not-to-compete can be more restrictive than a covenant not to reveal a trade secret because the prevented competition may involve the use of information which is not necessarily a trade secret. Such covenants are not favored by the law. As stated by one court "powerful considerations of public policy which militate against sanctioning the loss of a man's livelihood."

c. Pursuant to this strong public policy, a covenant that restricts an employee will be enforced only to if it is: 1) reasonably necessary to protect the employer's legitimate business interests, e.g. unique employee service, trade secrets or confidential customer information; 2) not unreasonably burdensome to the employee in either time or area; and 3) not harmful to the general public. If a court determines that the conditions are satisfied, then the covenant will be enforced. However, tailoring an agreement to the particular circumstances is difficult. Care must be taken to ensure that the agreement is not overbroad in scope. Also, proper language should be inserted in the agreement to allow the court to limit, rather than strike, an overbroad clause.

d. If the agreement is signed after the employee has actually been hired, then there may be no consideration to make the agreement enforceable. Also, a too restrictive covenant could be a restraint of trade.

e. **Losing a Trade Secret.**

There are several means by which a competitor might legitimately obtain an owner's trade secret. First, the owner of the trade secret might inadvertently publicize the information—at a cocktail party, for example. If the owner or one of the owner's employees reveals the secret without any wrong-doing on the part of the one that learns it, and if there is no prior notice that the information is a trade secret which has been revealed by mistake, then the one who gains the trade secret has no liability.

A competitor is also free to "reverse engineer" the trade secret. Thus, if the competitor buys a micro chip on the open market, analyzes its design, and then builds an identical chip, there is no misappropriation of the trade secret. However, to prevent this situation, many micro chips are embedded in a protective casing before they are marketed. Destroying the case will also destroy the microchip.

There are also illegal ways to obtain a trade secret, and some of them may subject the actor to criminal prosecution as well as civil liability. One of the most complex situations involves the information that employees take from a prior job. The matter is particularly sensitive when such employees have been made to sign a nondisclosure, non-competition agreement with their former employer, and yet are being hired because of skills and knowledge demonstrated in their previous work. When hiring new employees, it is always good practice to have them represent that they are not misappropriating any proprietary information from a former employer.

f. **Misappropriation and Remedies.**

i. Trade secret cases often involve multiple pleading that include contract law, quasi-contract law, unjust enrichment, tort and conversion law, unfair competition and confidential relationships. In many states, it is a crime if a person:

a. 1. by force or violence, or by putting the owner in fear, takes from the owner any article representing a trade secret; or willfully and maliciously enters any

building or other structure with the intent to obtain unlawful possession of, or access to, an article representing a trade secret; or

b. 2. intends to wrongfully deprive of, or withhold from the owner, the control of a trade secret, or intends to wrongfully appropriate a trade secret for his or her own use, or for the use of another, or unlawfully obtains possession of, or access to, an article representing a trade secret; or

c. 3. having lawfully obtained possession of an article representing a trade secret, or access thereto, converts such article to his or her own use or that of another person, while having possession thereof or access thereto makes, or causes to be made, a copy of such article, or exhibits such article to another.

In order to prove the above, the owner might show that the competitor did not have the information prior to his or her firing the former employee and that a substantial bonus or salary increase was offered because of the former employee's special knowledge.

The owner of a trade secret may seek relief from a court if he or she believes that the trade secret has been, or is about to be, misappropriated. For example, an injunction may be sought to prevent a former employee from using the trade secret in the employee of another company.

4. **Trademark.**

a. What is a Trademark.

i. Trademarks originated as devices to identify in the marketplace the craftsmen responsible for producing goods for sale. The medieval European practice of inscribing the name or mark of the manufacturer is the direct antecedent of our modern federal trademark law. As a result, trademark law evolved more naturally in the business place as a means of identifying the origin of goods or services. Also as a result, the manner in which a business acquires a trademark is different from other forms of intellectual property such as a copyright or patent. Most significantly, trademark law does not find its authority in the federal or state constitutions, but at common law in the courts.

ii. Notwithstanding the fact that trademark law exists without any relevant statute, the federal and various state governments have passed statutes to clarify trademark law. Congress obtained its power to pass the various trademark acts by means of Article I, Section 8, Clause 3 of the Constitution, which provides: "The Congress shall have Power . . . To regulate Commerce . . . among the several States . . . ."

iii. A trademark can be any word, symbol or device that is adopted and used by a business to distinguish that business's goods or services from those of another business. "Trademark" is a generic term used to describe both trademarks, which are available for goods, and service marks, which are available for services.

It is that association—between a symbol and the origin of the goods or services—that makes a trademark valuable. Because McDonalds chose and adopted a trademark early in its business, and used it consistently, the golden arches have become one of McDonalds most valuable assets. McDonalds now derives substantial revenue merely from licensing the use of its trademarks to franchisees.

b. Acquiring a Trademark.

i. Rights in trademarks accrue on the date of first actual use. Therefore, a business should be somewhat careful to document the first date when a trademark is publicly used with its goods or services anywhere, and also the date when the trademark is used in interstate commerce. An important exception is that the revision to the federal trademark law permitting "intent-to-use" conditional applications for registration. If a business is reasonably confident that it intends to use a trademark in interstate commerce, then the more expensive intent-to-use applications may afford protection of a trademark not otherwise available.

ii. Trademarks are recognized independently by the state and federal governments.

iii. Generally, a business will obtain state trademark rights as soon as the trademark is properly used in commerce. A business will obtain federal trademark rights as soon as the trademark is properly used in interstate commerce.

iv. A registration of the trademark is not required—although it is usually advisable. Therefore, prior to using a mark in commerce, a business should be reasonably prudent to determine whether a mark is available for use.

v. Simply stated, a copyright protects authorship, a trademark protects the reputation of the origin of products and services. These are distinct protections.

vi. Trademarks can last forever.

c. Questions.

Following are basic questions that businesses should evaluate when deciding to acquire a trademark:

i. **Is the trademark available?**

a. A mark that has been selected by a business to be used as a trademark may not always be available for trademark protection. There are two basic reasons: a) the mark is generic; or b) the mark has already been adopted and used by another business.

- **Determine whether the mark is generic.** A generic mark is a mark that is or becomes actually the name of the thing itself.

- **Determine whether the mark been used by another business.** As in so many areas of the law, first in time is first in right. If another business has already used a similar mark for similar goods or services, then often the best advice for a new business is to choose a new mark.

The only way to obtain some assurance that a trade name, logo or other trademark has not been adopted anywhere in this or any other state is to perform a trademark search. The cost of a search generally ranges between $250 and $500 per trademark. If that seems to be expensive, consider how much it costs to develop a reputation for quality goods and services over the years, and then to find out that business cannot be expanded with that trade name or logo because it would infringe on another's trademark.

It is important to note that obtaining a fictitious name registration, or a state incorporation certificate, does not grant trademark rights. State cor-

<u>poration bureaus merely permit a business to operate as an entity. Trademark infringement is a separate issue</u>.

ii. **What types of goods or services are to be sold?**

As a general rule, rights in trademarks exist for types of goods or services. For example, an apple may be the trademark of Apple Computer and also the trademark of Apple Records. The basic reason is that the public would probably not be confused into thinking that an Apple Computer was made by Apple Records.

iii. **When were the goods or services sold, or are expected to be sold?**

Rights in trademarks accrue on the date of first actual use. Therefore, a business should be somewhat careful to document the first date when a trademark is publicly used with its goods or services anywhere, and also the date when the trademark is used in interstate commerce.

An important exception is that a the federal trademark law permits "intent-to-use" conditional applications for registration. If a business is reasonably confident that it intends to use a trademark in interstate commerce, then the more expensive intent-to-use applications may afford protection of a trademark not otherwise available.

iv. **Where have the goods or services been sold?**

Trademarks are recognized independently by the state and federal governments. Generally, a business will obtain state trademark rights as soon as the trademark is properly used in commerce. A business will obtain federal trademark rights as soon as the trademark is properly used in interstate commerce. A registration of the trademark is not required—although it is usually advisable.

d. Legal Rights Granted.

i. There are two types of registrations: state and federal.

ii. Whether one or both registrations is advisable is a function of the costs and benefits of each registration. As stated, rights accrue on the actual use of the trademark in commerce. However, the scope of the rights is usually limited to the market territory where the trademark is actually used. Therefore, without more, a business would have to do business nationally, in every market, to obtain complete national trademark protection.

iii. The benefits of a state registration vary with the law of each individual state. Generally, state registrations cost about $400 - $600 per registration. Most often, state laws do not afford any more protection than already available without a state registration, *i.e.* protection in the actual market territories within the state. However, state registrations are usually entered into computer databases that are nationally available; thus, it may act as a deterrent to another business that is performing a trademark search. Furthermore, a state registration may provide evidentiary value in future trademark litigation. It is important to note that state registrations are usually filed by state-office administrative staff who do not perform any research to determine if the trademark is actually available for use.

iv. There are many benefits of federal registration. The usual application fee is $275 for an electronic filing. On average, the total cost per trademark, including search fees and legal fees, is usually about $1,500. If a someone opposes the registration, fees

can be substantially more. Following submission of a federal application, a trademark examining attorney will perform research to confirm that the trademark is available and that the application is otherwise proper. If there are no problems, then the trademark will be published in the Official Gazette, which is a national publication reviewed by interested parties, such as trademark attorneys. For a period of 30 days following the date of publication, the public is given the right to oppose the registration if a registration would infringe upon a similar mark in which the opposer has interest. If there are no oppositions, then the examiner will issue a registration. The process generally takes about 12 months. Even a registration does not guaranty that the trademark is available, but, if registered, the law provides many procedural and substantive advantages not otherwise available.

v. Even if a mark is federally registered, it can be challenged by a "cancellation" action. After a federal registration is five years old, it can be claimed to be "incontestable" and thereby claim a status that prevents certain types of challenges.

vi. It is common practice for a businesses to use the "TM" symbol (or "SM" for service marks) to alert the public that a trademark is being claimed. While use of that symbol does not convey any rights, it is good practice. After a *federal* registration, the business should then use the ® symbol to signify that the trademark as registered. However, care must be taken with use of the non-registered symbols: use of those symbols is an admission that a trademark is claimed and can be used as such in an infringement action. For example, if I use ™ on my labels, but I am an infringer, and if I get sued, it will be difficult to argue that the plaintiff has a generic mark when I, myself, was claiming common law trademark rights in the mark.

vii. Dates of Use/Specimens. Trademarks must be used in commerce, as evidenced by specimens. If a mark ceases to be used in commerce, there is a risk of abandonment, which can be shown by intent or, more clearly, action that denotes intent. The use of registered and unregistered trademarks remains a function of usage, likelihood of confusion and reputation, but registered marks must be maintained pursuant to the respective statutes that govern the registration. The Trademark Manual of Examining Procedure (TMEP), http://www.uspto.gov/web/offices/tac/tmep/, is the best source of information on the standards for review during the application process, including for citation in responses to office actions.

a. There are two important dates of use: the first date of use anywhere, and the date of use in interstate or foreign commerce. The latter date cannot be earlier than the former date. Interstate commerce is required for federal jurisdiction.

b. Generally, the mark must be used with the good or services. For goods, the first date of a bona fide sale provides an excellent date of use. However, sometimes a sale is not required, such as when bona fide demonstration and test goods bearing the mark were used in commerce, even if not sold. For services, the mark merely needs to be on advertisements for the services; however, the advertisements must identify the services claimed in the application. For example, letterhead with the mark will not satisfy the requirement unless the letterhead also has the services designation, such as "Banking Services," "Home Inspections," etc.

c. Do not let your client make a "token" sale of goods to secure a date of use. Intent-to-Use applications have been available since 1988. Prior to that time, "token uses" were often used to secure a date of use. A "token use" is not a bona fide use, but usually an isolated use for the purpose of securing the statutorily-required date. Because Intent-to-Use applications are available, practitioners must be careful to persuade clients to assert only a bona fide sale in the ordinary course of business.

If a mark has not acquired distinction in the marketplace, a practitioner should be aware that it may have the option to amend the application to the Supplemental Register. The Supplement Register is not afforded the presumptions of a Principal Register registration, but does permit use of the ® symbol; and the registration can be moved to the Principal Register after the applicant can show secondary meaning in the marketplace, presumed after five years.

e. Recognizing Types of Trademarks.

There are four categories of marks, irrespective of the particular embodiment in which the mark exists:

i. generic;
ii. descriptive;
iii. suggestive; and
iv. arbitrary.

i. **Generic.** Generic marks are not available for trademark protection because generic marks are generally the very name of the product or service. For example, a business could not trademark "spoons" for a type kitchen utensil, although it has been registered for restaurant services.

ii. **Descriptive.** Descriptive marks describe the goods or services. For example, "The Computer Store" for a computer store describes the services offered. Descriptive marks are presumptively not trademarkable. However, descriptive marks are available for trademark protection if the mark has acquired distinctiveness through the use of continuous and exclusive use of the mark, generally for a five-year period.

iii. **Suggestive.** Suggestive marks suggest the nature of the goods or services, but require imagination, thought and perception to reach a conclusion as to the actual nature of the goods or services. Suggestive marks, even if partly descriptive, are trademarkable. For example, "Coppertone" for suntan lotion suggests some of the features of the product, but requires imagination to develop the association.

iv. **Arbitrary (Fanciful).** Arbitrary marks are the best marks and are clearly available for trademark protection. For example, the term "Kodak" does not otherwise have any relation to photographic equipment.

f. Confidently Selecting Trademarks.

New businesses often choose descriptive marks because it allows potential customers to immediately know the type of goods or services offered for sale. However, a new business is usually well-advised to adopt and to use trademarks that are arbitrary.

Marks can be embodied in words, logo and/slogans. Domain names can be trademarks and can certainly infringe on a trademark right. Similar to state registrations of corporate names, domain names are ministerially granted without regard to trademark review. When there is a domain name that is infringing on a mark, there is a strategic decision regarding how best to resolve the issue. One option is to use the administrative process through Internic, with an administrative review. The other option is to bring a judicial action under the available state and federal statutes in a court of proper jurisdiction and venue.

Generally speaking, if the would-be defendant is actually doing legitimate business, this firm's practice tends to be filing in federal court to acquire local jurisdiction. It also permits a definitive action requiring immediate priority of attention by the defendant. Domain names can be viewed at godaddy.com, with a "whois" search that indicates ownership.

i. **Research and Clearing Proposed Names for Registration.**

a. The ultimate goal of researching and clearing a proposed name for registration is to ensure that: a) you are not infringing upon another person's intellectual property; and b) you can protect and claim ownership of the proposed name. You cannot perfectly guarantee, in advance, that any name you choose will not infringe another's rights, or that you will ultimately be able to claim exclusive rights to a name.

b. Consider if the Disney descendants decide to start selling copyrighted artwork they have *personally painted* with their "Disney" name on it. What confuses the marketplace will always be contextual.

c. Working with indefinites, intellectual property attorneys have developed business processes to minimize risks associated with researching and clearing names. If you are a business professional, you should not be put off that your attorney cannot guarantee that a word, logo or slogan is able to be registered as a trademark. If you are an attorney or other legal professional, you should be very careful, as stated below, from communicating anything that creates a client expectation that a mark is able to be registered.

ii. **Basic Rules.**

Following are certain basic rules to remember when selecting names:

a. Rule No. 1: Clearance by the corporations bureau for a corporate or "assumed" fictitious name does not indicate that the name is valid for trademark purposes. THE NO. 1 ACCOUNTANT MISTAKE!

Background. The establishment of a commercial enterprise is generally regulated by the state government in which the enterprise is located. State law, rather than federal law, generally applies to the formation and governance of an enterprise, *eg.,* a proprietorship, general partnership, corporation, limited partnership, limited liability company.

Proprietorships and general partnerships can be formed without any prior filing with the state government. They are formed by operation of law, in light of the circumstances. Other entities need to be formed by filing documents with the state government as a precondition; these entities generally include corporations, limited liability companies and limited partnerships (distinguished from general partnerships). The difference between a general partnership and a limited partnership is that the partners in a general partnership are personally liable for the acts of the partnership. A limited partnership is a partially limited liability entity: a limited partnership consists of at least one limited partner and at least one general partner; any limited partner has no personal liability, but any general partner is personally liable for the acts of the partnership. The reason is that the general partners, and not the limited partners, manage the partnership.

Even though proprietorships and general partnerships can be formed without any prior filing with the state government, state governments generally require that the name of the enterprise be registered with the state government as an "assumed" name, also called a "fictitious" name. The exception to this rule is, intuitively, that a fictitious name registration is not required if business is being conducted in the full legal name of all individuals interested in the business. The exception is the rare case, and almost unheard of in partnerships. When was the last time you heard of a partnership named "John Doe, Jane Doe and John Smith"? Proprietorships and partnerships are "unlimited liability entities" because each owner is liable for all debts of the enterprise. There is no legal distinction between the business and the human being(s) involved in the enterprise. The theory underlying the law is that persons doing business with another person who is using a false, or fictitious, name can review the corporation bureau registry to learn who are the true individuals that are obliged to perform or to pay.

Think of it this way, you are hit by a truck, as it rolls by you, you look up and see "Joe's Fish." You want to sue. To determine who owns "Joe's Fish," you do a state corporation bureau registry search. Might you have to search every state's registry? Yes. Might the owner of "Joe's Fish" have violated the law and not registered the false name? Yes. So be it. Law is art, not science.

Generally, fictitious names are disclosed in contracts under the designation "t/d/b/a," "trading and doing business as"; e.g., Gregg R. Zegarelli t/d/b/a Acme Enterprises. This means, Gregg R. Zegarelli does business using the name "Acme Enterprise" but it is he who is personally responsible. If Acme Enterprises, Inc. is a corporation, contract party designations should not indicate Gregg Zegarelli t/d/b/a Acme Enterprises. This is often a landlord's trick to try to create personal liability where a corporation would otherwise prevent pass-through liability.

Unlike a fictitious name, usually, any enterprise that is formed by filing with the corporation bureau has the name approved as an integral part of that process. In other words, when a corporation is formed, the name is approved as part of that process and no fictitious name filing is required for that name; this is distinguished from a proprietorship or general partnership. States may vary.

A corporation or other limited liability entity, a legal person, can do business with multiple names. If so, the company must file a fictitious name. For example, "International Business Machines Corp." could arguably have a fictitious name for "IBM" or "Big Blue" or any other name in which it does business. To digress a bit, you need to distinguish the difference between a fictitious name

and a trademark. My usual question to clients is, "Do you answer the telephone with that name?" Therefore, post analysis, International Business Machines would probably have a fictitious name registration for "IBM," but probably not for "Big Blue." However, "Big Blue" may be a trademark. Without the fictitious name registration, the business known as "IBM" could be any business using that designation. By the way, that is the fundamental difference between a trade name and a trademark.

Corporate and limited liability entities do not need to place legal notices of the fictitious name filing; only if a natural person (a human being) is an owner does the filing need to have legal notices in a newspaper of general circulation and the legal journal in the appropriate county. From a cost perspective, fictitious names are rather inexpensive at $70 in Pennsylvania at the time of this writing, but, if a natural person is a party to the registration, then legal notices are required. This will generally triple the out of pocket costs.

State Clearances. The Commonwealth of Pennsylvania uses a standard of review called "**technical distinctiveness**." This standard is easy, mechanical and permits market confusion. However, it apparently satisfies the Commonwealth's business goal of simplistically tracking different business entities. For example, "Microsoft Corp." is technically distinct from "Microsoft Services Corp."

Technical distinctiveness may be a minimum standard for the state's need to track entities, but it is of no use for trademark analysis. If you call the corporation bureau of most states and ask if the corporate name "Microsoft Home Systems Services" is available, it probably is available. But, if you incorporate with that name, you will be sued. Simply stated, the state corporation bureau will let you infringe.

Therefore, as a very solid general rule, do not use state corporate name approvals as determinative of whether a name is "owned" or the trademark is acquired. State governments generally do not interface with the United States Patent and Trademark Office.

Scenario 1: Charlie Doe calls his accountant, rather than his attorney, to establish a business, named "MicronSoft." The accountant wants the “extra” business. The accountant, says she'll "check to see if the name is available." The accountant calls the Pennsylvania Corporation Bureau. The Corporation Bureau says that the name is available. The accountant incorporates the business.

For three years, Charlie spends hundreds of thousands of dollars building the business with advertising materials, brochures and product manufacturing investments. Just when Charlie was doing a fantastic business, he receives a cease and desist letter from Micron Computers, and incidentally, at the same time, from Microsoft. Now threatened with litigation, Charlie calls his attorney.

Charlie tells the attorney that he checked the name and it was cleared for use. He thought he "owned" the name because the accountant “said so.”

The attorney's response…"Sorry, Charlie. We have a problem."

Scenario 2: Charlie Doe calls his accountant, rather than his attorney, to establish a business, named "MicroWildMen, Inc." (I am, of course, assuming this is a unique name…) The accountant, says he will "check to see if the name is available." The accountant calls the Pennsylvania Corporation Bureau. The

Corporation Bureau says that the name is available. The accountant incorporates the business.
For three years, Charlie spends hundreds of thousands of dollars building the business with advertising materials, brochures and product manufacturing investments.

Charlie is at a wild cocktail party when he see Gregg, the business attorney. Gregg receives Charlie's card with the name of the business, but the name lacks the "®" symbol, so Gregg asks, "Interesting name, Charlie. Is it a federally registered trademark?" Charlie says, "Well, I don't really know too much about all of that, my accountant told me that I own the name." Gregg offers, "Well, Charlie, you are not a client of mine, so I cannot advise you, but I would be glad to check the federal registry status for you at my cost." Charlie loves getting free legal work (or so he thinks), and so Charlie gladly accepts.

Gregg determines that an application for a federal registration of the mark was never filed.

Charlie then engages Gregg to do research and get that mark filed immediately. However, Gregg determines that in the three years that passed, there are 25 other users of the mark. It seems that when Charlie was just doing some local business, some business people from other states passing through heard the name, loved it, copied it and used it in areas where Charlie does not have a prior reputation.

Again, "Sorry, Charlie. We have a problem."

True stories. And, each one more than once.

The First Mistake: Relying on Incorrect Team Member. Unless an accountant is also an attorney, do not acquiesce to the accountant to perform "business" services such as an incorporation. The tax code is a law to which both accountants and some attorneys frequently refer; however, accountants are not generally trained in liability questions and the intricacies of the corporation and trademark statutes. Further, intellectual property is not always intuitive. Most lawyers known as "general practitioners" are knowledgeable in many areas of law, but usually are not otherwise knowledgeable in areas of trademark and copyright law; it is prudent to run some formative issues by an attorney who regularly practices in the intellectual property field. It is the purpose of this seminar to leverage your knowledge to handle certain issues and/or acknowledge that the issues exist.

The Second Mistake: Relying upon Corporation Bureau. When the accountant called the Corporations Bureau, the Corporations Bureau merely checked to see if there was a pre-existing limited liability entity on record for tracking purposes. The Corporations Bureau did not check any other state's records, nor did the corporations bureau check the USPTO records.

Whether the name "Micronsoft" was a federally registered trademark, or confusingly similar to "Microsoft" or "Micron," is not part of the Corporation Bureau's review or approval process.

The Fictitious Name Party Room. Confusion occurs because of the word "**approved**" by the state agencies. The business name is merely "approved" as a business name for tracking purposes. In fact, for the state to even try to review

names on a substantive basis would be extremely time consuming and the foundation for much litigation.
This problem is compounded by the fact that "corporate" names are "**exclusive**" in that the Corporation Bureau will not permit the name to be used by another business after it has been "acquired" by a limited liability entity, such as a corporation.

Even so, however, the Corporations Bureau does not give exclusivity on fictitious names. Therefore, an unlimited number of unrelated persons can be doing business with exactly the same fictitious name, which can be a serious trademark problem, and one for which the Corporations Bureau does not accept responsibility.

Exclusivity of name is granted by the Corporations Bureau for limited liability entities, such as a corporation. Again, this is on a technical distinctiveness standard. No two limited liability entities, such as corporations, for example, can have exactly the same name. Also, the corporate designator, "Incorporated," "Limited," "Company" and "Corporation," and the abbreviations thereof, "Inc.," "Ltd.," "Co." and "Corp." are immaterial to the evaluation of names.

When a limited liability entity, such as a corporation, acquires a corporate name, no subsequent fictitious names, or limited liability entities, will be permitted to file for that exact same name. If a limited liability entity, such as a corporation, is the first to acquire the name, it will prevent subsequent exact same name filings (again, the corporate designator is immaterial), but only at the state level and this has no bearing on trademark rights.

If a limited liability entity, such as a corporation, files for a corporate name after, let us say, there are five prior fictitious name filings with the same name, then the corporation locks the door on the name behind it. Everyone in the "party room" stays in, but no one else can get in with that name. The corporation locked the door behind it.

Nevertheless, everyone in that business name party room have the same name! No fun there.

b. Rule No. 2: Clever name spellings and incidental additional terms on a name are not determinative of whether you can use a name. Do not over-analyze channels of commerce. Trademark review is based upon a "confusingly similar" standard. This is not a technical analysis.

A frequent layperson's response to review constraints is to create cleverly fancy spellings for names. Do not do it to try to avoid infringement. "Disnee" equals "Disney."

It is a very simple rule, but very difficult to obtain assurance. Just ask yourself, "Is it likely that the public would be confused and/or think there is an affiliation?" If you hear "Krispy Kreme" or "Crispy Cream" over the radio, you can be confused.

Sometimes channels of commerce are important in the review; but, this type of an analysis is often very finely honed and not casual. Channels of commerce often cross. Simply stated, this is merely a corollary for the proposition that the marks are not confusingly similar. For example, consider whether "Red Stick" for lipstick is confusingly similar to "Red Stick" for bubble gum.

The standard is not only confusion, but untrue association!

c. Rule No. 3: Determine if the name is not available.

The first two rules constrain the natural inclinations for something desired. Do not rely on the state, and do not try clever work-arounds. Rule No. 3 is purposely stated in the negative. As stated above, you cannot really determine if a name is available, but you might be able to determine that it is certainly not available.

Following are steps that are logical in many circumstances, but it is contextual. For some marks, it makes more sense to start with the USPTO search.

Step 1. Domain Names. Domain names used to be incidental. They are now crucial. In today's market, if you select a company name and/or product name and you are able to obtain to obtain the .COM domain name -- without any clever spellings -- there is an excellent probability that you will be able to secure the trademark registration. The ".com" extension is the litmus test. However, acquiring the .org, .net, etc. are far less valuable; it is less intuitive.

Remember, picking a strangely-spelled domain name or a one-off extension (*e.g.* .net, .org, .us) can have two fundamental problems: a) people will forget the spelling/extension and go to the wrong place, possibly your competitor; and b) if the preferred domain name is owned by a competitor, you might obviously be an infringer or selecting a domain name that makes infringement more obvious by your conscious work-around.

The prior registrant of the domain name may merely be "squatting" which is currently illegal under the Trademark Cyber-piracy Prevention Act.

If the domain name is in use, evaluate the channel of commerce and make a determination regarding the probability of confusion. Sometimes it is better to move to a new mark at this point, particularly if the Internet is a major sales channel.

Godaddy.com is an excellent site on which to check the availability of a domain name. Search the name, then perform the “WhoIs” lookup option.

Step 2. Bing, Google or Other Search Engine. Sometimes this is combined with the domain name search. This process is as simple as going to www.bing.com or other search engines of your choice and searching on the mark you intend to acquire. This is often a very rough cut, but it gives you a method to see what is in the marketplace. Often, Examining Attorneys at the USPTO do the same thing, so you need to know.

More than I prefer to admit, a client will provide a mark that the client seeks to register. One simple google search demonstrates that mark is a common family name, name of a city, etc., with hundreds or thousands of hits. When I say to the client, "Hey John, I thought you said this was a clean mark." The response is invariably something like, "Yes, there's nothing out for these type of widgets sold on Sundays, from Pittsburgh to Tallahassee, um, with a hyphen in the mark in the plural."

Step 3. Corporation Bureau. Many states now have official websites that allow for searching. Go to the corporation bureau of the state in which the entity is to be formed. A google search on something similar to "Pennsylvania corporation bureau" will usually yield a link to the office state site. Remember, in ac-

cordance with the above, this review is only to see if the name can be used to form an entity. See exhibits for a reference to the Pennsylvania website.

Step 4. USPTO.gov. In the old days, c.1995, only professional services and expensive professional subscription services were available for performing trademark research. The USPTO now allows searching online at www.uspto.gov. This website allows for online searching; there are also facilities for online filing and procedural manual review. This is a free service and it is very valuable. We often counsel clients to go onto the website and to search their intended mark before handing the research to our firm. Unlike years ago, smaller business clients do not need to pay huge fees to iterate through an "is this new one okay" back and forth.

When searching, remember that a "yes" and a "no" are not equal. Let us use an example. You are at a party. You are trying to find Gregg. You ask ten people, "Is Gregg here?" They respond, "no." You ask the eleventh person the same question, she responds, "yes, he's right there." The ten "no's" do not equal one "yes."

Same with trying to find a prior use of a mark. One confirmation is better than ten non-confirmations. If you find something, it is there. If you do not find it, it might still be there. Therein is the essence of the inherent difficulty with assuring a client a clear prior use history to a mark.

If prior users (called a "senior users") exist, you know they are there, but not finding anyone does not mean they do not exist, just that you might not have found them. Contend with all that you find by analyzing the details, but always understand that you may not have found it all.

iii. **Giving Opinions.** An "opinion" is a term of art in the legal profession. To render an opinion, particularly in a written opinion, is effectively to ensure the advice to the point, in some contexts, of a guarantee. Paralegals should not use the term; attorneys should avoid the term. Sometimes people tend to self-puff by using that term; it has a professorial ring: "Well, Mr. Wentworth, it is my learned opinion that the trademark is available." Do not do it.

Some larger firms have a rule that no writing shall contain the word "opinion" unless approved by committee. BEWARE OF EMAILS. With ever-increasing reliance on email, formality has tended to minimize in client/attorney relations. Remember that an email can be viewed as an opinion. Our firm's practice is not to write opinion letters. Most opinion letters are filled with caveats and exceptions. Our firm tends to merely identify what we found, to indicate verbally our "thoughts" in a forthright manner, but to formally write the disclaimer. We tend to promise less and perform more.

A drowning person will grasp at anything. The client will certainly blame the advisor, if the client's expectation was that the mark would issue. Whether a registration issues, and whether a registration process is easy or difficult can rest on the nature and inclination of the Examining Attorney: just like any court. Ask a seasoned litigator, and he or she will tell you that the exact same case can have two completely different postures and results depending upon the judge. Even if you think the mark is fantastic, with no prior uses, do not verbally say more than something like, "The search results look good. I think we can be comfortable. There are no guarantees, but, we'll do our best for you." Then, in writing, send the disclaimer.

a. **Cease and Desist Letters/Preparation for Litigation.** Remember, "First in Time is First In Right." A first in time use beats a federal registration. However, "first in time " is relevant only within the territory of use, with some arguable expansion area. Filing a federal trademark application becomes constructive use throughout the United States, if the application ripens to a registration. Be very careful with a prior user who has not filed a federal trademark application, but has a prior interstate usage.

To help our clients visualize how priority operates, I often use the following example: Imagine every use prior to a federal application for registration is a filled black circle on a map of the United States, with the circumference of the black circle being the territory of use of the respective prior users. A subsequent federal registration is like laying a yellow sheet of paper over the map. The registrant gets everywhere yellow and nowhere black. Of course, the goal is to be first to file for a federal registration before anyone actually uses the mark. Therefore, the entire map is yellow without any black circles.

Rule No. 1. If you are not sure that you have absolute priority of use for a mark, be very careful about sending a cease and desist letter.

Do not send out a cease and desist letter just because you have a trademark registration. A registration is a presumption, but not conclusive. If the recipient has senior rights to you, you have just noticed the recipient with cause to sue you!

As stated above, until a registration becomes "incontestable," a mark registration can be challenged for lack of distinctiveness and any other irregularity. In effect, a registration is somewhat "soft" for the first five years. The theory is that a registration is very powerful, and if no cancellation or other litigation is established within five years, the mark has acquired sufficient goodwill to eliminate challenge. A registration does not wipe-out prior users of the mark.

Rule No. 2. Do not send a cease and desist letter unless you are prepared to litigate the case.

When you send a "cease and desist" letter, you are indicating to the recipient to "stop or else." The "or else" is usually a threat of a lawsuit. Once you threaten the recipient with a lawsuit, the recipient usually will have a basis to file a lawsuit for declaratory relief. The risk of the recipient filing a lawsuit is particularly problematic in light of Rule No. 1, or any questionable claim. Since plaintiff picks the forum, sending a cease and desist letter to someone in California, when you and your client are in Pennsylvania, puts you at risk of being sued in a foreign jurisdiction. It is very difficult to explain to a client that, in the course of protecting the mark, you are now a defendant in a remote jurisdiction.

g. **The Federal Application.**

The steps for an application for a federal registration are basically as follows below. Timing varies widely, but below are reasonable averages.

Actual Use	Intent to Use	Time
File Application	Same	Day 1
Assigned to Examining Attorney	Same	3 - 4 months
PTO Review; First Office Action	Same	+3 months
Final Review; Notice of Publication	Same	+2 months
Publication	Same	+2 months
Oppositions, if filed	Same	+ 1 year

Approval: Register in Due Course		+2 months
	Approval: Notice of Allowance	+2 months
	Statement of Use Issues	+3 months
	Register in Due Course	+2 months

The fee is currently $275 or $325, per class (depending upon details of the claim methodology), for electronic filing and $375, per class, for paper files, but, unless particular client strategy constrains otherwise, to describe the goods and services broadly which may cover multiple classes, assuming the classes are generally available. This way, if there is a fatal problem, only one filing fee is lost. If the Examining Attorney permits additional classes, then the additional class fees can be paid at that time. This may slow down an application, because it ensures an office action, but the effective risk is whether there would have been an office action anyway for some other reason.

h. **U.S. Customs and Border Protection Recordation.** A copyright, 19 CFR 133.31, *et seq.*, and/or trademark, 19 CFR 133.1, *et seq.,* registration, as well as trade names, can be recorded with U.S. Customs and Border Protection for the purpose of preventing the import of counterfeit goods. https://iprr.cbp.gov/ The current fee is $190, 20 year term. (Title 19: Customs Duties, Part 133—Trademarks, Trade Names, And Copyrights)

i. Monitoring Services.

Monitoring services are automated processes to check to see if, for example, similar trademarks have been filed with the United States Patent and Trademark Office. Our firm developed and branded the MarkAssure service, markassure@markassure.com. On a subscription basis, clients and counsel get automated emails notifying them of any problematic files. MarkAssure is now available to other firms on a subscription basis.

j. Social Networking Posts Considered as Advertising, Endorsement, or Testimonial.

i. Corporate policies should require that, if employees promote or endorse company products or services, their relationship must be clearly and conspicuously disclosed. The Federal Trade Commission's recently-updated guidelines on endorsements and testimonials in advertising, codified at 16 C.F.R. § 255, impose liability on endorsers and companies for failure to make required disclosures about ''material connections,'' such as payments or employment relationships, that exist between endorsers and the speaker.

ii. Federal Trade Commission's Endorsement Guidance. See Federal Trade Commission, "FTC Publishes Final Guides Governing Endorsements, Testimonials" (Oct. 5, 2009), available at http://www.ftc.gov/opa/2009/10/endortest.shtm; see also Federal Trade Commission, "Guides Concerning the Use of Endorsements and Testimonials in Advertising," available at http://www.ftc.gov/os/2009/10/091005revisedendorsementguides.pdf.

iii. Companies inviting public endorsement through Facebook, Twitter, LinkedIn, and other social media will be held to certain standards regarding the endorsement.

B. The Non-Traditionals.

1. **Social Media.**

a. Potential Claims Against Employees:

i. Defamation

ii. Misappropriation of Trade Secrets
iii. Breach of Fiduciary Duty
iv. Breach of Contractual Confidentiality Agreement
v. Copyright, Trademark Violations

b. Potential Claims Against Employers:

i. Fair Credit Reporting Act
ii. Employment Discrimination
iii. Retaliation – Protected Activity
iv. NLRA Violation – Concerted Activity
v. Invasion of Privacy

c. Employment Decisions and Social Media.

Information on the Internet can be helpful or dangerous for employment decisions. This is true both for employers seeking to find information and employees who do not keep certain information private. See Social Media Research + Employment Decisions: May Be a Recipe for Litigation, Labor & Employment Law Blog (Jan. 21, 2011), http://www.laboremploymentlawblog.com/306160-print.html.

Employers are naturally tempted to use social media to review job candidates. Employers should be cautious because of information such as age, race, or disability that open the employer to discrimination claims. At the same time, employers want to ensure potential employees will reflect well on the company. Options including outsource social media background searches or firewalling the searches to ensure the person making the hiring decision only has the relevant information.

i. Survey data indicates substantial percentages of employers are doing so. See, e.g., CareerBuilder.com, Forty-Five Percent of Employers Use Social Networking Sites to Research Job Candidates, CareerBuilder Survey Finds, Aug. 19, 2009, available at http://www.careerbuilder.com/share/aboutus/pressreleasesdetail.aspx?id=pr519&sd=8%2f19%2f2009&ed=12%2f31%2f2009&siteid=cbpr&sc_cmp1=cb_pr519_&cbRecursionCnt=1&cbsid=6a40c4a869044991bf9c6f933cdf930a-319894625-we-6.

ii. Federal, state, and local non-discrimination statutes, common laws and local ordinances, prohibit employers from taking into account, in any employment action, including hiring, the applicant's age, race, national origin, gender, pregnancy, disability and medical condition, and, in many states and municipalities, sexual orientation, gender identity, and family status.

iii. There are two general solutions to the use of social networks as a source of information on prospective employees:

a. Do not use those tools.

b. Hire a neutral third party to conduct the search and filter out all illegitimate information before providing the business-relevant data to the hiring manager. http://www.opinionresearch.com/what_emp.shtml.

c. As a practical matter, a "second best" alternative is to designate a member of management involved in hiring decisions as the "screener" of social media, responsible for searching for publicly available information on potential candidates online and releasing only proper information, possibly by comparative matrix.

iv. Sometimes what is permissible can vary based upon the size of the company. It may also depend on whether it does business, directly or indirectly, with government entities, which may impose additional non-discrimination or affirmative action requirements upon employers who supply them with goods and services.

v. Employers with more than 15 employees are subject to Title VII of the Civil Rights Act, which prohibits discrimination on the basis of race, color, religion, sex (including pregnancy) or national origin (including characteristics of a national origin or perceived national origin, or the fact that a candidate does not speak English as a first language).

vi. Employers with 15 or more employees are subject to the Americans with Disabilities Act, which requires them to refrain from asking about a prospective employee's disability — the existence or severity thereof.

vii. All employers with more than 20 employees are prevented from making employment decisions, including hiring, on the basis of a candidate's age, pursuant to the Age Discrimination in Employment Act.

viii. Employers, regardless of how many employees they have, are subject to the Genetic Information Nondiscrimination Act of 2008 (GINA). The Act prohibits group health plans and health insurers from denying coverage to a healthy individual or charging that person higher premiums based solely on a genetic predisposition to developing a disease in the future. The legislation also bars employers from using individuals' genetic information when making hiring, firing, job placement, or promotion decisions.

ix. Certain government contractors are prohibited from discriminating against an employee on the basis of his or her veteran status.

x. Many states prohibit employment discrimination on the basis of an individual's sexual orientation, gender identity, and/or familial status.

xi. Documented processes should be implemented regarding the decision-makers in the hiring process and maintained for two years following the completion of the hiring process.

d. News and Publications

i. With respect to the discipline line of cases, the NLRB Acting General Counsel's Report indicates that social media posts that can be reasonably be interpreted as acting with or on behalf of other employees will be protected, regardless of any otherwise offensive content. http://www.employerlawreport.com/uploads/file/OM_11_74_Report_of_the_Acting_General_Counsel_Concerning_Social_Media_Cases_doc[1].pdf

ii. ACLU letter to Maryland Division of Correction Letter from Deborah A. Jeon, Legal Director, American Civil Liberties Union of Maryland, to Secretary Gary D. Maynard, Maryland Department of Public Safety and Correctional Services (Jan. 25, 2011), http://www.aclu-md.org/aPress/Press2011/collinsletterfinal.pdf. This letter mentions two possible claims arising from the Department's policy, namely, violations of the Stored Communications Act (SCA) and invasion of privacy for requiring social media information.

iii. Michael Clarkson, Human Resources and Employment Law Implications of Social Networking, morganbrown.com (2009), available at

http://www.morganbrown.com/docs/Social%20Networking%20Article%20%28final%29.pdf.

iv. Meredith Levinson, Social Networks" New Hotbed for Hiring Discrimination Claims, CIO (Apr. 18, 2011), http://www.cio.com/article/679830/Social_Networks_A_New_Hotbed_for_Hiring_Discrimination_Claims_?page=2&taxonomyId=3123.

e. Recommendations, Conclusions:

i. Set up a procedure for conducting social network searches on prospective employees.
ii. Appoint a screener for each position, responsible for researching applicants online and through social media, who is familiar with the non-discrimination laws that apply to filter the information.
iii. Be aware of applicable laws.
iv. Keep records of this process for two years following the filling of the position.

f. Termination.

i. **Use of Social Media in Employee Discipline and the Employee's Expectation of Privacy**

a. Employees release personal information that may be used by employers in disciplinary proceedings, investigating the integrity of an employee's request, carrying out investigations into harassment or workers' compensation claims, and assessing employee productivity.

b. The "expectation of privacy." Employment policies should eliminate guesswork, including information made public online and that "public" may be defined as "accessible to other employees."

c. The "False Friend" Problem. There remains some doubt about the right of privacy in a social network profile, but the direction of the law is reasonably clear. The New York Bar Association's Committee on Professional Ethics issued the following opinion on the matter, as it relates to lawyers:

- "A lawyer who represents a client in a pending litigation, and who has access to the Facebook or Myspace network used by another party in litigation, may access and review the public social network pages of that party to search for potential impeachment material. As long as the lawyer does not 'friend' the other party or direct a third person to do so, accessing the social network pages of the party will not violate Rule 8.4 (prohibiting deceptive or misleading conduct), Rule 4.1 (prohibiting false statements of fact or law), or Rule 5.3(b)(1) (imposing responsibility on lawyers for unethical conduct by nonlawyers acting at their direction)."

- In a 2010 New York case, *Romano v. Steelcase,* 907 N.Y.S. 2d 650 (N.Y. Sup. Ct. 2010), dealing with a claim for personal injuries, including "loss of enjoyment of life," the judge granted the defense access to evidence from the plaintiff's Myspace and Facebook accounts including private and all deleted information.

- In a 2009 New Jersey case, *Pietrylo v. Hillstone Restaurant Group,* 2009 WL 3128420 (D. N.J. Sept. 25, 2009), servers at a Houston's restaurant created a password-protected Myspace group for the purpose of providing a fo-

rum to discuss and complain about their common workplace. The content of the discussion posted in the forum was sometimes sexual in nature, sometimes offensive, and almost always derogatory as it related to the employer's workplace. A manager "convinced" one of the staff to provide him with access to the group and began monitoring the posts. The end result was the termination of employment of the servers, who reacted by filing a lawsuit on the basis of violation of their privacy rights, and wrongful termination in violation of public policy. The District Court ultimately sided with the employees and found that the company violated privacy laws (including the federal Stored Communications Act) since the group was password-protected, and the employee had only provided a password under duress.

g. Privacy Question Remains Unclear

   i. This is a new area of law. Contextual balancing of interests. *Romano* granted discovery, *Pietrylo* indicates that perhaps an employee will have a protectable privacy interest in information that he has specifically shared with a controlled group online.

h. Conclusions on the Employee's Expectation of Privacy

   i. Consider investigating an employee's social networking activities when the employee has claimed a right to leave.

   ii. When the employer is involved in litigation surrounding such a claim, even private social networking information may be discoverable and admissible.

   iii. Carry out a traditional investigation without "bullying" or "spy" tactics to gain access to password-protected sites where employees gather virtually.

i. Employee Postings

   i. The employee made comments on her MySpace page threatening violence, which she had made known to many of her co-workers. May become a common situation where employees post threatening comments about their employers to social media. *Nguyen v. Starbucks,* No. CV 08-3554, 2009 U.S. Dist. LEXIS 113461 (N.D. Cal. Dec. 7, 2009) (granting defendant's motion for summary judgment where employee failed to produce evidence showing an issue of material fact) .

   ii. John Holmquist, Facebook and employers: new ways to get information about employees, Michigan Employment Law Connection (Feb. 28, 2011), http://www.michiganemploymentlawconnection.com/2011/02/facebook-and-employers-new-ways-to-get.html. http://www.michiganemploymentlawconnection.com/2011/04/facebook-and-nlrb-part-2.html.

j. Several law review articles have addressed these issues.

   i. Robert Sprague, Fired for Blogging: Are There Legal Protections for Employees Who Blog? , http://www.law.upenn.edu/journals/jbl/articles/volume9/issue2/Sprague9U.Pa.J.Lab.&Emp.L.355(2007).pdf.

   ii. Katherine M. Scott, When is Employee Blogging Protected by Section 7 of the NLRA?, 2006 Duke L. & Tech. Rev. 17 (2006), http://www.law.duke.edu/journals/dltr/articles/pdf/2006DLTR0017.pdf.

iii. Molly DiBianca, Employee Fired When Her Sex Blog is Discovered by Her Boss, The Delaware Employment Law Blog (May 13, 2010) http://www.delawareemploymentlawblog.com/2010/05/employee-fired-when-her-sex-bl.html. Sex blogging after hours and terminated.

k. The "Facebook Firing" Case and Related Cases – Under What Circumstances Will Employment/Handbook Policies on the Use of Social Media Constitute an Unfair Labor Practice?

i. On November 2, 2010, the NLRB filed a complaint against American Medical Response of Connecticut, Inc. (AMR), also known as the "**Facebook Firing**" case. The NLRB alleged that (1) AMR's handbook policy regarding blogging, internet posting, and inter-employee communications was overly broad; and (2) AMR had unlawfully terminated an employee under said policy for posting and responding to critical comments on Facebook about her supervisor. On February 7, 2011, the NLRB announced that the case settled, and that AMR agreed to (1) revise its policy to ensure that it does not improperly restrict employees from discussing their wages, hours, and working conditions with coworkers and others while not at work, and (2) refrain from disciplining or discharging employees for making such disclosures. The NLRB's press release regarding settlement is at: http://privacyblog.littler.com/uploads/file/NLRB%20press%20release%20re%20AMR%20settlement.pdf. Updated by August 18, 2011 Acting General Counsel. http://www.employerlawreport.com/uploads/file/OM_11_74_Report_of_the_Acting_General_Counsel_Concerning_Social_Media_Cases_doc[1].pdf

ii. On February 7, 2011, American Response of Connecticut, Inc. (ARC) settled a case brought against it by the National Labor Relations Board (NLRB), wherein the NLRB alleged that ARC's social networking policy was unlawfully broad and could have a chilling effect on employees' rights to organize. The policy in question read, in pertinent part: "Employees are prohibited from making disparaging, discriminatory or defamatory comments when discussing the Company or the employee's superiors, co-workers or competitors."

An employee of ARC, Dawnmarie Souza, used her Facebook page to criticize her supervisor, and her comment drew supportive responses from her co-workers. Her employment was consequently terminated for violation of the policy. The NLRB filed a complaint, stating that Souza's Facebook posts amounted to protected concerted activity, and that AMR's social networking policy constituted an unlawful interference with employees' right to "engage in concerted activities for the purpose of collective bargaining," which is their Section 7 right.

Since the case was settled, there is no binding precedent to guide employers in revisions to their social networking policies. However, the ARC settlement specifically provided that ARC would revise its policies to ensure that "they do not restrict employees from discussing their wages, hours and working conditions with co-workers and others while not at work, and that they would not discipline or discharge employees for engaging in such discussions." The lesson is clear: social networking policies should include explicit language expressing the intent of the policy to stop short of restricting an employee's exercise of her Section 7 rights in limiting her employment-related speech online.

iii. On February 4, 2011, the Connecticut State Employee Association/Service Employees Int'l Union filed an unfair labor practice charge against Student Transportation of America (STA), a Connecticut Bus Company, claiming that STA violated Section 8(a)(1) of the NLRA by maintaining certain policies in its employment handbook, including a policy which prohibits, among other things: The use of electronic com-

munication and/or social media in a manner that might target, offend, disparage, or harm customers, passengers or employees; or in a manner that might violate any other company policy. A copy of the charge form in the STA case can be found at: http://www.laborrelationstoday.com/uploads/file/34-CA-12906.pdf .

l. DoD Policy on Use of Social Media

i. Deputy Secretary of Defense, Responsible and Effective Use of Internet-based Capabilities, Directive-Type Memorandum (DTM) 09-026 (Feb. 25, 2010), available at http://www.defense.gov/NEWS/DTM%2009-026.pdf.

m. OMB Guidance on Agency Use of Social Media

i. Cass R. Sunstein, Social Media, Web-Based Interactive Technologies, and the Paperwork Reduction Act, White House Office of Information and Regulatory Affairs (Apr. 7, 2010), available at http://www.whitehouse.gov/omb/assets/inforeg/SocialMediaGuidance_04072010.pdf .

n. Discoverability and Admissibility of Social Networking Sites

i. Privacy concerns were overridden by the fact that plaintiffs had already shared the information "with at least one person." http://www.canlii.org/en/on/onsc/doc/2009/2009canlii6838/2009canlii6838.pdf.

ii. The Ontario Superior Court of Justice ordered a plaintiff in a motor vehicle suit to produce copies of her Facebook pages. The defendant successfully argued that the pages were likely to contain photographs relevant to the plaintiff's damages claim, and was buttressed by the fact that the plaintiff had served photographs showing herself participating in various forms of activities. The court concluded granted access by weighing analysis.

iii. Jury Instructions at http://goingpaperlessblog.com/2010/06/15/discovery-of-social-media-profiles (June 15, 2010). http://goingpaperlessblog.com/social-media-in-the-legal-profession. http://www.al.com/news/birminghamnews/metro.ssf?/base/news/1256026558309710.xml&coll=2 ("After U.S. District Court Judge Scott Coogler seated jurors to hear the case of Birmingham Mayor Larry Langford, he gave them an extra instruction: no tweeting during the trial. Judges typically tell jurors not to talk about the trial or read or listen to information about it, but the warning over electronic communication is a fairly new one.")

iv. *Crispin v. Christian Audigier, Inc.*, 2010 U.S. Dist. LEXIS (C.D. Cal. May 26, 2010), in which the court confronted the issue of the discovery, via subpoena, of social network sites themselves. In *Crispin,* the court delineated the three types of information contained on social network sites, as follows:

a. Information made public via a social network—e.g., Facebook or Twitter postings.
b. Information not readily available to the general public via option privacy settings.
c. Private messages between users of the sites, with the site serving merely as a conduit for the private communications.

d. The court continued, noting that of the above three, only the first may be discoverable via subpoena: "Those portions of the…subpoenas that sought private

messaging are therefore quashed. With respect to the subpoenas seeking wall postings, however, the court concludes that the evidentiary record…is not sufficient to determine whether the subpoenas should be quashed."

v. *Moreno v. Hanford Sentinel,* 172 Cal. App. 4th 1125 (Cal. Ct. App. 5th App. Dist. Apr. 2, 2009). An author who posted an article on MySpace claimed invasion of privacy and intentional infliction of emotional distress when the defendant submitted to the article to the defendant newspaper, which republished it. The republished article included the author's name, unlike the MySpace posting, and it was included in the letters to the editor section of the newspaper. The article explained that the plaintiff despised her hometown. After republication, the author's family received death threats. The court dismissed plaintiff's claim for invasion of privacy because she had publicized her opinions on MySpace, relinquishing any reasonable expectation of privacy. Nor was her name a private fact: her identity, the court found, was "readily ascertainable" from her MySpace page, which contained her picture, and the principal was able to attribute the article to her from the original source. The principal, according to the court, was only giving further publicity to "already public information."

vi. *Barnes v. CUS Nashville,* Order, No. 3:09-cv-00764 (M.D. Tenn. May 27, 2010). An initial order directed Facebook to produce information from the Facebook account of a nonparty witness. Facebook appeared and moved to set aside the order. The magistrate judge agreed with Facebook that the Secured Communication Act (SCA) prohibits Facebook from disclosing the materials sought in the order.

vii. Lori Paul, Paralegal Practice Tip: How to Subpoena MySpace and Facebook Information, PARALEGAL BLAW BLAW BLAW (Oct. 10, 2009), http://lorijpaul.com/?tag=litigation. MySpace requires that you provide the user's unique friend ID number or url. The friend ID number is located in the url line. For example, within the url http://www.myspace.com/index.cfm?_fuseaction=user.viewProfile&friendID=6221&Mytoken=20050518161358, friend ID 6221.

o. Social Networking Posts Considered as Advertising, Endorsement, or Testimonial:

i. Corporate policies should require that, if employees promote or endorse company products or services, their relationship must be clearly and conspicuously disclosed. The Federal Trade Commission's recently-updated guidelines on endorsements and testimonials in advertising, codified at 16 C.F.R. § 255, impose liability on endorsers and companies for failure to make required disclosures about ''material connections,'' such as payments or employment relationships, that exist between endorsers and the speaker.

ii. Federal Trade Commission's Endorsement Guidance. See Federal Trade Commission, "FTC Publishes Final Guides Governing Endorsements, Testimonials" (Oct. 5, 2009), available at http://www.ftc.gov/opa/2009/10/endortest.shtm; see also Federal Trade Commission, "Guides Concerning the Use of Endorsements and Testimonials in Advertising," available at http://www.ftc.gov/os/2009/10/091005revisedendorsementguides.pdf.

iii. Companies inviting public endorsement through Facebook, Twitter, LinkedIn, and other social media will be held to certain standards regarding the endorsement.

p. Drafting Policies

i. Overview

Social media, which generically includes similar professional online networking, such as LinkedIn, represents a new challenge for employers, because of how it is relied upon and used, and the extreme visibility outside of the company. Consider the following examples for which the circumstances have been changed to protect against further republication.

- Example: A high-profile executive lands in a particular city and smugly posts on Twitter, "This city is a dump." The problem: the city is the corporate home to a corporate partner who relies upon the image of the city for revenue production, one of the executive's employer's most important relationships.

Amplifying the risk, once information is conveyed, there is a significant probability that the information will be indexed (forever) for search purposes, and could be picked up by larger media and governmental enforcement agencies.

- Example: When two employees at a national pizza chain were bored one evening, one filmed the other sticking a piece of cheese up his nose and then placing it on food. Demonstrating the pure irreverence of the act, they then posted the video on YouTube. More than half a million hits later, the pizza chain had a public relations nightmare and a Health Department inquiry. The individuals were criminally charged with intentional food contamination.

In light of the magnitude of users, there is a high probability that, if you are looking for someone online who is generally socially or professionally active, that person will have a Facebook and/or LinkedIn presence. It is now commonplace to research any new contact online, whether a potential client, employee or neighbor. What you can find online and why it might have been published can tell you a lot about a person.

- Example: A national governmental elected official voluntarily tweets a picture of himself in his underwear to a potential mistress. There are two issues: the published fact, and the fact that the person himself would have published it. Donald Trump commented that it is one thing to have a marital affair, which is wrong, and it is downright stupid to have tweeted it.

When any person is using the company brand, the company needs to be vigilant. Company brands can be valuable and actions that bring that brand into disrepute, even for an unrelated act, can significantly decrease value. A company employee disparaging activities, even if somewhat "private," even if true, or a company employee who is brought into criminal media attention. People reflect the brand, and the brand reflects the people.

A social media policy is often recommended for businesses to manage use of the company brand forum. That is, to the extent that the company name is used for any reason, there is a claim to a legitimate interest by the company. A company may not want to completely eliminate the use of social networks, because employees can sometimes be some of the best users given their company knowledge. However, the substantive content and appearance of an employee post or profile made outside of the scope of his or her employment duties can raise a number of legal and other problematic issues.

To regulate, but not to eliminate use of online networking with the company brand, maintaining the potential benefits of social networking employees, companies should seriously consider having an employee social media policy in place. Such as other types of employment policies, a social networking policy should be tailored to the specific business at issue. Depending on the nature of the business, there could be a number of topics to explore in constructing a social media policy.

ii. The Questions

Crafting the policy: The Questions

There used to be unwritten rules of gentry, simply act with discretion and courtesy toward others, and in a respectful manner regarding oneself and others. But, all these toys just tends to make children of us all.

- The inherent problem is that social networking is a cultural phenomenon for young adults. It can be so engrained in new workers that a limitation will only inspire contradictory machinations and destroy loyalty and morale. Young talent will just find a way around it or leave to work for a company with less restrictions.

- Businesses are learning that social networking, used properly, can be an effective business tool. Having your employees involved in the community can enhance the company's reputation and bring in more business — so long as it is managed.

- Employers need to exert some control over how these sites are used. People tend to push the limits. As anyone knows who has litigated an unemployment compensation issue, it is difficult to blame employees for violating rules that do not officially exist. You need a social networking policy that explicitly lays out what is permissible, both on the company's network and outside of it if they are using company identities.

- Even blocking social networking sites does not address working from home, so you a social networking policy is still recommended.

With that in mind, here are important questions:

a. **Does social networking have any applicability to your business, or could it?** This needs to be answered in the new context. To answer in a conclusory manner that that there is no applicability begs the question.

b. **What is the categorical scope: During work and not during work?** These are two difference interests and each has different implications. For example, during work, the employer is paying for employee time and attention; accordingly, has a specific interest in controlling behavior. During non-working hours, the interest is not cause-based, but only effect-based. That is the employer no longer controls the incidents of cause, time and equipment; accordingly, the interest is becomes limited to the result. Does the policy include access social networks from their personal mobile devices during work hours? If you prohibit social networking, how will you monitor it?

c. **If you permit employees to social network at work, do you want to limit it to work-related conduct, or permit limited personal use?** How you answer this question depends on how you balance productivity versus marketing. Define

"reasonable use" of social networks on company computers is expected, and that this should take place during lunch or break times. But, remember, you are opening the door to the usage.

d. **Do you want employees to identify with your business when networking online?** Employees should be made aware that if they post as an employee of your company, the company will hold them responsible. You could simply require that employees not affiliate with your business. Possibly differentiate between a private and public profile. Remind employees that although their time spent social networking is restricted during work hours, the content that they post and the activity in which they engage may have consequences in the workplace, even if posted after hours from the employee's home computer.

e. **How do you define permitted behavior?** Employees should understand that what they post online is public, and they have no privacy rights in what they put out for the world to see.

f. **How will social networking intersect with your broader handbook policies?** Employment policies do not operate alone. Employees' online use can violate other corporate policies. Drafting a social networking policy should be part of a revisiting of other policies.

iii. Policy Points

As you start to draft your policy anything less than total prohibition, you need to draft within some constraints:

1. Request Review Before Posting, Connecting

Companies could encourage employees to seek review of certain social media behavior (postings and/or the content of any online profiles) by the company first for advice or even approval. While requiring every relevant post to be ''pre-approved'' could prove cumbersome, some type of common-sense language may help to encourage open dialog on ''close'' calls. In other words, when in doubt, employees should not post before checking with the company.

2. Make Responsibility Clear

Companies should make clear to employees that it is the employees who are solely and legally responsible and liable for posts made outside of the company's request. If employees commonly use work-related computer systems and hardware for personal use, an additional clarification may be wise stating that employees are responsible for any online activity conducted with a company e-mail address, and/or done through the use of a company computer system and/or hardware.

3. Restrict Use of Intellectual Property

Social media behavior should not appear as if it is endorsed or approved by the company. Accordingly, companies should consider restrictions on how the company's trademarks and other intellectual property are used, including not registering company names and marks as components of usernames or other login identifiers. If employees want to list their employment in profiles, they should limit the listings so the profiles do not appear as if they originate from official company representatives or spokespersons. In no way should employees propose or conduct any business on behalf of the company.

4. Mandate Professionalism

Companies should require that all content distributed through social networks is accurate, and should be fact checked as needed. Companies should also strive to ensure that social media interactions are conducted professionally. The behavior should not be critical of competitors or used to engage in online arguments. The behavior should not contain personal attacks. In this vein, companies should require that if an employee notices a negative or inaccurate post about the company, he or she should avoid responding to it and should alert company management.

5. Require Relationship Disclosure

Corporate policies must require that, if employees promote or endorse company products or services, their employee status must be clearly and conspicuously disclosed. The Federal Trade Commission's recently-updated guidelines on endorsements and testimonials in advertising.

6. Prohibit Illegal, Abusive Uses

Social media behavior should not violate any laws or regulations, but companies would still be wise to include such language in their corporate policies. Companies could also include in this section prohibitions on behavior that infringes the intellectual property of other parties. Employees should not engage in spam or other problematic conduct such as hacking or uploading viruses, for instance. Employees should avoid any behavior that could create a hostile work environment. Employees should use good judgment, and should do their best to avoid any behavior that would reflect poorly on the company.

7. Set Privacy Expectations

A corporate social networking policy should prohibit employees from posting the names, photos, or other personally identifiable information of other individuals, especially fellow employees, without proper permission.

8. Set Restrictions on Data, Information Sharing

To protect assets and maintain image, corporations should specifically bar employees from using social networks to disclose, whether advertently or not, any sensitive financial or other confidential or trade secret information about the company or any other company, person or entity . This may include information about upcoming product/service releases, sales data, finances, employee statistics, company strategy, and any other information that has not been publicly released by the company. Employees should also not discuss securities and related issues. This includes any behavior that could in any way misrepresent the financial status of the company.

9. Prevent or Limit Endorsements by Employees

A strong social networking policy will prohibit employees from providing recommendations about colleagues or former colleagues without first seeking company approval. In the case of former colleagues, the recommendations may be inconsistent with the company's position. Similarly, the corporate policy should restrict employees' online, networked responses to a journalist's request for an interview or comments on a specific issue. Use agreements for post-employee covenants.

10. Set Standards as Objectively as Possible, and Set Forth the Subjective Standards

To the extent that objective standards can be established, the company should establish them. More subjectively, companies should make the general standards known and require that employees use good judgment when posting a link to a third-party site.

iv. Concepts

a. **The Internet is not anonymous, nor does it forget.** Everything written on the web can be traced back to its author one way or another and very easily. Information is backed up often and repeatedly, and posts in one forum are usually replicated in others through trackbacks and reposts or references.

b. **There is no clear line between your work life and your personal life. Always be honest and respectful in both capacities.** With the ease of tracing authors back from their posts and the amount of information online, finding the actual identity of a poster from a few posts and a screen name is not impossible. This creates an avenue for outside parties to link your personal writings to those you've done in a professional capacity. Always write as if everyone knows you. Never write anything you would not say out loud to all parties involved.

c. **Avoid hazardous materials.** Do not post or link to any materials that are defamatory, harassing or indecent.

d. **Don't promote other brands with our brand.** Do not promote personal projects or endorse brands, causes or opinions when posting from a company account. Be sure to respect third party copyrights. If a personal opinion must be posted, clearly state to all readers that it does not represent the opinions of company. You may not sell any product or service that would compete with any of your company's products or services without permission in writing from the president. This includes, but is not limited to training, books, products, and freelance writing. If in doubt, talk with your manager and the president.

e. **Maintain confidentiality.** Do not post any confidential or proprietary information in regards to company or its clients.

f. **Do not retaliate.** If a negative post or comment is found online, do not counter with another negative post. Instead, publicly offer to remedy the situation through positive action. Seek help from the company in defusing these types of situations. On the web, retorts breed retorts, and it tends to get worse.

g. **Respect Privacy.** Speak respectfully about the company and our current and potential employees, customers, partners, and competitors. Do not engage in name calling or behavior that will reflect negatively on your company's reputation. Note that the use of copyrighted materials, unfounded or derogatory statements, or misrepresentation is not viewed favorably by your company and can result in disciplinary action up to and including employment termination.

h. **Legal Liability.** Recognize that you are legally liable for anything you write or present online. Employees can be disciplined by the company for commentary, content, or images that are defamatory, pornographic, proprietary, harassing, libelous, or that can create a hostile work environment. You can also be sued by

company employees, competitors, and any individual or company that views your commentary, content, or images as defamatory, pornographic, proprietary, harassing, libelous or creating a hostile work environment.

Remember, use of information on social media sites can certainly be a release of confidential information, even if disclosed from memory: "In the present case there is no dispute that the customer data of the plaintiff company was both confidential and highly valuable, and the court *en banc* so found. Whether this information was embodied in *625 written lists or committed to memory is, we believe, of no significance; in either case the data are entitled to protection." *Morgan's Home Equipment v. Martucci, et. al.,* 136 A.2d 838 (Pa. 1957), *citing, Macbeth-Evans Glass Co. v. Schnelbach, supra*; *Belmont Laboratories Inc., v. Heist,* 1930, 300 Pa. 542, 151 A. 15; *See, also, Boylston Coal Co. v. Rautenbush,* 1925, 237 Ill.App. 550; *Colonial Laundries v. Henry,* 1927, 48 R.I. 332, 138 A. 47, 54 A.L.R. 343; *J. L. Cooper & Co. v. Anchors Securities Co.,* 1941, 9 Wash.2d 45, 113 P.2d 845; 2 Callmann, op. cit. supra at 844.

v. **Rules and Interests**

The following are fundamental points, rules. If an employee or potential employee disagrees with any of these points, there is a major disconnect that may be cause not to start the employment relationship.

- **Rule No. 1. The Company has an interest in protecting its reputation and the use of its intellectual properties, brands, copyrights and trademarks.**
- **Rule No. 2. The Company has an interest in managing use of its assets, technologies and equipment.**
- **Rule No. 3. The Company has in interest in managing as to how an employee's time is used, which is paid by the Company.**
- **Rule No. 4. The Company is entitled to coordinate its marketing efforts.**
- **Rule No. 5. The Company is entitled to coordinate its current clients.**
- **Rule No. 6. The Company is entitled to coordinate its current employees.**
- **Rule No. 7. The Company is entitled to coordinate potential and former clients, as it relates to management of current business.**
- **Rule No. 8. The Company is entitled to coordinate and potential and former employees, as it relates to management of current business.**

Other than the above, the Company does not intend to limit unrelated use of social networking.

As a company develops its policy, most of the requirements and individual policies will fall within protecting its interests. If there is disagreement with any of the above, there will be contention on the policies. Certainly, Rule No. 8 is important to the employee and more broad, since it purports to control.

Sample Policies

Employee Policy. Metadata is hidden data contained within electronic documents and things. It is the policy of this firm that each attorney and staff member, on his or her own volition without additional supervision, must remove all metadata and hidden content from transmissions of electronic documents and things to third-parties. Disclosure of metadata risks disclosure of confidential and proprietary information of the firm and/or its clients, as well as risks disclosure of client privileged information and workproduct. Improper disclosure is a violation of this firm's express employment policy. If an attorney of this firm receives metadata from a third-party in a matter governed by the Rules of Professional Conduct, the attorney must contact his or her supervisor on the matter; if the matter is not supervised, the attorney must comply with the Rules of Professional Conduct and to call an appropriate Ethics Hotline for additional information if appropriate. In every case, notwithstanding coordination with the supervisor, each attorney is individually responsible for ultimate compliance with his or her license within the applicable jurisdiction. In all cases, the manner in which to deal with the receipt of metadata from another attorney or another third party may be governed by substantive rules of law. This policy does not apply to the extent of applicable law or court order to the contrary, such as, but not limited to, during the proper production of documents or things.

Client Engagement Policy: The firm is pleased to have the capacity to communicate with its clients and third parties by electronic mail and other electronic facilities. At times, such communication can significantly reduce the cost of your legal services. However, because ultimate security for such communication systems remains unsure, unless we agree otherwise in writing, you hereby consent and authorize the firm to use, and you agree to hold the firm harmless arising from, related to or in connection with using, electronic mail and the transmission of electronic documents and things, including, but not limited to, in non-encrypted form. For this purpose, formatives of the term "encrypt" include any form of secure transmission, including password protection; the term "electronic mail" includes any form of electronic communication and/or transmission of electronic documents or things. Your consent includes transmission with you and/or third-parties. We must advise you that, custom and convenience notwithstanding, there are serious risks associated with the use of electronic mail and the transmission of electronic documents and things, and, more particularly, if not encrypted. Each client of the firm must make the decision regarding the use of electronic mail and/or encryption in light of the client's particular circumstances, budget and risk aversion. Any use of encryption by the firm or you at any time shall not imply that any other use is implied or required. Your request to prevent the firm's use of electronic mail or transmission of electronic documents and things, or to require the firm's use of encryption, must be absolute and clearly expressed by you in writing and acknowledged in writing by the firm; moreover, any such request is prospective only. The firm is not in the position to advise you as to whether this policy is ultimately in your best interest, and you are encouraged to seek independent advice. If you choose to require the firm not to communicate by electronic mail and/or to require the firm to use encryption, upon your advance written request, the firm will estimate any additional time and cost to you for us to do so and will respond in writing accordingly.

Confidentiality; Privacy.

Confidentiality. Confidentiality in a law office is considered to be of absolute paramount importance. In the course of your employment, you will learn of or see confidential, secret and valuable assets of COMPANY relating to its clients, client lists, forms, publications, marketing plans, internal operating procedures, financial statements and other trade secret information (the "Confidential Information"). COMPANY has invested substantial time, money and effort into developing the Confidential Information. As a result, you are expected to maintain the confidentiality of such information during and at all times after your employment with COMPANY. Under no circumstances may you remove any Confidential Information (whether or not labeled as such). **Confidential Information includes information that you have memorized or that is contained in any medium.**

All right, title and interest in the Confidential Information (including, without limitation, copyrights and patents) are and shall remain exclusively in COMPANY. All knowledge and information concerning COMPANY and the Confidential Information which you may acquire shall at all times and for all purposes are regarded as confidential and shall not be disclosed or used by you in any manner. You may not disclose or permit disclosure of the Confidential Information or any information related thereto to any person or entity. If you receive any Confidential Information, then, upon termination of your employment with COMPANY, you shall promptly return all copies of the Confidential Information to COMPANY.

Because of the importance of confidentiality, you must indemnify COMPANY for any breach of confidentiality. You acknowledge that any breach or threatened breach of confidentiality would cause irreparable harm to COMPANY and/or its clients within a very short period of time and that the remedies at law for such a breach may be inadequate. Accordingly, you agree that COMPANY and/or its clients shall be entitled to preliminary injunctive relief and other injunctive relief against any such breach, which relief shall be in addition to any and all other remedies which COMPANY and/or its clients may have at law or in equity.

Privacy. All equipment is accessible by the COMPANY and you do not have any expectation of privacy in anything performed during paid COMPANY time or on COMPANY equipment, even if the hardware, software or other functionality of the facility indicates that the information or communication is private. Many employees must share the equipment and facilities assigned primarily for your use. Without limiting the generality of the foregoing, all office equipment and facilities, including, but not limited to, the information contained in computerized format on, or distributed by means of, the computer and/or telephone equipment at COMPANY, whether directly or indirectly related to the business of COMPANY or otherwise personal to you, may be reviewed by COMPANY. Without limiting the generality of the foregoing, COMPANY may, at any time, review the content of any desk, drawer, cabinet, computer, disks, electronic mail messages or voice mail messages, even if such messages are created as private or even if other COMPANY materials, the manuals and/or technical information indicate that such messages can or will remain private. YOU EXPRESSLY WAIVE ANY RIGHT TO PRIVACY IN THE AFORESAID INFORMATION. Usage of network files is or may be tracked by the network software; at any time, the firm may determine the files which you have accesses. You may not access files or client documents except with good reason for the benefit of the firm. YOU EXPRESSLY WAIVE ANY RIGHT TO PRIVACY IN AND TO ANY SOCIAL OR PROFESSIONAL NETWORKING DATA USED, AC-

CESSED OR STORED ONLINE TO THE EXTENT THAT IT REGARDS COMPANY, EMPLOYEES, CLIENTS, VENDORS OR AFFILIATES.

M E M O

TO: All Staff
SUBJECT: LinkedIn® Social Media Policy

LinkedIn® is a professional networking tool with an intended use as part of your employment with COMPANY. While COMPANY does not want to interfere with personal connections and recommendations, to the extent that recommendations regard or bear upon professional services offered by COMPANY or are in conjunction with COMPANY clients, COMPANY needs to coordinate the effort in the best interests of everyone at COMPANY, as a common enterprise.

Following is COMPANY's LinkedIn® policy as of this date; other online social and network policies are under review, so please understand that, because COMPANY does not have a specific policy regarding the use of other social and professional media, you should always be guided by the general policies of COMPANY, this policy, your employment agreement and the common sense to do what is in the best interests of COMPANY as your employer. You are encouraged to implement the spirit of this policy on any other online social and/or professional network.

1. **The COMPANY Online Networking Philosophy.** On the one hand, it is in COMPANY's best interest to drive business, recommendations and new accounts into COMPANY. The success of COMPANY, and the prosperity of its employees, depend upon acquiring new business and providing quality services. But, on the other hand, COMPANY must ensure that recommendations and online networking is coordinated so that COMPANY and its staff is unified with focused momentum for the benefit of COMPANY team as a whole. Although online media allows for a more efficient process, COMPANY conceptually views the online media process as if the same goals and acts were accomplished by telephone and/or letter. For example, if you become connected with a potential client and you are also connected with a competitor, it is tantamount to sending a letter to a competitor regarding your new relationship. COMPANY also needs to ensure that the professional social media usage of its staff is consistent with COMPANY overall goals and internal processes.

If you believe that any aspect of social networking would benefit COMPANY, you are encouraged to present your request to COMPANY in writing. If you believe that any portion of this policy contradicts any rights you may otherwise have by law, please contact your supervisor immediately in writing and we will duly consider making any adjustments.

2. **LinkedIn® with COMPANY Clients.** You are permitted to connect with COMPANY clients and former clients with whom you personally have provided services. However, COMPANY needs to manage the LinkedIn® recommendation and introduction processes. For example, COMPANY needs to ensure that clients and former clients do not receive multiple requests for recommendations; if one client works with multiple COMPANY staff, there is a risk that multiple staff will each request a recommendation. This could create an awkward situation for the client, as well as burden the client. Even if a client only works with one staff member, an unapproved request to a client could place the client in a position of

frustration believing that the quality of services will be leveraged against the quality of the recommendation. Therefore, COMPANY employees may not request or accepted LinkedIn® recommendations or introductions with or from clients or former clients, except with the prior written approval of COMPANY.

In the event that any employee receives an unsolicited recommendation or introduction request from a client or former client, it is important that COMPANY qualify the information. For example, if the recommendation references hiring the staff member, rather than COMPANY, or if the recommendation identifies a non-attorney as providing legal services, COMPANY must correct any misunderstanding with the client and/or the incorrect public statement. Therefore, upon you receiving notice of a recommendation or request for introduction, please forward a copy to COMPANY management for approval. If you are provided the opportunity to edit the information prior to publication, please notify COMPANY at that time.

3. **LinkedIn® with COMPANY Competitors and Competing Firms.** COMPANY competitors and competing law firms, respectively, are those who advertise or are known to otherwise []. COMPANY has determined that it is in the best interests of COMPANY that its staff does not connect with competitors, competing firms and their staff. If you or COMPANY determines that you are engaging in LinkedIn® networking with an COMPANY competitor or competing firm or any of its staff (including, but not limited to, connecting, recommendations and introductions) you must disconnect that relationship immediately. The LinkedIn® networking is continually "improving" and COMPANY believes that LinkedIn® networking introduces new management risks and costs into operations. The goal of the firm is to maximize revenue to COMPANY and minimize risk of disruption; if you believe that it is COMPANY's best interest that you have such a connection, please contact management.

4. **LinkedIn® with COMPANY Co-Workers and Vendors.** COMPANY has determined that recommendations between or among COMPANY co-workers and vendors, including former co-workers and vendors is not in the best interest of COMPANY as raises contractual enforcement, workplace and social implications that can be complex. Accordingly, the COMPANY LinkedIn® policy for COMPANY co-workers and vendors, including former co-workers and vendors, is the same as for COMPANY clients and former clients.

5. **LinkedIn® with [Judges, Witnesses, Adverse Counsel, Adverse Parties.]** COMPANY needs to ensure that it maintains a policy consistent with integrity in the legal profession. Accordingly, except as otherwise permitted in writing, COMPANY does not permit LinkedIn® connections with judges, witnesses, adverse counsel, adverse parties and/or any person inappropriate pursuant to the applicable rules of professional or industry conduct.

6. **LinkedIn® General Policies and Handbook Coordination.**

a. In order to manage the this LinkedIn® policy, it is required that you maintain a LinkedIn® connection with your supervisor, and that all of your connections remain visible for review.

b. You are encouraged to implement the spirit of this policy on any other online social and/or professional network; however, at this time, this policy is implemented and mandatory only for LinkedIn.®

   Consider that today's standards of indexing permit someone to locate you by your name possibly easier than through a reference to COMPANY.

   Employee social networking profiles and personal blogs that are open to viewing by your colleagues at work or customers or business affiliates of COMPANY (e.g., "Public Profile"), particularly if you reference COMPANY, should be free of material that could be viewed as offensive, obscene, harassing, sexually oriented, threatening, or intimidating. Examples of such materials include, but are not limited to, sexually-based text and pictures, and material that might offend individuals of different genders, sexual orientations, disabilities, religions, races, or national origins. You may not use your Public Profile to disclose or discuss personal information about, or to disparage, the COMPANY, a colleague, a customer, vendor, or an affiliate of COMPANY.

   Remember, everything you publish online is published and indexed. If you are an espoused hater of certain genders, races, colors or creeds, with that being known on the Internet worldwide, any customer may review that information and it will reflect upon the COMPANY whether or not you use the COMPANY name.

c. Nothing in this policy is in derogation of COMPANY's policy on Internet Use contained in the Employee Handbook. This means, among other things, that COMPANY does not allow misuse of copyrighted or proprietary material by its employees on social networking sites, nor does it allow harassing behavior by its employees on these sites. Also, this policy is not in derogation of the COMPANY policy on non-disclosure of confidential information applies to your use of social networking sites as stated in the Employee Handbook.

d. Nothing in this policy or the Employee Handbook affects your right to discuss working conditions with your co-workers under applicable labor laws and regulations, if any. Therefore, all policies are appropriately to be read and interpreted as accordingly constrained.

e. As stated in the Employee Handbook, you may not use your COMPANY business email address or telephone number on any Public Profile without advance written permission of the Company.

f. COMPANY time and equipment are to be used for business purposes only. [You may use social networking sites for short, reasonable periods during scheduled breaks in the work day, and only when such use does not interfere with COMPANY's business or your job. Use of social networking sites on company computers or personal mobile devices, during business hours, outside of those scheduled breaks, is not permitted. Remember, however, if you do so, you have no expectation of privacy whatsoever as to anything done or performed on company equipment, irrespective of technology functionality that may indicate privacy. In accordance with the Employee Handbook, COMPANY reserves the right to review its equipment for any reason whatsoever.]

COMPANY hopes you understand the basis for controlling the manner in which it markets professional services for the best interests of everyone. COMPANY reserves the right to continue its subjective assessment of staff conduct and compliance. Violation of this policy shall create grounds for discipline up to and including termination. If you are unwilling or unable strictly to comply with this policy, please contact your supervisor immediately in writing.

Acknowledged Receipt By:

_____

III. Ethics

A. **Overview.** http://www.padisciplinaryboard.org/documents/RulesOfProfessionalConduct.pdf.

B. Rule 8.2 Statements Concerning Judges and Other Adjudicatory Officers. (a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.

1. The risks of blogging that the judge is an "Evil, unfair witch" and "seemingly mentally ill." Brief: http://jaablog.jaablaw.com/files/34726-32374/conway_response.pdf. UCLU: http://jaablog.jaablaw.com/files/34726-32374/aclu_amicus.pdf. First Amendment? Fact?

> Prior to October 18, 2006, Broward Circuit Judge Cheryl Aleman appointed the respondent, Conway, a Florida lawyer, to represent defendant in her courtroom for a pending felony. Through a written plea the defendant was arraigned *in absentia* on October 18, 2006. Six days later on October 24th, the clerk of the court sent a Notice of Trial to the respondent. On October 25th the Notice of Trial was received by the Respondent advising him that his client's trial was scheduled to begin three business days later on October 30, 2006. Of equal importance, this date was only eight business days after his client's arraignment.
>
> On October 30th, Conway and his client appeared before Judge Aleman. When the case was initially called Judge Aleman asked counsel, "[t]rial or continuance?" If counsel and client wanted time to serve witnesses with subpoenas or to engage in reasonable discovery, Judge Aleman insisted that defendants, including Conway's client, waive their right to a speedy trial as a condition of granting their request for a continuance.
>
> When the case was recalled approximately two hours later Conway directed Judge Aleman's attention to Fla. R. Crim. P. 3.160(d) which specifies that, "[a]fter a plea of not guilty has been entered the defendant is entitled to a reasonable time in which to prepare for trial." (Emphasis added). The trial judge did not directly respond to counsel's suggestion that the language of the rule should guide the court in the matter. As a consequence, counsel reluctantly advised the Court that he was moving for a continuance, as it was the only prudent option available. Judge Aleman then directed her attention to Conwav's client and had him affirmatively waive his rights to a speedy trial.
>
> The next day, Halloween 2006,Conway posted on the JAAR blog his views concerning what had transpired in Judge Aleman's courtroom with respect to his client's case, as well as all other cases which had been arraigned on October 18, 2006 and were thereafter set for trial on October 30, 2006. See Exhibit -A- Respondent's JAAB posting dated October 31, 2006. Conway acknowledges the following remarks: (1) "I along with several other attorneys, had to endure her ugly, condescending attitude as one-by-one we all went up to the podium and noted that our respective clients had just been arraigned on Oct. 18th as she forced us to decide between saying ready for trial - or need a continuance"; (2) "Every atty tried their best to bring reason to that courtroom, but, as anyone who has been in there knows, she is clearly unfit for her position and knows not what it means to be a neutral arbiter"; (3) "Evil, unfair witch ("hereinafter "witch")"; (4) "As my case was on recall for 2 hours, I watched this seemingly mentally ill judge condescend each previous attorney"; and (5) "Judge (not your honor b/c there's nothing honorable about that malcontent) there seems to be a mistake in this case."

2. Respondent referred to a judge as being "a total a**hole," and in a blog entry dated March 11, 2008, Respondent referred to a judge as "Judge Clueless." Respondent's blog entries contained sufficient identifying information such that Respondent's co-workers, employees of the State's Attorney's Office, police, bailiffs, or other participants in the system could determine the identity of the clients and judges to which Respondent's blog entries referred. The blog entries also contained sufficient information such that a motivated person who was not an employee could, using other publicly-available information, determine the identity of the judges and clients referred to in Respondent's blog entries.

   By reason of the conduct described above, Respondent has engaged in the following misconduct: using or revealing a confidence or secret of the client known to the lawyer, in violation of Rule 1.6(a), of the Illinois Rules of Professional Conduct; and conduct which tends to defeat the administration of justice or to bring the courts or the legal profession into disrepute, in violation of Illinois Supreme Court Rule 770. https://www.iardc.org/09CH0089CM.html.

   Respondent was aware that the defendant had misinformed the court regarding her drug usage, but, at no time did Respondent call upon the defendant to rectify her misstatement to the court, and at no time did Respondent inform the court that defendant had admitted to using methadone. Respondent knew or should have known that she had a duty to inform the court that the defendant had misrepresented that she was not using any drugs at that time, or that she had a duty to call upon the defendant to correct her misstatement. By reason of the conduct described above, Respondent has engaged in the following misconduct:

   a. failing to call upon a client to rectify a fraud that the client perpetrated on the court, in violation of Rule 1.2(g) of the Illinois Rules of Professional Conduct; b. failing to disclose to a tribunal a material fact known to the lawyer when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client, in violation of Rule 3.3(a)(2) of the Illinois Rules of Professional Conduct; c. conduct involving dishonesty, fraud, deceit or misrepresentation, in violation of Rule 8.4(a)(4) of the Illinois Rules of Professional Conduct; d. conduct that is prejudicial to the administration of justice, in violation of Rule 8.4(a)(5) of the Illinois Rules of Professional Conduct; and e. conduct which tends to defeat the administration of justice or to bring the courts or the legal profession into disrepute, in violation of Illinois Supreme Court Rule 770.

3. Jurors should not blog about the case, or even about the process itself, because it invites scrutiny. Attorneys in the case can pick up the blog and adjust their case. Jurors are not supposed to discuss the case, and deliberation has not begun. http://www.nytimes.com/2010/10/18/nyregion/18juror.html; http://www.nbcchicago.com/traffic/transit/Metra-Takes-Blogging-Juror-Case-to-Supreme-Court-133919678.html.

4. Attorney blogging information about a patient care record, under the objection of a hospital internal business record. No protective order and voluntarily released. http://www.vamedmal.com/library/Mahone_v_Sentara_02052010.pdf.pdf.

5. Juror trying to friend a defendant on Facebook. http://www.zdnet.com/blog/facebook/juror-sentenced-for-trying-to-friend-defendant-on-facebook/3097?tag=rbxccnbzd1.

6. Connecticut Superior Court Judge Kenneth Shluger recently ordered a divorcing couple to hand over their "Facebook and dating website passwords" to each other's lawyers. The ruling apparently forces both parties to violate Facebook's terms of service. http://www.zdnet.com/blog/facebook/couple-ordered-to-swap-facebook-passwords-in-divorce-case/5262?tag=content;siu-container.

7. Judges should not ex parte "google" regarding a case. http://www.aoc.state.nc.us/www/public/coa/jsc/publicreprimands/jsc08-234.pdf. *See, Judicial Ethics and the Internet: May Judges Search the Internet in Evaluating and Deciding a Case?* 16 NO. 2 Prof. Law. 2 (2005) (ABA Center for Professional Responsibility); www.abanet.org/judicialethics/ABA_MCJC_approved.pdf (discussion of the Model Code); *The Temptations of Technology,* Cynthia Gray, the American Judicature Society, 2009); New York Advisory Opinion 08-176 (www.nycourts.gov/ip/judicialethics/opinions/08-176.htm); Ind. Code of Judicial Conduct Rule 2.9(C) (no independent investigation extending to all mediums, including electronic); Fed.R.Evid. 201; Code of Conduct for United States Judges, Canon 3A(4) (ex parte communications) and 3C(1)(a) (recusal for independent knowledge of disputed facts).

8. Judges should not befriend lawyers according to the Florida Supreme Court Judicial Ethics Advisory Committee. Remember that administrative committees and Bar Associations do not have the force of law. http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jeacopinions/2009/2009-20.html.

   The inquiring judge proposes to identify lawyers who may appear in front of the judge as "friends" on the judge's page and to permit those lawyers to identify the judge as a "friend" on their pages. To the extent that such identification is available for any other person to view, the Committee concluded that this practice would violate Canon 2B.

   Canon 2B states: "A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge."

   With regard to a social networking site, in order to fall within the prohibition of Canon 2B, the Committee believed that three elements must be present. First, the judge must establish the social networking page. Second, the site must afford the judge the right to accept or reject contacts or "friends" on the judge's page, or denominate the judge as a "friend" on another member's page. Third, the identity of the "friends" or contacts selected by the judge, and the judge's having denominated himself or herself as a "friend" on another's page, must then be communicated to others. Typically, this third element is fulfilled because each of a judge's "friends" may see on the judge's page who the judge's other "friends" are. Similarly, all "friends" of another user may see that the judge is also a "friend" of that user. It is this selection and communication process, the Committee believed, that violates Canon 2B, because the judge, by so doing, conveys or permits others to convey the impression that they are in a special position to influence the judge.

   While judges cannot isolate themselves entirely from the real world and cannot be expected to avoid all friendships outside of their judicial responsibilities, some restrictions upon a judge's conduct are inherent in the office. Thus, the Commentary to Canon 2A states:

   "Irresponsible or improper conduct by judges erodes public confidence in the judiciary. A judge must avoid all impropriety and appearance of impropriety. A judge must expect to be the subject of constant public scrutiny. A judge must therefore accept restrictions on the judge's conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly."

   A judge's participation in a social networking site must also conform to the limitations imposed by Canon 5A, which provides:

"A. Extrajudicial Activities in General. A judge shall conduct all of the judge's extra-judicial activities so that they do not:

1. cast reasonable doubt on the judge's capacity to act impartially as a judge;
2. undermine the judge's independence, integrity, or impartiality;
3. demean the judicial office;
4. interfere with the proper performance of judicial duties;
5. lead to frequent disqualification of the judge; or
6. appear to a reasonable person to be coercive."

The issue is not whether the lawyer actually is in a position to influence the judge, but instead whether the proposed conduct, the identification of the lawyer as a "friend" on the social networking site, conveys the impression that the lawyer is in a position to influence the judge. The Committee concluded that such identification in a public forum of a lawyer who may appear before the judge does convey this impression and therefore is not permitted.

The inquiring judge has asked about the possibility of identifying lawyers who may appear before the judge as "friends" on the social networking site and has not asked about the identification of others who do not fall into that category as "friends". This opinion should not be interpreted to mean that the inquiring judge is prohibited from identifying any person as a "friend" on a social networking site. Instead, it is limited to the facts presented by the inquiring judge, related to lawyers who may appear before the judge. Therefore, this opinion does not apply to the practice of listing as "friends" persons other than lawyers, or to listing as "friends" lawyers who do not appear before the judge, either because they do not practice in the judge's area or court or because the judge has listed them on the judge's recusal list so that their cases are not assigned to the judge.

A minority of the committee would answer all the inquiring judge's questions in the affirmative. The minority believds that the listing of lawyers who may appear before the judge as "friends" on a judge's social networking page does not reasonably convey to others the impression that these lawyers are in a special position to influence the judge. The minority concluded that social networking sites have become so ubiquitous that the term "friend" on these pages does not convey the same meaning that it did in the pre-internet age; that today, the term "friend" on social networking sites merely conveys the message that a person so identified is a contact or acquaintance; and that such an identification does not convey that a person is a "friend" in the traditional sense, i.e., a person attached to another person by feelings of affection or personal regard. In this sense, the minority concluded that identification of a lawyer who may appear before a judge as a "friend" on a social networking site does not convey the impression that the person is in a position to influence the judge and does not violate Canon 2B.

The question then remained whether a campaign committee may establish a social networking page which allows lawyers who may practice before the judge to designate themselves as "fans" or supporters of the judge's candidacy.

To the extent a social networking site permits a lawyer who may practice before a judge to designate himself or herself as a fan or supporter of the judge, this practice is not prohibited by Canon 2B, so long as the judge or committee controlling the site cannot accept or reject the lawyer's listing of himself or herself on the site. Because the judge or the campaign cannot accept or reject the listing of the fan on the campaign's social networking site, the listing of a lawyer's name does not convey the impression that the lawyer is in a special position to influence the judge.

9. Relevant Rule of Conduct PA
   a. Trial Publicity 3.6

b. Communication with Persons Represented by Counsel 4.2
c. Dealing with Unrepresented Persons 4.3
d. Responsibilities of Partners, Managers & Supervisors 5.1
e. Unauthorized Practice of Law 5.5
f. Communications Concerning Lawyer's Service 7.1
g. Advertising 7.2
h. Direct Contact with Prospective Clients (Solicitation) 7.3
i. Communication of Fields of Practice & Specialization 7.4
j. Firm Names and Letterhead 7.5
k. Lawyer Referral Service 7.7
l. Disciplinary Authority; Choice of Law 8.5

10. Resources
    a. ABA/BNA Lawyers' Manual of Professional Conduct
    b. www.abanet.org/adrules
    c. www.aprl.net
    d. www.law.cornell.edu/ethics
    e. www.pabar.com
    f. www.pacode.com
    g. Pa Bar Ethics Hotline (800) 932.0311 x2214
    h. Allegheny County Bar Association Ethics Hotline 412.261.6161

~ ~ ~

To:	The Alberta Group LLC (trademarks@leehayes.com)
Subject:	U.S. TRADEMARK APPLICATION NO. 87414012 - CANNABIS AROMATICS - H117-0005TMU
Sent:	11/15/2017 11:37:15 AM
Sent As:	ECOM108@USPTO.GOV
Attachments:	Attachment - 1 Attachment - 2 Attachment - 3 Attachment - 4 Attachment - 5 Attachment - 6

UNITED STATES PATENT AND TRADEMARK OFFICE (USPTO)

OFFICE ACTION (OFFICIAL LETTER) ABOUT APPLICANT'S TRADEMARK APPLICATION

U.S. APPLICATION SERIAL NO. 87414012

MARK: CANNABIS AROMATICS

87414012

CORRESPONDENT ADDRESS:
RHETT V. BARNEY
LEE & HAYES, PLLC
601 WEST RIVERSIDE, SUITE 1400
SPOKANE, WA 99201

CLICK HERE TO RESPOND TO THIS LETTER:
http://www.uspto.gov/trademarks/teas/response_forms.jsp

VIEW YOUR APPLICATION FILE

APPLICANT: The Alberta Group LLC

CORRESPONDENT'S REFERENCE/DOCKET NO:
H117-0005TMU

CORRESPONDENT E-MAIL ADDRESS:
trademarks@leehayes.com

OFFICE ACTION

STRICT DEADLINE TO RESPOND TO THIS LETTER

TO AVOID ABANDONMENT OF APPLICANT'S TRADEMARK APPLICATION, THE USPTO MUST RECEIVE APPLICANT'S COMPLETE RESPONSE TO THIS LETTER **WITHIN 6 MONTHS** OF THE ISSUE/MAILING DATE BELOW. A RESPONSE TRANSMITTED THROUGH THE TRADEMARK ELECTRONIC APPLICATION SYSTEM (TEAS) MUST BE RECEIVED BEFORE MIDNIGHT **EASTERN TIME** OF THE LAST DAY OF THE RESPONSE PERIOD.

ISSUE/MAILING DATE: 11/15/2017

The referenced application has been reviewed by the assigned trademark examining attorney. Applicant must respond timely and completely to the issues below. 15 U.S.C. §1062(b); 37 C.F.R. §§2.62(a), 2.65(a); TMEP §§711, 718.03.

SEARCH RESULTS

The trademark examining attorney has searched the Office's database of registered and pending marks and has found no conflicting marks that would bar registration under Trademark Act Section 2(d). TMEP §704.02; *see* 15 U.S.C. §1052(d).

REFUSAL – NO BONA FIDE INTENT TO LAWFUL USE IN COMMERCE – MARIJUANA-RELATED GOODS – BASED ON EVIDENCE

Registration is refused because applicant does not have a bona fide intent to lawfully use the applied-for mark in commerce. Trademark Act Sections 1 and 45, 15 U.S.C. §§1051, 1127; *see* TMEP §907. This refusal issues when "(1) a violation of federal law is indicated by the application [record] or other evidence, such as when a court or a federal agency responsible for overseeing activity in which the applicant is involved, and which activity is relevant to its application, has issued a finding of noncompliance under the relevant statute or regulation, or (2) when the applicant's application-[related] activities involve a *per se* violation of a federal law." *In re PharmaCann LLC*, 123 USPQ2d 1122, 1123 (TTAB 2017) (quoting *In re Brown*, 119 USPQ2d 1350, 1351 (TTAB 2016)); TMEP §907.

To qualify for a federal registration, the use of a mark must be lawful. *Gray v. Daffy Dan's Bargaintown* , 823 F.2d 522, 526, 3 USPQ2d 1306, 1308 (Fed. Cir. 1987); *In re PharmaCann LLC*, 123 USPQ2d at 1123-24. If the goods with which a mark is intended to be used are prohibited by law, the applicant can neither use its mark in lawful commerce nor have the requisite bona fide intent to use the mark in lawful commerce. *In re PharmaCann LLC*, 123 USPQ2d at 1124.

In this case, the items or activities with which the mark will be used will involve a per se violation of federal law. Specifically, the Controlled Substances Act (CSA) prohibits, among other things, manufacturing, distributing, dispensing, or possessing certain controlled substances, including marijuana and marijuana-based preparations. 21 U.S.C. §§812, 841(a)(1), 844(a); *see also* 21 U.S.C. §802(16) (defining "[marijuana]"). In addition, the CSA makes it unlawful to sell, offer for sale, or use any facility of interstate commerce to transport drug paraphernalia, i.e., "any equipment, product, or material of any kind which is primarily intended or designed for use in manufacturing, compounding, converting, concealing, producing, processing, preparing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance, possession of which is unlawful under [the CSA]." 21 U.S.C. §863. In December 2016, the Drug Enforcement Administration issued clearer guidance on the definition of marijuana and extracts from marijuana which can include cannabidiol (CBD) under new Schedule 1 Drug Code 7350. *See* the attachment from DEADIVERSION.USDOJ.GOV. Schedule I of the Controlled Substances Act was modified in December 2016 to include a new Drug Code, 7350, which is called "marijuana extract." The new 7350 Drug Code has been interpreted by the DEA as including extracts comprised of cannabinoids from cannabis plants including CBD. *See* www.deadiversion.usdoj.gov/schedules/marijuana/m_extract_7350.html (copy attached). Section 802(16) defines marijuana as "all parts of the plant *Cannabis sativa L*, whether growing or not, the seeds thereof, the resin extracted from any part of such plant, every compound, manufacture, salt, derivative, mixture or preparation of such plant, its seeds or resin. Such term does not include the mature stalks of such plant, fiber produced from such stalks, oil or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil or cake or the sterilized seeds of such plant which are incapable of germination." If the oil/extract/compound/derivative used in goods is obtained from any part of the *Cannabis sativa L* plant that is not specifically excluded from the definition of marijuana under 21 USC Section 802(16), then the plant and any oil, extract, compound or derivative therefrom is marijuana under the CSA.

In this case, the application identifies the following goods:

> **International Class 3: Fragrances for personal use; Non-medicated skin care products, namely, lotions, creams, serums, gels, and soap; Non-medicated bath soaps in liquid, solid or gel form; Non-medicated preparations all for the care of skin, hair and scalp; Non-medicated lip balms; Natural essential oils**

International Class 4: Candles

International Class 34: Electronic cigarettes, namely, e-pens and Vape pens

In view of the law cited above, these goods are not in lawful use because the term "CANNABIS" in the applied-for mark indicates that the goods contain marijuana or are intended for use with marijuana.

Accordingly, because applicant's goods consist of or include items or activities that are a per se violation of federal law, applicant cannot have a bona fide intent to lawfully use the applied-for mark in commerce in connection with such goods.

Applicant should note the following additional ground for refusal.

SECTION 2(E)(1) REFUSAL – MERELY DESCRIPTIVE

Registration is refused because the applied-for mark merely describes an ingredient and feature of applicant's goods, namely, the goods contain or are intended for use with marijuana and are intended to smell good. Trademark Act Section 2(e)(1), 15 U.S.C. §1052(e)(1); *see* TMEP §§1209.01(b), 1209.03 *et seq.*

A mark is merely descriptive if it describes an ingredient, quality, characteristic, function, feature, purpose, or use of an applicant's goods. TMEP §1209.01(b); *see, e.g., In re TriVita, Inc.*, 783 F.3d 872, 874, 114 USPQ2d 1574, 1575 (Fed. Cir. 2015) (quoting *In re Oppedahl & Larson LLP*, 373 F.3d 1171, 1173, 71 USPQ2d 1370, 1371 (Fed. Cir. 2004)); *In re Steelbuilding.com*, 415 F.3d 1293, 1297, 75 USPQ2d 1420, 1421 (Fed. Cir. 2005) (citing *Estate of P.D. Beckwith, Inc. v. Comm'r of Patents* , 252 U.S. 538, 543 (1920)).

The determination of whether a mark is merely descriptive is made in relation to an applicant's goods, not in the abstract. *DuoProSS Meditech Corp. v. Inviro Med. Devices, Ltd.*, 695 F.3d 1247, 1254, 103 USPQ2d 1753, 1757 (Fed. Cir. 2012); *In re The Chamber of Commerce of the U.S.*, 675 F.3d 1297, 1300, 102 USPQ2d 1217, 1219 (Fed. Cir. 2012); TMEP §1209.01(b); *see, e.g., In re Polo Int'l Inc.* , 51 USPQ2d 1061, 1062-63 (TTAB 1999) (finding DOC in DOC-CONTROL would refer to the "documents" managed by applicant's software rather than the term "doctor" shown in a dictionary definition); *In re Digital Research Inc.*, 4 USPQ2d 1242, 1243-44 (TTAB 1987) (finding CONCURRENT PC-DOS and CONCURRENT DOS merely descriptive of "computer programs recorded on disk" where the relevant trade used the denomination "concurrent" as a descriptor of a particular type of operating system). "Whether consumers could guess what the product [or service] is from consideration of the mark alone is not the test." *In re Am. Greetings Corp.*, 226 USPQ 365, 366 (TTAB 1985).

Here, the term "CANNABIS" merely describes an ingredient or intended use of the applied-for goods, namely, they contain marijuana or are intended for use with marijuana. Please see the attached definition of "cannabis." The term "AROMATICS" merely describes a feature of the applied-for goods, namely, they smell good. Please see the attached definition of "aromatic."

Generally, if the individual components of a mark retain their descriptive meaning in relation to the goods, the combination results in a composite mark that is itself descriptive and not registrable. *In re Fat Boys Water Sports LLC*, 118 USPQ2d 1511, 1516 (TTAB 2016) (citing *In re Tower Tech, Inc.*, 64 USPQ2d 1314, 1317-18 (TTAB (2002)); TMEP §1209.03(d); *see, e.g., Apollo Med. Extrusion Techs., Inc. v. Med. Extrusion Techs., Inc.*, 123 USPQ2d 1844, 1851 (TTAB 2017) (holding MEDICAL EXTRUSION TECHNOLOGIES merely descriptive of medical extrusion goods produced by employing medical extrusion technologies); *In re Cannon Safe, Inc.*, 116 USPQ2d 1348, 1351 (TTAB 2015) (holding SMART SERIES merely descriptive of metal gun safes); *In re King Koil Licensing Co.*, 79 USPQ2d 1048, 1052 (TTAB 2006) (holding THE BREATHABLE MATTRESS merely descriptive of beds, mattresses, box springs, and pillows).

Only where the combination of descriptive terms creates a unitary mark with a unique, incongruous, or otherwise nondescriptive meaning in relation to the goods is the combined mark registrable. *See In re Colonial Stores, Inc.*, 394 F.2d 549, 551, 157 USPQ 382, 384 (C.C.P.A. 1968); *In re Positec Grp. Ltd.*, 108 USPQ2d 1161, 1162-63 (TTAB 2013).

In this case, both the individual components and the composite result are descriptive of applicant's goods and do not create a unique,

incongruous, or nondescriptive meaning in relation to the goods. Specifically, the mark immediately merely describes an ingredient and feature of applicant's goods, namely, the goods contain or are intended for use with marijuana and are intended to smell good. Accordingly, registration is refused pursuant to Trademark Act Section 2(e)(1).

SUPPLEMENTAL REGISTER

Although an amendment to the Supplemental Register would normally be an appropriate response to this refusal, such a response is not appropriate in the present case. The instant application was filed under Trademark Act Section 1(b) and is not eligible for registration on the Supplemental Register until an acceptable amendment to allege use meeting the requirements of 37 C.F.R. §2.76 has been timely filed. 37 C.F.R. §2.47(d); TMEP §§816.02, 1102.03.

If applicant files an acceptable allegation of use and also amends to the Supplemental Register, the application effective filing date will be the date applicant met the minimum filing requirements under 37 C.F.R. §2.76(c) for an amendment to allege use. TMEP §§816.02, 1102.03; *see* 37 C.F.R. §2.75(b). In addition, the undersigned trademark examining attorney will conduct a new search of the USPTO records for conflicting marks based on the later application filing date. TMEP §§206.01, 1102.03.

Although registration on the Supplemental Register does not afford all the benefits of registration on the Principal Register, it does provide the following advantages to the registrant:

(1) Use of the registration symbol ® with the registered mark in connection with the designated goods, which provides public notice of the registration and potentially deters third parties from using confusingly similar marks.

(2) Inclusion of the registered mark in the USPTO's database of registered and pending marks, which will (a) make it easier for third parties to find it in trademark search reports, (b) provide public notice of the registration, and thus (c) potentially deter third parties from using confusingly similar marks.

(3) Use of the registration by a USPTO trademark examining attorney as a bar to registering confusingly similar marks in applications filed by third parties.

(4) Use of the registration as a basis to bring suit for trademark infringement in federal court, which, although more costly than state court, means judges with more trademark experience, often faster adjudications, and the opportunity to seek an injunction, actual damages, and attorneys' fees and costs.

(5) Use of the registration as a filing basis for a trademark application for registration in certain foreign countries, in accordance with international treaties.

See 15 U.S.C. §§1052(d), 1091, 1094; J. Thomas McCarthy, *McCarthy on Trademarks & Unfair Competition* §§19:33, 19:37 (rev. 4th ed. Supp. 2017).

APPLICANT SHOULD NOTE THAT AN AMENDMENT TO THE SUPPLEMENTAL REGISTER WILL NOT OVERCOME THE NO INTENT TO LAWFUL USE IN COMMECRE REFUSAL ABOVE.

DISCLAIMER IF AMENDING TO THE SUPPLEMENTAL REGISTER

Applicant is advised that, if the application is amended to seek registration on the Supplemental Register, applicant will be required to disclaim "CANNABIS" because such wording appears to be generic in the context of applicant's goods. *See* 15 U.S.C. §1056(a); *In re Wella Corp.*, 565 F.2d 143, 144, 196 USPQ 7, 8 (C.C.P.A. 1977); *In re Creative Goldsmiths of Wash., Inc.*, 229 USPQ 766, 768 (TTAB 1986); TMEP §1213.03(b).

The following is the standardized format for a disclaimer:

No claim is made to the exclusive right to use "CANNABIS" apart from the mark as shown.

TMEP §1213.08(a)(i).

RESPONSE GUIDELINES

For this application to proceed further, applicant must explicitly address each refusal and/or requirement raised in this Office action. If the action includes a refusal, applicant may provide arguments and/or evidence as to why the refusal should be withdrawn and the mark should register. Applicant may also have other options specified in this Office action for responding to a refusal and should consider those options carefully. To respond to requirements and certain refusal response options, applicant should set forth in writing the required changes or statements. For more information and general tips on responding to USPTO Office actions, response options, and how to file a response online, see "Responding to Office Actions" on the USPTO's website.

If applicant does not respond to this Office action within six months of the issue/mailing date, or responds by expressly abandoning the application, the application process will end and the trademark will fail to register. *See* 15 U.S.C. §1062(b); 37 C.F.R. §§2.65(a), 2.68(a); TMEP §§718.01, 718.02. Additionally, the USPTO will not refund the application filing fee, which is a required processing fee. *See* 37 C.F.R. §§2.6(a)(1)(i)-(iv), 2.209(a); TMEP §405.04.

When an application has abandoned for failure to respond to an Office action, an applicant may timely file a petition to revive the application, which, if granted, would allow the application to return to active status. *See* 37 C.F.R. §2.66; TMEP §1714. The petition must be filed within two months of the date of issuance of the notice of abandonment and may be filed online via the Trademark Electronic Application System (TEAS) with a $100 fee. *See* 37 C.F.R. §§2.6(a)(15)(ii), 2.66(a)(1), (b)(1).

If applicant has questions regarding this Office action, please telephone or e-mail the assigned trademark examining attorney. All relevant e-mail communications will be placed in the official application record; however, an e-mail communication will not be accepted as a response to this Office action and will not extend the deadline for filing a proper response. *See* 37 C.F.R. §§2.62(c), 2.191; TMEP §§304.01-.02, 709.04-.05. Further, although the trademark examining attorney may provide additional explanation pertaining to the refusal(s) and/or requirement(s) in this Office action, the trademark examining attorney may not provide legal advice or statements about applicant's rights. *See* TMEP §§705.02, 709.06.

TEAS PLUS OR TEAS REDUCED FEE (TEAS RF) APPLICANTS – TO MAINTAIN LOWER FEE, ADDITIONAL REQUIREMENTS MUST BE MET, INCLUDING SUBMITTING DOCUMENTS ONLINE: Applicants who filed their application online using the lower-fee TEAS Plus or TEAS RF application form must (1) file certain documents online using TEAS, including responses to Office actions (see TMEP §§819.02(b), 820.02(b) for a complete list of these documents); (2) maintain a valid e-mail correspondence address; and (3) agree to receive correspondence from the USPTO by e-mail throughout the prosecution of the application. *See* 37 C.F.R. §§2.22(b), 2.23(b); TMEP §§819, 820. TEAS Plus or TEAS RF applicants who do not meet these requirements must submit an additional processing fee of $125 per class of goods. 37 C.F.R. §§2.6(a)(1)(v), 2.22(c), 2.23(c); TMEP §§819.04, 820.04. However, in certain situations, TEAS Plus or TEAS RF applicants may respond to an Office action by authorizing an examiner's amendment by telephone or e-mail without incurring this additional fee.

/Lindsey H. Ben/

Lindsey H. Ben

Trademark Examining Attorney

Law Office 108

(571) 272-4239

Lindsey.Ben@uspto.gov

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this Office action by e-mail.

All informal e-mail communications relevant to this application will be placed in the official application record.

WHO MUST SIGN THE RESPONSE: It must be personally signed by an individual applicant or someone with legal authority to bind an applicant (i.e., a corporate officer, a general partner, all joint applicants). If an applicant is represented by an attorney, the attorney must sign the response.

PERIODICALLY CHECK THE STATUS OF THE APPLICATION: To ensure that applicant does not miss crucial deadlines or official notices, check the status of the application every three to four months using the Trademark Status and Document Retrieval (TSDR) system at http://tsdr.uspto.gov/. Please keep a copy of the TSDR status screen. If the status shows no change for more than six months, contact the Trademark Assistance Center by e-mail at TrademarkAssistanceCenter@uspto.gov or call 1-800-786-9199. For more information on checking status, see http://www.uspto.gov/trademarks/process/status/.

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Marijuana

Clarification of the New Drug Code (7350) for Marijuana Extract

Note regarding this rule – In light of questions that the Drug Enforcement Administration has received from members of the public following the publication of the **Final Rule establishing a new Controlled Substance Code Number (drug code) for marijuana extract**, DEA makes the following clarification:

- The new drug code (7350) established in the Final Rule does not include materials or products that are excluded from the definition of marijuana set forth in the Controlled Substances Act (CSA).[1]
- The new drug code includes only those extracts that fall within the CSA definition of marijuana.
- If a product consisted solely of parts of the cannabis plant excluded from the CSA definition of marijuana, such product would not be included in the new drug code (7350) or in the drug code for marijuana (7360).

As explained in the Final Rule, the creation of this new drug code was primarily intended to give DEA more precise accounting to assist the agency in carrying out its obligations to provide certain reports required by U.S. treaty obligations. Because the Final Rule did not add any substance to the schedules that was not already controlled, and did not change the schedule of any substance, it was not a scheduling action under **21 U.S.C. §§ 811** and **812**.

The new drug code is a subset of what has always been included in the CSA definition of marijuana. By creating a new drug code for marijuana extract, the Final Rule divides into more descriptive pieces the materials, compounds, mixtures, and preparations that fall within the CSA definition of marijuana. Both drug code 7360 (marijuana) and new drug code 7350 (marijuana extract) are limited to that which falls within the CSA definition of marijuana.

Because recent public inquiries that DEA has received following the publication of the Final Rule suggest there may be some misunderstanding about the source of cannabinoids in the cannabis plant, we also note the following botanical considerations. As the scientific literature indicates, cannabinoids, such as tetrahydrocannabinols (THC), cannabinols (CBN) and cannabidiols (CBD), are found in the parts of the cannabis plant that fall within the CSA definition of marijuana, such as the flowering tops, resin, and leaves.[2] According to the scientific literature, cannabinoids are not found in the parts of the cannabis plant that are excluded from the CSA definition of marijuana, except for trace amounts (typically, only parts per million)[3] that may be found where small quantities of resin adhere to the surface of seeds and mature stalk.[4] Thus, based on the scientific literature, it is not practical to produce extracts that contain more than trace amounts of cannabinoids using only the parts of the cannabis plant that are excluded from the CSA definition of marijuana, such as oil from the seeds. The industrial processes used to clean cannabis seeds and produce seed oil would likely further diminish any trace amounts of cannabinoids that end up in the finished product. However, as indicated above, if a product, such as oil from cannabis seeds, consisted solely of parts of the cannabis plant excluded from the CSA definition of marijuana, such product would not be included in the new drug code (7350) or in the drug code for marijuana (7360), even if it contained trace amounts of cannabinoids.[5]

[1] The CSA states: "The term 'marihuana' means all parts of the plant Cannabis sativa L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin. Such term does not include the mature stalks of such plant, fiber produced from such stalks, oil or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of such plant which is incapable of germination." **21 U.S.C. § 802(16)**.

[2] H. Mölleken and H. Hussman. Cannabinoid in seed extracts of *Cannabis sativa* cultivars. *J. Int. Hemp Assoc.* 4(2): 73-79 (1997).

[3] *See id.*; *see also* S. Ross et al., GC-MS Analysis of the Total Δ9-THC Content of Both Drug- and Fiber-Type Cannabis Seeds, *J. Anal. Toxic.*, Vol. 24, 715-717 (2000).

[4] H. Mölleken, *supra*.

[5] Nor would such a product be included under drug code 7370 (tetrahydrocannabinols). *See Hemp Industries Association v. DEA*, 357 F.3d 1012 (9th Cir. 2004) (*Hemp II*). However, as the Ninth Circuit stated in *Hemp II*, "when Congress excluded from the definition of marijuana 'mature stalks of such plant, fiber . . . , [and] oil or cake made from the seeds,' it also made an exception to the exception, and included 'resin extracted from' the excepted parts of the plant in the definition of marijuana, despite the stalks and seed exception." *Id.* at 1018. Thus, if an extract of cannabinoids were produced using extracted resin from any part of the cannabis plant (including the parts excluded from the CSA definition of marijuana), such an extract would be included in the CSA definition of marijuana.

DEA guidance is clear: Cannabidiol is illegal and always has been

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In December, the DEA issued a rule about marijuana policy that set off a firestorm of criticism from the marijuana reform movement—and particularly among medical marijuana advocates. The rule dealt with a compound found in the cannabis plant called cannabidiol or CBD. CBD is present in most marijuana products, often along with its sister compound THC. The difference between the two is that THC is intoxicating, while CBD is not.

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That distraction over termination and THC's explicit mention in the central drug control law in the U.S.—the Controlled Substances Act—has led to a variety of interpretations about what is legal and what is illegal. In its December regulatory action, DEA reiterated that CBD is considered an illegal substance—just like other marijuana products. Formally, the action finalized a rule proposed in 2011 to establish a distinct entry for marijuana extracts (like CBD) in the federal schedules of controlled substances, separate from marijuana itself. In explaining its December decision, the DEA characterized the rule as bringing U.S. marijuana enforcement into better compliance with international drug control regulations—under the United Nations Single Convention on Narcotic Drugs, marijuana and its extracts are tracked separately.

So, why is there conflict? Part of the problem has arisen as states have legalized medical and recreational marijuana and a variety of products have become more mainstream. Among these products are CBD oils or other products rich in CBD. They are used by medical marijuana patients for everything from reducing seizures, to serving as an anti-inflammatory, to alleviating anxiety. Often, these products are (incorrectly) called CBD-only products. And what's more, some companies are shipping these products across state lines, claiming that CBD products are perfectly legal. They're not, and shipping these products across state lines violates both federal law and the Justice Department guidance that has allowed state legal systems to operate. That behavior, and the inaction of federal law, have led to a [illegible] of cease and desist letters from the FDA to producers shipping products across state lines.

As the video above explains, the problem with the label "CBD-only" is that these products contain other compounds—or cannabinoids—including THC. In many states with either legal marijuana systems or laws that allow for the possession of CBD products, there are thresholds for determining a CBD product. In many states, it is a "CBD-only" product if it has less than 0.3 percent or 0.5 percent THC. However, any product that contains THC, even in small amounts, is considered marijuana under federal law and is illegal.

Some have argued that as long as producers use industrial hemp, legally imported from foreign sources, and the CBD product is extracted from that, it is legal. Once again, this contrive interpretation of the law runs afoul of reality. The use of imported hemp is heavily regulated, and even if such extraction processes were not, as demonstrates, a violation of federal law, products containing even trace elements of THC would be.

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Courts have largely afforded DEA broad latitude in controlling substances derived from the cannabis plant. The DEA's stance, all along, has been that cannabinoids are marijuana and thus are a Schedule I substance and illegal in all circumstances. Marijuana advocates often point to Shrap Industries Associates v. DEA to say that any psychoactive hemp is not a controlled substance. While the judge in that case ruled that not all cannabis plants fall under the Controlled Substances Act, court cases, including the case U.S. v. Pham (2006), U.S. v. Pruner (1995), and U.S. v. Spann (1975), have held just the opposite.

There is one path forward for those hoping to challenge the federal government on CBD's legality. Marijuana is defined in the Controlled Substances Act as a product derived from the cannabis plant, except products derived from its mature stalks—essentially from hemp. This has pushed people to argue that extracts derived from hemp should not be controlled. However, the law is also clear that tetrahydrocannabinols (THC products) are controlled as a Schedule I substance. If a company could extract pure CBD with no detectable amount of THC from a hemp plant, a plain reading of the Controlled Substances Act would provide cover for its legality. Yet, the strict rules emerging from [illegible] about the manner in which hemp can be grown in the U.S. make it "illegal to grow for commercial purposes, one thing is clear: in order for a truly CBD-only product to be declared legal, other laws would need to be amended.

So, for now, CBD products are illegal substances and DEA will continue to treat them as such.

Author

John Hudak
Senior Fellow, Center for Effective Public Management, Brown Center, Governance Studies
@jwhudak

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Subject:	U.S. TRADEMARK APPLICATION NO. 87414012 - CANNABIS AROMATICS - H117-0005TMU
Sent:	11/15/2017 11:37:21 AM
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UNITED STATES PATENT AND TRADEMARK OFFICE (USPTO)

IMPORTANT NOTICE REGARDING YOUR U.S. TRADEMARK APPLICATION

USPTO OFFICE ACTION (OFFICIAL LETTER) HAS ISSUED

ON **11/15/2017** FOR U.S. APPLICATION SERIAL NO. 87414012

Please follow the instructions below:

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The Office action may not be immediately viewable, to allow for necessary system updates of the application, but will be available within 24 hours of this e-mail notification.

(2) TIMELY RESPONSE IS REQUIRED: Please carefully review the Office action to determine (1) how to respond, and (2) the applicable response time period. Your response deadline will be calculated from **11/15/2017** (*or sooner if specified in the Office action*). A response transmitted through the Trademark Electronic Application System (TEAS) must be received before midnight **Eastern Time** of the last day of the response period. For information regarding response time periods, see http://www.uspto.gov/trademarks/process/status/responsetime.jsp.

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PERFORMER & ENDORSEMENT AGREEMENT

This agreement is made on (date) between _____ ("Company") and _____ ("Performer")

Term: This agreement will become effective on today's date and continues for one year.

Independent Contractor Status: It is the express intention of the parties that Performer is an independent contractor and not an employee, agent, joint venturer or partner of Company. Nothing in this agreement shall be interpreted or construed as creating or establishing the relationship of employer and employee between Company and Performer. Both parties acknowledge that Performer is not an employee for state or federal tax purposes. Performer shall retain the right to perform services for others during the term of this agreement.

Services To Be Performed: Performer has a distinct brand and identity and Company desires to utilize same in connection with co-branding and marketing for Company. Company will coordinate and direct the creation of a "strain" or "strains" of cannabis for purposes of legal sale (the "Product"). Company may utilize Performer's stage name and any other trademarked identity ("Performer IP") to market the Product for legal sale. Company will create distinct packaging and promotional materials for the Product. Solely during the term, Performer hereby licenses to Company the use of the Performer IP, and will utilize social media, appearances, other media platforms, and appearances to promote Company and Product as further referenced herein. Notwithstanding the foregoing, Company acknowledges that Performer is and shall remain the owner of all right, title and interest in and to the Performer IP and in all copyrights, trademarks, and other rights associated with the Performer IP, and that Company shall obtain approvals from Performer prior to any use of the Performer IP, such approval not to be unreasonably withheld.

Category Exclusivity: Performer agrees to not enter into any like agreement with a Competing Company in the cannabis industry space for the period of the term. "Competing Company" is defined as any business that primarily sells, distributes, operates, or manufactures cannabis related goods or services.

Sales Support: Performer agrees to promote the Product via appearances, product placement segments, and social media activation as outlined below

Appearances: Performer agrees to a minimum of three (3) appearances (any more than three [3] shall be at Performer's sole discretion) at Company selected events during the term, subject to Performer's prior availability. Performer agrees to a minimum of two hours for each appearance. Company shall provide notification to Performer no less than sixty (60) days prior to suggested appearance date(s). Performer will use best efforts to appear at each appearance below. Appearances are as follows:

[Event] [Date] [Location]

Product Placement Segments: Performer agrees to use reasonable efforts to include Product placement in two (2) video segments during the term of the agreement, herein referred to as "Product Placement Segments". Product Placement Segments are defined as inclusion of the Product in video content developed and distributed by Performer. Both parties agree that Product Placement Segments shall be mutually agreed upon. Should Company not agree to two (2) Product Placement Segments during the term, Performer shall not be in breach of this agreement for failure to include same in video content.

Social Media: Once per month during the term, Company will provide Performer with images and copy for purpose of social media posts to Performer's social media channels to include but not limited to Facebook, Twitter, and Instagram. Performer agrees to promote product through such social channels whenever reasonably possible and will use reasonably efforts to frequently post to social channels including but not limited to the one monthly post outlined above.

Payments: In consideration for the marketing services and licensing of trademarked Performer Name, Company shall pay Performer a fee of $_____ (herein referred to as "the Fee") and a royalty of $__/unit from sale of above referenced cannabis (herein referred to as "Royalties"). Fee payments shall be made as follows: $_____ within 30 days of execution of this agreement, $_____ upon completion of the first appearance, and $_____ upon completion of the final . Performer will supply an invoice for payments that coincide with the above referenced payment schedule including preferred method of payment to either a bank account or physical address.

Royalties will be made as follows: Company will pay a flat fee of $_____ to Performer for every _____ units sold from vapor pen sales and packaged eighths of dry flower buds. Additional items for branding may be available upon request. Company shall issue monthly sales reports to Performer for purpose of tracking sales. Such reports shall be rendered to Performer within thirty (30) days of the close of each calendar month and shall include payment of any Royalties due pursuant to the report. Performer shall have the right to audit the Company's books and records to the extent they relate to Performer's Royalties hereunder.

As Performer is not Company's employee, Performer is responsible for paying all state and federal taxes.

Expenses: Performer shall be responsible for all costs and expenses incident to the performance of services for Company. Performer is responsible for all payments to their talent agent, if any. Any expenses in connection with any appearances beyond the requisite three (3) shall be the responsibility of the Company, unless the parties negotiate otherwise.

Readiness to Work and Supplies: Except as otherwise stated herein, Performer will supply all materials, social media, accessories, tools, equipment, and instrumentalities required to perform the services under this agreement. Performer will make reasonable efforts to communicate with Company and promote Company and the Product.

Warranties and Representations: Company agrees to indemnify and hold the Performer and his predecessors, successors, assigns, parents, subsidiaries, affiliates, and their respective directors, officers, employees, agents, managers, attorneys and representatives ("Performer Parties") harmless from and against all losses, penalties, damages (including without limitation punitive damages), liabilities, suits and expenses (including without limitation reasonable attorneys' fees) arising out of or in connection with third party claims and/or suits, against the Performer for (i) the Product or any other product of Company and/or their manufacture, packaging, distribution, advertising, promotion, sale or exploitation and (ii) any breach by Company of any of its representations, warranties or covenants in this agreement. Performer shall have the option to undertake and solely control the defense and/or settlement of any claim or suit at Company's cost and expense, provided that the settlement (if any) thereof shall be subject to the Company's reasonable approval, such approval not to be unreasonably withheld. Further, Company acknowledges that despite its assertions herein regarding "legal sale" of the Product, marijuana (and its derivatives) (a) remain illegal in any amount and/or circumstances pursuant to the federal Controlled Substance Act, wherein marijuana is classified as a Schedule 1 drug; (b) is only legal under California law (where Company is located) for medical use pursuant to California Health and Safety Code §11362.5; and (c) remains illegal in any amount and/or circumstances under Texas law (where Performer resides) pursuant to Texas Health and Safety Code §481.032, et seq. Accordingly, Company's

above indemnity shall also extend to any criminal charges and/or government fines levied against Performer and/or any of the Performer Parties in connection with Performer's services under this agreement.

Insurance: Company shall acquire and maintain at its sole cost and expense throughout the term and any renewal of this agreement, and for a period of four (4) years following the termination or expiration of this agreement, Comprehensive General Liability Insurance, including product liability, advertiser's, and contractual liability, underwritten by an insurance company with a Best's rating of at least A-/XII and licensed to do business in the United States. This insurance coverage shall provide protection of not less than $2,000,000 combined single limit for personal injury and property damage (on a per occurrence basis) and a deductible not to exceed ten percent (10%) of the required policy limits. All insurance policies shall name the Performer, Performer's related companies and the respective officers, directors, agents and employees of each of them as additional insureds. Company shall furnish the Performer with endorsements from insurance carriers reflecting compliance with the foregoing obligations within thirty (30) days after execution of this agreement. Company's insurance will be primary and not excess or contributory with respect to any insurance the Performer may maintain.

Entire Agreement: This document constitutes the entire understanding and agreement of the parties, and any and all prior agreements, understandings, and representations are hereby terminated and canceled in their entirety and are of no further force and effect. Each of the provisions hereof are severable so that if any provision of this agreement shall be found to be invalid or unenforceable the same shall not affect the validity or enforceability of the remaining provisions. The parties shall negotiate in good faith to replace any invalid, illegal, unenforceable or incomplete provision with a valid provision the effect of which comes as close as possible to that of the intention of the parties. This agreement will be interpreted and construed in accordance with the laws of the State of California (exclusive of its conflict of law rules) relating to contracts entered into and to be fully performed therein. The state and federal courts having jurisdiction over Los Angeles County, California, will have exclusive jurisdiction over any and all disputes arising under this agreement or related to its subject matter.

PERFORMER:	**COMPANY:**
[Name]	[Name]

PERFORMER & CANNABIS MARKETING AGREEMENT

This agreement is made on (date) between _____ (Company) and _____ (Performer)

Term: This agreement will become effective on today's date and continues for one year or until terminated by Company.

Independent Contractor Status: It is the express intention of the parties that Performer is an independent contractor and not an employee, agent, joint venturer or partner of Company. Nothing in this agreement shall be interpreted or construed as creating or establishing the relationship of employer and employee between Company and Performer. Both parties acknowledge that Performer is not an employee for state or federal tax purposes. Performer shall retain the right to perform services for others during the term of this agreement.

Services To Be Performed: Performer has a distinct brand and identity and desires to utilize co-branding and marketing with Company for mutual benefits. Company will coordinate and direct the creation of a "strain" or "strains" of cannabis for purposes of legal sale. Company will utilize Performer's stage name and any other trademarked identity to market the cannabis for legal sale. Company will create distinct packaging and promotional materials. Performer licenses the use of the stage name and other identified trademarked names, and will utilize social media, appearances, other media platforms, and appearances to promote Company and the above referenced cannabis.

Category Exclusivity: Performer agrees to not enter into any like agreement with a competing company in the cannabis industry space for the period of the term. Competing company is defined as any business that sells, distributes, operates, or manufactures cannabis related goods or services.

Sales Support: Performer agrees to engage sales support activity during the term to promote sale of product. Sales support to include but not limited to appearances, product placement segments, and social media activation as outlined below

Appearances: Performer agrees to a minimum of three (3) appearances at Company selected events during the term. Performer agrees to a minimum of two hours for each appearance. Company shall provide notification to Performer no less than 60 days prior to appearance date. Performer will use best efforts to appear at each appearance as chosen by Company. Appearances may include but are not limited to the following:

[Event] [Date] [Location]

Product Placement Segments: Performer agrees to use best efforts to include product placement in a minimum of two (2) video segments during the term of the agreement, herein referred to as "product placement segments". Product placement segments are defined as prominent inclusion of Company product in video content developed and distributed by Performer during the period, to include but not limited to YouTube videos or other video content broadly distributed by Performer. Performer agrees that product placement segments and distribution shall be mutually agreed.

Social Media: Once per month during the term, Company will provide Performer with images and copy for purpose of social media posts to Performer social media channels to include but not limited to Facebook, Twitter, and Instagram. Performer agrees to promote product through social channels whenever possible and will use best efforts to frequently post to social channels including but not limited to the one monthly post outlined above.

Payments: In consideration for the marketing services and licensing of trademarked Performer Name, Company shall pay Performer a fee of $_____ (herein referred to as "the fee") and a fee of $__/unit from sale of above referenced cannabis (herein referred to as "commissions"). Fee payments shall be made as follows: $_____ within 30 days of contract signing, _____ upon delivery and execution of the first appearance, and $____ upon delivery and execution of the final two appearances and distribution of the product placements. Performer will supply an invoice for payments that coincide with the above referenced payment schedule including preferred method of payment to either a bank account or physical address.

Commission payments will be made as follows: Company will pay a flat fee of $____ to Performer for every ____ units sold from vapor pen sales and packaged eighths of dry flower buds. Additional items for branding may be available upon request. Company shall issue monthly sales reports to Performer for purpose of tracking sales.

As Performer is not Company's employee, Performer is responsible for paying all state and federal taxes.

Expenses: Performer shall be responsible for all costs and expenses incident to the performance of services for Company. Performer is responsible for all payments to their talent agent, if that agency relationship exists.

Readiness to Work and Supplies: Performer will supply all materials, social media, accessories, tools, equipment, and instrumentalities required to perform the services under this agreement. Performer will make best efforts to communicate with Company and promote Company and above referenced cannabis.

Entire Agreement: This document constitutes the entire understanding and agreement of the parties, and any and all prior agreements, understandings, and representations are hereby terminated and canceled in their entirety and are of no further force and effect.

PERFORMER:
[Name]

COMPANY:
[Name]

INDEPENDENT CONTRACTOR AGREEMENT

THIS INDEPENDENT CONTRACTOR AGREEMENT ("Agreement") is made by and between _____ with its principal place of business at _____ ("Agency") and _____ ("Contractor" or "I") **f/s/o** _____ ("Talent") c/o _____, effective [date], (the "Effective Date") for the purpose of setting forth the terms and conditions under which Contractor will cause Talent to perform services for Agency on a one-time basis. Agency and Contractor may be referred to herein individually as a "Party," or collectively as the "Parties."

In consideration of the mutual obligations specified in this Agreement, and any compensation paid to Contractor for his or her services, the Parties agree to the following:

1. **Engagement of Services.** Contractor will cause Talent to perform the services more specifically described in Exhibit A attached hereto and incorporated herein by this reference, unless otherwise mutually agreed by the parties in writing (the "Services"). Contractor shall cause Talent to perform all Services in a professional manner and shall perform all such work him or herself, engaging the assistance of other individuals only with the prior written consent of Agency.

2. **Payment:** A total fee of $_____ USD ("Fee") shall be paid by Agency to Contractor payable upon full execution of this Agreement.

   Notwithstanding the foregoing or anything contained herein to the contrary, in the event that the Sponsor is late in paying to Agency all or a portion of the Fee, then Agency shall not be obligated to pay to Contractor the late portion of such Fee until Agency receives such monies from the Sponsor, provided however nothing contained herein shall be deemed to release Agency of its obligation to pay Contractor the Fee and in no event shall such Fee be paid in full later than [date].

3. **Schedule of Work.** Contractor shall cause Talent to devote as much time as reasonably necessary to perform and successfully complete the Services in accordance with the schedule and deadlines also set forth in Exhibit A hereto.

4. **Independent Contractor Relationship.** Contractor is an independent Contractor, and is not an agent or employee of Agency and is not authorized to act on behalf of Agency. Contractor will not be eligible for any employee benefits, nor will Agency make deductions from any amounts payable to Contractor for taxes. Payment of all taxes due on any amounts paid to Contractor hereunder shall be the sole responsibility of Contractor.

5. **Confidential Information.**

   5.1 Confidential Information. "Confidential Information" includes, but is not limited to, any proprietary information, techniques, models, know-how, processes, designs, analyses, inventions, formula, data, procedure, discovery, software programs, software source documents, trade secret, trade dress, copyright, patent or other intellectual property right, or any registration or application therefor, or materials relating thereto in connection with the current, future, and proposed services of either Party, its clients, suppliers, employees and customers, including financial information, customer lists, business forecasts and strategies, sales, merchandising and marketing plans, legal or other business activities or to any present or future products, prices, plans, forecasts, ideas or techniques, whether in oral, written, graphic or electronic form.

5.2 **Nondisclosure and Nonuse Obligations**. The Parties shall not disclose to any person the Confidential Information of the other Party. The Parties shall use the Confidential Information only for performing services under this Agreement. The Parties shall treat and protect the Confidential Information with at least the same degree of care the Parties take with their own confidential information. The Parties shall not be restricted in using any material which is (i) publicly available; (ii) already in that Party's possession or known to the Parties without restriction; (iii) rightfully obtained by the Parties from sources other than the other Party; or (iv) permitted in writing by the other Party to be disclosed prior to such disclosure.

6. **Compliance with Applicable Laws.** Contractor warrants that all materials supplied by Contractor, and work performed by Contractor under this Agreement shall be provided or performed in compliance with all applicable laws and regulations.

7. **Termination.** The term of this Agreement will terminate on [dae] (the "Term"). If either Party defaults in the performance of this Agreement or materially breaches any of its provisions, and does not cure same within fifteen (15) days of notice by the non-breaching party, the non-breaching Party may terminate this Agreement by giving written notification (the "Termination Notice") to the breaching Party. Termination shall be effective immediately upon receipt of the Termination Notice. For purposes of this section, material breach of this Agreement includes failure of Contractor to comply with deliverables or nonpayment by Agency after fifteen (15) days from written demand for payment. Contractor shall be paid for all services rendered in accordance with this Agreement up to the date of termination. This Agreement terminates automatically upon the occurrence of the bankruptcy or insolvency of either Party, the sale of the business of either Party, the death of either Party, gross misconduct by Contractor or breach of Section 6 herein by Contractor.

8. **Notices.** Any notices to be given pursuant to this Agreement must be in writing to the respective addresses set forth herein or at such other address as any Party may designate in writing from time to time and delivered by: (i) personal delivery; (ii) overnight courier; (iii) telecopy or facsimile transmission with acknowledgment of receipt; or (iv) certified or registered mail, return receipt requested.

9. **Severability**. If any provision of this Agreement is illegal, invalid or unenforceable, the legality, validity and enforceability of the remaining provisions continue.

10. **Waiver.** Waiver by either Party of a specific breach by the other Party is not a waiver of any other breach.

11. **Entire Agreement.** This Agreement, and any Exhibits attached hereto, constitute the entire agreement between the Parties on this subject and supersedes all prior and contemporaneous understandings and agreements, whether oral or written agreement. This Agreement may only be modified in writing signed by both Parties.

12. **Indemnity.** Except to the extent paid in settlement from any applicable insurance policies, and to the extent permitted by applicable law, each party hereto agrees to indemnify and hold harmless the other party, and its respective affiliates, officers, agents, employees, and permitted successors and assigns against any and all third party claims, losses, damages, liabilities, penalties, punitive damages, expenses,

reasonable outside legal fees and actual, verifiable, out of pocket costs of any kind or amount whatsoever, which result from or arise out of any act or omission of the indemnifying party, its respective affiliates, officers, agents, employees, and permitted successors and assigns that occurs in connection with this Agreement, provided such claim is reduced to a final, adverse, non-appealable judgment in a court of competent jurisdiction or settled with the indemnifying party's prior written consent. This indemnification will survive the termination of this Agreement.

13. **Assignment**. Contractor may not assign or transfer any of Contractor's rights or delegate any of Contractor's obligations under this Agreement, in whole or in part, without Agency' express prior written consent, other than the right to receive payment hereunder. Any attempted assignment, transfer or delegation, without such consent, will be void. Subject to the foregoing, this Agreement will be binding upon and will inure to the benefit of the Parties' permitted successors and assigns.

14. **Counterparts**. This Agreement may be executed in counterparts, each of which shall be deemed an original and which together shall constitute one and the same instrument.

15. **Governing Law/Jurisdiction**. This Agreement will be construed in accordance with and governed by the laws of the State of California. The Parties agree that the state and federal courts in California have exclusive jurisdiction over all disputes arising out of or related to this Agreement.

16. **Legal Advice and Construction of Agreement**. Both parties hereto have received independent legal advice with respect to, and neither has relied on the other (or his or its advisors) in, entering into this Agreement.

17. **Taxes**. Contractor is solely responsible for paying, when due, all income and other taxes incurred as a result of the compensation paid by Agency to Contractor for services rendered under this Agreement. Contractor agrees to defend, indemnify, and hold harmless Agency and its affiliates from and against any and all claims, losses, fees, penalties, interest, or damages suffered by Agency or any such affiliates as a result of Contractor's failure to comply with this Section.

18. **Capacity.** In providing the Services under this Agreement, it is expressly agreed that the Contractor is acting as an independent Contractor and not as an employee. Agency and the Contractor acknowledge that this Agreement does not create a partnership or joint venture between them and is exclusively a contract for services.

    Subject to the terms and conditions herein and Agency's and Sponsor's full performance of all obligations hereunder, Contractor releases from liability, Agency, its clients, employees, officers, volunteers and agents, and/or entities affiliated with the Services from any. And all claims including claims of negligence, resulting in any injury, illness (including death) or economic loss Contractor may suffer as a result of the Services, travel to and from locations where the Services shall be performed or any incidental events.

19. **Grant of Rights**. Solely during the Term, Contractor hereby grants Agency the right to (a) re-tweet and/or re-post the Posts and said postings shall not count against the total number of messages as outlined in Exhibit A, so long as no such repost is promoted or

sponsored as any form of paid media on any platform, and (b) repurpose the Post for Program-related social media on Client-owned channels (i.e. Twitter, Facebook, Instagram, Pinterest), so long as no such repurposed post is promoted or sponsored as any form of paid media on any platform. Contractor additionally grants Agency perpetual rights to use Contractor content created solely in connection with the Services as outlined in Exhibit A (the "Content"), to use, reproduce, publish, distribute and/or exhibit the Materials for internal and/or archival purposes, including research, intranet, internal sales and marketing meetings, and other non-advertising purposes (such as, without limitation, in advertising awards competitions, retrospectives and archival and/or historical sections of Client's websites, including Client's social media sites (i.e. social media posts and content shall solely remain where/when originally posted in the feed during the Term) and without further permission from or compensation to Talent.

20. **Representations and Warranties**. Contractor hereby represents and warrants: (a) that Contractor owns all rights to the Content (but specifically excluding any content provided by Agency or Sponsor); (b) that Contractor has full right and power to enter into this agreement; and (c) that all models and any other living persons, or the representatives of any deceased persons whose names or likenesses are used in the Content, and the owner(s) of any unique or unusual inanimate objects, which are used in the Content, have executed or will execute releases allowing use of content by Agency and that Contractor will supply Agency with copies of said releases. Agency represents and warrants that: (a) Agency shall comply with all applicable laws, rules and regulations in connection with the Content; (b) Agency shall not itself, and shall not permit any third parties to, promote or sponsor the Content as any form of paid media on any platform; (c) Agency shall obtain all third-party consents and make all third-party payments required in connection with the Content; and (d) Agency has full right and power to enter into this agreement.

21. **Agency Rejection and Approval Rights**. Agency reserves the right to reasonably reject Services not delivered in accordance with the specifications of this agreement as set forth on Exhibit A, including timely delivery, which is of the essence. Complaints, or notice or defects in workmanship or design of the Services, or notice of rejection of any of the Services, will be forwarded to Contractor promptly after Agency has reviewed the Content. Parties will agree to approval processes that may prevent rejection of Services, such as a concept description or storyboard for planned Services that will be approved by Agency prior to the development of Services and a formal review and approval process by Agency of the first and final drafts of Services.

22. **Intellectual Property:** Contractor grants Agency the right to use Talent's name, prior written approved image, prior written approved likeness, voice solely as embodied in the Content, performance solely as embodied in the Content, and character solely as embodied in the Content (collectively, the "Personality Rights") during the Term and for three (3) months following the end of the Term to promote Agency and its products (the "Products") in accordance with the terms contained herein. To ensure Contractor's compliance with the Federal Trade Commission "Guides Concerning the Use of Endorsements and Testimonials in Advertising" (the "FTC Guidelines"), Contractor hereby certifies as of the Effective Date of the Agreement to the following:

22.1 that any testimonial or endorsement made in any means of mass communication, including, without limitation, newspapers, magazines, radio, television or recognized Internet media outlets (collectively, the "Media Outlets"), by the Contractor regarding

the Program/Products shall reflect the honest opinions, findings, beliefs, and/or experiences of the Contractor with respect to the Program/Products;

22.2 that the Contractor shall promptly notify Agency if any opinions, findings, beliefs and/or experiences of the Contractor with respect to the Program/Products change from that which the Contractor have previously expressed in any Media Outlet or to Agency prior to, or during the Term of, the Agreement; and

22.3 that in connection with any testimonial or endorsement made in any Media Outlet by the Contractor regarding the Program/Products, the Contractor shall affirmatively and conspicuously disclose that Contractor is a compensated endorser of the Program/Products by using #ad or #sponsored.

IN WITNESS WHEREOF, the Parties hereto have executed this Agreement as of the date first set forth above.

Agency	CONTRACTOR
By: _____	By: _____
Name of Signor	An Authorized Signatory
Date: _____	Date: _____

EXHIBIT A

Contractor agrees to the following scope of work and to produce the following deliverables:

SERVICES:

- Review and adapt content brief for audience and campaign
- Post between [date] and [date]
- One (1) non-dedicated YouTube video featuring Agency (the "Video")
- At least One (1) affiliated Instagram feed post announcing or supporting the Video.
    - May be video, Boomerang, or static image
- At least One (1) affiliated Instagram Story post announcing or supporting the Video
- Two (2) affiliated Facebook or Twitter feed post(s) announcing or supporting the video

POST REQUIREMENTS:

- Video title, description, and tags must be submitted for approval at least forty-eight (48) hours before the scheduled publish time. If reasonable changes are deemed necessary by Agency, Contractor agrees to cause Talent to make such changes prior to publishing. Agency shall be permitted only one round of such approval hereunder.
- Contractor must cause Talent to upload the video on the day of the week and time that follows their regular upload schedule. The post must be made during their peak traffic.
- Content and timing of all Content to be mutually agreed to by the parties
- Content should include full product name: [name]
- Content must be educational and include how easy the product is to use and how it is a time and money saver
- YouTube video should show you [details]
- Instagram post should feature the moment in the process and/or benefit that made you believe in [product name]
- Tag @[name]
- Use hashtag #_____ in the description of the Video,
- Drive followers to purchase product via _____.com, or retailer of choice in Video
- All Content must be approved by Agency in advance of being published in accordance with the terms of this Agreement, such approval not to be unreasonably withheld.
- Agency shall exercise all approvals of Content hereunder within forty-eight (48) hours of Contractor's submission of same, or such approvals shall be deemed given
- Product exclusivity three (3) days before and three (3) days after the post
- Content must be consistent with applicable laws
- Contractor shall not remove Content for one (1) year beyond the Term, but may seek written approval to delete earlier, such approval not to be unreasonably withheld.
- Follow FTC's Guides Concerning the Use of Endorsements and Testimonials in Advertising requiring that promotional statements must be truthful and accurate and must disclose the existence of a material connection with Agency by including language that readers would understand such as the use of "#ad" or "#sponsored" at the beginning of the post

OTHER

- Contractor will have direct line of contact to Agency should Contractor have questions or concerns regarding the product or campaign
- Contractor agrees to inform Agency if Talent is approached by a member of the media to speak about Agency

_____ _____

Initials Initials
Agency

INFLUENCER TRADE AGREEMENT

This Influencer Trade Agreement (the **"Agreement"**) sets forth the terms and conditions whereby _____ (**"you"**) agrees to cause _____ (**"Talent"**) to make certain social media posts (as described below) regarding _____ (the **"Company"**), in exchange for complimentary accommodations and invitation to _____ (the **"Event"**). The Company and you are collectively referred to hereinafter as the **"Parties"**). This Agreement shall be effective as of the date you sign this Agreement (the **"Effective Date"**).

1. The Event. In consideration for the Post (as described in Section 2, below), the Company will allow Talent and Talent's companion to attend the Event at the Company's expense. The Event is currently scheduled for [date] through [date], and consists of two (2) complimentary roundtrip flights, transportation, one (1) room accommodation, two (2) lunch dining experiences, three (3) dinner dining experiences, one (1) brunch dining experience, one (1) mixology experience, three (3) VIP table experiences, additional food and beverage outside of scheduled dining experiences during The Event on [date] through [date]. You must be age 18 or older. All dates are subject to change. No responsibility is assumed for cancellation of the Event beyond the Company's control. You will not receive any compensation or consideration for attending the Event, other than the Company's allowing Talent to attend the Event at the Company's expense, as set forth above.

2. Required Post.

2.1 You shall cause Talent to make at least one (1) positive post on Instagram about the Event using the Instagram account name @[name], at some point during the Event at [location] tagging [location] as the location, tag @[name] in the photo, and include the following hashtags #_____; a total of two (2) positive posts on Instagram story and/or Snapchat story during the Event, while at the experiences at either [location], [location], or [location] and include the corresponding hashtags for the venue: #_____, #_____, #_____; and at least one (1) positive post on Twitter during the Event, while at the experiences at either [location], [location], or [location] tagging @[name] in a photo or otherwise and utilizing the hashtag #_____ (collectively and individually, the **"Post"**). The Post must contain original photos taken at the Event (no stock photography).

2.2 The Post may not include or support libelous, defamatory, knowingly false content, violence, profanity, racial intolerance, illicit drugs or drug paraphernalia, pornography, or any other content that promotes intolerance, illegal activity, or infringes upon the legal rights of others, including but not limited to any third party copyright or trademark. The Post must comply with all Instagram terms of use and guidelines. No third party links, names, or advertisements may be included within the Post unless authorized by the Company.

2.3 You shall cause Talent to clearly and conspicuously disclose the sponsorship by the Company and ensure that the Post is in compliance with Federal Trade Commission disclosure guidelines, including by using one of the following hashtags in each Post: #sponsored or #ad.

2.4 The Company and its affiliates shall be allowed to reshare, repost, republish, or redistribute the Post across social media channels, on their websites, or in any other manner.

2.5 The Company reserves the right to require you to remove any Post in the Company's sole discretion. Unless specifically requested by the Company in writing, you are not permitted to remove any Post for a period of three (3) months following the date of posting, and doing so shall be considered a material breach of this Agreement.

3. Relationship of the Parties. For all purposes, including but not limited to Medicare and Social Security taxes, the Federal Unemployment Tax Act, income tax withholdings, and any and all other federal, state, and local laws, rules, and regulations, you and Talent shall be treated as an independent contractor and not as an employee with respect to the Company. You acknowledge and agree that you and Talent shall be responsible for filing all tax returns, tax declarations, and tax schedules, and for paying all taxes required, when due, with respect to the Event. The Company will report the fair market value of the Event on IRS Forms 1099, to the extent so required under the Internal Revenue Code. This Agreement shall not be construed to create any association, partnership, joint venture, employee or agency relationship between you and Talent and the Company for any purpose.

4. Publicity Waiver and Release. In exchange for Talent's participation in the Event, you hereby irrevocably permit, authorize and license Company and its affiliates, successors and assigns, and their respective licensees, advertising agencies, promotion agencies and fulfillment agencies, and the employees, officers, directors and agents of each and all of them (**"Authorized Persons"**), to display, publicly perform, exhibit, transmit, broadcast, reproduce, record, photograph, digitize, modify, alter, edit, adapt, create derivative works, exploit, otherwise use and permit others to use Talent's name, prior written approved image, prior written approved likeness, prior written approved appearance, prior written approved voice, other personal characteristics, and all materials created by or on behalf of the Company that incorporate any of the foregoing, but specifically excluding the Post (collectively, the **"Materials"**) solely in connection with the Event throughout the world and in any medium or format whatsoever now existing or hereafter created, including but not limited to, in and on magazines, brochures and other print publications, electronic, magnetic and optical media, social media, television broadcasts, radio broadcasts, display, point-of-sale and other advertising and promotional materials, press releases, the internet, and for any purpose, including but not limited to advertising, public relations, publicity, packaging and promotion of the Company and its affiliates and their businesses and services, without further consent from or royalty, payment or other compensation to you. For proposed uses of the Materials during the Event, you will provide a representative on-site at the Event to provide the above-referenced approvals. Company shall be permitted to re-post the Post on Company's account one (1) time without prior approval, however, any and all other uses of the Post and/or Materials by Company must be approved in writing by you prior to such use, and such approval may be withheld in your sole discretion. Notwithstanding the foregoing, Company shall not, nor have any right to, use the Materials in any manner which is or could be derogatory to or defamatory to Talent. The Company has no obligation to use the Materials. You represent and warrant to Company that (i) you have the full right and power to enter into this Agreement and grant the rights granted to Company hereunder; and (ii) the Authorized Persons' use of the Materials and the rights and license granted hereunder do not, and will not, violate any right of, or conflict with or violate any contract with or commitment made to, any person or entity, and that no consent or authorization from any third party is required in connection herewith.

5. Termination. The Company may terminate this Agreement upon three (3) days' advanced written notice to you.

6. Assignment. You shall not assign any rights, or delegate or subcontract any obligations, under this Agreement without the Company's prior written consent. Any assignment in violation of the foregoing shall be deemed null and void. The Company may freely assign its rights and obligations under this Agreement at any time. Subject to the limits on assignment stated above, this Agreement will inure to the benefit of, be binding upon, and be enforceable against, each of the Parties hereto and their respective successors and assigns.

7. Indemnification. You shall indemnify, and hold harmless the Company, its affiliates, and each of

their respective managers, members, stockholders, directors, officers, employees, agents, and affiliates from and against all claims, demands, obligations, liabilities, damages, actual, verifiable, out-of-pocket expenses (including reasonable outside attorney's fees and costs), actions, causes of action or suits at law or in equity of whatever kind or nature, known or unknown, suspected to exist or not suspected to exist, anticipated or not anticipated, which have arisen, or are now arising out of or in connection with any breach or non-fulfillment of any covenant, term or obligation to be performed by you under this Agreement.

8. Miscellaneous.

8.1 All notices, requests, consents, claims, demands, waivers, and other communications hereunder (each, a **"Notice"**) shall be in writing and addressed to the Parties at the addresses set forth below (or to such other address that may be designated by the receiving Party from time to time in accordance with this Section). All Notices shall be delivered by personal delivery, nationally recognized overnight courier (with all fees pre-paid), or e-mail of a PDF document (with confirmation of transmission) or certified or registered mail (in each case, return receipt requested, postage prepaid).

8.2 This Agreement constitutes the sole and entire agreement of the Parties to this Agreement with respect to the subject matter contained herein, and supersedes all prior and contemporaneous understandings, agreements, representations, and warranties, both written and oral, with respect to such subject matter.

8.3 You warrant and represent that entering into or performing under this Agreement will not violate any agreement you have with a third party or any third party rights.

8.4 Company represents and warrants that: (a) Company shall comply with all applicable laws, rules and regulations in connection with the Post and Event; (b) Company shall not itself, and shall not permit any third parties to, promote or sponsor the Post as any form of paid media on any platform; (c) Company shall obtain all third-party consents and make all third-party payments required in connection with the Post; (d) Company has full right and power to enter into this agreement; and (e) for the duration of the Event, Company shall maintain, at its sole cost and expense, comprehensive general liability insurance. Company hereby indemnifies and holds you, Talent, and Talent's and your licensees, affiliates, officers, directors, successors and assigns harmless against all liabilities, costs, expenses, damages and losses (including reasonable outside attorneys' fees) that they may suffer which arises from (i) Company's use of the Post in a manner inconsistent with the rights granted herein, or (ii) any breach of any representation, warranty, covenant or obligation of Company herein.

8.5 This Agreement may only be amended, modified, or supplemented by an agreement in writing signed by each Party hereto, and any of the terms thereof may be waived, only by a written document signed by each Party to this Agreement or, in the case of waiver, by the Party or Parties waiving compliance.

8.6 This Agreement shall be governed by and construed in accordance with the internal laws of the State of Nevada without giving effect to any choice or conflict of law provision or rule. Each Party irrevocably submits to the exclusive jurisdiction and venue of the federal and state courts located in Clark County, Nevada in any legal suit, action, or proceeding arising out of or based upon this Agreement or the Services provided hereunder. This Section is mandatory.

8.7 If any term or provision of this Agreement is invalid, illegal, or unenforceable in any

jurisdiction, such invalidity, illegality, or unenforceability shall not affect any other term or provision of this Agreement or invalidate or render unenforceable such term or provision in any other jurisdiction.

8.8 This Agreement may be executed in multiple counterparts and by facsimile signature, each of which shall be deemed an original and all of which together shall constitute one instrument.

8.9 In any legal action or other proceeding brought to enforce or interpret the terms of this Agreement, the prevailing Party shall be entitled to recover its reasonable attorneys' fees and costs.

8.10 You acknowledge that you have had the opportunity to consult legal counsel in regard to this Agreement, that you have read and understand this Agreement, that you are fully aware of its legal effect, and that you have entered into it freely, voluntarily, based on your own judgment, and not on any representations or promises other than those contained in this Agreement.

PARTICIPANT	COMPANY
Address:	Address:
Signature:_____	Signature:_____
Print Name:_____	Print Name:_____
	Title:_____

CROWDFUNDING

By Gregg R. Zegarelli, Esq.

Zegarelli

Technology & Entrepreneurial
Ventures Law Group, PC

Administrative and Postal Office:
2585 Washington Road, Suite 134
Summerfield Commons Office Park
Pittsburgh, PA 15241-2565 USA

301 Grant Street, Suite 4300 • One Oxford Centre
Pittsburgh, PA 15219-1407 USA
http://www.zegarelli.com

http://www.linkedin.com/in/greggzegarelli
http://www.zegarelli.com/staff/grz

Biography

Gregg R. Zegarelli, Esq.

Mr. Zegarelli has practiced law for more than 25 years and is admitted to practice law in the Commonwealth of Pennsylvania, District of Columbia and State of Illinois. He is a graduate of Duquesne University with dual major areas in Accounting and History and dual minors in Philosophy and Political Science. He is a graduate of the Duquesne University Law School and is qualified to sit for the C.P.A. examination.

Mr. Zegarelli is Adjunct Professor in the Duquesne University McAnulty Graduate School teaching in the Master of Leadership graduate degree program. His courses include *The Leader as Entrepreneur* and *Developing Leadership Character Through Adversity.*

Mr. Zegarelli remains a practicing attorney. He practices in all transactional areas of law, with a concentration in technology and media law, and the law of corporate and business transactions. His representation includes advising on business formation and entrepreneurial ventures, commercial and corporate litigation, venture capital, franchising, mergers and acquisitions, licensing of technology and information, employee and contractor agreements, and intellectual property matters such as copyright, media, trade secret and trademark law.

Mr. Zegarelli serves as general counsel for businesses ranging from the startup to large enterprises. He has been retained as special counsel for technology development contracts, such as for the automated parking facility at the Pittsburgh International Airport. He has personally negotiated with a wide-range of well-known companies, including Acclaim, Borland, Coca-Cola, Disney, Facebook, General Electric, Google, Intel, Lion's Gate, Mattel, McKesson, Metro-Goldwyn-Mayer (MGM), Microsoft, Sony and Xerox.

Mr. Zegarelli has also earned a very unusual credential: Mr. Zegarelli represents clients in federal and state courts and has successfully litigated disputes with extremely complicated deliverable logistics. Mr. Zegarelli has been selected several times as an Arbitrator (Judge) for the American Arbitration Association, and has presided over more than 100 arbitrations in the largest class action settlement in history. Mr. Zegarelli was appointed to the panel of neutrals for the United States Copyright Arbitration Royalty Panel for two years prior to the statutory internalization and was appointed by the United States District Court for the Western District of Pennsylvania as an Early Neutral Evaluator. Mr. Zegarelli was lead counsel in *Borings v. Google*, the first case against Google for Street View trespass, with a successful reversal at the Third Circuit that resulted in the only known judgment against Google as an intentional trespasser.

Mr. Zegarelli was appointed as the first Chairman of the ACBA Allegheny Lawyers Online program—the first telecommunications service to be sponsored by a local bar association. Mr. Zegarelli has been interviewed by television and Internet media, such as CBS-affiliate KDKA (Internet gambling), CNN (electronic privacy), and USLive (getting inventions to market), and he is author of the article on the *Computer Fraud and Abuse Act* for the *MacMillan (Gale Group) Encyclopedia*, and *Current Technology Issues* by the *Ohio CPA Journal*. Mr. Zegarelli also was interviewed by on *TBC Today* regarding entrepreneurism and appeared on WMNY Pittsburgh Business Radio discussing intellectual property issues and ethics. Mr. Zegarelli was Councilman in the Municipality of Penn Hills, and President of the Student Government Association of Duquesne University. Mr. Zegarelli was authored and published *The Sunshine Act*, republished by the *Pittsburgh Legal Journal* at 135 P.L.J. 39, 1988, and cited by the Pennsylvania Statutes (Purdon Supp. 65 P.S. § 271). He was chosen by the *Pittsburgh Post-Gazette* as "Ones to Watch in the 90's."

Mr. Zegarelli is a frequent lecturer for accredited continuing education series on technology, social media, entrepreneurship, law office management and intellectual property issues. He has the distinction of being a member of the faculty for attorney CLE and accountancy CPE courses. Mr. Zegarelli is the author of ONE®, the Unified Gospel of Jesus, in which he has systematically unified the four Gospels with a new 3,000 item reference system. He is a member of the District of Columbia, Illinois and Allegheny County

Bar Associations. He is admitted to the U.S. Third Circuit and the U.S. Supreme Court. He is a member of the Duquesne University McAnulty College and Graduate School of Liberal Arts Alumni Advisory Committee. He is a board member of the MLR Charitable Foundation Advisory Board. Mr. Zegarelli is listed in Who's Who in Practicing Attorneys. Mr. Zegarelli's personal website is http://www.greggzegarelli.com.

Disclaimer

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I. Introduction.

1. On April 5, 2012, President Obama signed the Jumpstart Our Business Startups Act, better known as the JOBS Act. The Act is designed to "reopen American capital markets to small companies," defined as "emerging growth companies."

2. On May 16, 2016, the Final Rules became effective. 17 CFR Parts 200, 227, 232, 239, 240, 249, 269, and 274.

3. **** RESEARCH CONFUSION POINT **** Keep perspective. The *U.S. Congress* enacts "statutes" Those laws are often then implemented and clarified by *administrative agencies*, which enact "regulations." For example, compare the Tax Act from the Internal Revenue Service (IRS) and its tax regulations. In this context, Congress enacted the JOBS Act, but the Securities and Exchange Commission (SEC) enacts the securities regulations. It took the SEC more than four years to enact regulations, and the statute was abated until those regulations.

4. A game changer. Revolutionary, not evolutionary.

5. A composite of several pieces of proposed legislation, the final version of the JOBS Act, H.R. 3606, was passed by the House of Representatives on March 7, 2012. The Senate passed its version of the legislation on March 22, 2012. Supporters included the National Venture Capital Association, the Small Business and Entrepreneurship Council, the National Small Business Association, the U.S. Chamber of Commerce, the International Franchise Association, and the Biotechnology Industry Organization. Crowdfunding platform IndieGoGo also supported the law. Opponents included the American Association of Retired Persons and the North American Securities Administrators Association.

6. What is Crowdfunding.

    a. Crowd funding or crowdfunding is to fund something by means of placing it before a crowd for consideration. It describes the collective effort of individuals who network and pool their money, usually via the Internet, to support efforts initiated by other people or organizations. Crowdfunding is used in support of a wide variety of activities. Generally, it refers to any kind of capital formation where funding requests are communicated via an **open call** in a forum where the call can be evaluated by a large group of individuals--the crowd. The outreach is referred to as a **crowdfunding campaign** and the person or company who is in charge of the campaign is referred to as the **campaign owner**.

    b. **** RESEARCH CONFUSION POINT **** Be Careful. There are two types of "crowd funding." If you google the term, you will find many variations with the basis for the crowdfunding being on distinct footing. *Generally:*

        i. One type that has already been implemented is to fund a product by pre-sales. That is, to make a conditional product available. If enough pre-sales are achieved, the product is produced. This is (probably) not an securities issuance model.

        ii. The other type is a securities issuance model. That is, to sell interests in an enterprise. This is the heart of the paradigm revolution.

    c. Crowdfunding has its origins in the concept of *crowdsourcing*, which is the broader concept of reaching a goal by receiving and leveraging small contributions from many parties. Crowdfunding is the application of this concept to the collection of funds through small contributions from many parties in order to finance a particular project or venture.

d. Crowdfunding is supported by an organization, the "**platform,**" which brings together the project initiator and the crowd.

e. Open Calls. An open call in context of crowdfunding (and crowdsourcing in general) is understood as a call-to-action where the message is not targeted at any specific intended recipient. This line of communication is somewhat passive in that it is not necessarily targeted, but makes itself available to be found.

f. Crowdfunding Platforms. In a crowdfunding context, the sender is the campaign owner, the recipient is any member of the crowd that decides to support the campaign, and the communication is predominantly established via a crowdfunding platform supported by the campaign owner's personal means of communication and outreach.

7. The JOBS Act seeks to invigorate the capital markets by removing restrictions on capital raising. Specifically, the JOBS Act:
   a. Creates a new category of securities issuer called an "**Emerging Growth Company**" (**EGC**) and provides for an "**IPO on-ramp**";
   b. Eliminates the ban on public solicitation of investors by companies seeking financing in a private offering;
   c. Permits "crowdfunding";
   d. Creates a new Regulation A+ offering exemption; and
   e. Raises the threshold for required registration as a public company.

8. The implementation period varies.

   a. Immediate Effectiveness: a) Relief from overly burdensome regulations for EGCs seeking to go public; b) Raised threshold for required registration as a public company.

   b. The SEC adopted the regulations 17 CFR.

II. Jumpstart Our Business Startups (JOBS) Act Textual Review

III. Title II - Access to Capital for Job Creators (Elimination of Ban on General Solicitation and Advertising)

1. Introduction. Title II of the JOBS Act eliminates the ban on general solicitation and advertising for private offerings relying on Rule 506 or Rule 144A.

2. GOLDEN RULE OF CORPORATE SECURITES LAW:

   All offers and sales of securities must be registered unless an exemption exists.

3. Many private offerings are set up as private placements exempt from registration under SEC Rule 506, which allows an unlimited amount of money to be raised from an unlimited number of accredited investors (and up to 35 non-accredited investors).

4. Regulation D ("**Reg D**"). In 1982, the SEC promulgated an integrated series of rule exemptions for limited offerings of securities. These series of rules are cast under Federal Regulation D. The regulation is found under Title 17 of the Code of Federal Regulations, part 230, Sections 501 through 508 (Rules 501 – 508). The legal citation is 17 C.F.R. §230.501 et seq.

   a. Rule 501, Definitions. Rule 502, General Conditions: (a) that all sales within a certain time period that are part of the same Reg D offering must be "integrated"; (b) disclosures must be provided; (c) **no "general solicitation"**; and (d) resale restrictions. Rule 503, Form D. **** CAUTION **** Not all of these definitional subsections are applicable for all provisions of Regulation D; for example, (c) is not applicable to the 506(c) exemption.

b. **** TAKE NOTICE **** The different Regulation D exemptions find different sources of statutory authority; to wit:

   i. In Rules 504 and 505, Regulation D implements **§3(b)** of the Securities Act of 1933 (also referred to as the "'33 Act"), which allows the SEC to exempt issuances of not more than $5,000,000 from registration (aka, "a 3(b) [money amount] exemption").

   ii. Rule 506 provides a safe harbor under §4(2) of the '33 Act which says that non-public offerings are exempt from the registration requirement. (aka, "a 4(2) [non-public] exemption"). In other words, if an issuer complies with the requirements of Rule 506, they can rest assured that their offering is "non-public," and thus that it is exempt from registration.

c. Rule 507, Penalties for non-filing Form D. Rule 508, enforcement guidelines.

d. Rule 504 exempts offerings which do not exceed $1M during any 12 month period. Prior to the SEC's adoption of its small business initiatives, offerings under Rule 504 were subject to the general terms and conditions applicable to all Regulation D offerings, *i.e.*, securities were subject to restrictions on transferability and could not be offered or sold by means of general solicitation or advertisement. These restrictions were removed by the SEC in August, 1992. The result is that companies are permitted under federal law to conduct a limited public offering without limitation on the number or nature of investors or the requirement to deliver a prescribed disclosure document. **** CAUTION **** However, state securities laws may curtail certain aspects of these types of offerings.

e. Rule 505, exempts offerings not exceeding $5M during any twelve month period. Unlike the Rule 504 exemption, there can be no more than thirty-five "non-accredited investors" purchasing the offered securities. An "accredited investor" is defined to include virtually every type of institution that typically participates in the private placement market as well as wealthy individual investors. A company relying on Rule 505 can sell to an unlimited number of accredited investors and a maximum of thirty-five non-accredited investors. Rule 505 requires the delivery of a disclosure document to investors, the contents of which are detailed in the rule.

f. Rule 506 exempts offerings without any limitation on the dollar amount of securities which can be sold.

   i. **** RESEARCH CAUTION **** The JOBS Act separated Rule 506 into 506(b) and 506(c), 506(b) being the pre-existing substantive Rule 506. When research is performed, care must be taken to view the date of the content. Newer content tends to be clear with the distinction, but older content will cause confusion unless the reader understands the distinction of Rule 506(c).

   ii. The requirements of the Rule 506(b) exemption are substantially identical to Rule 505, including the thirty-five "non-accredited investor" limitation. The principal difference between the two rules is an additional requirement that Rule 506 "non-accredited investors" must also have sufficient knowledge and experience in financial and business matters to be capable of evaluating the merits and risks of the proposed investment. This "sophistication" requirement together with the slightly more comprehensive disclosure requirements are the distinguishing features of Rule 506.

   iii. Rule 506(c) does not have the anti-general solicitation rule of 502(c) and has additional heightened investor verification requirements.

g. Accredited investors are those individuals whose joint net worth with their spouse is at least $1 million, excluding the value of any equity in primary residences but including any mortgage debt to the extent it exceeds the fair market value of the residences. The term also includes individuals with income exceeding $200,000 in each of the two most recent years, or joint income with their spouse exceeding $300,000 in each of those years, plus a reasonable expectation of reaching these income levels in the current year. of $5 million and directors executive officers of the issuer.

h. Rule 144A offerings are offerings where an issuer sells securities to a financial intermediary under Section 4(a)(2) (formerly Section 4(2) before the JOBS Act) and the financial intermediary subsequently resells the securities to Qualified Institutional Buyers (QIBs) under Rule 144A. (Rule 506 is a safe harbor under the broader Section 4(a)(2) exemption involving transactions "by an issuer not involving an public offering.")

5. Rule 506(c) of Reg D. **** NOTE **** This is not *per se* the "crowdfunding" exemption, but a new addition to Rule 506[(b)] allowing broader general advertising. Private offerings that qualify under Rule 506 are deemed to be exempt from registration under the Securities Act because they do not involve a "public" offering. The JOBS Act removes the ban on general solicitation and advertising in connection with Rule 506(c) private offerings as long as all purchasers of the securities in any such offering are "accredited investors" under the Regulation D standard, and requires the issuer to take "reasonable steps" to confirm the "accredited investor" status of all such investors.

a. What constitutes "reasonable steps" to confirm the "accredited investor" status has been the focus of SEC rule making.
b. SEC chose to implement a principle-based approach rather than require any specific procedures.

c. Issuers will need to make an objective determination based on:

i. the nature of the purchaser and the type of the accredited investor the purchaser claims to be;

ii. the amount and type of information known about the purchaser; and

iii. the nature of offering, such as the manner in which the purchaser was solicited to participate in the offering, and the terms of the offering, such as a minimum investment amount.

iv. Because there are various types of accredited investors, the reasonable steps to verify will be based on the type of purchaser. High minimum investments, while not 100% proof of being an accredited investor, could make it more likely that the investor is accredited. No specific required verification methods were set out in the proposed rules. Reasonable belief means just that. It is not an absolute belief standard.

d. Form D has a new box to check indicating whether the issuer used general solicitation.

6. Rule 144A currently provides a safe harbor exemption from registration for securities sold to purchasers that the seller reasonably believes are QIBs.

a. The JOBS Act makes an important beneficial change to Rule 144A. The availability of Rule 144A will be expanded so that securities sold under the Rule 144A exemption may be offered to purchasers who are not QIBs, including through general solicitation and advertising, provided that securities are resold only to persons that the seller (or a party operating on the seller's behalf) reasonably believes are QIBs.

7. Regulation S Offerings. Regulation S is a safe harbor for offers and sales of securities outside the U.S., provided that the transaction is off shore and there can be no directed selling efforts in the U.S.

8. Relaxing Certain Broker-Dealer Registration Requirements. The JOBS Act creates an exemption from required registration as a broker-dealer if the registration would have been required solely due to the following activities.

    a. maintaining a platform or mechanism that facilitates or permits offers, sales purchases, negotiations, general solicitation or similar activities by issuers of securities (regardless of how such activities are conducted);

    b. co-investing in an issuer's securities; or

    c. providing certain ancillary services, such as due diligence reviews or standardized documentation services.

    d. These persons will have to comply with certain restrictions to qualify for this exemption from broker-dealer registration, including: a) receiving no compensation in connection with the purchase or sale of securities; b) no possession of customer funds or securities in the purchase and sale process; and c) not being subject to certain Exchange Act disqualifications.

IV. Title III - Capital Raising Online While Deterring Fraud and Unethical Non-Disclosure Act of 2012 (Crowdfunding)

1. The JOBS Act creates a new registration exemption that permits certain issuers to raise up to $1.07M within any twelve month period, provided that the issuer is not an SEC reporting company.

    a. KEY: An investor will be limited to investing: (1) the greater of: $2,200 or 5 percent of the lesser of the investor's annual income or net worth if either annual income or net worth is less than $107,000; or (2) 10 percent of the lesser of the investor's annual income or net worth, not to exceed an amount sold of $107,000, if both annual income and net worth are $107,000 or more

    The maximum investment by any investor in such a transaction must be limited to the lesser of:

    i. If either the investor's annual income or net worth is less than $107K then: the greater of $2,200 or 5% of the investor' s annual income or net worth within any twelve month period; or

    ii. Otherwise, the lesser of 10% of the investor's annual income or net worth, not to exceed $107K (if both annual income and net worth are more than $107K).

2. This chart illustrates a few examples of the investment limits:

Investor Annual Income	Investor Net Worth	Calculation	Investment Limit
$30,000	$105,000	Greater of $2,200 or 5% of $30,000 ($1,500)	$2,200

$150,000	$80,000	Greater of $2,200 or 5% of $80,000 ($4,000)	$4,000
$150,000	$107,000	10% of $107,000 ($10,700)	$10,700
$200,000	$900,000	10% of $200,000 ($20,000)	$20,000
$1,200,000	$2,000,000	10% of $1,200,000 ($120,000), subject to $107,000 cap	$107,000

3. The reporting requirements will vary depending on the amount of funding:

    a. $107,000 or less: financial statements and tax returns (unless audited/reviewed financials are given)
    b. less than $535,000: financial statements reviewed by an accountant (unless audited/reviewed financials are given).
    c. $535,000 or more:

        i. for first time offerors, financial statements reviewed by an accountant (unless audited/reviewed financials are given).
        ii. for non-first time offerors, financial statements audited by a public accountant that is independent of the issuer.

4. The JOBS Act deems securities issued in a crowdfunding transaction to be "covered securities."

5. Investor Protections. Significant investor protections in connection with crowdfunding were put into place:

    a. Crowdfunding must be conducted through a broker or "funding portal."

        i. A "**funding portal**" is an intermediary in a securities offering that satisfies certain requirements, including not offering investment advice or recommendations, not soliciting purchases, sales or offers to buy securities, and not compensating employees or others based on the sale of securities;

    b. Ban on advertising the terms of the offering;

    c. Restricting the transfer of securities sold under the exemption for one year;

    d. Imposing personal civil liability under Section 12(a)(2) of the Securities Act for principals for material misstatements or omissions in connection with the offering;

    e. Requiring the issuer to file with the SEC (and to provide to investors and financial intermediaries) certain information about the issuer and its business, anticipated business plan, financial condition, and details of the proposed crowd funding transaction; and

    f. Depending on the size of the offering, the issuer would be required to provide different levels of financial information: a) income tax returns and financial statements certified by the principal executive officer of the issuer for offerings of less than $100,000; b) reviewed financial statements by a certified public accountant for offerings of more than $100,000, but not more than $500,000; and c) audited financial statements for offerings of more than $500,000.

6. Funding Portals. Effectively acts as a broker or funding portal intermediary for crowdfunding capital raises, the broker or funding portal must:

a. Register with the SEC and any applicable self-regulatory organization as a broker or funding portal;

b. Provide certain disclosures to potential investors relating to risks and other investor education materials and ensuring that potential investors review and acknowledge these disclosures;

c. Take certain actions to reduce the risk of fraud by issuers, including conducting background checks on issuer principals;

d. Make available to the SEC and potential investors any information that the issuer provides to investors and intermediaries; and

e. Confirm compliance by issuers with the limitations on investment amounts for crowd funding transactions.

f. The final rules define "platform" as "a program or application accessible via the Internet or other similar electronic communication medium through which a registered broker or a registered funding portal acts as an intermediary in a transaction involving the offer or sale of securities in reliance on Section 4(a)(6) of the Securities Act (15 U.S.C. 77d(a)(6)).

g. See additional SEC online resources for additional information. Title 17 is available at the http://bookstore.gpo.gov for ordering in 4 books for about $200. Regulation Crowdfunding: A Small Entity Compliance Guide for Issuers https://www.sec.gov/info/smallbus/secg/rccomplianceguide-051316.htm and

   and Registration of Funding Portals https://www.sec.gov/divisions/marketreg/tmcompliance/fpregistrationguide.htm

h. Financial Industry Regulation Authority (FINRA) http://www.finra.org/industry/funding-portals FINRA crowdfunding are located at http://finra.complinet.com/en/display/display_viewall.html?rbid=2403&element_id=12218&record_id=16794&filtered_tag=

i. https://crowdfundinglegalhub.com/2015/01/16/state-of-the-states-compariative-summaries-of-current-active-and-proposed-intrastate-crowdfunding-exemptions/ for a summary of current state laws for crowdfunding.

j. A crowdfunding intermediary must register with the SEC as a broker or as a funding portal and become a member of a national securities association (FINRA). The following crowdfunding intermediaries are registered with the SEC as funding portals and are funding portal members of FINRA. Regulated Funding Portals http://www.finra.org/about/funding-portals-we-regulate, as of August, 2018:

Avonto, LLC
SEC File No.: 7-80
Other Name(s):
Website URL(s):http://www.avonto.com/
2435 E. North St., Ste. 1108-178
Greenville, SC 29615

Buy The Block
SEC File No.: 7-98
Other Name(s):
Website URL(s):
4860 Chambers Rd, #21
Denver, CO 80239

CollectiveSun, LLC
SEC File No.: 7-71
Other Name(s):
Website URL(s):
4685 Convoy Street, Ste 210-3
San Diego, CA 92111

Crowd Ignition, Inc.
SEC File No.: 7-106
Other Name(s):
Website URL(s): https://crowdignition.com/
200 Park Avenue, Suite 1700
New York, NY 10166

CrowdsourceFunded.com
SEC File No.: 7-27
Other Name(s):
Website URL(s): https://crowdsourcefunded.com/
3753 North Pine Grove Ave., # 2
Chicago, IL 60613

EnergyFunders Marketplace
SEC File No.: 7-124
Other Name(s):
Website
URL(s): http://www.energyfunders.com/marketplace
1900 W. Gray #130945
Houston, TX 77219

EnrichHER Funding LLC
SEC File No.: 7-136
Other Name(s):
Website URL(s):
3423 Piedmont Road NE
Atlanta, GA 30305

Equifund Crowd Funding Portal Inc.
SEC File No.: 7-115
Other Name(s): EquifundCFP
Website URL(s): www.equifundcfp.com
260 Terence Matthews Cres, Suite 201
Kanata ON K2M 2C7 CAN

EquityBender LLC
SEC File No.: 7-92
Other Name(s): www.equitybender.com
Website URL(s): https://equitybender.com/
15 Crest Circle
Corona Del Mar, CA 92625

First Democracy VC
SEC File No.: 7-76
Other Name(s):
Website URL(s): https://microventures.com
11601 Alterra Parkway, Suite 100
Austin, TX 78758

FlashFunders Funding Portal, LLC
SEC File No.: 7-9
Other Name(s):
Website URL(s): https://www.flashfunders.com
6 Venture, Suite 265
Irvine, CA 92618

Funding Wonder Crowd, LLC
SEC File No.: 7-70
Other Name(s): SeriesOne LLC
Website URL(s): https://seriesone.com/
175 SW 7th Street, Suite 1800
Miami, FL 33130

Fundme.com, Inc.
SEC File No.: 7-78
Other Name(s): FundMe
Website URL(s): https://www.fundme.com
4770 South, 900 East, Suite 202
Murray, UT 84117

Fundpaas Inc
SEC File No.: 7-65
Other Name(s): FundpaaS, Inc. d/b/a Custvestor
Website URL(s): http://www.custvestor.com/
415 Jackson Street, Suite B
San Francisco, CA 94111

Good Capital Ventures
SEC File No.: 7-94
Other Name(s):
Website URL(s):
2051 Stockton Rd NW
Massillon, OH 44646

Gridshare LLC
SEC File No.: 7-18
Other Name(s):
Website URL(s): http://gridshare.com/
2607 NE 13TH Avenue
Portland, OR 97212

GrowthFountain Capital, LLC
SEC File No.: 7-28
Other Name(s):
Website URL(s): www.growthfountain.com
75 Chambers Street, 6th Floor
New York, NY 10007

Honeycomb Portal LLC
SEC File No.: 7-119
Other Name(s): HoneyComb
Website URL(s): https://www.honeycombcredit.com/
6022 Broad Street, Floor 3
Pittsburgh, PA 15224

Hycrowd LLC
SEC File No.: 7-96
Other Name(s): Hycrowd
Website URL(s):
3 SwanCt
Jersey City, NJ 07305

Indie Crowd Funder, LLC.
SEC File No.: 7-10
Other Name(s): IndieCrowdFunder.Com
Website URL(s): http://www.indiecrowdfunder.com
8306 Wilshire Blvd., Suite 1904
Beverly Hills, CA 90211

Jumpstart Micro, Inc
SEC File No.: 7-8
Other Name(s):
Website URL(s): http://www.jumpstartmicro.com
101 Great Road
Bedford, MA 01730

Ksdaq Inc.
SEC File No.: 7-42
Other Name(s): Mr. Crowd
Website URL(s): https://www.MrCrowd.com
35/F The Gas Company Tower #35100, 555 West 5th Street
Los Angeles, CA 90013

Merging Traffic Portal llc
SEC File No.: 7-127
Other Name(s): Merging Traffic
Website URL(s): https://www.mergingtrafficportal.com/
6555 Sanger Road, #100
Orlando, FL 32827

MinnowCFunding LLC
SEC File No.: 7-20
Other Name(s):
Website URL(s): http://minnowcfunding.com
16 S. Oakland Ave., #205
Pasadena, CA 91101

MiTec, PBC
SEC File No.: 7-133
Other Name(s): Crowdfund Main Street
Website URL(s): https://www.crowdfundmainstreet.com/
4388 Lorren Drive
Fremont, CA 94536

NetCapital Funding Portal Inc.
SEC File No.: 7-35
Other Name(s):
Website URL(s): https://netcapital.com/
16192 Coastal Highway
Lewes, DE 19958

NextSeed US LLC
SEC File No.: 7-23
Other Name(s):
Website URL(s): https://www.nextseed.com/
3 Greenway Plaza, Suite 110
Houston, TX 77046

NSSC Funding Portal, LLC
SEC File No.: 7-12
Other Name(s): Small Change
Website URL(s): https://smallchange.com/
945 Liberty Avenue, Unit 605
Pittsburgh, PA 15222

OpenDeal Inc.
SEC File No.: 7-46
Other Name(s): Republic
Website URL(s): www.republic.co
335 Madison Avenue, 16th Floor
New York, NY 10017

Razitall, Inc.
SEC File No.: 7-26
Other Name(s):
Website URL(s): https://www.razitall.com/
411 King George Rd, Suite 101, #325
Basking Ridge, NJ 07920

SI Portal, LLC
SEC File No.: 7-29
Other Name(s):
Website URL(s): https://www.seedinvest.com
116 West Houston, 6th Floor
New York, NY 10012

Silicon Prairie Holdings, Inc.
SEC File No.: 7-123
Other Name(s): Silicon Prairie Online
Website URL(s): https://sppx.io/
475 Cleveland Avenue N.
St. Paul, MN 55104

Slice Capital
SEC File No.: 7-61
Other Name(s):
Website URL(s): https://www.slice.capital/
10 Regency Court
Exton, PA 19341

Sprowtt CrowdFunding, Inc.
SEC File No.: 7-44
Other Name(s):
Website URL(s): https://www.sprowttcf.com/
500 E. Kennedy Blvd., Suite 3003
Tampa, FL 33602

Stampede cfp llc
SEC File No.: 7-142
Other Name(s):
Website URL(s):
702 South Beretania Street
Honolulu, HI 96813

StartEngine Capital LLC
SEC File No.: 7-7
Other Name(s): StartEngine
Website URL(s): https://www.startengine.com/
570 N. San Vicente Blvd, Suite 800 West
West Hollywood, CA 90069

StartWise, Inc.
SEC File No.: 7-54
Other Name(s):
Website URL(s): https://www.startwise.com
703 Crestview Drive
San Carlos, CA 94070

STL Critical Technologies JV I, LLC
SEC File No.: 7-111
Other Name(s): Nvsted
Website URL(s): https://www.nvstedwithus.com/
7733 Forsyth Blvd, Suite 2300
St. Louis, MO 63105

Thrivera Ventures Fund I, LLC
SEC File No.: 7-116
Other Name(s): Wunderfund
Website URL(s): https://www.wunderfund.co/
1100 Sycamore Street, 7th Floor
Cincinnati, OH 45202

title3funds.com
SEC File No.: 7-83
Other Name(s): Fundivations LLC
Website URL(s): http://title3funds.com/
300 Spectrum Center Drive, Suite 1090
Irvine, CA 92618

truCrowd Inc
SEC File No.: 7-15
Other Name(s): TRUCROWD; FUNDANNA; CRYPTOLAUNCH
Website URL(s): http://www.us.trucrowd.com/https://fundanna.com/ https://cryptolaun.ch/
1136 S Delano Ct, Ste B201
Chicago, IL 60605

Venture Capital 500, LLC
SEC File No.: 7-87
Other Name(s): VC 500
Website URL(s): https://venturecapital500.com
670 Treehouse Circle
Saint Augustine, FL 32095

Wefunder Portal LLC
SEC File No.: 7-33
Other Name(s): Wefunder
Website URL(s): https://www.Wefunder.com
141b Hampshire St
San Franciso, CA 94103

billboard

Could Louis Tomlinson or Harry Styles Have a Legal Case Against HBO Over 'Euphoria' Animated Sex Scene?

7/2/2019 by Gil Kaufman

Matt Sayles/Invision/AP

Harry Styles and Louis Tomlinson of One Direction perform at the American Music Awards at the Microsoft Theater on Nov. 22, 2015 in Los Angeles.

Louis Tomlinson made it clear that he was not in any way involved with the explicit animated sequence in Sunday's (June 30) episode of HBO's teen drama *Euphoria*, which depicted an imagined sex scene between himself and former One Direction bandmate Harry Styles.

In the animated, minute-long flashback scene, character Kat Hernandez writes graphic fan-fic about the same-sex 1D duo getting intimate, creating the subgenre of "Larry Stylinson" fan fiction -- which in real life did become popular among Directioners at the group's mid-'10s peak -- in the process. On Monday, Tomlinson wrote of the scene, "I can categorically say that I was not contacted nor did I approve it," in response.

But, other than clarifying that he nothing to do with the scene, could he do anything to legally respond to it? Though Tomlinson has not threatened to take legal action over the scene -- spokespeople for HBO, Tomlinson and Styles had not returned requests for comment at press time -- *Billboard* reached out to several intellectual property attorneys to find out if the animated romp is the kind of speech protected under the First Amendment.

"First of all, this is a First Amendment-protected work," Brian Caplan, an intellectual property lawyer at the New York firm Reitler Kailas & Rosenblatt LLC tells *Billboard* about his assessment of the legal protections afforded this kind of parody. Caplan, who has represented the Lumineers and the estates of James Brown and George Gershwin, was speaking as a legal expert, with no first-hand knowledge of the HBO series' internal legal deliberations. "The only types of claims would be over right of publicity or defamation claims."

Caplan explains that in terms of right of publicity, the images are not being used for commercial purposes -- even if they appear on a pay-cable channel series -- adding that there are a "number of defenses" that would make a defamation claim fail. Specifically, he says, a number of states have found that claiming that someone is gay is no longer considered to be defamatory, though the statutes still differ on a state-by-state basis.

More importantly, he says, the scene is clearly a parody. "The fact is the person is having a fantasy in the show, so nobody would take what appears on the screen to be a

statement of fact," he says. "To be defamatory it must be a statement of fact, such as 'this person has broken the law repeatedly,' but this is not a statement of fact, it's a depiction."

He notes that *South Park* engages in this type of parody all the time, including a 2005 episode, "Trapped in the Closet," during which an animated R. Kelly begged actors Tom Cruise and John Travolta to "come out of the closet."

Peter Scoolidge, an intellectual property attorney at Scoolidge, Peters, Russotti & Fox, LLP, concurs with Caplan's assessment, explaining that an artist has a right of publicity that allows them to control the use of their likeness and prevent someone else from profiting from using their image for profit. "People didn't just tune in to see this one clip," he says; Scoolidge also has no first-hand knowledge and was speaking in general legal terms. "The show has other commercial appeal and they probably wouldn't be able to do anything to stop this."

He suspects that the legal team at HBO took time to vet the question and concluded that the scene did not require them to get a release from the singers, and that it would not present a legal problem. "I'm sure it was on their radar and they probably felt pretty confident that they had a good First Amendment protection," he says, noting that book publishers and media organizations have legal departments that clear such matters after careful analysis.

And, as Caplan points out, HBO didn't have a legal obligation to contact Tomlinson because the scene was not defamatory and didn't violate the singers' right of publicity. "People sue frivolously all the time, but do I think he [Tomlinson] would lose if he sued? Absolutely."

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MINKOZE.COM, LLC d/b/a WORLD STAR MARKETING GROUP a/k/a WORLDSTAR MARKETING GROUP, INC., KSR GROUP, LLC, and KLENORD RAPHAEL, Plaintiffs, v. BELCALIS ALMANZAR p/k/a CARDI B, PATIENTCE FOSTER, QUALITY CONTROL MANAGEMENT, LLC, KEVIN "COACH K" LEE, PIERRE "PEE" THOMAS, and SOLID FOUNDATION MANAGEMENT, LLC, Defendants.	Case: 18-cv-03710 (VEC) (GWG) **DEMAND FOR JURY TRIAL**
BELCALIS ALMANZAR p/k/a CARDI B, Counterclaim-Plaintiff, v. MINKOZE.COM, LLC d/b/a WORLD STAR MARKETING GROUP a/k/a WORLDSTAR MARKETING GROUP, INC., KSR GROUP, LLC, and KLENORD RAPHAEL, Counterclaim-Defendants.	

DEFENDANT BELCALIS ALMANZAR'S
ANSWER, AFFIRMATIVE DEFENSES, AND COUNTERCLAIMS
TO PLAINTIFFS' FIRST AMENDED COMPLAINT

Defendant Belcalis Almanzar p/k/a Cardi B, through her attorneys, Robins Kaplan LLP, answers the First Amended Complaint ("FAC") filed by Plaintiffs MINKOZE.COM, LLC d/b/a

World Star Marketing Group a/k/a WorldStar Marketing Group, Inc. ("WorldStar"), KSR Group, LLC ("KSR"), and Klenord Raphael ("Shaft") (collectively, "Plaintiffs") as follows:

PARTIES

1. Ms. Almanzar lacks knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 1 of the FAC, and accordingly denies the same.

2. Ms. Almanzar lacks knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 2 of the FAC, and accordingly denies the same.

3. Ms. Almanzar lacks knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 3 of the FAC, and accordingly denies the same.

4. Ms. Almanzar admits that she is, among other things, a recording artist and performer and that she is professionally known as "Cardi B." She further admits that she is a resident of the State of New Jersey. Ms. Almanzar denies the remainder of the allegations set forth in paragraph 4 of the FAC.

5. Ms. Almanzar lacks knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 5 of the FAC, and accordingly denies the same, except admits that Ms. Foster is, among other things, a publicist, and a member of Ms. Almanzar's management team.

6. Ms. Almanzar lacks knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 6 of the FAC, and accordingly denies the same, except admits that, upon information and belief, Quality Control Music, LLC (hereafter, "Quality Control") is a record company that is owned by Defendants Lee and Thomas and/or is affiliated with them, and that this entity is based in Atlanta, Georgia.

7. Ms. Almanzar lacks knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 7 of the FAC, and accordingly denies the same, except admits that, upon information and belief, Solid Foundation Management, LLC (hereafter, "Solid Foundation") is a management company that is owned by Defendants Lee and Thomas and/or is affiliated with them, and that this entity is based in Atlanta, Georgia.

8. Ms. Almanzar lacks knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 8 of the FAC, and accordingly denies the same.

9. Ms. Almanzar lacks knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 9 of the FAC, and accordingly denies the same.

JURISDICTION AND VENUE

10. Paragraph 10 of the FAC sets forth legal conclusions to which no response is required. To the extent a response is required, Ms. Almanzar lacks knowledge or information sufficient to form a belief as to the citizenship of the parties to the lawsuit, but believes that this Court has jurisdiction over this action under 28 U.S.C. § 1332(a)(1).

11. Ms. Almanzar admits the allegations set forth in paragraph 11 of the FAC.

12. Paragraph 12 of the FAC sets forth legal conclusions to which no response is required. To the extent a response is required, Ms. Almanzar lacks knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 12 of the FAC, but believes that venue is proper in this district for at least some of Plaintiffs' claims.

13. Paragraph 13 of the FAC sets forth legal conclusions to which no response is required. To the extent a response is required, Ms. Almanzar lacks knowledge or information sufficient to form a belief as to whether all Defendants are subject to personal jurisdiction of this Court and whether a substantial part of the events giving rise to the claims occurred in this

district, and accordingly denies the same. Ms. Almanzar does not contest that she is subject to personal jurisdiction in this Court.

NATURE OF THE ACTION

14. Paragraph 14 of the FAC sets forth legal conclusions to which no response is required. To the extent a response is required, Ms. Almanzar denies the allegations set forth in paragraph 14 of the FAC.

15. Paragraph 15 of the FAC sets forth legal conclusions to which no response is required. To the extent a response is required, Ms. Almanzar denies each and every allegation set forth in paragraph 15 of the FAC.

16. Paragraph 16 of the FAC sets forth legal conclusions to which no response is required. To the extent a response is required, Ms. Almanzar denies each and every allegation set forth in paragraph 16 of the FAC, with the exception of the following: Ms. Almanzar has declared both the management agreement with WorldStar and the recording agreements with KSR to be void and unenforceable.

17. Paragraph 17 of the FAC sets forth legal conclusions to which no response is required. To the extent a response is required, Ms. Almanzar denies each and every allegation set forth in paragraph 17 of the FAC.

18. Paragraph 18 of the FAC sets forth legal conclusions to which no response is required. To the extent a response is required, Ms. Almanzar denies each and every allegation set forth in paragraph 18 of the FAC, with the exception of the following: upon information and belief, Ms. Almanzar believes she may have privately opined to her husband, Kiara Kendrell Cephus p/k/a Offset, that Shaft was robbing her but she denies that any such statement, even if made, was false or would constitute defamation.

19. Paragraph 19 of the FAC sets forth legal conclusions to which no response is required. To the extent a response is required, Ms. Almanzar lacks knowledge or information sufficient to form a belief as to the truth of the allegations regarding what Ms. Foster knew and for what Plaintiffs seek to hold Ms. Foster liable in this litigation, and accordingly denies the same. Ms. Almanzar denies the remainder of the allegations set forth in paragraph 19 of the FAC.

20. Ms. Almanzar denies each and every allegation set forth in paragraph 20 of the FAC.

21. Ms. Almanzar admits that her husband Offset is a member of the group Migos and that Migos are, upon information and belief, signed to Quality Control and/or Solid Foundation. Ms. Almanzar denies the remainder of the allegations set forth in paragraph 21 of the FAC.

22. Paragraph 22 of the FAC sets forth legal conclusions to which no response is required. To the extent a response is required, Ms. Almanzar denies each and every allegation set forth in paragraph 22 of the FAC.

23. Paragraph 23 of the FAC sets forth legal conclusions to which no response is required. To the extent a response is required, Ms. Almanzar denies each and every allegation set forth in paragraph 23 of the FAC.

BACKGROUND FACTS

24. Ms. Almanzar denies each and every allegation set forth in paragraph 24 of the FAC.

25. Ms. Almanzar denies each and every allegation set forth in paragraph 25 of the FAC.

26. Ms. Almanzar admits that she is from the Bronx, New York, that she was inexperienced in the entertainment business before beginning her business relationship with Shaft, and that she had achieved a significant public following and recognition on social media prior to meeting Shaft (which she believes included significantly more than 100,000 Instagram followers). Ms. Almanzar denies the remainder of the allegations set forth in paragraph 26 of the FAC.

27. Ms. Almanzar denies each and every allegation set forth in paragraph 27 of the FAC, except admits that she did not professionally rap or perform music before meeting Shaft, that Shaft recognized her talent and acted as her manager for a certain amount of time, and that Shaft encouraged her to pursue music.

28. Ms. Almanzar denies that Shaft first transformed her into a party host. Ms. Almanzar lacks knowledge or information sufficient to form a belief as to whether Shaft managed DJ Self to fame and stardom, and accordingly denies the same. Ms. Almanzar admits that she traveled the country with DJ Self and Shaft, and further admits that she was cast on VH1's *Love & Hip Hop*, where she became a show favorite and regular. Ms. Almanzar denies the remainder of the allegations set forth in paragraph 28 of the FAC.

29. Ms. Almanzar admits that she received additional Instagram followers with her appearance on VH1's *Love & Hip Hop*. Ms. Almanzar further admits, upon information and belief, that she worked with certain producers and writers that Shaft managed as she was developing her career as a rap artist, and that Shaft helped guide the initial stages of her career as a rap artist (in accordance with his duties as her manager). Ms. Almanzar further admits that she signed a major-label record deal with Atlantic Records dated as of September 28, 2016, and that Shaft orchestrated the record deal such that Plaintiff KSR agreed to furnish Ms. Almanzar's

services under the terms of the recording agreement KSR signed with Atlantic Records regarding Ms. Almanzar's services (Ms. Almanzar respectfully refers the Court to a true and complete copy of that agreement for its contents). Ms. Almanzar denies the remainder of the allegations set forth in paragraph 29 of the FAC, including, but not limited to, the allegation that it is a "common arrangement in the music industry" for a manager of an artist to insert his wholly-owned entity in between that manager's artist and a record label, particularly where this self-dealing transaction is not properly negotiated with independent counsel for the artist, and where the manager does not exhaust opportunities to sign an artist directly with a record label.

30. Ms. Almanzar admits that she received two nominations at the 2017 BET Awards, nine nominations and five awards at the 2017 BET Hip Hop Awards, two nominations at the 2018 Grammy Awards (for Best Rap Performance and Best Rap Song for *Bodak Yellow*), five nominations and two awards at the 2018 iHeart Radio Music Awards, and eight nominations and one award at the 2018 *Billboard* Music Awards. Ms. Almanzar denies the remainder of the allegations set forth in paragraph 27 of the FAC.

31. Ms. Almanzar admits that *Bodak Yellow* replaced Taylor Swift's *Look What You Made Me Do* at the top of the *Billboard* Hot 100 chart. Ms. Almanzar further admits that she appeared as a featured artist on a song by G-Eazy ("No Limit"), which reached number four on the *Billboard* Hot 100 chart, and that she was a lead artist on two other *Top 10* singles, appearing alongside Bruno Mars (on "Finesse") and Migos (on "MotorSport") (among others). Ms. Almanzar denies the remainder of the allegations set forth in paragraph 31 of the FAC.

32. Ms. Almanzar lacks knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 32 of the FAC, and accordingly denies the same.

33. Ms. Almanzar admits that Ms. Foster is her publicist and a member of her management team. Ms. Almanzar further admits that she and Ms. Foster spent much time together and with each other's families. Ms. Almanzar denies the remainder of the allegations set forth in paragraph 33 of the FAC, except admits that by the end of 2017, she had determined that Shaft had betrayed the trust she had placed in him.

34. Ms. Almanzar lacks knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 34 of the FAC concerning what Ms. Foster told or texted to others, and accordingly denies the same. Ms. Almanzar denies the remainder of the allegations set forth in paragraph 34 of the FAC.

35. Paragraph 35 of the FAC sets forth legal conclusions to which no response is required. To the extent a response is required, Ms. Almanzar denies each and every allegation set forth in paragraph 35 of the FAC.

36. Ms. Almanzar denies each and every allegation set forth in paragraph 36 of the FAC.

37. Ms. Almanzar lacks knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 37 of the FAC concerning Ms. Foster's knowledge, and the knowledge or awareness of Messrs. Lee and Thomas, and accordingly denies the same. Ms. Almanzar admits that Ms. Foster has performed some services for Offset, that Offset is a member of the group Migos and that Migos are, upon information and belief, signed to Quality Control and/or Solid Foundation. Ms. Almanzar denies the remainder of the allegations set forth in paragraph 37 of the FAC.

38. Ms. Almanzar admits that she texted the language quoted in paragraph 38 of the FAC to Shaft on or about December 16, 2017 and that she began to communicate with Shaft with

less frequency in or around December 2017. Ms. Almanzar denies the remainder of the allegations set forth in paragraph 38 of the FAC.

39. Ms. Almanzar denies each and every allegation set forth in paragraph 39 of the FAC, except admits that Offset texted the language quoted in paragraph 39 of the FAC to Shaft (although she lacks knowledge or information sufficient to form a belief as to when that language was sent to Shaft).

40. Ms. Almanzar denies each and every allegation set forth in paragraph 40 of the FAC.

41. Ms. Almanzar lacks knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 41 of the FAC, and accordingly denies the same.

42. Ms. Almanzar denies each and every allegation set forth in paragraph 42 of the FAC.

43. Paragraph 43 of the FAC sets forth legal conclusions to which no response is required. To the extent a response is required, Ms. Almanzar denies each and every allegation set forth in paragraph 43 of the FAC, and respectfully refers the Court to a true and complete copy of the Management Agreement for its contents.

44. Ms. Almanzar admits that her debut studio album, *Invasion of Privacy*, was digitally released on April 6, 2018 on Atlantic Records. Ms. Almanzar further admits that the RIAA certified that the album reached Gold status on the day of its release, and that the album sat atop the *Billboard* 200, and may have sat at No. 2 when the original complaint was filed. Ms. Almanzar denies the remainder of the allegations set forth in paragraph 44 of the FAC.

45. Ms. Almanzar admits that she has achieved a significant level of professional success and that she has received acclaim and congratulations from fans, celebrities and fellow

artists from around the world. Ms. Almanzar further admits that she has appeared on magazine covers, talk shows, and *Saturday Night Live*. Ms. Almanzar also admits that, as of the date of this Answer, she has over 46 million Instagram followers. Ms. Almanzar denies the remainder of the allegations set forth in paragraph 45 of the FAC.

46. Ms. Almanzar denies each and every allegation set forth in paragraph 46 of the FAC.

47. Ms. Almanzar admits that she sent the language quoted in paragraph 47 of the FAC to her sister in a text message on or about March 25, 2018 but she denies that the quoted language could constitute defamation.

48. Ms. Almanzar denies each and every allegation set forth in paragraph 48 of the FAC, except admits that on or about March 27, 2018, a video stream was made available on YouTube that included the language quoted in paragraph 48 of the FAC. Ms. Almanzar denies that that the quoted language (even taken out of context as it is in the FAC) or the entire video stream contained any reference to Shaft that could be considered disparagement.

49. Ms. Almanzar lacks knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 49 of the FAC, and accordingly denies the same. Ms. Almanzar denies the absurd implication that she has any responsibility for, or any duty to correct, any belief that commenters on the internet espouse.

50. Ms. Almanzar admits that a video titled "Cardi B Addresses Manager Who She Found Out Was Stealing From Her" is on YouTube, but denies that she posted this video on YouTube or had any involvement in or knowledge of the naming of the video. Ms. Almanzar lacks knowledge or information sufficient to form a belief as to the date of any publication of the video, but admits that it purports to have been published on March 27, 2018 and that, as of the

date of this Answer, the video has over 23,000 views and 78 comments. Ms. Almanzar denies the remainder of the allegations set forth in paragraph 50 of the FAC.

51. Ms. Almanzar lacks knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 51 of the FAC, and accordingly denies the same, except Ms. Almanzar admits, upon information and belief, that the account @teatenders_liv may have posted the language quoted in paragraph 51 of the FAC.

52. Ms. Almanzar lacks knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 52 of the FAC, and accordingly denies the same, except admits that the @teatenders_liv post previously appeared to have been liked over 5,100 times, and that certain comments from seemingly random accounts appear to have been quoted in the FAC. Ms. Almanzar respectfully refers the Court to the actual public postings for their contents (including those that run counter to Plaintiffs' narrative) to the extent they may still be available, but denies the implication that she has any responsibility for, or duty to correct, any belief that commenters on the internet espouse.

53. Paragraph 53 of the FAC sets forth legal conclusions to which no response is required. To the extent a response is required, Ms. Almanzar denies each and every allegation set forth in paragraph 53 of the FAC.

54. Ms. Almanzar denies each and every allegation set forth in paragraph 54 of the FAC, except admits that on or about April 18, 2018, she posted a picture on her Instagram account with the language quoted in paragraph 54 of the FAC in the caption, but denies that this language had anything whatsoever to do with Shaft, even by implication. This paragraph also sets forth legal conclusions to which no response is required. However, to the extent any further response is required, Ms. Almanzar denies any responsibility for, or duty to correct, random

statements by commenters on the internet, and denies the remainder of the allegations set forth in paragraph 54 of the FAC.

55. Ms. Almanzar admits that she sent the language quoted in paragraph 55 of the FAC to Skeemo Holmes (@itsyaboiiskeemo) in a private direct message on Instagram on or about April 25, 2018, but denies that any part of this message could constitute defamation.

56. Ms. Almanzar admits that she sent the language quoted in paragraph 56 of the FAC in a private direct message on Instagram to the account @offsetxcardib on or about April 26, 2018 but denies that these messages could constitute defamation.

57. Ms. Almanzar lacks knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 57 of the FAC, and accordingly denies the same.

58. Ms. Almanzar lacks knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 58 of the FAC, and accordingly denies the same.

THE AGREEMENTS

A. The Management Agreement

59. Ms. Almanzar admits that a Management Agreement bearing a handwritten date of March 3, 2015 appears to have been signed by her and Shaft, purportedly on behalf of WorldStar Marketing Group, Inc., but denies Plaintiffs' characterization of the Management Agreement set forth in paragraph 59 of the FAC and respectfully refers the Court to a true and complete copy of the Management Agreement for its contents. A copy of the Management Agreement is attached as Exhibit 1 to Ms. Almanzar's Counterclaims, filed herewith. Ms. Almanzar further admits that the Management Agreement appears to bear a notary public stamp but she does not recall signing the Management Agreement and does not recall whether a notary public was present if and when she did sign it. Ms. Almanzar denies the remainder of the

allegations set forth in paragraph 59 of the FAC, and denies that she is bound by the Management Agreement for the reasons stated in her Counterclaims, filed herewith.

60. Ms. Almanzar denies Plaintiffs' characterization of the Management Agreement set forth in paragraph 60 of the FAC and respectfully refers the Court to a true and complete copy of the Management Agreement for its contents. To the extent any further response is required, Ms. Almanzar admits that the Management Agreement states that "Manager shall be your exclusive personal manager throughout the Territory and shall confer with, counsel, guide and advise you in all matters pertaining to your career in the entertainment and amusement industries, including, without limitation, in connection with your live performances, personal appearances, recording and producing of musical and lyrical material, music publishing, motion pictures, legitimate theater, television, concerts, the use of your name, likeness and biographical information for commercial or promotional purposes and the sale, lease or other disposition of musical, literary, dramatic or other artistic material which you may create, compose or acquire…." Ms. Almanzar further admits that the Management Agreement purports to define the Territory as "The world," but denies the remainder of the allegations set forth in paragraph 60 of the FAC.

61. Ms. Almanzar denies Plaintiffs' characterization of the Management Agreement set forth in paragraph 61 of the FAC and respectfully refers the Court to a true and complete copy of the Management Agreement for its contents. To the extent any further response is required, Ms. Almanzar admits that the Management Agreement purports to provide WorldStar with the option to renew its initial one year term and that the agreement states that "Each Option shall be deemed to be exercised by Manager unless Manager shall give you written notice to the

contrary at any time prior to the date that … [each contract period] … would otherwise expire." Ms. Almanzar denies the remainder of the allegations set forth in paragraph 61 of the FAC.

62. Ms. Almanzar denies Plaintiffs' characterization of the Management Agreement set forth in paragraph 62 of the FAC and respectfully refers the Court to a true and complete copy of the Management Agreement for its contents. To the extent any further response is required, Ms. Almanzar admits that the Management Agreement purports to provide for a Manager's Commission of 20% of Ms. Almanzar's "Gross Income," and respectfully refers the Court to the Management Agreement for its definition of "Gross Income." Ms. Almanzar denies the remainder of the allegations set forth in paragraph 62 of the FAC.

63. Ms. Almanzar denies Plaintiffs' characterization of the Management Agreement set forth in paragraph 63 of the FAC and respectfully refers the Court to a true and complete copy of the Management Agreement for its contents. To the extent any further response is required, Ms. Almanzar denies the allegations set forth in paragraph 63 of the FAC.

64. Ms. Almanzar denies Plaintiffs' characterization of the Management Agreement set forth in paragraph 64 of the FAC and respectfully refers the Court to a true and complete copy of the Management Agreement for its contents. To the extent any further response is required, Ms. Almanzar denies the allegations set forth in paragraph 64 of the FAC, including the allegation that she has not provided any such notice to WorldStar. Ms. Almanzar states that she substantially complied with the written notice requirement and terminated the Management Agreement no later than February 28, 2018.

65. Ms. Almanzar denies Plaintiffs' characterization of the Management Agreement set forth in paragraph 65 of the FAC and respectfully refers the Court to a true and complete copy of the Management Agreement for its contents. To the extent any further response is

required, Ms. Almanzar denies the allegations set forth in paragraph 65 of the FAC, including any implication that she (a) was advised to seek her own independent counsel concerning the legal effect of the Management Agreement, or (b) that she knowingly and voluntarily waived such right.

B. <u>The KSR Recording Agreement</u>

66. Ms. Almanzar denies Plaintiffs' characterization of the KSR Agreement set forth in paragraph 66 of the FAC and respectfully refers the Court to a true and complete copy of the 2016 KSR Recording Agreement (defined below) for its contents. A copy of the 2016 KSR Recording Agreement is attached as Exhibit 2 to Ms. Almanzar's Counterclaims, filed herewith. Ms. Almanzar admits that she signed the 2016 KSR Recording Agreement on or about October 18, 2016, but she denies that a notary public was present when she signed. Ms. Almanzar lacks knowledge or information sufficient to form a belief as to when and whether KSR signed the 2016 KSR Recording Agreement, and accordingly denies the same. Ms. Almanzar denies the remainder of the allegations set forth in paragraph 66 of the FAC, and denies that she is bound by either the 2015 KSR Recording Agreement (dated May 1, 2015) which Plaintiffs have alleged KSR entered into with Ms. Almanzar in their previous Answer/Reply to Counterclaims (*see* Dkt. No. 37, at 2) or to the 2016 KSR Recording Agreement for the reasons stated in her Counterclaims, filed herewith.

67. Ms. Almanzar denies Plaintiffs' characterization of the 2016 KSR Recording Agreement set forth in paragraph 67 of the FAC and respectfully refers the Court to a true and complete copy of the 2016 KSR Recording Agreement for its contents. To the extent any further response is required, Ms. Almanzar denies the allegations sets forth in paragraph 67 of the FAC.

68. Ms. Almanzar denies Plaintiffs' characterization of the 2016 KSR Recording Agreement set forth in paragraph 68 of the FAC and respectfully refers the Court to a true and complete copy of the 2016 KSR Recording Agreement for its contents. Ms. Almanzar admits that the 2016 KSR Recording Agreement purports to provide that if KSR secures a Distribution Agreement, then the term of the 2016 KSR Recording Agreement will be deemed to be co-extensive with the Distribution Agreement (and as otherwise provided therein), but she denies that KSR fulfilled its obligations under that same paragraph of the 2016 KSR Recording Agreement to "provide you [Ms. Almanzar] with a copy of the Distribution Agreement promptly following its execution and [KSR] shall meaningfully consult with your attorney during the negotiation of the Distribution Agreement regarding the terms that pertain to you." Ms. Almanzar denies the remainder of the allegations set forth in paragraph 68 of the FAC.

69. Ms. Almanzar denies Plaintiffs' characterization of the 2016 KSR Recording Agreement set forth in paragraph 69 of the FAC and respectfully refers the Court to a true and complete copy of the 2016 KSR Recording Agreement for its contents. Ms. Almanzar admits that the 2016 KSR Recording Agreement purports to provide KSR with the irrevocable option to extend its initial twelve month term and that it states "you will deliver one additional Album to us during each option period." Ms. Almanzar denies the remainder of the allegations set forth in paragraph 69 of the FAC.

70. Ms. Almanzar denies Plaintiffs' characterization of the 2016 KSR Recording Agreement set forth in paragraph 70 of the FAC and respectfully refers the Court to a true and complete copy of the KSR Recording Agreement for its contents. To the extent any further response is required, Ms. Almanzar admits that paragraph 3 of the 2016 KSR Recording Agreement states that: "If we enter into a Distribution Agreement we shall instruct the

Distributor to account to you directly for fifty (50%) percent of all net advances and royalties otherwise payable to us pursuant to the Distribution Agreement. You shall be subject to all of the same provisions affecting us in connection with royalties accounted to us by Distributor[.]" Ms. Almanzar denies the remainder of the allegations set forth in paragraph 70 of the FAC.

71. Ms. Almanzar denies Plaintiffs' characterization of the 2016 KSR Recording Agreement set forth in paragraph 71 of the FAC and respectfully refers the Court to a true and complete copy of the 2016 KSR Recording Agreement for its contents. Ms. Almanzar admits that paragraph 5 of the 2016 KSR Recording Agreement states in part that: "You shall account and pay to us 25% (our 'Revenue Share') of all compensation earned by you in Entertainment Industry resulting from any agreements substantially negotiated during the Term of this Agreement or within 6 months following the end of the Term, including live concert performances, merchandising, endorsements, songwriting, music publishing (but music publishing and songwriting is excluded in the event we acquire music publishing rights from you), record producing, scripted and non-scripted television performances, dramatic acting, any exploitation of Artist's name or likeness in any capacity or for any reason ('Gross Compensation')." Ms. Almanzar denies the remainder of the allegations set forth in paragraph 71 of the FAC.

72. Ms. Almanzar denies Plaintiffs' characterization of the 2016 KSR Recording Agreement set forth in paragraph 72 of the FAC and respectfully refers the Court to a true and complete copy of the 2016 KSR Recording Agreement for its contents. To the extent any further response is required, Ms. Almanzar refers to her response in the previous paragraph for an accurate quotation of the sentence in the 2016 KSR Recording Agreement referenced in

paragraph 72 of the FAC. Ms. Almanzar denies the remainder of the allegations set forth in paragraph 72 of the FAC.

73. Ms. Almanzar denies Plaintiffs' characterization of the 2016 KSR Recording Agreement set forth in paragraph 73 of the FAC and respectfully refers the Court to a true and complete copy of the 2016 KSR Recording Agreement for its contents. To the extent any further response is required, Ms. Almanzar admits that paragraph 6 of the 2016 KSR Recording Agreement states in part that: "Provided we secure a Distribution Agreement, you and your music publishing entity, any company or person controlled by you, shall assign to our music publishing affiliate an undivided fifty percent (50%) interest of your entire interest, and the sole and exclusive right to administer our share of your rights granted there under for the length of copyright throughout the world, in each and every musical composition ('Compositions' and each a 'Composition') written by you during the Term hereof (which shall include the Distribution Term as well), as well as any musical composition written by you and embodied on an Existing Master or Video, referenced in paragraph 9, below, and otherwise embodied on any recording released by us or Distributor. You and we agree to enter into a more formal Co-Publishing agreement incorporating the terms hereof, but until such time, if ever, that the parties enter into such more formal agreement, it is agreed that: (1) we are the sole and exclusive administrator of your and our copyright interest in the Compositions throughout the world for the length of copyright; (2) we shall account 75% of all income and revenues from the sales and exploitations of the Compositions, except that your publisher share of public performance royalties shall be 50% thereof . . . ." Ms. Almanzar denies the remainder of the allegations set forth in paragraph 73 of the FAC.

74. Ms. Almanzar denies Plaintiffs' characterization of the 2016 KSR Recording Agreement set forth in paragraph 74 of the FAC and respectfully refers the Court to a true and complete copy of the 2016 KSR Recording Agreement for its contents. To the extent any further response is required, Ms. Almanzar denies the allegations set forth in paragraph 74 of the FAC.

75. Ms. Almanzar denies Plaintiffs' characterization of the 2016 KSR Recording Agreement set forth in paragraph 75 of the FAC and respectfully refers the Court to a true and complete copy of the 2016 KSR Recording Agreement for its contents. To the extent any further response is required, Ms. Almanzar denies the allegations set forth in paragraph 75 of the FAC.

76. Ms. Almanzar denies Plaintiffs' characterization of the 2016 KSR Recording Agreement set forth in paragraph 76 of the FAC and respectfully refers the Court to a true and complete copy of the 2016 KSR Recording Agreement for its contents. To the extent any further response is required, Ms. Almanzar denies the allegations set forth in paragraph 76 of the FAC.

77. Ms. Almanzar denies Plaintiffs' characterization of the 2016 KSR Recording Agreement set forth in paragraph 77 of the FAC and respectfully refers the Court to a true and complete copy of the 2016 KSR Recording Agreement for its contents. To the extent any further response is required, Ms. Almanzar denies the allegations set forth in paragraph 77 of the FAC.

78. Ms. Almanzar denies Plaintiffs' characterization of the 2016 KSR Recording Agreement set forth in paragraph 78 of the FAC and respectfully refers the Court to a true and complete copy of the 2016 KSR Recording Agreement for its contents. To the extent any further response is required, Ms. Almanzar denies the allegations set forth in paragraph 78 of the FAC.

C. <u>The Atlantic Records Agreement</u>

79. Ms. Almanzar denies Plaintiffs' characterization of the agreement dated as of September 28, 2016 between Atlantic Recording Corporation and KSR regarding the exclusive

services of Ms. Almanzar for the making of records (the "Furnishing Agreement" or the "Atlantic Recording Agreement") set forth in paragraph 79 of the FAC and respectfully refers the Court to a true and complete copy of the Furnishing Agreement for its contents. Ms. Almanzar admits that the Furnishing Agreement was signed on or about October 18, 2016 by a representative of Atlantic Recording Corporation ("Atlantic Records") and, upon information and belief, by Shaft as a representative of KSR. Ms. Almanzar further admits that KSR agreed in the Furnishing Agreement to furnish the exclusive services of Ms. Almanzar "for the making of Recordings and Records" and respectfully refers the Court to the Furnishing Agreement for its terms regarding the term of that agreement. Ms. Almanzar denies the remainder of the allegations set forth in paragraph 79 of the FAC.

80. Ms. Almanzar denies Plaintiffs' characterization of the Furnishing Agreement set forth in paragraph 80 of the FAC and respectfully refers the Court to a true and complete copy of the Furnishing Agreement for its contents. To the extent any further response is required, Ms. Almanzar admits that in the Furnishing Agreement, Atlantic Records agrees to give KSR and/or Artist certain approval and consent rights, but denies knowledge or information sufficient to form a belief as to the truth of, or what is meant by, the vague allegation contained in paragraph 80 of the FAC regarding KSR's purported "approval and consent rights concerning various aspects of their contractual relationship," and accordingly denies the same.

81. Ms. Almanzar denies Plaintiffs' characterization of the Furnishing Agreement set forth in paragraph 81 of the FAC and respectfully refers the Court to a true and complete copy of the Furnishing Agreement for its contents. To the extent any further response is required, Ms. Almanzar admits that the Furnishing Agreement in paragraph 4(a) states in part that: "Prior to the commencement of recording sessions in each instance, you and Company shall mutually

agree on each of the following before you proceed further: (i) selection of producer and the financial terms of your agreement(s) with such producer(s); (ii) selection of material, including the number of Compositions to be recorded; and (iii) the dates and locations of recording and mixing and the studios where recording and mixing are to take place."

82. Ms. Almanzar denies Plaintiffs' characterization of the Furnishing Agreement set forth in paragraph 82 of the FAC and respectfully refers the Court to a true and complete copy of the Furnishing Agreement for its contents. To the extent any further response is required, Ms. Almanzar admits that the Furnishing Agreement in paragraph 4(a) states in part that: "at least fourteen (14) days prior to the proposed date of the first recording session for the applicable Masters, you shall submit to Company in writing a proposed recording budget setting forth, in itemized detail, all anticipated Recording Costs. Upon receipt of Company's written approval of such recording budget (the '**Authorized Budget'**), you shall commence such sessions." Ms. Almanzar denies the remainder of the allegations set forth in paragraph 82 of the FAC.

83. Ms. Almanzar denies Plaintiffs' characterization of the Furnishing Agreement set forth in paragraph 83 of the FAC and respectfully refers the Court to a true and complete copy of the Furnishing Agreement for its contents. To the extent any further response is required, Ms. Almanzar admits that the Furnishing Agreement in paragraph 6(a) states in part that: "During the Term, with respect to Phono Records manufactured for sale in the United States, all photographs of Artist and biographical material concerning Artist which Company uses for the purposes herein stated shall be subject to your approval" and later provides that "Any inadvertent failure by Company to obtain your approval pursuant to this paragraph 6(a) shall not constitute a breach of this agreement by Company."

84. Ms. Almanzar denies Plaintiffs' characterization of the Furnishing Agreement set forth in paragraph 84 of the FAC and respectfully refers the Court to a true and complete copy of the Furnishing Agreement for its contents. To the extent any further response is required, Ms. Almanzar admits that the Furnishing Agreement in paragraph 15(a)(vii)(B) states in part that: "Notwithstanding anything to the contrary contained herein, Artist shall have the right to perform as a so-called non-featured 'back-up musician', 'background vocalist' or 'sideperson' with featured artists for the purpose of making Records for Persons other than Company only upon the following conditions: … (2) You shall give Company written notice thereof in advance and the Compositions to be performed and recorded shall not be Compositions recorded pursuant to this agreement[.]" Ms. Almanzar denies the remainder of the allegations set forth in paragraph 84 of the FAC.

85. Ms. Almanzar denies Plaintiffs' characterization of the Furnishing Agreement set forth in paragraph 85 of the FAC and respectfully refers the Court to a true and complete copy of the Furnishing Agreement for its contents. To the extent any further response is required, Ms. Almanzar admits that the Furnishing Agreement in paragraph 15(a) states in part that: "You warrant, represent and agree that: (i) You and Artist have the right and legal capacity to enter into, execute and implement this agreement, and you and Artist are not subject to any prior obligations or agreements, whether as a party or otherwise, which would restrict or interfere in any way with the full and prompt performance of your obligations hereunder." Ms. Almanzar denies the remainder of the allegations set forth in paragraph 85 of the FAC.

86. In response to paragraph 86 of the FAC, Ms. Almanzar admits that the Furnishing Agreement in paragraph 15(a)(xii) states in part that: "You [*i.e.* KSR] further warrant and represent that you have a valid and enforceable exclusive agreement with Artist under which

Artist is required to perform exclusively for you as a recording artist, and that such agreement shall continue to be in full force and effect during the Term." Ms. Almanzar denies the remainder of the allegations set forth in paragraph 86 of the FAC.

87. Ms. Almanzar denies Plaintiffs' characterization of the Furnishing Agreement set forth in paragraph 87 of the FAC and respectfully refers the Court to a true and complete copy of the Furnishing Agreement for its contents. To the extent any further response is required, Ms. Almanzar admits that the Furnishing Agreement in paragraph 15(a)(xii) states in part that: "You agree to provide Company with a true copy of your agreement with Artist upon Company's request. During the Term, you shall not waive, release or forfeit your exclusive rights to the services of Artist. You shall exercise all options provided to you by your agreement with Artist so as to enable you to fulfill your commitments hereunder, and you shall take all reasonable steps necessary or desirable to keep your agreement with Artist in full force and effect so that Company shall have the benefits of Artist's exclusive services as a recording artist during the Term as if Artist had contracted directly with the Company. You shall cause Artist to execute and deliver to Company at the time of execution of this agreement Company's standard Artist Inducement Letter annexed hereto as Exhibit A." Ms. Almanzar denies the remainder of the allegations set forth in paragraph 87 of the FAC.

D. <u>The Cardi B Inducement Letter</u>

88. Ms. Almanzar denies Plaintiffs' characterization of the Furnishing Agreement and Inducement Letter set forth in paragraph 88 of the FAC and respectfully refers the Court to a true and complete copy of the Furnishing Agreement and Inducement Letter for their contents. To the extent any further response is required, Ms. Almanzar admits that she signed the Inducement Letter on or about October 18, 2016, that the Inducement Letter was signed, upon information

and belief, at or about the time that the Furnishing Agreement was signed, and that she was paid an advance as a result of the Atlantic Recording Agreement, but lacks knowledge or information sufficient to form a belief as to whether the advance was "substantial," and accordingly denies the same.

89. Ms. Almanzar denies Plaintiffs' characterization of the Inducement Letter set forth in paragraph 89 of the FAC and respectfully refers the Court to a true and complete copy of the Inducement Letter for its contents. To the extent any further response is required, Ms. Almanzar admits that she signed the Inducement Letter on or about October 18, 2016, that the Inducement Letter was signed by a representative of Atlantic Records, and that it appears to have been signed by Shaft as a representative of KSR. Ms. Almanzar denies the remainder of the allegations set forth in paragraph 89 of the FAC.

90. Ms. Almanzar denies Plaintiffs' characterization of the Inducement Letter set forth in paragraph 90 of the FAC and respectfully refers the Court to a true and complete copy of the Inducement Letter for its contents. To the extent any further response is required, Ms. Almanzar admits that the Inducement Letter refers to "the agreement between me and KSR Group, LLC ('Productions') relating to my exclusive services as a recording artist ('Artist Agreement')" but denies that the Artist Agreement referred to here, which may have been intended to refer to the 2016 KSR Recording Agreement, was a valid or existing agreement at the time she signed the Inducement Letter. Irrespective of the language contained in the Inducement Letter, Ms. Almanzar denies that she had the opportunity to consult independent counsel for the purpose of having the legal effect of each of the provisions contained in the 2015 KSR Recording Agreement or the 2016 KSR Recording Agreement explained to her, and denies that she knowingly and voluntarily waived her right to do so. Ms. Almanzar denies that she is

bound by the provisions contained in the 2015 KSR Recording Agreement or the 2016 KSR Recording Agreement. Ms. Almanzar denies the remainder of the allegations set forth in paragraph 90 of the FAC.

91. Ms. Almanzar denies Plaintiffs' characterization of the Inducement Letter set forth in paragraph 91 of the FAC and respectfully refers the Court to a true and complete copy of the Inducement Letter for its contents. To the extent any further response is required, Ms. Almanzar denies the allegations set forth in paragraph 91 of the FAC.

92. Ms. Almanzar denies Plaintiffs' characterization of the Inducement Letter set forth in paragraph 92 of the FAC and respectfully refers the Court to a true and complete copy of the Inducement Letter for its contents. To the extent any further response is required, Ms. Almanzar denies the allegations set forth in paragraph 92 of the FAC.

93. Ms. Almanzar denies Plaintiffs' characterization of the Inducement Letter set forth in paragraph 93 of the FAC and respectfully refers the Court to a true and complete copy of the Inducement Letter for its contents. To the extent any further response is required, Ms. Almanzar denies the allegations set forth in paragraph 93 of the FAC.

94. Ms. Almanzar denies Plaintiffs' characterization of the Inducement Letter set forth in paragraph 94 of the FAC and respectfully refers the Court to a true and complete copy of the Inducement Letter for its contents. To the extent any further response is required, Ms. Almanzar admits that the Inducement Letter in paragraph 7 states in part that: "I acknowledge that you would not have entered into the [Furnishing] Agreement without my execution of this agreement and, therefore, I warrant, represent and agree that I have not entered into (nor will enter into) any contract or commitment in conflict with any of the provisions of this agreement, the Artist Agreement or the [Furnishing] Agreement or that might interfere with or impair your

rights under this agreement or the [Furnishing] Agreement." Ms. Almanzar further admits that paragraph 7 of the Inducement Letter later states in part that: "Neither the expiration nor any other termination of this agreement, the [Furnishing] Agreement or the Artist Agreement shall affect your ownership of the results, proceeds and products of the services rendered by me under this agreement, the Artist Agreement or the [Furnishing] Agreement or alter any of your rights or privileges and/or any warranty or undertaking on my part in connection with such results, proceeds or products." Ms. Almanzar denies the remainder of the allegations set forth in paragraph 94 of the FAC.

95. Ms. Almanzar denies Plaintiffs' characterization of the Inducement Letter set forth in paragraph 95 of the FAC and respectfully refers the Court to a true and complete copy of the Inducement Letter for its contents. To the extent any further response is required, Ms. Almanzar admits that the Inducement Letter in paragraph 7 states in part that: "The parties hereto acknowledge and agree that: (a) each party and its counsel reviewed and negotiated the terms and provisions of this agreement and have contributed to its revision . . . ." Ms. Almanzar denies that she or her counsel negotiated the terms and provisions of, or contributed to the revision of the Inducement Letter, and denies the remainder of the allegations set forth in paragraph 95 of the FAC.

COUNT I
(Breach of Contract Against Cardi B)

96. Ms. Almanzar repeats and realleges her answers to the allegations in paragraphs 1 through 95 of the FAC above as if fully set forth herein.

97. Paragraph 97 of the FAC sets forth legal conclusions to which no response is required. To the extent a response is necessary, Ms. Almanzar denies each and every allegation

set forth in paragraph 97 of the FAC, except admits that the Management Agreement appears to have been signed by her.

98. Paragraph 98 of the FAC sets forth legal conclusions to which no response is required. To the extent a response is necessary, Ms. Almanzar denies each and every allegation set forth in paragraph 98 of the FAC.

99. Paragraph 99 of the FAC sets forth legal conclusions to which no response is required. To the extent a response is required, Ms. Almanzar denies each and every allegation set forth in paragraph 99 of the FAC.

100. Paragraph 100 of the FAC sets forth legal conclusions to which no response is required. To the extent a response is required, Ms. Almanzar denies each and every allegation set forth in paragraph 100 of the FAC.

101. Paragraph 101 of the FAC sets forth legal conclusions to which no response is required. To the extent a response is required, Ms. Almanzar denies each and every allegation set forth in paragraph 101 of the FAC.

102. Paragraph 102 of the FAC sets forth legal conclusions to which no response is required. To the extent a response is required, Ms. Almanzar denies each and every allegation set forth in paragraph 102 of the FAC.

103. Paragraph 103 of the FAC sets forth legal conclusions to which no response is required. To the extent a response is required, Ms. Almanzar denies each and every allegation set forth in paragraph 103 of the FAC.

104. Paragraph 104 of the FAC sets forth legal conclusions to which no response is required. To the extent a response is required, Ms. Almanzar denies each and every allegation set forth in paragraph 104 of the FAC.

105. Paragraph 105 of the FAC sets forth legal conclusions to which no response is required. To the extent a response is required, Ms. Almanzar denies each and every allegation set forth in paragraph 105 of the FAC.

106. Paragraph 106 of the FAC sets forth legal conclusions to which no response is required. To the extent a response is required, Ms. Almanzar denies each and every allegation set forth in paragraph 106 of the FAC.

107. Paragraph 107 of the FAC sets forth legal conclusions to which no response is required. To the extent a response is required, Ms. Almanzar denies each and every allegation set forth in paragraph 107 of the FAC.

COUNT II
(Unjust Enrichment Against Cardi B)

108. Ms. Almanzar repeats and realleges her answers to the allegations in paragraphs 1 through 107 of the FAC above as if fully set forth herein.

109. Ms. Almanzar denies each and every allegation set forth in paragraph 109 of the FAC.

110. Paragraph 110 of the FAC sets forth legal conclusions to which no response is required. To the extent a response is required, Ms. Almanzar denies each and every allegation set forth in paragraph 110 of the FAC.

111. Ms. Almanzar denies each and every allegation set forth in paragraph 111 of the FAC.

112. Paragraph 112 of the FAC sets forth legal conclusions to which no response is required. To the extent a response is required, Ms. Almanzar denies each and every allegation set forth in paragraph 112 of the FAC.

COUNT III
(*Quantum Meruit* Against Cardi B)

113. Ms. Almanzar repeats and realleges her answers to the allegations in paragraphs 1 through 112 of the FAC above as if fully set forth herein.

114. Ms. Almanzar denies each and every allegation set forth in paragraph 114 of the FAC.

115. In response to paragraph 115 of the FAC, Ms. Almanzar admits that she engaged Shaft in or around the fall of 2014 to personally manage her career in certain entertainment endeavors and admits that the Management Agreement appears to have been signed by her and, upon information and belief, by Shaft, as a purported representative of WorldStar. Ms. Almanzar respectfully refers the Court to a true and complete copy of the Management Agreement for its contents and exclusions. Ms. Almanzar denies the remainder of the allegations set forth in paragraph 115 of the FAC.

116. In response to paragraph 116 of the FAC, Ms. Almanzar admits that WorldStar and/or Shaft performed some work and services at the request of Ms. Almanzar. Ms. Almanzar denies that WorldStar "fully" performed its work, labor and services at the specific instance and request of Ms. Almanzar, and lacks knowledge or information sufficient to form a belief as to WorldStar's understanding or expectation, and accordingly denies the same, but further states that WorldStar and/or Shaft were amply compensated for the work they performed. Ms. Almanzar denies the remainder of the allegations set forth in paragraph 116 of the FAC.

117. In response to paragraph 117 of the FAC, Ms. Almanzar admits that she has achieved a certain amount of success in the entertainment industry, and admits that she benefited to some degree from the work and services of WorldStar and/or Shaft. Ms. Almanzar denies the remainder of the allegations set forth in paragraph 117 of the FAC.

118. Ms. Almanzar denies each and every allegation set forth in paragraph 118 of the FAC.

119. Paragraph 119 of the FAC sets forth legal conclusions to which no response is required. To the extent a response is required, Ms. Almanzar denies each and every allegation set forth in paragraph 119 of the FAC.

120. Paragraph 120 of the FAC sets forth legal conclusions to which no response is required. To the extent a response is required, Ms. Almanzar denies each and every allegation set forth in paragraph 120 of the FAC.

COUNT IV
(Declaratory Judgment Against Cardi B)

121. Ms. Almanzar repeats and realleges her answers to the allegations in paragraphs 1 through 120 of the FAC above as if fully set forth herein.

122. Paragraph 122 of the FAC sets forth legal conclusions to which no response is required. To the extent a response is required, Ms. Almanzar admits that an actual and justiciable controversy exists between her and WorldStar/Shaft/KSR (who Ms. Almanzar contends are alter egos of each other) regarding the validity and enforceability of the Management Agreement. Ms. Almanzar denies the remainder of the allegations set forth in paragraph 122 of the FAC.

123. Paragraph 123 of the FAC sets forth legal conclusions to which no response is required. To the extent a response is required, Ms. Almanzar denies each and every allegation set forth in paragraph 123 of the FAC, except admits that a determination as to the validity of the Management Agreement by the Court is necessary.

124. Paragraph 124 of the FAC sets forth legal conclusions to which no response is required. To the extent a response is required, Ms. Almanzar denies each and every allegation set forth in paragraph 124 of the FAC.

125. Paragraph 125 of the FAC sets forth legal conclusions to which no response is required. To the extent a response is required, Ms. Almanzar denies each and every allegation set forth in paragraph 125 of the FAC.

COUNT V
(Breach of Contract Against Cardi B)

126. Ms. Almanzar repeats and realleges her answers to the allegations in paragraphs 1 through 125 of the FAC above as if fully set forth herein.

127. Paragraph 127 of the FAC sets forth legal conclusions to which no response is required. To the extent a response is required, Ms. Almanzar admits upon information and belief that she signed the 2016 KSR Recording Agreement, but denies knowledge or information sufficient to form a belief as to whether KSR executed the 2016 KSR Recording Agreement and denies each and every other allegation set forth in paragraph 127 of the Complaint.

128. Paragraph 128 of the FAC sets forth legal conclusions to which no response is required. To the extent a response is required, Ms. Almanzar denies each and every allegation set forth in paragraph 128 of the FAC, including particularly (but not limited to) the allegation that a distributor was "then yet-to-be determined" when the 2016 KSR Recording Agreement was signed.

129. Ms. Almanzar denies each and every allegation set forth in paragraph 129 of the FAC.

130. Paragraph 130 of the FAC sets forth legal conclusions to which no response is required. To the extent a response is required, Ms. Almanzar denies each and every allegation set forth in paragraph 130 of the FAC.

131. Paragraph 131 of the FAC sets forth legal conclusions to which no response is required. To the extent a response is required, Ms. Almanzar denies each and every allegation set forth in paragraph 131 of the FAC.

132. Paragraph 132 of the FAC sets forth legal conclusions to which no response is required. To the extent a response is required, Ms. Almanzar denies each and every allegation set forth in paragraph 132 of the FAC.

133. Ms. Almanzar denies each and every allegation set forth in paragraph 133 of the FAC.

134. Paragraph 134 of the FAC sets forth legal conclusions to which no response is required. To the extent a response is required, Ms. Almanzar denies each and every allegation set forth in paragraph 134 of the FAC.

135. Paragraph 135 of the FAC sets forth legal conclusions to which no response is required. To the extent a response is required, Ms. Almanzar denies each and every allegation set forth in paragraph 135 of the FAC.

136. Paragraph 136 of the FAC sets forth legal conclusions to which no response is required. To the extent a response is required, Ms. Almanzar denies each and every allegation set forth in paragraph 136 of the FAC.

COUNT VI
(Unjust Enrichment Against Cardi B)

137. Ms. Almanzar repeats and realleges her answers to the allegations in paragraphs 1 through 136 of the FAC above as if fully set forth herein.

138. Ms. Almanzar denies each and every allegation set forth in paragraph 138 of the FAC.

139. Paragraph 139 of the FAC sets forth legal conclusions to which no response is required. To the extent a response is required, Ms. Almanzar denies each and every allegation set forth in paragraph 139 of the FAC.

140. Ms. Almanzar denies each and every allegation set forth in paragraph 140 of the FAC.

141. Paragraph 141 of the FAC sets forth legal conclusions to which no response is required. To the extent a response is required, Ms. Almanzar denies each and every allegation set forth in paragraph 141 of the FAC.

COUNT VII
(*Quantum Meruit* Against Cardi B)

142. Ms. Almanzar repeats and realleges her answers to the allegations in paragraphs 1 through 141 of the FAC above as if fully set forth herein.

143. Ms. Almanzar denies each and every allegation set forth in paragraph 143 of the FAC.

144. Ms. Almanzar denies each and every allegation set forth in paragraph 144 of the FAC.

145. In response to paragraph 145 of the FAC, Ms. Almanzar admits that KSR and/or WorldStar and/or Shaft performed some work and services for Ms. Almanzar. Ms. Almanzar denies that KSR "fully" performed its work, labor and services at the specific instance and request of Ms. Almanzar, and denies knowledge or information sufficient to form a belief as to KSR's understanding or expectation, but further states that KSR and/or Shaft were amply

compensated for the work they performed. Ms. Almanzar denies the remainder of the allegations set forth in paragraph 145 of the FAC.

146. In response to paragraph 146 of the FAC, Ms. Almanzar admits that she has achieved a certain amount of success in the entertainment industry and admits that she benefited to some degree from the work and services of KSR and/or WorldStar and/or Shaft. Ms. Almanzar denies the remainder of the allegations set forth in paragraph 146 of the FAC.

147. Ms. Almanzar denies each and every allegation set forth in paragraph 147 of the FAC.

148. Paragraph 148 of the FAC sets forth legal conclusions to which no response is required. To the extent a response is required, Ms. Almanzar denies each and every allegation set forth in paragraph 148 of the FAC.

149. Paragraph 149 of the FAC sets forth legal conclusions to which no response is required. To the extent a response is required, Ms. Almanzar denies each and every allegation set forth in paragraph 149 of the FAC.

COUNT VIII
(Declaratory Judgment Against Cardi B)

150. Ms. Almanzar repeats and realleges her answers to the allegations in paragraphs 1 through 149 of the FAC above as if fully set forth herein.

151. Paragraph 151 of the FAC sets forth legal conclusions to which no response is required. To the extent a response is required, Ms. Almanzar admits that an actual and justiciable controversy exists between her and KSR/WorldStar/Shaft (who Ms. Almanzar contends are alter egos of each other) regarding the validity and enforceability of the 2016 KSR Recording Agreement. Ms. Almanzar denies the remainder of the allegations set forth in paragraph 151 of the FAC.

152. Paragraph 152 of the FAC sets forth legal conclusions to which no response is required. To the extent a response is required, Ms. Almanzar denies each and every allegation set forth in paragraph 152 of the FAC, except admits that a determination as to the validity of the 2016 KSR Recording Agreement by the Court is necessary.

153. Paragraph 153 of the FAC sets forth legal conclusions to which no response is required. To the extent a response is required, Ms. Almanzar denies each and every allegation set forth in paragraph 153 of the FAC.

154. Paragraph 154 of the FAC sets forth legal conclusions to which no response is required. To the extent a response is required, Ms. Almanzar denies each and every allegation set forth in paragraph 154 of the FAC.

COUNT IX
(Breach of Contract Against Cardi B)

155. Ms. Almanzar repeats and realleges her answers to the allegations in paragraphs 1 through 154 of the FAC above as if fully set forth herein.

156. Paragraph 156 of the FAC sets forth legal conclusions to which no response is required. To the extent a response is required, Ms. Almanzar denies each and every allegation set forth in paragraph 156 of the FAC, except admits that the Furnishing Agreement was signed on or about October 18, 2016 by a representative of Atlantic Records and, upon information and belief, by Shaft as a representative of KSR.

157. Paragraph 157 of the FAC sets forth legal conclusions to which no response is required. To the extent a response is required, Ms. Almanzar denies each and every allegation set forth in paragraph 157 of the FAC, except admits that she signed the Inducement Letter on or about October 18, 2016, that the Inducement Letter was signed by a representative of Atlantic Records, and that it appears to have been signed by Shaft as a representative of KSR.

158. Ms. Almanzar denies Plaintiffs' characterization of the Inducement Letter set forth in paragraph 158 of the FAC and respectfully refers the Court to a true and complete copy of the Inducement Letter for its contents. To the extent any further response is required, Ms. Almanzar admits that paragraph 1 of the Inducement Letter states in part that: "I assent to the execution of the [Furnishing] Agreement, agree to be bound by all grants, restrictions, and other provisions of the [Furnishing] Agreement relating to me and affirm all warranties and representations in the [Furnishing] Agreement which relate to me including those in paragraph 15(a) of the [Furnishing] Agreement." Ms. Almanzar denies the remainder of the allegations set forth in paragraph 158 of the FAC.

159. Paragraph 159 of the FAC sets forth legal conclusions to which no response is required. To the extent a response is required, Ms. Almanzar denies each and every allegation set forth in paragraph 159 of the FAC.

160. In response to paragraph 160 of the FAC, Ms. Almanzar admits that she has participated in recording sessions for which she does not believe KSR submitted proposed recording budgets to Atlantic Records prior to those sessions, but she denies that any such participation constitutes a breach by her of the Inducement Letter, and respectfully refers the Court to true and correct copies of the Inducement Letter and Furnishing Agreement for their contents.

161. Ms. Almanzar lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 161 of the FAC and accordingly denies the same. To the extent any further response is required, Ms. Almanzar admits that she has participated in recording session with producers, has recorded material, and has participated in sessions on various dates in various studios in various locations but lacks knowledge or information

sufficient to form a belief as to whether such participation was agreed to by KSR. Ms. Almanzar believes her conduct has been fully consistent with her contractual obligations towards Atlantic Records, and that neither she nor Atlantic Records has any remaining contractual obligations to KSR because of, *inter alia*, Plaintiffs' breach of various duties and contractual obligations they owed to Ms. Almanzar. Ms. Almanzar respectfully refers the Court to a true and complete copy of the relevant agreements for their contents and to Ms. Almanzar's Counterclaims, filed herewith.

162. Ms. Almanzar lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 162 of the FAC and accordingly denies the same. To the extent any further response is required, Ms. Almanzar admits that she has approved of the use by Atlantic Records of photographs and/or biographical material but she does not know whether or in which specific situations such material was approved by KSR.

163. Paragraph 163 of the FAC sets forth legal conclusions to which no response is required. To the extent a response is required, Ms. Almanzar denies each and every allegation set forth in paragraph 163 of the FAC.

164. Ms. Almanzar denies each and every allegation set forth in paragraph 164 of the FAC.

165. Paragraph 165 of the FAC sets forth legal conclusions to which no response is required. To the extent a response is required, Ms. Almanzar denies each and every allegation set forth in paragraph 165 of the FAC.

166. Paragraph 166 of the FAC sets forth legal conclusions to which no response is required. To the extent a response is required, Ms. Almanzar denies each and every allegation set forth in paragraph 166 of the FAC.

167. Paragraph 167 of the FAC sets forth legal conclusions to which no response is required. To the extent a response is required, Ms. Almanzar denies each and every allegation set forth in paragraph 167 of the FAC.

COUNT X
(Tortious Interference with Contract Against Cardi B QC, Solid Foundation, Lee, and Thomas)

168. Ms. Almanzar repeats and realleges her answers to the allegations in paragraphs 1 through 167 of the FAC above as if fully set forth herein.

169. Paragraph 169 of the FAC sets forth legal conclusions to which no response is required. To the extent a response is required, Ms. Almanzar denies each and every allegation set forth in paragraph 169 of the FAC, except admits that the Furnishing Agreement was signed on or about October 18, 2016 by a representative of Atlantic Records and, upon information and belief, by Shaft as a representative of KSR.

170. Ms. Almanzar lacks knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 170 of the FAC concerning what Quality Control, Solid Foundation, and Messrs. Lee and Thomas had actual knowledge of, and accordingly denies the same, except admits that she had general knowledge of the Furnishing Agreement. Ms. Almanzar denies the remainder of the allegations set forth in paragraph 170 of the FAC.

171. Paragraph 171 of the FAC sets forth legal conclusions to which no response is required. To the extent a response is required, Ms. Almanzar denies each and every allegation set forth in paragraph 171 of the FAC.

172. Ms. Almanzar lacks knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 172 of the FAC concerning what she, Quality Control, Solid Foundation, and Messrs. Lee and Thomas have "caused Atlantic Records to

acquiesce in," and accordingly denies the same. Ms. Almanzar admits that she has participated in recording sessions for which she does not believe KSR submitted proposed recording budgets to Atlantic Records prior to those sessions, but she denies that any such participation constitutes a breach by her of the Inducement Letter, and respectfully refers the Court to true and correct copies of the Inducement Letter and Furnishing Agreement for their contents. Ms. Almanzar denies the remainder of the allegations set forth in paragraph 172 of the FAC.

173. Ms. Almanzar lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 173 of the FAC concerning what she, Quality Control, Solid Foundation, and Messrs. Lee and Thomas have "caused Atlantic Records to acquiesce in," and accordingly denies the same. To the extent any further response is required, Ms. Almanzar admits that she has participated in recording session with producers, has recorded material, and has participated in sessions on various dates in various studios in various locations but lacks knowledge or information sufficient to form a belief as to whether such participation was agreed to by KSR. Ms. Almanzar believes her conduct has been fully consistent with her contractual obligations towards Atlantic Records, and that neither she nor Atlantic Records has any remaining contractual obligations to KSR because of, *inter alia*, Plaintiffs' breach of various duties and contractual obligations they owed to Ms. Almanzar. Ms. Almanzar respectfully refers the Court to a true and complete copy of the relevant agreements for their contents and to Ms. Almanzar's Counterclaims, filed herewith.

174. Ms. Almanzar lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 174 of the FAC and accordingly denies the same. To the extent any further response is required, Ms. Almanzar admits that she has approved of the

use by Atlantic Records of photographs and/or biographical material but she does not know whether or in which specific situations such material was approved by KSR.

175. Paragraph 175 of the FAC sets forth legal conclusions to which no response is required. To the extent a response is required, Ms. Almanzar denies each and every allegation set forth in paragraph 175 of the FAC.

176. Paragraph 176 of the FAC sets forth legal conclusions to which no response is required. To the extent a response is required, Ms. Almanzar denies each and every allegation set forth in paragraph 176 of the FAC.

177. Paragraph 177 of the FAC sets forth legal conclusions to which no response is required. To the extent a response is required, Ms. Almanzar denies each and every allegation set forth in paragraph 177 of the FAC.

178. Paragraph 178 of the FAC sets forth legal conclusions to which no response is required. To the extent a response is required, Ms. Almanzar denies each and every allegation set forth in paragraph 178 of the FAC.

179. Paragraph 179 of the FAC sets forth legal conclusions to which no response is required. To the extent a response is required, Ms. Almanzar denies each and every allegation set forth in paragraph 179 of the FAC.

COUNT XI
(Tortious Interference with Contract Against Foster, QC, Solid Foundation, Lee, and Thomas)

180. Ms. Almanzar repeats and realleges her answers to the allegations in paragraphs 1 through 179 of the FAC above as if fully set forth herein.

181. Paragraph 181 of the FAC is not directed to Ms. Almanzar and thus no response is required. To the extent a response is required, Ms. Almanzar denies each and every allegation

set forth in paragraph 181 of the FAC, which, in any event, sets forth legal conclusions to which no response is required.

182. Paragraph 182 of the FAC is not directed to Ms. Almanzar and thus no response is required. To the extent a response is required, Ms. Almanzar lacks knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 182 of the FAC, and accordingly denies the same.

183. Paragraph 183 of the FAC is not directed to Ms. Almanzar and thus no response is required. To the extent a response is required, Ms. Almanzar lacks knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 183 of the FAC, and accordingly denies the same.

184. Paragraph 184 of the FAC is not directed to Ms. Almanzar and thus no response is required. To the extent a response is required, Ms. Almanzar lacks knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 184 of the FAC, and accordingly denies the same.

185. Paragraph 185 of the FAC is not directed to Ms. Almanzar and thus no response is required. To the extent a response is required, Ms. Almanzar lacks knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 148 of the Complaint, and accordingly denies the same.

186. Paragraph 186 of the FAC is not directed to Ms. Almanzar and thus no response is required. To the extent a response is required, Ms. Almanzar denies each and every allegation set forth in paragraph 186 of the FAC.

187. Paragraph 187 of the FAC is not directed to Ms. Almanzar and thus no response is required. To the extent a response is required, Ms. Almanzar denies each and every allegation set forth in paragraph 187 of the FAC.

188. Paragraph 188 of the FAC is not directed to Ms. Almanzar and thus no response is required. To the extent a response is required, Ms. Almanzar denies each and every allegation set forth in paragraph 188 of the FAC.

COUNT XII
(Defamation *Per Se* Against Foster)

189. Ms. Almanzar repeats and realleges her answers to the allegations in paragraphs 1 through 188 of the FAC above as if fully set forth herein.

190. Paragraph 190 of the FAC is not directed to Ms. Almanzar and thus no response is required. To the extent a response is required, Ms. Almanzar lacks knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 190 of the FAC, and accordingly denies the same.

191. Paragraph 191 of the FAC is not directed to Ms. Almanzar and thus no response is required. To the extent a response is required, Ms. Almanzar lacks knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 190 of the FAC, and accordingly denies the same.

192. Paragraph 192 of the FAC is not directed to Ms. Almanzar and thus no response is required. To the extent a response is required, Ms. Almanzar denies each and every allegation set forth in paragraph 192 of the FAC.

193. Paragraph 193 of the FAC is not directed to Ms. Almanzar and thus no response is required. To the extent a response is required, Ms. Almanzar denies each and every allegation

set forth in paragraph 193 of the FAC (which, in any event, set forth legal conclusions to which no response is required).

194. Paragraph 194 of the FAC is not directed to Ms. Almanzar and thus no response is required. To the extent a response is required, Ms. Almanzar lacks knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 194 of the FAC, and accordingly denies the same.

195. Paragraph 195 of the FAC is not directed to Ms. Almanzar and thus no response is required. To the extent a response is required, Ms. Almanzar lacks knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 195 of the FAC, and accordingly denies the same.

196. Paragraph 196 of the FAC is not directed to Ms. Almanzar and thus no response is required. To the extent a response is required, Ms. Almanzar lacks knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 196 of the FAC, and accordingly denies the same.

197. Paragraph 197 of the FAC is not directed to Ms. Almanzar and thus no response is required. To the extent a response is required, Ms. Almanzar lacks knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 197 of the FAC, and accordingly denies the same.

198. Paragraph 198 of the FAC is not directed to Ms. Almanzar and thus no response is required. To the extent a response is required, Ms. Almanzar denies each and every allegation set forth in paragraph 198 of the FAC.

199. Paragraph 199 of the FAC is not directed to Ms. Almanzar and thus no response is required. To the extent a response is required, Ms. Almanzar denies each and every allegation set forth in paragraph 199 of the FAC.

200. Paragraph 200 of the FAC is not directed to Ms. Almanzar and thus no response is required. To the extent a response is required, Ms. Almanzar denies each and every allegation set forth in paragraph 200 of the FAC.

201. Paragraph 201 of the FAC is not directed to Ms. Almanzar and thus no response is required. To the extent a response is required, Ms. Almanzar denies each and every allegation set forth in paragraph 201 of the FAC.

202. Paragraph 202 of the FAC is not directed to Ms. Almanzar and thus no response is required. To the extent a response is required, Ms. Almanzar denies each and every allegation set forth in paragraph 202 of the FAC.

COUNT XII
(Defamation *Per Se* Against Cardi B)

203. Ms. Almanzar repeats and realleges her answers to the allegations in paragraphs 1 through 202 of the FAC above as if fully set forth herein.

204. Upon information and belief, Ms. Almanzar believes she may have privately opined to her husband Offset, her sister Hennessy and her friend Skeemo Holmes that Shaft was robbing her or had robbed her, but she denies that any such statements were false or would constitute defamation. Ms. Almanzar denies the remainder of the allegations set forth in paragraph 204 of the FAC.

205. Ms. Almanzar denies each and every allegation set forth in paragraph 205 of the FAC.

206. Paragraph 206 of the FAC sets forth legal conclusions to which no response is required. To the extent a response is required, Ms. Almanzar denies each and every allegation set forth in paragraph 206 of the FAC.

207. Paragraph 207 of the FAC sets forth legal conclusions to which no response is required. To the extent a response is required, Ms. Almanzar denies each and every allegation set forth in paragraph 207 of the FAC.

208. Paragraph 208 of the FAC sets forth legal conclusions to which no response is required. To the extent a response is required, Ms. Almanzar denies each and every allegation set forth in paragraph 208 of the FAC.

209. Paragraph 209 of the FAC sets forth legal conclusions to which no response is required. To the extent a response is required, Ms. Almanzar denies each and every allegation set forth in paragraph 209 of the FAC.

210. Ms. Almanzar denies each and every allegation set forth in paragraph 210 of the FAC.

211. Paragraph 211 of the FAC sets forth legal conclusions to which no response is required. To the extent a response is required, Ms. Almanzar denies each and every allegation set forth in paragraph 211 of the FAC.

212. Paragraph 212 of the FAC sets forth legal conclusions to which no response is required. To the extent a response is required, Ms. Almanzar denies each and every allegation set forth in paragraph 212 of the FAC.

213. Paragraph 213 of the FAC sets forth legal conclusions to which no response is required. To the extent a response is required, Ms. Almanzar denies each and every allegation set forth in paragraph 213 of the FAC.

214. Paragraph 214 of the FAC sets forth legal conclusions to which no response is required. To the extent a response is required, Ms. Almanzar denies each and every allegation set forth in paragraph 214 of the FAC.

215. Paragraph 215 of the FAC sets forth legal conclusions to which no response is required. To the extent a response is required, Ms. Almanzar denies each and every allegation set forth in paragraph 215 of the FAC.

COUNT XIV
(Defamation *Per Se* Against Cardi B)

216. Ms. Almanzar repeats and realleges her answers to the allegations in paragraphs 1 through 215 of the FAC above as if fully set forth herein.

217. Paragraph 217 of the FAC sets forth legal conclusions to which no response is required. To the extent a response is required, Ms. Almanzar denies each and every allegation set forth in paragraph 217 of the FAC.

218. Ms. Almanzar denies each and every allegation set forth in paragraph 218 of the FAC.

219. Paragraph 219 of the FAC sets forth legal conclusions to which no response is required. To the extent a response is required, Ms. Almanzar denies each and every allegation set forth in paragraph 219 of the FAC.

220. Paragraph 220 of the FAC sets forth legal conclusions to which no response is required. To the extent a response is required, Ms. Almanzar lacks knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 220 of the FAC, and accordingly denies the same.

221. Paragraph 221 of the FAC sets forth legal conclusions to which no response is required. To the extent a response is required, Ms. Almanzar denies each and every allegation set forth in paragraph 221 of the FAC.

222. Paragraph 222 of the FAC sets forth legal conclusions to which no response is required. To the extent a response is required, Ms. Almanzar denies each and every allegation set forth in paragraph 222 of the FAC.

223. Paragraph 223 of the FAC sets forth legal conclusions to which no response is required. To the extent a response is required, Ms. Almanzar denies each and every allegation set forth in paragraph 223 of the FAC.

224. Paragraph 224 of the FAC sets forth legal conclusions to which no response is required. To the extent a response is required, Ms. Almanzar denies each and every allegation set forth in paragraph 224 of the FAC.

225. Paragraph 225 of the FAC sets forth legal conclusions to which no response is required. To the extent a response is required, Ms. Almanzar denies each and every allegation set forth in paragraph 225 of the FAC.

226. Paragraph 226 of the FAC sets forth legal conclusions to which no response is required. To the extent a response is required, Ms. Almanzar denies each and every allegation set forth in paragraph 226 of the FAC.

227. Paragraph 227 of the FAC sets forth legal conclusions to which no response is required. To the extent a response is required, Ms. Almanzar denies each and every allegation set forth in paragraph 227 of the FAC.

Ms. Almanzar denies that Plaintiffs are entitled to any of the relief sought in their demand for judgment or any relief whatsoever.

AFFIRMATIVE DEFENSES

Ms. Almanzar asserts the following affirmative defenses to the FAC:

FIRST AFFIRMATIVE DEFENSE
(Failure to State a Claim)

228. The FAC fails, in whole or in part, to state a claim upon which relief may be granted.

SECOND AFFIRMATIVE DEFENSES
(Unconscionability)

229. Plaintiffs cannot enforce one or more of the contracts set forth in the FAC because the terms are substantively unconscionable.

230. Plaintiffs cannot enforce one or more of the contracts set forth in the FAC because the negotiation and execution of those contracts was procedurally unconscionable.

THIRD AFFIRMATIVE DEFENSE
(Failure of Conditions Precedent)

231. Plaintiffs cannot enforce one or more of the contracts set forth in the FAC because of Plaintiffs' failure to satisfy conditions precedent.

FOURTH AFFIRMATIVE DEFENSE
(Wrongful/Tortious Conduct)

232. Plaintiffs are barred from recovery, if any, by reason of Plaintiffs' wrongful or tortious conduct.

FIFTH AFFIRMATIVE DEFENSE
(Waiver)

233. Plaintiffs intentionally and voluntarily relinquished or surrendered a known right, benefit, or advantage in connection with one or more of the causes of action set forth in the FAC and the facts underlying each of those causes of action.

SIXTH AFFIRMATIVE DEFENSE
(Estoppel)

234. Plaintiffs are estopped from recovery, if any, in whole or in part, by reason of Plaintiffs' own acts and omissions.

SEVENTH AFFIRMATIVE DEFENSE
(Unclean Hands)

235. Plaintiffs are barred from recovery, if any, in whole or in part, by reason of Plaintiffs' unclean hands.

EIGHTH AFFIRMATIVE DEFENSE
(Breach of Contract/Implied Covenant of Good Faith and Fair Dealing)

236. To the extent there is otherwise a valid contract claim against Ms. Almanzar, Plaintiffs' claims are barred by their own material breach of the relevant agreements, including the implied covenant of good faith and fair dealing.

NINTH AFFIRMATIVE DEFENSE
(Breach of Fiduciary Duty)

237. Plaintiffs' claims are barred in whole or in part because Plaintiffs breached their fiduciary duties owed to Ms. Almanzar including under the Management Agreement and under an oral understanding that pre-dated the Management Agreement.

TENTH AFFIRMATIVE DEFENSE
(Termination)

238. Plaintiffs' claims are barred in whole or in part because Ms. Almanzar effectively terminated both the Management Agreement and the 2015 KSR Recording Agreement and the 2016 KSR Recording Agreement.

ELEVENTH AFFIRMATIVE DEFENSE
(Rescission based on Fraud, Breach of Fiduciary Duty, or Fraudulent Inducement)

239. Plaintiffs' claims are barred in whole or in part because Ms. Almanzar is entitled to rescission of the Management Agreement, the 2015 KSR Recording Agreement and the 2016 KSR Recording Agreement due to Plaintiffs' fraud and/or breaches of fiduciary duties and/or fraudulent inducement of Ms. Almanzar to enter into the Management Agreement, the 2015 KSR Recording Agreement and/or the 2016 KSR Recording Agreement.

TWELFTH AFFIRMATIVE DEFENSE
(Justification)

240. Ms. Almanzar's actions at all times were reasonable, justified and undertaken in good faith, and Ms. Almanzar did not directly or indirectly undertake or fail to undertake any action in violation of the law or in derogation of any enforceable or lawful agreement with Plaintiffs.

THIRTEENTH AFFIRMATIVE DEFENSE
(Lack of Breach)

241. Plaintiffs' breach of contract claim based on the Inducement Letter (Count IX) is barred in whole or in part because Ms. Almanzar did not breach that agreement.

FOURTEENTH AFFIRMATIVE DEFENSE
(Lack of Causation)

242. Plaintiffs' breach of contract claim based on the Inducement Letter (Count IX) and tortious interference claim regarding the Furnishing Agreement (Count X) are barred in whole or in part because any damages allegedly suffered by Plaintiffs were not caused by any Defendant.

FIFTEENTH AFFIRMATIVE DEFENSE
(Party to Multilateral Agreement)

243. Plaintiffs' tortious interference claim (Count X) is barred in whole or in part because Ms. Almanzar is a party to the Inducement Letter which was attached as an exhibit to

the Furnishing Agreement, and the Furnishing Agreement and the Inducement Letter were intended to be and should be construed as one multilateral agreement; thus, because Ms. Almanzar is not a stranger to the agreement, she cannot be held liable for tortuously interfering with same.

SIXTEENTH AFFIRMATIVE DEFENSE
(Duplicative Claims)

244. Plaintiffs' tortious interference claim (Count X) is barred in whole or in part because it is duplicative of Plaintiffs' claim for breach of the Inducement Letter.

SEVENTEENTH AFFIRMATIVE DEFENSE
(Truth)

245. Plaintiffs' defamation claims are barred in whole or in part by reason of the truth of the allegedly defamatory statements.

EIGHTEENTH AFFIRMATIVE DEFENSE
(Lack of Publication)

246. Plaintiffs' defamation claims are barred in whole or in part because the alleged statements were not published.

NINETEENTH AFFIRMATIVE DEFENSE
(Negligence)

247. Plaintiffs' claims are barred in whole or in part by Plaintiffs' own carelessness and negligence.

TWENTIETH AFFIRMATIVE DEFENSE
(Unlicensed Talent Agency)

248. Plaintiffs' claims are barred in whole or in part because the Management Agreement is unlawful and unenforceable against Ms. Almanzar because, among other things, WorldStar and KSR are unlicensed talent agents under Article 11 of the New York General Business Law.

TWENTY-FIRST AFFIRMATIVE DEFENSE
(Speculative Damages)

249. Plaintiffs are not entitled to recover the alleged damages, if any, because they are uncertain, contingent and speculative.

TWENTY-SECOND AFFIRMATIVE DEFENSE
(Failure to Mitigate Damages)

250. Plaintiffs' claims are barred in whole or in part to the extent Plaintiffs have failed to mitigate their damages. Therefore, such damages are not recoverable.

TWENTY-THIRD AFFIRMATIVE DEFENSE
(Reservation of Rights)

251. Ms. Almanzar reserves the right to allege additional Affirmative Defenses as they become known, and accordingly to amend this Answer.

* * * * *

COUNTERCLAIMS

Counterclaim-Plaintiff Belcalis Almanzar p/k/a Cardi B, through her attorneys, Robins Kaplan LLP, hereby counterclaims against Counterclaim-Defendants WorldStar Marketing Group, Inc. ("WorldStar"), KSR Group, LLC ("KSR"), and Klenord Raphael ("Shaft") (collectively, "Counterclaim-Defendants") as follows:

NATURE OF THE ACTION

1. This case arises out of the deceitful and disloyal conduct of a self-serving and controlling personal manager, Counterclaim-Defendant Klenord "Shaft" Raphael and his entities through which he does business, WorldStar and KSR, who together, among other things, breached their contractual and fiduciary duties to Counterclaim-Plaintiff Belcalis Almanzar, an immensely talented and trusting young artist. Ms. Almanzar entrusted Shaft and his wholly owned entities with many aspects of her professional and business affairs and that trust was

abused. Despite having a fiduciary duty as a manager to act in Ms. Almanzar's best interest with undivided loyalty, Shaft himself and through his entities took advantage of Ms. Almanzar's trust and naiveté and persuaded her to sign contracts and to enter deals in which Shaft attempted to take an unreasonable and unconscionable portion of Ms. Almanzar's earnings in the entertainment industry for himself.

2. In or around the fall of 2014, Ms. Almanzar hired Shaft to act as one of her personal managers to help her book personal appearances at dance clubs and to help develop her professional career. At Shaft's urging, and after being convinced by him that it was the best way to run her affairs, Ms. Almanzar put complete trust and power over her business affairs and personal finances in Shaft and his wholly-owned entities. In return, as Ms. Almanzar's financial success increased, so too did Shaft's greed. Shaft proved increasingly willing to take advantage of, deceive and exploit Ms. Almanzar, and he had the ability to do so through complete control over all legal documents and virtually every dollar that Ms. Almanzar earned in the entertainment business.

3. Ms. Almanzar initially signed a management agreement with Shaft's entity WorldStar in or around March 2015 (when she was 22 years old) without the benefit of any counsel acting on her behalf. That Management Agreement provided, among other things, for Shaft to commission 20% of Ms. Almanzar's earnings in the entertainment industry, subject to various specific terms and conditions. WorldStar breached that agreement by, *inter alia*, failing to appoint an independent business manager, failing to provide monthly accountings as contractually required, upon information and belief failing to provide adequate payment to Ms. Almanzar under the Management Agreement, failing to properly account for expenses and failing to provide documentation of its expenses.

4. With his role as manager for Ms. Almanzar secured, and as Ms. Almanzar's talents were increasingly being recognized by the world, Shaft unconscionably used his position of trust as a fiduciary to extract a larger portion of Ms. Almanzar's income and potential future earnings for himself. Less than two months after signing Ms. Almanzar to the onerous Management Agreement through his entity WorldStar, Shaft set up a new and different wholly-owned entity, KSR, through which he sought to self-deal the majority of the proceeds of Ms. Almanzar's music career before it even started. In a Recording Agreement dated as of May 1, 2015 (the "2015 KSR Recording Agreement"), which Plaintiffs allege Ms. Almanzar signed in 2015, Shaft, wearing a different corporate hat branded "KSR," secured for himself an **additional** 20% of Ms. Almanzar's income from entertainment activities, complete ownership of copyrights in all sound recordings and videos that would feature Ms. Almanzar, more than half of all record royalties, 50% ownership of any songwriting/publishing copyrights, and 25% of songwriter royalties for a period of 7 albums (at KSR's sole option). Shaft did not negotiate the terms of this 2015 KSR Recording Agreement with Ms. Almanzar (at arms-length or otherwise), he did not explain the material terms of the deal, he did not provide her with independent legal counsel, and he did not even provide her a copy of the agreement. Despite having a fiduciary duty to act in Ms. Almanzar's best interest as her manager (including the related duty of candor and duty of loyalty), Shaft dealt himself Ms. Almanzar's most valuable rights for many years to come without even the inconvenience of someone negotiating against him. In this transaction, Shaft was hopelessly conflicted, and despite knowing that Ms. Almanzar was naïve, inexperienced, uninformed, unrepresented, and utterly dependent on Shaft, he took advantage of her and breached the fiduciary duties he owed her.

5. Crucially, these contracts on their face provided Shaft the opportunity to "double dip" in Ms. Almanzar's income from entertainment activities. While the Management Agreement provided that the Manager (WorldStar) would not commission income derived by any entity in which the Manager (WorldStar) has a proprietary or income interest, Worldstar had no proprietary or income interest in KSR; KSR is owned by Shaft individually (as is WorldStar). Thus, the agreements by their terms, allowed Shaft – through the mechanism of two separate but wholly-owned companies – to double-dip in commissioning Ms. Almanzar's income.

6. As Ms. Almanzar's manager and under the terms Management Agreement, Shaft was already obligated to guide Ms. Almanzar in her music career. Rather than shepherding that career by pursuing the most contractually advantageous means for Ms. Almanzar in the production and distribution of her music, Shaft tied up Ms. Almanzar with KSR to insure that he would get his own additional benefit from that career (above and beyond his management commission).

7. In the deal that Shaft orchestrated with Atlantic Recording Corporation (Ms. Almanzar's record company), Shaft did not seek to have Ms. Almanzar sign a recording contract directly with Atlantic, but rather inserted his wholly-owned entity KSR to be paid over 50% of all of Ms. Almanzar's record royalties for "furnishing" her services to Atlantic. Shaft also decided that his entities' double-dipping was not sufficient, and that KSR's share of Ms. Almanzar's earnings from activities in the entertainment industry should *increase* to 25% in the new 2016 KSR Recording Agreement (rather than the 20% provided for in the 2015 KSR Recording Agreement). He attempted to paper over this further breach of fiduciary duty and self-enrichment by providing Ms. Almanzar an attorney, Scott Mason, who was told by KSR that the deal increasing KSR's share of Ms. Almanzar's non-record royalty earnings to 25% had

already been reached and that the deal with Atlantic Recording Corporation had also been negotiated and finalized by an attorney who purported to act for both KSR and Ms. Almanzar simultaneously. KSR effectively prevented any arms-length negotiation between itself and Ms. Almanzar, and concealed its double dipping and breach of fiduciary duties by concealing from attorney Mason the fact that the Management Agreement existed with another one of Shaft's entities and had been signed prior to the 2015 KSR Recording Agreement. Shaft's last-second token suggestion that Ms. Almanzar have her own separate counsel review the Atlantic Recording Corporation deal and 2016 KSR Recording Agreement with her, each of which was presented as a *fait accompli*, hardly excuses the blatant breach of trust and breaches of the duty of care, loyalty and candor which Counterclaim-Defendants owed to Ms. Almanzar.

8. By this Action, Ms. Almanzar seeks to: undo the abuses of the fiduciary duties Shaft owed to Ms. Almanzar; terminate the unconscionable contractual arrangements Shaft made with his entities through deceit, fraud and breaches of fiduciary duties (including both the Management Agreement and the KSR Recording Agreements); compel an accounting by Counterclaim-Defendants and receive compensation for the monies that were wrongfully taken by Shaft and his entities; compel the return of the most basic financial and legal documents and other property belonging to Ms. Almanzar but wrongfully withheld; and to punish and deter Shaft and his entities from engaging in this type of unethical conduct in the future.

PARTIES

9. Counterclaim-Plaintiff Belcalis Almanzar p/k/a Cardi B is an individual who at the times relevant to this Counter-Complaint was a resident of the State of New Jersey. Ms. Almanzar is, among other things, a rapper, entertainer, and media personality.

10. Upon information and belief, Counterclaim-Defendant MINKOZE.COM, LLC d/b/a WORLD STAR MARKETING GROUP a/k/a WorldStar Marketing Group, Inc. ("WorldStar") is a New York corporation with its principal place of business located at 244 Fifth Avenue, Suite K261, New York, New York 10001, and purports to be in the business of personal artist management.

11. Upon information and belief, Counterclaim-Defendant KSR Group, LLC ("KSR") is a New York domestic limited liability company with its principal place of business located at 244 Fifth Avenue, Suite K261, New York, New York 10001, and purports to be in the music recording business.

12. Upon information and belief, Counterclaim-Defendant Klenord Raphael p/k/a Shaft is an individual who resides in the State of New York, and is the President, CEO, and sole shareholder of WorldStar and the sole member of KSR.

13. Upon information and belief, at all relevant times, there existed a unity of interest in ownership between Counterclaim-Defendants WorldStar and KSR, on the one hand, and Counterclaim-Defendant Shaft on the other hand, such that the individuality and separateness between them ceased and WorldStar and KSR are the alter egos of Shaft in that, among other things:

a. Upon information and belief, Shaft, at all relevant times, dominated, influenced, and controlled WorldStar and any officers thereof as well as the business, property, and affairs of said corporation; and

b. Upon information and belief, Shaft, at all relevant times, dominated, influenced, and controlled KSR and any officers thereof as well as the business, property, and affairs of said company.

JURISDICTION AND VENUE

14. This Court has jurisdiction over these Counterclaims pursuant to 28 U.S.C. § 1367(a), and upon information and belief, pursuant to 28 U.S.C. § 1332(a)(1), as the amount in controversy exceeds the sum or value of $75,000, exclusive of interest and costs.

15. This Court may exercise personal jurisdiction over Counterclaim-Defendants pursuant to CPLR § 301 as all Counterclaim-Defendants are located in the State of New York.

16. Upon information and belief, venue is proper in this district pursuant to 28 U.S.C. §§ 1391(b)(1) and (b)(2).

FACTS

17. Ms. Almanzar went from being a cashier at a grocery store at the age of 19, to exotic dancer, to social media personality and party host/promoter, to breakout reality-TV star of *Love & Hip Hop: New York*, and, finally, to world-famous rapper by the age of 25. Ms. Almanzar's career ascendance as a stripper-turned-rapper and cultural icon – *Time* magazine named Ms. Almanzar one of the 100 most influential people in the world in 2018 – is a result of her personality, hustle, and sheer talent.

18. While working as an exotic dancer, Ms. Almanzar began posting short clips of herself on Instagram and other social media platforms, delivering comedic criticisms and observations on, among other things, her profession, men, relationships and money. Her videos proved hugely popular and she steadily amassed an online following in the hundreds of thousands on Instagram. By the end of 2014, Ms. Almanzar had roughly 500,000 Instagram followers.

19. Ms. Almanzar's social media star power caught the attention of the producers of VH1's reality series *Love & Hip Hop: New York*, on which she appeared for two seasons (airing

from 2015 to 2017). The network press release announcing her debut stated: "Firecracker and Instagram sensation Cardi B. leaps from the pages of IG [i.e., Instagram] to the small screen with a bang!" She quickly became the breakout star of the show with catchphrases like "shmoney" and "okurrr" delivered in her unmistakable Bronx accent. Viral videos from both *Love & Hip-Hop* and her own social media posts were early signs of her undeniable star power. In one popular clip from the series, Ms. Almanzar pointedly informs a male friend: "if a girl have beef with me, she gon' have beef with me … foreva." Soon after, Ms. Almanzar recorded a song titled "Foreva," incorporating this line into the song's "hook," which became a hit from Ms. Almanzar's debut mixtape *Gangsta Bitch Music, Vol. 1*, released in March 2016.

20. Ms. Almanzar's music career grew quickly. A second mixtape was released in January 2017, *Gangsta Bitch Music, Vol. 2*; in February, it was announced that she had signed a record deal with Atlantic Recording Corporation (hereafter, "Atlantic Records"); in June, 2017, she released the single "Bodak Yellow" which subsequently became a #1 hit single, and by the end of the year she became the first female rapper to have her first three *Billboard* Hot 100 singles chart in the Top 10. She received nominations from the BET Awards, BET Hip Hop Awards, Grammy Awards; and won a Billboard Music Award and two iHeartRadio Music Awards. Her debut full length studio album, *Invasion of Privacy*, released in April 2018, entered the charts at number one in the United States, and that month she became the first female artist to chart 13 entries simultaneously on the *Billboard* Hot 100.

The Management Agreement with WorldStar

21. At the time Shaft first met Ms. Almanzar – in or around the late summer of 2014 – she was working as an exotic dancer and party host in dance clubs, and had already amassed a

significant public following on social media. Shaft recognized her talent and charisma and offered to help manage her career.

22. In or around September of 2014, Shaft and Ms. Almanzar entered into an oral non-exclusive management agreement under which Shaft agreed to serve as Ms. Almanzar's professional manager and advance her career, in exchange for a certain percentage of revenues she earned through her work as a party host, social media influencer and performer (the "Oral Management Agreement").

23. Under the Oral Management Agreement, Shaft had a fiduciary relationship with Ms. Almanzar, requiring Shaft at all times to conduct himself in Ms. Almanzar's best interests and to participate in no activities or arrangements inimical to Ms. Almanzar's best interests.

24. Prior to meeting Shaft, Ms. Almanzar had been working with a friend, Ashley, who served as her manager, helping to book club and party host appearance dates around the country. For a time, both Shaft and Ashley managed Ms. Almanzar, and each of them worked to help book appearances for Ms. Almanzar around the country.

25. However, from the beginning of the professional relationship, Shaft began attempting to exert ever-more control over Ms. Almanzar and the people around her. Within a few months, Shaft succeeded in pushing Ashley out of the picture. He gave Ms. Almanzar an ultimatum, forcing her to choose between working with him as her manager exclusively, or her friend Ashley. Based on Shaft's purported experience and promises of expert guidance and success, Ms. Almanzar felt constrained to choose Shaft. Although Ms. Almanzar did not wish to cut off ties with her friend, Shaft succeeded in pushing away a person she liked and trusted. It would not be the first person that Shaft succeeded in pushing out of Ms. Almanzar's life.

26. Shaft repeatedly assured Ms. Almanzar that she could trust him, and that he was working in her best interests. Ms. Almanzar placed her trust in Shaft, confided in him about all aspects of her professional life and took his advice and guidance. Like many artists, Ms. Almanzar hired Shaft to handle and direct her business interests while she focused on and pursued her creative interests.

27. From the beginning of their manager/artist relationship, Ms. Almanzar was encouraged to, and did believe that Shaft had her best interest at heart and would never take advantage of her in any way. As a fiduciary, Shaft owed Ms. Almanzar the highest duty of openness, honesty, loyalty and disclosure. He was never permitted to put his own interests above Ms. Almanzar's and was required to disclose all material facts and information known to him in any way related to the services he was providing to Ms. Almanzar. Ms. Almanzar was legally entitled to and did place the highest level of trust in Shaft for over three years.

28. In or around the beginning of March 2015, Shaft approached Ms. Almanzar about signing a formal management agreement. Having already worked with Shaft for several months, Ms. Almanzar trusted him. She did not have experience with signing contracts and little awareness of the benefits or advisability of consulting counsel prior to signing a long-term contract. Shaft told her that the terms of the management agreement he put before her were fair and standard. Other than mentioning the manager's 20% commission, Shaft provided no explanation of any of the material terms of the Agreement. Trusting Shaft, Ms. Almanzar signed. She did so without having the material terms explained to her, without knowing the purpose and effect of the terms and without the advice of any independent advisor or counsel. Ms. Almanzar did not have a meaningful opportunity to negotiate the terms of this contract and was not even given a copy of the agreement she signed.

29. Shaft induced and encouraged Ms. Almanzar to enter into a written exclusive personal management agreement with WorldStar Marketing Group, Inc. ("WorldStar"), an alter ego of Shaft, with a handwritten date of March 3, 2015 (but which also included a typed date of "August ___ 2014") (the "Management Agreement"). A true and correct copy of the Management Agreement is annexed hereto as Exhibit 1.

30. Shaft gave Ms. Almanzar the false impression that WorldStar had some connection or affiliation with the popular entertainment and music website, worldstarhiphop.com. It did not.

31. In fact, although she did not know it at the time – because Shaft did not disclose this material fact – the entity name that appeared on the face of the Management Agreement, WorldStar Marketing Group, Inc., was not an existing entity. Shaft had registered an entity named Minkoze.Com, LLC with the State of New York and filed a certificate of assumed name for that entity to use: World Star Marketing Group, both in 2009. But no certificate was filed for the name actually appearing on the Management Agreement – WorldStar Marketing Group, Inc. Ms. Almanzar was not told by Shaft that the entity signing the Management Agreement did not exist; nor was she told that, upon information and belief, the entity appearing on the contract was intended to be a "d/b/a" for a different entity owned by Shaft, Minkoze.Com, LLC.

32. The Management Agreement was one-sided and unfair to Ms. Almanzar in many of its material terms. The Management Agreement provided, *inter alia*, that the Manager, WorldStar would be Ms. Almanzar's exclusive personal manager during the term, which would consist of 1-year terms that the Manager could extend at its unilateral option for up to five years, and which options would be deemed exercised unless the Manager provided notice to the contrary. The Management Agreement provided that the Manager's Commission would

continue after the Term for an additional "Post-Term Period" equal to the actual duration of the Term, such that the Manager would be entitled to commissions for ***ten years*** if no notice of termination was delivered by the Manager during the five years of the Term. This exceedingly long term and "sunset" provision, which would provide royalties to the Manager years after ceasing to have any involvement with the artist, was grossly unfair, especially in light of the fact that Ms. Almanzar was not represented by counsel.

33. Paragraph 5 of the Management Agreement provided that "All Gross Income shall be paid to and collected by your independent business manager ('Business Manager'), if applicable, and such Business Manager will render monthly accountings and payment hereunder (if any) to you and Manager. You hereby initially designate Manager as your initial Business Manager." The agreement further provided that all Gross Compensation would be delivered to the Business Manager and that "the Business Manager shall pay to Manager the Manager's Commission."

34. At all relevant times (until the end of 2017 when Ms. Almanzar elected to terminate the Management Agreement), WorldStar acted as the Business Manager, despite the fact that it was not an independent business manager. In breach of Shaft's and WorldStar's fiduciary duty of care, WorldStar never appointed an independent business manager and failed to competently manage the collection of Gross Income under the Management Agreement.

35. In breach of the Management Agreement, WorldStar did not keep proper financial records and failed to render monthly accountings and payments as it was required to do under the Management Agreement. WorldStar never provided Ms. Almanzar with monthly accountings.

36. Paragraph 5(b) of the Management Agreement states that "[u]pon written notice by either party to the other, the party to whom such notice is addressed shall furnish an

accounting to the other party of all transactions between the parties since the last such accounting …. Either party shall have the right to reasonable inspection of the other's books and records which relate to the subject matter hereof in order to verify the accuracy of such accountings …." WorldStar and/or Shaft or KSR as WorldStar's alter egos have been given written notice by Ms. Almanzar (either personally or through an agent) and have failed to furnish an accounting in breach of this provision.

37. Paragraph 6 of the Management Agreement provides that "Manager shall furnish you and Business Manager with appropriate documentation of Manager's expenses within thirty (30) days after the date such expense is incurred …." In breach of this provision, WorldStar and Counterclaim-Defendants have repeatedly failed to provide appropriate documentation of Manager's expenses despite repeated requests from Ms. Almanzar and agents acting on her behalf.

38. Upon information and belief, in late 2017, an attorney acting for Ms. Almanzar demanded an immediate accounting from Counterclaim-Defendants and they failed to provide same. Ms. Almanzar hired an independent business manager in February or March of 2018, who also repeatedly requested accountings and expense records on behalf of Ms. Almanzar from Counterclaim-Defendants, and they again failed to provide these records. Counterclaim-Defendants eventually produced cryptic and incomplete statements with few, if any, back-up expense records and no appropriate documentation.

As Ms. Almanzar's Career Begins to Take Off, Shaft Exerts Increasing Control over Her

39. Ms. Almanzar's frequent unfiltered, insightful and humorous posts on social media – a product of her own thoughts and feelings – were the creative engine that grew her social media following and popularity. She had a significant social media following prior to

even meeting Shaft. Although Shaft provided advice and guidance to Ms. Almanzar, it was Ms. Almanzar's undeniable charisma, talent and irreverent personality that made her the break out star of season six of *Love and Hip Hop*.

40. Upon information and belief, Ms. Almanzar had been introduced to the producers of *Love and Hip Hop* through her friend, the radio personality DJ Self. DJ Self also introduced Ms. Almanzar to Shaft, who was a friend of DJ Self's and was then acting as DJ Self's manager. Upon information and belief, DJ Self fired Shaft as his manager only a few months later.

41. In helping Ms. Almanzar to launch a career as a recording artist, Shaft was acting in accordance with his fiduciary duties to act in Ms. Almanzar's best interests and in accordance with his contractual duties (through WorldStar in the Management Agreement) to assist her in reviewing potential engagements of her talents (including "recording and producing of musical and lyrical material"), counsel her in the development of a professional act, and assist her in the selection and procurement of artistic material for her "exploitation as a performer, artist and songwriter" (as explicitly provided in Section 2 of the Management Agreement).

42. Shaft had secured for himself a lucrative, one-sided and highly-favorable (to himself/WorldStar) Management Agreement in March 2015 and obviously recognized that he was working with a special talent in Ms. Almanzar. Unfortunately, as sometimes happens in the world of entertainment, a businessman with a far better understanding of the music business and industry standards than a young up-and-coming artist who is focused on developing her craft, took advantage of this dynamic and his position of trust. Seeing that he had a star on his hands, Shaft decided to reach beyond his already overly-generous Management Agreement and tried to take a larger piece of Ms. Almanzar's entertainment-related activities through his new entity, KSR. In order to accomplish this overreaching and self-dealing, Shaft attempted to exert

complete control over Ms. Almanzar and limit the people and information to which she was exposed.

43. Among other things, Shaft attempted to control the people with whom Ms. Almanzar associated. While Shaft encouraged Ms. Almanzar to work with certain producers and writers, if he thought someone was getting too close to Ms. Almanzar, he would push that person away. He put barriers between her and people close to her in an effort to maintain complete control over her. Shaft even attempted to control Ms. Almanzar's personal life, telling her who she should and should not see romantically.

44. Later, he told Ms. Almanzar not to be overly friendly with personnel from the record label and to distrust what record label personnel told her. While Ms. Almanzar continued to trust Shaft, as the months went by and she was exposed to more people, she began to wonder whether the deals that Shaft had put her in were as beneficial to her as he had insisted they were.

The 2015 KSR Recording Agreement

45. Shaft put Ms. Almanzar into several deals, and, contrary to his fiduciary duties to act with the utmost loyalty in her best interests, he acted to secure further rights for himself beyond his commission in the Management Agreement. The Management Agreement was signed in March 2015. Shaft formed KSR in April, 2015 (Articles of Organization were filed on April 20, 2015). Upon information and belief, Shaft had the 2015 KSR Recording Agreement prepared several days later, and moved quickly to have Ms. Almanzar enter into this agreement (dated as of May 1, 2015) so that she would not have an opportunity to seek outside advice about whether its terms were fair. Given, Shaft's existing role as Ms. Almanzar's manager and his control over KSR, they were not.

46. As mentioned, the Management Agreement obligated WorldStar to guide Ms. Almanzar in her entertainment career and to help her develop as an artist. But despite the fact that Ms. Almanzar had not professionally recorded any songs at the time the agreement was dated (March, 2015), the Management Agreement included numerous references to music. There was specific mention in the Management Agreement of WorldStar's obligation to counsel, guide and advise Ms. Almanzar in all matters pertaining to her career … in connection with, among other things, recording and producing of "musical and lyrical material, music publishing," the selection of material for her exploitation as a "performer, artist, and songwriter" and assisting her in the "selection and engagement of artists, producers, engineers, mixers, writers, musical directors … and other creative and technical personnel." The Management Agreement provided that the Manager, WorldStar, would be entitled to 20% of Ms. Almanzar's Gross Income, but excluded from Gross Income, among other things, "income derived by any entity in which Manager [WorldStar] has a proprietary or income interest." Thus, if income was derived by an entity in which WorldStar did not have a proprietary or income interest, and Shaft owned that entity, Shaft would be entitled to commission on that income. Other exclusions from Gross Income included, among other things, live dance performances within the New York City metropolitan area (reflecting Ms. Almanzar's professional activities at the time), music publishing income payable to third parties, actual recording, production and other recoupable costs of master recordings, and advances and royalties paid to third party record producers. Upon information and belief, these latter exclusions reflect the contemplated musical future of where Ms. Almanzar's career was headed.

47. Beginning fairly early on in their relationship, Shaft encouraged Ms. Almanzar to pursue music. Instead of guiding that pursuit as he was already contractually-obligated to do as

her manager, when it came time to actually record and produce music, KSR was presented to Ms. Almanzar as the only option for the production of her music. And the "Recording Agreement" dated of May 1, 2015 through which Shaft purported to do so, tied Ms. Almanzar up for 7 albums – longer than many, if not most, recording artists' careers last – at the very beginning stages of that pursuit.

48. Ms. Almanzar does not recall signing the 2015 KSR Recording Agreement, and she was never provided with a signed copy. Indeed, Counterclaim-Defendants have not produced a signed copy of the 2015 KSR Recording Agreement in this litigation, although they have taken the position that Ms. Almanzar signed the agreement in 2015 and that Counterclaim Plaintiffs have lost their signed copies.

49. Whether or not Ms. Almanzar signed the 2015 KSR Recording Agreement, Counterclaim-Defendants unquestionably breached their fiduciary duties to Ms. Almanzar. Either she signed the agreement, and the terms were substantively overreaching and procedurally unconscionable given Shaft's existing fiduciary duties, or, if Ms. Almanzar never signed the agreement, Counterclaim-Defendants lied to the attorney they later got for her (just days before her signing with Atlantic Records in 2016) about the fact that Ms. Almanzar had already signed and agreed to all of the terms in the 2015 KSR Recording Agreement.

50. Upon information and belief, Shaft told Ms. Almanzar that the terms of the 2015 KSR Recording Agreement he put before her were fair and standard. Shaft provided no explanation of most if not all of the material terms of the Agreement. Ms. Almanzar trusted Shaft and agreed to go along with his suggestions about pursuing music, so, upon information and belief, she entered into the 2015 KSR Recording Agreement. She did so without having the material terms explained to her, without knowing the purpose and effect of the terms and without

the advice of any independent advisor or counsel. Ms. Almanzar did not have a meaningful opportunity to negotiate the terms of this contract and was never even given a copy of the agreement Plaintiffs allege that she signed.

51. In entering the 2015 KSR Recording Agreement, Shaft was hopelessly conflicted. He had a fiduciary duty to act with undivided loyalty in Ms. Almanzar's best interest and to inform her of all material terms of any agreement for her services, particularly one in which he had a conflict of interest and was negotiating against Ms. Almanzar. Shaft violated these duties to Ms. Almanzar. He manipulated and deceived her and abused the trust she had placed in him.

52. The 2015 KSR Recording Agreement placed KSR in a position of complete control over Ms. Almanzar's music career and unconscionably granted KSR over 50% of her record royalties, 20% of income from her entertainment-related activities (double-dipping in addition to the 20% Shaft had already secured to WorldStar for such activities in the Management Agreement, the existence of which was not acknowledged or referenced in the 2015 KSR Recording Agreement), 50% ownership of songwriting copyrights, and 25% of royalties from songwriting copyrights, among other onerous terms. Importantly, it included an exceedingly lengthy term (encompassing options, for a total of 7 albums) that purported to only be capable of extension or termination at the option of KSR. Indeed, there was no provision permitting Ms. Almanzar to terminate the agreement for any reason whatsoever. While KSR purported to be entitled to damages and equitable remedies in the event of a breach by Ms. Almanzar, her only remedy under the agreement purported to be for unpaid royalties. Further, for the purposes of calculating "Gross Compensation" thereunder, the agreement provided an unfair and plainly insufficient exclusion of a total of only up to 25% of Gross Compensation for personal management, business management, talent agent, broker commissions or fees (or up to

35% for touring revenue) when Shaft's own management entity WorldStar already purported to be entitled to 20% of such income, and talent agencies generally charge standard 10% commissions. The agreement also provided for an additional 5% "label services fee" to KSR for no additional work or service in addition to a so-called "Distribution Fee." The 2015 KSR Recording Agreement purported to require Ms. Almanzar to appoint an experienced business manager but KSR did not do so.

The Atlantic Records Deal and the 2016 KSR Recording Agreement

53. With the release (in March 2016) of *Gangsta Bitch Music, Vol. 1* getting favorable treatment in the music press, and Ms. Almanzar's increasing exposure on *Love and Hip Hop* and surging social media following, Ms. Almanzar was successfully advancing her career and became increasingly focused on developing her music.

54. Ms. Almanzar believed that Shaft was working for her best interests when he told her in or around the late summer of 2016 that he was negotiating a major-label record deal with Atlantic Records. Shaft told Ms. Almanzar that Atlantic Records was interested in signing her as its exclusive artist and would likely pay a significant cash advance. As the deal with Atlantic Records was coming together, Shaft extolled the purported virtues of the deal he had negotiated without explaining any of the material terms, which operated to the significant advantage of Shaft himself.

55. Upon information and belief, Shaft did not shop Ms. Almanzar to major label record companies (whether Atlantic Records or otherwise) for her services as a recording artist directly, as an artist would customarily sign a direct deal with a label for a recording contract (sometimes with an artist's wholly-owned loan-out corporation). Instead, Shaft pursued deals only through and with his wholly-owned entity, KSR Group, LLC acting as an intermediary,

which would contractually provide the services of the artist (Ms. Almanzar). Indeed, the recording contract that Ms. Almanzar signed with Atlantic Records was actually an exclusive recording distribution agreement between Atlantic Recording Corporation and KSR Group, LLC, dated as of September 28, 2016 (the "Atlantic Recording Agreement" or "Furnishing Agreement") under which KSR Group granted Atlantic Records exclusive rights to distribute sound recordings featuring Ms. Almanzar's performances. Ms. Almanzar signed a separate Inducement Letter agreement (the "Inducement Letter") with Atlantic Records guaranteeing the performance of KSR under the Furnishing Agreement, which again, was explicitly for Ms. Almanzar's services.

56. Upon information and belief, Ms. Almanzar signed the Inducement Letter and other ancillary agreements which together constituted her so-called "360 deal" with Atlantic Records on or about October 18, 2016 (although the agreements were all dated as of September 28, 2016). These ancillary agreements, together with the Furnishing Agreement and the Inducement Letter shall be collectively referred to herein as the "Atlantic Records Deal."

57. On or about that same day, October 18, 2016, Shaft induced and encouraged Ms. Almanzar to enter into a new exclusive recording agreement with KSR; this agreement was memorialized in a written agreement dated as of October 17, 2016 (the "2016 KSR Recording Agreement"). A true and correct copy of the 2016 KSR Recording Agreement is annexed hereto as Exhibit 2. (The 2015 KSR Recording Agreement and the 2016 KSR Recording Agreement will be referred to collectively herein as the "KSR Recording Agreements".)

58. The KSR Recording Agreements and the Furnishing Agreement contained terms that were extremely favorable to KSR and Shaft at the expense of Ms. Almanzar. These agreements constituted self-dealing by Shaft and presented clear conflicts of interests that

required absolute, full disclosure by Shaft, and an arms-length negotiation between Shaft/KSR and Ms. Almanzar that Shaft purposefully did not allow to occur. By inducing Ms. Almanzar to enter into these agreements without a truly arms-length negotiation (and without fully disclosing the material terms in a way that ensured that Ms. Almanzar understood them and consented to them), Shaft breached his fiduciary duties to Ms. Almanzar.

59. Shaft misled Ms. Almanzar into believing that he was protecting her interests in the Atlantic Records Deal when in fact he was not. Shortly before the Atlantic Records Deal was to be signed, and upon information and belief, after all its material terms had been negotiated and agreed upon between Shaft/KSR and Atlantic Records, Shaft told Ms. Almanzar that she should have a lawyer at the signing of the Atlantic Records Deal and explained that it would be more "convenient" for her to have her own lawyer rather than the lawyer who had been representing both Shaft/KSR and Ms. Almanzar in negotiating the Atlantic Records Deal. Ms. Almanzar did not understand but agreed to go along with what Shaft said because she trusted that he had her best interest in mind. That trust was misplaced. Shaft misled Ms. Almanzar into believing that he was looking out for her best interests, and that she only needed her own lawyer for "convenience." Ms. Almanzar was entitled to rely on Shaft's complete, undivided loyalty as her fiduciary and he breached the duties that he owed to her.

60. Upon information and belief, the lawyer that Counterclaim-Defendants found for Ms. Almanzar and that was recommended to her, Scott Mason, was simply advised by Shaft/KSR's lawyer that he should review the Atlantic Records Deal with Ms. Almanzar, but that the terms of the Atlantic Records Deal had been finalized and would not be changed. Ms. Almanzar met with Attorney Mason for approximately 30 minutes the day before she signed the

Atlantic Records Deal papers to review the broad terms of the deal as well as what was presented to Attorney Mason as an amendment to the 2015 KSR Agreement.

61. Attorney Mason was informed by KSR that Ms. Almanzar was already signed to an exclusive recording agreement with KSR. Attorney Mason was provided by KSR with an unsigned copy of the 2015 KSR Recording Agreement and told that while the KSR percentage previously was 20% on its "360 DEAL, NOW ITS 25 HENCE THE ADDENDUM ATTACHED. WE WANT TO INCLUDE THE 25 % IN THE MAIN CONTRACT INSTEAD OF THE ADDENDUM." In the quoted email sending Attorney Mason these documents, there were two attachments: one attachment named "KSR.Cardi.amendment.10.16.pdf" was a short 1-page amendment purporting to amend the 2015 KSR Agreement by providing that the Revenue Share as defined in Paragraph 5 thereof would be 25% instead of 20%, and that KSR had "advised [Ms. Almanzar] to seek the advice and counsel of an attorney specializing in the music industry to review the Agreement and this Amendment"; the other attachment was an unsigned copy of the 2015 KSR Recording Agreement named "Cardi B.KSR.Rec Agr.Signed.4 29 15.pdf."

62. Neither KSR nor its attorney (nor Shaft or Worldstar) disclosed to Attorney Mason that there existed a separate Management Agreement between WorldStar and Ms. Almanzar which pre-dated the 2015 KSR Recording Agreement.

63. Although Attorney Mason was at the signing of the Furnishing Agreement (and the other ancillary agreements Ms. Almanzar signed with Atlantic Records as part of the Atlantic Records Deal), Attorney Mason was not present when Ms. Almanzar signed the 2016 KSR Recording Agreement on that same day. Upon information and belief, the 2016 KSR Recording Agreement was signed by Ms. Almanzar in the back of a friend's car – not in the presence of any lawyer, and certainly not a lawyer acting on Ms. Almanzar's behalf. Pre-empted by the

representations by KSR, Attorney Mason did not negotiate at all on behalf of Ms. Almanzar with respect to the 2016 KSR Recording Agreement.

64. The 2016 KSR Recording Agreement that Ms. Almanzar signed was almost identical to the 2015 KSR Recording Agreement with the following exceptions – the Revenue Share was changed from 20 to 25%, and a reference to television performances was added, the date of the agreement was changed from May 1, 2015 to October 17, 2016 and an address was added for Ms. Almanzar. There was no reference to KSR having advised Ms. Almanzar to seek the advice of an attorney specializing in the music industry, as had been included in the draft amendment sent to Attorney Mason.

65. Like the 2015 KSR Recording Agreement, the 2016 KSR Recording Agreement placed KSR in a position of complete control over Ms. Almanzar and unconscionably granted KSR over 50% of her record royalties, 25% of her income from her entertainment-related activities (double-dipping in addition to the 20% Shaft had already secured to WorldStar for such activities in the Management Agreement, the existence of which was not acknowledged or referenced in either of the KSR Recording Agreements, and not disclosed to Attorney Mason), 50% ownership of her songwriting/publishing copyrights and 25% of her music publishing royalties, among other onerous terms. This was a self-dealing transaction between Shaft/KSR and Ms. Almanzar in which Ms. Almanzar was not meaningfully represented by counsel (if at all) because Shaft knowingly arranged that there would be no arms-length negotiation between himself and Ms. Almanzar for the ownership and control of Ms. Almanzar's most valuable and lucrative rights in her record royalties. Despite his fiduciary duties to act with undivided loyalty in her best interests, Shaft manipulated and deceived Ms. Almanzar and abused the trust she had placed in him.

66. Like the 2015 KSR Recording Agreement, the terms of the 2016 KSR Recording Agreement were grossly unfair to Ms. Almanzar, because among other provisions mentioned above, it included a lengthy term (encompassing options, for a total of 7 albums) that purported to only be capable of extension or termination at the option of KSR. Indeed, there is no provision permitting Ms. Almanzar to terminate the agreement for any reason whatsoever, and while KSR purports to be entitled to damages and equitable remedies in the event of a breach by Ms. Almanzar, her only remedy under the agreement purports to be for unpaid royalties. Further, for the purposes of calculating "Gross Compensation" thereunder, the agreement provided an unfair and plainly insufficient exclusion of a total of only up to 25% of Gross Compensation for personal management, business management, talent agent, broker commissions or fees (or up to 35% for touring revenue) when Shaft's own management entity WorldStar already purported to be entitled to 20% of such income and talent agencies generally charge standard 10% commissions. The agreement also provided for an additional 5% "label services fee" to KSR for no additional work or service in addition to a so-called "Distribution Fee." The 2016 KSR Recording Agreement purported to require Ms. Almanzar to appoint an experienced business manager but KSR never did so. KSR never even provided Ms. Almanzar or any attorney acting on her behalf with a complete copy of the 2016 KSR Recording Agreement until after Counterclaim-Defendants filed this action.

67. KSR materially breached the KSR Recording Agreements in a number of ways, including but not limited to by failing to "meaningfully consult with [Ms. Almanzar's] attorney during the negotiation of the Distribution Agreement [i.e. the Furnishing Agreement] regarding the terms that pertain to [Ms. Almanzar]," and by failing "to provide [Ms. Almanzar] with a copy of the Distribution Agreement promptly following its execution." KSR did not provide fully-

executed copies of the Atlantic Records Deal agreements or even just the Furnishing Agreement, at any time, much less "promptly." Upon information and belief, KSR's attorney Richard Joseph only provided fully executed copies of the Atlantic Records Deal agreements to Attorney Mason in or around February 2018 after Attorney Mason had to request these documents from Attorney Joseph.

68. Although Attorney Mason was purportedly representing Ms. Almanzar at the signing of the Atlantic Records Deal, the attorney listed for Ms. Almanzar in the Inducement Letter annexed to the Furnishing Agreement was KSR's attorney, Richard Joseph.

69. Attorney Mason did not negotiate with Atlantic Records regarding any provision of any of the agreements constituting the Atlantic Records Deal, nor did Attorney Mason negotiate any provision of these agreements with KSR.

70. The Furnishing Agreement presumed on its face and by its terms that Ms. Almanzar had already signed an exclusive recording agreement with KSR such that KSR had the exclusive right to offer Ms. Almanzar's services for a record contract. Nowhere in either iteration of the KSR Recording Agreement was there any mention of the Management Agreement. Nor was there any mention in the Furnishing Agreement (or any other part of the Atlantic Records Deal) that the sole shareholder of KSR, Shaft, was also the sole owner of WorldStar, which had a separate Management Agreement with Ms. Almanzar that on its face purported to entitle WorldStar to additional percentages of Ms. Almanzar's income from her entertainment activities.

71. The 2016 KSR Recording Agreement was dated as of October 17, 2016 while the Furnishing Agreement and Inducement Letter (and the other ancillary agreements making up the Atlantic Records Deal) were dated as of September 28, 2016.

72. The fact that the KSR Recording Agreement was dated as of October 17, 2016, after the date of the Furnishing Agreement (September 28, 2016) was highly irregular and put Ms. Almanzar at risk professionally with Atlantic Records. As mentioned, Ms. Almanzar does not recall signing the 2015 KSR Recording Agreement – to the extent that she did not sign the 2015 KSR Recording Agreement, KSR would not have had the rights it purported to have in the Furnishing Agreement as of September 28, 2016. In any event, what the Counterclaim-Defendants allege is the operative 2016 KSR Recording Agreement (referenced in the Inducement Letter as the "Artist Agreement") would not have been effective as of the date of the effective dates of the Furnishing Agreement and Inducement Letter.

73. Both before and after it was signed, Shaft repeatedly assured Ms. Almanzar that the Atlantic Records Deal was a good one and operated to her benefit. When Ms. Almanzar questioned whether it was proper for her to receive only 50% of the record royalties paid by Atlantic Records, Shaft deceitfully told her that this was an absolutely standard percentage for a recording artist to receive and repeatedly told her that other famous artists were paid far smaller percentages of their record royalties; in the case of other particular superstars, he said they only received 2 or 3% of their record royalties. Ms. Almanzar, inexperienced in the intricacies of the record business, and deeply trusting of Shaft, was for a time persuaded to believe Shaft's misrepresentations. At all relevant times, Ms. Almanzar was entitled to rely on the complete, undivided loyalty of her manager and she relied on that loyalty to her detriment.

74. Shaft told Ms. Almanzar that the Atlantic Records Deal should be kept a secret until the right time came to announce the deal publicly, presumably after Ms. Almanzar would become better-known in the music industry (possibly after the release of her second mixtape, *Gangsta Bitch Music Vol. 2*). Upon information and belief, the fact that the Atlantic Records

Deal was not publicly announced encouraged Ms. Almanzar not to speak with others about the terms of her record deal and delayed her ability to discover that the terms and structure of her record deal were unfair to her (and conversely, overly generous to KSR/Shaft because KSR was taking an outsize proportion of her record royalties and entertainment-related activities, in addition to the already onerous 20% management commission provided to WorldStar in the Management Agreement).

The Falling Out

75. In or around late 2017, Ms. Almanzar began to question whether Shaft and his entities were making fair deals for her and whether the percentages they were taking were customary in the industry.

76. Once Ms. Almanzar began to suspect that there was something improper about the way Shaft was handling her affairs, she re-contacted Attorney Mason (in or around November or December of 2017). At that point, she had not seen nor spoken to Attorney Mason in over a year.

77. Indeed, for example, in the music publishing agreement that Ms. Almanzar signed with Sony/ATV in or around September of 2017, she was represented by Shaft's lawyer (Richard Joseph) although she had no contact with him whatsoever regarding the Sony/ATV deal. Attorney Richard Joseph was not even at the signing of the Sony/ATV deal – only Shaft was present. This was in keeping with Shaft's practice of using professionals selected and directed by Shaft and insulating Ms. Almanzar from contact with any of her outside attorneys or accountants (in addition to handling and receiving virtually all money received from Ms. Almanzar's performances and entertainment-related activities). Shaft told Ms. Almanzar that he would take care of these affairs. As Ms. Almanzar had come to rely on Shaft, her closest

confidant and fiduciary, for all aspects of her professional life, he encouraged Ms. Almanzar's isolation from all other advisors, whom Shaft was free to control.

78. When Ms. Almanzar received her advance from the music-publishing deal with Sony/ATV directly, Shaft demanded that she turn over half of that amount to him. Ms. Almanzar did not understand why royalties that she earned as a songwriter (or advances paid against royalties that she would earn) should have to be split 50/50 with Shaft when Shaft had not contributed any creative input to the musical compositions, or to the extent he did contribute, he would receive his own songwriter royalties. Not content with the often-unreasonable percentage interest (or splits) in songs Shaft had negotiated for himself despite having limited, if any, creative input, he demanded his kings-ransom from Ms. Almanzar's share as well. This issue, among others, caused Ms. Almanzar to suspect that Shaft had failed to act in accordance with the highest and truest principles of morality, as he was required to do as her fiduciary.

79. It further bears noting, that even under the onerous terms of the KSR Recording Agreements, Shaft would not be entitled to 50% of Ms. Almanzar's publishing income, but rather only 25%. In any event, KSR waived its entitlement to any of Ms. Almanzar's publishing income when it directed its attorney to negotiate and close a publishing deal for Ms. Almanzar which did not include any reference to, or grant any rights (of administration or otherwise) to KSR.

80. Upon information and belief, Shaft, through WorldStar, was taking a greater portion of Ms. Almanzar's income than the Management Agreement called for on its own terms.

81. Upon information and belief, Shaft, through KSR, was taking a greater portion of Ms. Almanzar's income than the KSR Recording Agreements called for on their own terms.

82. Shaft also improperly sought to leverage his relationship with Ms. Almanzar to gain access to publishing and record deals for himself and other artists he managed.

83. In or around December of 2017 Ms. Almanzar intensified her requests to Shaft for statements and accountings that would show a detailed breakdown of income and expenses from her various sources of entertainment-related income. Shaft and his entities did not provide the requested documentation in a timely manner, and it soon became clear that none of the Counterclaim-Defendants were or had been keeping proper financial records.

84. Ms. Almanzar began to suspect that her own employees, who were being paid with income generated from her entertainment activities, were being kept on KSR's books and that she would not receive any credit on her income taxes for paying these and other legitimate costs related to her entertainment activities. She confronted Shaft about this issue as well.

85. When Ms. Almanzar confronted Shaft about these issues, he became defensive. Shaft attempted to convince Ms. Almanzar that the agreements she had entered into were fair and that he was not stealing from her.

86. Ms. Almanzar demanded an immediate accounting from Shaft and his entities, and he failed to provide appropriate documentation. In response to Ms. Almanzar's request for an immediate accounting, Shaft and/or KSR eventually prepared rough, cryptic spreadsheets for individual performance dates in 2017, which failed to include much of the most basic expense information necessary to determine whether even these inadequate sketches were accurate or reliable.

87. Ms. Almanzar realized that Shaft, through WorldStar and KSR, was taking advantage of her. She requested that Attorney Mason take over the day-to-day management of certain financial tasks.

88. Attorney Mason repeatedly requested financial information and documentation from Shaft and KSR regarding monies they had collected on behalf of Ms. Almanzar (after Ms. Almanzar's own requests). Counterclaim-Defendants did not provide information that they were required to provide under the Management Agreement and KSR Recording Agreements, as well as pursuant to their fiduciary duties that they owed to Ms. Almanzar. Upon information and belief, Counterclaim-Defendants delayed providing the limited, inadequate information on appearance income that they did provide because they had never kept proper financial records and needed to recreate statements for past appearances. Counterclaim-Defendants were negligent in their record-keeping responsibilities and breached the fiduciary duty of care they owed to Ms. Almanzar.

89. In further breach of their legal, professional and ethical obligations, Shaft and KSR provided highly misleading financial information to Ms. Almanzar in an effort to conceal their misconduct, and have refused to return all the books and records in their possession so that Ms. Almanzar can determine the full extent of her damages.

90. Ms. Almanzar has made and continues to make demand for return of all of her books, records and other property maintained in the possession, custody or control of Counterclaim-Defendants, who continue to wrongfully withhold all such property.

91. Shaft and KSR/WorldStar controlled all the books and records relating to Ms. Almanzar's professional activities. When they did finally provide some cryptic, incomplete information in or around early 2018, it became clear that KSR and/or its employees had been helping themselves to the "Bank of Almanzar," taking Ms. Almanzar's earnings for purported personal loans. One summary statement provided to Ms. Almanzar at this time showed that in or around June of 2017, an employee of KSR had taken $15,000, which was apparently booked as a

"loan" to the employee from Ms. Almanzar in KSR's records. Unlike most loans, this loan was not formalized with any note, carried no interest, required no collateral and provided no realistic means of repayment. There was no arms-length negotiation between Ms. Almanzar or professionals acting on her behalf on the one hand and KSR or its employee on the other. Rather, KSR simply withdrew the money free of charge. Upon information and belief, several such "loans" were taken from Ms. Almanzar, most or all of which Ms. Almanzar was never even told about. Ms. Almanzar was not aware of this particular loan. KSR's conduct in this regard was an unacceptable breach of the fiduciary duties owed to Ms. Almanzar and constituted self-enrichment by her agents, as well as waste of Ms. Almanzar's assets.

92. By the end of February 2018, Ms. Almanzar, by her conduct and statements, effectively terminated the Management Agreement and KSR Recording Agreements with Shaft and his entities.

93. As set forth in detail above, the conduct of Shaft and his entities, WordStar and KSR, is an egregious and reprehensible breach of all trust and confidence placed in them by Ms. Almanzar.

COUNTERCLAIM I
(Breach of Contract – Management Agreement – Against All Counterclaim-Defendants)

94. Ms. Almanzar repeats, realleges and incorporates each and every allegation contained in paragraphs 1 through 93 of the Counterclaim as though fully set forth herein.

95. WorldStar and Counterclaim-Defendants breached their obligations under the terms of the Management Agreement as detailed above.

96. Specifically, Counterclaim-Defendants breached the Management Agreement by, among other things, failing to appoint Ms. Almanzar an independent business manager; failing to provide monthly accountings; failing to provide documentation of their expenses; failing to

furnish an accounting to Ms. Almanzar within 30 days of her request and, upon information and belief, failing to provide adequate payment to Ms. Almanzar under the terms of that agreement.

97. Counterclaim-Defendants further breached the Management Agreement by failing to regularly review with Ms. Almanzar "all actual and potential venues and engagements of [her] talents and services in the Entertainment Industries and all other matters relating to [her] professional career therein," specifically by failing to review and fully disclose the material terms of the 2015 KSR Recording Agreement, the 2016 KSR Recording Agreement, the Furnishing Agreement, and the other ancillary agreements with Atlantic Records, with Ms. Almanzar. Indeed, WorldStar and/or Counterclaim-Defendants refrained from properly reviewing these engagements with her because they pursued their own self-interests in capturing additional (and unconscionable) portions of record royalties payable to Ms. Almanzar, as well as her copyrights and further income from her entertainment-related activities for KSR in the KSR Recording Agreements.

98. Ms. Almanzar has performed all conditions, covenants, and promises required of her pursuant to the terms of the Management Agreement, except those conditions, covenants, and promises which have been prevented or otherwise excused by the conduct of Counterclaim-Defendants.

99. Additionally, under New York law, there exists an implied covenant of good faith and fair dealing in the Management Agreement, creating a duty in WorldStar and Counterclaim-Defendants to cooperate with Ms. Almanzar to achieve the objectives of the Management Agreement and to refrain from doing anything that would render Ms. Almanzar's performance unreasonably difficult or impossible, or that would prevent her from realizing the benefit of the bargain.

100. WorldStar and Counterclaim-Defendants breached the implied covenant of good faith and fair dealing by, among other acts detailed above, (i) failing to review the material terms of the KSR Recording Agreements with Ms. Almanzar prior to her entering into those agreements; (ii) entering into the KSR Recording Agreements with her without undertaking arms-length negotiations; (iii) giving her the false impression that the KSR Recording Agreements were fair to her, and (iv) not disclosing the existence of the Management Agreement to Attorney Mason.

101. Ms. Almanzar has been damaged by Counterclaim-Defendants' actions in an amount to be determined at trial but believed to exceed Ten Million Dollars ($10,000,000.00).

COUNTERCLAIM II
(Breach of Contract – 2015 KSR Recording Agreement – Against All Counterclaim-Defendants)

102. Ms. Almanzar repeats, realleges and incorporates each and every allegation contained in paragraphs 1 through 101 of the Counterclaim as though fully set forth herein.

103. As detailed above, Ms. Almanzar does not recall signing the 2015 KSR Recording Agreement and Counterclaim-Defendants have not produced a signed copy of this agreement but they allege that she signed it in 2015. To the extent the 2015 KSR Recording Agreement was in fact consummated, Counterclaim-Defendants breached their obligations under that agreement.

104. Counterclaim-Defendants breached their obligations under the terms of the 2015 KSR Recording Agreement as detailed above, including but not limited to, by failing to "meaningfully consult with [Ms. Almanzar's] attorney during the negotiation of the Distribution Agreement [i.e. the Furnishing Agreement] regarding the terms that pertain to [Ms. Almanzar]," and by failing "to provide [Ms. Almanzar] with a copy of the Distribution Agreement promptly following its execution."

105. Counterclaim-Defendants further breached their obligations under paragraph 11 of the 2015 KSR Recording Agreement, which states: "Statements as to royalties payable to you hereunder shall be sent by us to you within ninety (90) days following the end of each semi-annual accounting period ending December 31st and June 30th during which we receive revenues in connection with the exploitation of Records, Videos, Controlled Compositions, and any of our rights hereunder, whether from Distributor or otherwise. We will provide you with a true copy of each royalty/sales statement which we receive from our Distributor with each royalty statement rendered by you. … We shall maintain books of account records hereunder."

106. In breach of their obligations, Counterclaim-Defendants failed to provide statements as to royalties payable to Ms. Almanzar within ninety days of at least five semi-annual periods during which they received revenues in connection with Ms. Almanzar's entertainment activities. Counterclaim-Defendants also failed to maintain proper books of account records under the terms of the 2015 KSR Recording Agreement. In late 2017, Ms. Almanzar demanded an immediate accounting from Shaft and his entities, and Counterclaim-Defendants refused and failed to provide same.

107. Upon information and belief, Counterclaim-Defendants breached the terms of the 2015 KSR Recording Agreement by failing to provide adequate payment to Ms. Almanzar under the payment terms of the agreement.

108. Ms. Almanzar has performed all conditions, covenants, and promises required of her pursuant to the terms of the 2015 KSR Recording Agreement, except those conditions, covenants, and promises which have been prevented or otherwise excused by the conduct of Counterclaim-Defendants.

109. Under New York law, there exists an implied covenant of good faith and fair dealing in the 2015 KSR Recording Agreement, creating a duty in KSR and Counterclaim-Defendants to cooperate with Ms. Almanzar to achieve the objectives of the 2015 KSR Recording Agreement and to refrain from doing anything that would render Ms. Almanzar's performance unreasonably difficult or impossible, or that would prevent her from realizing the benefit of the bargain.

110. KSR and Counterclaim-Defendants breached the implied covenant of good faith and fair dealing by, among other acts detailed above, failing to act in good faith in (i) failing to explicitly acknowledge in the 2015 KSR Agreement the existence of the Management Agreement; (ii) failing to disclose to Attorney Mason the existence of the Management Agreement; (iii) failing to meaningfully consult with any attorney for Ms. Almanzar regarding the terms of the Furnishing Agreement that pertained to her; (iv) interfering with Ms. Almanzar's rights under the Inducement Letter to be substituted for KSR under the Furnishing Agreement, which KSR negotiated; and (v) creating obvious conflict of interest issues in the Atlantic Records Deal, by among other things, having Attorney Richard Joseph represent both Ms. Almanzar and KSR in negotiating all the Atlantic Records Deal agreements.

111. Ms. Almanzar has been damaged by Counterclaim-Defendants' actions in an amount to be determined at trial but believed to exceed Ten Million Dollars ($10,000,000.00).

COUNTERCLAIM III
(Breach of Contract – 2016 KSR Recording Agreement – Against All Counterclaim-Defendants)

112. Ms. Almanzar repeats, realleges and incorporates each and every allegation contained in paragraphs 1 through 111 of the Counterclaim as though fully set forth herein.

113. Counterclaim-Defendants breached their obligations under the terms of the 2016 KSR Recording Agreement as detailed above, including but not limited to, by failing to "meaningfully consult with [Ms. Almanzar's] attorney during the negotiation of the Distribution Agreement [i.e. the Furnishing Agreement] regarding the terms that pertain to [Ms. Almanzar]," and by failing "to provide [Ms. Almanzar] with a copy of the Distribution Agreement promptly following its execution."

114. Counterclaim-Defendants further breached their obligations under paragraph 11 of the 2016 KSR Recording Agreement, which states: "Statements as to royalties payable to you hereunder shall be sent by us to you within ninety (90) days following the end of each semi-annual accounting period ending December 31st and June 30th during which we receive revenues in connection with the exploitation of Records, Videos, Controlled Compositions, and any of our rights hereunder, whether from Distributor or otherwise. We will provide you with a true copy of each royalty/sales statement which we receive from our Distributor with each royalty statement rendered by you. … We shall maintain books of account records hereunder."

115. In breach of their obligations, Counterclaim-Defendants failed to provide statements as to royalties payable to Ms. Almanzar within ninety days of at least three semi-annual periods during which they received revenues in connection with Ms. Almanzar's entertainment activities. Counterclaim-Defendants also failed to maintain proper books of account records under the terms of the 2016 KSR Recording Agreement. In late 2017, Ms. Almanzar demanded an immediate accounting from Shaft and his entities, and Counterclaim-Defendants refused and failed to provide same.

116. Upon information and belief, Counterclaim-Defendants breached the terms of the 2016 KSR Recording Agreement by failing to provide adequate payment to Ms. Almanzar under the payment terms of the agreement.

117. Ms. Almanzar has performed all conditions, covenants, and promises required of her pursuant to the terms of the 2016 KSR Recording Agreement, except those conditions, covenants, and promises which have been prevented or otherwise excused by the conduct of Counterclaim-Defendants.

118. Under New York law, there exists an implied covenant of good faith and fair dealing in the 2016 KSR Recording Agreement, creating a duty in KSR and Counterclaim-Defendants to cooperate with Ms. Almanzar to achieve the objectives of the 2016 KSR Recording Agreement and to refrain from doing anything that would render Ms. Almanzar's performance unreasonably difficult or impossible, or that would prevent her from realizing the benefit of the bargain.

119. KSR and Counterclaim-Defendants breached the implied covenant of good faith and fair dealing by, among other acts detailed above, failing to negotiate and secure the rights purporting to be granted therein as of an effective date prior to the effective date of the Furnishing Agreement for Ms. Almanzar's services, thus putting at risk Ms. Almanzar's rights to enjoy the meager benefits to which she would be entitled under the 2016 KSR Recording Agreement.

120. Upon information and belief, Counterclaim-Defendants also failed to act in good faith in (i) failing to explicitly acknowledge in the 2016 KSR Agreement the existence of the Management Agreement; (ii) failing to disclose to Attorney Mason the existence of the Management Agreement; (iii) failing to meaningfully consult with any attorney for Ms.

Almanzar regarding the terms of the Furnishing Agreement that pertained to her; (iv) interfering with Ms. Almanzar's rights under the Inducement Letter to be substituted for KSR under the Furnishing Agreement, which KSR negotiated; and (v) creating obvious conflict of interest issues in the Atlantic Records Deal, by among other things, having Attorney Richard Joseph represent both Ms. Almanzar and KSR in negotiating all the Atlantic Records Deal agreements.

121. Ms. Almanzar has been damaged by Counterclaim-Defendants' actions in an amount to be determined at trial but believed to exceed Ten Million Dollars ($10,000,000.00).

COUNTERCLAIM IV
(Breach of Fiduciary Duty Against All Counterclaim-Defendants)

122. Ms. Almanzar repeats, realleges and incorporates each and every allegation contained in paragraphs 1 through 121 of the Counterclaim as though fully set forth herein.

123. As Ms. Almanzar's manager, at all times mentioned herein, Shaft and his entities, WorldStar and KSR, owed fiduciary duties to Ms. Almanzar to treat her with the highest degree of good faith and honesty and to zealously protect Ms. Almanzar's interests, to preserve and promote her business opportunities, and not to act contrary to her business interests.

124. Counterclaim-Defendants breached their fiduciary duties as more specifically described above, by, among other things:

a. Inducing Ms. Almanzar to sign the Management Agreement without the benefit of independent counsel and inducing her to keep Shaft and his entity WorldStar as her manager by misrepresenting and failing to disclose material information;

b. Failing to appoint an independent business manager for Ms. Almanzar;

c. Entering into the 2015 KSR Recording Agreement, which was a self-dealing transaction, for which Ms. Almanzar had no counsel, for which she could not give informed consent because she was not provided full and complete disclosure of

material information by her fiduciary agent, and for which there was no arms-length negotiations between KSR (or any of the Counterclaim-Defendants) and Ms. Almanzar;

d. In the 2015 KSR Recording Agreement, taking for a period of 7 albums over 50% of Ms. Almanzar's record royalties, 100% ownership of Ms. Almanzar's copyrights in any audio or video recordings, 50% ownership of Ms. Almanzar's copyrights in any musical compositions, 25% of her royalties from Ms. Almanzar's copyrights in musical compositions, and an additional 20% commission of Ms. Almanzar's earnings in the entertainment industry, when Shaft/WorldStar had a pre-existing fiduciary duty to Ms. Almanzar as her manager and Ms. Almanzar had barely begun pursuing a music career;

e. In the 2015 KSR Recording Agreement, failing to mention the Management Agreement and providing for an additional 20% commission of Ms. Almanzar's non-record royalty earnings in the entertainment industry, which would allow Counterclaim-Defendants to double dip in Ms. Almanzar's earnings, when Shaft/WorldStar had a pre-existing fiduciary duty to Ms. Almanzar as her manager;

f. Failing as Ms. Almanzar's manager to seek a recording contract between a record label and Ms. Almanzar directly which would maximize Ms. Almanzar's record royalties, and entering into the Furnishing Agreement with the self-dealing device of KSR taking a significant portion of Ms. Almanzar's record royalties, without previously attempting to obtain a direct record deal for Ms. Almanzar;

g. Entering into the 2016 KSR Recording Agreement, which was a self-dealing transaction, for which Ms. Almanzar had no counsel (or counsel that was deliberately not provided all material information), for which she could not give informed consent because she was not provided full and complete disclosure of material information by her fiduciary agent, and for which there was no arms-length negotiations between KSR (or any of the Counterclaim-Defendants) and Ms. Almanzar;

h. In the 2016 KSR Recording Agreement, taking for a period of 7 albums over 50% of Ms. Almanzar's record royalties, 100% ownership of Ms. Almanzar's copyrights in any audio or video recordings, 50% ownership of Ms. Almanzar's copyrights in her musical compositions, 25% of her royalties from Ms. Almanzar's copyrights in musical compositions, and an additional 25% commission of Ms. Almanzar's earnings in the entertainment industry by way of the 2016 KSR Recording Agreement, when Shaft/WorldStar had a pre-existing fiduciary duty to Ms. Almanzar as her manager;

i. In the 2016 KSR Recording Agreement, failing to mention the Management Agreement and providing for an additional 25% commission of Ms. Almanzar's non-record royalty earnings in the entertainment industry, which would allow Counterclaim-Defendants to double dip in Ms. Almanzar's earnings, when Shaft/WorldStar had a pre-existing fiduciary duty to Ms. Almanzar as her manager;

j. Inducing Ms. Almanzar to sign the Inducement Letter to the Furnishing Agreement by, among other things, misrepresenting to Ms. Almanzar's putative

attorney that a version of the KSR Recording Agreement had already been signed by Ms. Almanzar and failing to disclose material information to Ms. Almanzar and her attorney, including the existence of the Management Agreement;

k. Inducing Ms. Almanzar to sign the 2016 KSR Recording Agreement by misrepresenting why Ms. Almanzar needed separate counsel for the Atlantic Records Deal and preventing her from obtaining meaningfully independent counsel regarding the 2016 KSR Recording Agreement;

l. Upon information and belief, wrongfully misappropriating income from Ms. Almanzar, including by, among other things, wrongfully making loans to themselves and their employees from Ms. Almanzar's revenues without her knowledge;

m. Failing to exercise reasonable care and competence in handling Ms. Almanzar's financial affairs, including by failing to appoint an independent business manager, and failing to competently manage the collection of Gross Income under the Management Agreement and Gross Compensation under the KSR Recording Agreements, and failing to maintain appropriate business records regarding Ms. Almanzar's career and Counterclaim-Defendants' own expenses;

n. Manipulating and deceiving Ms. Almanzar by representing to her that the KSR Recording Agreements were fair, that their terms were standard in the industry and that they were indeed generous to her;

o. Seeking to leverage their relationship with Ms. Almanzar to gain access to publishing and record deals for themselves and other artists Shaft managed;

p. Failing to provide monthly accountings and willfully and fraudulently concealing their wrongdoing from Ms. Almanzar by providing various excuses for the lack of documentation and eventually providing incomplete financial information meant to conceal their fraud; and

q. Upon information and belief, using Ms. Almanar's money for personal travel, entertainment and expenses.

125. The aforementioned conduct constituted multiple breaches of Counterclaim-Defendants' fiduciary duties because, *inter alia*: (i) the various agreements conferred substantial benefit on Counterclaim-Defendants to the detriment of Ms. Almanzar; (ii) Ms. Almanzar had no independent counsel in connection with either the Management Agreement or the KSR Recording Agreements; (iii) Counterclaim-Defendants made fraudulent representations and omissions in connection with each of these agreements; and (iv) none of these deals with Ms. Almanzar were the result of arms-length negotiations.

126. Counterclaim-Defendants breached their duty of loyalty by elevating their own interests above Ms. Almanzar's interests, including by taking for themselves Ms. Almanzar's most valuable asset—her contract and compensation rights under the Atlantic Recording Agreement and the KSR Recording Agreements.

127. As a result of the activities described above which were undertaken by Counterclaim-Defendants during a time when they were obligated to act as faithful servants in their role as Ms. Almanzar's managers, Counterclaim-Defendants must forfeit all compensation during the time of such faithlessness, and Ms. Almanzar is entitled to disgorge all monies earned by Counterclaim-Defendants at least from the time that the 2015 and 2016 KSR Recording Agreements were signed.

128. As a direct and proximate result of Counterclaim-Defendants' actions and multiple breaches of fiduciary duties, Ms. Almanzar has been damaged in an amount to be determined at trial but believed to be in excess of $10,000,000.00. Ms. Almanzar presently cannot ascertain the exact amount of damages she has sustained as a direct and proximate result of these breaches but they include, without limitation, disgorgement of management commissions in the amount dictated by law and disgorgement of profits from KSR which were collected as a result of Ms. Almanzar's entertainment related activities, recordings, compositions or performances.

129. The activities of Counterclaim-Defendants described above and particularly the efforts undertaken by Shaft and his entities to mislead and deceive Ms. Almanzar regarding the propriety and fairness of the KSR Recording Agreements were willful and malicious, oppressive and taken in conscious disregard of Ms. Almanzar's property rights. Ms. Almanzar is therefore entitled to punitive and exemplary damages against each of the Counterclaim-Defendants in an amount sufficient to punish and deter them from similar future conduct, estimated by Ms. Almanzar to be a minimum amount of $20,000,000.00 or such greater sum as may be assessed by the trier of fact.

130. As a direct and proximate result of Counterclaim-Defendants' breaches of fiduciary duty described herein, Ms. Almanzar is entitled to rescind and/or terminate the Management Agreement and the KSR Recording Agreements.

COUNTERCLAIM V
(Aiding and Abetting Breach of Fiduciary Duty Against KSR and Shaft)

131. Ms. Almanzar repeats, realleges and incorporates each and every allegation contained in paragraphs 1 through 130 of the Counterclaim as though fully set forth herein.

132. To the extent KSR and Shaft are not determined to be alter egos of WorldStar, KSR's and Shaft's acts as set forth above aided and abetted WorldStar's breach of its fiduciary duties owed to Ms. Almanzar.

133. As Ms. Almanzar's manager, at all times mentioned herein, WorldStar owed fiduciary duties to Ms. Almanzar to treat her with the utmost degree of good faith and honesty and to zealously protect Ms. Almanzar's interests.

134. WorldStar breached its fiduciary duties to Ms. Almanzar as alleged hereinabove, and KSR and Shaft had actual knowledge of WorldStar's intentions and conduct and knowingly participated in the breach, by among other things, fraudulently and deceitfully inducing Ms. Almanzar to enter into the KSR Recording Agreements. Shaft and KSR each provided substantial assistance to the violations of WorldStar by inducing Ms. Almanzar to enter into the KSR Recording Agreements, and by entering into those agreements, respectively.

135. Ms. Almanzar has been damaged by KSR's and Shaft's actions in an amount to be determined at trial but believed to be in excess of $10,000,000.00.

COUNTERCLAIM VI
(Fraud and Fraudulent Concealment Against All Counterclaim-Defendants)

136. Ms. Almanzar repeats, realleges and incorporates each and every allegation contained in paragraphs 1 through 135 of the Counterclaim as though fully set forth herein.

137. With full knowledge of the rights of Ms. Almanzar and their fiduciary obligations towards her, Counterclaim-Defendants engaged in the fraudulent conduct described above, including, among other things, (i) by making misrepresentations to Ms. Almanzar regarding why she should have a lawyer in connection with the Atlantic Records Deal, and/or (ii) by failing to disclose material facts regarding the deal and KSR's conflict of interest in purporting to act for both Ms. Almanzar and itself in the Furnishing Agreement and the KSR Recording Agreements;

and (iii) by misrepresenting or intentionally failing to disclose to Attorney Mason the existence of the Management Agreement and to the extent the 2015 KSR Recording Agreement was never signed, that Ms. Almanzar had signed with KSR prior to the Atlantic Records Deal.

138. By reason of their fiduciary relationship with her, Ms. Almanzar relied upon Counterclaim-Defendants to deal fairly and honestly with her in their capacity as fiduciaries. Taking advantage of Ms. Almanzar's misplaced trust, Counterclaim-Defendants deliberately, willfully and repeatedly engaged in the fraudulent conduct described above and materially breached their fiduciary obligations. Counterclaim-Defendants intended to prevent Ms. Almanzar from learning the truth about their self-dealing and intentionally prevented her from engaging in arms-length negotiations with them in entering the KSR Recording Agreements. Ms. Almanzar relied to her detriment on the false misrepresentations and material omissions of Counterclaim-Defendants regarding her need for a lawyer and the fairness of the KSR Recording Agreements.

139. By reason of the foregoing, Ms. Almanzar sustained damage in the amount and manner described in this Counterclaim in an amount to be determined at trial but believed to be in excess of $10,000,000.00.

140. The activities of Counterclaim-Defendants described above and particularly the efforts undertaken by Shaft and his entities to mislead and deceive Ms. Almanzar regarding the propriety and fairness of the KSR Recording Agreements were willful and malicious, oppressive and taken in conscious disregard of Ms. Almanzar's property rights. Ms. Almanzar is therefore entitled to punitive and exemplary damages against each of the Counterclaim-Defendants in an amount sufficient to punish and deter them from similar future conduct, estimated by Ms.

Almanzar to be a minimum amount of $20,000,000.00 or such greater sum as may be assessed by the trier of fact.

COUNTERCLAIM VII
(Unconscionability Against All Counterclaim-Defendants)

141. Ms. Almanzar repeats, realleges and incorporates each and every allegation contained in paragraphs 1 through 140 of the Counterclaim as though fully set forth herein.

142. As Ms. Almanzar's manager, at all times mentioned herein, Shaft and his entities, WorldStar and KSR, owed a fiduciary duty to Ms. Almanzar to treat her with the highest degree of good faith and honesty and to zealously protect Ms. Almanzar's interests.

143. Despite their duty of loyalty and honesty, Counterclaim-Defendants wrongfully induced Ms. Almanzar to enter into the following agreements, the details of which have been set forth above and are incorporated herein:

a. The Management Agreement;

b. The Inducement Letter to the Furnishing Agreement; and

c. The KSR Recording Agreements.

144. Counterclaim-Defendants wrongfully and deceptively represented that all of the above agreements were fair, equitable, and standard in the industry. Counterclaim-Defendants did not suggest that Ms. Almanzar seek meaningful independent legal counsel or speak to anyone about the terms of any of the above agreements and knew that Ms. Almanzar did not do so. In fact, Counterclaim-Defendants took affirmative steps to mislead Attorney Mason about the existence of the Management Agreement and, to the extent the 2015 KSR Recording Agreement had not been signed, about whether Ms. Almanzar had already agreed to the terms of the 2015 KSR Recording Agreement prior to signing the 2016 KSR Recording Agreement and the Atlantic Records Deal. At all times Counterclaim-Defendants knew Ms. Almanzar was

relying on them to honor their fiduciary responsibilities. As a result, there was a gross imbalance in the understanding and acumen of the parties in connection with the above mentioned agreements making them procedurally unconscionable.

145. These agreements are also substantively unconscionable because they unreasonably favor Counterclaim-Defendants in every respect including by containing exceedingly lengthy and unreasonable terms, excessive compensation and engaging in double-dipping, and are highly detrimental to Ms. Almanzar, as set forth in detail above and incorporated by reference herein.

146. Ms. Almanzar did not know the unconscionable nature of these agreements until at least the early part of last year (2018) when she discovered that Counterclaim-Defendants were not keeping appropriate financial records and that they could not justify that the amounts they retained were appropriate, even after several months of time spent preparing recreations of contemporaneous financial statements. In fact, Counterclaim-Defendants intentionally prevented Ms. Almanzar from knowing the true nature of their accounting practices (or lack thereof).

147. As a direct and proximate result of the unconscionable nature of these agreements, Ms. Almanzar is entitled to rescind the Management Agreement and the KSR Recording Agreements.

COUNTERCLAIM VIII
(Fraudulent Inducement Against All Counterclaim-Defendants)

148. Ms. Almanzar repeats, realleges and incorporates each and every allegation contained in paragraphs 1 through 147 of the Counterclaim as though fully set forth herein.

149. As Ms. Almanzar's manager and trusted advisor pursuant to the Oral Management Agreement, Shaft owed Ms. Almanzar fiduciary duties of good faith, honesty, and loyalty, requiring him to make truthful and complete disclosure of information he possessed to

Ms. Almanzar which materially affected her interests. Shaft was forbidden from obtaining an improper advantage at Ms. Almanzar's expense.

150. In or around March of 2015 when Shaft presented Ms. Almanzar with the Management Agreement for signature, he misrepresented to Ms. Almanzar that the terms of the Management Agreement were standard in the industry. He further told her that he had her best interest at heart and would never take advantage of her in any way. He encouraged her to sign the Management Agreement without having explained the material terms to her and without advising her to get an independent lawyer to review the terms of the agreement for her. He also gave Ms. Almanzar the false impression that the Management Agreement was being signed with an entity, WorldStar, that had some connection or affiliation with the popular entertainment and music website, worldstarhiphop.com, when in fact, the entity "World Star Marketing Group, Inc." did not even exist. The name of Shaft's actual entity, MINKOZE.COM LLC, was not disclosed in the Management Agreement and was in fact not disclosed to Ms. Almanzar until well after Counterclaim-Defendants filed this action. And even though MINKOZE.COM LLC had registered an assumed name with State of New York Department of State, the registered name – "World Star Marketing Group" is obviously different from the name appearing on the Management Agreement: WorldStar Marketing Group, Inc. No entity by this name – the name actually appearing on the Management Agreement – is registered to do business in the State of New York.

151. Each of the aforementioned statements were materially false representations or omissions upon which Ms. Almanzar relied to her detriment.

152. The terms of the Management Agreement were not standard in the industry, as the agreement contained an excessively long term and sunset provision for royalties to be earned by

the manager without any specific provision allowing for Ms. Almanzar to terminate the agreement. Shaft failed to disclose that the Management Agreement purported to allow extension for a term of five years at his sole option, which would require further payments to be made to Shaft for an additional five years without any further work or services performed by Shaft. Moreover, this Management Agreement was one of the most important agreements that Ms. Almanzar would sign in her career, so it was in Ms. Almanzar's best interests to have the material terms explained to her and to have independent counsel review and negotiate the agreement for her.

153. Shaft omitted to inform Ms. Almanzar that his entity had no connection or affiliation with the entertainment website, worldstarhiphop.com, and upon information and belief, he knew and intended that the name of the WorldStar entity was misleading to Ms. Almanzar and would induce her to sign the Management Agreement without asking too many questions.

154. Shaft failed to disclose that he in fact did not have Ms. Almanzar's best interests at heart and would take advantage of his position of trust by seeking to enrich himself with over half of any record royalties that would be earned by Ms. Almanzar. Upon information and belief, Shaft knew and planned to take additional percentages of Ms. Almanzar's revenues from the time she signed the Management Agreement.

155. Had Ms. Almanzar been aware of the truth regarding the aforementioned material misrepresentations and omissions (with full disclosure regarding the terms of the Management Agreement, the advisability of having her own lawyer review and negotiate the agreement, the intentions of Shaft, the lack of any affiliation of WorldStar with the popular website, and the

non-existence of any entity by the name Worldstar) she would not have acted the way she did in blindly signing the Management Agreement.

156. When Shaft presented Ms. Almanzar with the 2015 KSR Recording Agreement, he misrepresented to Ms. Almanzar that the terms of the 2015 KSR Recording Agreement were fair and standard in the industry. He encouraged her to enter into the 2015 KSR Recording Agreement – one of the most important agreements that she would enter into in her career – without having explained the material terms to her and without advising her to get an independent lawyer to review the terms of the agreement for her, and to negotiate with Shaft (or his representative) regarding its terms.

157. In or around October 2016 when Shaft presented Ms. Almanzar with the 2016 KSR Recording Agreement, he misrepresented to Ms. Almanzar that the terms of the 2016 KSR Recording Agreement were fair and standard in the industry. He further told her that he was protecting her interests and that she only needed a lawyer for the Atlantic Records Deal for convenience (rather than to review the terms of the 2016 KSR Recording Agreement, or to negotiate and review a deal in which Shaft was personally interested and engaging in self-dealing). He encouraged her to sign the 2016 KSR Recording Agreement – one of the most important agreements that she would sign in her career – without having explained the material terms to her and without advising her to get an independent lawyer to review the terms of the agreement for her, and to negotiate with Shaft (or his representative) regarding its terms. He failed to disclose to Ms. Almanzar that he had put her into contracts which purported to allow him to double-dip (to be paid percentages of her entertainment income separately to different entities that he solely owned and controlled), and he did not disclose this fact both to Ms. Almanzar's putative attorney and to Atlantic Records. To the extent Ms. Almanzar never signed

the 2015 KSR Recording Agreement, Shaft failed to disclose to Attorney Mason that Ms. Almanzar had not previously agreed to the similar terms contained in the 2016 KSR Recording Agreement, and that KSR did not have the rights it purported to have in the Furnishing Agreement as of the effective date of that agreement (September 28, 2016).

158. The terms of both the KSR Recording Agreements were not fair and standard in the industry. Among other things, the KSR Recording Agreements purported to provide a disproportionate share of Ms. Almanzar's record royalties to KSR/Shaft, a disproportionate share of revenue from Ms. Almanzar's other entertainment-related activities (20% in the 2015 KSR Recording Agreement; 25% in the 2016 KSR Recording Agreement; in **addition** to the Management Agreement's 20%, which was not disclosed in either of the KSR Recording Agreements), and a disproportionate share of Ms. Almanzar's own songwriting royalties (25%). Both KSR Recording Agreements provided for an additional "label services fee" for no additional services, and they both lasted for an excessively long term without providing any explicit provision for Ms. Almanzar to terminate the agreements. All of these unfair terms were included during a time when Shaft owed Ms. Almanzar fiduciary duties of loyalty and due care. Importantly, neither of the KSR Recording Agreements mentioned the pre-existing Management Agreement.

159. Upon information and belief, Shaft did not disclose the facts that these terms were unfair and that he was engaging in self-dealing because he was afraid that if Ms. Almanzar understood the full effects of the KSR Recording Agreements (including, but not limited to, Shaft's ability to double dip in her income from entertainment activities), she would renegotiate with him/KSR or terminate her relationship with him and/or WorldStar.

160. Had Ms. Almanzar been aware of the truth regarding the aforementioned material misrepresentations and omissions (with full disclosure regarding the terms of the KSR Recording Agreements and their unfairness, the advisability of having her own lawyer review and negotiate the terms of the KSR Recording Agreements prior to her signing them, and the self-dealing of Shaft) she would not have acted the way she did in blindly signing the 2016 KSR Recording Agreement (or the 2015 KSR Recording Agreement, if in fact she did sign that agreement). She would not have entered into either of the KSR Recording Agreements and she would have demanded that they be renegotiated or terminated prior to entering into the Atlantic Records Deal.

161. Shaft knew that Ms. Almanzar would rely on each of the above material misrepresentations and omissions, and he made such misrepresentations and omissions with the intention that Ms. Almanzar would rely on them.

162. As a direct and proximate result of the fraudulent nature of these transactions, Ms. Almanzar is entitled to rescind the Management Agreement and the KSR Recording Agreements.

163. Shaft's conduct, as alleged herein was oppressive, malicious and fraudulent and undertaken in conscious disregard of Ms. Almanzar's property rights. Ms. Almanzar is therefore entitled to an award of punitive and exemplary damages in an amount sufficient to punish and deter Shaft, WorldStar and KSR from similar future conduct.

COUNTERCLAIM IX
(Unjust Enrichment Against All Counterclaim-Defendants)

164. Ms. Almanzar repeats, realleges and incorporates each and every allegation contained in paragraphs 1 through 163 of the Counterclaim as though fully set forth herein.

165. In undertaking the wrongful acts alleged, Counterclaim-Defendants have been and were unjustly enriched to the detriment and loss of Ms. Almanzar, including but not limited to, diverting to themselves and away from Ms. Almanzar, Ms. Almanzar's contractually promised royalties and other monetary entitlements set forth in the Management Agreement and the KSR Recording Agreements.

166. As a direct and proximate result of Counterclaim-Defendants' unjust enrichment as alleged herein, Ms. Almanzar is entitled to restoration and disgorgement from Counterclaim-Defendants of all income wrongfully diverted from Ms. Almanzar, including but not limited to, all gains that Counterclaim-Defendants have realized from collecting and keeping Ms. Almanzar's royalties and other monetary entitlements set forth in the Management Agreement and the KSR Recording Agreements.

167. Ms. Almanzar has been damaged by Counterclaim-Defendants' actions in an amount to be determined at trial.

COUNTERCLAIM X
(Accounting Against All Counterclaim-Defendants)

168. Ms. Almanzar repeats, realleges and incorporates each and every allegation contained in paragraphs 1 through 167 of the Counterclaim as though fully set forth herein.

169. A fiduciary or other trust relationship exists between Ms. Almanzar on the one hand and Counterclaim-Defendants on the other hand for which an accounting of Counterclaim-Defendants' books and records is appropriate to the extent necessary to trace the royalties and other monies due and owed to Ms. Almanzar as described above.

170. Counterclaim-Defendants also have duties under the Management Agreement and KSR Recording Agreements with Ms. Almanzar which obligate the Counterclaim-Defendants to

disclose all financial information material to Ms. Almanzar's royalty and other monetary entitlement.

171. Upon information and belief, Counterclaim-Defendants have wrongfully collected and/or misappropriated income from Ms. Almanzar.

172. Counterclaim-Defendants' failure to provide accountings to Ms. Almanzar is a direct and material breach of the Management Agreement and the KSR Recording Agreements.

173. In the absence of an accounting of Counterclaim-Defendants' books and records under the Management Agreement and the KSR Recording Agreements, Ms. Almanzar cannot know the precise amount of monies received by Counterclaim-Defendants (in the form of royalties or otherwise) from the exploitation of Ms. Almanzar's talents and services in the entertainment industry.

174. To the extent that Counterclaim-Defendants WorldStar and KSR are established companies, which they purport to be, such established companies customarily keep detailed statements of transactions as a matter of proper business practices.

175. As a result of the foregoing, there are past, present, and future transactions arising from the commercial exploitation of Ms. Almanzar's talents and services in the entertainment industry, which have and will produce royalty income to Ms. Almanzar, and the right to an accounting from Counterclaim-Defendants should therefore be ordered by this Court to prevent further injury to Ms. Almanzar.

176. In the absence of an Order from this Court directing an accounting from Counterclaim-Defendants, Ms. Almanzar will not be able to adequately account for the full amount of income that Counterclaim-Defendants have wrongfully misappropriated from her.

COUNTERCLAIM XI
(Declaration that the Management Agreement is Void and/or Subject to Rescission)

177. Ms. Almanzar repeats, realleges and incorporates each and every allegation contained in paragraphs 1 through 176 of the Counterclaim as though fully set forth herein.

178. The actions of WorldStar, Shaft and KSR set forth above constitute a breach of Counterclaim-Defendants' contractual obligations to Ms. Almanzar under the Management Agreement that is so material and fundamental as to go to the very core purpose of the Management Agreement, and that is not capable of cure.

179. Counterclaim-Defendants' acts as set forth above constitute breaches of the fiduciary duties Counterclaim-Defendants owe to Ms. Almanzar as her managers.

180. Counterclaim-Defendants' acts as set forth above thus constitute a repudiation of the Management Agreement by Counterclaim-Defendants, which relieves Ms. Almanzar of any further obligation to perform services or grant rights thereunder.

181. In the alternative, Counterclaim-Defendants' acts as set forth above constitute grounds for Ms. Almanzar to rescind the Management Agreement.

182. An actual and genuine controversy has arisen and now exists between Ms. Almanzar and Counterclaim-Defendants concerning their rights and duties under the Management Agreement.

183. Ms. Almanzar therefore seeks a declaratory judgment that the Management Agreement has been repudiated by reason of Counterclaim-Defendants' material breaches thereof, and that Ms. Almanzar no longer has any obligations to Counterclaim-Defendants under that agreement, or in the alternative that the Management Agreement is subject to rescission by Ms. Almanzar at her election because of fraud or the breaches of fiduciary duty committed by Counterclaim-Defendants as detailed above.

COUNTERCLAIM XII
(Declaration that the KSR Recording Agreements are Void and/or Subject to Rescission)

184. Ms. Almanzar repeats, realleges and incorporates each and every allegation contained in paragraphs 1 through 183 of the Counterclaim as though fully set forth herein.

185. The actions of WorldStar, Shaft and KSR set forth above constitute a breach of Counterclaim-Defendants' contractual obligations to Ms. Almanzar under the KSR Recording Agreements that is so material and fundamental as to go to the very core purpose of the KSR Recording Agreements, and that is not capable of cure.

186. Counterclaim-Defendants' acts as set forth above constitute breaches of the fiduciary duties Counterclaim-Defendants owe to Ms. Almanzar as her managers.

187. Counterclaim-Defendants' acts as set forth above thus constitute a repudiation of the KSR Recording Agreements by Counterclaim-Defendants, which relieves Ms. Almanzar of any further obligation to perform services or grant rights thereunder.

188. In the alternative, Counterclaim-Defendants' acts as set forth above constitute grounds for Ms. Almanzar to rescind the KSR Recording Agreements.

189. An actual and genuine controversy has arisen and now exists between Ms. Almanzar and Counterclaim-Defendants concerning their rights and duties under the KSR Recording Agreements.

190. Ms. Almanzar therefore seeks a declaratory judgment that the KSR Recording Agreements have been repudiated by reason of Counterclaim-Defendants' material breaches thereof, and that Ms. Almanzar no longer has any obligations to Counterclaim-Defendants under those agreements, or in the alternative that the KSR Recording Agreements are subject to rescission by Ms. Almanzar at her election because of fraud or the breaches of fiduciary duty committed by Counterclaim-Defendants as detailed above.

COUNTERCLAIM XIII
(Negligence)

191. Ms. Almanzar repeats, realleges and incorporates each and every allegation contained in paragraphs 1 through 190 of the Counterclaim as though fully set forth herein.

192. As Ms. Almanzar's personal and business managers, Counterclaim-Defendants owed Ms. Almanzar a duty of care and a duty of loyalty. These duties of care and loyalty included, without limitation, an obligation to competently represent Ms. Almanzar in all aspects of her career, including in supervising the appearances and touring undertaken by Ms. Almanzar, keeping appropriate financial records regarding Ms. Almanzar's professional appearances, keeping appropriate records of expenses in connection with Ms. Almanzar's professional appearances, and keeping Ms. Almanzar informed regarding the expenses associated with her various professional appearances.

193. Counterclaim-Defendants breached their duty of reasonable care to Ms. Almanzar in that they failed to exercise the degree of skill and diligence commonly exercised by an ordinary member of the personal and business manager communities in supervising Ms. Almanzar's touring revenues, in the handling and receiving of monies paid for Ms. Almanzar's performances and appearances, in the failure to keep proper documentation of expenses, and in the accounting practices employed by Counterclaim-Defendants as her personal and business managers.

194. As a direct and proximate result of Counterclaim-Defendants' negligence, Ms. Almanzar has suffered actual and ascertainable damages in an amount to be determined at trial.

WHEREFORE, Ms. Almanzar requests that the Court grant the following relief:

a. Plaintiffs/Counterclaim-Defendants take nothing by way of their FAC and that the FAC be dismissed with prejudice;

b. Ms. Almanzar be awarded all compensatory monetary damages available at law, in an amount to be determined at trial, but in no event less than $10,000,000.00;

c. Ms. Almanzar be awarded punitive damages as a result of Plaintiffs'/Counterclaim-Defendants' egregious and willful conduct described herein, or conscious disregard of the rights of Ms. Almanzar or conduct so reckless as to amount to such disregard as described herein, in an amount to be determined at trial, but in no event less than $20,000,000.00;

d. Rescission of the Management Agreement and the KSR Recording Agreements;

e. An Order compelling Plaintiffs/Counterclaim-Defendants to provide Ms. Almanzar with a detailed and accurate accounting;

f. An Order of restitution compelling Plaintiffs/Counterclaim-Defendants to pay any money or thing owing to Ms. Almanzar;

g. Declaratory Judgment that the Management Agreement and the KSR Recording Agreements have been repudiated by reason of Plaintiffs'/Counterclaim-Defendants' material breaches thereof, and that Ms. Almanzar no longer has any obligations to Plaintiffs/Counterclaim-Defendants under those agreements, or in the alternative that Ms. Almanzar has terminated the Management Agreement and the KSR Recording Agreements, or in the alternative that the Management Agreement and the KSR Recording Agreements are subject to rescission by Ms. Almanzar at her election as a result of Counterclaim-Defendants' fraud or breaches of fiduciary duties;

h. Ms. Almanzar be awarded her full costs and attorneys' fees incurred herein to the full extent permissible by law; and

i. For such other and further relief as the Court may deem just and proper.

Dated: New York, New York
June 24, 2019

Respectfully submitted,

ROBINS KAPLAN LLP

/s/ Ofer Reger
Paul V. LiCalsi
Ofer Reger
Reena Jain
399 Park Avenue, Suite 3600
New York, New York 10022
Tel: (212) 980-7400
Fax: (212) 980-7499
plicalsi@robinskaplan.com
oreger@robinskaplan.com
rjain@robinskaplan.com

Attorneys for Defendant/Counterclaim-Plaintiff Belcalis Almanzar p/k/a Cardi B

EXHIBIT 1

MANAGEMENT AGREEMENT

March 3rd 2015
~~August [ ], 2014~~

Belcalis M. Almanzar

Re: WorldStar Marketing Group, Inc. with Belcalis M. Almanzar p/k/a "Cardi B."

Dear Belcalis:

The following, when signed by you and by an authorized representative of WorldStar Marketing Group, Inc. ("Manager"), will constitute a complete and binding agreement (this "Agreement") between you and Manager with respect to your engagement of Manager as your exclusive personal manager:

1. Territory

The world (the "Territory").

2. Scope of Manager's Activities

(a) During the Term (as hereinafter defined), Manager shall be your exclusive personal manager throughout the Territory and shall confer with, counsel, guide and advise you in all matters pertaining to your career in the entertainment and amusement industries, including, without limitation, in connection with your live performances, personal appearances, recording and producing of musical and lyrical material, music publishing, motion pictures, legitimate theater, television, concerts, the use of your name, likeness and biographical information for commercial or promotional purposes and the sale, lease or other disposition of musical, literary, dramatic or other artistic material which you may create, compose or acquire (collectively the "Entertainment Industries").

(b) Manager's services hereunder shall include, without limitation, the following:

(i) regularly reviewing with you all actual and potential venues and engagements of your talents and services in the Entertainment Industries and all other matters relating to your professional career therein;

(ii) assisting you in the selection of, and preliminary negotiation with, the following: theatrical, booking and similar agencies; other third parties that seek and/or procure employment and engagement for artists; and other potential users of your talents and services;

(iii) acting as your liaison to television, video, record, publishing and merchandising companies, and other actual and potential users of your talents and services

(iv) counseling and assisting you in the development of a professional act;

(v) assisting you in the selection and procurement of artistic and literary material for your exploitation as a performer, artist and songwriter; and

(vi) assisting you in the selection and engagement of artists, producers, engineers, mixers, writers, musical directors, choreographers, vocal coaches, video directors and producers, and other creative and technical personnel.

(c) You acknowledge and agree that Manager's services hereunder shall not be exclusive to you and that nothing contained herein shall prohibit Manager from providing similar services for others or from engaging in other business activities during the Term.

3. Term

(a) The term of this Agreement (the "Term") shall consist of an initial period of one (1) year commencing on the date hereof (the "First Contract Period") plus the additional contract period(s), if applicable, by which the Term may be extended by Manger's exercise of the options granted to Manager in the following paragraph 3(b).

(b) You hereby irrevocably grant to Manager the options (the "Options") to extend the Term for up to four (4) consecutive additional periods of one (1) year each, the first period to commence immediately upon the expiration of the First Contract Period (the "Second Contract Period"), the second period to commence immediately upon the expiration of the Second Contract Period (the "Third Contract Period"), the third period to commence immediately upon the expiration of the Third Contract Period (the "Fourth Contract Period") and the fourth period to commence immediately upon the expiration of the Fourth Contract Period. Each Option shall be deemed to be exercised by Manager unless Manager shall give you written notice to the contrary at any time prior to the date that the First Contract Period, Second Contract Period, Third Contract Period or Fourth Contract Period, as applicable, would otherwise expire.

4. Manager's Commission

(a) In consideration for the services rendered by Manager hereunder, you shall pay a commission ("Manager's Commission") to Manager of twenty percent (20%) of your Gross Income (as hereinafter defined).

(b) As used in this Agreement, "Gross Income" shall mean any and all gross monies or other considerations earned, paid or payable to you or on your behalf (including, without limitation, paid pr payable to entities in which you have an interest) in connection with your services and activities in the Entertainment Industries, including, without limitation, your salaries, earnings, fees, royalties, advances, gifts, profits, guarantees and net recoveries of claims for damages (whether by judgment, settlement or decree). Notwithstanding the foregoing sentence, Gross Income shall not include, and there shall be deducted therefrom, the following:

(i) all income that you earn from live dance performances that are conducted within the New York City metropolitan area; provided, however that any income from the recording, broadcast, streaming or other exploitation of any such performance shall be included in Gross Income;

(ii) all music publishing income retained by or payable to third parties including, without limitation, songwriter royalties payable to third party co-writers and publishing company administration fees;

(iii) actual recording, production and other recoupable costs of master recordings and audio visual works other than payments retained by you (e.g., musicians fees and producers fees) as a portion of those recording costs provided, however, not more than sixty five (65%) percent of any "all-in" recording or production fund payable to you shall be deemed to be non-commissionable costs for purposes of this paragraph, and the remainder of such fund shall be deemed Gross Income hereunder;

(iv) advances and royalties paid to (A) third party record producers and (B) third party producers and directors of audio visual works;

(v) income derived by any entity in which Manager has a proprietary or income interest, but only to the extent of Manager's interest therein;

(vi) reasonable "tour expenses" in connection with your concerts and other live engagements, including, without limitation, costs incurred in connection with (A) opening or other support acts, (B) hiring and transporting "sound and light" facilities (e.g., video projection and special effects equipment), costumes, props and other similar or related costs, and (C) the hiring, transporting and accommodating of technical and creative personnel, including, without limitation, security personnel, engineers, choreographers, costumers, musical directors, sound and lighting engineers, and personnel required to erect, dismantle, transport and operate sound, light, and video facilities and other similar or related equipment;

(vii) any income derived by you from non-entertainment related activities (except to the extent that you also perform entertainment services in connection therewith); and

(viii) income derived from agreements entered into after the expiration or termination of the Term. In this connection, all agreements substantially negotiated during the Term and entered into within six (6) months thereafter shall be deemed entered into during the Term.

(c) Manager's entitlement to Manager's Commission after the Term which Commission is derived from agreements entered into or services performed during the Term shall continue for an additional period (the "Post Term Period") equal to the actual duration of the Term. By way of illustration only, if the Term extends for three (3) years, then Manager's participation in such Gross Income received by you after the Term shall extend for a Post Term Period equal to three (3) years. After the expiration of the Post Term Period, Manager shall no longer be entitled to any portion of the Manager's Commission or otherwise receive any portion of your Gross Income.

(d) Notwithstanding anything to the contrary contained in this paragraph 4:

(i) with respect to audio and/or video performances released during the Post Term Period which are derived from master recordings embodying your performances which were recorded during the Term, Manager's Commission shall be reduced to ten (10%) percent of your Gross Income during the Post Term Period; and

(ii) with respect to audio and/or video performances released during the Post Term Period which are derived from master recordings embodying your performances which were recorded during the Post Term Period, Manager's Commission shall be reduced to five (5%) percent of your Gross Income during the Post Term Period.

5. Collection of Monies. Accountings and Audit Rights

(a) All Gross Income shall be paid to and collected by your independent business manager ("Business Manager"), if applicable, and such Business Manager will render monthly accountings and payment hereunder (if any) to you and Manager. You hereby initially designate Manager as your initial Business Manager. Said Business Manager is hereby authorized and directed by you to pay Manager's Commission (and all reimbursable expenses pursuant to paragraph 6 hereof) directly to Manager. Any and all Gross Compensation received directly by you or Manager shall be delivered by you or Manager, as the case may be, to Business Manager within five (5) business days following your or Manager's receipt thereof. Within seven (7) business days of receipt of such Gross Income, Business Manager shall pay to Manager the Manager's Commission.

(b) Upon written notice by either party to the other, the party to whom such notice is addressed shall furnish an accounting to the other party of all transactions between the parties since the last such accounting, within thirty (30) days of such request; provided, however, that neither party shall be obligated to account to the other more than twelve (12) times in any one (1) year period. Each party shall have the right to reasonable inspection of the other's books and records which relate to the subject matter hereof in order to verify the accuracy of such accountings, provided that each party shall be deemed to have consented to all accountings rendered by the other hereunder and said accountings shall be binding upon each party and not subject to objection for any reason unless specific written objection, stating the basis thereof, is given to the other party within two (2) years after the date rendered.

6. Management Expenses:

(a) You (or Business Manager) will reimburse Manager for any and all expenses incurred by Manager on your behalf in connection with Manager's services performed hereunder, provided that: (i) you will not be responsible for any portion of Manager's overhead expenses; and (ii) subject to paragraph 6(a)(iii) of this Agreement, if Manager incurs travel expenses on behalf of both you and other of Manager's clients, you shall be responsible only for your pro rata share of such expenses.

(b) Manager shall furnish you and Business Manager with appropriate documentation of Manager's expenses within thirty (30) days after the date such expense is

incurred, and reimbursement of such expenses, as appropriate, shall be made in connection with the monthly accountings referred to in paragraph 5(a) of this Agreement.

7. Manager's Power of Attorney

You hereby grant Manager a limited power of attorney and appoint Manager as your true and lawful agent and attorney-in-fact to do for you and on your behalf the matters related to this Agreement. Manager's power of attorney shall be expressly limited to live appearance "one-nighters" or a series of live appearance "one-nighters," until such time that it is expanded by you. Such appointment is coupled with an interest.

8. Representations and Warranties

(a) You represent, warrant and agree that:

(i) You are not under any disability, restriction or prohibition, either contractual, by force of any applicable law or otherwise, with respect to your right to execute this Agreement or to perform fully all of its terms and conditions; and

(ii) You have the full right, power and authority to (A) use the name "Cardi B." or any other name under which you perform entertainment services (the "Name") and (B) do business thereunder, and Manager's permissible activities on your behalf under this Agreement will not infringe upon, violate or interfere with the rights, whether statutory or otherwise, of any third party. For the avoidance of doubt, this Agreement shall govern you whether you use any other name or are a member of any performing group.

(b) Manager represents and warrants that Manager is not under any disability, restriction or prohibition, either contractual or otherwise, with respect to Manager's right to execute this Agreement or to perform fully its terms and conditions.

(c) You hereby acknowledge that Manager is not an employment agent, theatrical agent, or licensed artists' manager, and that Manager has not promised to procure employment or engagements for you, and that Manager shall not be obligated to procure or to attempt to procure any employment or engagements for you hereunder. You shall be solely responsible for payment of all necessary commissions to booking or similar agencies.

(d) You and Manager each warrant and represent that in executing this Agreement, each of you (i) have relied solely upon your own judgment, belief and knowledge and the advice and recommendations of your own independently selected and retained counsel concerning the nature, extent and duration of your respective rights and obligations hereunder, and (ii) have not been influenced to any extent whatsoever in executing this Agreement by any representations or statements made with respect to any matters (other than as specifically set forth herein) by the other party or representatives of such party.

9. Indemnification

You and Manager agree to indemnify, and hereby do indemnify, save and hold the other harmless from all loss, damage and expenses (including legal costs and reasonable

attorney's fees) arising out of or connected with any claim by any third party which shall be inconsistent with any agreement, warranty or representation made by you or Manager in this Agreement, provided such claim is reduced to a final adverse judgment or settled with the prior written consent of the indemnifying party. You and Manager each agree to reimburse the other, on demand, for any payment made at any time after the date hereof with respect to any liability to which the foregoing indemnity applies.

10. Cure

In order to make specific and definite, and/or to eliminate, if possible, any controversy which may arise between the parties hereunder, you and Manager agree that if at any time you or Manager, as applicable, believe that the terms of this Agreement are not being fully and faithfully performed hereunder, you or Manager, as applicable, will so advise the other in writing by registered or certified mail, return receipt requested, of the specific nature of any such claim, non-performance or misfeasance, and the party receiving such notice shall have a period of thirty (30) days after receipt thereof within which to cure such claimed breach.

11. Independent Counsel

You and Manager specifically acknowledge that each of you (i) have been advised to seek your own independent counsel concerning the interpretation and legal effect of this Agreement and (ii) have either obtained such counsel or have intentionally refrained from doing so and have knowingly and voluntarily waived such right.

12. Notices

All notices pursuant to this Agreement shall be in writing and shall be given by registered or certified mail, return receipt requested or telegraph (prepaid) at the respective addresses set forth herein or such other address(es) as may be designated by either party. Such notices shall be deemed given when mailed or delivered to a telegraph office, except that a notice of change of address shall be effective only from the date of its receipt.

13. Miscellaneous:

(a) This Agreement contains the entire understanding of the parties hereto relating to the subject matter hereof and cannot be changed or terminated, except by an instrument signed by the parties hereto. A waiver by either party of any term or condition of this Agreement in any instance shall not be deemed or construed as a waiver of such term or condition for the future, or of any subsequent breach thereof. All remedies, rights, undertakings, obligations, and agreements contained in this Agreement shall be cumulative and none of them shall be in limitation of any other remedy, right, undertaking, obligation or agreement of either party. This Agreement shall not be construed to create a partnership or joint venture between you and Manager. The headings in this Agreement are provided for convenience only and are not to be used in construing this Agreement.

(b) This Agreement has been entered into in the State of New York, and the validity, interpretation and legal affect of this Agreement shall be governed by the laws of the State of New York applicable to contracts entered into and performed entirely within that State,

without giving effect to conflict of law principles. In any action or proceeding arising from or relating to this Agreement, the parties agree that the jurisdiction and venue shall be exclusively in the federal and state courts located in the County of New York, State of New York, and each party waives any objection it may have with respect to the jurisdiction of such courts or the inconvenience of such forum or venue.

(c) If you form a corporation or other legal entity during the Term or use an existing corporation for the purposes of furnishing and exploiting your artistic talents, you agree that such corporation or legal entity is hereby deemed to have entered into a management agreement with Manager from its inception identical in all respects to this Agreement (except as to the parties thereto). In such event the gross earnings of such corporation or other entity shall be included as part of the Gross Income.

Very truly yours,

WorldStar Marketing Group, Inc.

By: _____
Name: Klenord Raphael
Title: President and CEO

CONSENTED AND AGREED TO:

Belcalis M. Almanzar p/k/a Cardi B.

_____
Name: Belcalis M. Almanzar
S.S.#:
Birthdate: [redacted]1992
Address:

Sworn to before me this 3rd day of March 2015

_____

CARLINE E LEGROS
Notary Public, State of New York
No. 01LE6225912
Qualified in Nassau County
Commission Expires July 26, 2018

EXHIBIT 2

RECORDING AGREEMENT

This is an Agreement ("Agreement") dated as of October 17, 2016, between KSR Group, LLC ("we" "us"), whose address is 244 fifth Avenue, Suite K261, New York, NY 10001, and Belcalis Almanzar p/k/a Cardi B ("you"", "your"), whose address is: 1222 Nelson Ave, 2 Floor, Bronx, NY 10452 whereby you agree to render your services exclusively to us as a recording artist for the Term hereof throughout the universe (the 'Territory"). Until such time as a more formal agreement is entered into between the parties the terms and conditions of this Agreement shall govern and be a binding and enforceable contract between you and us. More particularly:

1. **Distribution Agreement:** We shall have the exclusive right during the Term to solicit a recording agreement with third party record label (the "Distributor") pursuant to which we shall have the right to (i) deliver recordings to the Distributor for distribution through all channels of trade throughout any and all territories throughout the world; and/or (ii) furnish your exclusive services as a recording artist in the music industry to the Distributor, and otherwise assign all of our rights under this Agreement to Distributor (the agreement with the Distributor and us is referred to herein as the "Distribution Agreement"). Upon our entering into a Distribution Agreement, then notwithstanding anything to the contrary contained in this Agreement it is of the essence that you agree to the following:

(i) the Term hereof shall be deemed extended to be co-extensive with the term of the Distribution Agreement, plus an additional one hundred and twenty (120) days;

(ii) you shall comply with all of the terms and conditions of this Agreement and the Distribution Agreement to enable us to fulfill all of our obligations under the Distribution Agreement. We shall provide you with a copy of the Distribution Agreement promptly following its execution and shall meaningfully consult with your attorney during the negotiation of the Distribution Agreement regarding the terms that pertain to you.

(iii) you hereby agree to duly execute any letters of inducement and any other documents necessary or desirable to effectuate the terms of this Agreement or of the Distribution Agreement that may be required by the Distributor or us.

(iv) in the event of any inconsistency between the definitions in this Agreement and the definitions contained in the Distribution Agreement (if applicable), then the definitions of the Distribution Agreement shall control.

2. **Term/Recording/Delivery Commitment:** The Initial Term of this Agreement shall commence on the date hereof and continue for a period of twelve (12) months from date you deliver to us a minimum of two (2) recordings that are commercially and technically acceptable. You grant us six irrevocable and consecutive options to extend the Term hereof and you will deliver one additional Album to us during each option period. The first Option Period shall be deemed to commence upon expiration of the Initial Term. Each option period thereafter will be deemed to have been automatically exercised by us on the date (the "Option Date") occurring one year after our release in the United States of the immediately preceding Album in accordance with all of the terms and conditions hereof. Each such option shall be deemed automatically exercised by us as of the Option Date unless we notify you in

writing (the "Non-Exercise Notice") that we do not wish to exercise the option concerned. In addition, we may notify you in writing (the "Termination Notice") that we wish to terminate the term of this agreement. Also, if you do not deliver an Album to us in accordance with all of the terms and conditions hereof in any two-year period, we will have the right to terminate the term of this agreement by written notice to you. If we send you a Non-Exercise Notice or Termination Notice or we terminate the term pursuant to the preceding sentence or as otherwise provided herein, the term will end on the earlier of the next Option Date or the date set forth in the notice concerned, and we will have no liability to you for any undelivered Albums. If we do not send you a Non-Exercise Notice, Termination Notice or Non-Delivery Notice, the term will end nine months after we release the last option Album hereunder (i.e., the fifth Album under this agreement). To be clear, if we exercise all of our options you will record and deliver a minimum total of seven (7) Albums, or six (6) Albums and one EP; provided, that we may elect to reduce your minimum recording commitment to Delivery of an EP rather than an Album in any Option Period, in which event the applicable Option Period will continue until one (1) year after the commercial release of the EP in the United States. You shall Deliver to us one Album not later than four (4) months from the commencement of each Option Period. We shall have the right to suspend any term of this Agreement if you fail or refuse to comply with any material term contained herein. We shall have the right to extend the Initial Term for a period of up to 120 days if we have commenced good faith negotiations with a Distributor for the purpose of entering into a Distribution Agreement. We shall be deemed to have commenced good faith negotiations if we have received a written offer from a Distributor to enter into a Distribution Agreement during the Initial Term.

3. **Sharing of Royalties/Advances from Distributor/Advances:** If we enter into a Distribution Agreement we shall instruct the Distributor to account to you directly for fifty (50%) percent of all net advances and royalties otherwise payable to us pursuant to the Distribution Agreement. You shall be subject to all of the same provisions affecting us in connection with royalties accounted to us by Distributor

4. **Royalties from Our Exploitation of "Revenue Pool Products":** Provided you are not in breach of this Agreement, and solely with respect to Initial Recordings and Videos ("Revenue Pool Products") we exploit (as opposed to the exploitation recordings by a Distributor pursuant to a Distribution Agreement), we shall account and pay to you the royalties as described and defined in the attached Exhibit "1", incorporated herein by this reference.

5. **Revenue Share**: You shall account and pay to us 25% (our "Revenue Share") of all compensation earned by you in Entertainment Industry resulting from any agreements substantially negotiated during the Term of this Agreement or within 6 months following the end of the Term, including live concert performances, merchandising, endorsements, songwriting, music publishing (but music publishing and songwriting is excluded in the event we acquire music publishing rights from you), record producing, scripted and non-scripted television performances, dramatic acting, any exploitation of Artist's name or likeness in any capacity or for any reason ("Gross Compensation"). In calculating our share of Gross Compensation, the following will be excluded: a total of up to 25% of Gross Compensation in the aggregate for personal management, business management, talent agent, broker, commissions or fees; and except with respect only to Gross Compensation from live touring revenues, a total of up to 35% of Gross Compensation in the aggregate for all such commissions or fees; provided, however, that our share of your Gross Compensation

from touring and all live music performances will be subject to a floor of not less than 10% of Gross Compensation from such activities. The Revenue Share is inclusive of any sums payable to the Distributor in connection with your activities in the Entertainment Industry.

(a) You shall account the Revenue Share to us as and when you are paid, or credited with, Gross Compensation during and after the Term hereof pursuant to (i) any and all contracts, engagements and commitments entered into or negotiated during the Term hereof (other than this agreement); including, any and all extensions, additions, substitutions, renewals, replacements, modifications and amendments of all such contracts, engagements and commitments; and, (ii) any and all judgments awards, settlements, payments, damages and proceeds relating to any suits, claims, actions, proceedings or arbitration proceedings arising out of alleged breach, non-performance or infringement by others of any of the contracts, engagements, commitments, other agreements or rights referred to in subparagraph (i), above.

(b) Promptly upon our entering into a Distribution Agreement, you shall appoint a business manager that is experienced in the entertainment industry who will be authorized and directed to pay the Revenue Share to us per the terms hereof as and when you receive, or are credited with, Gross Compensation. The Revenue Share shall be accounted and paid to us promptly, but not later than thirty (30) days, after you are paid or credited with Gross Compensation. The assignment to us of the Revenue Share is irrevocable and is intended to create an agency coupled with an interest. You shall submit Letters of Direction to any third party with whom you may expect to receive Gross Compensation in connection with any contracts and engagements in the Entertainment Industry instructing such party to pay the Revenue Share to us directly on your behalf. Should you, or anyone with whom you enter into an agreement and engagement in the Entertainment Industry fail to account and pay us the Revenue Share in connection with Gross Compensation, we shall, in addition to any other remedies, all of which are reserved, have the right to deduct the unpaid Revenue Share from any monies due to you under this, and any other agreement between you and us.

(c) The term "Entertainment Industry" shall include any and all branches of such fields now existing or hereafter developed, conceived, or used, including, but without limiting the generality of the foregoing, the following: motion pictures, free and pay television, home video, theatrical engagements, legitimate stage, personal appearances, concerts, public appearances in places of amusement and entertainment, video games and devices, record production, music and literary publishing and songwriting, radio, and the use and licensing of your name(s), likeness and/or talent for purposes of merchandising, commercial exploitation, advertising and/or trade.

(d) Except for money payable to you by us under this and any other agreement between us, the term "Gross Compensation" shall include all forms of income derived from your professional career in the Entertainment Industry, and paid or credited to you without deductions, except as may otherwise be provided herein, including, but without limiting the foregoing, the total compensation, salaries, earnings, fees, royalties, advances, residuals, repeats and/or re-run fees, bonuses and the total amount paid for any endorsements, or any entertainment package or package program, live or recorded, earned and received, directly by you, and your heirs, executors, administrators or assigns, or any other person, firm or corporation in your behalf, or in which you have an interest of any kind.

(e) The terms "engagements", "contracts", "agreements", and "employment" shall

include any and all engagements, contracts, agreements or employment of any kind whatsoever entered into during the Term hereof, or substantially negotiated during the Term hereof, which relate in any way to your activities in the Entertainment Industry.

(f) We may conduct audits to verify the accuracy of your books and records in respect of Gross Compensation and your accountings to us. Any audit conducted by us will be at your usual place of business or wherever your books and records are kept, and during usual business hours. Timely payment of the Revenue Share is of the essence of this Agreement and we may, in addition to and not in limitation of, among other remedy available to us, suspend the Term of this Agreement in the event you fail to remit the Revenue Share to us, until such time as remittance is made.

(g) You will use your best efforts to ensure that all agreements in connection with your activities in the Entertainment Industry shall otherwise irrevocably instruct and direct all Persons with whom you are contracting with to account and pay the Revenue Share directly to us, at the same times as you are accounted to with respect to the Entertainment Activity concerned, and subject to the same conditions. You shall also use best efforts to cause each such third party agreement to provide that we will] have the same right to examine the applicable Person's books and records relating as apply to your audit rights. You shall sign any documents as we may reasonably request to effectuate and secure our rights under this paragraph.

6. **Music Publishing:** Provided we secure a Distribution Agreement, you and your music publishing entity, any company or person controlled by you, shall assign to our music publishing affiliate an undivided fifty percent (50%) interest of your entire interest, and the sole and exclusive right to administer our share of your rights granted there under for the length of copyright throughout the world, in each and every musical composition ("Compositions" and each a "Composition") written by you during the Term hereof(which shall include the Distribution Term as well), as well as any musical composition written by you and embodied on an Existing Master or Video, referenced in paragraph 9, below, and otherwise embodied on any recording released by us or Distributor. You and we agree to enter into a more formal Co-Publishing agreement incorporating the terms hereof, but until such time, if ever, that the parties enter into such more formal agreement, it is agreed that: (1) we are the sole and exclusive administrator of your and our copyright interest in the Compositions throughout the world for the length of copyright; (2) we shall account 75% of all income and revenues from the sales and exploitations of the Compositions, except that your publisher share of public performance royalties shall be 50% thereof; and (3) we may deduct actual administration fees and other third party charges such as subpublisher fees from amounts due to you hereunder.

7. **Re-Recording Restrictions**: During the Term of this Agreement you will not perform for the purpose of making phonograph records for any person, firm or corporation other than us. During a period of five years after the expiration or termination of this Agreement you will not perform any selection recorded hereunder for any other person, firm or corporation for the purpose of making phonograph records, or including such recorded performances in the soundtrack of a audio visual production of any kind, including, but not limited to motion pictures, television programs, and music videos.

8. **Our Rights in Masters/Videos:** All of the audio and audiovisual recordings ("Records" and "Recordings") made by you pursuant to this Agreement, including the Initial Recordings, Existing Masters and Audiovisual Recordings referenced in paragraph 9A, (each individually a "Master," and

collectively the "Masters", or "Video" and collectively "Videos" depending on the context) and all rights therein (including, without limitation, all copyrights) shall be owned solely and exclusively by us throughout the Territory in perpetuity, as works-made-for-hire within the meaning of the U.S. Copyright Act, and we shall have the right to exploit same by any means now known or hereafter devised, and to authorize others to do any or all of the foregoing. To the extent the Masters or Videos or any part of them are ever deemed not to be "works-made-for-hire" owned solely by us, then you hereby irrevocably and exclusively grant to us all rights in the Masters and Videos (including, without limitation, all copyrights therein, but excluding the copyrights in the underlying musical compositions unless assigned per the provisions of paragraph 6, above) throughout the Universe in perpetuity, and all extensions, renewals and reversions thereof. In the event we exploit such Masters and Videos (as opposed to exploitation of Records and Masters by Distributor), we shall account and pay you royalties set forth in Exhibit "1".

9. **Existing Master Recordings and Audiovisual Recordings:** Set forth on the attached Exhibit "2" is a list of Existing Masters and Videos which shall be deemed Masters and Videos hereunder pursuant to which we shall have all of the rights we are otherwise entitled to hereunder in connection with Masters and Videos, including, but not limited to, copyright ownership thereto as set forth in paragraph 8, above; and your warranties and representations shall also extend to the Existing Masters and Videos. To the extent the Existing Masters and Videos, or any part of them, are ever deemed not to be "works-made-for-hire" owned solely by us per the provisions of paragraph 8 above, then you hereby irrevocably and exclusively assign and grant to us all rights under copyright, excluding the underlying musical compositions, in the Existing Masters and Videos (including, without limitation, all copyrights) throughout the universe in perpetuity, and all extensions, renewals and reversions therein.

10. **Your Name and Likeness:** We shall have the right in perpetuity throughout the Territory to use, and to permit others to use your name (both legal and professional) and approved likeness and approved biographical material concerning you for advertising and purposes of trade, and otherwise without restriction, in connection with the exploitation of phonograph records. We shall have the further right to refer to you by your professional name, as our exclusive recording artist, and you shall, in your activities in the entertainment field. During the term of this Agreement you shall not authorize your legal or professional name or your likeness to be used in connection with the advertising or sale of phonograph records other than those approved by us.

11. **We Will Send You Statements:** Statements as to royalties payable to you hereunder shall be sent by us to you within ninety (90) days following the end of each semi-annual accounting period ending December 31st and June 30th during which we receive revenues in connection with the exploitation of Records, Videos, Controlled Compositions, and any of our rights hereunder, whether from Distributor or otherwise. We will provide you with a true copy of each royalty/sales statement which we receive from our Distributor with each royalty statement rendered by you. You shall be deemed to have consented to all royalty statements and all other accounts rendered by us to you, and said statements and other accounts shall be binding upon you and not subject to any objection by you for any reason, unless specific objection in writing, stating the basis thereof, is given by you to us within two (2) years from the date such statement was rendered. We shall maintain books of account records hereunder. You or a certified public accountant in your behalf may, at your expense, at our offices, examine our books pertaining to the records made hereunder during our usual business hours and upon reasonable notice. Our books relating to activities during any accounting period may only be examined

as aforesaid during the two (2) year period following the date such statement was due hereunder. Notwithstanding the foregoing, we shall instruct the Distributor to pay royalties and all other amounts due to you hereunder directly to you consistent with the terms and conditions contained herein. We may deduct such amount, if any, which we may be required to withhold pursuant to the U.S. Tax Regulations or any other applicable statute, regulations, treaty or law. Solely with respect to physical product only that embodies Records and Videos, we shall have the right to deduct returns and credits of any nature and to withhold reasonable reserves (which shall not exceed 25) from payments otherwise due to you. For purposes herein, the "reasonableness" of such reserves shall be determined by SoundScan sales figures. Each royalty reserve against anticipated returns and credits will be liquidated not later than the end of two years following the accounting period during which it is established. Any action, suit or proceeding concerning royalty statements or other accountings rendered to you by us shall be limited to a determination of the amount of royalties, if any, payable to you for the accountings periods in question, and your sole remedy shall be the recovery of those particular royalties; and, you specifically waive the right to seek any equitable remedies in respect of any claims regarding the payment or non-payment of royalties. Notwithstanding the foregoing, with respect to recordings released by the Distributor, the reserve and liquidation provisions of the Distribution Agreement shall apply to recordings released by the Distributor.

12. **Controlled Compositions/Mechanical Royalties**: A "Controlled Composition" is a musical composition written in whole or in part by you, owned or controlled in whole or in part by you, or any person or entity in which you have a direct interest. Solely with respect to Records (and Videos) we exploit (as opposed to Records and Videos that a Distributor may exploit), you agree to grant to us and our designees a gratis (meaning free) and irrevocable license, under copyright, to reproduce each Controlled Composition on Records and Videos and to distribute them in the United States of America and Canada. It is the essence of this Agreement that you acknowledge we are not obligated to account and pay so-called music publishing royalties with respect to Records and Videos solely exploited by us under this Agreement. At such time as we enter into a Distribution Agreement, you shall be accounted to with respect to Controlled Compositions according to the terms and conditions set forth in the Distribution Agreement and distributed or exploited by Distributor.

13. **Warranties/Representations/Indemnities:** You warrant and represent that you are under no disability, restriction or prohibition, whether contractual or otherwise, with respect to your right to execute this Agreement and perform its terms and conditions, and with respect to your right to record any and all selections hereunder. You specifically warrant and represent that no selections recorded or to be recorded by you hereunder are subject to any re-recording restrictions under any previous agreements to which you may be a party. You agree to and do hereby indemnify, save and hold us harmless from any and all loss and damage (including attorneys' fees) arising out of or connected with any claim by a third party which is inconsistent with any term of this Agreement, and you agree to reimburse us, on demand, for any payment made by us at any time after the date hereof with respect to any liability or claim to which the foregoing indemnity applies is reduced to a final judgment or mutually approved settlement. Pending the determination of any such claim, we may withhold payment of royalties or other monies hereunder.

14. **Miscellaneous:** This Agreement shall be governed by the laws of the state of California and only the courts (state and federal) located in Los Angeles County will have jurisdiction of any controversies regarding, or arising under, this Agreement. Any action or other proceeding which involves such a controversy will be brought only in those courts located in Los Angeles County and not

elsewhere. Any action, suit or proceeding concerning statements or other accountings rendered to you by us shall be limited to a determination of the amount of royalties payable to you for the accountings periods in question, and your sole and exclusive remedy shall be the recovery of those particular royalties; and you specifically waive any other legal and equitable remedies. If any part of this Agreement, or its application as it applies to a particular party, shall be adjudged by a court of competent jurisdiction to be invalid, such judgment shall not affect the remainder of this Agreement, which shall continue in full force and effect, or the application of this Agreement to the remaining parties. In entering into this Agreement, and in providing services pursuant hereto, you have the status of an independent contractor. Nothing herein contained contemplates or constitutes you as our employee. This Agreement is not intended to become effective until and unless it is executed by all of the proposed parties to it. Notwithstanding anything to the contrary contained herein, the Term of this Agreement is not intended to exceed that number of years that a personal services contract may be enforced. If it is determined that the Term of this Agreement does exceed that which is permissible under the law for the enforcement of personal services contracts, then the Term of this Agreement shall be deemed automatically amended so that it terminates on the next to the last day that a personal services agreement is enforceable under the laws of the state or jurisdiction that this Agreement is subject to. You expressly acknowledge that your services hereunder are of a special, unique and intellectual character which gives them peculiar value, and that in the event of a breach by you of any term, condition or covenant hereof we will be caused irreparable injury. You expressly agree that in the event you shall breach any provision of this Agreement we shall be entitled to injunctive relief and other equitable relief and/or damages, as we may deem appropriate, in addition to any other rights or remedies available to us, and we shall have the right to recoup any damages from any sums which may thereafter become due and payable to you hereunder, including sums otherwise payable to you after the expiration or termination of this Agreement.

If the foregoing correctly reflects your understanding and agreement with us, please so indicate by signing below.

Accepted and Agreed:

Belcalis Almanzar

10/18/16

SSN: [redacted]

ALVARO S. LUCIANO
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires 4/11/2021

KSR GROUP, LLC

An Authorized Signatory

Exhibit "1"
Royalties

1. With respect to Records, Videos, and the sale and exploitation of any products and services hereunder for which we are paid or credited with a payment (the "Revenue Pool Products"), we will account to you on the terms and conditions as set forth below.

2. Revenue Pool: The "Revenue Pool" will consist of all gross revenues actually received by us, or credited to us against advances previously received by us that are specifically attributable to the Revenue Pool Products, and which were not counted as gross revenues hereunder, in the United States that are directly attributable to sales and other exploitations of the Revenue Pool Products throughout the Territory (e.g. foreign sales, direct licensing, and record clubs), less all actual returns, credits, rebates, adjustments, and reasonable reserves against possible returns, which reserves shall take into account sales data available from Soundscan.

3. We will account to you for fifty (50%) percent of our Adjusted Gross Income in connection with the sale and exploitation of Revenue Pool Products. "Adjusted Gross Income" shall mean the following: the gross amount of the Revenue Pool less our out of pocket costs incurred or paid by us in connection with recording Records, marketing, promotion, advertising and sale of all applicable Revenue Pool Products such as: (1) all Marketing and Promotion Costs; (2) all Artwork Costs; (3) Audiovisual Production Costs; (4) all Manufacturing and Distribution costs; (6) Royalties to third parties rendering services on Revenue Pool Products; (7) advances and other amounts paid to you and on your behalf; (8) Judgments and settlement amounts in respect of third party claims having to do with Revenue Pool Products as well as reasonable outside legal fees and costs in defending such claims; and, (9) all applicable taxes and union payments actually charged to us in connection with Revenue Pool Products.

(a) "Marketing and Promotion Costs" are all third-party out-of-pocket marketing, promotion, advertising, and publicity costs paid or incurred by us in connection with the Revenue Pool Products.

(b) "Artwork Costs" are all artwork costs paid or incurred by us in connection with the creation, design, and preparation of artwork for covers, sleeves, or other packaging elements in connection with Revenue Pool Products.

(c) "Audiovisual Production Costs" are all costs paid or incurred by us associated with the any production of Videos.

(d) "Manufacturing and Distribution Costs" are: (1) all costs paid or incurred by us associated with the manufacture of all configurations of Revenue Pool Products (e.g., the costs of compact discs, vinyl discs, and tapes, packaging components, shrink wrapping and stickering and all other service costs in connection therewith) and the delivery of Records and their components to us or our distributor (e.g., freight charges and service charges actually charged to us by our distributor); (2)

the Distribution Fee (defined below); and (3) all other charges assessed to us by our distributor in connection with the manufacture and distribution of Revenue Pool Records (e.g., returns handling charges, freight charges, scraping fees, warehouse fees or charges, "loose unit" charges, service charges for the distribution of promotional records and refurbishing charges).

(e) The "Distribution Fee" means the distribution fee payable by us to its distributor(s) plus a label services fee of five (5%) percent.

(f) "Royalties" means all royalties and monies due to Persons ("Persons" means and refers to the persons and entities to whom a royalty is owed with respect to Revenue Pool Products), including, but not limited to, artists (which includes you), producers, mixers, and side artists rendering services in connection with the recording of the Records, as well as publishers of compositions embodied on Records. We may deduct reasonable reserves and liquidate such reserves within three accounting periods from the date each reserve is first established. You must provide us with true and correct copies of all relevant agreements with third parties regarding your royalty obligations prior to the release of a Record hereunder; and accurate information regarding the status of each applicable royalty account.

Exhibit "2"
[Existing Masters and Videos – Paragraph 9A]

Artist/Title(s)

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

IANCU, UNDER SECRETARY OF COMMERCE FOR INTELLECTUAL PROPERTY AND DIRECTOR, PATENT AND TRADEMARK OFFICE *v.* BRUNETTI

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

No. 18–302. Argued April 15, 2019—Decided June 24, 2019

Respondent Erik Brunetti sought federal registration of the trademark FUCT. The Patent and Trademark Office (PTO) denied his application under a provision of the Lanham Act that prohibits registration of trademarks that "[c]onsist[ ] of or comprise[ ] immoral[ ] or scandalous matter," 15 U. S. C. §1052(a). Brunetti brought a First Amendment challenge to the "immoral or scandalous" bar in the Federal Circuit, which invalidated the provision.

Held: The Lanham Act's prohibition on registration of "immoral[ ] or scandalous" trademarks violates the First Amendment.

In *Matal* v. *Tam*, 582 U. S. ___, this Court declared unconstitutional the Lanham Act's ban on registering marks that "disparage" any "person[ ], living or dead." §1052(a). A divided Court agreed on two propositions. First, if a trademark registration bar is viewpoint based, it is unconstitutional. And second, the disparagement bar was viewpoint based.

The "immoral or scandalous" bar similarly discriminates on the basis of viewpoint and so collides with this Court's First Amendment doctrine. Expressive material is "immoral" when it is "inconsistent with rectitude, purity, or good morals"; "wicked"; or "vicious." So the Lanham Act permits registration of marks that champion society's sense of rectitude and morality, but not marks that denigrate those concepts. And material is "scandalous" when it "giv[es] offense to the conscience or moral feelings"; "excite[s] reprobation"; or "call[s] out condemnation." So the Lanham Act allows registration of marks when their messages accord with, but not when their messages defy,

society's sense of decency or propriety. The statute, on its face, distinguishes between two opposed sets of ideas: those aligned with conventional moral standards and those hostile to them; those inducing societal nods of approval and those provoking offense and condemnation. This facial viewpoint bias in the law results in viewpoint-discriminatory application. The PTO has refused to register marks communicating "immoral" or "scandalous" views about (among other things) drug use, religion, and terrorism. But all the while, it has approved registration of marks expressing more accepted views on the same topics.

The Government says the statute is susceptible of a limiting construction that would remove its viewpoint bias. The Government's idea is to narrow the statutory bar to "marks that are offensive [or] shocking[ ] because of their mode of expression, independent of any views that they may express," which would mostly restrict the PTO to refusing marks that are lewd, sexually explicit, or profane. But this Court cannot accept the Government's proposal, because the statute says something markedly different. The "immoral or scandalous" bar does not draw the line at lewd, sexually explicit, or profane marks. Nor does it refer only to marks whose "mode of expression," independent of viewpoint, is particularly offensive. To cut the statute off where the Government urges is not to interpret the statute Congress enacted, but to fashion a new one. And once the "immoral or scandalous" bar is interpreted fairly, it must be invalidated. Pp. 4–11.

877 F. 3d 1330, affirmed.

KAGAN, J., delivered the opinion of the Court, in which THOMAS, GINSBURG, ALITO, GORSUCH and KAVANAUGH, JJ., joined. ALITO, J., filed a concurring opinion. ROBERTS, C. J., and BREYER, J., filed opinions concurring in part and dissenting in part. SOTOMAYOR, J., filed an opinion concurring in part and dissenting in part, in which BREYER, J., joined.

SUPREME COURT OF THE UNITED STATES

No. 18–302

ANDREI IANCU, UNDER SECRETARY OF COMMERCE FOR INTELLECTUAL PROPERTY AND DIRECTOR, PATENT AND TRADEMARK OFFICE, PETITIONER *v.* ERIK BRUNETTI

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

[June 24, 2019]

JUSTICE KAGAN delivered the opinion of the Court.

Two Terms ago, in *Matal* v. *Tam*, 582 U. S. ___ (2017), this Court invalidated the Lanham Act's bar on the registration of "disparag[ing]" trademarks. 15 U. S. C. §1052(a). Although split between two non-majority opinions, all Members of the Court agreed that the provision violated the First Amendment because it discriminated on the basis of viewpoint. Today we consider a First Amendment challenge to a neighboring provision of the Act, prohibiting the registration of "immoral[] or scandalous" trademarks. *Ibid.* We hold that this provision infringes the First Amendment for the same reason: It too disfavors certain ideas.

I

Respondent Erik Brunetti is an artist and entrepreneur who founded a clothing line that uses the trademark FUCT. According to Brunetti, the mark (which functions as the clothing's brand name) is pronounced as four letters, one after the other: F-U-C-T. See Brief for Respond-

ent 1. But you might read it differently and, if so, you would hardly be alone. See Tr. of Oral Arg. 5 (describing the brand name as "the equivalent of [the] past participle form of a well-known word of profanity"). That common perception caused difficulties for Brunetti when he tried to register his mark with the U. S. Patent and Trademark Office (PTO).

Under the Lanham Act, the PTO administers a federal registration system for trademarks. See 15 U. S. C. §§1051, 1052. Registration of a mark is not mandatory. The owner of an unregistered mark may still use it in commerce and enforce it against infringers. See *Tam*, 582 U. S., at ___ (slip op., at 4). But registration gives trademark owners valuable benefits. For example, registration constitutes "prima facie evidence" of the mark's validity. §1115(a). And registration serves as "constructive notice of the registrant's claim of ownership," which forecloses some defenses in infringement actions. §1072. Generally, a trademark is eligible for registration, and receipt of such benefits, if it is "used in commerce." §1051(a)(1). But the Act directs the PTO to "refuse[] registration" of certain marks. §1052. For instance, the PTO cannot register a mark that "so resembles" another mark as to create a likelihood of confusion. §1052(d). It cannot register a mark that is "merely descriptive" of the goods on which it is used. §1052(e). It cannot register a mark containing the flag or insignia of any nation or State. See §1052(b). There are five or ten more (depending on how you count). And until we invalidated the criterion two years ago, the PTO could not register a mark that "disparage[d]" a "person[], living or dead." §1052(a); see *Tam*, 582 U. S. ___.

This case involves another of the Lanham Act's prohibitions on registration—one applying to marks that "[c]onsist[] of or comprise[] immoral[] or scandalous matter." §1052(a). The PTO applies that bar as a "unitary provision," rather than treating the two adjectives in it

separately. *In re Brunetti*, 877 F. 3d 1330, 1336 (CA Fed. 2017); Brief for Petitioner 6 (stating that the PTO "has long treated the two terms as composing a single category"). To determine whether a mark fits in the category, the PTO asks whether a "substantial composite of the general public" would find the mark "shocking to the sense of truth, decency, or propriety"; "giving offense to the conscience or moral feelings"; "calling out for condemnation"; "disgraceful"; "offensive"; "disreputable"; or "vulgar." 877 F. 3d, at 1336 (internal quotation marks omitted); see Brief for Petitioner 6 (agreeing that the PTO "generally defines" the category in that way).

Both a PTO examining attorney and the PTO's Trademark Trial and Appeal Board decided that Brunetti's mark flunked that test. The attorney determined that FUCT was "a total vulgar" and "therefore[] unregistrable." App. 27–28. On review, the Board stated that the mark was "highly offensive" and "vulgar," and that it had "decidedly negative sexual connotations." App. to Pet. for Cert. 59a, 64a–65a. As part of its review, the Board also considered evidence of how Brunetti used the mark. It found that Brunetti's website and products contained imagery, near the mark, of "extreme nihilism" and "antisocial" behavior. *Id.,* at 64a. In that context, the Board thought, the mark communicated "misogyny, depravity, [and] violence." *Ibid*. The Board concluded: "Whether one considers [the mark] as a sexual term, or finds that [Brunetti] has used [the mark] in the context of extreme misogyny, nihilism or violence, we have no question but that [the term is] extremely offensive." *Id.,* at 65a.

Brunetti then brought a facial challenge to the "immoral or scandalous" bar in the Court of Appeals for the Federal Circuit. That court found the prohibition to violate the First Amendment. As usual when a lower court has invalidated a federal statute, we granted certiorari. 586 U. S. ___ (2019).

II

This Court first considered a First Amendment challenge to a trademark registration restriction in *Tam*, just two Terms ago. There, the Court declared unconstitutional the Lanham Act's ban on registering marks that "disparage" any "person[], living or dead." §1052(a). The eight-Justice Court divided evenly between two opinions and could not agree on the overall framework for deciding the case. (In particular, no majority emerged to resolve whether a Lanham Act bar is a condition on a government benefit or a simple restriction on speech.) But all the Justices agreed on two propositions. First, if a trademark registration bar is viewpoint-based, it is unconstitutional. See 582 U. S., at ___–___, ___–___ (opinion of ALITO, J.) (slip op., at 1–2, 22–23); *id.,* at ___–___, ___ (opinion of Kennedy, J.) (slip op., at 1–2, 5). And second, the disparagement bar was viewpoint-based. See *id.,* at ___–___, ___–___ (opinion of ALITO, J.) (slip op., at 1–2, 22–23); *id.,* at ___–___ (opinion of Kennedy, J.) (slip op., at 2–5).

The Justices thus found common ground in a core postulate of free speech law: The government may not discriminate against speech based on the ideas or opinions it conveys. See *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 829–830 (1995) (explaining that viewpoint discrimination is an "egregious form of content discrimination" and is "presumptively unconstitutional"). In Justice Kennedy's explanation, the disparagement bar allowed a trademark owner to register a mark if it was "positive" about a person, but not if it was "derogatory." *Tam*, 582 U. S., at ___ (slip op., at 2). That was the "essence of viewpoint discrimination," he continued, because "[t]he law thus reflects the Government's disapproval of a subset of messages it finds offensive." *Id.,* at ___–___ (slip op., at 2–3). JUSTICE ALITO emphasized that the statute "denie[d] registration to any mark" whose disparaging message was "offensive to a substantial percentage of the

members of any group." *Id.,* at ___ (slip op., at 22). The bar thus violated the "bedrock First Amendment principle" that the government cannot discriminate against "ideas that offend." *Id.,* at ___–___ (slip op., at 1–2). Slightly different explanations, then, but a shared conclusion: Viewpoint discrimination doomed the disparagement bar.

If the "immoral or scandalous" bar similarly discriminates on the basis of viewpoint, it must also collide with our First Amendment doctrine. The Government does not argue otherwise. In briefs and oral argument, the Government offers a theory for upholding the bar if it is viewpoint-neutral (essentially, that the bar would then be a reasonable condition on a government benefit). See Brief for Petitioner 14–26. But the Government agrees that under *Tam* it may not "deny registration based on the views expressed" by a mark. Tr. of Oral Arg. 24. "As the Court's *Tam* decision establishes," the Government says, "the criteria for federal trademark registration" must be "viewpoint-neutral to survive Free Speech Clause review." Pet. for Cert. 19. So the key question becomes: Is the "immoral or scandalous" criterion in the Lanham Act viewpoint-neutral or viewpoint-based?

It is viewpoint-based. The meanings of "immoral" and "scandalous" are not mysterious, but resort to some dictionaries still helps to lay bare the problem. When is expressive material "immoral"? According to a standard definition, when it is "inconsistent with rectitude, purity, or good morals"; "wicked"; or "vicious." Webster's New International Dictionary 1246 (2d ed. 1949). Or again, when it is "opposed to or violating morality"; or "morally evil." Shorter Oxford English Dictionary 961 (3d ed. 1947). So the Lanham Act permits registration of marks that champion society's sense of rectitude and morality, but not marks that denigrate those concepts. And when is such material "scandalous"? Says a typical definition, when it "giv[es] offense to the conscience or moral feel-

ings"; "excite[s] reprobation"; or "call[s] out condemnation." Webster's New International Dictionary, at 2229. Or again, when it is "shocking to the sense of truth, decency, or propriety"; "disgraceful"; "offensive"; or "disreputable." Funk & Wagnalls New Standard Dictionary 2186 (1944). So the Lanham Act allows registration of marks when their messages accord with, but not when their messages defy, society's sense of decency or propriety. Put the pair of overlapping terms together and the statute, on its face, distinguishes between two opposed sets of ideas: those aligned with conventional moral standards and those hostile to them; those inducing societal nods of approval and those provoking offense and condemnation. The statute favors the former, and disfavors the latter. "Love rules"? "Always be good"? Registration follows. "Hate rules"? "Always be cruel"? Not according to the Lanham Act's "immoral or scandalous" bar.

The facial viewpoint bias in the law results in viewpoint-discriminatory application. Recall that the PTO itself describes the "immoral or scandalous" criterion using much the same language as in the dictionary definitions recited above. See *supra,* at 3. The PTO, for example, asks whether the public would view the mark as "shocking to the sense of truth, decency, or propriety"; "calling out for condemnation"; "offensive"; or "disreputable." Brief for Petitioner 6 (internal quotation marks omitted). Using those guideposts, the PTO has refused to register marks communicating "immoral" or "scandalous" views about (among other things) drug use, religion, and terrorism. But all the while, it has approved registration of marks expressing more accepted views on the same topics. See generally Gilson & LaLonde, Trademarks Laid Bare, 101 Trademark Reporter 1476, 1510–1513, 1518–1522 (2011); Brief for Barton Beebe et al. as *Amici Curiae* 28–29.

Here are some samples. The PTO rejected marks con-

veying approval of drug use (YOU CAN'T SPELL HEALTHCARE WITHOUT THC for pain-relief medication, MARIJUANA COLA and KO KANE for beverages) because it is scandalous to "inappropriately glamoriz[e] drug abuse." PTO, Office Action of Aug. 28, 2010, Serial No. 85038867; see Office Action of Dec. 24, 2009, Serial No. 77833964; Office Action of Nov. 17, 2009, Serial No. 77671304. But at the same time, the PTO registered marks with such sayings as D.A.R.E. TO RESIST DRUGS AND VIOLENCE and SAY NO TO DRUGS—REALITY IS THE BEST TRIP IN LIFE. See PTO, Reg. No. 2975163 (July 26, 2005); Reg. No. 2966019 (July 12, 2005). Similarly, the PTO disapproved registration for the mark BONG HITS 4 JESUS because it "suggests that people should engage in an illegal activity [in connection with] worship" and because "Christians would be morally outraged by a statement that connects Jesus Christ with illegal drug use." Office Action of Mar. 15, 2008, Serial No. 77305946. And the PTO refused to register trademarks associating religious references with products (AGNUS DEI for safes and MADONNA for wine) because they would be "offensive to most individuals of the Christian faith" and "shocking to the sense of propriety." *Ex parte Summit Brass & Bronze Works*, 59 USPQ 22, 23 (Dec. Com. Pat. 1943); *In re Riverbank Canning Co.*, 95 F. 2d 327, 329 (CCPA 1938). But once again, the PTO approved marks—PRAISE THE LORD for a game and JESUS DIED FOR YOU on clothing—whose message suggested religious faith rather than blasphemy or irreverence. See Reg. No. 5265121 (Aug. 15, 2017); Reg. No. 3187985 (Dec. 19, 2006). Finally, the PTO rejected marks reflecting support for al-Qaeda (BABY AL QAEDA and AL-QAEDA on t-shirts) "because the bombing of civilians and other terrorist acts are shocking to the sense of decency and call out for condemnation." Office Action of Nov. 22, 2004, Serial No. 78444968; see Office Action of Feb. 23,

2005, Serial No. 78400213. Yet it approved registration of a mark with the words WAR ON TERROR MEMORIAL. Reg. No. 5495362 (Jun. 19, 2018). Of course, all these decisions are understandable. The rejected marks express opinions that are, at the least, offensive to many Americans. But as the Court made clear in *Tam*, a law disfavoring "ideas that offend" discriminates based on viewpoint, in violation of the First Amendment. 582 U. S., at ___ (opinion of ALITO, J.) (slip op., at 2); see *id.,* at ___–___ (slip op., at 22–23); *id.,* at ___–___ (opinion of Kennedy, J.) (slip op., at 2–3).

How, then, can the Government claim that the "immoral or scandalous" bar is viewpoint-neutral? The Government basically asks us to treat decisions like those described above as PTO examiners' mistakes. See Brief for Petitioner 46. Still more, the Government tells us to ignore how the Lanham Act's language, on its face, disfavors some ideas. In urging that course, the Government does not dispute that the statutory language—and words used to define it—have just that effect. At oral argument, the Government conceded: "[I]f you just looked at the words like 'shocking' and 'offensive' on their face and gave them their ordinary meanings[,] they could easily encompass material that was shocking [or offensive] because it expressed an outrageous point of view or a point of view that most members" of society reject. Tr. of Oral Arg. 6. But no matter, says the Government, because the statute is "susceptible of" a limiting construction that would remove this viewpoint bias. *Id.,* at 7 (arguing that the Court should "attempt to construe [the] statute in a way that would render it constitutional"). The Government's idea, abstractly phrased, is to narrow the statutory bar to "marks that are offensive [or] shocking to a substantial segment of the public because of their *mode* of expression, independent of any views that they may express." *Id.,* at 11 (emphasis added); see Brief for Petitioner 27–28. More

concretely, the Government explains that this reinterpretation would mostly restrict the PTO to refusing marks that are "vulgar"—meaning "lewd," "sexually explicit or profane." *Id.,* at 27, 30. Such a reconfigured bar, the Government says, would not turn on viewpoint, and so we could uphold it.

But we cannot accept the Government's proposal, because the statute says something markedly different. This Court, of course, may interpret "ambiguous statutory language" to "avoid serious constitutional doubts." *FCC* v. *Fox Television Stations, Inc.*, 556 U. S. 502, 516 (2009). But that canon of construction applies only when ambiguity exists. "We will not rewrite a law to conform it to constitutional requirements." *United States* v. *Stevens*, 559 U. S. 460, 481 (2010) (internal quotation marks and alteration omitted). So even assuming the Government's reading would eliminate First Amendment problems, we may adopt it only if we can see it in the statutory language. And we cannot. The "immoral or scandalous" bar stretches far beyond the Government's proposed construction. The statute as written does not draw the line at lewd, sexually explicit, or profane marks. Nor does it refer only to marks whose "mode of expression," independent of viewpoint, is particularly offensive. Brief for Petitioner 28 (internal quotation marks omitted). It covers the universe of immoral or scandalous—or (to use some PTO synonyms) offensive or disreputable—material. Whether or not lewd or profane. Whether the scandal and immorality comes from mode or instead from viewpoint. To cut the statute off where the Government urges is not to interpret the statute Congress enacted, but to fashion a new one.*

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*We reject the dissent's statutory surgery for the same reason. Although conceding that the term "immoral" cannot be saved, the dissent thinks that the term "scandalous" can be read as the Government proposes. See *post,* at 1–2 (SOTOMAYOR, J., concurring in part and dissenting in part). But that term is not "ambiguous," as the dissent

And once the "immoral or scandalous" bar is interpreted fairly, it must be invalidated. The Government just barely argues otherwise. In the last paragraph of its brief, the Government gestures toward the idea that the provision is salvageable by virtue of its constitutionally permissible applications (in the Government's view, its applications to lewd, sexually explicit, or profane marks). See *id.*, at 47. In other words, the Government invokes our First Amendment overbreadth doctrine, and asks us to uphold the statute against facial attack because its unconstitutional applications are not "substantial" relative to "the statute's plainly legitimate sweep." *Stevens*, 559 U. S., at 473 (internal quotation marks omitted). But to begin with, this Court has never applied that kind of analysis to a viewpoint-discriminatory law. In *Tam*, for example, we did not pause to consider whether the disparagement clause might admit some permissible applications (say, to certain libelous speech) before striking it down. The Court's finding of viewpoint bias ended the matter. And similarly, it seems unlikely we would compare permissible and impermissible applications if Congress outright banned "offensive" (or to use some other examples, "divisive" or "subversive") speech. Once we have found that a law "aim[s] at the suppression of" views, why would it

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argues, *post,* at 3; it is just broad. Remember that the dictionaries define it to mean offensive, disreputable, exciting reprobation, and so forth. See *supra,* at 5–6; *post,* at 3 (accepting those definitions). Even if hived off from "immoral" marks, the category of scandalous marks thus includes *both* marks that offend by the ideas they convey *and* marks that offend by their mode of expression. And its coverage of the former means that it discriminates based on viewpoint. We say nothing at all about a statute that covers only the latter—or, in the Government's more concrete description, a statute limited to lewd, sexually explicit, and profane marks. Nor do we say anything about how to evaluate viewpoint-neutral restrictions on trademark registration, see *post,* at 14–17—because the "scandalous" bar (whether or not attached to the "immoral" bar) is not one.

matter that Congress could have captured some of the same speech through a viewpoint-neutral statute? *Tam*, 582 U. S., at ___ (opinion of Kennedy, J.) (slip op., at 2). But in any event, the "immoral or scandalous" bar is substantially overbroad. There are a great many immoral and scandalous ideas in the world (even more than there are swearwords), and the Lanham Act covers them all. It therefore violates the First Amendment.

We accordingly affirm the judgment of the Court of Appeals.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 18–302

ANDREI IANCU, UNDER SECRETARY OF COMMERCE FOR INTELLECTUAL PROPERTY AND DIRECTOR, PATENT AND TRADEMARK OFFICE, PETITIONER *v.* ERIK BRUNETTI

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

[June 24, 2019]

JUSTICE ALITO, concurring.

For the reasons explained in the opinion of the Court, the provision of the Lanham Act at issue in this case violates the Free Speech Clause of the First Amendment because it discriminates on the basis of viewpoint and cannot be fixed without rewriting the statute. Viewpoint discrimination is poison to a free society. But in many countries with constitutions or legal traditions that claim to protect freedom of speech, serious viewpoint discrimination is now tolerated, and such discrimination has become increasingly prevalent in this country. At a time when free speech is under attack, it is especially important for this Court to remain firm on the principle that the First Amendment does not tolerate viewpoint discrimination. We reaffirm that principle today.

Our decision is not based on moral relativism but on the recognition that a law banning speech deemed by government officials to be "immoral" or "scandalous" can easily be exploited for illegitimate ends. Our decision does not prevent Congress from adopting a more carefully focused statute that precludes the registration of marks containing vulgar terms that play no real part in the expression of ideas. The particular mark in question in this case could

be denied registration under such a statute. The term suggested by that mark is not needed to express any idea and, in fact, as commonly used today, generally signifies nothing except emotion and a severely limited vocabulary. The registration of such marks serves only to further coarsen our popular culture. But we are not legislators and cannot substitute a new statute for the one now in force.

SUPREME COURT OF THE UNITED STATES

No. 18–302

ANDREI IANCU, UNDER SECRETARY OF COMMERCE FOR INTELLECTUAL PROPERTY AND DIRECTOR, PATENT AND TRADEMARK OFFICE, PETITIONER *v.* ERIK BRUNETTI

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

[June 24, 2019]

CHIEF JUSTICE ROBERTS, concurring in part and dissenting in part.

The Lanham Act directs the Patent and Trademark Office to refuse registration to marks that consist of or comprise "immoral, deceptive, or scandalous matter." 15 U. S. C. §1052(a). Although the statute lists "immoral" and "scandalous" separately, the PTO has long read those terms together to constitute a unitary bar on "immoral or scandalous" marks.

The Government concedes that the provision so read is broad enough to reach not only marks that offend because of their mode of expression (such as vulgarity and profanity) but also marks that offend because of the ideas they convey. The Government urges, however, that the provision can be given a narrowing construction—it can be understood to cover only marks that offend because of their mode of expression.

The Court rejects that proposal on the ground that it would in effect rewrite the statute. I agree with the majority that the "immoral" portion of the provision is not susceptible of a narrowing construction that would eliminate its viewpoint bias. As JUSTICE SOTOMAYOR explains, however, the "scandalous" portion of the provision is sus-

ceptible of such a narrowing construction. Standing alone, the term "scandalous" need not be understood to reach marks that offend because of the ideas they convey; it can be read more narrowly to bar only marks that offend because of their mode of expression—marks that are obscene, vulgar, or profane. That is how the PTO now understands the term, in light of our decision in *Matal* v. *Tam*, 582 U. S. ___ (2017). See Tr. of Oral Arg. 4–5. I agree with JUSTICE SOTOMAYOR that such a narrowing construction is appropriate in this context.

I also agree that, regardless of how exactly the trademark registration system is best conceived under our precedents—a question we left open in *Tam*—refusing registration to obscene, vulgar, or profane marks does not offend the First Amendment. Whether such marks can be registered does not affect the extent to which their owners may use them in commerce to identify goods. No speech is being restricted; no one is being punished. The owners of such marks are merely denied certain additional benefits associated with federal trademark registration. The Government, meanwhile, has an interest in not associating itself with trademarks whose content is obscene, vulgar, or profane. The First Amendment protects the freedom of speech; it does not require the Government to give aid and comfort to those using obscene, vulgar, and profane modes of expression. For those reasons, I concur in part and dissent in part.

SUPREME COURT OF THE UNITED STATES

No. 18–302

ANDREI IANCU, UNDER SECRETARY OF COMMERCE FOR INTELLECTUAL PROPERTY AND DIRECTOR, PATENT AND TRADEMARK OFFICE, PETITIONER *v.* ERIK BRUNETTI

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

[June 24, 2019]

JUSTICE BREYER, concurring in part and dissenting in part.

Our precedents warn us against interpreting statutes in ways that would likely render them unconstitutional. *Virginia* v. *American Booksellers Assn., Inc.*, 484 U. S. 383, 397 (1988) (noting that a law "will be upheld" if it is "'readily susceptible' to a narrowing construction that would make it constitutional"); *United States* v. *12 200-ft. Reels of Super 8MM. Film*, 413 U. S. 123, 130, n. 7 (1973) (noting our "duty" to adopt a "'fairly possible'" construction by which constitutional doubts "'may be avoided'" (quoting *United States* v. *Thirty-seven Photographs*, 402 U. S. 363, 369 (1971))). Following these precedents, I agree with JUSTICE SOTOMAYOR that, for the reasons she gives, we should interpret the word "scandalous" in the present statute to refer only to certain highly "vulgar" or "obscene" modes of expression. See *post*, at 6–7 (opinion concurring in part and dissenting in part).

The question, then, is whether the First Amendment permits the Government to rely on this statute, as narrowly construed, to deny the benefits of federal trademark registration to marks like the one at issue here, which involves the use of the term "FUCT" in connection with a

clothing line that includes apparel for children and infants. Like JUSTICE SOTOMAYOR, I believe the answer is "yes," though my reasons differ slightly from hers.

I

A

In my view, a category-based approach to the First Amendment cannot adequately resolve the problem before us. I would place less emphasis on trying to decide whether the statute at issue should be categorized as an example of "viewpoint discrimination," "content discrimination," "commercial speech," "government speech," or the like. Rather, as I have written before, I believe we would do better to treat this Court's speech-related categories not as outcome-determinative rules, but instead as rules of thumb. See *Reed* v. *Town of Gilbert*, 576 U. S. ___, ___ (2015) (opinion concurring in judgment) (slip op., at 1).

After all, these rules are not absolute. The First Amendment is not the Tax Code. Indeed, even when we consider a regulation that is ostensibly "viewpoint discriminatory" or that is subject to "strict scrutiny," we sometimes find the regulation to be constitutional after weighing the competing interests involved. See, *e.g.*, *Morse* v. *Frederick*, 551 U. S. 393, 397 (2007) ("[S]chools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use"); *Williams-Yulee* v. *Florida Bar*, 575 U. S. 433, ___ (2015) (slip op., at 8) (explaining that although "'it is the rare case'" when a statute satisfies strict scrutiny, "those cases do arise" (quoting *Burson* v. *Freeman*, 504 U. S. 191, 211 (1992) (plurality opinion))).

Unfortunately, the Court has sometimes applied these rules—especially the category of "content discrimination"—too rigidly. In a number of cases, the Court has struck down what I believe are ordinary, valid regulations that pose little or no threat to the speech interests that the

First Amendment protects. See *Janus* v. *State, County, and Municipal Employees*, 585 U. S. ___, ___–___ (2018) (KAGAN, J., dissenting) (slip op., at 27–28); *Sorrell* v. *IMS Health Inc.*, 564 U. S. 552, 589–592 (2011) (BREYER, J., dissenting); see generally *Reed*, 576 U. S., at ___–___ (opinion of BREYER, J.) (slip op., at 2–4).

Rather than deducing the answers to First Amendment questions strictly from categories, as the Court often does, I would appeal more often and more directly to the values the First Amendment seeks to protect. As I have previously written, I would ask whether the regulation at issue "works speech-related harm that is out of proportion to its justifications." *United States* v. *Alvarez*, 567 U. S. 709, 730 (2012) (opinion concurring in judgment); see *Reed*, 576 U. S., at ___ (opinion concurring in judgment) (slip op., at 4) (discussing the matter further, particularly in respect to the category of content discrimination).

B

This case illustrates the limits of relying on rigid First Amendment categories, for the statute at issue does not fit easily into any of these categories.

The Court has not decided whether the trademark statute is simply a method of regulating pure "commercial speech." See *Matal* v. *Tam*, 582 U. S. ___, ___ (2017) (opinion of ALITO, J.) (slip op., at 24) (leaving open the question whether trademarks are commercial speech); *id.*, at ___ (opinion of Kennedy, J.) (slip op., at 5) (same). There may be reasons for doubt on that score. Trademarks, after all, have an expressive component in addition to a commercial one, and the statute does not bar anyone from speaking. To be sure, the statute does regulate the commercial function of trademarks. But it does so in a limited way designed primarily to ensure that a mark identifies the product's source. See *Wal-Mart Stores, Inc.* v. *Samara Brothers, Inc.*, 529 U. S. 205, 212 (2000).

The trademark statute cannot easily be described as a regulation of "government speech," either. *Tam*, 582 U. S., at ___–___ (slip op., at 12–18). The Government, however, may be loosely associated with the mark because it registers the mark and confers certain benefits upon the owner.

What about the concept of a "public forum"? Trademark registration has little in common with a traditional public forum, as the register of trademarks is not a public park, a street, or a similar forum for public debate. See *Perry Ed. Assn.* v. *Perry Local Educators' Assn.*, 460 U. S. 37, 45 (1983). But one can find some vague resemblance between trademark registration and what this Court refers to as a "limited public forum" created by the government for private speech. See *post*, at 15 (opinion of SOTOMAYOR, J.); *Christian Legal Soc. Chapter of Univ. of Cal., Hastings College of Law* v. *Martinez*, 561 U. S. 661, 679, n. 11 (2010). The trademark registration system also bears some resemblance to cases involving government subsidies for private speech, as such programs—like trademark registration—may grant a benefit to some forms of speech without prohibiting other forms of speech. See *post*, at 15 (opinion of SOTOMAYOR, J.); *Legal Services Corporation* v. *Velazquez*, 531 U. S. 533, 543–544 (2001) (noting that the First Amendment rules applicable to limited public forums may be "instruc[tive]" "when the government establishes a subsidy for specified ends").

As for the concepts of "viewpoint discrimination" and "content discrimination," I agree with JUSTICE SOTOMAYOR that the boundaries between them may be difficult to discern. *Post*, at 10; see *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 831 (1995) ("[T]he distinction is not a precise one"). Even so, it is hard to see how a statute prohibiting the registration of only highly vulgar or obscene words discriminates based on "viewpoint." Of course, such words often evoke powerful emotions. Standing by themselves, however, these

words do not typically convey any particular viewpoint. See *FCC* v. *Pacifica Foundation*, 438 U. S. 726, 746, n. 22 (1978) (noting that the Government's regulation of vulgar words was based not on "point of view," but on "the way in which [speech] is expressed"). Moreover, while a restriction on the registration of highly vulgar words arguably places a content-based limit on trademark registration, it is hard to see why that label should be outcome-determinative here, for regulations governing trademark registration "inevitably involve content discrimination." *Reed*, 576 U. S., at ___ (opinion of BREYER, J.) (slip op., at 3); see *Tam*, 582 U. S., at ___ (opinion of Kennedy, J.) (slip op., at 6) (noting that the constitutionality of some content-based trademark restrictions is "well settled"); Katyal, Trademark Intersectionality, 57 UCLA L. Rev. 1601, 1602 (2010) (noting that trademark law is "indelibly rooted in content-based considerations").

In short, the trademark statute does not clearly fit within any of the existing outcome-determinative categories. Why, then, should we rigidly adhere to these categories? Rather than puzzling over categorization, I believe we should focus on the interests the First Amendment protects and ask a more basic proportionality question: Does "the regulation at issue wor[k] harm to First Amendment interests that is disproportionate in light of the relevant regulatory objectives"? *Reed*, 576 U. S., at ___ (opinion of BREYER, J.) (slip op., at 4).

II

Based on this proportionality analysis, I would conclude that the statute at issue here, as interpreted by JUSTICE SOTOMAYOR, does not violate the First Amendment.

How much harm to First Amendment interests does a bar on registering highly vulgar or obscene trademarks work? Not much. The statute leaves businesses free to use highly vulgar or obscene words on their products, and

even to use such words directly next to other registered marks. Indeed, a business owner might even use a vulgar word as a trademark, provided that he or she is willing to forgo the benefits of registration. See *post*, at 2 (opinion of SOTOMAYOR, J.); *Tam*, 582 U. S., at ___–___ (slip op., at 4–5).

Moreover, the field at issue here, trademark law, is a highly regulated one with a specialized mission: to "hel[p] consumers identify goods and services that they wish to purchase, as well as those they want to avoid." *Id.*, at ___ (slip op., at 2). As I have noted, that mission, by its very nature, requires the Government to impose limitations on speech. *Supra*, at 5. Trademark law therefore forbids the registration of certain types of words—for example, those that will likely "cause confusion," or those that are "merely descriptive." 15 U. S. C. §§1052(d), (e). For that reason, an applicant who seeks to register a mark should not expect complete freedom to say what she wishes, but should instead expect linguistic regulation.

Now consider, by way of contrast, the Government's interests in barring the registration of highly vulgar or obscene trademarks. For one thing, when the Government registers a mark, it is necessarily "involv[ed] in promoting" that mark. *Post*, at 18 (opinion of SOTOMAYOR, J.). The Government has at least a reasonable interest in ensuring that it is not involved in promoting highly vulgar or obscene speech, and that it will not be associated with such speech.

For another, scientific evidence suggests that certain highly vulgar words have a physiological and emotional impact that makes them different in kind from most other words. See M. Mohr, Holy S***: A Brief History of Swearing 252 (2013) (Mohr) (noting the "emotional impact" of certain profane words that "excite the lower-brain circuitry responsible for emotion," resulting in "electrical impulses that can be measured in the skin"). These vulgar words

originate in a different part of our brains than most other words. *Id.*, at 250. And these types of swear words tend to attract more attention and are harder to forget than other words. See Jay, Caldwell-Harris, & King, Recalling Taboo and Nontaboo Words, 121 Am. J. Psych. 83, 83–86 (2008) (collecting research). Notably, that has remained true even as the list of offensive swear words has changed over time: In the last few centuries, the list has evolved away from words of religious disrespect and toward words that are sexually explicit or that crudely describe bodily functions. Mohr 253. And the list of swear words may be evolving yet again, perhaps in the direction of including race-based epithets. *Id.*, at 254, 256.

These attention-grabbing words, though financially valuable to some businesses that seek to attract interest in their products, threaten to distract consumers and disrupt commerce. And they may lead to the creation of public spaces that many will find repellant, perhaps on occasion creating the risk of verbal altercations or even physical confrontations. (Just think about how you might react if you saw someone wearing a t-shirt or using a product emblazoned with an odious racial epithet.) The Government thus has an interest in seeking to disincentivize the use of such words in commerce by denying the benefit of trademark registration. Cf. *Brandenburg* v. *Ohio*, 395 U. S. 444, 447 (1969) (*per curiam*) (permitting regulation of words "directed to inciting or producing imminent lawless action" and "likely to incite or produce such action").

Finally, although some consumers may be attracted to products labeled with highly vulgar or obscene words, others may believe that such words should not be displayed in public spaces where goods are sold and where children are likely to be present. They may believe that trademark registration of such words could make it more likely that children will be exposed to public displays involving such words. To that end, the Government may

have an interest in protecting the sensibilities of children by barring the registration of such words. See *Denver Area Ed. Telecommunications Consortium, Inc.* v. *FCC*, 518 U. S. 727, 743 (1996) (plurality opinion) (noting the Government's interest in "protec[ting] children from exposure to patently offensive sex-related material"); *Ginsberg* v. *New York*, 390 U. S. 629, 640 (1968) (noting the government's "interest in the well-being of its youth").

The upshot of this analysis is that the narrowing construction articulated by JUSTICE SOTOMAYOR risks some harm to First Amendment interests, but not very much. And applying that interpretation seems a reasonable way—perhaps the only way—to further legitimate government interests. Of course, there is a risk that the statute might be applied in a manner that stretches it beyond the few vulgar words that are encompassed by the narrow interpretation JUSTICE SOTOMAYOR sets forth. That risk, however, could be mitigated by internal agency review to ensure that agency officials do not stray beyond their mandate. In any event, I do not believe that this risk alone warrants the facial invalidation of this statute.

I would conclude that the prohibition on registering "scandalous" marks does not "wor[k] harm to First Amendment interests that is disproportionate in light of the relevant regulatory objectives." *Reed*, 576 U. S., at ___ (opinion of BREYER, J.) (slip op., at 4). I would therefore uphold this part of the statute. I agree with the Court, however, that the bar on registering "immoral" marks violates the First Amendment. Because JUSTICE SOTOMAYOR reaches the same conclusions, using roughly similar reasoning, I join her opinion insofar as it is consistent with the views set forth here.

SUPREME COURT OF THE UNITED STATES

No. 18–302

ANDREI IANCU, UNDER SECRETARY OF COMMERCE FOR INTELLECTUAL PROPERTY AND DIRECTOR, PATENT AND TRADEMARK OFFICE, PETITIONER *v.* ERIK BRUNETTI

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

[June 24, 2019]

JUSTICE SOTOMAYOR, with whom JUSTICE BREYER joins, concurring in part and dissenting in part.

The Court's decision today will beget unfortunate results. With the Lanham Act's scandalous-marks provision, 15 U. S. C. §1052(a), struck down as unconstitutional viewpoint discrimination, the Government will have no statutory basis to refuse (and thus no choice but to begin) registering marks containing the most vulgar, profane, or obscene words and images imaginable.

The coming rush to register such trademarks—and the Government's immediate powerlessness to say no—is eminently avoidable. Rather than read the relevant text as the majority does, it is equally possible to read that provision's bar on the registration of "scandalous" marks to address only obscenity, vulgarity, and profanity. Such a narrowing construction would save that duly enacted legislative text by rendering it a reasonable, viewpoint-neutral restriction on speech that is permissible in the context of a beneficial governmental initiative like the trademark-registration system. I would apply that narrowing construction to the term "scandalous" and accordingly reject petitioner Erik Brunetti's facial challenge.

I

Trademark registration, as the majority notes, is not required for using, owning, or suing others for infringing a trademark. Rather, the trademark-registration system is an ancillary system set up by the Government that confers a small number of noncash benefits on trademark-holders who register their marks. See *ante*, at 2.

The Government need not provide this largely commercial benefit at all. Once the Government does provide the benefit, however, it may not restrict access on the basis of the viewpoint expressed by the relevant mark. See *ante,* at 4–5. For that reason, the Court concluded in *Matal* v. *Tam*, 582 U. S. ___ (2017), that §1052(a)'s provision directing the U. S. Patent and Trademark Office (PTO) to deny registration to "disparag[ing]" trademarks was unconstitutional. This case centers on a neighboring set of restrictions: §1052(a)'s provision barring registration of marks featuring "immoral . . . or scandalous matter."

The majority finds viewpoint discrimination here by treating the terms "scandalous" and "immoral" as comprising a unified standard that allows messages "aligned with conventional moral standards" but forbids messages "hostile to" such standards. See *ante*, at 6. While the majority's interpretation of the statute is a reasonable one, it is not the only reasonable one.

A

As the majority notes, there are dictionary definitions for both "immoral" and "scandalous" that do suggest a viewpoint-discriminatory meaning. See *ante*, at 5–6. And as for the word "immoral," I agree with the majority that there is no tenable way to read it that would ameliorate the problem. The word clearly connotes a preference for "rectitude and morality" over its opposite. See *ante*, at 5.

It is with regard to the word "scandalous" that I part ways with the majority. Unquestionably, "scandalous" can

mean something similar to "immoral" and thus favor some viewpoints over others. See *ante*, at 6. But it does not have to be read that way. To say that a word or image is "scandalous" can instead mean that it is simply indecent, shocking, or generally offensive. See Funk & Wagnalls New Standard Dictionary 2186 (1944) (Funk & Wagnalls) ("shocking to the sense of truth, decency, *or* propriety; disgraceful, offensive" (emphasis added)); Webster's New International Dictionary 2229 (1942) ("exciting reprobation; calling out condemnation"); 9 Oxford English Dictionary 175 (1933) ("Of the nature of, or causing, a 'stumbling-block' or occasion of offence"); 8 Century Dictionary and Cyclopedia 5374 (1911) (Century Dictionary) ("Causing scandal or offense; exciting reproach or reprobation; extremely offensive to the sense of duty or propriety; shameful; shocking"); see also Webster's New College Dictionary 1008 (3d ed. 2005) ("shocking or offensive"). That offensiveness could result from the views expressed, but it could also result from the way in which those views are expressed: using a manner of expression that is "shocking to [one's] sense of . . . decency," Funk & Wagnalls 2186, or "extremely offensive to the sense of . . . propriety," 8 Century Dictionary 5374.

The word "scandalous" on its own, then, is ambiguous: It can be read broadly (to cover both offensive ideas and offensive manners of expressing ideas), or it can be read narrowly (to cover only offensive modes of expression). That alone raises the possibility that a limiting construction might be appropriate. But the broader text confirms the reasonableness of the narrower reading, because the word "scandalous" appears in the statute alongside other words that can, and should, be read to constrain its scope.

It is foundational "that a statute is to be read as a whole, since the meaning of statutory language, plain or not, depends on context." *King* v. *St. Vincent's Hospital*, 502 U. S. 215, 221 (1991) (citation omitted). "'Words are

not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used.'" *Ibid.* (quoting *NLRB* v. *Federbush Co.*, 121 F. 2d 954, 957 (CA2 1941) (L. Hand, J.)). Accordingly, and relatedly, courts should, to the extent possible, read statutes so that "'no clause, sentence, or word shall be superfluous, void, or insignificant.'" *TRW Inc.* v. *Andrews*, 534 U. S. 19, 31 (2001).[1]

Here, Congress used not only the word "scandalous," but also the words "immoral" and "disparage," in the same block of statutory text—each as a separate feature that could render a mark unregistrable. See §1052(a). *Tam* already decided that "disparage" served to prohibit marks that were offensive because they derided a particular person or group. See 582 U. S., at ___ (opinion of ALITO, J.) (slip op., at 22) ("It denies registration to any mark that is offensive to a substantial percentage of the members of any group"); *id.,* at ___ (opinion of Kennedy, J.) (slip op., at 2) ("[A]n applicant may register a positive or benign mark but not a derogatory one"). That defines one of the three words. Meanwhile, as the majority explains, the word "immoral" prohibits marks that are offensive because they transgress widely held moral beliefs. See *ante*, at 5. That defines a second of the three words.

With marks that are offensive because they are disparaging and marks that are offensive because they are immoral already covered, what work did Congress intend for

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[1] For example, *McDonnell* v. *United States*, 579 U. S. ___ (2016), involved a statute that defined an "'official act'" as "'any decision or action on any question, matter, cause, suit, proceeding or controversy.'" *Id.*, at ___ (slip op., at 13). The Court declined to read "'question'" and "'matter'" as covering "a typical meeting, call, or event arranged by a public official" because doing so would deprive the words "'cause, suit, proceeding or controversy'" of meaning. *Id.*, at ___ (slip op., at 16).

"scandalous" to do? A logical answer is that Congress meant for "scandalous" to target a third and distinct type of offensiveness: offensiveness in the mode of communication rather than the idea. The other two words cover marks that are offensive because of the ideas they express; the "scandalous" clause covers marks that are offensive because of the mode of expression, apart from any particular message or idea.

To be sure, there are situations in which it makes sense to treat adjoining words as expressing the same or highly similar concepts (even at the risk of some redundancy). Cf. *Swearingen* v. *United States*, 161 U. S. 446, 450 (1896) (construing "'obscene, lewd or lascivious'" to have a unified meaning). That is essentially the approach that the majority takes. See *ante,* at 6.[2] But that is not the approach that Congress appears to have intended here. For example, "scandalous" does not serve as a broader catchall at the end of a list of similar words that all point in one direction. *E.g., Washington State Dept. of Social and Health Servs.* v. *Guardianship Estate of Keffeler*, 537 U. S. 371, 384 (2003). Nor is "scandalous" simply grouped among a number of closely related terms that help define its meaning. *E.g., Gustafson* v. *Alloyd Co.*, 513 U. S. 561, 575 (1995).

The text of §1052, instead, is a grab bag: It bars the registration of marks featuring "immoral, deceptive, or scandalous matter," as well as, *inter alia*, disparaging marks, flags, insignias, mislabeled wines, and deceased Presidents. See §§1052(a)–(e). This is not, in other words, a situation in which Congress was simply being "verbos[e]

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[2] That interpretive move appears to accord with the Federal Circuit and the PTO's past practice. *Ante,* at 2–3. Nevertheless, it is by no means the only reasonable way to read this text, and indeed some courts have suggested that "scandalous" can and should be applied independently of "immoral," see, *e.g., In re McGinley*, 660 F. 2d 481, 485, n. 6 (CCPA 1981).

and proli[x]," *Bruesewitz* v. *Wyeth LLC*, 562 U. S. 223, 236 (2011), using two synonyms in rapid-fire succession when one would have done fine. Instead, "scandalous" and "immoral" are separated by an unrelated word ("deceptive") and mixed in with a lengthy series of other, unrelated concepts. The two therefore need not be interpreted as mutually reinforcing under the Court's precedents. See *Graham County Soil and Water Conservation Dist.* v. *United States ex rel. Wilson*, 559 U. S. 280, 288 (2010).

For that reason, while the majority offers a reasonable reading of "scandalous," it also unnecessarily and ill-advisedly collapses the words "scandalous" and "immoral." Instead, it should treat them as each holding a distinct, nonredundant meaning, with "immoral" covering marks that are offensive because they transgress social norms, and "scandalous" covering marks that are offensive because of the mode in which they are expressed.

What would it mean for "scandalous" in §1052(a) to cover only offensive modes of expression? The most obvious ways—indeed, perhaps the only conceivable ways—in which a trademark can be expressed in a shocking or offensive manner are when the speaker employs obscenity, vulgarity, or profanity.[3] Obscenity has long been defined by this Court's decision in *Miller* v. *California*, 413 U. S. 15 (1973). See *id.,* at 24–26. As for what constitutes "scandalous" vulgarity or profanity, I do not offer a list, but I do interpret the term to allow the PTO to restrict (and potentially promulgate guidance to clarify) the small group of lewd words or "swear" words that cause a visceral reaction, that are not commonly used around children, and that are prohibited in comparable settings.[4] Cf. 18

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[3] Other modes of expression, such as fighting words or extremely loud noises, could also be called shocking or offensive in certain contexts, see *R. A. V.* v. *St. Paul*, 505 U. S. 377, 386 (1992), but it is hard to see how they would apply in the context of a trademark.

[4] Although the Government represents, and case law and scholarship

U. S. C. §1464 (prohibiting "obscene, indecent, or profane language" in radio communications); *FCC* v. *Pacifica Foundation*, 438 U. S. 726, 746, and n. 22 (1978) (opinion of Stevens, J.) (regulator's objection to a monologue containing various "four-letter words" was not to its "point of view, but to the way in which it [wa]s expressed"); 46 CFR §67.117(b)(3) (2018) (Coast Guard regulation prohibiting vessel names that "contain" or are "phonetically identical to obscene, indecent, or profane language, or to racial or ethnic epithets"); see also Jacobs, The Public Sensibilities Forum, 95 Nw. U. L. Rev. 1357, 1416–1417, and n. 432 (2001) (noting that "swear words" are "perhaps more than any other categor[y] capable of specific articulation" and citing one state agency's list). Of course, "scandalous" offers its own limiting principle: if a word, though not exactly polite, cannot be said to be "scandalous"—*e.g.,* "shocking" or "extremely offensive," 8 Century Dictionary 5374—it is clearly not the kind of vulgarity or profanity that Congress intended to target. Everyone can think of a small number of words (including the apparent homonym of Brunetti's mark) that would, however, plainly qualify.[5]

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appear to confirm, that "scandalous" in §1052(a) has often been applied to cover this kind of content, see Brief for United States 27; *In re Boulevard Entertainment, Inc.*, 334 F. 3d 1336, 1340 (CA Fed. 2003); Snow, Denying Trademark for Scandalous Speech, 51 U. C. D. L. Rev. 2331, 2339 (2018) (Snow), the majority notes that the PTO has hardly amassed a perfect track record of consistency, see *ante*, at 6–8. Be that as it may, the Government undeniably receives a large volume of trademark applications that easily would fit under this rubric (examples of which I will spare the reader). See *In re Brunetti*, 877 F. 3d 1330, 1355 (CA Fed. 2017) (noting an appendix containing marks denied registration "whose offensiveness cannot be reasonably questioned"). As a result of today's ruling, all of those marks will now presumably have to be registered.

[5] There is at least one particularly egregious racial epithet that would fit this description as well. While *Matal* v. *Tam*, 582 U. S. ___ (2017), removed a statutory basis to deny the registration of racial epithets in general, the Government represented at oral argument that it is

B

A limiting construction like the one just discussed is both appropriate in this context and consistent with past precedent. First, while a limiting construction must always be at least reasonable, there are contexts in which imposing such a construction is more appropriate than others. The most obvious example of a setting where more caution is required is in the realm of criminal statutes, where considerations such as the prohibition against vagueness and the rule of lenity come into play. See *Reno* v. *American Civil Liberties Union*, 521 U. S. 844, 872 (1997) (noting that "[t]he severity of criminal sanctions" can increase First Amendment concerns); *Board of Airport Comm'rs of Los Angeles* v. *Jews for Jesus, Inc.*, 482 U. S. 569, 575–576 (1987) (declining to apply a limiting construction to a provision that banned "'First Amendment activities'" from an airport and noting that the limiting construction proposed would "'confe[r] on police a virtually unrestrained power to arrest and charge persons with a violation,'" leading to "'self-evident'" "'opportunity for abuse'"). Here, however, the question is only whether the Government must be forced to provide the ancillary benefit of trademark registration to pre-existing trademarks that use even the most extreme obscenity, vulgarity, or profanity. The stakes are far removed from a situation in which, say, Brunetti was facing a threat to his liberty, or even his right to use and enforce his trademark in commerce.

Second, the Court has in the past accepted or applied similarly narrow constructions to avoid constitutional

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holding in abeyance trademark applications that use that particular epithet. See Tr. of Oral Arg. 61. As a result of today's ruling, the Government will now presumably be compelled to register marks containing that epithet as well rather than treating it as a "scandalous" form of profanity under §1052(a).

infirmities. In *Chaplinsky* v. *New Hampshire*, 315 U. S. 568 (1942), for example, the Court accepted the New Hampshire Supreme Court's narrowing of a state statute covering "'any offensive, derisive or annoying word,'" *id.,* at 569, to reach only those words that would strike the average person as being "plainly likely to cause a breach of the peace by the addressee," *id.,* at 573. "[T]hus construed," this Court decided, the statute did not violate the right to free speech. *Ibid.*; see also *Boos* v. *Barry*, 485 U. S. 312, 329–330 (1988) (accepting Court of Appeals' construction of a statute making it illegal "'to congregate within 500 feet of any [embassy, legation, or consulate] and refuse to disperse after having been ordered so to do by the police'" to reach only "congregations that are directed at an embassy" and "'only when the police reasonably believe that a threat to the security or peace of the embassy is present'").

In *Frisby* v. *Schultz*, 487 U. S. 474 (1988), the Court addressed an ordinance that prohibited "'picketing before or about the residence or dwelling of any individual.'" *Id.,* at 477. The Court construed the statute to reach only "focused picketing taking place solely in front of a particular residence." *Id.,* at 483. Given that "narrow scope," the statute was not facially unconstitutional. *Id.,* at 488; see also *In re Brunetti*, 877 F. 3d 1330, 1358 (CA Fed. 2017) (Dyk, J., concurring in judgment) (noting this Court's narrow constructions of federal obscenity statutes).

Taking the word "scandalous" to target only those marks that employ an offensive mode of expression follows a similar practice. To be sure, the word could be read more broadly, thereby sweeping unconstitutionally into viewpoint discrimination. And imposing a limiting construction is, of course, "not a license for the judiciary to rewrite language enacted by the legislature." *United States* v. *Albertini*, 472 U. S. 675, 680 (1985). But where the Court can reasonably read a statute like this one to

save it, the Court should do so. See *Stern* v. *Marshall*, 564 U. S. 462, 477–478 (2011); *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 30 (1937).

II

Adopting a narrow construction for the word "scandalous"—interpreting it to regulate only obscenity, vulgarity, and profanity—would save it from unconstitutionality. Properly narrowed, "scandalous" is a viewpoint-neutral form of content discrimination that is permissible in the kind of discretionary governmental program or limited forum typified by the trademark-registration system.

A

Content discrimination occurs whenever a government regulates "particular speech because of the topic discussed or the idea or message expressed." *Reed* v. *Town of Gilbert*, 576 U. S. ___, ___ (2015) (slip op., at 6); see also *Ward* v. *Rock Against Racism*, 491 U. S. 781, 791 (1989) ("Government regulation of expressive activity is content neutral so long as it is '*justified* without reference to the content of the regulated speech'"). Viewpoint discrimination is "an egregious form of content discrimination" in which "the government targets not subject matter, but particular views taken by speakers on a subject." *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 829 (1995).

While the line between viewpoint-based and viewpoint-neutral content discrimination can be "slippery," see Corbin, Mixed Speech: When Speech Is Both Private and Governmental, 83 N. Y. U. L. Rev. 605, 651 (2008), it is in any event clear that a regulation is not viewpoint discriminatory (or even content discriminatory) simply because it has an "incidental effect" on a certain subset of views. *Ward*, 491 U. S., at 791. Some people, for example, may have the viewpoint that society should be more sexually

liberated and feel that they cannot express that view sufficiently without the use of pornographic words or images. That does not automatically make a restriction on pornography into viewpoint discrimination, despite the fact that such a restriction limits communicating one's views on sexual liberation in that way. See *ibid.*; *Renton* v. *Playtime Theatres, Inc.*, 475 U. S. 41, 48 (1986).

Restrictions on particular modes of expression do not inherently qualify as viewpoint discrimination; they are not by nature examples of "the government target[ing] . . . particular views taken by speakers on a subject." *Rosenberger*, 515 U. S., at 829. For example, a ban on lighting fires in the town square does not facially violate the First Amendment simply because it makes it marginally harder for would-be flag-burners to express their views in that place. See *R. A. V.* v. *St. Paul*, 505 U. S. 377, 385 (1992). By the same token, "fighting words are categorically excluded from the protection of the First Amendment" not because they have no content or express no viewpoint (often quite the opposite), but because "their content embodies a particularly intolerable (and socially unnecessary) *mode* of expressing *whatever* idea the speaker wishes to convey." *Id.,* at 393; see *id.,* at 385–386; cf. *Bolger* v. *Youngs Drug Products Corp.*, 463 U. S. 60, 84 (1983) (Stevens, J., concurring in judgment) ("It matters whether a law regulates communications for their ideas or for their style").

A restriction on trademarks featuring obscenity, vulgarity, or profanity is similarly viewpoint neutral, though it is naturally content-based.[6] See *R. A. V.*, 505 U. S., at 383

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[6] Of course, obscenity itself is subject to a longstanding exception to First Amendment protection, see *Brown* v. *Entertainment Merchants Assn.*, 564 U. S. 786, 791 (2011), so it is proscribable in any event. As for vulgarity and profanity, however, they are not subject to any such exception, and a regulation like §1052(a)'s ban on the registration of scandalous marks is not "'justified without reference to the content of

(kinds of speech like "obscenity, defamation, etc." may "be regulated because of their constitutionally proscribable content" (emphasis deleted)); see also *Bethel School Dist. No. 403* v. *Fraser*, 478 U. S. 675, 685 (1986) (treating punishment of "offensively lewd and indecent speech" as viewpoint neutral); *Pacifica*, 438 U. S., at 745–746, and n. 22 (treating regulation of profane monologue as viewpoint neutral). Indeed, the statute that the Court upheld in *Chaplinsky* itself had been construed to cover, among other kinds of "disorderly words," "profanity, obscenity and threats," 315 U. S., at 573, despite the fact that such words had been used in that case to communicate an expressive message, *id.,* at 574. To treat a restriction on vulgarity, profanity, or obscenity as viewpoint discrimination would upend decades of precedent.[7]

Brunetti invokes *Cohen* v. *California*, 403 U. S. 15 (1971), to argue that the restriction at issue here is viewpoint discriminatory. But *Cohen*—which did not employ the precise taxonomy that is more common today—does not reach as far as Brunetti wants. *Cohen* arose in the criminal context: Cohen had been arrested and imprisoned under a California criminal statute targeting disturbances of the peace because he was "wearing a jacket bearing the words 'F[***] the Draft.'" *Id.,* at 16. The Court held that applying that statute to Cohen because of his jacket violated the First Amendment. *Id.,* at 26. But the Court did

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the regulated speech'" in the way that a simple regulation of time, place, or manner is. *Ward* v. *Rock Against Racism*, 491 U. S. 781, 791 (1989) (emphasis deleted).

[7] It would also risk destabilizing government practice in a number of other contexts. Governments regulate vulgarity and profanity, for example, on city-owned buses and billboards, *e.g., American Freedom Defense Initiative* v. *Massachusetts Bay Transp. Auth.*, 989 F. Supp. 2d 182, 183 (Mass. 2013) (noting such a prohibition), on registered vessels, 46 CFR §67.117(b)(3) (Coast Guard regulations), and at school events, *e.g., Bethel School Dist. No. 403* v. *Fraser*, 478 U. S. 675, 677–678, 685 (1986) (upholding discipline of high school student).

not suggest that the State had targeted Cohen to suppress his view itself (*i.e.,* his sharp distaste for the draft), such that it would have accepted an equally colorful statement of praise for the draft (or hostility toward war protesters). Rather, the Court suggested that the State had simply engaged in what later courts would more precisely call viewpoint-neutral content discrimination—it had regulated "the form or content of individual expression." *Id.,* at 24; see *id.,* at 25–26.

Cohen also famously recognized that "words are often chosen as much for their emotive as their cognitive force," *id.,* at 26, and that "one man's vulgarity is another's lyric," *id.,* at 25. That is all consistent with observing that a plain, blanket restriction on profanity (regardless of the idea to which it is attached) is a viewpoint-neutral form of content discrimination. The essence of *Cohen*'s discussion is that profanity can serve to tweak (or amplify) the viewpoint that a message expresses, such that it can be hard to disentangle the profanity from the underlying message—without the profanity, the message is not quite the same. See *id.,* at 25–26. But those statements merely reinforce that profanity is still properly understood as protected First Amendment content. See also *R. A. V.*, 505 U. S., at 384–385. *Cohen*'s discussion does not also go further to declare, as Brunetti suggests, that a provision that treats all instances of profanity equally is nevertheless by nature an instance of "the government target[ing] . . . particular views taken by speakers on a subject." *Rosenberger*, 515 U. S., at 829. To be sure, such a restriction could have the incidental effect of tamping down the overall volume of debate on all sides. But differential effects alone, as explained above, do not render a restriction viewpoint (or even content) discriminatory. See *Ward*, 491 U. S., at 791–792.[8]

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[8] That does not mean, of course, that a government may elude harsher

Cohen therefore does not resolve this case in Brunetti's favor. Yes, Brunetti has been, as Cohen was, subject to content discrimination, but that content discrimination is properly understood as viewpoint neutral. And whereas even viewpoint-neutral content discrimination is (in all but the most compelling cases, such as threats) impermissible in the context of a criminal prosecution like the one that Cohen faced, Brunetti is subject to such regulation only in the context of the federal trademark-registration system. I discuss next why that distinction matters.

B

While the Court has often subjected even viewpoint-neutral content discrimination to strict constitutional scrutiny, see, *e.g., Reed*, 576 U. S., at ___ (slip op., at 6), there are contexts in which it does not, see, *e.g., Rosenberger*, 515 U. S., at 829–830. When that is the case, the difference between viewpoint-based and viewpoint-neutral content discrimination can be decisive. The federal trademark-registration system is such a context.

Rights to a trademark itself arise through use, not registration. Regardless of whether a trademark is registered, it can be used, owned, and enforced against would-be infringers. See *B&B Hardware, Inc.* v. *Hargis Industries, Inc.*, 575 U. S. ___, ___, ___ (2015) (slip op., at 3, 5). Trademark registration, meanwhile, confers several ancil-

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scrutiny or invalidation of a regulation by simply claiming disinterest in a speaker's message, see *United States* v. *Eichman*, 496 U. S. 310, 315–317 (1990), or by concealing an attempt to favor some views over others in superficially neutral garb, see *Renton* v. *Playtime Theatres, Inc.*, 475 U. S. 41, 46–49 (1986); cf. *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U. S. 520, 533–534 (1993). But there is no evidence in the record from which to conclude that Congress enacted the scandalous-marks provision in order to advantage certain views over others. And where a denial of trademark registration by the PTO raises such a concern, it would be proper for an applicant to bring an as-applied challenge. See *infra*, at 18–19.

lary benefits on trademark-holders who meet Congress' specifications, including for example, additional protections against infringers. See *ante*, at 2; *Tam*, 582 U. S., at ___ (slip op., at 5). Registering a mark in the Government's searchable register puts the world on notice (whether actual or constructive) that a party is asserting ownership of that mark.[9] Registration, in short, is a helpful system, but it is one that the Government is under no obligation to establish and that is collateral to the existence and use of trademarks themselves. There is no evidence that speech or commerce would be endangered if the Government were not to provide it at all.

When the Court has talked about governmental initiatives like this one before, it has usually used one of two general labels. In several cases, the Court has treated such initiatives as a limited public (or nonpublic) forum. See, *e.g., Christian Legal Soc. Chapter of Univ. of Cal., Hastings College of Law* v. *Martinez*, 561 U. S. 661, 669–670, 682 (2010) ("'Registered Student Organization'" program providing various financial and nonfinancial benefits to recognized law-school student groups); *Rosenberger*, 515 U. S., at 823–824, 829–830 ("Student Activities Fund" for registered campus student groups); *Cornelius* v. *NAACP Legal Defense & Ed. Fund, Inc.*, 473 U. S. 788, 790–791, 799–801, 806 (1985) ("Combined Federal Campaign" literature enabling approved charitable organizations to solicit donations from federal employees). In other situations, the Court has discussed similar initiatives as government programs or subsidies. See, *e.g., Legal Services Corporation* v. *Velazquez*, 531 U. S. 533, 536, 543–544 (2001) (government program distributing funds to legal-services organizations); *National Endowment for*

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[9] See 15 U. S. C. §1072; U. S. Patent & Trademark Office, Search Trademark Database, https://www.uspto.gov/trademarks-application-process/search-trademark-database (as last visited June 20, 2019).

Arts v. *Finley*, 524 U. S. 569, 573, 585–587 (1998) (competitive government grant-making program to support the arts).[10] In each of these situations, a governmental body established an initiative that supported some forms of expression without restricting others. Some speakers were better off, but no speakers were worse off.

Regardless of the finer distinctions between these labels, reasonable, viewpoint-neutral content discrimination is generally permissible under either framework. See *Christian Legal Soc.*, 561 U. S., at 679 ("Any access barrier must be reasonable and viewpoint neutral"); *Velazquez*, 531 U. S., at 543–544, 548–549 (analogizing to limited-forum cases and explaining that "[w]here private speech is involved, even Congress' antecedent funding decision cannot be aimed at the suppression of ideas thought inimical to the Government's own interest"); see also *Ysursa* v. *Pocatello Ed. Assn.*, 555 U. S. 353, 355 (2009) (finding government conduct that did not restrict speech but simply "decline[d] to promote" it valid where it was "reasonable in light of the State's interest"). Perhaps for that reason, the Court has often discussed the two frameworks as at least closely related. See, *e.g., Christian Legal Society*, 561 U. S., at 682 ("[T]his case fits comfortably within the limited-public forum category, for [the plaintiff], in seek-

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[10] In *Tam*, four Justices concluded that cash-subsidy programs like the one in *Finley* were "not instructive in analyzing" trademark registration. 582 U. S., at ___ (opinion of ALITO, J.) (slip op., at 20). Trademark registration differs, of course, because any "subsidy" comes in the form of a noncash benefit, but that difference does not foreclose understanding the registration system as a beneficial, noncash governmental program. No Justice, meanwhile, rejected the limited-public-forum analogy, see *id.,* at ___–___, and n. 16 (slip op., at 22–23, and n. 16) (calling such cases "[p]otentially more analogous" and reserving the question), and scholars have noted arguments for adopting it. See Snow 2364–2366; Katyal, Trademark Intersectionality, 57 UCLA L. Rev. 1601, 1676–1681 (2010); Lefstin, Note, Does the First Amendment Bar Cancellation of REDSKINS? 52 Stan. L. Rev. 665, 706–707 (2000).

ing what is effectively a state subsidy, faces only indirect pressure . . . "); *Velazquez*, 531 U. S., at 544 ("As this suit involves a subsidy, limited forum cases . . . may not be controlling in a strict sense, yet they do provide some instruction").

Whichever label one chooses here, the federal system of trademark registration fits: It is, in essence, an opportunity to include one's trademark on a list and thereby secure the ancillary benefits that come with registration.[11] Just as in the limited-forum and government-program cases, some speakers benefit, but no speakers are harmed. Brunetti, for example, can use, own, and enforce his mark regardless of whether it has been registered. Whether he may register his mark can therefore turn on reasonable, viewpoint-neutral content regulations.[12]

C

Prohibiting the registration of obscene, profane, or vulgar marks qualifies as reasonable, viewpoint-neutral, content-based regulation. Apart from any interest in regulating commerce itself, the Government has an interest in not promoting certain kinds of speech, whether because such speech could be perceived as suggesting governmental favoritism or simply because the Government does not wish to involve itself with that kind of speech. See, *e.g., Ysursa*, 555 U. S., at 359–360; *Cornelius*, 473 U. S., at 809. While "there is no evidence that the

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[11] Not every registration system would necessarily fit the same bill, whether because not every such system invites expressive content like trademarks or simply because other forms of registration may not be so ancillary as to qualify solely as a "benefit."

[12] Though I do not address the constitutionality of provisions not before the Court, I note as well that the "scandalous" bar in §1052(a) is hardly the only provision in §1052 that could be characterized as content discriminatory. See, *e.g.,* §1052(b) (no flags or insignias); §1052(c) (no unapproved markers of deceased U. S. Presidents during the lives of their spouses).

public associates the contents of trademarks with the Federal Government," *Tam*, 582 U. S., at ___ (slip op., at 17), registration nevertheless entails Government involvement in promoting a particular mark. Registration requires the Government to publish the mark, as well as to take steps to combat international infringement. See 15 U. S. C. §§1062, 1124; see also Brief for United States 35. The Government has a reasonable interest in refraining from lending its ancillary support to marks that are obscene, vulgar, or profane. Cf. *Hustler Magazine, Inc.* v. *Falwell*, 485 U. S. 46, 56 (1988) ("[S]peech that is vulgar, offensive, and shocking is not entitled to absolute constitutional protection under all circumstances" (internal quotation marks omitted)).

III

"The cardinal principle of statutory construction is to save and not to destroy." *Jones & Laughlin Steel Corp.*, 301 U. S., at 30; see also *Hooper* v. *California*, 155 U. S. 648, 657 (1895) ("The elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality"). In directing the PTO to deny the ancillary benefit of registration to trademarks featuring "scandalous" content, Congress used a word that is susceptible of different meanings. The majority's reading would render the provision unconstitutional; mine would save it. Under these circumstances, the Court ought to adopt the narrower construction, rather than permit a rush to register trademarks for even the most viscerally offensive words and images that one can imagine.[13]

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[13] As noted above, I agree with the majority that §1052(a)'s bar on the registration of "immoral" marks is unconstitutional viewpoint discrimination. See *supra,* at 2. I would simply sever that provision and uphold the bar on "scandalous" marks. See *Reno* v. *American Civil Liberties Union*, 521 U. S. 844, 882–883 (1997); *Brockett* v. *Spokane*

That said, I emphasize that Brunetti's challenge is a facial one. That means that he must show that "'a substantial number of [the scandalous-marks provision's] applications are unconstitutional, judged in relation to the [provision's] plainly legitimate sweep.'" *United States* v. *Stevens*, 559 U. S. 460, 473 (2010). With "scandalous" narrowed to reach only obscene, profane, and vulgar content, the provision would not be overly broad. Cf. *Frisby*, 487 U. S., at 488 (rejecting a facial challenge after adopting a limiting construction); *Boos*, 485 U. S., at 331 (same). Even so, hard cases would remain, and I would expect courts to take seriously as-applied challenges demonstrating a danger that the provision had been used to restrict speech based on the views expressed rather than the mode of expression.[14] Cf. *Finley*, 524 U. S., at 587 (reserving the possibility of as-applied challenges).

Freedom of speech is a cornerstone of our society, and the First Amendment protects Brunetti's right to use words like the one at issue here. The Government need not, however, be forced to confer on Brunetti's trademark (and some more extreme) the ancillary benefit of trademark registration, when "scandalous" in §1052(a) can reasonably be read to bar the registration of only those marks that are obscene, vulgar, or profane. Though I concur as to the unconstitutionality of the term "immoral" in §1052(a), I respectfully dissent as to the term "scandalous" in the same statute and would instead uphold it under the narrow construction discussed here.

Arcades, Inc., 472 U. S. 491, 504–507 (1985); see also *Tam*, 582 U. S., at ___ (slip op., at 26) (striking down only the disparagement clause).

[14] The majority adverts to details in the record that could call into question whether the PTO engaged in viewpoint discrimination in this very case. See *ante*, at 3. Because a facial challenge is the only challenge before the Court, I do not address whether an as-applied challenge could have merit here.

Nos. 16-56057 & 16-56287

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHAEL SKIDMORE, AS TRUSTEE FOR THE RANDY CRAIG WOLFE TRUST,
Plaintiff-Appellant-Appellee

v.

LED ZEPPELIN, *et al.*,
Defendants-Appellees

AND

WARNER/CHAPPELL MUSIC, INC.,
Defendant-Appellee-Appellant

On Appeal from the United States District Court
For the Central District of California
Case No. 2:15-cv-03462-RGK(AGRx)
Hon. R. Gary Klausner, District Court Judge

AMICI CURIAE BRIEF OF MUSICOLOGISTS IN SUPPORT OF DEFENDANTS-APPELLEES AT *EN BANC* REHEARING

Kenneth D. Freundlich
FREUNDLICH LAW
16133 Ventura Blvd. Ste. 645
Encino, CA 91436
(310) 275-5350
Counsel for Amici Curiae

July 1, 2019

IDENTITY OF AMICI

This brief of amici curiae is submitted on behalf of the following persons (academic affiliations are listed for identification purposes only):

Nicole Biamonte, PhD Associate Professor of Music Theory Schulich School of Music McGill University	**John Covach, PhD** Professor of Music Theory The College Department of Music Director, Institute for Popular Music Mercer Brugler Distinguished Teaching Professor The College Department of Music, University of Rochester
Charles Cronin, PhD B.M., J.D., M.A., Ph.D. (musicology) M.I.M.S. (Masters, Information Management & Systems) Lecturer in Law, University of Southern California Law School	**Dr. Gerald Eskelin** Doctor of Music Education Formerly of: University of Southern California music faculty; Pierce College, Music chairman and teacher of music theory Testifying witness and advisor regarding music copyright issues Stage 3 Music
Robert Fink, PhD Professor IV Director of Undergraduate Studies; Department of Musicology Chair, Music Industry Program UCLA Herb Alpert	**Michael Harrington, D.M.A.** Professor and Course Author Berklee College of Music / Berklee Online Music Business Program Faculty Chair

School of Music Professor in Humanities	
Katherine M. Leo, Ph.D., J.D. Assistant Professor of Music Millikin University	**Brad Osborn, Ph.D.** Associate Professor of Music Theory University of Kansas School of Music Affiliated Faculty: American Studies
André O. Redwood, PhD Assistant Professor of Music Theory University at Albany – SUNY	**Anthony Ricigliano** Former Chairman of the Music Theory Department Manhattan School of Music Testifying Musicologist Donato Music Services, Inc.
Dr. Patrick Savage Associate Professor Faculty of Environment and Information Studies Keio University SFC (Shonan Fujisawa Campus)	**Eleanor Selfridge-Field, PhD** Consulting Professor, Music Stanford University
Mark Spicer, Ph.D. Professor of Music Hunter College and the Graduate Center City University of New York	**Robert Walser, PhD.** Professor of Music Case Western Reserve University

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned states that none of the amici is a corporation that issues stock or has a parent corporation that issues stock.

Dated: July 1, 2019

FREUNDLICH LAW

s/ Kenneth D. Freundlich
Kenneth D. Freundlich
Attorneys for Amici Curiae

STATEMENT OF COMPLIANCE WITH RULES 29-2 and 29(a)(3)

This brief is submitted pursuant to Ninth Circuit Rule 29-2 and Rule 29(a)(3) of the Federal Rules of Appellate Procedure. Plaintiff Skidmore has not consented to the filing of this brief. All other parties have consented. Amici therefore submit this brief concurrently with a Motion for Leave to file it.

No party's counsel authored the brief in whole or in part; no party or party's counsel contributed money intended to fund preparing or submitting the brief and no person or entity – other than the amicus curiae, its members, or its counsel – contributed funds for preparing or submitting the brief.

Dated: July 1, 2019

FREUNDLICH LAW

s/ Kenneth D. Freundlich
Kenneth D. Freundlich
Attorneys for Amici Curiae

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INTEREST OF AMICI CURIAE

Amici are musicologists who research, teach and write about music, music analysis and music composition. In music copyright infringement cases, musicologists offer expert testimony about similarities between contested musical works, and whether the similarities are musically significant. Such testimony assists judges and jurors to evaluate the significance of alleged similarities between two musical works for extrinsic similarity.

Amici and their composer clients rely on judges, as gatekeepers, to screen out cases where there is no extrinsic similarity by addressing the significance of originality of expression and the protectable musical expression in two musical compositions[1]. Then, if the case proceeds to a jury trial, we must rely on how the jury will be instructed to consider musicological testimony.

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[1] A similar group of Amici musicologists submitted briefs in the appeal of the so-called *Blurred Lines* case, *Williams v. Gaye*, Case No. 15-56880, Nos. 16-55089 and 16-55626 (consolidated), Dckt. No. 20, and the Petition for *en banc* review, Dckt. No. 99 (arguing that judges should seize upon their role as "gatekeeper" to prevent cases from going to a jury based on claims that should not survive the extrinsic test as a matter of law).

To find actionable infringement, a jury must find that two works satisfy the "extrinsic test" *and* an "intrinsic test," the latter which asks the jury for its subjective evaluation of the similarity between two compositions based on listening to them. *See generally Swirsky v. Carey*, 376 F.3d 841 (9th Cir. 2004). If a jury finds that there is no extrinsic similarity, as the jury did here, the works will not be intrinsically evaluated by jurors.

Jurors aurally perceive music in different ways. Accordingly, such intrinsic evaluation, where there is no objective similarity between two pieces of music, could produce particularly uneven and unpredictable results. Amici have a strong interest in Courts correctly instructing juries in such a way as to enable them, where appropriate, to find no "extrinsic similarity" between works. Without such consistent and correct instructions, the arguments will invariably proceed to the subsequent "intrinsic test" and grossly inequitable determinations of infringement that will ultimately stifle the robust public domain that has allowed unparalleled creativity and innovation by American popular musicians.

ARGUMENT

The Ninth Circuit panel reversed a defense jury verdict based on its finding that Judge Klausner failed to instruct the jury that it could find infringement based simply on the selection and arrangement of unprotectable elements between two musical compositions. Such an instruction, given in the broad terms suggested by the panel, would foster unprecedented opportunism, unpredictability, and inequity in the initiation and resolution of these disputes. It would enable juries to find infringement even where there is no originality in the selection and arrangement of allegedly similar elements. Disputes would devolve to battles between experts, cherry-picking commonplace unprotectable similarities between two works in an attempt to manipulate musically untrained juries into findings of substantial musical similarity.

All musical works, like works of expression in other fields such as literature and visual arts, use unprotectable elements on some level. All copyrightable musical expression uses a limited number of pitches, rhythms, harmonies, key signatures, tempos, genres, etc., none of which may be monopolized by any musician.

Ninth Circuit Judge Jacqueline Nguyen recently identified the pernicious consequences of finding infringement based on the fact that two works may share a number of unprotected musical elements. In her dissent from the majority opinion in *Williams v. Gaye*, 895 F.3d 1106 (9th Cir. 2018) (the "*Blurred Lines* Case"), Judge Nguyen notes that there was no melodic, harmonic or rhythmic similarity of protectable expression between Marvin Gaye's "Got to Give it Up" and Pharrell Williams, Robin Thicke and Clifford Harris, Jr.'s "Blurred Lines," just an alleged "constellation" of similarities. *Id.* at 1138. In the *Blurred Lines* Case, just like in this case, the Gaye family's expert presented the jury with a cherry-picked list of common generic musical elements, leading to a widely condemned verdict of infringement.

Judge Nguyen, in her well-stated dissent in the *Blurred Lines* Case, aptly disputed the expert's tactic: "[The expert's cherry picking] might be reasonable if the two constellations bore any resemblance. But Big and Little Dipper they are not. The only similarity between these 'constellations' is that they're both compositions of stars." *Id.*

And commenting on the verdict in favor of the Gaye family, Judge Nguyen warned of its deeply regrettable implications:

> "The Gayes, no doubt, are pleased by this outcome. They shouldn't be. They own copyrights in many musical works, each of which (including 'Got to Give it Up') now potentially infringes the copyright of any famous song that preceded it. That is the consequence of the majority's uncritical deference to musical experts."

Id. at 1152.

If a jury were authorized to find infringement based on the findings of the Plaintiff's expert here, Alexander Stewart, Judge Nguyen's apprehensions would be realized. Stewart, like the Gaye family's expert, identifies commonplace musical elements found in the contested songs. These common arpeggios, repeated eighth notes, repeated two-note phrases, extracted from their larger contexts, are the grounds on which Plaintiff hopes to convince a jury to believe that "Stairway to Heaven" ("Stairway") infringes upon "Taurus."

Stewart's implication that infringing melodic and harmonic similarities can result from common generic musical elements falls flat. In fact, these elements comprise nothing more than a descending

chromatic bass line and its associated chords, both of which are commonplace and unprotectable musical *scènes à faire*.

The similar generic musical elements that can be identified in "Taurus" and "Stairway" are not original to either work. These constituent elements are akin to the flecks of similarly colored paint in the pointillist paintings to which Judge Nguyen referred. *See id.* at 1139. Like varied colored flecks of paint, arpeggios and descending bass lines are musical *ideas* that must remain freely available to composers to promote copyright law's fundamental objective to promote the production of innovative expression.

I. Stewart's Identified Similarities Between "Taurus" and "Stairway" Are Neither Individually nor Collectively Original Expression

A. Fundamental Elements of Music

Musical works are built from a common vocabulary of fundamental elements like pitch, duration, meter, key and timbre[2]. In

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[2] "Pitch" refers to the selection of notes, of which there are twelve in the standard chromatic scale used in Western popular music.

"Duration" refers to the length of notes (*e.g.*, quarter note and half note).

"Meter" refers to how beats are grouped indicated by a time signature (*e.g.*, 4/4 (4 equally spaced quarter-note beats per bar)).

this regard, the sounds of the instruments chosen for a particular recording of a musical composition can have an outsized effect on a jury's perception of the similarity of two musical compositions by attracting a listener's attention to the performance as opposed to the composition. *See* Jamie Lund, *An Empirical Examination of the Lay Listener Test in Music Composition Copyright Infringement*, 11 Va. Sports Ent. L.J. 137 (2012). This underscores the reason why the "extrinsic test" must be rigorously applied to prevent songs sharing unoriginal elements from ever reaching the jury's "intrinsic" listening test, which is by its nature so subjective.

All songwriters choose from among these commonplace elements in forging their original musical expression. Using these basic elements, composers build more complex structures like chords and melodic and rhythmic motifs, which they further develop and combine to create the rhythmically structured melodies and underlying harmonic progressions that constitute the original backbone of a musical work.

"Key" signatures are groups of sharps or flats indicating the notes on which the piece primarily depend.

"Timbre" refers to the character or quality of a musical sound or voice.

Accordingly, the most important elements of a musical composition are its *melody, harmony and rhythm*. *Melody* comprises a succession of pitches, each sounded for a particular duration. It is typically the most distinctive and memorable musical aspect of a popular song and of musical works in general because melody is what listeners most readily comprehend, recall and replicate[3]. In popular songs, the sung vocal line is the most identifiable and hummable part of a composition, and substantial similarity analysis between two popular songs almost invariably results in a question of melodic similarity.

Harmony is the relationship between two or more pitches that are sounded simultaneously or in close succession (*e.g.*, arpeggios). These pitches are commonly said to constitute a "chord." The harmonic progression of a composition is the sequence of chords that provide the support for its melodies.

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[3] *See* Fishman, J. P., *Music as a matter of law*, Harvard Law Review, Vol. 131, pp. 1861–1923 (2018). Melody is, in fact, the only musical element mentioned in the U.S. Copyright and foreign copyright statutes.

Rhythm is the pattern of sounds and silences in a piece of music as determined by the sequence and duration of the notes being performed or the beats of a percussion instrument.

In addition to the primary components of melody, harmony, and rhythm, there are, of course, myriad other elements available to composers. These include, for example, tempo[4], instrumentation[5], genre[6], dynamics[7], articulation[8], and phrasing[9]. While particular combinations and deployments of these secondary elements may enhance the appeal of a musical work, these are fundamentally enhancements of the primary melodies, harmonies, and rhythm.

There is no music without melody, harmony and rhythm; a musical work comprised of a constellation of elements like key, meter, dynamic markings, and designated instrumentation is meaningless. All songwriters choose from among these commonplace elements in forging

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[4] The pace of the beat (expressed as beats per minute measured on a metronome for example)
[5] Guitars, drums, piano, trumpet, trombone, etc.
[6] Hip hop, rock, country, rhythm and blues, classical, etc.
[7] The relative volume of the notes
[8] The attack, duration and decay of a given note, *e.g.*, staccato, legato and slurred.
[9] How groups of notes are played

their original musical expression. The fact that two or more composers may choose to employ some of the same common musical elements, however, has no bearing on the question whether their works contain substantially similar musical *expression*.

Amici believe that when there is no significant similarity of melody, harmony or rhythm, there is no possibility of actionable similarity between two musical compositions.

B. **There Is No Similarity Between Any Alleged Original Melodic or Harmonic Elements of "Taurus" and "Stairway"**

Stewart's positing of melodic and harmonic similarity between "Stairway" and "Taurus" is based on a repeating four-measure passage. Defense expert Ferrara's chart (*see* Ferrara's Musical Example 1 reproduced below) comparing the first four measures of the chord progressions between "Taurus" and "Stairway" accurately identifies the

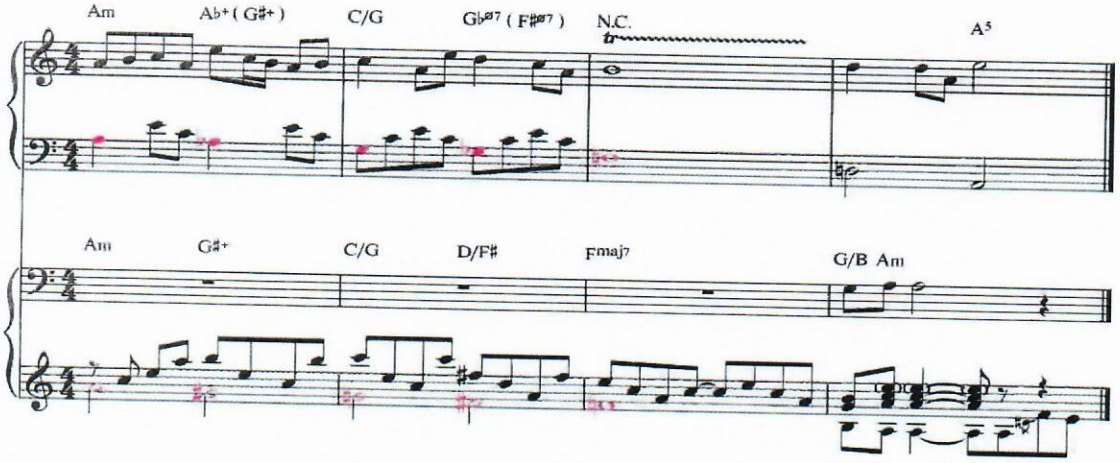
way to reflect the two phrases at issue.[10]

MUSICAL EXAMPLE 1

Four-measure chord progressions

Top two lines = Section A in "Taurus" with note values halved

Lower two lines = Measures 1-4 in "Stairway"



i. Unoriginal Chromatic Bass Line

The main similarity Stewart identifies between "Taurus" and "Stairway" is a descending chromatic bass line moving in half steps from the first to the fourth degree of the scale.

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[10] As written in the sheet music, the corresponding "Taurus" portion is actually eight measures long. Ferrara charted "Taurus" and "Stairway" for comparison, halving the difference in "Taurus" note values to facilitate comparative translation of shared similarities. This is an acceptable musicological practice.

Amici concur with Ferrara's testimony that this chromatic bassline is commonly heard not only in many twentieth-century popular songs, but also in musical works in general since the Baroque period.

ii. The Harmonic Progression (Chords) Following the Bass Line is Not Original

As indicated in the musical excerpt provided above, there are only three similar chords in the relevant four-bar phrase: A minor, A Flat augmented (which is identical to G Sharp augmented) and a C/G chord with G being the lowest bass note of this inversion of the C chord. The fourth chord in the sequence diverges to a D/F# in "Stairway" and an F# half diminished 7 in "Taurus" which are chords comprised of different note combinations making them entirely different. The variation in this pattern of chords is highlighted further because while "Stairway" has an F Major 7 chord in the third measure (the fifth chord in the sequence), "Taurus" has no chord at all (N.C. in the Ferrara chart, above). Finally, the resolution of these phrases in their final fourth measures is also significantly different - "Stairway" uses the aeolian cadence of G major to A minor (bvii to i) and "Taurus" does not.

The diversions in the fourth and fifth chords and the final measure makes these phrases significantly different.

However, regardless of any alleged similarities between these chord sequences, both progressions are essentially implied by the descending bass line and are so commonplace that composers refer to them as the "minor line cliché" (jazz) or the lament progression (in classical). This is so well known that a simple Google search of the words "minor line cliché" reveals numerous explanations of this phenomenon, even a guitarist demonstrating the cliché in the key of e minor,[11] and there are a plethora of examples of this cliché throughout music.[12]

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[11] https://www.youtube.com/watch?v=rOMXYtiCTs4.

[12] Peter Williams, *The Chromatic Fourth During Four Centuries of Music* (Oxford, 1998); (citing over 200 examples from classical music); Alex Ross, *Listen to This* (Farrar, Straus, Giroux, 2010), ch. 2; "Chacona, Lamento, Walking Blues: Bass Lines of Music History" (citing dozens of examples from both classical and popular music); Richard J. Scott, *Chord Progressions for Songwriters* (Writers Club Press, 2003), pp. 189ff on "Chromatic Bass Lines" (listing ten popular songs with versions of this progression, plus dozens of closely related variants). Ferrara also illustrated several works ranging from Purcell's "When I am Laid in Earth" (Dido's Lament) (1689) to Chopin's "Prelude in E minor" (1839) through Vic Dana's recording of "More" (1963) and the Sherman Brothers' "Chim Chim Cher-ee" (1964) and Beatles' "Michelle" (1965) to demonstrate how ubiquitous and unoriginal this chord structure is.

In short, there is nothing original in either the descending chromatic bass line or the few chords it implies in "Taurus" and "Stairway."

C. Any Shared Musical Elements Between "Taurus" and "Stairway" Are Common Musical Elements

The scattershot array of alleged similarities presented by Stewart includes arpeggios; two-note phrases; eighth notes; pitches of similar duration; and pitches derived from the same "pitch collection." Stewart has presented this list of purported similarities without regard to the actual notes being played or their contexts within the two compositions.

One can only infer from Stewart's presentation that he believes Plaintiff should have a monopoly over these commonplace musical characteristics regardless of their placement in the songs in question or whether the actual melody, harmony or rhythm expressed in these commonplace elements is original or even similar. This Circuit has found that such lists as Stewart presents are "inherently subjective and unreliable," *Litchfield v. Spielberg*, 736 F.2d 1352, 1356 (9th Cir. 1984), and that the Court should be cautious about them particularly in cases such as this one, where the list "emphasizes random similarities

scattered throughout the works." *Id.* (affirming verdict of no substantial similarity between the film *ET* and the plaintiff's work).

Arpeggios are chords whose notes are played successively. They are commonplace in music works from time immemorial – especially in music arranged for stringed instruments such as the acoustic guitar featured in "Taurus" and "Stairway." It is astonishing that Stewart has included them in his assembly of alleged musical similarities.

Two-note patterns can barely constitute a motif, let alone a protectable melody, especially when, as here, the two-note patterns occur in entirely different contexts and places in both compositions. Amici do not believe that isolated occurrences of two-note phrases could ever constitute protectable music expression. The occurrence of similar two-note phrases in fragments of these two songs is irrelevant to the question of actionable similarity.

Plaintiff claims similarity between the two works based on the common use of eighth notes in the pattern of the bass line; the placement of the chord changes in the measures; and the pattern of the individualized notes played by the respective guitars.

Here, the actual duration of the compared notes between "Taurus" and "Stairway" is manifestly different, so much so that Ferrara had to halve the duration of the "Taurus" notes for this comparison to make any sense[13]. The durational similarities, when the two phrases are compared as Ferrara did, are limited to the appearance of eighth notes in both pieces. Eighth notes are one of the traditional building blocks of music, and nobody can claim originality to the inclusion of eighth notes in a piece of music.

Plaintiff's argument that the musical expression of two works may be substantially similar based on the fact that they both use the same collection of pitches is groundless. There are only 12 pitches in Western popular music, which recycle across octaves[14]. Music generally derives from the selection of these pitches and their arrangement into musical compositions. But the mere fact that all music chooses from the same palette of notes is not something that makes any particular piece of

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[13] *See* footnote 10 and Ferrara's chart reproduced at page 11 of this Amici Brief.

[14] An octave is a series of eight notes in the interval between two notes. For example, Middle C to the C above middle C is an octave. The note names from octave to octave are the same. They just sound differently, lower or higher depending on which octave they occur in.

music original. If the pitches are not arranged in order and duration to form original melodies, there is nothing original about the existence of the pitches themselves. The twelve pitches are a musician's palette, just like the available colors to a painter; and nobody can claim protectability in the musical palette of notes unless it is expressed in an order and duration evidencing originality. Moreover, pitch collections in a given composition are driven by key signature such that an A minor key (which "Taurus" and "Stairway" share) provides a collection of pitches from which all songs in the key of A minor generally create their compositions.

D. The Combination of These Unoriginal Elements Is Not Original

Because none of the similar elements between "Taurus" and "Stairway" are separately original, Plaintiff resorts to the extravagant suggestion that a composer's use of a combination of the five unoriginal, unprotectable elements asserted by Stewart, earlier used by another composer, constitutes infringement. The jury instruction suggested by the panel would open the possibility that a confused jury might be persuaded that such a "constellation" of similarity is infringement.

Here, however, there is nothing original about combining a clichéd bass line and a set of three chords that mirror the cliché with fundamental musical elements that are in the public domain and shared as the commons of musical ideas and elements of expression.

Nobody would claim that Beethoven's "Piano Sonata No. 5 in C minor" and the first movement of his "Piano Sonata No. 8 in C minor ('Pathétique')" are substantially similar simply because they are played on an identical instrument, in the identical key (*i.e.,* the same hierarchical arrangement of the "alphabet" of notes with respect to one another), with the identical tempo indication (*allegro molto* - very swift) in the same expressive manner (*e con brio* - with vigor), and in the same musical form (each a sonata *allegro*).

As with the selection of unprotectable elements of the glass artwork in *Satava v. Lowry*, 323 F.3d 805 (9th Cir. 2003), found by this Circuit to not be original, the selection of these commonplace elements of music in "Taurus" and "Stairway" is not sufficiently original to merit any copyright protection. *See id.* at 812-13 (holding that the "selection of clear glass, oblong shroud, bright colors, proportion, vertical orientation,

and stereotyped jellyfish form, considered together, lacks originality to merit copyright protection").

II. Conclusion

The panel decision threatens the public domain and causes paralyzing uncertainty for composers. If a jury instruction is given permitting potential infringement verdicts when the similarities are trivial and commonplace, songwriters will be confused as to when originality – and thereby copyright protection – begins and ends. Such an instruction would threaten to eviscerate important elements of the public domain and stifle musical creativity. Given the confined set of common elements available to composers, they would understandably be anxious, fearing unwarranted and frivolous copyright lawsuits.[15]

Composers should be able to freely borrow from the rich tapestry of public domain musical elements. And musicologists should not be rewarded for cherry-picking unrelated, commonplace elements between

[15] Amici note that under no circumstances here are the similarities, if any, virtually identical, which would render even a virtual-identity jury instruction moot. *See, e.g.*, *Satava*, 323 F.3d at 812 (requiring virtual identity if all that is at issue is a thin copyright – *i.e.*, the original selection and arrangement of unprotectable elements).

two musical compositions simply because an errant jury instruction might support an infringement verdict for their client.

Amici urge this Court to reject the panel's disposition of this matter and uphold the jury verdict in this case.

Dated: July 1, 2019
Encino, California

Respectfully submitted,

s/ Kenneth D. Freundlich
Kenneth D. Freundlich
FREUNDLICH LAW
16133 Ventura Blvd., 645
Encino, California, 91436

CERTIFICATE OF COMPLIANCE WITH FRAP 32(a)(7)(C) AND CIRCUIT RULE 32-1

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Circuit Rule 32-1, the attached amici brief is proportionately spaced, has a typeface of 14 points or more and contains 3461 words.

DATED: July 1, 2019 FREUNDLICH LAW

s/ Kenneth D. Freundlich
Kenneth D. Freundlich
Attorneys for Amici Curae

CERTIFICATE OF SERVICE

I, Kenneth D. Freundlich, a member of the Bar of this Court, hereby certify that on July 1, 2019, I electronically filed the foregoing *AMICI CURIAE BRIEF OF MUSICOLOGISTS IN SUPPORT OF DEFENDANTS-APPELLEES AT EN BANC REHEARING* with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Kenneth D. Freundlich

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MICHAEL SKIDMORE, AS TRUSTEE FOR THE RANDY CRAIG WOLFE TRUST, *Plaintiff-Appellant*, v. LED ZEPPELIN; JAMES PATRICK PAGE; ROBERT ANTHONY PLANT; JOHN PAUL JONES; SUPER HYPE PUBLISHING, INC.; WARNER MUSIC GROUP CORPORATION; WARNER CHAPPELL MUSIC, INC.; ATLANTIC RECORDING CORPORATION; RHINO ENTERTAINMENT COMPANY, *Defendants-Appellees.*	No. 16-56057 D.C. No. 2:15-cv-03462-RGK-AGR

MICHAEL SKIDMORE, AS TRUSTEE FOR THE RANDY CRAIG WOLFE TRUST, *Plaintiff-Appellee*, v. WARNER/CHAPPELL MUSIC, INC, *Defendant-Appellant*, and LED ZEPPELIN; JAMES PATRICK PAGE; ROBERT ANTHONY PLANT; JOHN PAUL JONES; SUPER HYPE PUBLISHING, INC.; WARNER MUSIC GROUP CORPORATION, ATLANTIC RECORDING CORPORATION; RHINO ENTERTAINMENT COMPANY, *Defendants*.	No. 16-56287 D.C. No. 2:15-cv-03462-RGK-AGR OPINION

Appeal from the United States District Court
for the Central District of California
R. Gary Klausner, District Judge, Presiding

Argued and Submitted March 12, 2018
San Francisco, California

Filed September 28, 2018

Before: Richard A. Paez and Sandra S. Ikuta, Circuit Judges, and Eric N. Vitaliano,* District Judge.

Opinion by Judge Paez

SUMMARY**

Copyright

The panel vacated in part the district court's judgment after a jury trial in favor of the defendants and remanded for a new trial in a copyright infringement suit alleging that Led Zeppelin copied "Stairway to Heaven" from the song "Taurus," written by Spirit band member Randy Wolfe.

The jury found that plaintiff Michael Skidmore owned the copyright to "Taurus," that defendants had access to "Taurus," and that the two songs were not substantially similar under the extrinsic test.

The panel held that certain of the district court's jury instructions were erroneous and prejudicial. First, in connection with the extrinsic test for substantial similarity, the district court prejudicially erred by failing to instruct the jury that the selection and arrangement of unprotectable musical elements are protectable. Second, the district court prejudicially erred in its instructions on originality. The

* The Honorable Eric N. Vitaliano, United States District Judge for the Eastern District of New York, sitting by designation.

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

panel concluded that the district court did not err in failing to instruct the jury on the inverse ratio rule, but such an instruction might be appropriate on remand.

The panel further held that the scope of copyright protection for an unpublished musical work under the Copyright Act of 1909 is defined by the deposit copy because copyright protection under the 1909 Act did not attach until either publication or registration. Therefore, the district court correctly ruled that sound recordings of "Taurus" as performed by Spirit could not be used to prove substantial similarity.

Addressing evidentiary issues, the panel held that the district court abused its discretion by not allowing recordings of "Taurus" to be played for the purpose of demonstrating access. The district court did not abuse its discretion by failing to exclude expert testimony on the basis of a conflict of interest.

In light of its disposition, the panel vacated the district court's denial of defendants' motions for attorneys' fees and costs and remanded those issues as well.

COUNSEL

Francis Malofiy (argued) and Alfred Joseph Fluehr, Francis Alexander LLC, Media, Pennsylvania, for Plaintiff-Appellant.

Peter J. Anderson (argued), Law Offices of Peter J. Anderson, Santa Monica, California; Helens M. Freeman,

Phillips Nizer LLP, New York, New York; for Defendants-Appellees.

OPINION

PAEZ, Circuit Judge:

This copyright case involves a claim that Led Zeppelin copied key portions of its timeless hit "Stairway to Heaven" from the song "Taurus," which was written by Spirit band member Randy Wolfe. Years after Wolfe's death, the trustee of the Randy Craig Wolfe Trust, Michael Skidmore, brought this suit for copyright infringement against Led Zeppelin, James Patrick Page, Robert Anthony Plant, John Paul Jones, Super Hype Publishing, and the Warner Music Group Corporation as parent of Warner/Chappell Music, Inc., Atlantic Recording Corporation, and Rhino Entertainment Co. (collectively, "Defendants"). The case proceeded to a jury trial, and the jury returned a verdict in favor of Defendants. Skidmore appeals, raising a host of alleged trial errors and challenging the district court's determination that for unpublished works under the Copyright Act of 1909 ("1909 Act"), the scope of the copyright is defined by the deposit copy. We hold that several of the district court's jury instructions were erroneous and prejudicial. We therefore vacate the amended judgment in part and remand for a new trial. For the benefit of the parties and the district court on remand, we also address whether the scope of copyright protection for an unpublished work under the 1909 Act is defined by the deposit copy. We hold that it is. We also address several other evidentiary issues raised by Skidmore that are likely to arise again on remand. Finally, in light of our disposition,

we vacate the denial of Defendants' motions for attorneys' fees and costs and remand those issues as well.

I.

A.

Randy Wolfe, nicknamed Randy California by Jimi Hendrix, was a musician and a member of the band Spirit. He wrote the song "Taurus" in late 1966. Spirit signed a recording contract in August 1967, and its first album *Spirit*—which included "Taurus"—was released in late 1967 or early 1968. Hollenbeck Music ("Hollenbeck") filed the copyright for Taurus in December 1967 and listed Randy Wolfe as the author. As part of the copyright registration packet, "Taurus" was transcribed into sheet music that was deposited with the Copyright Office ("Taurus deposit copy").

The band Led Zeppelin, formed in 1968, consisted of Jimmy Page, Robert Plant, John Paul Jones, and John Bonham. Spirit and Led Zeppelin's paths crossed several times in the late 1960s and early 1970s. On tour, Led Zeppelin would occasionally perform a cover of another Spirit song, "Fresh Garbage." Spirit and Led Zeppelin both performed at a concert in Denver in 1968 and at the Atlanta International Pop Festival, the Seattle Pop Festival, and the Texas Pop Festival in 1969. There is no direct evidence that Led Zeppelin band members listened to Spirit's performances on any of these dates, although members of Spirit testified that they conversed with Led Zeppelin members, and one Spirit band member testified that Spirit had played "Taurus" the night both bands performed in Denver. Additionally, there was evidence at trial that Robert Plant attended a February 1970 Spirit performance. Jimmy Page testified that he currently owns a copy of the album

Spirit, but he was unable to clarify when he had obtained that copy. In late 1971, Led Zeppelin released its fourth album, an untitled album known as "Led Zeppelin IV." One of the tracks on the album is the timeless classic "Stairway to Heaven," which was written by Jimmy Page and Robert Plant.

Randy Wolfe passed away in 1997, and his mother established the Randy Craig Wolfe Trust (the "Trust"). All of Wolfe's intellectual property rights were transferred to the Trust, including his ownership interest in "Taurus."[1] His mother was the trustee or co-trustee until her death in 2009, after which time Skidmore became the trustee. Immediately after the Supreme Court's decision in *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962, 1967–68 (2014), which clarified that laches is not a defense where copyright infringement is ongoing, Skidmore filed this suit on behalf of the Trust alleging that "Stairway to Heaven" infringed the copyright in "Taurus."

B.

Skidmore initially filed his complaint in the Eastern District of Pennsylvania, but the case was subsequently transferred to the Central District of California. *Skidmore v. Led Zeppelin*, 106 F. Supp. 3d 581, 589–90 (E.D. Pa. 2015). Skidmore alleged direct, contributory, and vicarious copyright infringement. He also alleged a claim titled "Right of Attribution—Equitable Relief—Falsification of Rock n' Roll History." With regard to copyright infringement,

[1] Ownership of the Taurus copyright was one of the disputed issues at trial, but the jury found that Skidmore "is the owner of a valid copyright in Taurus." The Defendants do not challenge that finding on appeal.

Skidmore alleged that the opening notes of "Stairway to Heaven" are substantially similar to those in "Taurus." The Defendants disputed ownership, substantial similarity, and access. They also alleged a number of affirmative defenses including unclean hands, laches, and independent creation.

After discovery, Defendants moved for summary judgment, which the district court granted in part and denied in part. Specifically, the district court granted summary judgment to John Paul Jones, Super Hype Publishing, and Warner Music Group ("summary judgment defendants"), as they had not performed or distributed "Stairway to Heaven" in the three-year statute of limitations period preceding the filing of the complaint. Additionally, the district court granted summary judgment to Defendants on Skidmore's "Right of Attribution—Equitable Relief—Falsification of Rock n' Roll History" claim, as the district court "had diligently searched but [was] unable to locate any cognizable claim to support this [Falsification of Rock n' Roll History] theory of liability."

Because the 1909 Act governed the scope of the copyright Wolfe obtained in "Taurus," the district court further concluded that the protectable copyright was the musical composition transcribed in the deposit copy of "Taurus" and not the sound recordings. The district court therefore concluded that to prove substantial similarity between "Taurus" and "Stairway to Heaven," Skidmore would have to rely on the "Taurus" deposit copy rather than a sound recording. The district court also found that there were triable issues of fact relating to ownership, access, substantial similarity, and damages that could only be resolved at trial.

At a pretrial conference in April 2016, after reviewing summaries of each witnesses' proposed testimony, the

district court decided to allot each side ten hours to present its case. The district court also tentatively granted Defendants' motion in limine to exclude recordings of Spirit performing "Taurus" as well as expert testimony based on those recordings, again concluding that the 1967 deposit copy should be the baseline when considering substantial similarity. Before trial, the district court filed an order confirming its prior tentative rulings on the motions in limine.

As part of expert discovery, Skidmore's attorney deposed Dr. Lawrence Ferrara, Defendants' expert musicologist. During the deposition it came to light that in 2013 Dr. Ferrara had done a comparison of the "Taurus" and "Stairway to Heaven" recordings for Rondor Music ("Rondor"), a subsidiary of Universal Music Publishing Group.[2] Dr. Ferrara testified that when he was approached by Defendants' counsel, he informed them that he had already completed an analysis for Rondor. Defendants' counsel consulted with Rondor, which waived any conflict and consented to Dr. Ferrara being retained as an expert witness for Defendants. Throughout the deposition, Skidmore's counsel objected and requested copies of Dr. Ferrara's communications with Rondor and Universal. After the deposition, Skidmore filed a Motion for Sanctions and to Preclude Dr. Ferrara from testifying at trial. The district court denied Skidmore's motion because it was improperly noticed, over the page limit, and untimely.

[2] Skidmore presented evidence that Universal Music was working for Hollenbeck, the publisher of Spirit's music. Skidmore alleged during the deposition that because of this connection, Hollenbeck owed fiduciary duties to Skidmore.

A five-day jury trial ensued. While questioning Jimmy Page, Skidmore's counsel requested that several sound recordings of Spirit performing "Taurus" be played so that he could ask Page whether he had ever heard any of the recordings. When Defendants objected, Skidmore's counsel explained that the recordings were offered to prove access, rather than substantial similarity. The district court determined that although the sound recordings were relevant to prove access, it would be too prejudicial for the jury to hear the recordings. To avoid any prejudice, the district court had Page listen to the recordings outside the presence of the jury and then allowed Skidmore's counsel to question him about them in the presence of the jury. Page eventually testified that he presently had an album containing "Taurus" in his collection, but while testifying he did not admit to having heard any recordings of "Taurus" prior to composing "Stairway to Heaven."

Also of note, Kevin Hanson, Skidmore's master guitarist, performed the "Taurus" deposit copy as he interpreted it, and played recordings of his performances of the beginning notes of the "Taurus" deposit copy and "Stairway to Heaven." The "Taurus" recording Hanson played for the jury during his testimony, however, only contained the bass clef and excluded the treble clef, which contained additional notes.

During the cross-examination of Dr. Ferrara, Skidmore used up the last of his ten hours of allotted trial time. The district court found that Skidmore had not made effective use of his time for a variety of reasons, but granted Skidmore two additional minutes to finish cross-examining Dr. Ferrara and ten minutes to cross-examine each remaining witness. Skidmore was not allowed to call rebuttal witnesses.

During jury deliberations, the jury asked to hear Skidmore's recording of Hanson playing both "Taurus" and "Stairway to Heaven." The district court asked if the jury would like to hear the deposit-copy version of "Taurus" or the version of "Taurus" with only the bass clef. One juror responded with "bass clef" but the jury foreperson responded with "the full copy." The district court directed that the full deposit-copy version be played and asked if that answered the jury's question, to which the foreperson replied "thank you." The other juror did not object to hearing the full copy rather than the bass clef version.

The jury ultimately returned a verdict for Defendants. The jury found that Skidmore owned the copyright to "Taurus," that Defendants had access to "Taurus," but that the two songs were not substantially similar under the extrinsic test.[3] Following the verdict, the district court entered an amended judgment in favor of all Defendants. Skidmore did not file any post-judgment motions challenging the verdict, but timely appealed from the amended judgment.[4] In this appeal, Skidmore challenges (1) various jury instructions, (2) the district court's ruling that substantial similarity must be proven using the copyright

[3] The extrinsic test is one of two tests used to determine if an allegedly infringing work is substantially similar to a copyrighted work. This test objectively compares the protected areas of a work. *See, infra* p. 13; *Swirsky v. Carey*, 376 F.3d 841, 845 (9th Cir. 2004).

[4] Skidmore appeals from the amended judgment, which listed all defendants, but none of his arguments implicate the summary judgment defendants. Defendants argue that this waives any challenge to the summary judgment order as it relates to those defendants. We agree. *See, e.g.*, *Classic Concepts, Inc. v. Linen Source, Inc.*, 716 F.3d 1282, 1285 (9th Cir. 2013). Accordingly, we do not address any of the claims against the summary judgment defendants, and we do not disturb the amended judgment as it relates to those defendants.

deposit copy, (3) the district court's ruling that sound recordings could not be played to prove access, (4) the district court's decision not to exclude or sanction Dr. Ferrara, (5) the fact that the full version of "Taurus" rather than the bass clef version was played in response to the jury's request, and (6) the imposition of strict time limits as a violation of due process.

Following entry of the amended judgment, Warner/Chappell filed a motion for attorneys' fees and a motion for costs. The district court denied these motions. Warner/Chappell timely cross-appealed, and we consolidated the two appeals.

II.

We begin with a discussion of the elements that Skidmore must establish to prevail on his copyright infringement claim.

In order to prove copyright infringement, a plaintiff must show "(1) that he owns a valid copyright in his [work], and (2) that [the defendants] copied protected aspects of the [work's] expression." *See Rentmeester v. Nike, Inc.*, 883 F.3d 1111, 1116–17 (9th Cir. 2018) (citing *Feist Publ'ns, Inc. v. Rural Telephone Serv. Co., Inc.*, 499 U.S. 340, 345 (1991)). In this appeal, the parties do not contest that Skidmore owns a valid copyright in "Taurus," so our analysis turns on the second issue.

Whether Defendants copied protected expression contains two separate and distinct components: "copying" and "unlawful appropriation." *Rentmeester*, 883 F.3d at 1117. A plaintiff must be able to demonstrate that a defendant copied his work, as independent creation is a complete defense to copyright infringement. *See Feist*

Publ'ns, 499 U.S. at 345–46; *see also Rentmeester*, 883 F.3d at 1117. In cases such as this one where there is no direct evidence of copying, the plaintiff "can attempt to prove it circumstantially by showing that the defendant had access to the plaintiff's work and that the two works share similarities probative of copying." *Rentmeester*, 883 F.3d at 1117. "When a high degree of access is shown," a lower amount of similarity is needed to prove copying. *Rice v. Fox Broadcasting Co.*, 330 F.3d 1170, 1178 (9th Cir. 2003) (citation omitted). "To prove copying, the similarities between the two works need not be extensive, and they need not involve protected elements of the plaintiff's work. They just need to be similarities one would not expect to arise if the two works had been created independently." *Rentmeester*, 883 F.3d at 1117.

To prove "unlawful appropriation" a higher showing of substantial similarity is needed. *Id.* The works must share *substantial* similarities and those similarities must involve parts of the plaintiff's work that are original and therefore protected by copyright. *Id.* To determine whether an allegedly infringing work is substantially similar to the original work, we employ the extrinsic and intrinsic tests. The extrinsic test is an objective comparison of protected areas of a work. This is accomplished by "breaking the works down into their constituent elements, and comparing those elements" to determine whether they are substantially similar. *Swirsky v. Carey*, 376 F.3d 841, 845 (9th Cir. 2004). Only elements that are protected by copyright are compared under the extrinsic test. *Id.* The intrinsic test is concerned with a subjective comparison of the works, as it asks "whether the ordinary, reasonable person would find the total concept and feel of the works to be substantially similar." *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 485 (9th Cir. 2000) (citation omitted).

III.

We turn first to Skidmore's argument that the district court failed to properly instruct the jury on the elements of his copyright infringement claim as discussed above and whether the court's alleged errors were prejudicial. Skidmore argues: (1) that the district court erred by failing to give an instruction that selection and arrangement of otherwise unprotectable musical elements are protectable; (2) that the district court's jury instructions on originality and protectable musical elements were erroneous; and (3) that the district court erred in failing to give an inverse ratio rule instruction. We address each of these in turn.

We review for abuse of discretion the district court's formulation of jury instructions and review de novo whether the instructions misstate the law. *See Louis Vuitton Malletier, S.A. v. Akanoc Sols., Inc.*, 658 F.3d 936, 941 (9th Cir. 2011). As a general matter, prejudicial error in jury instructions occurs when "looking to the instructions as a whole, the substance of the applicable law was [not] fairly and correctly covered." *Swinton v. Potomac Corp.*, 270 F.3d 794, 802 (9th Cir. 2001) (quoting *In re Asbestos Cases*, 847 F.2d 523, 524 (9th Cir. 1998)) (alteration in original)). "An error in instructing the jury in a civil case requires reversal unless the error is more probably than not harmless." *Id.* at 805 (quoting *Caballero v. City of Concord*, 956 F.2d 204, 206–07 (9th Cir. 1992)).

A.

Skidmore argues that the district court's failure to instruct the jury that the selection and arrangement of unprotectable musical elements are protectable is reversible error. Each side had included a version of such an instruction in their proposed jury instructions. The district

court, however, did not include either instruction in its final version of the instructions nor did it modify any of the substantive instructions to include this point. We conclude that the district court erred by failing to instruct the jury on this issue and that the error was prejudicial.

We are concerned here with the extrinsic test for substantial similarity, as the jury decided that there was no extrinsic substantial similarity and failed to reach the intrinsic test. In the musical context, the extrinsic test can be difficult to administer. *See Swirsky*, 376 F.3d at 848. Although individual elements of a song, such as notes or a scale, may not be protectable, "music is comprised of a large array of elements, some combination of which is protectable by copyright." *Id.* at 849. For example, we have "upheld a jury finding of substantial similarity based on the combination of five otherwise unprotectable elements." *Id.* (citing *Three Boys*, 212 F.3d at 485). In other circumstances, we have recognized that "a combination of unprotectable elements is eligible for copyright protection only if those elements are numerous enough and their selection and arrangement original enough that their combination constitutes an original work of authorship." *Satava v. Lowry*, 323 F.3d 805, 811 (9th Cir. 2003) (citations omitted). The copyright in an arrangement of public domain elements extends only to the originality contributed by the author to the arrangement. *Id.* at 811–12; *see also Feist Publ'ns*, 499 U.S. at 345. Thus, there can be copyright protection on the basis of a sufficiently original combination of otherwise non-protectable music elements. The district court's failure to so instruct the jury was especially problematic in this case, because Skidmore's expert, Dr. Stewart, testified that there was extrinsic substantial similarity based on the combination of five elements—some of which were protectable and some of which were in the public domain.

Although Defendants requested an instruction on selection and arrangement, they argue that the district court's failure to give such an instruction does not warrant reversal. First, Defendants argue that Skidmore waived any objection to the court's failure to give such an instruction, in part because Skidmore did not voice any objection when the district court was reading the final jury instructions to counsel. This argument is baseless. Although Skidmore's counsel transcribed and assembled the jury instructions as directed by the district court, the court specifically stated that it did not want any oral objections to its final jury instructions, as the parties had already submitted separate instructions and written objections to the other side's proposed instructions. Skidmore proposed an instruction on selection and arrangement as did the Defendants and each side objected to the other side's proposed instruction as required by Local Rule 51-1, 5. *See, e.g.*, *Yamada v. Nobel Biocare Holding AG*, 825 F.3d 536, 543 (9th Cir. 2016).

Next, Defendants contend that Skidmore did not argue or present evidence of a copyrightable selection and arrangement of otherwise unprotectable elements. When objecting to one of Skidmore's jury instructions, however, Defendants expressly stated that Skidmore relied on a selection and arrangement theory in his argument for infringement. On appeal, Defendants maintain that Skidmore instead relied on the similarity of a "combination" of elements present in "Taurus" and "Stairway to Heaven." Defendants' refined argument splits hairs and contradicts their earlier position. Whether or not the words "selection and arrangement" were used at trial is irrelevant because it is clear that this legal theory formed the basis of Skidmore's infringement claim. Indeed, the fact that Defendants recognized this argument at trial undermines their contrary argument here. Additionally, many selection and

arrangement cases also refer to a "combination" of musical elements, further undermining Defendants' proffered distinction. *See Swirsky*, 376 F.3d at 849; *Satava*, 323 F.3d at 811. As both sides recognized in their proposed jury instructions, a selection and arrangement instruction was appropriate and necessary given the basis for Skidmore's infringement claim.

Defendants also argue that any error is harmless, because the jury would likely have reached the same verdict even if it had been instructed on selection and arrangement. *See Clem v. Lomeli*, 566 F.3d 1177, 1182 (9th Cir. 2009). We disagree. Without a selection and arrangement instruction, the jury instructions severely undermined Skidmore's argument for extrinsic similarity, which is exactly what the jury found lacking. Given that nothing else in the instructions alerted the jury that the selection and arrangement of unprotectable elements could be copyrightable, "looking to the instructions as a whole, the substance of the applicable law was [not] fairly and correctly covered." *Swinton*, 270 F.3d at 802 (alteration in original) (quotations omitted). Indeed, as discussed further below, other instructions when considered in the absence of a selection and arrangement instruction imply that selection and arrangement of public domain material is not copyrightable. For instance, Jury Instruction No. 20, which instructed the jury that "any elements from . . . the public domain are not considered original parts and not protected by copyright," suggests that no combination of these elements can be protected by copyright precisely because the court omitted a selection and arrangement instruction. The district court's failure to instruct the jury on selection and

arrangement was therefore prejudicial given Skidmore's theory of infringement.[5] *Id.*

B.

Skidmore also argues that the district court erred in two ways in its formulation of the jury instructions on originality. First, Skidmore contends that Jury Instruction No. 16 erroneously stated that copyright does not protect "chromatic scales, arpeggios or short sequences of three notes."[6] Second, Skidmore argues that Jury Instruction No.

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[5] Each side proposed its own selection and arrangement instruction and objected to the language of the other party's proposed instruction. We leave it to the district court on remand to determine which version of the proposed instructions to adopt, given applicable precedent on the issue. *See, e.g.*, *Feist Publ'ns*, 499 U.S. at 345; *Swirsky*, 376 F.3d at 848; *Satava*, 323 F.3d at 811; *Three Boys*, 212 F.3d at 485.

[6] In full, Jury Instruction No. 16 reads as follows:

> Plaintiff has filed a claim against Defendants for violation of the United States Copyright Act, which governs this case. In order for you to undertake your responsibility, you must know what a copyright is, what it protects, and what it does not protect.
>
> Copyright confers certain exclusive rights to the owner of a work including the rights to:
>
> 1. Reproduce or authorize the reproduction of the copyrighted work;
> 2. Prepare derivative works based upon the copyrighted work.
> 3. Distribute the copyrighted work to the public; and

20 on originality should not have instructed the jury that "[h]owever, any elements from prior works or the public domain are not considered original parts and not protected by copyright," and should have included the admonition from the Ninth Circuit Model Jury Instruction 17.13 that "[i]n copyright law, the 'original' part of a work need not be new or novel."[7] Defendants argue that Skidmore waived a challenge to these jury instructions for the same reason he waived a challenge to the lack of a selection and arrangement

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> 4. Perform publicly a copyrighted musical work.
>
> Copyright only protects the author's original expression in a work and does not protect ideas, themes or common musical elements, such as descending chromatic scales, arpeggios or short sequences of three notes.
>
> Also, there can be no copyright infringement without actual copying. If two people independently create two works, no matter how similar, there is no copyright infringement unless the second person copied the first.

[7] Jury Instruction No. 20 reads:

> An original work may include or incorporate elements taken from prior works or works from the public domain. However, any elements from prior works or the public domain are not considered original parts and not protected by copyright. Instead, the original part of the plaintiff's work is limited to the part created:
>
> 1. independently by the work's author, that is, the author did not copy it from another work; and
>
> 2. by use of at least some minimal creativity.

instruction. For the reasons discussed above, this argument fails. We further conclude that the district court erred in its instructions on originality.

There is a low bar for originality in copyright. *See Swirsky*, 376 F.3d at 851 ("[O]riginality means little more than a prohibition of actual copying.") (internal quotations omitted). Copyright extends to parts of a work created (1) independently, i.e., not copied from another's work and (2) which contain minimal creativity. *See Feist Publ'ns*, 499 U.S. at 348. Most basic musical elements are not copyrightable. *See Smith v. Jackson*, 84 F.3d 1213, 1216 n.3 (9th Cir. 1996) (explaining that "common or trite" musical elements are not protected); *Satava*, 323 F.3d at 811 (holding that expressions that are common to a subject matter or medium are not protectable); *Swirsky*, 376 F.3d at 851 (acknowledging that a single musical note lacks copyright protection). In *Swirsky*, however, we recognized that while "a single musical note would be too small a unit to attract copyright protection . . . an arrangement of a limited number of notes can garner copyright protection." *Id.* We therefore concluded that seven notes could be sufficient to garner copyright protection. *See id.* at 852.

Jury Instruction No. 16 included an instruction that "common musical elements, such as descending chromatic scales, arpeggios or short sequences of three notes" are not protected by copyright. This instruction runs contrary to our conclusion in *Swirsky* that a limited number of notes can be protected by copyright. *See id.* at 851. When considered in the absence of a selection and arrangement instruction, Jury Instruction No. 16 could have led the jury to believe that even if a series of three notes or a descending chromatic scale were used in combination with other elements in an original manner, it would not warrant copyright protection. *See*

Swinton, 270 F.3d at 802. This error was not harmless as it undercut testimony by Skidmore's expert that Led Zeppelin copied a chromatic scale that had been used in an original manner. *See Clem*, 566 F.3d at 1182 (an error in a jury instruction is harmless if "it is more probable than not that the jury would have reached the same verdict had it been properly instructed" (citation omitted)).

Similarly, Jury Instruction No. 20 omitted parts of the test for originality and added misleading language. Under *Feist Publications*, originality requires that a work not be copied and that it be produced with a minimal degree of creativity. 499 U.S. at 348. The original part of a work does not need to be new or novel, as long as it is not copied. *Id.* The district court, however, omitted Skidmore's requested instruction—drawn from Ninth Circuit Model Instruction 17.13—that "the 'original' part of a work need not be new or novel." [8] Additionally, Jury Instruction No. 20 stated that "any elements from prior works or the public domain are not considered original parts and not protectable by copyright." While this statement is not literally incorrect, it misleadingly

[8] At the time of trial, Ninth Circuit Model Instruction 17.13 provided that:

> An original work may include or incorporate elements taken from works owned by others, with the owner's permission. The original parts of the plaintiff's work are the parts created:
>
> 1. independently by the work's author, that is, the author did not copy it from another work; and
>
> 2. by use of at least some minimal creativity.
>
> In copyright law, the "original" part of a work need not be new or novel.

suggests that public domain elements such as basic musical structures are not copyrightable even when they are arranged or modified in a creative, original way. *See Swirsky*, 376 F.3d at 852. Ninth Circuit Model Instruction 17.13 avoids this problem by not including this misleading statement.

Nowhere did the jury instructions include any statements clarifying that the selection and arrangement of public domain elements could be considered original. Jury Instruction No. 20 compounded the errors of that omission by furthering an impression that public domain elements are not protected by copyright in any circumstances. This is in tension with the principle that an original element of a work need not be new; rather, it need only be created independently and arranged in a creative way. *See Feist Publ'ns*, 499 U.S. at 345, 349; *see also Swirsky*, 376 F.3d at 849. Jury Instruction Nos. 16 and 20 in combination likely led the jury to believe that public domain elements—such as a chromatic scale or a series of three notes—were not protectable, even where there was a modification or selection and arrangement that may have rendered them original. Skidmore's expert testified that "Taurus" contained certain public domain elements—such as chromatic scales—that were modified in an original way, but the jury instructions as a whole likely would have led the jury to believe that such evidence could not establish the basis of a cognizable copyright claim. Similarly, the instructions undermined Skidmore's expert's testimony that "Taurus" and "Stairway to Heaven" were similar because of the combination of otherwise unprotectable elements.

In sum, we conclude that the district court's originality jury instructions erroneously instructed the jury that public domain elements are not copyrightable, even if they are

modified in an original manner or included as part of a selection and arrangement. We further conclude that these instructions were prejudicial as they undermined the heart of Skidmore's argument that "Taurus" and "Stairway to Heaven" were extrinsically substantially similar. *Clem*, 566 F.3d at 1182. Because the district court erred both in the formulation of the originality jury instructions and in withholding a selection and arrangement instruction, we vacate the judgment and remand for a new trial.

C.

Skidmore also argues that the district court erred by not including a jury instruction on the inverse ratio rule. Under the "inverse ratio rule," a lower standard of proof of substantial similarity is required "when a high degree of access is shown." *Rice*, 330 F.3d at 1178 (citation omitted). We recently clarified the framework underlying the inverse ratio rule. *See Rentmeester*, 883 F.3d at 1124–25. This rule "assists only in proving copying, not in proving unlawful appropriation." *Id.* at 1124. Even if a plaintiff proves that a defendant copied his work, the plaintiff must still show that the copying "amounts to unlawful appropriation." *Id.*; *see also Peters v. West*, 692 F.3d 629, 635 (7th Cir. 2012). "The showing of substantial similarity necessary to prove unlawful appropriation does not vary with the degree of access the plaintiff has shown." *Rentmeester*, 883 F.3d at 1124; *see also Positive Black Talk Inc. v. Cash Money Records Inc.*, 394 F.3d 357, 372 n.11 (5th Cir. 2004).

Unlike in *Rentmeester*, where the parties did not contest that copying had occurred, Skidmore must prove both unlawful appropriation and copying to prevail. 883 F.3d at 1124. While an inverse ratio rule jury instruction may have been helpful to Skidmore in proving copying, the jury verdict form makes clear that the jury did not decide whether

Led Zeppelin had copied parts of "Taurus." Rather, the jury ended its deliberations after deciding that "Taurus" and "Stairway to Heaven" were not substantially similar under the extrinsic test. Substantial similarity under the extrinsic and intrinsic test goes to unlawful appropriation, rather than copying. *Id.* at 1117. The jury found that under the extrinsic test, any similarity was not substantial. Therefore, there was not unlawful appropriation under *Rentmeester*. *See id.* Because the jury did not reach the question of copying, the inverse ratio rule was not relevant, and any error in not including it was harmless.

Because we are remanding for a new trial, however, we note that in a case like this one where copying is in question and there is substantial evidence of access, an inverse ratio rule jury instruction may be appropriate. *See Rice*, 330 F.3d at 1178 (declining to apply the inverse ratio rule at the summary judgment stage because the claims of access were "based on speculation, conjecture, and inference which are far less than the 'high degree of access' required for application of the inverse ratio rule"); *see also Swirsky*, 376 F.3d at 844 (applying the inverse ration rule because access was conceded); *Metcalf v. Bocho*, 294 F.3d 1069, 1075 (9th Cir. 2002) (same); *Shaw v. Lindheim*, 919 F.2d 1353, 1361–62 (9th Cir. 1990) (same). Here, there was substantial evidence of access, and indeed, the jury found that both James Page and Robert Plant had access to "Taurus." On remand, the district court should reconsider whether an inverse ratio rule instruction is warranted unless it determines, as a matter of law, that Skidmore's "evidence as to proof of access is insufficient to trigger the inverse ratio rule." *Rice*, 330 F.3d at 1178.

IV.

Because we are remanding for a new trial, we address three of Skidmore's additional assignments of error that will continue to be relevant on remand. First, we address whether the district court erred by holding that the deposit copy of "Taurus," rather than a sound recording, defined the scope of the protectable copyright. We hold that there was no error in the district court's ruling. Next, we analyze whether the district court abused its discretion by not allowing recordings of "Taurus" to be played for the purpose of demonstrating access; we conclude that it did. Finally, we examine whether the district court abused its discretion in not excluding Dr. Ferrara's testimony due to an alleged conflict of interest. We hold that the district court's ruling was well within its discretion.

A.

Skidmore argues that the district court erred in concluding that the deposit copy of "Taurus" defines the scope of the protected copyright under the 1909 Act and that sound recordings of "Taurus" as performed by Spirit could not be used to prove substantial similarity. Because the copyright of "Taurus" was registered in 1967, the 1909 Act applies. *See Twentieth Century Fox Film Corp. v. Entm't Distrib.*, 429 F.3d 869, 876 (9th Cir. 2005) (considering infringement claims under the 1909 Act because the copyrighted work "was published before the January 1, 1978, effective date of the 1976 Copyright Act"). We review de novo legal questions such as the appropriate scope of copyright protection. *See Rentmeester*, 883 F.3d at 1116.

The scope of copyright protection for musical works has been in flux throughout the different versions of the Copyright Act. In 1831, the Copyright Act of 1790 was

amended and copyright protection was extended to musical compositions for the first time. Copyright Act of 1831, 4 Stat. 436 (1831) (repealed 1909). Musical protection under the 1831 Act only extended to the sheet music itself. *See Goldstein v. California*, 412 U.S. 546, 564 (1973). Around the turn of the twentieth century, devices called piano player rolls were invented, which allowed songs to be recreated mechanically on a piano. *See White-Smith Music Publ'g Co. v. Apollo Co.*, 209 U.S. 1, 10–11 (1908). In its 1908 *White-Smith* opinion, the Court held that the only protected musical expression under the Copyright Act of 1831 was sheet music, and that infringement could only occur by duplicating the sheet music. *Id.* at 17. Therefore, the makers of piano player rolls did not infringe the copyrights of musical composers. *Id.*

Congress promptly enacted the Copyright Act of 1909. Copyright Act of 1909, 35 Stat. 1075 (1909) (repealed 1978) (the "1909 Act"). In this 1909 iteration, Congress made clear that the scope of protection "[t]o print, reprint, publish, copy, and vend the copyrighted work" under § 1(a) extended to "any arrangement or setting of [the musical composition] or of the melody of it in any system of notation or any form of record in which the thought of an author may be recorded and from which it may be read or reproduced." 1909 Act § 1(e).

"Under the 1909 Act, an unpublished work was protected by state common law copyright from the moment of its creation until it was either published or until it received protection under the federal copyright scheme." *ABKCO Music, Inc. v. LaVere*, 217 F.3d 684, 688 (9th Cir. 2000) (quoting *La Cienega Music Co. v. ZZ Top*, 53 F.3d 950, 952 (9th Cir. 1995), *superseded by statute on other grounds*, 17 U.S.C. § 303(b) (1997)). A work could receive federal

copyright protection either through registration and submission of a deposit copy, 1909 Act § 10, or through publication, *id.* § 9. Distributing phonorecords did not constitute publication under the 1909 Act, so musical compositions were only published if the sheet music were also published.[9] *ABKCO*, 217 F.3d at 688. Additionally, the Copyright Office did not accept sound recordings as deposit copies under the 1909 Act. *See* M. Nimmer & D. Nimmer, 1 Nimmer on Copyright § 2.05[A] (2017).

In 1972, Congress extended copyright protection to sound recordings as separate copyrightable works from musical compositions. 17 U.S.C. § 102(a)(7). The Copyright Act was again amended in 1976 and this amendment allowed musical composers to submit a recording rather than sheet music as the deposit copy for a musical composition. 17 U.S.C. §§ 407, 408 (1976).

Skidmore argues that under the 1909 Act, a deposit copy is purely archival in nature, whereas Defendants argue that for unpublished works, the deposit copy defines the scope of the copyright. This is an issue of first impression in our circuit as well as our sister circuits. One district court considered the issue prior to this case and concluded that for unpublished works under the 1909 Act, the deposit copy defines the scope of the copyright. *See Williams v. Bridgeport Music*, 2014 WL 7877773, at *6–10 (C.D. Cal.

[9] We held in *La Cienega* that the sale and distribution of sound recordings in phonorecords constituted a publication. 53 F.3d at 953. After that decision, Congress passed a law stating that the distribution of phonorecords before 1978 did not count as publication. 17 U.S.C. § 303(b). We subsequently held in *ABKCO* that *La Cienega* was an incorrect statement of law and that § 303 retroactively applied. *See ABKCO*, 217 F.3d at 691–92.

Oct. 30, 2014). On appeal, we declined to reach the issue. *Williams v. Gaye*, 895 F.3d 1106, 1121 (9th Cir. 2018).

Skidmore argues that the express purpose of the 1909 Act was to overturn *White-Smith* and extend copyright protection beyond sheet music. Specifically, Skidmore relies on § 1(e), which extended copyright protection to "any system of notation or any form of record in which the thought of an author may be recorded." § 1(e). But, as Defendants point out, this actually defines the forms an infringing copy can take, rather than the scope of what can be copyrighted. § 1(a), (e). Therefore, although the 1909 Act clearly extended copyright law to protect against infringement beyond mere reproduction of the sheet music—in contravention of *White-Smith*—it did not clearly state that copyrighted works could be anything other than published sheet music or the musical composition transcribed in the deposit copy. Indeed, "in order to claim copyright in a musical work under the 1909 Act, the work had to be reduced to sheet music or other manuscript form." Nimmer on Copyright § 2.05[A] at 2–62 (2017).

Skidmore also cites to a host of cases to support his argument, but these cases are distinguishable. Skidmore relies primarily on *Three Boys*, 212 F.3d at 486–87. In *Three Boys*, appellants argued that because the deposit copy was incomplete—contrary to the 1909 Act's requirement that a "complete copy" be deposited—subject matter jurisdiction did not exist. *Id.* at 486. In response, we observed that an expert had testified that the essential elements of the musical composition were intact in the deposit copy; therefore we declined to overturn the jury's finding that the deposit copy was "complete" because there was no intent to defraud and any inaccuracies in the deposit copy were minor. *Id.* at 486–87. Since *Three Boys* dealt with whether the deposit copy

adequately satisfied the "complete copy" statutory requirement, it is not directly on point. Nonetheless, Skidmore argues that we should extrapolate from language in *Three Boys* that the expert "even played the deposit copy" to conclude that a recording was also played, and that the recording was used for purposes of evaluating substantial similarity. *Id.* While the evidentiary presentation in *Three Boys* may support Skidmore's claim that typically sound recordings have been used in infringement trials under the 1909 Act, our resolution of the "complete copy" issue did not create binding precedent that copyright protection extended to sound recordings under the 1909 Act. *Id.*

Skidmore also relies on three other cases to support his argument that copyright protection under the 1909 Act extends beyond sheet music, none of which are helpful. One of the cases cited by Skidmore concludes that a copyright obtained via publication is not invalidated by failure to deposit promptly a copy. *Washingtonian Pub. Co. v. Pearson*, 306 U.S. 30, 41–42 (1939). The deposit copy carries less importance for published works, however, so this conclusion is not particularly instructive. 2 *Nimmer on Copyright* § 7.17[A] (citing 17 U.S.C. § 704(d) for the proposition that either the original or a copy of the deposit copy must be kept for unpublished works). Unlike for unpublished works, a deposit copy is not necessary to secure copyright in published works. 1909 Act § 9.

The other two cases both deal with copyright issues under the 1976 Act. *See Bridgeport Music, Inc. v. UMG Recordings, Inc.*, 585 F.3d 267, 276 (6th Cir. 2009); *Nat'l Conference of Bar Examiners v. Multistate Legal Studies, Inc.*, 692 F.2d 478, 482–83 (7th Cir. 1982). Neither of these cases help us determine whether the deposit copy for unpublished works defines the scope of copyright protection

under the 1909 Act. The 1976 Act includes a provision providing that federal copyright protection attaches upon fixation of a work to any tangible medium, which can include a sound recording. 17 U.S.C. § 102(a). This provision, however, was not a part of the 1909 Act. As a result, although it makes sense in the context of the 1976 Act to look at a recording for evidence of what the composition includes because federal copyright protection attaches when the work is recorded, it makes significantly less sense to do so for the 1909 Act.

The cases Defendants offer in support of their argument are also not directly on point. Some do not pertain to the 1909 Act, which is problematic for the reasons discussed above. *See, e.g.*, *White-Smith*, 209 U.S. at 15–16; *Merrell v. Tice*, 104 U.S. 557, 558 (1881). More persuasive are the cases that, in the context of discussing the current copyright scheme, opined that one of the purposes of the deposit requirement is to provide "sufficient material to identify the work in which the registrant claims a copyright." *Data Gen. Corp. v. Grumman Sys. Support Corp.*, 36 F.3d 1147, 1161–63 (1st Cir. 1994); *see also Nicholls v. Tufenkian Import/Export Ventures, Inc.*, 367 F. Supp. 2d. 514, 520 (S.D.N.Y. 2005). These cases support Defendants' contention that the deposit copy defines the scope of the copyright, but as in *Three Boys* the ultimate holding in these cases was that minor errors in the deposit copy do not invalidate a copyright. *See Data Gen. Corp.*, 36 F.3d at 1163.

As further support for their position, Defendants contend that the treatment of deposit copies under the 1909 Act supports their argument that for unpublished works, the deposit copy defines the scope of the copyright. The 1909 Act prohibits the destruction of the deposit copies of

unpublished works without notice to the copyright owner. *See* 1909 Act §§ 59–60; Report of the Register on the General Revision of the U.S. Copyright Law at 81 (1961). Additionally, the Register of Copyright's policy is to retain access to unpublished works for the full copyright term. *See* Report of the Register on the General Revision of the U.S. Copyright Law at 80–82 (1961).[10]

We are persuaded that for unpublished musical works under the 1909 Act, the deposit copy defines the scope of the copyright. Overall, the structure of the 1909 Act demonstrates that the deposit copy encompasses the scope of the copyright for unpublished works, as the deposit copy must be filed not only to register the copyright, but for the copyright to even exist. The 1909 Act states that "copyright may also be had of the works of an author of which copies are not reproduced for sale, *by the deposit*, with claim of copyright, of one complete copy of such work." 1909 Act § 11 (emphasis added). Because the 1909 Act makes the existence of copyright dependent on the deposit copy, it makes sense that the deposit copy also defines the scope of the copyright. It was not until the 1976 Act that common law copyright was federalized and copyright attached at the creation of the work. Recognizing the importance of deposit copies for unpublished works, Congress and the Register of Copyrights have taken care to ensure the preservation of deposit copies. 1909 Act §§ 59–60; Report of the Register on the General Revision of the U.S. Copyright Law at 80–82 (1961). Similarly, even under later versions of the Copyright

[10] In the 1976 Act, Congress prohibited the destruction of deposit copies of unpublished works during the copyright term unless a reproduction had been made. 17 U.S.C. § 704(d). *See* H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 172 (1976) (recognizing "the unique value and irreplaceable nature of unpublished deposits").

Act, the purpose of deposit copies has been described as providing a way "to identify the work in which the registrant claims a copyright." *Data Gen. Corp.*, 36 F.3d at 1161–62. Given that copyright protection under the 1909 Act did not attach until either publication or registration, we conclude that for unpublished works the deposit copy defines the scope of the copyright.

Skidmore puts forth three policy arguments, but they do not alter our conclusion as they do not override the weight of the 1909 Act's statutory scheme and legislative history. First, Skidmore argues that it is challenging to compare a sound recording of the infringing work to a deposit copy of the infringed work. While many copyrighted works, such as books, can be easily formatted to satisfy the deposit copy requirement, musical works are not as well reflected in deposit copies. This makes the intrinsic test for substantial similarity especially challenging when comparing a deposit copy to a sound recording, as the intrinsic test is concerned with the general "total concept and feel" of a work. *See Three Boys*, 212 F.3d at 485. Second, Skidmore argues that our conclusion is biased against musicians who do not read music and could not possibly have written the deposit copies of their own songs. It is not uncommon for musicians who are composing songs to not know how to read music. Skidmore argues that for musicians who do not read music it would be overly time consuming and expensive to make accurate deposit copy sheet music going forward. For new works, however, sound recordings can be deposited as the deposit copy, so we are not overly concerned with the costs of transcribing deposit copies for new compositions. *See* 17 U.S.C. §§ 407, 408. Finally, Skidmore raises the question of whether a copyright claim would be provable if a deposit copy were lost or destroyed. These policy arguments do not undermine the statutory framework that

leads us to conclude that the deposit copy defines the scope of a copyrighted work for unpublished musical works under the 1909 Act.[11]

B.

Skidmore argues that the district court erred by failing to allow recordings of "Taurus" to be played to prove access. This was an evidentiary ruling, which we review for abuse of discretion. *United States v. Hinkson*, 585 F.3d 1247, 1267 (9th Cir. 2009). Although Skidmore's counsel was permitted to play recordings for Page outside the presence of the jury, who was then questioned about them in front of the jury, Skidmore argues that the jury could not assess Page's credibility without observing him listening to the recordings and then answering questions about the recordings.

As the jury ultimately found that both Plant and Page had access to "Taurus," any error in precluding the recordings was harmless. *See United States v. Edwards*, 235 F.3d 1173, 1178–79 (9th Cir. 2000) (stating that an evidentiary ruling is reversed only if the error "more likely than not affected the verdict"). As this issue will likely arise again at retrial, we address whether the district court abused its discretion.

The district court excluded the sound recordings under Federal Rule of Evidence 403, finding that "its probative value is substantially outweighed by danger of . . . unfair prejudice, confusing the issues, [or] misleading the jury . . . ." Fed. R. Evid. 403. Here, the district court abused its discretion in finding that it would be unduly prejudicial for

[11] We leave open the possibility that where the deposit copy has been lost or destroyed, an original sound recording may be used as evidence of the scope of the copyright under the 1909 Act.

the jury to listen to the sound recordings in order to assess Page's access to "Taurus." The district court acknowledged that the recordings were relevant to whether Page had access to "Taurus," as Page would have heard and allegedly copied a recording of "Taurus." The district court was concerned, however, that allowing the jury to hear the recordings would confuse them.

Skidmore argues that by not allowing the jury to observe Page listening to the recordings of "Taurus," the effect of the court's ruling was to decrease the probative value of Skidmore's questioning of Page. Although the jury could still draw conclusions and inferences from Page's demeanor during his testimony, allowing the jury to observe Page listening to the recordings would have enabled them to evaluate his demeanor while listening to the recordings, as well as when answering questions. Limiting the probative value of observation was not proper here, as the risk of unfair prejudice or jury confusion was relatively small and could have been reduced further with a proper admonition. For example, the district court could have instructed the jury that the recordings were limited to the issue of access and that they were not to be used to judge substantial similarity. *See United States v. W.R. Grace*, 504 F.3d 745, 765 (9th Cir. 2007) (providing that "the court substantially underestimated the . . . potential efficacy of a limiting instruction"). Given the probative value of the information and the relatively low risk of unfair prejudice, we conclude that the district court abused its discretion in excluding the evidence. *See* Fed. R. Evid. 403.

C.

Skidmore also argues that the district court abused its discretion by failing to disqualify Defendants' expert Dr. Ferrara or to give a negative inference instruction to the jury

because he previously had been hired by Rondor to compare "Stairway to Heaven" to the original recording of "Taurus." District courts have "broad discretion" in making evidentiary rulings, including whether to allow expert testimony. *Campbell Indus. v. M/V Gemini*, 619 F.2d 24, 27 (9th Cir. 1980). We thus review for abuse of discretion the district court's decision to allow expert testimony. *See id.*

The district court did not abuse its discretion when it denied Skidmore's request for sanctions against Dr. Ferrara and excluded his testimony. Skidmore's motion was rejected as untimely and improperly filed. Even if the motion had been timely filed, the district court did not err in denying the motion because there was no conflict that merited monetary sanctions or exclusion of Dr. Ferrara's testimony. Skidmore argues that Dr. Ferrara effectively switched sides in this case. We have held that when an expert switches sides, the party moving for disqualification must show that the expert in question has confidential information from the first client. *See Erickson v. Newmar Corp.*, 87 F.3d 298, 300 (9th Cir. 1996). Here, even if Dr. Ferrara switched sides, there was no showing that Dr. Ferrara had confidential information. Rondor retained Dr. Ferrara to obtain his opinion on two publicly available songs, and he volunteered to share his conclusion with Skidmore. While he did not produce a report from this prior consultation, he did testify that he believed he communicated his opinion telephonically to Rondor rather than in a written report.

Additionally, there is no evidence presented that Dr. Ferrara did switch sides. Rondor does not have an interest in this case, nor does Universal Music, and Rondor waived any potential conflict that might arise from having Dr. Ferrara testify as an expert for Defendants. Skidmore

contends that Universal Music was working for Hollenbeck, which owed a fiduciary duty to Skidmore as a publisher of Spirit's music. He presents no evidence, however, that Hollenbeck owed a fiduciary duty to Skidmore. *See Cafferty v. Scotti Bros. Records, Inc.*, 969 F. Supp. 193, 205 (S.D.N.Y. 1997) ("In the absence of special circumstances, no fiduciary relationship exists between a music publisher and composers as a matter of law." (citation omitted)). On remand, in light of the current record, there is no basis for excluding Dr. Ferrara's testimony, giving an adverse jury instruction, or imposing monetary sanctions.

V.

Defendants cross-appeal the district court's denial of their motions for attorneys' fees and costs. In light of our disposition, we vacate the district court's denial of attorneys' fees and costs under 17 U.S.C. § 505. In the event Defendants' prevail on remand, they may renew their motions.

VI.

Given our disposition, we need not address the remaining arguments raised by the parties. To be clear, we do not consider whether the district court abused its discretion in determining which version of "Taurus" to play in response to the jury's request during jury deliberations. And, we do not address whether the district court's imposition of time limits violated due process. We note, however, that strict time limits are generally disfavored at trial. *See Monotype Corp. PLC v. Int'l Typeface Corp.*, 43 F.3d 443, 450 (9th Cir. 1994). Given the complex nature of this case, we are troubled by the strict imposition of time limits and the relative inflexibility of the district court once Skidmore ran out of time. On remand, if the district court

again imposes time limits for the retrial it should ensure that each side has adequate time to present its witnesses and arguments.

VII.

We vacate the amended judgment in part and remand for a new trial against Defendants because of the deficiencies in the jury instructions on originality and the district court's failure to include a selection and arrangement jury instruction. Additionally, although harmless in this instance, we conclude that the district court abused its discretion by not allowing the sound recordings of "Taurus" to be played to prove access. Further, at any retrial, the district court should reconsider whether an inverse ratio jury instruction is warranted. The district court did not err, however, in limiting the copyright of "Taurus" to its deposit copy or in allowing Dr. Ferrara to testify. Finally, we vacate the order denying Defendants' motions for attorneys' fees and costs. Given our disposition, there is no need to address the remaining issues raised by Skidmore.

VACATED in part and REMANDED for a new trial.

Appellant shall recover his costs on appeal.

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

MATAL, INTERIM DIRECTOR, UNITED STATES PATENT AND TRADEMARK OFFICE *v.* TAM

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

No. 15–1293. Argued January 18, 2017—Decided June 19, 2017

Simon Tam, lead singer of the rock group "The Slants," chose this moniker in order to "reclaim" the term and drain its denigrating force as a derogatory term for Asian persons. Tam sought federal registration of the mark "THE SLANTS." The Patent and Trademark Office (PTO) denied the application under a Lanham Act provision prohibiting the registration of trademarks that may "disparage . . . or bring . . . into contemp[t] or disrepute" any "persons, living or dead." 15 U. S. C. §1052(a). Tam contested the denial of registration through the administrative appeals process, to no avail. He then took the case to federal court, where the en banc Federal Circuit ultimately found the disparagement clause facially unconstitutional under the First Amendment's Free Speech Clause.

Held: The judgment is affirmed.

808 F. 3d 1321, affirmed.

JUSTICE ALITO delivered the opinion of the Court with respect to Parts I, II, and III–A, concluding:

1. The disparagement clause applies to marks that disparage the members of a racial or ethnic group. Tam's view, that the clause applies only to natural or juristic persons, is refuted by the plain terms of the clause, which uses the word "persons." A mark that disparages a "substantial" percentage of the members of a racial or ethnic group necessarily disparages many "persons," namely, members of that group. Tam's narrow reading also clashes with the breadth of the disparagement clause, which by its terms applies not just to "persons," but also to "institutions" and "beliefs." §1052(a). Had Congress wanted to confine the reach of the clause, it could have used the

phrase "particular living individual," which it used in neighboring §1052(c). Tam contends that his interpretation is supported by legislative history and by the PTO's practice for many years of registering marks that plainly denigrated certain groups. But an inquiry into the meaning of the statute's text ceases when, as here, "the statutory language is unambiguous and the statutory scheme is coherent and consistent." *Barnhart* v. *Sigmon Coal Co.*, 534 U. S. 438, 450 (internal quotation marks omitted). Even if resort to legislative history and early enforcement practice were appropriate, Tam has presented nothing showing a congressional intent to adopt his interpretation, and the PTO's practice in the years following the disparagement clause's enactment is unenlightening. Pp. 8–12.

2. The disparagement clause violates the First Amendment's Free Speech Clause. Contrary to the Government's contention, trademarks are private, not government speech. Because the "Free Speech Clause . . . does not regulate government speech," *Pleasant Grove City* v. *Summum*, 555 U. S. 460, 467, the government is not required to maintain viewpoint neutrality on its own speech. This Court exercises great caution in extending its government-speech precedents, for if private speech could be passed off as government speech by simply affixing a government seal of approval, government could silence or muffle the expression of disfavored viewpoints.

The Federal Government does not dream up the trademarks registered by the PTO. Except as required by §1052(a), an examiner may not reject a mark based on the viewpoint that it appears to express. If the mark meets the Lanham Act's viewpoint-neutral requirements, registration is mandatory. And once a mark is registered, the PTO is not authorized to remove it from the register unless a party moves for cancellation, the registration expires, or the Federal Trade Commission initiates proceedings based on certain grounds. It is thus far-fetched to suggest that the content of a registered mark is government speech, especially given the fact that if trademarks become government speech when they are registered, the Federal Government is babbling prodigiously and incoherently. And none of this Court's government-speech cases supports the idea that registered trademarks are government speech. *Johanns* v. *Livestock Marketing Assn.*, 544 U. S. 550; *Pleasant Grove City* v. *Summum*, 555 U. S. 460; and *Walker* v. *Texas Div., Sons of Confederate Veterans, Inc.*, 576 U. S. ___, distinguished. Holding that the registration of a trademark converts the mark into government speech would constitute a huge and dangerous extension of the government-speech doctrine, for other systems of government registration (such as copyright) could easily be characterized in the same way. Pp. 12–18.

JUSTICE ALITO, joined by THE CHIEF JUSTICE, JUSTICE THOMAS, and

JUSTICE BREYER, concluded in Parts III–B, III–C, and IV:

(a) The Government's argument that this case is governed by the Court's subsidized-speech cases is unpersuasive. Those cases all involved cash subsidies or their equivalent, *e.g.*, funds to private parties for family planning services in *Rust* v. *Sullivan*, 500 U. S. 173, and cash grants to artists in *National Endowment for Arts* v. *Finley*, 524 U. S. 569. The federal registration of a trademark is nothing like these programs. The PTO does not pay money to parties seeking registration of a mark; it requires the payment of fees to file an application and to maintain the registration once it is granted. The Government responds that registration provides valuable non-monetary benefits traceable to the Government's resources devoted to registering the marks, but nearly every government service requires the expenditure of government funds. This is true of services that benefit everyone, like police and fire protection, as well as services that are utilized by only some, *e.g.*, the adjudication of private lawsuits and the use of public parks and highways. Pp. 18–20.

(b) Also unpersuasive is the Government's claim that the disparagement clause is constitutional under a "government-program" doctrine, an argument which is based on a merger of this Court's government-speech cases and subsidy cases. It points to two cases involving a public employer's collection of union dues from its employees, *Davenport* v. *Washington Ed. Assn.*, 551 U. S. 177, and *Ysursa* v. *Pocatello Ed. Assn.*, 555 U. S. 353, but these cases occupy a special area of First Amendment case law that is far removed from the registration of trademarks. Cases in which government creates a limited public forum for private speech, thus allowing for some content- and speaker-based restrictions, see, *e.g.*, *Good News Club* v. *Milford Central School*, 533 U. S. 98, 106–107; *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 831, are potentially more analogous. But even in those cases, viewpoint discrimination is forbidden. The disparagement clause denies registration to any mark that is offensive to a substantial percentage of the members of any group. That is viewpoint discrimination in the sense relevant here: Giving offense is a viewpoint. The "public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers." *Street* v. *New York*, 394 U. S. 576, 592. Pp. 20–23.

(c) The dispute between the parties over whether trademarks are commercial speech subject to the relaxed scrutiny outlined in *Central Hudson Gas & Elect.* v. *Public Serv. Comm'n of N. Y.*, 447 U. S. 557, need not be resolved here because the disparagement clause cannot withstand even *Central Hudson* review. Under *Central Hudson*, a restriction of speech must serve "a substantial interest" and be "nar-

rowly drawn." *Id.*, at 564–565 (internal quotation marks omitted). One purported interest is in preventing speech expressing ideas that offend, but that idea strikes at the heart of the First Amendment. The second interest asserted is protecting the orderly flow of commerce from disruption caused by trademarks that support invidious discrimination; but the clause, which reaches any trademark that disparages *any person, group*, *or institution*, is not narrowly drawn. Pp. 23–26.

JUSTICE KENNEDY, joined by JUSTICE GINSBURG, JUSTICE SOTOMAYOR, and JUSTICE KAGAN, agreed that 15 U. S. C. §1052(a) constitutes viewpoint discrimination, concluding:

(a) With few narrow exceptions, a fundamental principle of the First Amendment is that the government may not punish or suppress speech based on disapproval of the ideas or perspectives the speech conveys. See *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 828–829. The test for viewpoint discrimination is whether—within the relevant subject category—the government has singled out a subset of messages for disfavor based on the views expressed. Here, the disparagement clause identifies the relevant subject as "persons, living or dead, institutions, beliefs, or national symbols," §1052(a); and within that category, an applicant may register a positive or benign mark but not a derogatory one. The law thus reflects the Government's disapproval of a subset of messages it finds offensive, the essence of viewpoint discrimination. The Government's arguments in defense of the statute are unpersuasive. Pp. 2–5.

(b) Regardless of whether trademarks are commercial speech, the viewpoint based discrimination here necessarily invokes heightened scrutiny. See *Sorrell* v. *IMS Health Inc.*, 564 U. S. 552, 566. To the extent trademarks qualify as commercial speech, they are an example of why that category does not serve as a blanket exemption from the First Amendment's requirement of viewpoint neutrality. In the realm of trademarks, the metaphorical marketplace of ideas becomes a tangible, powerful reality. To permit viewpoint discrimination in this context is to permit Government censorship. Pp. 5–7.

ALITO, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, and III–A, in which ROBERTS, C. J., and KENNEDY, GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined, and in which THOMAS, J., joined except for Part II, and an opinion with respect to Parts III–B, III–C, and IV, in which ROBERTS, C. J., and THOMAS and BREYER, JJ., joined. KENNEDY, J., filed an opinion concurring in part and concurring in the judgment, in which GINSBURG, SOTOMAYOR, and KAGAN, JJ., joined. THOMAS, J., filed an opinion concurring in part and concurring in the judgment. GORSUCH, J., took no part in the consideration or decision of the case.

SUPREME COURT OF THE UNITED STATES

No. 15–1293

JOSEPH MATAL, INTERIM DIRECTOR, UNITED STATES PATENT AND TRADEMARK OFFICE, PETITIONER *v.* SIMON SHIAO TAM

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

[June 19, 2017]

JUSTICE ALITO announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, and III–A, and an opinion with respect to Parts III–B, III–C, and IV, in which THE CHIEF JUSTICE, JUSTICE THOMAS, and JUSTICE BREYER join.

This case concerns a dance-rock band's application for federal trademark registration of the band's name, "The Slants." "Slants" is a derogatory term for persons of Asian descent, and members of the band are Asian-Americans. But the band members believe that by taking that slur as the name of their group, they will help to "reclaim" the term and drain its denigrating force.

The Patent and Trademark Office (PTO) denied the application based on a provision of federal law prohibiting the registration of trademarks that may "disparage . . . or bring . . . into contemp[t] or disrepute" any "persons, living or dead." 15 U. S. C. §1052(a). We now hold that this provision violates the Free Speech Clause of the First Amendment. It offends a bedrock First Amendment principle: Speech may not be banned on the ground that it

expresses ideas that offend.

I

A

"The principle underlying trademark protection is that distinctive marks—words, names, symbols, and the like—can help distinguish a particular artisan's goods from those of others." *B&B Hardware, Inc.* v. *Hargis Industries, Inc.*, 575 U. S. ___, ___ (2015) (slip op., at 3); see also *Wal-Mart Stores, Inc.* v. *Samara Brothers, Inc.*, 529 U. S. 205, 212 (2000). A trademark "designate[s] the goods as the product of a particular trader" and "protect[s] his good will against the sale of another's product as his." *United Drug Co.* v. *Theodore Rectanus Co.*, 248 U. S. 90, 97 (1918); see also *Hanover Star Milling Co.* v. *Metcalf*, 240 U. S. 403, 412–413 (1916). It helps consumers identify goods and services that they wish to purchase, as well as those they want to avoid. See *Wal-Mart Stores*, *supra*, at 212–213; *Park 'N Fly, Inc.* v. *Dollar Park & Fly, Inc.*, 469 U. S. 189, 198 (1985).

"[F]ederal law does not create trademarks." *B&B Hardware*, *supra*, at ___ (slip op., at 3). Trademarks and their precursors have ancient origins, and trademarks were protected at common law and in equity at the time of the founding of our country. 3 J. McCarthy, Trademarks and Unfair Competition §19:8 (4th ed. 2017) (hereinafter McCarthy); 1 *id.*, §§5:1, 5:2, 5:3; Pattishal, The Constitutional Foundations of American Trademark Law, 78 Trademark Rep. 456, 457–458 (1988); Pattishall, Two Hundred Years of American Trademark Law, 68 Trademark Rep. 121, 121–123 (1978); see *Trade-Mark Cases*, 100 U. S. 82, 92 (1879). For most of the 19th century, trademark protection was the province of the States. See *Two Pesos, Inc.* v. *Taco Cabana, Inc.*, 505 U. S. 763, 780–782 (1992) (Stevens, J., concurring in judgment); *id.*, at 785 (THOMAS, J., concurring in judgment). Eventually,

Congress stepped in to provide a degree of national uniformity, passing the first federal legislation protecting trademarks in 1870. See Act of July 8, 1870, §§77–84, 16 Stat. 210–212. The foundation of current federal trademark law is the Lanham Act, enacted in 1946. See Act of July 5, 1946, ch. 540, 60 Stat. 427. By that time, trademark had expanded far beyond phrases that do no more than identify a good or service. Then, as now, trademarks often consisted of catchy phrases that convey a message.

Under the Lanham Act, trademarks that are "used in commerce" may be placed on the "principal register," that is, they may be federally registered. 15 U. S. C. §1051(a)(1). And some marks "capable of distinguishing [an] applicant's goods or services and not registrable on the principal register . . . which are in lawful use in commerce by the owner thereof" may instead be placed on a different federal register: the supplemental register. §1091(a). There are now more than two million marks that have active federal certificates of registration. PTO Performance and Accountability Report, Fiscal Year 2016, p. 192 (Table 15), https://www.uspto.gov/sites/default/files/documents/USPTOFY16PAR.pdf (all Internet materials as last visited June 16, 2017). This system of federal registration helps to ensure that trademarks are fully protected and supports the free flow of commerce. "[N]ational protection of trademarks is desirable," we have explained, "because trademarks foster competition and the maintenance of quality by securing to the producer the benefits of good reputation." *San Francisco Arts & Athletics, Inc.* v. *United States Olympic Comm.*, 483 U. S. 522, 531 (1987) (internal quotation marks omitted); see also *Park 'N Fly, Inc.*, *supra*, at 198 ("The Lanham Act provides national protection of trademarks in order to secure to the owner of the mark the goodwill of his business and to protect the ability of consumers to distinguish among competing producers").

B

Without federal registration, a valid trademark may still be used in commerce. See 3 McCarthy §19:8. And an unregistered trademark can be enforced against would-be infringers in several ways. Most important, even if a trademark is not federally registered, it may still be enforceable under §43(a) of the Lanham Act, which creates a federal cause of action for trademark infringement. See *Two Pesos*, *supra*, at 768 ("Section 43(a) prohibits a broader range of practices than does §32, which applies to registered marks, but it is common ground that §43(a) protects qualifying unregistered trademarks" (internal quotation marks and citation omitted)).[1] Unregistered trademarks may also be entitled to protection under other federal statutes, such as the Anticybersquatting Consumer Protection Act, 15 U. S. C. §1125(d). See 5 McCarthy §25A:49, at 25A–198 ("[T]here is no requirement [in the Anticybersquatting Act] that the protected 'mark' be registered: unregistered common law marks are protected by the Act"). And an unregistered trademark can be enforced under state common law, or if it has been registered in a State, under that State's registration system. See 3 *id.*, §19:3, at 19–23 (explaining that "[t]he federal system of registration and protection does not preempt parallel state

[1] In the opinion below, the Federal Circuit opined that although "Section 43(a) allows for a federal suit to protect an unregistered trademark," "it is not at all clear" that respondent could bring suit under §43(a) because "there is no authority extending §43(a) to marks denied under §2(a)'s disparagement provision." *In re Tam*, 808 F. 3d 1321, 1344–1345, n.11 (en banc), as corrected (Feb. 11, 2016). When drawing this conclusion, the Federal Circuit relied in part on our statement in *Two Pesos* that "the general principles qualifying a mark for registration under §2 of the Lanham Act are for the most part applicable in determining whether an unregistered mark is entitled to protection under §43(a)." 505 U. S., at 768. We need not decide today whether respondent could bring suit under §43(a) if his application for federal registration had been lawfully denied under the disparagement clause.

law protection, either by state common law or state registration" and "[i]n the vast majority of situations, federal and state trademark law peacefully coexist"); *id.*, §22:1 (discussing state trademark registration systems).

Federal registration, however, "confers important legal rights and benefits on trademark owners who register their marks." *B&B Hardware*, 575 U. S., at ___ (slip op., at 3) (internal quotation marks omitted). Registration on the principal register (1) "serves as 'constructive notice of the registrant's claim of ownership' of the mark," *ibid.* (quoting 15 U. S. C. §1072); (2) "is 'prima facie evidence of the validity of the registered mark and of the registration of the mark, of the owner's ownership of the mark, and of the owner's exclusive right to use the registered mark in commerce on or in connection with the goods or services specified in the certificate,'" *B & B Hardware*, 575 U. S. ___ (slip op., at 3) (quoting §1057(b)); and (3) can make a mark "'incontestable'" once a mark has been registered for five years," *ibid.* (quoting §§1065, 1115(b)); see *Park 'N Fly*, 469 U. S., at 193. Registration also enables the trademark holder "to stop the importation into the United States of articles bearing an infringing mark." 3 McCarthy §19:9, at 19–38; see 15 U. S. C. §1124.

C

The Lanham Act contains provisions that bar certain trademarks from the principal register. For example, a trademark cannot be registered if it is "merely descriptive or deceptively misdescriptive" of goods, §1052(e)(1), or if it is so similar to an already registered trademark or trade name that it is "likely . . . to cause confusion, or to cause mistake, or to deceive," §1052(d).

At issue in this case is one such provision, which we will call "the disparagement clause." This provision prohibits the registration of a trademark "which may disparage . . . persons, living or dead, institutions, beliefs, or national symbols,

or bring them into contempt, or disrepute." §1052(a).[2] This clause appeared in the original Lanham Act and has remained the same to this day. See §2(a), 60 Stat. 428.

When deciding whether a trademark is disparaging, an examiner at the PTO generally applies a "two-part test." The examiner first considers "the likely meaning of the matter in question, taking into account not only dictionary definitions, but also the relationship of the matter to the other elements in the mark, the nature of the goods or services, and the manner in which the mark is used in the marketplace in connection with the goods or services." Trademark Manual of Examining Procedure §1203.03(b)(i) (Apr. 2017), p. 1200–150, http://tmep.uspto.gov. "If that meaning is found to refer to identifiable persons, institutions, beliefs or national symbols," the examiner moves to the second step, asking "whether that meaning may be disparaging to a substantial composite[3] of the referenced group." *Ibid.* If the examiner finds that a "substantial composite, although not necessarily a majority, of the referenced group would find the proposed mark . . . to be disparaging in the context of contemporary attitudes," a prima facie case of disparagement is made out, and the burden shifts to the applicant to prove that the trademark is not disparaging. *Ibid.* What is more, the PTO has specified that "[t]he fact that an applicant may be a member of that group or has good intentions underlying its use of a term does not obviate the fact that a substantial composite of the referenced group would find the term objectionable." *Ibid.*

D

Simon Tam is the lead singer of "The Slants." *In re Tam*, 808 F. 3d 1321, 1331 (CA Fed. 2015) (en banc), as

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[2] The disparagement clause also prevents a trademark from being registered on the supplemental register. §1091(a).

[3] By "composite," we assume the PTO means component.

corrected (Feb. 11, 2016). He chose this moniker in order to "reclaim" and "take ownership" of stereotypes about people of Asian ethnicity. *Ibid.* (internal quotation marks omitted). The group "draws inspiration for its lyrics from childhood slurs and mocking nursery rhymes" and has given its albums names such as "The Yellow Album" and "Slanted Eyes, Slanted Hearts." *Ibid.*

Tam sought federal registration of "THE SLANTS," on the principal register, App. 17, but an examining attorney at the PTO rejected the request, applying the PTO's two-part framework and finding that "there is . . . a substantial composite of persons who find the term in the applied-for mark offensive." *Id.*, at 30. The examining attorney relied in part on the fact that "numerous dictionaries define 'slants' or 'slant-eyes' as a derogatory or offensive term." *Id.*, at 29. The examining attorney also relied on a finding that "the band's name has been found offensive numerous times"—citing a performance that was canceled because of the band's moniker and the fact that "several bloggers and commenters to articles on the band have indicated that they find the term and the applied-for mark offensive." *Id.*, at 29–30.

Tam contested the denial of registration before the examining attorney and before the PTO's Trademark Trial and Appeal Board (TTAB) but to no avail. Eventually, he took the case to federal court, where the en banc Federal Circuit ultimately found the disparagement clause facially unconstitutional under the First Amendment's Free Speech Clause. The majority found that the clause engages in viewpoint-based discrimination, that the clause regulates the expressive component of trademarks and consequently cannot be treated as commercial speech, and that the clause is subject to and cannot satisfy strict scrutiny. See 808 F. 3d, at 1334–1339. The majority also rejected the Government's argument that registered trademarks constitute government speech, as well as the

Government's contention that federal registration is a form of government subsidy. See *id.*, at 1339–1355. And the majority opined that even if the disparagement clause were analyzed under this Court's commercial speech cases, the clause would fail the "intermediate scrutiny" that those cases prescribe. See *id.*, at 1355–1357.

Several judges wrote separately, advancing an assortment of theories. Concurring, Judge O'Malley agreed with the majority's reasoning but added that the disparagement clause is unconstitutionally vague. See *id.*, at 1358–1363. Judge Dyk concurred in part and dissented in part. He argued that trademark registration is a government subsidy and that the disparagement clause is facially constitutional, but he found the clause unconstitutional as applied to THE SLANTS because that mark constitutes "core expression" and was not adopted for the purpose of disparaging Asian-Americans. See *id.*, at 1363–1374. In dissent, Judge Lourie agreed with Judge Dyk that the clause is facially constitutional but concluded for a variety of reasons that it is also constitutional as applied in this case. See *id.*, at 1374–1376. Judge Reyna also dissented, maintaining that trademarks are commercial speech and that the disparagement clause survives intermediate scrutiny because it "directly advances the government's substantial interest in the orderly flow of commerce." See *id.*, at 1376–1382.

The Government filed a petition for certiorari, which we granted in order to decide whether the disparagement clause "is facially invalid under the Free Speech Clause of the First Amendment." Pet. for Cert. i; see *sub. nom. Lee* v. *Tam*, 579 U. S. ___ (2016).

II

Before reaching the question whether the disparagement clause violates the First Amendment, we consider Tam's argument that the clause does not reach marks that

disparage racial or ethnic groups. The clause prohibits the registration of marks that disparage "persons," and Tam claims that the term "persons" "includes only natural and juristic persons," not "non-juristic entities such as racial and ethnic groups." Brief for Respondent 46.

Tam never raised this argument before the PTO or the Federal Circuit, and we declined to grant certiorari on this question when Tam asked us to do so, see Brief Responding to Petition for Certiorari, pp. i, 17–21. Normally, that would be the end of the matter in this Court. See, *e.g.*, *Yee* v. *Escondido,* 503 U. S. 519, 534–538 (1992); *Freytag* v. *Commissioner*, 501 U. S. 868, 894–895 (1991) (Scalia, J., concurring in part and concurring in judgment).

But as the Government pointed out in connection with its petition for certiorari, accepting Tam's statutory interpretation would resolve this case and leave the First Amendment question for another day. See Reply Brief 9. "[W]e have often stressed" that it is "importan[t] [to] avoid[d] the premature adjudication of constitutional questions," *Clinton* v. *Jones*, 520 U. S. 681, 690 (1997), and that "we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable," *Spector Motor Service, Inc.* v. *McLaughlin*, 323 U. S. 101, 105 (1944). See also *Alabama State Federation of Labor* v. *McAdory*, 325 U. S. 450, 461 (1945); *Burton* v. *United States*, 196 U. S. 283, 295 (1905). We thus begin by explaining why Tam's argument about the definition of "persons" in the Lanham Act is meritless.

As noted, the disparagement clause prohibits the registration of trademarks "which may disparage . . . persons, living or dead." 15 U. S. C. §1052(a). Tam points to a definition of "person" in the Lanham Act, which provides that "[i]n the construction of this chapter, unless the contrary is plainly apparent from the context . . . [t]he term 'person' and any other word or term used to designate the applicant or other entitled to a benefit or privi-

lege or rendered liable under the provisions of this chapter includes a juristic person as well as a natural person." §1127. Because racial and ethnic groups are neither natural nor "juristic" persons, Tam asserts, these groups fall outside this definition. Brief for Respondent 46–48.

Tam's argument is refuted by the plain terms of the disparagement clause. The clause applies to marks that disparage "persons." A mark that disparages a "substantial" percentage of the members of a racial or ethnic group, Trademark Manual §1203.03(b)(i), at 1200–150, necessarily disparages many "persons," namely, members of that group. Tam's argument would fail even if the clause used the singular term "person," but Congress' use of the plural "persons" makes the point doubly clear.[4]

Tam's narrow reading of the term "persons" also clashes with the breadth of the disparagement clause. By its terms, the clause applies to marks that disparage, not just "persons," but also "institutions" and "beliefs." 15 U. S. C. §1052(a). It thus applies to the members of any group whose members share particular "beliefs," such as political, ideological, and religious groups. It applies to marks that denigrate "institutions," and on Tam's reading, it also reaches "juristic" persons such as corporations, unions, and other unincorporated associations. See §1127. Thus, the clause is not limited to marks that disparage a particular natural person. If Congress had wanted to confine

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[4] Tam advances a convoluted textual argument that goes as follows. The definition of a "person" in 15 U. S. C. §1127 does not include a "non-juristic person," *i.e.*, a group that cannot sue or be sued in its own right. Brief for Respondent 46–47. Such groups consist of multiple natural persons. Therefore, the members of such groups are not "persons" under the disparagement clause. *Id.*, at 46–48.

This argument leads to the absurd result that no person is a "person" within the meaning of the disparagement clause. This is so because every person is a member of a "non-juristic" group, *e.g.*, right-handers, left-handers, women, men, people born on odd-numbered days, people born on even-numbered days.

the reach of the disparagement clause in the way that Tam suggests, it would have been easy to do so. A neighboring provision of the Lanham Act denies registration to any trademark that "[c]onsists of or comprises a name, portrait, or signature identifying a *particular living individual* except by his written consent." §1052(c) (emphasis added).

Tam contends that his interpretation of the disparagement clause is supported by its legislative history and by the PTO's willingness for many years to register marks that plainly denigrated African-Americans and Native Americans. These arguments are unpersuasive. As always, our inquiry into the meaning of the statute's text ceases when "the statutory language is unambiguous and the statutory scheme is coherent and consistent." *Barnhart* v. *Sigmon Coal Co.*, 534 U. S. 438, 450 (2002) (internal quotation marks omitted). Here, it is clear that the prohibition against registering trademarks "which may disparage . . . persons," §1052(a), prohibits registration of terms that disparage persons who share a common race or ethnicity.

Even if resort to legislative history and early enforcement practice were appropriate, we would find Tam's arguments unconvincing. Tam has not brought to our attention any evidence in the legislative history showing that Congress meant to adopt his interpretation. And the practice of the PTO in the years following the enactment of the disparagement clause is unenlightening. The admitted vagueness of the disparagement test[5] and the huge

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[5] The PTO has acknowledged that the guidelines "for determining whether a mark is scandalous or disparaging are somewhat vague and the determination of whether a mark is scandalous or disparaging is necessarily a highly subjective one." *In re In Over Our Heads, Inc.*, 16 USPQ 2d 1653, 1654 (TTAB 1990) (brackets and internal quotation marks omitted). The PTO has similarly observed that whether a mark is disparaging "is highly subjective and, thus, general rules are difficult

volume of applications have produced a haphazard record of enforcement. (Even today, the principal register is replete with marks that many would regard as disparaging to racial and ethnic groups.[6]) Registration of the offensive marks that Tam cites is likely attributable not to the acceptance of his interpretation of the clause but to other factors—most likely the regrettable attitudes and sensibilities of the time in question.

III

Because the disparagement clause applies to marks that disparage the members of a racial or ethnic group, we must decide whether the clause violates the Free Speech Clause of the First Amendment. And at the outset, we must consider three arguments that would either eliminate any First Amendment protection or result in highly permissive rational-basis review. Specifically, the Government contends (1) that trademarks are government speech, not private speech, (2) that trademarks are a form of government subsidy, and (3) that the constitutionality of the disparagement clause should be tested under a new "government-program" doctrine. We address each of these arguments below.

A

The First Amendment prohibits Congress and other government entities and actors from "abridging the freedom of speech"; the First Amendment does not say that Congress and other government entities must abridge their own ability to speak freely. And our cases recognize that "[t]he Free Speech Clause . . . does not regulate government speech." *Pleasant Grove City* v. *Summum*, 555

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to postulate." *Harjo* v. *Pro-Football Inc.*, 50 USPQ 2d 1705, 1737 (TTAB 1999), rev'd, 284 F. Supp. 2d 96 (DC 2003), rev'd and remanded in part, 415 F. 3d 44 (CADC 2005) (*per curiam*).

[6] See, *e.g.*, App. to Brief for Pro-Football, Inc., as *Amicus Curiae*.

U.S. 460, 467 (2009); see *Johanns* v. *Livestock Marketing Assn.*, 544 U.S. 550, 553 (2005) ("[T]he Government's own speech . . . is exempt from First Amendment scrutiny"); *Board of Regents of Univ. of Wis. System* v. *Southworth*, 529 U.S. 217, 235 (2000).

As we have said, "it is not easy to imagine how government could function" if it were subject to the restrictions that the First Amendment imposes on private speech. *Summum*, *supra*, at 468; see *Walker* v. *Texas Div., Sons of Confederate Veterans, Inc.*, 576 U. S. ___, ___–___ (2015) (slip op., at 5–7). "'[T]he First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others,'" *Lamb's Chapel* v. *Center Moriches Union Free School Dist.*, 508 U. S. 384, 394 (1993), but imposing a requirement of viewpoint-neutrality on government speech would be paralyzing. When a government entity embarks on a course of action, it necessarily takes a particular viewpoint and rejects others. The Free Speech Clause does not require government to maintain viewpoint neutrality when its officers and employees speak about that venture.

Here is a simple example. During the Second World War, the Federal Government produced and distributed millions of posters to promote the war effort.[7] There were posters urging enlistment, the purchase of war bonds, and the conservation of scarce resources.[8] These posters expressed a viewpoint, but the First Amendment did not demand that the Government balance the message of these posters by producing and distributing posters encouraging Americans to refrain from engaging in these activities.

But while the government-speech doctrine is important—indeed, essential—it is a doctrine that is suscep-

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[7] See, *e.g.*, D. Nelson, The Posters That Won the War (1991).

[8] *Ibid.*

tible to dangerous misuse. If private speech could be passed off as government speech by simply affixing a government seal of approval, government could silence or muffle the expression of disfavored viewpoints. For this reason, we must exercise great caution before extending our government-speech precedents.

At issue here is the content of trademarks that are registered by the PTO, an arm of the Federal Government. The Federal Government does not dream up these marks, and it does not edit marks submitted for registration. Except as required by the statute involved here, 15 U. S. C. §1052(a), an examiner may not reject a mark based on the viewpoint that it appears to express. Thus, unless that section is thought to apply, an examiner does not inquire whether any viewpoint conveyed by a mark is consistent with Government policy or whether any such viewpoint is consistent with that expressed by other marks already on the principal register. Instead, if the mark meets the Lanham Act's viewpoint-neutral requirements, registration is mandatory. *Ibid.* (requiring that "[n]o trademark . . . shall be refused registration on the principal register on account of its nature unless" it falls within an enumerated statutory exception). And if an examiner finds that a mark is eligible for placement on the principal register, that decision is not reviewed by any higher official unless the registration is challenged. See §§1062(a), 1071; 37 CFR §41.31(a) (2016). Moreover, once a mark is registered, the PTO is not authorized to remove it from the register unless a party moves for cancellation, the registration expires, or the Federal Trade Commission initiates proceedings based on certain grounds. See 15 U. S. C. §§1058(a), 1059, 1064; 37 CFR §§2.111(b), 2.160.

In light of all this, it is far-fetched to suggest that the content of a registered mark is government speech. If the federal registration of a trademark makes the mark government speech, the Federal Government is babbling

prodigiously and incoherently. It is saying many unseemly things. See App. to Brief for Pro-Football, Inc., as *Amicus Curiae*. It is expressing contradictory views.[9] It is unashamedly endorsing a vast array of commercial products and services. And it is providing Delphic advice to the consuming public.

For example, if trademarks represent government speech, what does the Government have in mind when it advises Americans to "make.believe" (Sony),[10] "Think different" (Apple),[11] "Just do it" (Nike),[12] or "Have it your way" (Burger King)[13]? Was the Government warning about a coming disaster when it registered the mark "EndTime Ministries"[14]?

The PTO has made it clear that registration does not constitute approval of a mark. See *In re Old Glory Condom Corp.*, 26 USPQ 2d 1216, 1220, n. 3 (TTAB 1993) ("[I]ssuance of a trademark registration . . . is not a government imprimatur"). And it is unlikely that more than a tiny fraction of the public has any idea what federal registration of a trademark means. See *Application of National Distillers & Chemical Corp.*, 49 C. C. P. A. (Pat.) 854, 863, 297 F. 2d 941, 949 (1962) (Rich, J., concurring) ("The purchasing public knows no more about trademark registrations than a man walking down the street in a

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[9] Compare "Abolish Abortion," Registration No. 4,935,774 (Apr. 12, 2016), with "I Stand With Planned Parenthood," Registration No. 5,073,573 (Nov. 1, 2016); compare "Capitalism Is Not Moral, Not Fair, Not Freedom," Registration No. 4,696,419 (Mar. 3, 2015), with "Capitalism Ensuring Innovation," Registration No. 3,966,092 (May 24, 2011); compare "Global Warming Is Good," Registration No. 4,776,235 (July 21, 2015), with "A Solution to Global Warming," Registration No. 3,875,271 (Nov. 10, 2010).

[10] "make.believe," Registration No. 4,342,903 (May 28, 2013).

[11] "Think Different," Registration No. 2,707,257 (Apr. 15, 2003).

[12] "Just Do It," Registration No. 1,875,307 (Jan. 25, 1995).

[13] "Have It Your Way," Registration No. 0,961,016. (June 12, 1973)

[14] "EndTime Ministries," Registration No. 4,746,225 (June 2, 2015).

strange city knows about legal title to the land and buildings he passes" (emphasis deleted)).

None of our government speech cases even remotely supports the idea that registered trademarks are government speech. In *Johanns,* we considered advertisements promoting the sale of beef products. A federal statute called for the creation of a program of paid advertising "'to advance the image and desirability of beef and beef products.'" 544 U. S., at 561 (quoting 7 U. S. C. § 2902(13)). Congress and the Secretary of Agriculture provided guidelines for the content of the ads, Department of Agriculture officials attended the meetings at which the content of specific ads was discussed, and the Secretary could edit or reject any proposed ad. 544 U. S., at 561. Noting that "[t]he message set out in the beef promotions [was] from beginning to end the message established by the Federal Government," we held that the ads were government speech. *Id.*, at 560. The Government's involvement in the creation of these beef ads bears no resemblance to anything that occurs when a trademark is registered.

Our decision in *Summum* is similarly far afield. A small city park contained 15 monuments. 555 U.S., at 464. Eleven had been donated by private groups, and one of these displayed the Ten Commandments. *Id.*, at 464–465. A religious group claimed that the city, by accepting donated monuments, had created a limited public forum for private speech and was therefore obligated to place in the park a monument expressing the group's religious beliefs.

Holding that the monuments in the park represented government speech, we cited many factors. Governments have used monuments to speak to the public since ancient times; parks have traditionally been selective in accepting and displaying donated monuments; parks would be overrun if they were obligated to accept all monuments offered by private groups; "[p]ublic parks are often closely identified in the public mind with the government unit that

owns the land"; and "[t]he monuments that are accepted . . . are meant to convey and have the effect of conveying a government message." *Id.*, at 472.

Trademarks share none of these characteristics. Trademarks have not traditionally been used to convey a Government message. With the exception of the enforcement of 15 U. S. C. §1052(a), the viewpoint expressed by a mark has not played a role in the decision whether to place it on the principal register. And there is no evidence that the public associates the contents of trademarks with the Federal Government.

This brings us to the case on which the Government relies most heavily, *Walker*, which likely marks the outer bounds of the government-speech doctrine. Holding that the messages on Texas specialty license plates are government speech, the *Walker* Court cited three factors distilled from *Summum*. 576 U. S., at ___–___ (slip op., at 7–8). First, license plates have long been used by the States to convey state messages. *Id.*, at ___–___ (slip op., at 9–10). Second, license plates "are often closely identified in the public mind" with the State, since they are manufactured and owned by the State, generally designed by the State, and serve as a form of "government ID." *Id.*, at ___ (slip op., at 10) (internal quotation marks omitted). Third, Texas "maintain[ed] direct control over the messages conveyed on its specialty plates." *Id.*, at ___ (slip op., at 11). As explained above, none of these factors are present in this case.

In sum, the federal registration of trademarks is vastly different from the beef ads in *Johanns*, the monuments in *Summum*, and even the specialty license plates in *Walker*. Holding that the registration of a trademark converts the mark into government speech would constitute a huge and dangerous extension of the government-speech doctrine. For if the registration of trademarks constituted government speech, other systems of government registration

could easily be characterized in the same way.

Perhaps the most worrisome implication of the Government's argument concerns the system of copyright registration. If federal registration makes a trademark government speech and thus eliminates all First Amendment protection, would the registration of the copyright for a book produce a similar transformation? See 808 F. 3d, at 1346 (explaining that if trademark registration amounts to government speech, "then copyright registration" which "has identical accoutrements" would "likewise amount to government speech").

The Government attempts to distinguish copyright on the ground that it is "'the engine of free expression,'" Brief for Petitioner 47 (quoting *Eldred* v. *Ashcroft*, 537 U. S. 186, 219 (2003)), but as this case illustrates, trademarks often have an expressive content. Companies spend huge amounts to create and publicize trademarks that convey a message. It is true that the necessary brevity of trademarks limits what they can say. But powerful messages can sometimes be conveyed in just a few words.

Trademarks are private, not government, speech.

B

We next address the Government's argument that this case is governed by cases in which this Court has upheld the constitutionality of government programs that subsidized speech expressing a particular viewpoint. These cases implicate a notoriously tricky question of constitutional law. "[W]e have held that the Government 'may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech even if he has no entitlement to that benefit.'" *Agency for Int'l Development* v. *Alliance for Open Society Int'l, Inc.*, 570 U. S. ___, ___ (2013) (slip op., at 8) (some internal quotation marks omitted). But at the same time, government is not required to subsidize activities that it does not wish to

promote. *Ibid.* Determining which of these principles applies in a particular case "is not always self-evident," *id.*, at ___ (slip op., at 11), but no difficult question is presented here.

Unlike the present case, the decisions on which the Government relies all involved cash subsidies or their equivalent. In *Rust* v. *Sullivan*, 500 U. S. 173 (1991), a federal law provided funds to private parties for family planning services. In *National Endowment for Arts* v. *Finley*, 524 U. S. 569 (1998), cash grants were awarded to artists. And federal funding for public libraries was at issue in *United States* v. *American Library Assn., Inc.*, 539 U.S. 194 (2003). In other cases, we have regarded tax benefits as comparable to cash subsidies. See *Regan* v. *Taxation With Representation of Wash.*, 461 U. S. 540 (1983); *Cammarano* v. *United States*, 358 U. S 498 (1959).

The federal registration of a trademark is nothing like the programs at issue in these cases. The PTO does not pay money to parties seeking registration of a mark. Quite the contrary is true: An applicant for registration must pay the PTO a filing fee of $225–$600. 37 CFR §2.6(a)(1). (Tam submitted a fee of $275 as part of his application to register THE SLANTS. App. 18.) And to maintain federal registration, the holder of a mark must pay a fee of $300–$500 every 10 years. §2.6(a)(5); see also 15 U. S. C. §1059(a). The Federal Circuit concluded that these fees have fully supported the registration system for the past 27 years. 808 F. 3d, at 1353.

The Government responds that registration provides valuable non-monetary benefits that "are directly traceable to the resources devoted by the federal government to examining, publishing, and issuing certificates of registration for those marks." Brief for Petitioner 27. But just about every government service requires the expenditure of government funds. This is true of services that benefit everyone, like police and fire protection, as well as services

that are utilized by only some, *e.g.*, the adjudication of private lawsuits and the use of public parks and highways.

Trademark registration is not the only government registration scheme. For example, the Federal Government registers copyrights and patents. State governments and their subdivisions register the title to real property and security interests; they issue driver's licenses, motor vehicle registrations, and hunting, fishing, and boating licenses or permits.

Cases like *Rust* and *Finley* are not instructive in analyzing the constitutionality of restrictions on speech imposed in connection with such services.

C

Finally, the Government urges us to sustain the disparagement clause under a new doctrine that would apply to "government-program" cases. For the most part, this argument simply merges our government-speech cases and the previously discussed subsidy cases in an attempt to construct a broader doctrine that can be applied to the registration of trademarks. The only new element in this construct consists of two cases involving a public employer's collection of union dues from its employees. But those cases occupy a special area of First Amendment case law, and they are far removed from the registration of trademarks.

In *Davenport* v. *Washington Ed. Assn.*, 551 U. S. 177, 181–182 (2007), a Washington law permitted a public employer automatically to deduct from the wages of employees who chose not to join the union the portion of union dues used for activities related to collective bargaining. But unless these employees affirmatively consented, the law did not allow the employer to collect the portion of union dues that would be used in election activities. *Id.*, at 180–182. A public employee union argued that this law unconstitutionally restricted its speech based on its con-

tent; that is, the law permitted the employer to assist union speech on matters relating to collective bargaining but made it harder for the union to collect money to support its election activities. *Id.*, at 188. Upholding this law, we characterized it as imposing a "modest limitation" on an "extraordinary benefit," namely, taking money from the wages of non-union members and turning it over to the union free of charge. *Id.*, at 184. Refusing to confer an even greater benefit, we held, did not upset the marketplace of ideas and did not abridge the union's free speech rights. *Id.*, at 189–190.

Ysursa v. *Pocatello Ed. Assn.*, 555 U. S. 353 (2009), is similar. There, we considered an Idaho law that allowed public employees to elect to have union dues deducted from their wages but did not allow such a deduction for money remitted to the union's political action committee. *Id.*, at 355. We reasoned that the "the government . . . [was] not required to assist others in funding the expression of particular ideas." *Id.*, at 358; see also *id.*, at 355 ("The First Amendment . . . does not confer an affirmative right to use government payroll mechanisms for the purpose of obtaining funds for expression").

Davenport and *Ysursa* are akin to our subsidy cases. Although the laws at issue in *Davenport* and *Ysursa* did not provide cash subsidies to the unions, they conferred a very valuable benefit—the right to negotiate a collective-bargaining agreement under which non-members would be obligated to pay an agency fee that the public employer would collect and turn over to the union free of charge. As in the cash subsidy cases, the laws conferred this benefit because it was thought that this arrangement served important government interests. See *Abood* v. *Detroit Bd. of Ed.*, 431 U. S. 209, 224–226 (1977). But the challenged laws did not go further and provide convenient collection mechanisms for money to be used in political activities. In essence, the Washington and Idaho lawmakers chose to

confer a substantial non-cash benefit for the purpose of furthering activities that they particularly desired to promote but not to provide a similar benefit for the purpose of furthering other activities. Thus, *Davenport* and *Ysursa* are no more relevant for present purposes than the subsidy cases previously discussed.[15]

Potentially more analogous are cases in which a unit of government creates a limited public forum for private speech. See, *e.g.*, *Good News Club* v. *Milford Central School*, 533 U. S. 98, 106–107 (2001); *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 831 (1995); *Lamb's Chapel*, 508 U. S., at 392–393. See also *Legal Services Corporation* v. *Velazquez*, 531 U. S. 533, 541–544 (2001). When government creates such a forum, in either a literal or "metaphysical" sense, see *Rosenberger*, 515 U. S., at 830, some content- and speaker-based restrictions may be allowed, see *id.*, at 830–831. However, even in such cases, what we have termed "viewpoint discrimination" is forbidden. *Id.*, at 831.

Our cases use the term "viewpoint" discrimination in a broad sense, see *ibid.*, and in that sense, the disparagement clause discriminates on the bases of "viewpoint." To be sure, the clause evenhandedly prohibits disparagement of all groups. It applies equally to marks that damn Democrats and Republicans, capitalists and socialists, and those arrayed on both sides of every possible issue. It denies registration to any mark that is offensive to a substantial percentage of the members of any group. But in the sense relevant here, that is viewpoint discrimination: Giving offense is a viewpoint.

We have said time and again that "the public expression

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[15] While these cases resemble subsidy cases insofar as the free speech rights of unions and their members are concerned, arrangements like those in these cases also implicate the free speech rights of non-union members. Our decision here has no bearing on that issue.

of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers." *Street* v. *New York*, 394 U. S. 576, 592 (1969). See also *Texas* v. *Johnson*, 491 U. S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable"); *Hustler Magazine, Inc.* v. *Falwell*, 485 U. S. 46, 55–56 (1988); *Coates* v. *Cincinnati*, 402 U. S. 611, 615 (1971); *Bachellar* v. *Maryland*, 397 U. S. 564, 567 (1970); *Tinker* v. *Des Moines Independent Community School Dist.*, 393 U. S. 503, 509–514 (1969); *Cox* v. *Louisiana*, 379 U. S. 536, 551 (1965); *Edwards* v. *South Carolina*, 372 U. S. 229, 237–238 (1963); *Terminiello* v. *Chicago*, 337 U. S. 1, 4–5 (1949); *Cantwell* v. *Connecticut*, 310 U. S. 296, 311 (1940); *Schneider* v. *State (Town of Irvington)*, 308 U. S. 147, 161 (1939); *De Jonge* v. *Oregon*, 299 U. S. 353, 365 (1937).

For this reason, the disparagement clause cannot be saved by analyzing it as a type of government program in which some content- and speaker-based restrictions are permitted.[16]

IV

Having concluded that the disparagement clause cannot be sustained under our government-speech or subsidy cases or under the Government's proposed "government-program" doctrine, we must confront a dispute between the parties on the question whether trademarks are commercial speech and are thus subject to the relaxed scrutiny outlined in *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n of N. Y.*, 447 U. S. 557 (1980). The Government and *amici* supporting its position argue that all

[16] We leave open the question whether this is the appropriate framework for analyzing free speech challenges to provisions of the Lanham Act.

trademarks are commercial speech. They note that the central purposes of trademarks are commercial and that federal law regulates trademarks to promote fair and orderly interstate commerce. Tam and his *amici*, on the other hand, contend that many, if not all, trademarks have an expressive component. In other words, these trademarks do not simply identify the source of a product or service but go on to say something more, either about the product or service or some broader issue. The trademark in this case illustrates this point. The name "The Slants" not only identifies the band but expresses a view about social issues.

We need not resolve this debate between the parties because the disparagement clause cannot withstand even *Central Hudson* review.[17] Under *Central Hudson*, a restriction of speech must serve "a substantial interest," and it must be "narrowly drawn." *Id.*, at 564–565 (internal quotation marks omitted). This means, among other things, that "[t]he regulatory technique may extend only as far as the interest it serves." *Id.*, at 565. The disparagement clause fails this requirement.

It is claimed that the disparagement clause serves two interests. The first is phrased in a variety of ways in the briefs. Echoing language in one of the opinions below, the Government asserts an interest in preventing "'underrepresented groups'" from being "'bombarded with demeaning messages in commercial advertising.'" Brief for Petitioner 48 (quoting 808 F. 3d, at 1364 (Dyk, J., concurring in part and dissenting in part)). An *amicus* supporting the Government refers to "encouraging racial

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[17] As with the framework discussed in Part III–C of this opinion, we leave open the question whether *Central Hudson* provides the appropriate test for deciding free speech challenges to provisions of the Lanham Act. And nothing in our decision should be read to speak to the validity of state unfair competition provisions or product libel laws that are not before us and differ from §1052(d)'s disparagement clause.

tolerance and protecting the privacy and welfare of individuals." Brief for Native American Organizations as *Amici Curiae* 21. But no matter how the point is phrased, its unmistakable thrust is this: The Government has an interest in preventing speech expressing ideas that offend. And, as we have explained, that idea strikes at the heart of the First Amendment. Speech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express "the thought that we hate." *United States* v. *Schwimmer*, 279 U. S. 644, 655 (1929) (Holmes, J., dissenting).

The second interest asserted is protecting the orderly flow of commerce. See 808 F. 3d, at 1379–1381 (Reyna, J., dissenting); Brief for Petitioner 49; Brief for Native American Organizations as *Amicus Curiae* 18–21. Commerce, we are told, is disrupted by trademarks that "involv[e] disparagement of race, gender, ethnicity, national origin, religion, sexual orientation, and similar demographic classification." 808 F. 3d, at 1380–1381 (opinion of Reyna, J.). Such trademarks are analogized to discriminatory conduct, which has been recognized to have an adverse effect on commerce. See *ibid.*; Brief for Petitioner 49; Brief for Native American Organizations as *Amici Curiae* 18–20.

A simple answer to this argument is that the disparagement clause is not "narrowly drawn" to drive out trademarks that support invidious discrimination. The clause reaches any trademark that disparages *any person, group, or institution*. It applies to trademarks like the following: "Down with racists," "Down with sexists," "Down with homophobes." It is not an anti-discrimination clause; it is a happy-talk clause. In this way, it goes much further than is necessary to serve the interest asserted.

The clause is far too broad in other ways as well. The

clause protects every person living or dead as well as every institution. Is it conceivable that commerce would be disrupted by a trademark saying: "James Buchanan was a disastrous president" or "Slavery is an evil institution"?

There is also a deeper problem with the argument that commercial speech may be cleansed of any expression likely to cause offense. The commercial market is well stocked with merchandise that disparages prominent figures and groups, and the line between commercial and non-commercial speech is not always clear, as this case illustrates. If affixing the commercial label permits the suppression of any speech that may lead to political or social "volatility," free speech would be endangered.

* * *

For these reasons, we hold that the disparagement clause violates the Free Speech Clause of the First Amendment. The judgment of the Federal Circuit is affirmed.

It is so ordered.

JUSTICE GORSUCH took no part in the consideration or decision of this case.

SUPREME COURT OF THE UNITED STATES

No. 15–1293

JOSEPH MATAL, INTERIM DIRECTOR, UNITED STATES PATENT AND TRADEMARK OFFICE, PETITIONER *v.* SIMON SHIAO TAM

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

[June 19, 2017]

JUSTICE KENNEDY, with whom JUSTICE GINSBURG, JUSTICE SOTOMAYOR, and JUSTICE KAGAN join, concurring in part and concurring in the judgment.

The Patent and Trademark Office (PTO) has denied the substantial benefits of federal trademark registration to the mark THE SLANTS. The PTO did so under the mandate of the disparagement clause in 15 U. S. C. §1052(a), which prohibits the registration of marks that may "disparage . . . or bring . . . into contemp[t] or disrepute" any "persons, living or dead, institutions, beliefs, or national symbols."

As the Court is correct to hold, §1052(a) constitutes viewpoint discrimination—a form of speech suppression so potent that it must be subject to rigorous constitutional scrutiny. The Government's action and the statute on which it is based cannot survive this scrutiny.

The Court is correct in its judgment, and I join Parts I, II, and III–A of its opinion. This separate writing explains in greater detail why the First Amendment's protections against viewpoint discrimination apply to the trademark here. It submits further that the viewpoint discrimination rationale renders unnecessary any extended treatment of other questions raised by the parties.

I

Those few categories of speech that the government can regulate or punish—for instance, fraud, defamation, or incitement—are well established within our constitutional tradition. See *United States* v. *Stevens*, 559 U. S. 460, 468 (2010). Aside from these and a few other narrow exceptions, it is a fundamental principle of the First Amendment that the government may not punish or suppress speech based on disapproval of the ideas or perspectives the speech conveys. See *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 828–829 (1995).

The First Amendment guards against laws "targeted at specific subject matter," a form of speech suppression known as content based discrimination. *Reed* v. *Town of Gilbert,* 576 U. S. ___, ___ (2015) (slip op., at 12). This category includes a subtype of laws that go further, aimed at the suppression of "particular views . . . on a subject." *Rosenberger*, 515 U. S., at 829. A law found to discriminate based on viewpoint is an "egregious form of content discrimination," which is "presumptively unconstitutional." *Id.,* at 829–830.

At its most basic, the test for viewpoint discrimination is whether—within the relevant subject category—the government has singled out a subset of messages for disfavor based on the views expressed. See *Cornelius* v. *NAACP Legal Defense & Ed. Fund, Inc.*, 473 U. S. 788, 806 (1985) ("[T]he government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject"). In the instant case, the disparagement clause the Government now seeks to implement and enforce identifies the relevant subject as "persons, living or dead, institutions, beliefs, or national symbols." 15 U. S. C. §1052(a). Within that category, an applicant may register a positive or benign mark but not a derogatory one. The law thus reflects the Government's disapproval of a subset of mes-

sages it finds offensive. This is the essence of viewpoint discrimination.

The Government disputes this conclusion. It argues, to begin with, that the law is viewpoint neutral because it applies in equal measure to any trademark that demeans or offends. This misses the point. A subject that is first defined by content and then regulated or censored by mandating only one sort of comment is not viewpoint neutral. To prohibit all sides from criticizing their opponents makes a law more viewpoint based, not less so. Cf. *Rosenberger*, *supra,* at 831–832 ("The . . . declaration that debate is not skewed so long as multiple voices are silenced is simply wrong; the debate is skewed in multiple ways"). The logic of the Government's rule is that a law would be viewpoint neutral even if it provided that public officials could be praised but not condemned. The First Amendment's viewpoint neutrality principle protects more than the right to identify with a particular side. It protects the right to create and present arguments for particular positions in particular ways, as the speaker chooses. By mandating positivity, the law here might silence dissent and distort the marketplace of ideas.

The Government next suggests that the statute is viewpoint neutral because the disparagement clause applies to trademarks regardless of the applicant's personal views or reasons for using the mark. Instead, registration is denied based on the expected reaction of the applicant's audience. In this way, the argument goes, it cannot be said that Government is acting with hostility toward a particular point of view. For example, the Government does not dispute that respondent seeks to use his mark in a positive way. Indeed, respondent endeavors to use The Slants to supplant a racial epithet, using new insights, musical talents, and wry humor to make it a badge of pride. Respondent's application was denied not because the Government thought his object was to demean or offend but

because the Government thought his trademark would have that effect on at least some Asian-Americans.

The Government may not insulate a law from charges of viewpoint discrimination by tying censorship to the reaction of the speaker's audience. The Court has suggested that viewpoint discrimination occurs when the government intends to suppress a speaker's beliefs, *Reed*, *supra*, at ___–___ (slip op., at 11–12), but viewpoint discrimination need not take that form in every instance. The danger of viewpoint discrimination is that the government is attempting to remove certain ideas or perspectives from a broader debate. That danger is all the greater if the ideas or perspectives are ones a particular audience might think offensive, at least at first hearing. An initial reaction may prompt further reflection, leading to a more reasoned, more tolerant position.

Indeed, a speech burden based on audience reactions is simply government hostility and intervention in a different guise. The speech is targeted, after all, based on the government's disapproval of the speaker's choice of message. And it is the government itself that is attempting in this case to decide whether the relevant audience would find the speech offensive. For reasons like these, the Court's cases have long prohibited the government from justifying a First Amendment burden by pointing to the offensiveness of the speech to be suppressed. See *ante*, at 23 (collecting examples).

The Government's argument in defense of the statute assumes that respondent's mark is a negative comment. In addressing that argument on its own terms, this opinion is not intended to imply that the Government's interpretation is accurate. From respondent's submissions, it is evident he would disagree that his mark means what the Government says it does. The trademark will have the effect, respondent urges, of reclaiming an offensive term for the positive purpose of celebrating all that Asian-

Americans can and do contribute to our diverse Nation. Brief for Respondent 1–4, 42–43. While thoughtful persons can agree or disagree with this approach, the dissonance between the trademark's potential to teach and the Government's insistence on its own, opposite, and negative interpretation confirms the constitutional vice of the statute.

II

The parties dispute whether trademarks are commercial speech and whether trademark registration should be considered a federal subsidy. The former issue may turn on whether certain commercial concerns for the protection of trademarks might, as a general matter, be the basis for regulation. However that issue is resolved, the viewpoint based discrimination at issue here necessarily invokes heightened scrutiny.

"Commercial speech is no exception," the Court has explained, to the principle that the First Amendment "requires heightened scrutiny whenever the government creates a regulation of speech because of disagreement with the message it conveys." *Sorrell* v. *IMS Health Inc.*, 564 U. S. 552, 566 (2011) (internal quotation marks omitted). Unlike content based discrimination, discrimination based on viewpoint, including a regulation that targets speech for its offensiveness, remains of serious concern in the commercial context. See *Bolger* v. *Youngs Drug Products Corp.*, 463 U. S. 60, 65, 71–72 (1983).

To the extent trademarks qualify as commercial speech, they are an example of why that term or category does not serve as a blanket exemption from the First Amendment's requirement of viewpoint neutrality. Justice Holmes' reference to the "free trade in ideas" and the "power of . . . thought to get itself accepted in the competition of the market," *Abrams* v. *United States*, 250 U. S. 616, 630 (1919) (dissenting opinion), was a metaphor. In the realm

of trademarks, the metaphorical marketplace of ideas becomes a tangible, powerful reality. Here that real marketplace exists as a matter of state law and our common-law tradition, quite without regard to the Federal Government. See *ante,* at 2. These marks make up part of the expression of everyday life, as with the names of entertainment groups, broadcast networks, designer clothing, newspapers, automobiles, candy bars, toys, and so on. See Brief for Pro-Football, Inc., as *Amicus Curiae* 8 (collecting examples). Nonprofit organizations—ranging from medical-research charities and other humanitarian causes to political advocacy groups—also have trademarks, which they use to compete in a real economic sense for funding and other resources as they seek to persuade others to join their cause. See *id.,* at 8–9 (collecting examples). To permit viewpoint discrimination in this context is to permit Government censorship.

This case does not present the question of how other provisions of the Lanham Act should be analyzed under the First Amendment. It is well settled, for instance, that to the extent a trademark is confusing or misleading the law can protect consumers and trademark owners. See, *e.g., FTC* v. *Winstead Hosiery Co.*, 285 U. S. 483, 493 (1922) ("The labels in question are literally false, and . . . palpably so. All are, as the Commission found, calculated to deceive and do in fact deceive a substantial portion of the purchasing public"). This case also does not involve laws related to product labeling or otherwise designed to protect consumers. See *Sorrell*, *supra,* at 579 ("[T]he government's legitimate interest in protecting consumers from commercial harms explains why commercial speech can be subject to greater governmental regulation than noncommercial speech" (internal quotation marks omitted)). These considerations, however, do not alter the speech principles that bar the viewpoint discrimination embodied in the statutory provision at issue here.

It is telling that the Court's precedents have recognized just one narrow situation in which viewpoint discrimination is permissible: where the government itself is speaking or recruiting others to communicate a message on its behalf. See *Legal Services Corporation* v. *Velazquez*, 531 U. S. 533, 540–542 (2001); *Board of Regents of Univ. of Wis. System* v. *Southworth*, 529 U. S. 217, 229, 235 (2000); *Rosenberger*, 515 U. S., at 833. The exception is necessary to allow the government to stake out positions and pursue policies. See *Southworth*, *supra,* at 235; see also *ante,* at 13–14. But it is also narrow, to prevent the government from claiming that every government program is exempt from the First Amendment. These cases have identified a number of factors that, if present, suggest the government is speaking on its own behalf; but none are present here. See *ante,* at 14–18.

There may be situations where private speakers are selected for a government program to assist the government in advancing a particular message. That is not this case either. The central purpose of trademark registration is to facilitate source identification. To serve that broad purpose, the Government has provided the benefits of federal registration to millions of marks identifying every type of product and cause. Registered trademarks do so by means of a wide diversity of words, symbols, and messages. Whether a mark is disparaging bears no plausible relation to that goal. While defining the purpose and scope of a federal program for these purposes can be complex, see, *e.g., Agency for Int'l Development* v. *Alliance for Open Society Int'l, Inc.*, 570 U. S. ___, ___ (2013) (slip op., at 8), our cases are clear that viewpoint discrimination is not permitted where, as here, the Government "expends funds to encourage a diversity of views from private speakers," *Velazquez*, *supra*, at 542 (internal quotation marks omitted).

* * *

A law that can be directed against speech found offensive to some portion of the public can be turned against minority and dissenting views to the detriment of all. The First Amendment does not entrust that power to the government's benevolence. Instead, our reliance must be on the substantial safeguards of free and open discussion in a democratic society.

For these reasons, I join the Court's opinion in part and concur in the judgment.

SUPREME COURT OF THE UNITED STATES

No. 15–1293

JOSEPH MATAL, INTERIM DIRECTOR, UNITED STATES PATENT AND TRADEMARK OFFICE, PETITIONER *v.* SIMON SHIAO TAM

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

[June 19, 2017]

JUSTICE THOMAS, concurring in part and concurring in the judgment.

I join the opinion of JUSTICE ALITO, except for Part II. Respondent failed to present his statutory argument either to the Patent and Trademark Office or to the Court of Appeals, and we declined respondent's invitation to grant certiorari on this question. *Ante*, at 9. I see no reason to address this legal question in the first instance. See *Star Athletica, L. L. C.* v. *Varsity Brands, Inc.*, 580 U. S. ___, ___ (2017) (slip op., at 6).

I also write separately because "I continue to believe that when the government seeks to restrict truthful speech in order to suppress the ideas it conveys, strict scrutiny is appropriate, whether or not the speech in question may be characterized as 'commercial.'" *Lorillard Tobacco Co.* v. *Reilly*, 533 U. S. 525, 572 (2001) (THOMAS, J., concurring in part and concurring in judgment); see also, *e.g.*, *44 Liquormart, Inc.* v. *Rhode Island*, 517 U. S. 484, 518 (1996) (same). I nonetheless join Part IV of JUSTICE ALITO's opinion because it correctly concludes that the disparagement clause, 15 U. S. C. §1052(a), is unconstitutional even under the less stringent test announced in *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n of N. Y.*, 447 U. S. 557 (1980).

1203.01 Immoral or Scandalous Matter

Section 2(a) of the Trademark Act, **15 U.S.C. §1052(a)**, is an absolute bar to the registration of immoral or scandalous matter on either the Principal Register or the Supplemental Register.

Although the words "immoral" and "scandalous" may have somewhat different connotations, case law has included immoral matter in the same category as scandalous matter. *See In re McGinley*, 660 F.2d 481, 484 n.6, 211 USPQ 668, 673 n.6 (C.C.P.A. 1981) , *aff'g*206 USPQ 753 (TTAB 1979) ("Because of our holding, *infra*, that appellant's mark is 'scandalous,' it is unnecessary to consider whether appellant's mark is 'immoral.' We note the dearth of reported trademark decisions in which the term 'immoral' has been directly applied.")

The prohibition against the registration of marks that consist of or comprise immoral or scandalous matter was originally enacted as §5(a) of the Trademark Act of 1905, and was reenacted as part of §2(a) of the Act of 1946. There is little legislative history concerning the intent of Congress with regard to the provision; therefore, the term "scandalous" is interpreted by looking to "its ordinary and common meaning." *In re Riverbank Canning Co.*, 95 F.2d 327, 328, 37 USPQ 268, 269 (C.C.P.A. 1938) . The Court has noted, however, that the word "comprises" meant "includes" at the time of the statute's enactment in 1905, and thus Congress extended the prohibition not only to marks that consist of scandalous matter, but also to marks that include scandalous matter. *In re Fox*, 702 F.3d 633, 638, 105 USPQ2d 1247, 1250 (Fed. Cir. 2012) (holding scandalous a mark for rooster-shaped chocolate lollipops where, in the context of the goods, "a substantial composite of the general public perceives" a scandalous meaning, even though the mark had a non-scandalous meaning in relation to the goods as well). Moreover, there is no requirement in §2(a) that a mark's vulgar meaning be the only relevant meaning, or even the most relevant meaning. *Id*. Thus, an examining attorney need only prove the existence of one vulgar meaning to justify a §2(a) refusal. *Id*. This may be established by referring to court decisions, decisions of the Trademark Trial and Appeal Board and dictionary definitions. *McGinley*, 660 F.2d at 485, 211 USPQ at 673.

In affirming a refusal to register a mark as scandalous under §2(a), the Court of Customs and Patent Appeals noted dictionary entries that defined "scandalous" as, *inter alia*, shocking to the sense of propriety, offensive to the conscience or moral feelings or calling out for condemnation. *McGinley*, 660 F.2d at 486, 211 USPQ at 673 (holding scandalous a mark comprising a photograph of a nude, reclining man and woman, kissing and embracing, for a "newsletter devoted to social and interpersonal relationship topics" and for "social club services"). The statutory language "scandalous" has also been considered to encompass matter that is "vulgar," defined as "lacking in taste, indelicate, morally crude." *In re Runsdorf,* 171 USPQ 443, 444 (TTAB 1971).

The meaning imparted by a mark must be determined in the context of the current attitudes of the day. *See In re Mavety Media Grp. Ltd.*, 33 F.3d 1367, 31 USPQ2d 1923 (Fed. Cir. 1994) (finding the evidence insufficient to establish that BLACK TAIL, used on adult entertainment magazines, comprises scandalous matter; noting that there were both vulgar and non-vulgar definitions of "tail," and that the record was devoid of evidence demonstrating which of these definitions a substantial composite of the general public would choose in the context of the relevant marketplace); *In re Michalko*, 110 USPQ2d 1949, 1953 (TTAB 2014) (finding the evidence sufficient to establish that ASSHOLE remains vulgar and offensive under modern standards of usage); *In re Old Glory Condom Corp.*, 26 USPQ2d 1216 (TTAB 1993) (holding not scandalous OLD GLORY CONDOM CORP and design comprising the representation of a condom decorated with stars and stripes in a manner to suggest the American flag); *In re Thomas Labs., Inc*., 189 USPQ 50, 52 (TTAB 1975) ("[I]t is imperative that fullest consideration be given to the moral values and conduct which contemporary society has deemed to be appropriate and acceptable.")

The determination of whether a mark is scandalous must be made in the context of the relevant marketplace for the goods or services identified in the application, and must be ascertained from the standpoint of not necessarily a majority, but a "substantial composite of the general public." As long as a substantial composite of the general public would perceive the mark, in context, to have a vulgar meaning, "the mark as a whole 'consists of or *comprises* . . . scandalous matter'" under §2(a). *In re Fox*, 702 F.3d at 638, 105 USPQ2d at 1250 (quoting **15 U.S.C. §1052(a)** (emphasis added); *In re Boulevard Entm't, Inc.*, 334 F.3d 1336, 1340, 67 USPQ2d 1475, 1477 (Fed. Cir. 2003); *McGinley*, 660 F.2d at 485, 211 USPQ at 673 ("[T]he Lanham Act does not require, under the rubric of 'scandalous,' any inquiry into the specific goods or services not shown in the application itself."); *In re Star Belly Stitcher, Inc*., 107 USPQ2d 2059 (TTAB 2013) (finding the evidence sufficient to establish prima facie that the term "aw shit" is scandalous or vulgar to the conscience of a substantial composite of the general public); *In re Luxuria s.r.o.*, 100 USPQ2d 1146 (TTAB 2011) (finding a mark consisting of a bottle in the shape of a hand with middle finger extended upwards comprised matter that would be considered vulgar by a substantial composite of the general public); *In re Wilcher Corp.*, 40 USPQ2d 1929 (TTAB 1996) (holding scandalous a mark for restaurant and bar services consisting of words DICK HEADS positioned directly underneath caricature of a human head composed primarily of graphic and readily recognizable representation of male genitalia, as it would be considered offensive by a substantial portion of the public); *Greyhound Corp. v.*

Both Worlds Inc., 6 USPQ2d 1635, 1639 (TTAB 1988) (holding scandalous a graphic design of a dog defecating, as applied to polo shirts and T-shirts, given the broad potential audience that may view applicant's mark in sales establishments and "virtually all public places"); *In re Hepperle,* 175 USPQ 512 (TTAB 1972) (holding ACAPULCO GOLD not scandalous when used as a mark for suntan lotion even though the words might be a reference to marijuana).

Therefore, to support a refusal on the ground that a proposed mark is immoral or scandalous, the examining attorney must provide evidence that a substantial portion of the general public would consider the mark to be scandalous in the context of contemporary attitudes and the relevant marketplace. *Mavety Media,* 33 F.3d at 1371-72, 31 USPQ2d at 1925-26. This evidence could include dictionary definitions, newspaper articles, and magazine articles. The examining attorney should not rely solely on an earlier decision holding a term to be scandalous in support of a refusal. The Trademark Trial and Appeal Board has held that an earlier decision is insufficient to warrant the same finding in a future case. *In re Red Bull GmbH*, 78 USPQ2d 1375 (TTAB 2006) (rejecting examining attorney's argument that the Board's 1981 decision in *In re Tinseltown, Inc.*, *212 USPQ* 863 (TTAB 1981) finding BULLSHIT to be scandalous is sufficient to warrant the same finding in a later case). Rather, the facts underlying the earlier decision must be looked at to determine, first, whether it has any relevance to the present case, and, if so, whether that earlier finding is equally applicable today, for example, by looking at other evidence such as recent dictionary definitions. *Red Bull*, 78 USPQ2d at 1381.

Dictionary definitions alone may be sufficient to establish that a proposed mark comprises scandalous matter, where multiple dictionaries, including at least one standard dictionary, all indicate that a word is vulgar, and the applicant's use of the word is limited to the vulgar meaning of the word. *Boulevard Entm't,* 334 F.3d at 1341, 67 USPQ2d at 1478 (holding 1-800-JACK-OFF and JACK OFF scandalous, where all dictionary definitions of "jack-off" were considered vulgar); *In re Manwin/RK Collateral Trust*, 111 USPQ2d 1311, 1314 (TTAB 2014) (finding dictionary definitions alone sufficient to make prima facie showing that mark MOMSBANGTEENS comprises vulgar matter); *In re Star Belly Stitcher*, 107 USPQ2d 2059 at 2062 (stating that dictionary evidence showed that the terms "shit" and "aw shit" are vulgar terms); *Boston Red Sox Baseball Club Ltd. P'ship v. Sherman*, 88 USPQ2d 1581 (TTAB 2008) (sustaining an opposition and finding that SEX ROD was immoral and scandalous under §2(a) based on dictionary definitions designating the term "ROD" as being vulgar, and applicant's admission that SEX ROD had a sexual connotation); *Red Bull,* 78 USPQ2d at 1381-82 (finding multiple dictionary definitions indicating BULLSHIT is "obscene," "vulgar," "usually vulgar," "vulgar slang," or "rude slang" constitute a prima facie showing that the term is offensive to the conscience of a substantial composite of the general public).

"Whether applicant intended the mark to be humorous, or even whether some people would actually find it to be humorous, is immaterial." *In re Luxuria, s.r.o.*, 100 USPQ2d at 1149 (quoting *Boston Red Sox Baseball Club*, 88 USPQ2d at 1588). A refusal is proper if the evidence shows that "the term would be perceived and understood as vulgar by a substantial portion of the purchasing public." *Id.*; *see also Fox*, 702 F.3d at 634, 105 USPQ2d at 1248 ("a mark that creates a double entendre falls within the proscription of §1052(a) where, as here, one of its meanings is clearly vulgar"); *In re Star Belly Stitcher*, 107 USPQ2d at 2063 ("[T]here is no requirement in Section 2(a) that a mark's vulgar meaning must be the only relevant meaning, or even the most relevant meaning.").

It has been noted that the threshold is lower for what can be described as "scandalous" than for "obscene." Refusal to register immoral or scandalous matter has been found not to abridge First Amendment rights, because no conduct is proscribed and no tangible form of expression is suppressed. Also, the term "scandalous" has been held sufficiently precise to satisfy due process requirements under the Fifth Amendment. *McGinley*, 660 F.2d at 484-85, 211 USPQ at 672.

The prohibition in §2(a) of the Act against the registration of scandalous matter pertains only to *marks* that are scandalous. The authority of the Act does not extend to goods that may be scandalous. *See In re Madsen*, 180 USPQ 334, 335 (TTAB 1973) (holding WEEK-END SEX for magazines not scandalous and observing that whether the magazine contents may be pornographic was not an issue before the Board).

The examining attorney may look to the specimen(s) or other aspects of the record for confirmation that a substantial composite of the general public would perceive the mark to be vulgar in the context of the goods or services at issue. *See McGinley,* 660 F.2d at 482 n.3, 211 USPQ at 670 n.3 (referring to excerpts from appellant's newsletters pertaining to the sexual connotation of the subject matter).

To ensure consistency in examination with respect to immoral or scandalous matter, when an examining attorney believes, for whatever reason, that a mark may be considered to comprise such matter, the examining attorney must consult with his or her supervisor.

Karen B. Tripp
Attorney-at-Law
162 Vieux Carre Drive
Houston, Texas 77009
(713) 658-9323 – *Telephone*
(832) 798-7576 – *Cell/Text*
tripp.karen@gmail.com

May 17, 2016

Via e-mail
toddbrabec@gmail.com
Mr. Todd Brabec

Via e-mail
eic.lawreview@mitchellhamline.edu
Editor in Chief, Mitchell Hamline L. Rev.

Re: The Performance Right—A World in Transition
By: Todd Brabec
Originally published at 42 Mitchell Hamline L. Rev. 16 (2016)

Dear Mr. Brabec and Editor:

The referenced article has been judged one of the best law review articles related to entertainment, publishing and/or the arts published within the last year. As such, it has been selected for inclusion in the 2016 edition of the ENTERTAINMENT, PUBLISHING AND THE ARTS HANDBOOK, an anthology published annually by Thomson Reuters (West). As editor of that HANDBOOK, I am privileged to congratulate you on the selection.

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Again, congratulations on the selection of your article as one of the best of those recently published. I look forward to including it in the HANDBOOK. Please call me at (713) 658-9323 (office) or (832) 798-7576 (cell) if you have any questions.

Sincerely yours,
/s/Karen B. Tripp
Editor, ENTERTAINMENT, PUBLISHING AND THE ARTS HANDBOOK 2016

ADVISING THE BEGINNING INDEPENDENT FILMMAKER

Thomas R. Leavens
Leavens, Strand & Glover, LLC
Suite 2550
203 North LaSalle Street
Chicago, Illinois 60601
312.488.4171

I. PERSONAL ASSESSMENT – The seasoned know the importance of this assessment.

A. Available time commitment – ability to see project through to completion.

B. Personal inventory – discipline, perseverance, resourcefulness, stability, adaptability, equanimity, comportment.

C. Sales prowess – ability to enchant.

D. Credibility of experience and extent of knowledge.

E. Credibility of venture

F. Willingness to ask favors (and more) of family and friends.

G. Ability of family and friends to provide favors (and more).

II. PUTTING RIGHTS IN ORDER

A. Secure rights in story or script.

B. Secure rights in other necessary film elements, i.e., life story, book adaptation, music, other footage, etc.

C. Don't give up rights prematurely – meaning, don't give outright grants of rights in one's project but instead provide options based upon critical conditions.

D. Issues to explore:

1. If personal story rights are critical, what is level of cooperation of key person? Any health issues? Will want to have person available not only for purposes of production, but for promotional purposes as well when film is launched.

2. Any archival material or documents or artifacts required? If so, any access complications?

3. Any story verification issues – how will story be backed up if challenged?

4. Any special location access complications?

5. Any secrecy, non-disclosure, or non-competition issues with respect to any member of the production team or key subject?

6. What pre-existing material will be incorporated in the film – footage, photos, music – and what terms will be available for their use?

7. Any time constraints on the availability of any person or material, or the timeliness of the film subject?

8. Any competing projects that the producers are aware of?

9. Any adverse claims made with respect to the production of the film?

10. Any aspect of the film developed within the scope of any contributor's employment, or developed with the assets of another?

11. Who have been contributors to the script, and what have been their contributions? What has been the intention of the contributors with respect to the ownership of their contributions – rights retained separately, or has there been a merger of rights?

12. Has the script been circulated for comments, what comments have been received, and in what form, and what has been done with the comments?

13. Any copyright registrations undertaken? If so, who is claimant and what other information is disclosed, such as pre-existing works?

14. Any title searches undertaken? Any title registrations done?

15. Any intent-to-use trademark applications undertaken for ancillary products?

16. Any URLs obtained?

17. Any social media accounts set up?

18. Any personal issue with respect to any potential claimant to the film or production entity that might impact rights in the film or production entity?

    a. Grant of general security interest to collateralize an obligation.

    b. Marital separation or divorce proceeding.

    c. Bankruptcy

    d. Health or disability

III. ASSEMBLING (OR DISASSEMBLING) THE PRODUCING TEAM

A. Identify the members of the producing team.

B. Determine respective rights and responsibilities.

C. Distinguish producing functions from other roles, such as directing, writing, etc.

D. Distinguish co-ownership of project from percentage income interest in project, such as percentage of profits.

E. Attaching others to (or detaching others from) the project

F. Resisting the urge to be egalitarian or too inclusive.

IV. DEVELOPMENT OF PRODUCING ENTITY

A. Identify the entity from which the project originated – individual, general partnership (perhaps undeclared), within scope of employment, etc.

B. Identify the entity that will undertake pre-production activities as producing team emerges – a new general partnership, LLC, or corporation, or certain producing team members may be merged into existing entities, or existing entities may employ other members of the producing team.

C. The actual entity that obtains production funds and produces the film may be the same entity that originated and developed the project or a new entity that obtains rights developed by the originating entity and in which the originating entity becomes a partner, unit interest holder, or shareholder.

V. REALISTIC POTENTIAL FINANCING SOURCES

A. Unlikely sources and why:

1. Commercial finance companies – the producing entity generally does not have business assets to loan against or sell.

2. Venture capital firms – few fund individual projects, and they generally can't investigate and control the project as they might other investments.

3. Debt instruments – producing entity generally does not have forecastable revenue.

4. Unsecured bank financing – new venture, and high risk.

5. Government funding – not there, unless operate as a not-for-profit.

B. Likely sources:

1. Personal funds

2. Personal loans secured by personal or business assets or assets of friends or family.

3. Loans from friends or family

4. Investors

5. Presale of rights

6. Financing of tax credit

7. Co-production agreements – like a pre-sale, but not to a rights user.

8. Loans secured by pre-sold rights – guarantees under such agreements can secure a loan.

9. Contributions through fiscal sponsors. www.fracturedatlas.org; www.fiscalsponsordirectory.org.

10. Crowdfunding web sites

C. Assessing potential for pre-selling rights.

1. Suitability of project for pre-sale (ability to meet theatrical release requirements, genre, foreign values, rating, etc.)

2. Foreign rights vs. domestic rights

3. Advance funding, guarantees, or letters of support.

4. Fractionalized agreements (separate parties get rights to home video, cable, broadcast, etc.) vs. all rights to distributor.

5. Selling potential profit to finance film?

a. Upside reduced in exchange for certainty of funds

b. Possible impairment of ability to sell other rights

c. May trigger residual payments to talent

D. Assessing availability of bank financing secured by pre-sales.

1. Domestic vs. multiple foreign territory sales

2. Creditworthiness and production history of buyer.

3. Availability of letter of credit to fund pre-sale obligation.

4. Availability of completion bond, either to complete project or fund short fall

5. Availability of insurance coverage to fund producer breaches of warranty.

VI. UNDERSTANDING THE INVESTOR'S POINT OF VIEW

A. Investors risk present assets for the promise of future benefits. The producer must project to the investor the value of his or her proposal and instill confidence in the investor in the predictability and potential of the project's success. The producer must be prepared to give the investor full information, good and bad, to allow the investor to make an informed investment decision.

B. The producer controls the circumstances of how his or her project is developed and marketed; the investor does not. Thus, the investor views the risks of production and financial return as greater than the producer does.

C. Film financing must be judged on the economic merits of a project, since there are no significant tax incentives to cause an investor to invest regardless of the likely success of the project.

D. Investors know film success is dependent upon public taste, which is unpredictable and subject to change without warning or explanation. Further, information about the film production industry as a whole and the experience of individual independent film productions is imprecise and anecdotal. Consequently, producers sell into a market where investor perceptions have been forged to reflect the belief that film investments are risky ventures.

E. Since financing is generally done on a film-by-film basis, there is little or no business history (balance sheet, income statement, management stability and performance, etc.) for an investor to investigate as part of his or her due diligence, which usually results in an investor ultimately putting his or her faith in the assessment of the personal skills and reliability of the producer to develop and produce the film.

F. Unless the principals of the project risk what to the investor's mind appears to be a significant loss (either financial or otherwise) if the project is not properly handled to completion, the investor may lack confidence in the principal's long term commitment to the project.

VII. WHAT THE PRODUCER SHOULD DO BEFORE SEEKING INVESTORS.

A. Identify the producing team.

B. Secure rights.

C. Obtain professional feedback on marketability of project.

D. Establish relationship with professional advisors.

E. Gather and gauge level of support and financing available from family and acquaintances.

F. Prepare business plan, including development of likely projections of income gauged to expected performance of film and source and amounts of revenue.

G. Have budget vetted.

H. Consider producing a trailer.

VIII. WHAT THE PRODUCER SHOULD NOT DO BEFORE SEEKING PROFESSIONAL ADVICE – CHECK TO SEE IF ANY OF THESE HAVE OCCURRED.

A. Place advertisements looking for money

B. Conduct an unsolicited mailing or other general quest for financing.

C. Convey rights in script or story.

D. Promise a position or responsibility to people beyond that which the producer can deliver.

E. Engage a fund raiser.

F. Accept money from an investor.

G. Sign any written agreement.

H. Give a written agreement to somebody to sign

IX. POTENTIAL CONSEQUENCES OF DOING IT WRONG.

A. Return of investor funds.

B. Cloud on title adversely affects marketability of film.

C. Funds from rights users (distributors, licensees, etc.) may be withheld pending resolution of conflicting claims.

D. Expense and inconvenience of defending lawsuits.

E. Costs erode or consume entirely potential profit of project.

F. May be required to compromise legitimate claims in exchange for other interests.

G. Get cut out of transaction.

H. Diminishment of professional credentials.

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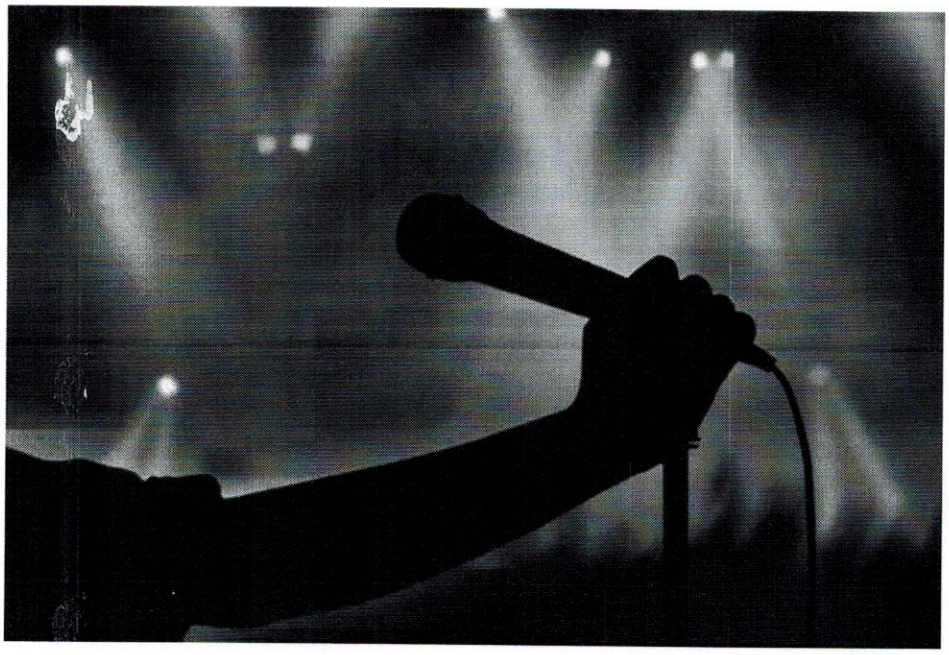

Unique Aspects of Labor Law in the Entertainment Industry

BY HOWARD D. FABRICK

The title of this article presupposes that there exists some well-defined and universally recognized definition of the "entertainment industry." There is no such definition but rather diverse forms of entertainment, each with its own definition. The classic story about the circus elephant keeper is illustrative. At his retirement party when asked how he could have spent 40 years following the elephants with a shovel and wheelbarrow, he replied, "I love being in show business."

The definition of "entertainment industry" is comparable to the definition of beauty—it's often in the eye of the beholder. There are a multitude of activities that fall within the very broadest definition of the term. It could be defined as every activity on which the public spends its leisure time dollars. The hotels in Las Vegas consider themselves to be in the entertainment industry, as do Carnival and Princess cruises.

CONTINUED ON PAGE 30

The Performance Right

A World in Transition

BY TODD BRABEC

Section 106 of the Copyright Act provides:

> Subject to sections 107 through 122, the owner of a copyright under this title has the exclusive right to do and to authorize any of the following:
>
> (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; [and]
>
> (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.[1]

These two exclusive rights of copyright are at the heart of the worldwide business of music. They involve musical compositions and sound recordings, the rights of copyright owners and limitations on those rights, and how creators and copyright owners are compensated.

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continued frome page 1

THE MUSIC BUSINESS PRE-DIGITAL

In the world of traditional media—radio and television primarily—the music licensing process has evolved into a fairly straightforward process. For musical compositions, songwriters, composers, and music publishers join or affiliate with ASCAP, BMI, or SESAC (performing rights organizations or PROs), which negotiate license agreements for the use of music, collect the fees, and distribute them back to writers and publishers who have performances in specific media. If the PRO and a user cannot come to an agreement as to license fees, courts intervene and determine "reasonable fees" for music use.

In the area of sound recordings, performances on traditional over-the-air radio are exempt from royalties and considered as "promotional" tools to drive sales. A record company's main source of income, other than record sales, comes from the licensing of master recordings to television series, feature films, and advertising commercials, among other uses. And then came the online/digital world—a technological revolution that changed everything.

A rather simplistic view of the music business, but one that serves as an appropriate starting point for an increasingly changing and complex business.

MUSICAL COMPOSITIONS

In the United States, there are three primary organizations that represent songwriters, composers, and music publishers on a nonexclusive basis in the negotiation, collection, and distribution of music performance license fees. The organizations are the American Society of Composers, Authors and Publishers (ASCAP, 1914); Broadcast Music, Inc. (BMI, 1939); and SESAC (1930). They are referred to as performing rights organizations (PROs). The primary sources of license fees are traditional radio, broadcast and cable television, and general licensing (live performance, music in bars and restaurants, etc.).

New media license fees, which include online and digital music services, currently represent a relatively small portion of U.S. domestic music license fees (approximately $100 million of a total annual U.S. domestic PRO collection of $1.4 billion). Royalty distributions are made 50 percent to writers and 50 percent to music publishers after operating costs are taken into account (approximately 12–13 percent in the case of ASCAP and BMI). There is a PRO in practically every country of the world where, via reciprocal agreements with ASCAP, BMI, and SESAC, U.S. writers' and publishers' works are represented and paid for when performances occur in foreign territories.

In the case of ASCAP and BMI, both entered into consent decrees with the government in 1941, with amendments to those decrees in 1950, 1960, and 2001 in the case of ASCAP, and in 1966 and 1994 for BMI. One aspect of these decrees that has had a significant effect on the determination of license fees is the existence of a separate "rate court" for ASCAP and for BMI, which comes into play when the PRO and a music user cannot come to a negotiated agreement as to what "reasonable" license fees should be in any given area. The decree allows any party to apply to the court (U.S. District Court for the Southern District of New York) for a determination of interim and final fees. These rate courts have been in existence with ASCAP since 1950 and with BMI since 1994, and have determined fees and license terms for the major traditional media areas of radio and broadcast and cable television, as well as, in recent years, the online music community. It is in these latter "new media" decisions and settlements where most of today's complex issues have arisen.

SESAC, the smallest of the U.S. PROs, operates on a for-profit basis as opposed to the nonprofit operations of ASCAP and BMI, is not governed by a consent decree with the government, and does not have a "rate court"–type procedure for license fee adjudications and disputes. Under a recent October 2014 settlement with the Television Music License Committee (TMLC) regarding a class action antitrust suit involving local television stations though, SESAC has agreed to binding arbitration for any future licensing fee disputes with the settlement class that cannot be resolved by negotiation. It was further agreed that SESAC could not interfere with the ability of any affiliate to issue a public performance rights license directly to a settlement class member. A final settlement approval hearing is set for March 2015 in the U.S. District Court for the Southern District of New York.[2]

In the online world of music licensing, the ASCAP rate court has been instrumental in deciding not only what "reasonable" license fees should be but also what is actually licensable by the U.S. PROs. Interim fee and final fee decisions have involved many of the biggest players in the "new media/technology" world and have resulted in license fees significantly below what the PROs and copyright owners were requesting. To put the online fees into perspective, ASCAP, BMI, and SESAC collected approximately $1.4 billion in domestic U.S. license fees (radio, broadcast and cable television, live, etc.). Of this amount, approximately $100 million was generated from all online/digital uses. An additional $700 million is received each year by the U.S. PROs from foreign collection societies (PRS, GEMA, SACEM, SIAE, SGAE, SOCAN, APRA, IMRO, etc.) for performances of U.S. writers' works performed in foreign countries, with a small portion of that money attributable to online uses. Most publishers, incidentally, collect their foreign country performance royalties directly from those societies as direct members or through subpublishers.

Commencing with the 2007 AOL/RealNetworks/Yahoo case, rate court filings, hearings, and decisions have involved YouTube, MobiTV, AT&T Mobility, Verizon Wireless, Spotify, Ericsson, and Netflix, among others.[3] A brief summary of some of the most important points of these cases should help in understanding the current status of online performance licensing:

The AOL/RealNetworks/Yahoo rate court case had major worldwide significance, as there was a summary judgment ruling that the downloading of a music file did not constitute a public performance under the Copyright Act—a ruling totally contrary

to the laws of most other countries with the exception of Canada.[4] This decision was affirmed by the Second Circuit Court of Appeals,[5] with cert denied by the U.S. Supreme Court.[6] The Second Circuit also remanded the fee formula back to the district court for further proceedings.

The 2009 Verizon Wireless rate court case reaffirmed the AOL "no performance in a download" decision in a ruling that stated that the transmission of a ringtone to a cellular telephone customer did not constitute a performance, and that the mechanical ringtone rate of $0.24 per download was the only appropriate right and compensation involved.[7] The primary issue of the 2009 AT&T case was whether previews of ringtones were to be considered "fair use" rather than licensable performances.[8] The court ruled in favor of ASCAP, and a customer's previewing of ringtones was therefore licensable by the PROs. An interim fee 2009 decision regarding YouTube was a good example of the size of court-set "reasonable" music license fees, with an order of $70,000 a month.[9]

The 2010 MobiTV case involved what a reasonable license fee should be for the delivering of television programming to mobile telephones and audio channels. In this case, the court returned to the early 1990s ASCAP performance licenses with Turner Broadcasting that set a three-tiered license based on the music intensity of the program. The music intensive fee was 0.9 percent of defined revenue, with 0.375 percent for general entertainment and 0.1375 percent for news and sports programming.[10] The Second Circuit affirmed the lower court decision.[11]

All of the aforementioned cases were eventually settled, with additional settlements and agreements entered into with Apple, Rdio, Spotify, Netflix, Hulu, and others. Practically all settlements in this area are confidential.

DMX and Pandora

Two additional rate court cases, DMX and Pandora, involved not only the determination of reasonable license fees but also the role that direct licensing plays in the PRO licensing picture. Under the ASCAP and BMI consent decrees, the agreements that writers and music publishers sign with ASCAP and BMI are nonexclusive—members and affiliates are allowed to directly license their works to a music user and bypass the PRO structures entirely.

DMX is a leading background and foreground music service provider that provides preprogrammed music for business establishments via direct broadcast satellites or on-premises delivery mechanisms. DMX hired a company to assist and design a direct licensing program with copyright owners that eventually resulted in direct licenses representing over 7,000 catalogs, including one major music publisher, Sony. DMX was requesting from ASCAP and BMI a "through-to-the-audience" blanket license that reflected the DMX direct licenses already obtained as well as those to be negotiated in the future.

In July 2010, the BMI rate court entered a final rate for the blanket license subject to adjustment of DMX's BMI performances directly licensed.[12] In a separate decision, the ASCAP rate court ruled that ASCAP is required to issue to DMX a blanket license with "carve-outs" for the direct licensing program.[13] Both decisions were appealed to the Second Circuit, which in June 2012 affirmed the district court decisions.[14] The resulting rates significantly reduced the license fees that DMX was paying to ASCAP and BMI.

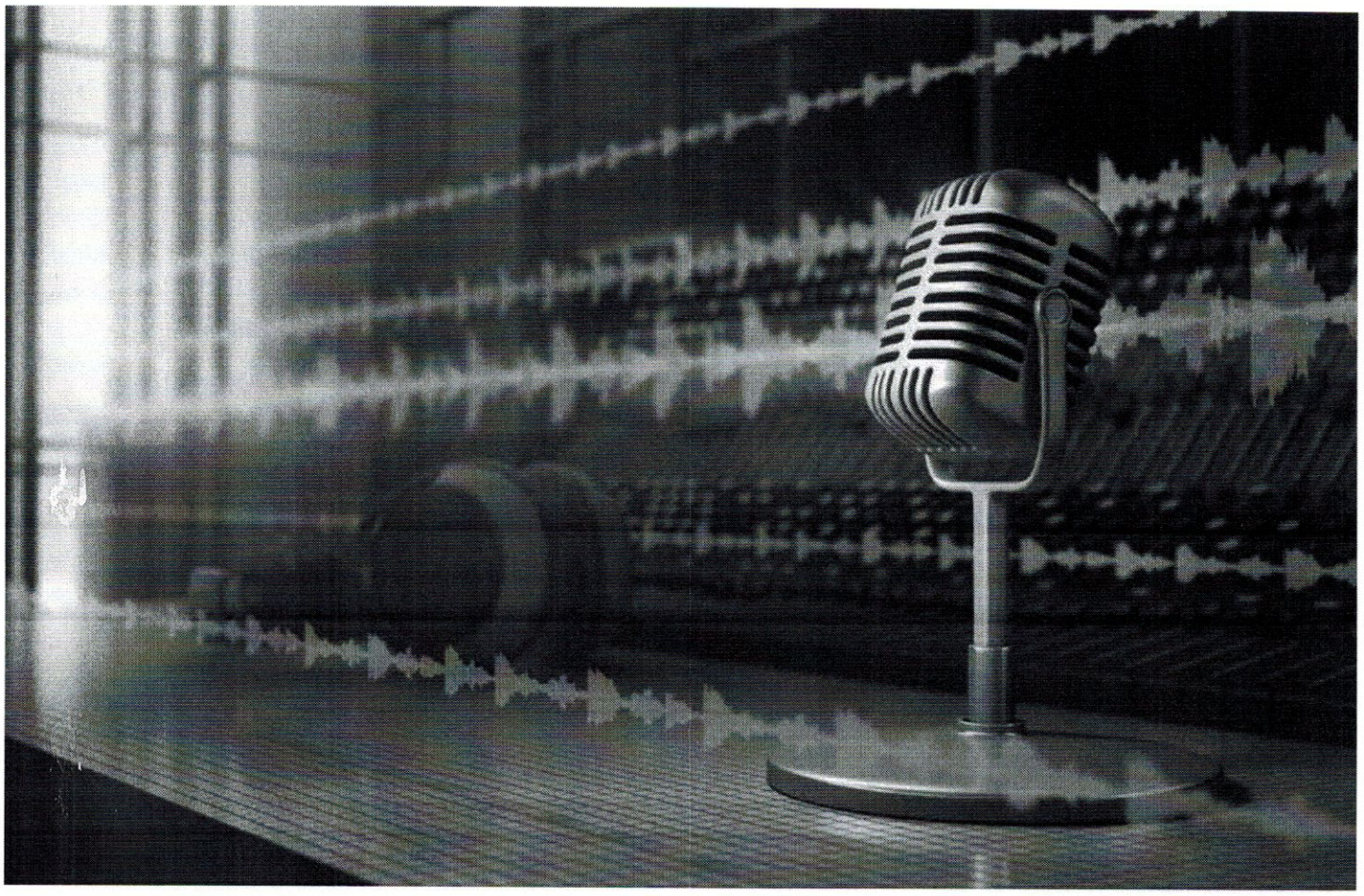
Pandora is the leading Internet customized radio service and is considered a noninteractive service as opposed to an on-demand/interactive service where the user chooses what he or she wants to hear. Pandora entered into license agreements with both ASCAP and BMI in 2005 and terminated those licenses at the end of 2010 and 2012, respectively. In the case of ASCAP, Pandora applied to the court for a through-to-the-audience blanket license for the period 2011 through 2015. In the case of BMI, Pandora filed an application for a five-year license commencing January 1, 2013.

Based primarily on the small license fees that were awarded by the ASCAP and BMI rate court judges commencing with the AOL/RealNetworks/Yahoo case in 2007, the major music publishers, starting with EMI (later acquired by Sony), notified ASCAP and BMI that they were withdrawing their catalogs for online licensing purposes. The majors felt strongly that they could negotiate more financially acceptable online value deals than the arrangements that had been set by prior rate court decisions and the subsequent settlements emanating from those decisions. These online media withdrawals were accomplished by specific changes in the rules, regulations, and practices of ASCAP and BMI. Upon withdrawing their works, a number of the publishers entered into direct licensing deals with Pandora, in effect creating a system whereby Pandora had licenses with ASCAP, BMI, and SESAC, as well as short-term negotiated direct performance licenses with the major publishers. Discussions were also held between ASCAP, BMI, and the major publishers with a view toward ASCAP and BMI handling the administration of the online licenses negotiated by the publishers.

In response to a motion for summary judgment in September 2013, Judge Cote, the ASCAP judge, ruled that a selective withdrawal of new media rights by publisher members could not be implemented without violating the consent decree, and further that the ASCAP repertory subject to that license is all works in ASCAP at the time Pandora applied for a license (January 1, 2011)—not when the final license is arrived at.[15] In short, an application for a license is treated as a license in effect, and in this case no works could be removed by any ASCAP member during the period 2011 through 2015. And when works are finally removed by any publishers, those works have to be removed for all licensing purposes, not just for online licensing. Any users with license agreements still in effect at the time of the withdrawal could continue to use the withdrawn works up until their specific license agreement expires.

In a similar motion for summary judgment in the BMI case, Judge Stanton allowed the removal of works that occurred prior to January 1, 2013, but ruled that those works could not be licensed by BMI to any others after any existing license agreements expired.[16] If BMI cannot offer those compositions to new media applicants, their availability does not meet the standards of the BMI decree and they cannot be held in the BMI repertory. The BMI-Pandora rate court trial is set for 2015.

To put both judges' "all in or all out" summary judgment decisions into real world perspective, if one were to remove works from the current $100 million PRO annual license fee area of the online world, one would be forced eventually to remove those works from the other $1.3 billion in PRO domestic license fees being generated by traditional media (radio,



broadcast and cable television, live, etc.). Not to mention the effect that such withdrawals would have on the reciprocal "flow through of money" agreements between foreign collection societies and the U.S. PROs. As a point of reference, it is important to note that practically all new PRO licensing deals with traditional media (radio, television, etc.) include streaming, website music uses, mobile apps, digital and primary broadcasts, mobile and wireless platforms, webcasts, and multicasts.

On March 14, 2014, Judge Cote issued her "determination of reasonable license fees" 136-page decision in the ASCAP-Pandora rate court case.[17] The judge ruled that the appropriate fee for the years 2011–2015 was 1.85 percent of revenue less certain deductions. ASCAP had requested a rate of 1.85 percent for 2011 and 2012, 2.5 percent for 2013, and 3 percent for 2014 and 2015. Pandora had requested a rate between 1.7 percent (the current traditional radio rate—Pandora had acquired a small radio station in an attempt to qualify for this rate) and 1.85 percent (the ASCAP form rate in effect for Pandora since 2005).

Two of the more important issues in the Pandora rate court proceedings involve the concept of the divisibility of copyrights, which allows a publisher/copyright owner to make deals with various classes of users for their catalog, and the disparity in payments between artists and record companies and songwriters and music publishers for the same type of performance.

As to the latter issue, the AOL/RealNetworks/Yahoo 2007 rate court case provided evidence of the over $30 million paid by these services to the major record companies over a two-year period, whereas their fees to the PROs were, in comparison, very small. As to Pandora, the company expended in 2013 approximately $315 million of its total revenue of $600 million on content acquisition. Of that amount, close to $290 million went to SoundExchange for artists and record companies, with all three PROs collecting a total of less than $25 million for songwriters and publishers. As a point of additional reference, total 2013 limited performance right statutory royalties to SoundExchange were $650 million in addition to significant record company interactive streaming license fees and payments negotiated with the services, whereas combined ASCAP, BMI, and SESAC revenue for all new media uses from all licenses and services was less than $100 million.

In July 2014, ASCAP, along with Universal Music Publishing, Sony/ATV Music, and EMI Music as intervenors, filed an appeal from the two district court opinions with the Second Circuit.[18] The basis of the appeal was that the district court erred in ruling that the amended final judgment of 2001 prohibited ASCAP from accepting partial grants of public performance rights, and that the district court in setting a final license fee ignored recent arms-length relevant benchmark agreements.

As to the "partial grants" prohibition, ASCAP's position was that the consent decree long ago removed any prohibition on the right of members to reserve for themselves the right to grant exclusive licensing rights to music users. Further, such a

prohibition is in direct conflict with the exclusive rights provided by the copyright law to copyright owners.

As to the issue of ignoring benchmark agreements in the setting of final reasonable license fees, ASCAP pointed out that the Universal Music, Sony/ATV Music, and EMI Music Pandora direct license deals were all in excess of the 1.85 percent court set fee, as was the 2013 negotiated ASCAP Apple iTunes radio license—all "arms-length willing buyer and willing seller agreements." Further, the Second Circuit, in its 2010 RealNetworks/Yahoo decision, confirmed that a 2.5 percent rate was a valid benchmark even though it vacated the district court's across-the-board application of that rate to all of RealNetworks' and Yahoo's services.[19] Accordingly, the current district court erred in ignoring the Second Circuit's guidance in RealNetworks/Yahoo, which established that a rate of 2.5 percent revenue (or higher) is reasonable for all-audio, music-intensive digital music services similar to Pandora's.

Direct Licensing

The ability of a copyright owner to directly license a work to a music user and bypass the PROs was a major issue in the ASCAP and BMI DMX rate court decisions as well as the current Pandora litigation. Language in both the ASCAP and BMI consent decrees guarantees the right of any member or affiliate to directly license their works to a user. SESAC, as it is not under a consent decree with the government, incorporates language in its writer and publisher affiliation agreements that insures the right to directly license—"publisher retains the right to issue nonexclusive licenses directly to any third person for the public performance in the United States, its territories and possessions, of any work subject to this Agreement."

When songwriters, composers, and music publishers join or affiliate with ASCAP, BMI, or SESAC, they sign representation agreements granting to the PRO the nonexclusive right to license the nondramatic public performances of their works. Though each PRO contract and governing documents are different as to their terms, length of contract, withdrawal of works and resignation/termination provisions, dispute resolution procedures, payment schedules, distribution rules, and benefits, they all are nonexclusive agreements whereby the writer or publisher can license a work directly. The PROs cannot interfere in any way with this right or the ability to exercise this right.

Language as to the ability to directly license as well as the effect of a direct license has been standard in many types of industry license agreements, including work-for-hire/employee-for-hire contracts, for many decades. A sample clause might read:

> The performing rights in the composition, to the extent permitted by law, shall be assigned to and licensed by the applicable performing rights organization with said organization authorized to collect and receive all monies earned from the public performance of the composition and to pay the writers and publishers directly. If to the extent it is unlawful for the PRO, or any of its affiliates, to issue blanket small performing rights licenses or the applicable performing rights society does not from time to time, for any reason whatsoever maintain a regular system of collecting performance fees and/or a third-party licensee (i.e., a television network, independent television station, digital music service, etc.) requires direct licensing of such rights, company and publisher shall have the right to directly license their respective shares of the public performance rights in the composition to such third parties. If the company or publishing designee receives a distribution of earned public performance fees from any source that does not make a separate distribution directly or indirectly to publisher and to composer, then publisher shall be entitled to receive its portion of such fees and composer shall be entitled to receive the writer's share of such fees.

Additional variations of a direct license clause are as follows:

> Licensee desires to obtain from publisher a blanket license for all necessary performance, reproduction, and distribution rights implicated by the delivery of programming embodying publisher's catalog, and publisher is willing to grant such right to license on a nonexclusive basis.

> The right to publicly perform and to authorize others to perform the composition by means of a media entity not licensed by ASCAP, BMI, or SESAC is subject to clearance of the performing right either from Licensor or from any other duly authorized licensor acting for or on behalf of Licensor subject to good faith negotiations in accordance with established industry customs and practices.

An issue in many agreements is what happens to the writer share when a copyright owner, usually the music publisher, directly licenses a work to a user. Clauses range from "payments to be made based upon the prevailing PRO rates for the specific use," "compensation to be negotiated in good faith," "reasonable fee," "fee subject to arbitration," "a complete buyout with no further compensation or continuing royalties,""or "50 percent of any license fee received."

A further unresolved issue as to an allowable and effective direct license under court or consent decree interpretation involves the situation where a music user (traditional broadcaster, online music service, etc.) contacts a copyright owner directly with the request versus the situation where the ASCAP or BMI copyright owner approaches the user to negotiate a direct license—a fine distinction but an important one in current litigation and consent decree interpretation.

Department of Justice Intervention

In part because of the Pandora decisions, a major development occurred in June 2014 when the Department of Justice (DOJ) announced that it would review both the ASCAP and BMI consent decrees "to account for changes in how music is delivered to and experienced by listeners [and to determine] what modifications would be appropriate."[20] The DOJ allowed a 60-day period for comments from any interested party (music publishers, songwriters and composers, PROs, online service companies, music users of any nature, the general public, etc.).

A cross-section of some of the views was illustrative of the issues as well as the diametrically opposed positions of many of the parties. The comments very much reflected a creators v. users scenario.

On the music user side, the National Association of Broadcasters (NAB), the Digital Media Association (DiMA), Netflix, Fox News, the Radio Music License Committee (RMLC), the National Restaurant Association, and the Consumer Electronics Association, among others, submitted comments. The creator/copyright representative side included comments from the PROs ASCAP, BMI, PRS for Music (U.K.), SOCAN (Canada), JASRAC (Japan), and SIAE (Italy), as well as the Society of Composers and Lyricists (SCL), the Nashville Songwriters Association International (NSAI), the National Music Publishers' Association (NMPA), and the Screen Actors Guild-American Federation of Television and Radio Artists (SAG-AFTRA), among others.

ASCAP, in its comments, requested that the rate court be replaced with a faster and cheaper dispute resolution procedure, that ASCAP be allowed to bundle and license multiple rights (the current decree prohibits ASCAP from licensing any right other than performance) and allow partial grants of rights from its members.[21] The arguments centered on the fact that new media users need multiple rights in their business, that publishers need flexibility to manage rights and negotiate contracts terms, and that property rights are divisible, assignable, and licensable either in whole or in part. BMI, which is not prevented from bundling or licensing multiple rights, requested that publishers be allowed to withdraw digital rights and that a binding arbitration model replace the consent decree mandate.[22]

The SCL (film and television composers and songwriters) was in favor of consent decree changes and expressed concerns that if the major music publishers withdrew completely from ASCAP and BMI, the transparency and accountability of the PRO collective licensing model would be affected, and further that in a bundled rights situation it would be difficult to ascertain the value of the performance right in bundled transactions.[23] Most writers in this field sign "work-for-hire" contracts where the backend performance royalties represent a substantial portion of their income. The 165,000-member organization SAG-AFTRA, the largest labor union representing working media artists, commented that the scales have tipped too far in favor of licensees' interests over those of artists and that the rate setting process set forth by the consent decrees is inefficient, expensive, and burdensome on the PROs, and if not modified will significantly devalue a writer's works.[24]

Sony/ATV Music supported amending the consent decrees to allow copyright owners the ability to limit the scope of the rights they grant to ASCAP and BMI in their musical compositions and to require the PROs to accept those grants; supported an expedited arbitration process for resolving rate disputes; and recommended that the reviews of the decrees occur periodically to take into account new technology changes and conditions. Sony/ATV was not in favor of allowing the PROs to handle rights other than performing rights, as it was their position that these markets already functioned well and that the introduction of such regulated entities into the market for these other rights would be costly and disruptive.[25]

As to the foreign PROs that submitted comments, widespread concern centered on the belief that the current consent decrees were outdated in today's world and that changes were essential if music was to be appropriately licensed and compensated. Partial grants of rights and the bundling of multiple rights are commonplace in the foreign marketplace, and dispute resolution procedures are less cumbersome than the U.S. rate court. PRS for Music in the United Kingdom, which receives over $100 million a year in U.S. performance royalties for its members from ASCAP and BMI, expressed concerns over the present decrees and stated that it would consider licensing the British repertory directly in the United States rather than through intermediaries if it proved more efficient.[26]

DiMA, a trade organization whose members include Apple, Amazon, Microsoft, and YouTube, stated that the decrees have not harmed ASCAP or BMI financially in terms of the music industry generally, and that the PROs must be subject to oversight as their anticompetitive behavior continues to this day. Further, if the DOJ does allow all the PROs to bundle rights as well as permit partial withdrawals, then substantial oversight must be put in place; songwriters should be allowed to keep their rights with their PRO if that's what they wanted, regardless of whether the publisher removed the works.[27]

The RMLC strongly felt that the decrees were necessary to keep the market power of ASCAP and BMI in check.[28] If publishers were allowed to withdraw from the PROs, they could leverage their outsized market share to extract exorbitant license fees from licensees. Both the NAB[29] and Television Music License Committee also shared these views. As to Netflix, its position was that the decrees were in place to constrain the PROs market power.[30] It was against allowing partial publisher withdrawals, but if the DOJ allowed them, then conditions would have to be imposed to mitigate any adverse consequences. Finally, the rate court must stay in place though it does need to be streamlined.

SOUND RECORDINGS

Prior to 1972, no federal copyright protection existed for sound recordings. Congress rectified that situation by extending copyright to any recordings that were fixed on or after February 15, 1972. The owners of the copyright therefore had the exclusive right to reproduce and distribute phonorecords embodying the sound recording, including by means of digital transmission, and to authorize others to do the same. Pre-1972 recordings remained subject to the protection afforded by state laws.

As to the performance right aspect of sound recordings, the right that was enjoyed by musical compositions was nonexistent for records. No performance royalty existed in any medium for sound recordings. That changed in 1995 with the passage of the Digital Performance Right in Sound Recording Act (DPRSRA), which provided for a limited right when sound recordings are publicly performed "by means of a digital audio transmission."[31] The 1998 Digital Millennium Copyright Act (DMCA) included webcasting as a category of performance applicable to this limited performance right.[32] This new right applied specifically to satellite radio (e.g., Sirius XM), Internet radio (e.g., Pandora), and cable television music channels (e.g., Music Choice).[33] Broadcast radio continued to be exempt.

It is important to note that the statutory license applies only to noninteractive services. The right to perform copyrighted sound recordings for on-demand services (interactive services) remains with the copyright owner (normally the label) and is a negotiated agreement between the label and the music user.

These deals have taken many forms, including percentage of gross or net revenue formulas, per performance rates, an equity stake in the business, or a combination of these and other elements.

The rates and terms of the sound recording statutory license are set by the Copyright Royalty Board (CRB), an administrative body created by Congress. SoundExchange, a nonprofit organization, has been designated by the Librarian of Congress and the CRB to be the sole entity to collect, administer, and distribute the royalties from noninteractive webcasting, digital cable, and satellite transmissions and satellite audio services. Congress also gave SoundExchange the right to negotiate agreements separate from those set by the CRB through the Webcaster Settlement Acts of 2008 and 2009.[34] Services therefore can choose whether to be licensed under the CRB rates or the SoundExchange negotiated rates.

There are five major sound recording licensing categories, each of which is subject to a separate rate proceeding. The categories are webcasting, satellite radio, preexisting music services, other cable and satellite music providers, and business establishments. An example of one of these proceedings involved Sirius XM satellite radio, which concluded in 2012 and set rates for a five-year period at 9 percent of gross revenue for 2013 increasing to 11 percent in 2017.[35]

Webcasting IV—the proceeding regarding future webcasting rates—commenced in early 2014 and will conclude at the end of 2015 and will set rates for the period 2016–2020.[36] The most recent five-year CRB per-performance statutory webcasting rates were $0.0019 for 2011, $0.0021 for 2012 and 2013, and $0.0023 for 2014 and 2015.[37]

The Webcaster Settlement Acts of 2008 and 2009 allowed SoundExchange to negotiate alternative royalty rates ("pureplay" rates) with certain webcasters. For nonsubscription services and broadcasters streaming their content on the Internet, the "pureplay" per-performance rate started as $0.00102 for 2011 and increased to $0.0013 in 2014 and $0.0014 in 2015. The rate applicable is the greater of the per-performance rate or 25 percent of U.S. gross revenue. The "pureplay" per-performance rate for subscription services started at $0.0017 in 2011 and increased to $0.0023 and $0.0025, respectively, for 2014 and 2015.[38] No percentage of revenue figures applied to the subscription rate. Under those agreements, webcasters therefore had a choice to be licensed through 2015 either with the CRB rates or the SoundExchange "pureplay" rates.

As to the current *Webcasting IV* CRB proceeding, SoundExchange's initial rate proposal for the 2016–2020 period was a "greater of" formula taking into account a per-performance rate and a percentage of the service's revenue. Specifically, the per-performance rate for commercial webcasters would commence at $0.0025 in 2016 with escalations to $0.0029 in 2020. The percentage of revenue would be 55 percent for all five years. Its proposal was based on the fact that webcasting is a vibrant and growing industry, that it has widespread adoption by consumers, and that direct licensing deals between record companies and on-demand services (interactive streaming) were the most appropriate benchmarks to use. A review of these deals confirmed that the record companies received a minimum share of 50–60 percent of a service's revenue, with allocations based on each record company's share of total streams.

Music services, on the other hand, argued in their direct case that the industry is not profitable even considering payments under the reduced Webcaster Settlement Act agreements. Pandora, Sirius XM (streaming component), and the broadcasters, through NAB among others, came up with proposals ranging from a royalty of $0.0005 per performance for all five years, to $0.0016 pending study of the direct deals, to a $0.000125 rate similar to the Canadian rate. Pandora supported a "greater of" rate of $0.0010 per performance or 25 percent of revenue.

SoundExchange Distributions/Direct Licenses

SoundExchange collected $650 million in 2013 pursuant to the statutory license and distributed $590.4 million to artists and sound recording copyright owners.[39] Collections and distributions for 2014 are projected significantly higher than 2013. Royalty distributions are allocated 50 percent to sound recording copyright owners (many times the label), 45 percent to featured artists, and 2.5 percent each to nonfeatured musicians and nonfeatured vocalists via the Intellectual Property Rights Distribution Fund administered by the American Federation of Musicians and SAG-AFTRA. An additional $6 million was collected from foreign country collection societies that handle the performance right in sound recordings. As to this latter collection, it is limited based on the reciprocal right being administered in each country. As the U.S. sound recording performance right is a very limited one (noninteractive streaming primarily), it substantially reduces the amount of royalties coming into the United States for overseas sound recording performances.

Finally, in the case of rights owners wishing to directly license their works to noninteractive services and not rely on the statutory license or SoundExchange separately negotiated deals, SoundExchange does offer administration services to both labels as well as artists for those works.

Pre-1972 Sound Recordings

As previously mentioned, sound recordings fixed prior to February 15, 1972, are not subject to copyright, and any rights they do have depend solely on whatever rights are afforded to sound recording owners under state law.

In September 2014, in *Flo & Eddie Inc. v. Sirius XM Radio Inc.*, the U.S. District Court for the Central District of California ruled in a motion for summary judgment that copyright ownership of a sound recording under the California statute includes the right to publicly perform the recording, and that Sirius XM's streaming of the 1960s band the Turtles' pre-1972 recordings without authorization and without paying royalties constituted copyright infringement.[40] In November 2014, the U.S. District Court for the Southern District of New York in *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, ruled that Sirius XM had committed copyright infringement and engaged in unfair competition by publicly performing sound recordings owned by Flo & Eddie.[41] These cases and their appeals as well as similar pending cases regarding the same or similar issues need to be watched, as they could have a very significant impact on future sound recording license fees and royalties to labels and artists.

WHERE DO WE NOW STAND?

Of the two performance areas under discussion, musical composition rights and sound recording rights, the sound recording side seems much clearer than the composition side. The sound recording performance right, at least for now, is a very limited right (traditional radio, for example, is not included) and has a statutory scheme in place with rates set by either the CRB, by SoundExchange with users, or by direct negotiations between copyright owners and users. Over the past 10 years, this has been, percentage wise, by far the biggest growth area for sound recording copyright owners.

The musical composition performance right, on the other hand, has more questions and unresolved issues in the licensing process than ever before. Not only do you have unresolved rate court cases and issues affecting every aspect of the licensing of music in the "new media" world (not to mention the effect on traditional media licensing) but also the entrance into the field of new types of PRO models (music publishers, business entities, administration services, foreign territory rights management organizations, etc.). This could, depending on your point of view, significantly complicate the existing licensing structure for music users, achieve "willing buyer, willing seller" market rates for the creative community and their representatives, strengthen the arguments for licensing through the traditional PRO model, weaken the current traditional PRO structures, increase license fees and royalties in some areas with reductions in others, initiate an era of PRO selective administration services only, create new writer and music publisher royalty payment formulas, values, compensation plans, guarantee arrangements, royalty advance deals, bonus and "rewards for success" policies, and other financial incentive plans, among other possibilities and results.

In addition, the direct licensing of works by copyright owners, never a major factor in the past, has taken on new significance in not only the online "new media" world of music licensing but also traditional media music licensing practices. Finally, the DOJ review of the ASCAP and BMI consent decrees, in effect since 1941, could have a significant effect on the future of music performance licensing, assuming that any changes encompass more than just minor modifications.

The foreign marketplace, responsible for the collection of over $1.5 billion in annual U.S. writer and publisher performance fees, represents an additional area of concern regarding the stability, continuation, and accuracy of "overseas" royalty payments. The issues in this area are more significant for songwriters and composers than music publishers, as many publishers collect their monies directly from foreign societies as members or via subpublishers. For successful songwriters, film and television composers, and writer estates, foreign royalties—for many, easily in excess of 50 percent of their short-term and long-term royalty income—have always flowed through the societies through reciprocal agreements, and any change in those relationships could have a major impact on the ability to license, track, audit, collect, and receive foreign country songwriter and composer royalties.

The best advice for the future—in all of your deals, negotiations, and contracts—"prepare for every contingency and possibility," as they may very well come true.

Welcome to the "new world of performance licensing."

ENDNOTES

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3. *See* Todd Brabec & Jeff Brabec, *Online Music Licensing: From PROs, AOL, and MobiTV to SoundExchange, AT&T, and the CRB*, Ent. & Sports Law., Oct. 2011.
4. *See* United States v. ASCAP, 485 F. Supp. 2d 438 (S.D.N.Y. 2007).
5. United States v. ASCAP, 627 F.3d 64 (2d Cir. 2010).
6. ASCAP v. United States, 132 S. Ct. 366 (2011).
7. *In re* Cellco P'ship, 663 F. Supp. 2d 363 (S.D.N.Y. 2009).
8. United States v. ASCAP, 599 F. Supp. 2d 415 (S.D.N.Y. 2009).
9. United States v. ASCAP, 616 F. Supp. 2d 447 (S.D.N.Y. 2009).
10. *In re* MobiTV, Inc., 712 F. Supp. 2d 206 (S.D.N.Y. 2010).
11. ASCAP v. MobiTV, Inc., 681 F.3d 76 (2d Cir. 2012).
12. Broad. Music, Inc. v. DMX, Inc., 726 F. Supp. 2d 355 (S.D.N.Y. 2010).
13. *In re* THP Capstar Acquisition Corp., 756 F. Supp. 2d 516 (S.D.N.Y. 2010).
14. Broad. Music, Inc. v. DMX Inc., 683 F.3d 32 (2d Cir. 2012).
15. *In re* Pandora Media, Inc., Nos. 12 Civ. 8035, 41 Civ. 1395, 2013 WL 5211927 (S.D.N.Y. Sept. 17, 2013).
16. Broad. Music, Inc. v. Pandora Media, Inc., Nos. 13 Civ. 4037, 64 Civ. 3787, 2013 WL 6697788 (S.D.N.Y. Dec. 19, 2013).
17. *In re* Pandora Media, Inc., 6 F. Supp. 3d 317 (S.D.N.Y. 2014).
18. Pandora Media, Inc. v. ASCAP, No. 14-1158 (2d Cir. Aug. 4, 2014), ECF No. 143, *available at* http://www.ascap.com/~/media/files/pdf/advocacy-legislation/pandora_media_v_ascap_ascap_opening_brief.pdf.
19. *See* United States v. ASCAP, 627 F.3d 64 (2d Cir. 2010).
20. *Antitrust Consent Decree Review*, U.S. Dep't of Justice (June 2014), http://www.justice.gov/atr/cases/ascap-bmi-decree-review.html.
21. Public Comments of the American Society of Composers, Authors and Publishers Regarding Review of the ASCAP and BMI Consent Decrees (Aug. 6, 2014), http://www.justice.gov/atr/cases/ascapbmi/comments/307803.pdf.
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23. Comments of the Society of Composer & Lyricists (Aug. 6, 2014), http://www.justice.gov/atr/cases/ascapbmi/comments/307971.pdf.
24. Comments of Screen Actors Guild-American Federation of Television and Radio Artists (Aug. 6, 2014), http://www.justice.gov/atr/cases/ascapbmi/comments/307818.pdf.
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30. Comments of Netflix, Inc. (Aug. 6, 2014), http://www.justice.gov/atr/cases/ascapbmi/comments/307908.pdf.
31. Pub. L. No. 104-39, 109 Stat. 336 (1995).
32. Pub. L. No. 105-304, 112 Stat. 2860 (1998).
33. *See* 17 U.S.C. §§ 112, 114.
34. Pub. L. No. 110-435, 122 Stat. 4974 (2008); Pub. L. No. 111-36, 123 Stat. 1926 (2009).

35. *In re* Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services, No. 2011-1 (C.R.B. Dec. 14, 2012), *available at* http://www.loc.gov/crb/comments/2012-12/Public_Initial_Determination.pdf.

36. *See In re* Determination of Royalty Rates and Terms for Ephemeral Recording and Digital Performance of Sound Recordings (*Webcasting IV*), No. 14-CRB-0001-WR (C.R.B. 2014).

37. 37 C.F.R. § 380.3.

38. Notification of Agreements under the Webcaster Settlement Act of 2009, 74 Fed. Reg. 34,796 (July 17, 2009).

39. *See* Comments of SoundExchange, Inc. 3, 20 (May 23, 2014), http://copyright.gov/docs/musiclicensingstudy/comments/Docket2014_3/SoundExchange_Inc_MLS_2014.pdf.

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41. Memorandum Decision and Order Denying Defendant's Motion for Summary Judgment, *Flo & Eddie*, No. 13 Civ. 5784(CM), 2014 WL 6670201 (S.D.N.Y. Nov. 14, 2014).

Todd Brabec, former ASCAP executive vice president and worldwide director of membership, is a Deems Taylor award-winning co-author of Music, Money, and Success: The Insider's Guide to Making Money in the Music Business *(7th ed. 2011), an adjunct professor at USC Thornton School of Music, where he teaches music licensing, music publishing, and film, television, and video game scoring and song contracts, a governing committee member of the American Bar Association Forum on the Entertainment and Sports Industries, and an entertainment industry consultant and attorney. He may be reached at toddbrabec@gmail.com.*

CUTTING EDGE CE 27th

NEW ORLEANS

August 2019

Ch Ch Ch Changes

by Peter Dekom[1]

J.J. ABRAMS
Director, upcoming "Star Wars: The Rise of Skywalker"
"For a long time, people have been saying the business is changing, but that's undeniable now. It's on."
New York Times, June 20, 2019

For those of us who have lived through decades of changes and challenges in practicing entertainment law, nothing begins to approach the level of structural, social and economic change we face today. So, I thought I'd write down what I believe are the biggest challenges of practicing entertainment law, especial today, focusing primarily on audio-visual content:

I. Globalization is a Bitch!

ELIZABETH BANKS
Actress, director of upcoming *Charlie's Angels*
"It's interesting, because there's a lot more work, but it's a lot harder to make money on anything."
New York Times, June 20, 2019

We are more dependent on international exploitation of our entertainment assets than ever before. Take away international revenues, even beyond the English-speaking world, and just about every segment of the U.S.-based entertainment industry would collapse. But with that incredible new source of revenues comes a litany of problems.

Not only are the production resources in other nations increasingly being deployed for their own local productions (or regional co-productions), but those old "quota" ratios are rearing their ugly heads again. Not to mention that we have real competition: K-Pop and Korean movies, for example, are fan favorites all over Asia these days… and spreading. Lots of this content is more popular than some of the best creative content from the United States.

Locally produced Chinese (PRC) movies are consistently outperforming American fare as well. And for revenue sharing content, the PRC quotas for allowing in international theatrical movies are severely limited: 34 films per year as of this writing with the proviso that at least 14 of those

[1] A graduate of Yale University and the UCLA School of Law, Mr. Dekom has practiced entertainment law for over four decades, being named by both the Century City Bar Assn and the Beverly Hills Bar Assn as entertainment lawyer of the year.

films be in either 3D or IMAX format. Then try exporting your Chinese-generated profits back to the United States! Donald Trump's disfavor with Hollywood has also moved "entertainment content" issues to a very back burner in his trade negotiations. The censorship issues are, well, obvious.

If money from ancillary rights was a driver, perhaps also the fuel that enables coproductions (note the United States has no coproduction treaties), then anything that threatens the deep European pockets that write those checks also threatens indie productions across the board. Cord-cutting and multinational competition are definitely pushing European presale and coproduction values lower. Mega-huge French "Canal Plus has confirmed its plan to trim nearly 20% of its workforce in France where the pay TV group has been facing the continued decline of its subscriber base.

"Canal Plus said in a press release on [June 9, 2019] that it met with the company's social and economical committee to lay out its plan to cut up to 492 jobs through voluntary departures and said it will be holding further discussions on July 15 and 16… In its statement, Canal Plus said it was struggling to cope with the 'revolution"' going on in the TV industry, with the 'global platforms, digital native and international which boast considerable financial muscles and are not under the same fiscal and regulatory constraints than the Canal Plus Group,' said the company." Variety.com, June 9, 2019.

Europe offers us even more problems as well. With the U.K. poised for an even uglier Brexit, Ireland remains as the only English-speaking country in Europe. Might seem like slight change, but all those lovely European Union benefits (like nice TV license fees, access to co-productions, the ability to use any EU resident and quota compliance) we used to get by shooting in heavily tax-subsidy-incented England are slip-sliding away. Yet we hunger for European audiences (the largest still for US product) and increasingly for European subsidies.

The cost of making audio-visual productions – film, television, digital, long format, short format, music, multiple platform, etc. – has so escalated that we have become addicted to so-called "soft money," government production incentives that literally absorb significant production costs. In the states (especially Georgia, New Mexico, Louisiana and New York) and overseas (everywhere!). We're always looking for the next good deal. Problem is, these incentives keep changing, getting challenged, "adjusted and amended," recalculated … country by country. Are their crews sufficient and good? English-speaking? Production facilities? Comparable work ethic? Visas and local taxes? Costs to transport and house talent? Getting stuff in and out of customs? Local laws? Co-production potential (the U.S. has no co-production treaties, by the way). Need a local attorney too. Who's good? Foreign Corrupt Practices Act issues? Bribery Act issues (UK)? Ramifications of moving money across international boundaries? U.S. taxes?

European Union laws, beyond the General Data Protection Regulation (GDPR), are threatening to move Europe into becoming a single digital market (sell digital rights in one market and you

may in the future have sold digital rights to the entire EU). Under the guise of copyright reform, the EU is redefining the notion of a "safe harbor" to internet service providers, making digital platforms responsible for copyright infringement, artist rights and fake news carried on those sites. "The overhaul contains two controversial provisions that will make online platforms liable for illegal uploading of copyright-protected content on their sites, as well as force Google, Facebook and other digital companies to pay publishers for press articles they post online." Variety, April 15, 2019. The new rule was signed into law on April 17, 2019.

Privacy laws, sprouting up all over the world are picking up the log line in the GDPR as well. The California Consumer Privacy Act of 2018 was the seminal U.S. state statute in the space, several other states have followed and are following suit (Washington State appears to be working on the next big bill), and Congress is exploring national requirements. Opt-in requirements, the ability to erase your online footprint (to disappear), the notice for hacked sites and the crushing penalties for violation should put the fear of God into the hearts and minds of all entertainment practitioners whose clients access the web, particularly those who reach across international boundaries. Are you ready for 'dis?

That's what's happening in nations where "free speech" has few limitations. While you cannot sell Nazi memorabilia online in Europe, generally across the West, the counter to the press for privacy regulation and responsibility for disseminating fake news is countered by that "free speech" value (or more, like our First Amendment). Those values are tempered in other parts of the world, even ostensible democracies like India and Singapore.

Murders by Hindus against local Muslims based on fake news gone viral made India particularly sensitive to the impact of too much free speech. Look back at their pre-election planning back in early April of 2019: "As India, the world's largest democracy, gears up for a gigantic general electoral process, global social media companies are putting their own houses in order. The election runs in seven phases from April 11 through May 19, with results known on May 23.

"Approximately 900 million Indians, many of whom are constantly exposed to social media via their phones, are eligible to vote in the elections. Facebook counts approximately 300 million subscribers in India, making the country its largest single market.

"On Monday [April 1, 2019], Facebook removed hundreds of pages associated with the opposition Indian National Congress party and the ruling Bharatiya Janata Party for 'coordinated inauthentic behavior.' With ongoing tensions between India and neighboring Pakistan, the company removed 103 Facebook and Instagram pages with links to the Pakistan military.

"The specter of fake news is all too real in India and, in a bid to curb this, on Tuesday, WhatsApp launched 'Checkpoint Tipline' where users can report suspicious material. The company will confirm whether the shared information is verified or not.

Earlier, on March 20 [2019], the Social Media Platforms and Internet And Mobile Association of India, which includes representatives of Facebook, WhatsApp, Twitter, Google, ShareChat, TikTok and others, presented a voluntary code of ethics to Indian election commissioners. The code consists of several steps to prevent abuse, and to maintain a transparent flow of information to the Election Commission.

"The Election Commission has an exhaustive model conduct code that all political parties are expected to adhere to, beginning with 'No party or candidate shall indulge in any activity which may aggravate existing differences or create mutual hatred or causing tension between castes and communities, religious or linguistic.'" Variety.com, April 2, 2019.

Another regional democracy, aghast at both its own issues and the ugly example of "fake news" roiling through the United States, decided to crush that movement with swift legislation, virtually certain to become law. "The Singapore government has introduced legislation to combat the spread of misinformation online. The proposed law puts responsibility on media and social media platforms, requires online corrections, and threatens to take away profits of repeat offenders.

"The Protection from Online Falsehoods and Manipulation Bill was introduced by the Ministry of Law, and put to parliament on Monday. Given the government's solid majority it could become law in a matter of weeks.

"The government says that the bill targets falsehoods, not opinions and criticisms, satire or parody. Corrections will be the primary response to a harmful online falsehood that is actively spreading, and that corrections will usually require the facts to be put up alongside the falsehood, so that the facts can travel together with the falsehood." Variety, April 2, 2019.

But the implications for American companies crossing international boundaries is not just the massive uptick in complex, detailed and exceptionally expensive (both as to compliance and fines) impact of new laws and regulations. The financial realities overseas are equally in flux. To make bad matters "much badder" and adding to the complication, the entertainment-related financial picture from overseas is also undergoing other rapid changes. The foreign territorial sales marketplace (discussed below – in *Rescinding the Indies*), for example, was already bad and is just getting worse.

As hungry as Hollywood may be for subsidy money, it is positively ravenous for international investment capital. On August 18, 2017, when Chinese President Xi Jinping gave the order, China put the kibosh on exporting PRC investment capital into overseas real estate and entertainment ventures. The squeal of brakes was heard across the U.S. entertainment industry, from "independents" hall all the way up to the loss of a billion dollar off-balance-sheet investment fund for Paramount Pictures.

Already slowing before the announcement, PRC money that was not already outside of China just plain stopped. Lots of schemes and dreams exist to get that tap turned on again. Nuffin'! Trade war didn't help either. China announced stricter censorship rules, and many U.S. film and television conglomerates fear the possibility of a total closing of the Chinese marketplace to U.S. product. China's done it before – with South Korea – so it is certainly not out of the question.

"Chinese film officials have told some local buyers to steer clear of U.S. movies. One Chinese distributor says he was advised by various platforms not to submit U.S. titles for consideration, while another has heard through unofficial channels that private companies can no longer import U.S. content. American actors working in the Middle Kingdom say their careers have nosedived without explanation.

"Industry insiders stress that there is nothing in writing – no officially published decree – putting a freeze on U.S. content. The Chinese government tends to exercise such controls internally and unofficially, which allows it to publicly deny the existence of any restrictions and to make exceptions when it suits them. Three years ago, when China blocked South Korean films, pop bands and other cultural exports out of anger over Seoul's decision to deploy U.S.-made missiles, it took six months before Beijing publicly acknowledged the policy." Variety.com, June 5, 2019. Even if a trade agreement is consummated, the tensions between the two powers will continue. South Korea is small and local; the U.S. is the enemy.

How about Middle Eastern money? The March 8, 2019 The Washington Post: "A bid by a Hollywood power player to return a $400 million investment to the Saudi Arabian government after an outcry over the murder of Saudi journalist Jamal Khashoggi has been fulfilled, a person with knowledge of the talks told The Washington Post. The person spoke on the condition of anonymity because of the matter's sensitivity.

"Endeavor, the Hollywood talent agency and content company, had accepted the money last spring from Saudi Arabia's Public Investment Fund after, Ari Emanuel, the company's co-chief executive, became enamored with the idea that Saudi Crown Prince Mohammed bin Salman was on the path to reform. The capital was quickly spent as Endeavor looked to pay down debt on a host of corporate acquisitions, which in recent years have included mixed martial arts and professional bull riding leagues." Ouch! Endeavor's alternative – going public – is discussed later.

II. Rescinding the Indies.

JORDAN HOROWITZ
Producer, *La La Land, Fast Color*
"I don't feel particularly optimistic about the traditional theatrical experience, especially for independent films."
NY Times, June 20, 2019

With about 4,000 new English-speaking feature-length independent motion pictures still being produced annually, you'd guess that that world is robust and lucrative. Guess again. Under 1% of

that batch ever find anything close to a genuine release anyway, and most of that product finds its way onto the small screen, digital or otherwise. Well-structured documentaries are doing better than in recent years, although competition for distribution is still horribly competitive, but dramatic fare is struggling. With a few exceptions – *my category of five,* where sharing the experience with an audience has value or where an older audience still make the trek: truly spell-binding horror films, fall-on-the-floor hard comedies, faith-based/"patriotic" specialty releases, films that made a splash overseas and films targeting kids (especially animated) – the U.S. theatrical market (release in movie theaters) is all-but-closed to indies, particularly those with modest to lower budgets. Hot preexisting IP rules, and most writers don't have the money to option those titles.

As Hollywood studios up their production budgets, with concomitant increases in marketing spends, the ability of "festival favorite" independent features to penetrate the U.S. theatrical marketplace has all but vaporized, as was the case for this May 24, 2019 wide release: "Despite film festival raves and endorsements from celebrities like Ryan Reynolds, Taylor Swift and Mindy Kaling, Annapurna's 'Booksmart' wasn't able to earn high marks during its opening weekend. Olivia Wilde's coming-of-age comedy sputtered with $6.9 million, a disappointing start for a movie that debuted in over 2,500 theaters across North America.

"The raunchy R-rated movie is a stark reminder that even glowing word of mouth and strong reviews aren't always enough when punching up against big-budget blockbusters. 'Booksmart' is one of a handful of indie hopefuls trying to cut through and find an audience amid a crowded summer slate. Will its underwhelming ticket sales signal trouble for other film festival favorites coming down the pike?" Variety.com, May 29, 2019. Everything about making and releasing an independent theatrical film has gotten exceptionally challenging.

While soft money has absorbed some of the financial pain of film and television production, the fall in demand for indies internationally is not good news for lawyers whose bread and butter is based on these films. This is also particularly challenging to filmmakers who have typically relied heavily on international territorial presales to provide production capital (usually discounted by banks relying on completion bonds). International buyers increasingly add the demand for a wide theatrical release in the United States as a precondition to payment, but U.S. distributors have learned that smaller films cannot compete against the mega-productions from Hollywood majors. The scoundrel: marketing and distribution costs for a domestic theatrical opening have skyrocketed. U.S. theatrical deals for indie films have become as rare as hens' teeth. Some films, however, are either so inexpensive or have such an obvious international cachet that they can avoid this U.S. release mandate.

Where an indie still needs that U.S. theatrical release (remember those international buyer conditions), it is often required to put up all releasing costs to open their film – $15 million and

up for a release on at least 1500 screens – without getting a dime in the way of an advance against their production costs. Many of the distributors who are open to indies also require an advance of six figures against the ultimate distribution fee and often require that all the ancillary exploitation flow through their deal as well.

What you say, at least in this digital world we don't have to strike old-world prints; think of the savings! Sorry, it could actually cost more! When a distributor books a screen for a theatrical movie, where the projector is digital (they almost all are these days), the distributor must pay either the theater owner or the financier of the digital projector a set fee, called a virtual print fee. It may depend on the nature of the equipment (3D/IMAX vs regular formats), the size of the theater and/or the number of weeks of the run. It ain't cheap! It used to be to cover the amortization cost to buy those cool projectors, until recouped, but you just know those fees are not only never going away, they are like to increase.

So now the risk to the indie is not just the cost of making the movie but the significant cost to release that film theatrically in the U.S. marketplace. Majors and their specialty labels seldom pick up indie films anymore, but if a film has already opened well overseas, particularly in English-speaking markets, they are more open to picking up that proven content.

As the theatrical distribution pickups for U.S. independent films dwindle, likewise those who have traditionally provided so-called "P&A funding" (literally "prints and advertising," but today a general reference to theatrical releasing costs, usually within the United States) have left the marketplace or made the cost of such funding so high as to be prohibitive. This has sent filmmakers scrambling in desperation, and many have simply relinquished their hopes for a U.S. theatrical release.

Even assuming you can get over the above U.S. release requirement, in the past five years, the "average" presales from the foreign market for films that are not heavily skewed to a U.S. audience (e.g., a baseball or American football themed movie) have fallen from 60% of an average budget (capped on really big films) to 40%... and falling. The strong dollar along with international instability (Brexit, too much national debt, too much competition, etc.), coupled with bigger companies (like Lionsgate and STX) absorbing capacity, have tightened purses everywhere.

There's still plenty of activity in pick-ups and production supported by domestic streaming services, but audience consumption of feature films (original and aftermarket) from a successful streaming service generally caps out at about 30% of total content watched. The continuity of *series* (characters and storylines), the added plus of binge viewing, tends to drive most of that other 70%. Live sports are an area that viewers enjoy as well and is increasing finding its way into the streaming universe. And exactly what is a "movie" anyway?

As you can tell from the battle between traditional "big-screen" filmmakers and streamer-Netflix – evidenced in the Oscar squabble over *Roma* – the opportunities for indies has so narrowed that there is a push to allow a film with a token theatrical release that is intended primarily for the small screen to be accorded the same respect and treatment as a film specifically produced for a mainstream theatrical release. The writing is on the wall, and if "quality" productions are to have a shot against escapist Hollywood blockbusters, this seems to be inevitable.

But there's one more ugly reality that has frightened indie filmmakers with "quality" on their minds: theatrical releases from digital streamers are tanking on par with all other indies… even festival darlings and award-winners. "Five months after strutting out of the Sundance Film Festival with a bag full of splashy acquisitions, Amazon Studios has been thrown off balance by a box office losing streak and the departure of one of its top executives [marketing and distribution chief, Bob Berney].

"One of its highest profile Sundance buys, Mindy Kaling's 'Late Night,' has proven to be a painful failure. It has earned only $11.3 million in North America, where it's been playing on over 2,000 screens for the past two weeks. That's a poor result given that Amazon plunked down a hefty $13 million for domestic rights to the picture. What's worse, the marketing budget on 'Late Night' topped out at $33 million. Rival studios project that Amazon could lose roughly $40 million on the comedy's theatrical run." Variety.com, June 27, 2019.

U.S. theater owners, awash in available screens, see the problem. Our largest exhibitor, AMC Entertainment with 8,380 screens, is resurrecting a program it has tried in the past: a special structure aimed at supporting smaller quality films in search of a theatrical release. "The program, dubbed AMC Artisan Films, will seek to boost certain movies that might have trouble gaining traction as moviegoers increasingly choose well-known brands, such as Marvel Studios and Pixar, over midbudget dramas, comedies and quirky independent fare. The dominance of movies such as 'Avengers: Endgame' has made it tough for critically acclaimed pictures such as 'Booksmart' and 'Late Night' to get oxygen at the local multiplex, according to box office analysts.

"'[W]e aim to expose more moviegoers to specialized films and increase their theatrical success," Elizabeth Frank, AMC's head of worldwide programming and chief content officer, said in a statement… The company did not immediately provide details on how many of AMC's locations would be participating in the new program…

"According to AMC's announcement, a movie that gets the AMC Artisan Films seal is 'an artist-driven, thought-provoking movie that advances the art of filmmaking.'… The company will promote such pictures in part by keeping them in theaters longer and by seeking to give them earlier runs in limited release, Frank said." Los Angeles Times, June 27, 2019. These programs have not worked well in the past, but perhaps times have changed.

Smaller studios (entities with both production and distribution arms), holding hope for many indie filmmakers, have not fared well in recent years either. In early July of this year, The Wrap suggested that STX Entertainment was on the block, looking for a buyer, although company executives denied the story. "The independent studio STX Entertainment is looking to merge, raise capital or find a buyer following a string of box office disappointments and the scuttling of a planned [Hong Kong] IPO last fall, TheWrap has learned…

"This year, the studio has suffered one disappointment after another at the box office, with one notable exception: In January, STX released the $108 million-grossing domestic hit 'The Upside,' a release by The Weinstein Company [defunct for other reasons] successor Lantern Entertainment for which STX collected a distribution fee and some back-end profit… STX's most recent release, 'Poms,' grossed $13.6 million at the box office in May in a distribution deal with producer eOne. STX took on the cost of prints and marketing. Another spring release, 'Best of Enemies' starring Taraji P. Henson and Sam Rockwell, took in just $10.2 million on a $10 million production budget.

"But the most painful misstep came with a May [2019] release of star-studded animated feature 'UglyDolls,' which cost roughly $95 million between production and marketing spend and brand tie-ins and brought in only $26.4 million worldwide. The studio had hoped for a hit that would become a franchise based on the popular children's toys… The studio's financial difficulties are one in the latest in a string of indie studios to struggle or fade from view in the last few years — including Open Road, The Weinstein Company, Relativity and Annapurna — as Hollywood has become dominated by superhero franchises and a wave of major studio consolidation." TheWrap.com, July 7, 2019. Yet, every part of the U.S. theatrical motion picture is challenged.

Even the greenlighting of those Hollywood blockbusters has changed. Making a move based on the presence of a movie star has been replaced by hot titles and subject matter recognized by the general public as well as the presence of a very, very few hot directors. The era of "first dollar gross" actors has pretty much been relegated to the history books. With the new mindset of younger audiences, used to hyper-accelerating change, their "what and who is cool next" perspective has decimated the movie star system. "Star" actors who survive tend to eschew the leading man/women cachet of old in favor of becoming character actors creating a *new-next* persona in each film they pursue.

Without independent films, however, there is simply not enough product to fill the over 40,000 screens in the United States. Experts suggest that we are 15,000 screens too many. Given the high production costs, the number of super-high-production value films is of necessity limited, so theater owners have been having a terrible time, saved only by one record-breaking blockbuster – *Avengers: Endgame.* "AMC Entertainment as the world's biggest exhibitor, felt the burn from a series of flop films and underperforming blockbuster hopefuls during its most recent [first]

quarter. The company's revenues fell 13.2% to $1.2 billion, while the company suffered an adjusted loss of $1.21 per share. It also recorded a net loss of $130.2 million…

"The movie business was in a funk for the first three months of 2019… AMC wasn't the only chain to see its fortunes fade. U.S. movie admissions slid 14.9% in the first quarter to 265.6 million and box office receipts plunged 16.3% to $2.39 billion. AMC did manage to outperform the industry — its domestic attendance per screen only declined 10.1% in the first quarter of 2019." Variety.com, May 9, 2019. Strange. The exhibition business needs films, there are lots of screens available virtually any time of the year, but with all the entertainment alternatives, indie films still underperform to the point of near extinction. But wannabe filmmakers are out there, shaking the trees for production financing.

Even some of those expensive, effects-laden Hollywood franchises seem to be unable to impress a jaded audience with too many entertainment alternatives. The less-then-expected performance this May of this year of Warner Bros' *Godzilla: King of the Monsters* (opening at disappointing $49 million domestically – almost half of 2014's *Godzilla* [$93 million] and behind even 2017's *Kong: Skull Island* [$61 million]) followed immediately, in June, with of Fox/Disney's *X-Men: Dark Phoenix* (the worst opening for an X-Men franchise), Sony's *Men in Black: International* (opening at slightly above half the U.S. box office of prior MIB films) and Universal/Illumination's *Secret Life of Pets 2* (generating 15% less than the original) remind us that success is anything but consistently automatic even for those mega-budgets studio films.

Are consumers experiencing "franchise fatigue," as some pundits suggest? Then along comes a blockbuster opening, a $185 million Fourth of July U.S./Canadian box office – *Spider-Man: Far from Home* – suggesting that there might be more to these audience shifts than a simple "franchise fatigue" explanation. Perhaps, because It was uniformly viewed by critics and audiences alike as a high-quality film and was a necessary part of the continuing saga of the Marvel Universe. Audiences are still willing to go… "if"… and that's the question. If it's hard for major studios, it's ever so much harder for indies, but wannabe filmmakers are out there, shaking the trees for production financing.

And that leads to another dreaded plague in indie-land. Too many lawyers – who are in the "everybody does it" school – also seem to forget that raising passive equity money to finance film production and/or distribution is usually subject to federal securities and state Blue Sky laws and regulations. There is no entertainment industry exception. And filmmakers continue to have a "my film is an obvious success" mentality that has them telling investors all kinds of "facts" that fly in the face of contemporary statistical realities. Will lawyers involved in such financing efforts find themselves as the guarantors of success to the relevant investors? Bankruptcy may not be available to those who are accused of skirting these statutes and regulations. I'm skipping over that "felony" thang, because enforcement at that level is generally relegated to extreme abusers.

But raising passive equity by hyping a nascent film project in an obviously down market for indies has never been this legally risky.

So, what happens today to indie filmmakers here in the United States. For very low budget productions, the ability to show content via one or more online services at least gets a filmmaker a shot at building credibility. But the online world seems to have genuine mass-audience slots for a very few filmmakers – well-established superstar creators and those who have weathered the film festival circuit and come out with accolades. Maybe not even those creatives. What really generates values in the new streaming world: *series*. A word that is the new focus of just about everyone in Hollywood these days.

"Reality" and semi-scripted series – docuseries, competitions, talk shows, voyeuristic celebrity showcases, variety programming, eSports, etc. – have lost some of their cachet from too many years of oversupply, relegating the most of programming that does get produced to the bigger program suppliers and well-established creator/executive producers. Budgets get bigger as competition increases, and newbies are often forced into tiny participations for their original ideas as the big boyz and girlz eat most of the pie. With luck and time, some of these newbies rise into the system.

The hot commodity: scripted series. There were an estimated 487 scripted series (cable, satellite, terrestrial, digitally-transmitted) in the U.S. market last year; a projected 520 for calendar 2019. This is way, way above the 140 series that the U.S. audience consumed thirty years ago, and since the population has not grown proportionately, except for the biggest such productions, the average revenue per series today has plunged proportionately. The crowded aftermarket also has contracted the value of that "long tail" everyone continues to discuss. Traditional 22-26-episode order patterns have dropped to 13 or fewer for an entire cycle, a challenge to talent pay levels. Fewer and lower paychecks for most…

That said, some of the numbers paid to produce scripted series seem a whole more like feature numbers. Let's hear it for the bell curve and the fact that premium product in the sweet spot has never been hotter. We were all shocked with the initial season (2013) of the Netflix hit, *House of Cards,* commanded a whopping $3.9 million per episode produced. A massive premium above the cost of production replaced the potential for upside. Netflix has since dropped their upside structure – now mostly fixed fee premium bonuses based on series that go beyond the first cycle – and there is no percentage upside accorded on any of their productions.

But that dramatic $3.9 million soon became dwarfed when extremely high-production value series, like HBO's *Game of Thrones,* cost $9-$10 million an episode to make in the first year, with rumors of individual episodes costing as much as $20 million in subsequent cycles. Whew! For A-titles at the tip of the bell curve, the sky seems to be the limit. Hot TV creators were offered tens

of millions of dollars to take their talents into the digital streaming world, leaving behind their old-world telecasters.

Indie filmmakers take note: if you morph your passion for making two-hour movies for theatrical release, a business that is all but gone, into a storyline that can continue, perhaps for years, you just might soar. Learning to write bibles (summaries of characters, scene, continuous story vectors with outlines of five or six episodic storylines) and the pilot teleplay are the "next-gen" skills that writers need to embrace. Hint!

Writers writing originals for theatrical films, not based on preexisting hot intellectual property that they own or control, need to know that their two-hour screenplays are little more than writing samples. Why? Without preexisting name recognition, especially in the United States, the extra marketing cost to create that awareness, always a risk anyway, is often in the tens of millions of dollars over the tens of millions already needed to open a film in the U.S. that already has that awareness. Majors can spend $30 to $80 million (or more) toward a single U.S. theatrical release. Television/digital programmers don't have those marketing costs, so they are a more open to such content (they just need some "names" – actors and/or a hot director to vindicate their choice). There is also another path.

Turn it into book, place that book into the market and pray (prey?). Example: picture *Fifty Shades of Grey* as an original script seeking a studio production deal. No shot! Zip! Nada! Rejection city! Self-published as the very successful first book of a trilogy, studios were tripping all over themselves for the film rights. To date, that trilogy has sold over 125 million books worldwide. English author, E. L. (Erika) James, a former studio manager's assistant at the National Film and Television School (Beaconsfield), sold those film rights, with real upside, for a fortune.

As we shall see in my section on Consolidation below, increasingly, the definition of percentage upside for television production is vaporizing, particularly as streaming services do not want to report viewership or be forced to track exploitation revenues. In feature distribution, "net profits" have become an illusory waste of paper. Replaced by more meaningful definitions of "breakeven" often embellished with box office bonuses as advances against percentage upside, it still remains that except for that short list – *my category of five* types of films listed above – the probability of significant upside from a theatrical film appears to be relegated almost exclusively to the majors and their specialty labels.

Bottom line: the places where talent can expect to make huge salaries and upside may still exist, but those opportunities are rare and far between. For most of us in this industry, we are going to work twice as hard to make half as much on the rest. The individual units of production have multiplied, but the audience has not. So, while aggregate earnings across the entire spectrum may have gone up, it is spread across a vastly greater pool of content. There are still big winners,

but under the law of averages most of us will make content for less, a factor that only will be multiplied by my next section.

IV. Consolidation.

JASON BLUM
Producer, *Get Out, Whiplash*
"I've never felt the nervous energy in Hollywood that I've felt over the last 12 months, and it increases every day. There's an uncertainty about the future, because the change is happening in an incredibly dramatic way… I make a show for Apple. They sell a million more phones — how are you ever going to connect those two things? With Amazon and Apple, they don't ever have to be just in a profitable business on movies and TV shows. That's crazy! And it makes people go nuts, because people have worked so hard to put a business model around content, and now they're competing with people who don't need to make that profit." NY Times, June 20, 2019

The future seems to belong to those who control the most content. Netcasters like Netflix, Amazon and Hulu have staggering values, easily competing with old-world content monoliths. With 5G mobile access just around the corner, the ability to view elegant, rich media content, delivered with almost no latency at download speeds that *start* at 10 times 4G speeds, being able to provide massive of "whatever I want, when and wherever I want it" has become a corporate goal for major media players around the world. Younger eyes – Y and Z generation – have no issues with a small, smart phone screen… older viewers, it's a push! Tablet-size?

But is there a limit? Consumers are being charged left and right for online/mobile subscription fees while some streamers have managed to bury those fees with bundled packages (internet carriers/mobile providers, Web-retailer/streamer Amazon, etc.). Cable is/was expensive, but is the aggregation of cord-cutting alternatives turning out to be even pricier? Add an expected recession, and will the cord cutters start paring their selections to just a few "vital" services? Those with the most "best" content? Will AVOD (advertiser-supported video on demand streaming) grow? Or will advertiser skepticism and more reflective metrics create further credibility, and hence revenue, challenges there too?

We all sense that the numbers on the wall for traditional pay television are not particularly encouraging; many such services have added digital subscription services (OTT, over-the-top) as insurance policies. "Subscriptions to traditional pay TV remained flat at 65 percent, says [accounting/consulting giant] Deloitte [in the survey noted below], which changed the way it asked about pay TV, so the 2017 data is not directly comparable to 2018's… Many households (43 percent) have both pay TV and a streaming subscription. More than half (52 percent) of Generation X consumers (ages 36-52) do.

Let's start with the big picture: "Last year, half of Americans aged 22 to 45 watched zero hours of cable TV. And almost 35 million households have quit cable in the past decade… All these

people are moving to streaming services like Netflix (NFLX). Today, more than half of American households subscribe to a streaming service… The media calls this 'cord cutting.'

"This trend is far more disruptive than most people understand. The downfall of cable is releasing billions in stock market wealth… Combined, America's five biggest cable companies are worth over $750 billion. And most investors assume Netflix will claim the bulk of profits that cable leaves behind… So far, they've been right. Have you seen Netflix's stock price? Holy cow. It has rocketed 8,300% since 2009, leaving even Amazon in the dust…

"But don't let its past success fool you… Because Netflix is not the future of TV. Let me say that one more time… *Netflix is not the future of TV*… But for now, let's talk about Netflix's biggest problem…Netflix changed *how* we watch TV, but it didn't really change *what* we watch… Netflix has achieved its incredible growth by taking *distribution* away from cable companies. Instead of watching *The Office* on cable, people now watch *The Office* on Netflix.

"This edge isn't sustainable… In a world where you can watch practically anything whenever you want, dominance in distribution is very fragile… Because the internet has opened up a whole world of choice, featuring great *exclusive* content is now far more important than anything else…

"Netflix management knows content is king. The company spent $12 billion developing original shows last year. It released 88% more original programming in 2018 than it did the previous year… And spending on original shows and movies is expected to hit $15 billion this year… It now invests more in content than any other American TV network… To fund its new shows, Netflix is borrowing huge sums of debt. It currently owes creditors $10.4 billion, which is 59% more than it owed this time last year." Stephen McBride writing for Forbes.com, May 21, 2019.

You mean make or break content like HBO's *Game of Thrones*? Or like that massive accumulation of content that Disney controls that will soon be Netflix worst nightmare? We know. Traditional television is fading fast. Content consumption patterns are changing almost as fast as the weather. Through all of this, Netflix continues to borrow heavily, debt predicated on continued growth. But what happens when a market gets saturated – not very many households left to sell – or new competition puts pressure on pricing and choice? See some serious issues down the road for Netflix? Exactly how fast is all this going to happen anyway? Faster than most think.

"Traditional pay-TV subscriptions do continue to trend downward. Last year, the major pay-TV providers lost about 2.9 million subscribers, after accounting for about 640,000 new subscribers to streamed live TV services such as Sling TV and DirecTV Now, according to Leichtman Research Group. Overall 89.1 million subscribe to pay TV, down from 92 million in 2017, the research firm says." USA Today, March 19, 2019. But it's not just the major pay services that are suffering; it's a macro-trend. And entertainment conglomerates are more than acutely aware of these changes, as I will illustrate in greater detail later.

As we have seen, most recent reports illustrate how "cord-cutting" is just accelerating across the board, and clever repackaging into fewer available networks ("skinny bundles") isn't stemming the hemorrhaging. "The pace of cord cutting is continuing to accelerate this year, according to a new Convergence Research Group report, with 4.56 million TV households opting to ditch pay TV. By the end of the year, 34% of U.S. households won't have a traditional TV subscription, according to the research company's latest 'Battle for the American Couch Potato' report.

"In the report, Convergence estimated that the pay TV industry will see a 5% decline in pay TV subscribers in 2019. That's up from 4% in 2018, when an estimated 4.01 million U.S. subscribers ditched their TV service. Based on the top 66 online video services, the number of streaming subscribers will actually surpass the number of traditional pay TV subscribers this year (households can subscriber to both).

"Attempts to convert cord cutters to skinny bundle subscribers won't pay off for the industry, Convergence predicted. 'With ARPU [average revenue per user] half the traditional TV average, lackluster margins, programming gaps and technical issues, live multichannel OTT provides little counter to category killers Netflix & Amazon that sell at lower price points and essentially without advertising,' the report outlined. 'We believe a number of OTT plays, including large and niche, will fail due to insufficient subscriber traction, cost, and competition.'

"Altogether, online video services are poised to bring in $22 billion in 2019, up from $16.3 billion in 2018, according to the report. Last year, that revenue already grew by 37%. However, even with this growth, traditional pay TV is still expected to bring in more than 3 times as much money per household, and more than 4 times as much across the entire industry, as much as over-the-top video." Variety.com, April 22, 2019

Desperation is driving some providers to attempt to stem their losses by increasing the prices of even their cheapest skinny bundles, which in turn drives away potential subscribers. "The price for the cheapest DirecTV Now bundle went from $35 to $40 last summer, and the telco phased out virtually all of its promotional pricing, which allowed some wireless subscribers to stream DirecTV Now for as little as $10 per month.

"The latter already contributed to significant defections over the holiday quarter. Over the past two quarters, AT&T lost a total of 350,000 DirecTV Now subscribers. It's likely that the service will see additional cancellations from price-sensitive customers in the coming months: AT&T further increased the price of the cheapest DirecTV Now bundle to $50 per month in April…

"[Even] new entrants [like Hulu and YouTube TV] may not be immune to defections as the prices for these so-called skinny bundles are getting fatter across the board. Sports-focused fuboTV announced a $10 price hike in March, and Hulu and YouTube TV both raised their prices by $5 over the past couple of months.

“These massive pay TV defections are increasingly impacting the media industry at large. Discovery reported a 4% decline in subscribers to its cable networks for Q1, despite the addition to online TV bundles… [Research firm, BTIG, LLC’s analyst Richard] Greenfield expects that cord cutting will also ‘negatively impact broadcast and cable network programmer retrans/affiliate revenues’ in the current quarter. And he doesn’t expect online TV bundles to make up for those losses, despite the fact that programmers get paid more per online subscriber since ‘churn is dramatically higher’ for online bundles.” Variety.com, May 3, 2019. The ship is sinking, and moving the leaks around isn’t going to reverse the obvious.

The trends are even more pronounced, particularly as you look at millennials and Gen-Z: “For example, 70% of Gen Z households had a streaming subscription, closely followed by millennials at 68% and Gen X at 64%. About 70% of Gen Z and millennials stream movies compared with 60% of Gen X viewers on a weekly basis. Some 96% ‘MilleXZials’ multitask while watching TV.” Variety.com, March 20, 2019.

When you mix in the general population, the streaming numbers are less pronounced. “Parks Associates' OTT video research finds household spending on subscription OTT video services has held steady for three years, averaging just under $8 per month since 2016. Given the growing adoption of OTT video services over the past three years, these figures suggest that adoption of multiple services or expensive services by some consumers is offset by a larger base of consumers who either subscribe to one or two relatively inexpensive services, including 30 percent of consumers who do not spend any money on OTT video services.” MENFN.com, March 20, 2019. For those households with streaming services, they average a much larger $38 per month, which is growing fast.

Thus, it is clear that television as a medium is rapidly migrating into “all digital,” mostly as a subscription-fee-supported format (streaming video on demand, SVOD) with some AVOD and hybrid subscription/advertising platforms in the mix. AVOD is sneaking up on the industry with some surprising numbers. Streaming service Hulu is an A/SVOD hybrid, but “the majority of Hulu subscribers are on the $5.99-per-month ad-supported plan, which is half the price of the $11.99 no-commercials version.” Variety.com, May 29, 2019. Is this a reflection of increasing consumer price-sensitivity?

Deloitte examined these Web-delivered-content trends in its latest and 12th annual Digital Media Trends survey released on March 19, 2019, which polled 2,003 American digital consumers from December of last year through February of 2019. 69 percent of those surveyed subscribed to at least one SVOD service (up from 55 percent last year), with the average such consumer subscribing to three.

“Even as more consumers subscribe to video delivered over the internet, nearly half (47 percent) of those surveyed say they are experiencing subscription fatigue… There's now more than 300

streaming services to choose from – up from 200-plus a year ago – and consumers may be feeling overwhelmed, says Kevin Westcott, Deloitte's vice chairman for U.S. telecom, media and entertainment.

"'Well over half (of consumers) say they are frustrated when shows they like disappear or are no longer on a streaming service and that they have to have multiple subscriptions to get what they want,' he said. 'So there is a little bit of subscription fatigue.'

"Those consumer sentiments could concern a marketplace that's bracing for the arrival of two major players later this year – a Disney+ subscription service with Disney, Pixar, Lucasfilm and Marvel movies and original TV series, and an AT&T offering with HBO [to be available online solely through Warner's nascent streaming service] and other Time Warner content – and an NBCUniversal subscription service in early 2020.

"Also growing: subscriptions to streaming music services such as Spotify and Apple Music (41 percent, up from 26 percent a year ago), and video game services including Xbox Live and PlayStation Plus (30 percent vs. 26 percent last year).

"These consumer behaviors could lead streaming providers to develop 'the next generation of the home entertainment platform,' Westcott said. Such services would have coveted original content, but also 'a broad swath of entertainment options inclusive of music and games,' he said. 'It may not be their own content, but they have to have that available to try to keep me under their umbrella.'" USA Today.

Streaming is big business and getting bigger, $2.1 billion a month here in the United States. These numbers are great motivators. Fatigue or not, there is a rush among entertainment conglomerates, with the cash and credit to engage in the race, to aggregate as much content under one roof as possible. They believe that this is the way to ensure that as consumers ultimately pick and choose which services to keep and which to cut, these massive content providers will be on that "must subscribe" list.

But then why is CBS, which has its eyes on its former owner Viacom, offering Lionsgate $5 billion for that mini-major's Starz pay television channels? Until that offer, Lionsgate's stock had plunged 40% in a single year, analysts saying it failed to replace aging motion picture and television franchises. Without Starz, what is Lionsgate anyway? It is an offer that's simply too good to ignore, but what exactly would Lionsgate do that substantial sum? If they couldn't manage to create value for the rest of the company, what would their business plan be going forward without their greatest asset?

For CBS? It's content, library fare and original series. And content, even from an old-world pay service, can easily migrate to a full-digital only stream. Lionsgate countered at $5.5 billion, and the deal slid from view. Permanently? Who knows? CBS then turned its attention to acquiring its

former parent, Viacom, which owns Paramount, Nickelodeon, the MTV Networks to name just a few of its assets. CBS is hungry. It's main network (broadcast and its streaming component) plus Showtime (pay television) just aren't enough to compete with the rising streaming behemoths. So…. Time will tell who the winner and losers are, but consumers are getting new ways to receive content.

There are future trends suggesting that consumer demand for content is likely to escalate as 5G mobile services come online and as Uber, Lyft and driverless cars give passengers even more time to consume content. The volume of such content offers opportunity, but that same volume suggests that the revenue margins will only get thinner. Some are predicting that the chopping up of a consumer day, clearly referring to changing commuting patterns, will give rise to greater demand for short-form audio-visual content, mostly intended for small-screen smart phones. Certainly, Jeffrey Katzenberg's and Meg Whitman's billion-dollar Quibi is being built on that assumption. One way or another, the world of content control seems increasingly divided between buyer/aggregators and exit strategy sellers. Existential.

That little mobile-viewing trend just might not be so little, and 5G is going accelerate the transition. "In the United States, adults will spend an average of 3 hours and 43 minutes each day on their smartphones, feature phones and tablets this year, eight more minutes than they'll spend watching TV, according to a forecast released [June 5, 2019] by research firm EMarketer.

"The change has been years in the making, as smartphones have become nearly ubiquitous and the ways people use their devices have shifted. Phones now let you do more than steal quick glances at social media, and streaming shows and movies on the smaller, portable screens has become commonplace… 'There is far more content today than there was even a couple of years ago,' said Monica Peart, a senior forecasting director at EMarketer, referring to the growth of streaming platforms such as Netflix and Hulu. 'All of this is driving the need or desire to be on the smartphone.'

"The gap between the amount of time spent on mobile devices and TV has narrowed dramatically over time. Last year, American adults spent nine minutes more watching TV than looking at their phones and tablets, EMarketer said. But TV watching used to be more dominant; just five years ago, adults spent two hours more watching TV than using mobile devices, the firm said.

"The forecast follows other reports, including one by Nielsen, that indicate audiences are spending less time with traditional television. In the third quarter of 2018, Nielsen said, American adults on average spent 4 hours and 14 minutes each day on live or time-shifted TV, 11 minutes less than a year earlier. Time spent on apps and the web on smartphones and tablets in the third quarter was 3 hours and 14 minutes, 17 minutes more than a year earlier, Nielsen said." Los Angeles Times, June 6, 2019. Which content will benefit most from the migration to this small

screen? Too much content? Confusing to consumers? Overwhelming? A big shakeout? Time will tell.

While this article has focused mostly on audio-visual content, there are lessons to be learned from our neighbors in the music business. Just as digital delivery is altering the film and television industry in a huge way, changing the landscape on access to audiences and slowly replacing older models, the Napsterization of the music industry moved the big bucks for major artists to live performances – hmmm, sort of like the domination of the theatrical world (especially in the U.S.) by high-production value/"must see" motion pictures; the rest have found "new TV" – and almost totally replaced physical compact discs with downloads and increasingly rapidly by streaming services.

From a "moribund and falling" music business model two plus decades ago, the transitional growth in digital delivery has been monumental in recent years. "The global recorded music market grew by 9.7% in 2018 — its fourth consecutive year of growth — to $19.1 billion, according the latest annual report from the International Federation of the Phonographic Industry (IFPI).

"Streaming revenue grew by 34.0% and accounted for almost half (47%) of global revenue, powered by a 32.9% increase in paid subscription streaming, according to the report. There were 255 million users of paid streaming services at the end of 2018, with paid streaming accounting for 37% of total recorded music revenue. Growth in streaming more than offset a 10.1% decline in physical revenue and a 21.2% decline in download revenue." Variety.com, April 2, 2019.

Ah… it is clear that glomming on to content, volumes and volumes of it, is increasingly viewed by the behemoth entertainment conglomerates as their only path to survival. Owners of digital systems are be equally aware that having lots of branded content could well be the key to keeping consumers on their networks. And so it is and has been for a while.

Comcast bought NBC/Universal including all of its basic networks. AT&T bought DirecTV and then Time Warner (now WarnerMedia, which includes Turner, CNN and HBO). And then there's the voracious Disney: In 1996, Disney bought Capital Cities/ABC for $19 billion, in 2006 Disney acquired Pixar for a combined stock and cash value of $7.4 billion, in 2009 it picked up Marvel for $4.3 billion (in 2013, $100 million more to buy out distribution rights to a few Marvel titles held by Paramount), buying Lucasfilm in 2012 for $4.06 billion, but the piece de resistance, 21st Century Fox (minus the Fox lot and some broadcast assets retained by the Murdoch family and their shareholders), was acquired by Disney for a whopping $71.3 billion.

The driving force behind such massive acquisitions? CEOs watched nothing entertainment companies grow so fast that their values equaled or exceeded the values attributed to entire major studios. Streaming and the extreme values that both Amazon and Netflix generated in a

very short period of time. From its founding in 1997, Netflix has grown into the largest streaming service in the world, about 150 million subscribers worldwide as of this writing.

"Netflix — whose name has practically achieved verb status — was the fastest-growing brand from 2018-19 among American companies, according to a new study by Brand Finance, a global brand-valuation consulting firm.

"The streamer's estimated brand value more than doubled over the past year, growing 105%, to $21.2 billion, per the study. Brand Finance calculates values of brands using 'royalty relief' methodology, which involves estimating the likely future revenue that are attributable to a brand by calculating a royalty rate that would be charged for its use." Variety, March 28, 2019. The very word, "Netflix," send quivers of fear and anger through the bodies of big-company CEOs in the entertainment industry. Time Warner, Disney, Comcast, and AT&T CEO's were no exceptions. Obviously. They were playing catch-up, and they clearly did not like dealing from so far behind.

There's a lot of competition brewing, and many believe that has Netflix maxed out, at least in the U.S. market. The PwC Global Entertainment & Media Outlook 2019–2023 (released June 5, 2019) said it simply: "Netflix appears to be nearing its peak subscriber point in the U.S… The first-mover advantage in streaming video that Netflix has capitalized on to date continues to be eroded, as the industry begins to fragment, with more and more companies entering the market, from pay-TV heavyweights to specialized, niche players." The recent acceleration of major corporate mergers and acquisitions in the entertainment space seemed to be focused on building streaming competition. The dollars involved were staggering.

After the Fox acquisition in March of this year, which required approval from governments all over the world, Disney controlled a full 27% of the U.S.-based theatrical motion picture industry, picked up a greater ownership share of Hulu (in May, it subsequently closed a deal with Comcast to buy the rest) and began a push to create a new streaming service able to compete with Netflix.

In the course of its negotiations to acquire Fox, facing competition from Comcast, Disney was forced to up its bid by $20 billion, and that extra cost literally pushed Disney to justify that extra sum by generating extra revenue fast – not really possible – or by slashing costs every way it could. In March, when the acquisition closed, it announced an immediate cut of Fox/Disney employees from top to bottom of an initial 4,000 employees, with experts predicting at another 3,000 would be let go in the near term. Disney issued a "layoff" warning on May 15, 2019.

With the two most profitable motion picture franchises in history, *Avatar* and the recent *Avengers: Endgame*, ownership of Hulu, you'd think Disney is just killing it: "Conventional wisdom may hold that the Walt Disney Co. has been firing on all cylinders, with its $71.3 billion partial merger with 21st Century Fox closed, streaming service Disney+ on pace to launch Nov. 12 and *Avengers: Endgame* rewriting the record books. But there are signs that a perfect storm of (gasp!)

mediocrity for the $240 billion conglomerate may be on the way thanks to digital investments and the film calendar — at least for the short term.

"Disney CFO Christine McCarthy disclosed May 8 that the creation of Disney+ and ramp-up of ESPN+ will dent operating income to the tune of about $460 million in the current quarter alone. The company intends on spending about $2.5 billion on original and licensed content for Disney+ in fiscal 2020, rising annually to $4.5 billion in fiscal 2024. Peak operating losses for the upcoming streamer are expected from 2020 to 2022 before it hits profitability in 2024. Oh, and its $400 million investment in Vice Media is essentially worthless.

"These digital expenditures will occur as Disney services its debt load, which swelled to $57 billion post-Fox, and as its TV business suffers from 2 percent annual cord-cutting (operating income at Disney Media Networks fell 3 percent in fiscal 2018). Plus, CEO Bob Iger [completed a purchase of the remaining non-Disney stake in Hulu, which required] Disney to shell out about $5 billion to purchase Comcast's one-third stake in that streamer.

"'The costs are definitely making their way to the financial statements,' says Moody's lead analyst Neil Begley. 'I'd say Disney is entering a high-scale investment cycle, and they'll eventually feel a hangover.' And Disney may also have to contend with a (relatively!) soft 2020 film slate, with *Avatar 2* pushed a year to Dec. 17, 2021, while the next *Star Wars* movie won't debut until Dec. 16, 2022." HollywoodReporter.com, May 13th. Are you listening, entertainment bar?! How do studios respond to such pressures in their deal-making?

Here's another little tidbit apparently under consideration, how Disney may well deploy its new and massive leverage against competitive program suppliers with their Hulu streaming service: "Most shows in the future will originate from Disney-owned studios, but where another studio wants to sell a show to the service, Hulu will ask that a Disney shop (like ABC Studios or 20th Century Fox Television) come on as co-producer, ensuring long-term profit sharing." SeekingAlpha.com (investment analysis), June 21, 2019.

And then there's the combined WarnerMedia AT&T debt of $170 *billion* generating somewhere around $6.7 *billion* a year in interest payments alone. It's no secret that this new conglomerate is putting together its own massive layoff and cost-cutting plans. Turner, CNN and HBO, part of the WarnerMedia group, have already offered buyouts to long-standing employees willing to leave their companies early. Having passed global judicial and administrative reviews with little resistance, these combinations are here to stay.

Even with a very successful final season of *Game of Thrones* (WB/HBO), the post-merger world of AT&T/WarnerMedia did not begin with numbers that made anyone feel good, well beyond the massive debt noted above. With all the expect red ink, all that debt, AT&T needed to ramp up its cash flow. In March of 2019, "AT&T [began] overhauling its DirecTV Now pricing and packaging

strategy — including hiking prices for existing customers by $10 across the board — a move that could lead to more subscriber losses for the company's flagging pay-TV business.

"At the same time, AT&T [announced that it] is launching two new DirecTV Now packages: Plus, at $50 per month for up to 46 channels; and Max, $70 per month for up to 59 channels. Both include AT&T-owned HBO, HBO Family and HBO Latino along with networks from WarnerMedia (Turner), NBCUniversal, Disney and Fox, and exclude channels from A+E Networks, AMC Networks, Discovery and Viacom." Variety.com, March 13, 2019. The old DirecTV packages were no longer available to new subscribers. A little over a month later, the initial results were in.

"AT&T missed on the top-line with first quarter 2019 sales coming in under Wall Street targets. DirecTV continued to bleed subscribers — including a net decline of 83,000 DirecTV Now customers — partially offset by 3.3% revenue growth at WarnerMedia although sales in the media segment were lighter than analysts expected.

"The telco's revenue for Q1 of 2019 was $44.83 billion, with net income of $4.10 billion (down 12% from $4.7 billion in the year-ago period). Adjusted earnings per diluted share were 86 cents. Wall Street analysts' consensus estimates were revenue of $45.1 billion and EPS of 86 cents.

"WarnerMedia revenue of $8.38 billion was up 3.3% year over year, below analyst estimates of $8.45 billion. Each division reporting operating income gains. Warner Bros. operating income was up 42.8% on theatrical revenue gains of 12.7% (largely from 'Aquaman' carryover); Turner was up 7.0%; and HBO grew 6.0% year over year.

"HBO revenue declined in the 7% in first quarter, to $1.5 billion, which was related to its ongoing carriage dispute with Dish Network since November 2018, according to AT&T. Turner revenue was down 0.4% in Q1, to $3.4 billion; Turner ad revenue dropped 6% in Q1, which AT&T said was primarily due to the shift of NCAA Final Four games (which occurred in Q2). Warner Bros. revenue was $3.5 billion, up 8.6% year over year.

"AT&T noted that the 'Game of Thrones' season 8 premiere broke HBO's viewership records — and the show drove record subscribers to HBO Now — and that DC Entertainment's 'Shazam!' has already grossed more than $300 million worldwide.

"Meanwhile, the AT&T Entertainment Group lost a whopping 544,000 net subscribers for DirecTV and U-verse TV, to stand at 22.4 million at quarter's end (down 2.4% sequentially). It dropped 83,000 DirecTV Now subs, declining 5.2% in the period to 1.5 million over-the-top customers, as AT&T ended promotional pricing and hiked rates for OTT subscribers. Revenue in the Entertainment Group (which includes AT&T's broadband and legacy wireline businesses) dropped 0.9%, to $11.33 billion, while operating income increased 12.9% to $1.48 billion.

"The company's key Mobility wireless segment generated revenue of $17.57 million (up 1.2% year over year), with a 4.5% decline in equipment sales offset by higher service revenue. Wall Street had pegged $17.65 billion in Q1 revenue for the segment. AT&T reported 80,000 postpaid phone net adds vs. 49,000 postpaid net adds in the year-ago quarter." Variety.com, April 25, 2019. Ouch!

Some said it was a tech/telco giant trying to compete in a non-linear story-telling world, an uncomfortable marriage at best. Would that mean that the Fox-Disney merger had a better chance, since Disney was well-established in the original content space? What would the WarnerMedia streaming universe – conveniently labeled "HBO Max" – look like, and how would it generate enough content to compete with Netflix and Disney+? Whatever the underlying story, the sheer dollars at risk put huge pressures on these new media structure at levels never experienced before in the entertainment industry. They also created new, mega-powerful combinations that seemed able to dictate massive competitive changes imposed on an already-terrified Hollywood. With a hint of desperation to "make it work" at all costs.

You can bet that Disney and WarnerMedia have already started looking very carefully at reducing what they pay to produce content – are you reading this, lawyers? – pay for people who do not generate more than their cost and the spend on overhead. It isn't going to be pretty, and it presents an opportunity, in a field of fewer networks and studios, for every such company in entertainment to pay less to providers and talent. It's all about the big boyz now. Even as Congress moves to level the playing field to favor consumers in some arenas, like reversing the F.C.C.'s elimination of "net neutrality" requirements – which reversal allows carriers to prioritize online transmission of content or delivery ("discriminate" or "play favorites" might be better descriptions) – pro-business-crony Donald Trump has promised to veto that effort.

Feeling the pressure yet, everybody? Consolidation, merger fever and new business growth, has also redefined the talent agency business. In the spring of 2019, as agents and the Writers Guild of America (WGA) battled over the greatest profit center for all the larger agencies – a percent of the aggregate budgets/license fees paid to such agencies as "packaging commissions" plus direct content ownership – television networks and program suppliers were grinning in the hopes of getting rid of those fees entirely. Let the agents go back to the 10% of talent and rights fees that they gave up in order to get the vastly higher packaging commissions. Laughing harder because everyone was already feeling the downward pressure on talent and rights fees and payments.

It was an old story, at least as far as Hollywood was concerned. Back in the 1960s, under the John F Kennedy administration, MCA/Universal found itself in a similar bind: an agency with a massive production capacity. "In the midst of the grand jury's [antitrust] investigation, MCA purchased Universal Pictures and its parent company, Decca Records. The government immediately went

to court, seeking to block MCA's takeover of the corporation. However, after lengthy negotiations between attorneys for the Justice Department's Antitrust Division and MCA, a consent decree was issued and the case was considered closed. The litigation forced MCA to choose whether it wished to be either a talent agency or a production company. Considering that its production efforts yielded nearly ten times more money than the talent agency, the decision was an easy one: MCA dissolved its talent agency." Dan E. Moldea, *Dark Victory: Ronald Reagan, MCA, and the Mob* (Viking Press, 1986), Chapter One. Cut to: present day.

Relying on revenues from personal service income, money tied to the very personal relationship between agents (who are notorious job-hoppers) and individual talent, was not a business plan that Wall Street investors and fund managers found reliable. Celebrity and fame were hardly permanent, particularly in an era of changing values. Packaging entire television series and directly owning the content itself – asset-based structures – were the stuff financiers understood.

The larger and most powerful agencies had engaged in heavily-leveraged mergers and acquisitions, and the debt levels required a growth-directed business strategy. These agencies *needed* investors now! Some agencies carried *billions* of dollars of debt. If payment deadlines passed without extension, if interest rates climbed, they faced ruin. Loyalty to individual creative talent, starting with writers, was clearly no longer the driver of the "agency" business, perhaps now a misnomer.

Amidst all of this industry reconfiguration, larger talent agencies have taken on private equity partners, diversified into parallel businesses, are as much content producers and distributors, corporate consultants with marketing and data-metrics groups, etc., etc. To create liquidity, respond to their existing investor demands for higher-level rates of return and manage large tranches of debt with approaching payback dates, there has been a pressure to turn service-driven agencies into asset play.

On May 23, 2019, Endeavor Group Holdings, Inc. (the parent of the old-world William Morris and Endeavor legacy talent agencies/later WME) filed an S-1 (intention to file a public offering) with the Securities and Exchange Commission. Did underwriters Goldman Sachs, KKR, J.P. Morgan, Morgan Stanley and Deutsche Bank Securities think this was a good time for an initial public offering on the New York Stock Exchange or did Endeavor feel pressure from its lenders? What is Endeavor anyway? A talent agency or a lot more?

"'There are no other publicly traded companies like this,' says Matt Kennedy, senior IPO market strategist for Renaissance Capital. Kennedy points to the company's lack of free cash flow and a high debt-to-earnings ratio as potential red flags for investors.

"Endeavor is composed of a disparate set of assets — from Professional Bull Riders to the Miss Universe pageant to the Miami Open tennis tournament to the Frieze art fair franchise — which

don't offer a lot of natural synergies to generate economies of scale. In its IPO pitch, Endeavor emphasizes WME's role as a wellspring for relationships with stars such as Dwayne Johnson, who can work across the Endeavor 'platform' to launch live event businesses, secure endorsement deals and licensing and merchandising pacts, as well as launch a YouTube channel and a production venture, all while WME helps him land top movie and TV roles…

"The financial figures disclosed in the company's prospectus filed May 23 with the Securities and Exchange Commission show that Endeavor is burdened by heavy debt, steady losses in some units, negative cash flow and big capital needs for start-up efforts such as Endeavor Content and Endeavor Streaming… After a spree of more than 20 acquisitions since 2012, Endeavor has more than doubled in size and now has 7,000 employees in 20 countries.

"There are questions about the long-term health of the company's single biggest driver of earnings, the mixed martial arts giant UFC. And WME, the agency that's central to Endeavor's strategy of leveraging its access to top-tier talent, is in the thick of a nasty fight with the Writers Guild of America that threatens a key source of income: TV series packaging fees [charging a percentage of the budget of production plus a hefty piece of the upside; the Guild forced writers to fire their agents who would not accept a new code eschewing packaging fees in April of 2019]. The sudden loss of WME's writer clients in April, amid the industrywide dispute, underscores the volatility of the talent representation business." Variety.com, June 4, 2019. That talent agency war with the Writer's Guild would seem challenging to say the least.

The working relationship between agencies (represented by the Association of Talent Agents – ATA) and the WGA had been governed for 43 years by a negotiated Artists' Managers Basic Agreement. When that agreement expired, the Guild set about trying to force the agencies to restore their primarily loyalty to the creative individuals behind everything Hollywood does. They demanded a new code of conduct from agencies. Packaging commissions and the ability to fund, operate and own production companies was, in the eyes of the WGA, an unsustainable conflict of interest. To the agencies, not being able to engage in this lucrative aspect of the entertainment industry represented an inability to attract and hold traditional investors, now desperately needed to support these huge new agency-based combinations.

Litigation between the Guild and ATA-member agencies intensified. Challenging traditional statutory and judicial antitrust exemptions accorded labor unions, agency giants WME, CAA and UTA claimed that the WGA had stepped outside of that exemption and was exerting unprotected market manipulation.

As of this writing, WGA has forced their members to fire their agents and attempted to allow lawyers and personal managers to negotiate for writers without licensed talent agents in the mix. But under an obviously archaic law, California forbids entertainment employment deals from being secured, or even negotiated, by anyone other than licensed talent agents… even by fully-

licensed lawyers. While New York's restrictions are less draconian (but woe to the NY lawyer who sends a client to California to work without an agent in the mix), the ATA announced to the world that they would inform the California Labor Commissioner (or its NY counterpart) as to lawyers and managers who were violating the law. Aside from being able to issue "cease and desist" letters, the California Labor Commissioner has let it be known that where there were such employment transactions, such unlicensed representatives were not entitled to be paid. Ugly! More disruptions seared through the entertainment universe.

The industry also found other material consumer patterns changing. Competition? Apples, oranges and video games? According to the April 11, 2019 Variety, "In a study of 94 countries, Eurodata estimated that average daily TV viewing time in 2018 was down only one minute from the previous year, although that number varied significantly from territory to territory – in the U.S. it decreased nine minutes, whereas in parts of Asia the number grew.

"According to Eurodata Worldwide vice president [Frédéric] Vaulpré, 'If we put this into perspective by looking at how these figures change over the long term, in the most recent years, viewing times around the world are down slightly, but are still at a comparable level to the early 2000s. The American continent and Europe have broadly exceeded the global average since the beginning of the 1990s. Over the last 25 years, daily viewing time has been stable in North America and has even increased in South America and in Europe. TV is in good health and is also benefitting from new consumer practices.'"

Nevertheless, there are little hints in those numbers. Nine minutes less in the U.S.? What does that really mean? Netflix sees the real competition for eyeballs only in part from other television programmers… but also from the massive growth of online video gaming. Gamers now average in their mid-30s and are 45% female. Netflix' January 17, 2019 shareholders' report is remarkably candid, making a special reference to the changing competitive landscape: "In the U.S., we earn around 10 percent of television screen time and less than that of mobile screen time,' the report states, noting 'a very broad set of competitors.' Then comes the line, 'We compete with (and lose to) *Fornite* more than HBO.'… According to ***Deadline***, which cites Neilsen estimates, *Fortnite*, a free-to-play game with in-game purchases, generated the most annual revenue of any game in history, $2.4 billion in 2018…

"Video games, in summation, shouldn't be written off. Do you know what the most lucrative piece of entertainment of all time happens to be? It's not a movie or a TV show. It's a video game, *Grand Theft Auto V*, which last April had **sold more than 90 million units** (roughly $6 billion). Now, gaming sales and movie ticket sales aren't exactly comparable statistics, but it's still an impressive number that is routinely lost in this conversation." Nick Romano writing for the January 18, 2019, ew.com (Entertainment Weekly). Nine minutes… and falling.

But competition battles are not just among and between entertainment conglomerates, governments and consumers. There are other forces seeking to redefine entertainment creative relationships from the ground up. Unions and trade associations, long used to some level of statutory and/or judicial relief from antitrust laws may not be happy with governmental agencies deciding to take another look at an industry that Donald Trump appears to hold in particular disdain. Try this little battle on for size: "The Justice Department has warned the Academy of Motion Picture Arts and Sciences that its potential rule changes limiting the eligibility of Netflix and other streaming services for the Oscars could raise antitrust concerns and violate competition law.

"According to a letter obtained by *Variety*, the chief of the DOJ's Antitrust Division, Makan Delrahim, wrote to AMPAS CEO Dawn Hudson on March 21 to express concerns that the new rules would be written 'in a way that tends to suppress competition… In the event that the Academy — an association that includes multiple competitors in its membership — establishes certain eligibility requirements for the Oscars that eliminate competition without procompetitive justification, such conduct may raise antitrust concerns,' Delrahim wrote.

"The letter came in response to reports that Steven Spielberg, an Academy board member, was planning to push for rules changes to Oscars eligibility, restricting movies that debut on Netflix and other streaming services around the same time that they show in theaters.'" Variety.com, April 2, 2019. But even as some biggies are being questioned, the potential of other biggies rising and dominating looms large. Opportunities or another set of gatekeepers?

Indeed, said the agents and lawyers generating income representing talent and rights holders, there's at least one more player who could change everything. One of the biggest companies on earth Apple (NASDAQ: APPL)! Perhaps?! On March 25, 2019, Apple CEO Tim Cook mounted the presentation stage and, after introducing a new Apple credit card format, proceeds to tout Apple's new streaming service. But what followed looked a whole lot like a standard "here's what next season will look like" that the major broadcast networks had been doing for decades. The industry was underwhelmed; you could hear the sigh from executives at Netflix, Amazon, Disney and AT&T.

"How underwhelming? Netflix (NASDAQ: NFLX) was widely expected to face a tough competitor in AAPL's new Apple TV+ video streaming service. Finally! A competitor with really deep pockets. But instead of Netflix stock taking a hit on the announcement, the script was flipped: NFLX closed up 1.45% while Apple stock was down 1.2% at the end of the day." InvestorPlace.com, March 26th.

Are we having fun yet? Litigators perk up your ears. All of this consolidation may have received federal regulatory approval, but it does not vitiate private antitrust violations and the massive complexity that mergers have created for the acquiring companies. While the new behemoths

might be able to mitigate the damage in new agreements with talent and rights holders going forward, these melded entities have to deal with upside agreements inherent in content deals they have now acquired. There are so many new interrelated entities, so many allocations and pricing decisions that are always questionable. No one really believes that "arm's length" pitch. The "Chinese wall" is made of see-through paper.

First, we all need to laugh at any of these new combined studios when they use the word "precedent," always the argument of a weak mind in stagnant times. For example, the day the 21st Century Fox/Disney deal closed, March 20, 2019, ***all*** Fox and Disney precedents died. Totally new company with a totally new structure. Still, Disney has announced all over the entertainment trades that they are placing all their high-profile content on their new streaming services, with less than subtle hints that they will be able to do this at below market rates.

Two years ago, Disney withdrew all of its Disney/Marvel shows from Netflix. Netflix also let Disney know that they were no longer interested in any Disney content, anyway. A complete break? Not exactly. It seemed that way… until you really look: The "Walt Disney Co. parted ways with Netflix Inc. in a public declaration of war. The owner of 'Star Wars,' Marvel and Pixar movies would stop licensing films to the world's most popular paid online TV network. Instead, Disney planned to keep them for its own streaming services.

"Yet the media giant left out a key detail: Under their current deal, every movie released between January 2016 and December 2018 — including epics such as 'Black Panther' — will be back on Netflix starting around 2026, people familiar with the matter said… Similar issues confront other media titans such as NBCUniversal and AT&T Inc., the owner of HBO and Warner Bros. Netflix, which has about 150 million subscribers worldwide, has some of their most-popular shows locked up for years." Los Angeles Times, June 2, 2019. But the handwriting is on the wall, and clearly Disney and its competitor-brethren streaming services are not about to continue to let their product enhance Netflix for long. Big companies feeding their own new or newly acquired services are absolutely going to use their best content to drive up the values of those nascent services. Not Netflix!

Folks who made deals with upside at Fox now are stuck in the Disney universe, and Disney participants are going to watch Disney build a network, probably by placing their work into a Disney streaming network at below market and alienating the other buyers by becoming their competitor. So, Disney can also claim that there are no other buyers for their controlled content.

Why do I think Disney will be dumping its best content into their streaming service at below what that content might otherwise generate in an open bidding? Their fee structure says it all. As Netflix upped its "basic" monthly subscription plan effective in May of 2019 to $8.99, the "standard" plan (adding an additional device and HD) to $12.99 and its "premium" plan (four devices and ultra-HD) to $15.99 and Warner suggesting its HBO/Cinemax-driven SVOD service

(probably going into a beta test in the fourth quarter of 2019 and fully online in the first quarter of 2020) would be between $16-17/month, Disney was looking to begin with an exceptionally low price that should attract consumers.

With pressure on Disney to justify its $20 billion *increase* from their initial offer to acquire Fox (to $71.3 billion), cost controls – from layoffs to cutting content-related expenditures – are the order of the day from both Wall Street and senior management. You can be pretty sure that they are not going to account to upside participants in a way that would reflect full market pricing for content placed on a start-up streaming service.

And then there's the short-content Quibi SVOD service from Jeff Katzenberg and Meg Whitman, noted above, that nobody seems to understand. Mostly small screen smart phone fare. Well-funded, with investments including from Warner Bros., Viacom, NBCUniversal, Sony and both U.K.'s BBC and ITV, Quibi is being sold as scontent for those "on the go." But what would it look like, and how would it compete with the other streaming services? Scheduled to go live as 5G cell phones are rolling out, Quibi is betting on segmented series (two to four hours presented in ten or fewer minute bits) and mirrors Hulu in offering a variable pricing structure.

"According to Katzenberg, the service will have two pricing tiers at launch on April 6, 2020. The first will cost $4.99 with one pre-roll ad before each video segment — a 10-second ad if the video is less than 5 minutes and a 15-second ad for 5-10 minute videos. The ad-free option will cost $7.99. Whitman also said they expect to have approximately 7,000 pieces of content available within the first year…

"Quibi will pay [top content creators their] cost [of production] plus 20% up to $6 million an hour… In terms of ownership, two versions of each series will exist. The first will be the Quibi version divided into segments, which will be owned exclusively by Quibi for seven years. At the same time, the creator of the project will edit together a full-length version with no segmentation. After two years, the creator will fully own the full-length version and can sell it globally." Variety.com, June 8th. Sounds very pricey for a start-up, but if the programming is good enough… A big maybe, even as their first effort in generating ad support seemed positive.

In mid-June of 2019, the company reported that they had booked $100 million is ad sales towards their first year of operation, two-thirds of the entire first year ad inventory. "Advertisers that have committed ad spending to Quibi include Google, Procter & Gamble, PepsiCo, Walmart, Progressive and AB InBev, according to the company." Variety.com, June 19, 2019. With all these streaming services, however, most experts are focusing on Disney+ as the likely winner in the SVOD race.

"Disney+ will launch in the U.S. on Nov. 12, 2019, and will be priced at $6.99 per month, the company announced… The subscription VOD service represents Disney's next major foray into

the video-streaming wars. By pricing it well below Netflix, the Mouse House is betting it can rapidly drive up Disney+ customer base with a mélange of content that appeals to multiple demographics, including movies and TV shows from its Marvel, Lucasfilm's Star Wars, Pixar and Disney brands." Variety, April 11, 2019. Obvious, yes. Subtle, no. Unlike the opposite result when Apple made its streaming announcement (Apple shares down, Netflix up), Wall Street rewarded the Mouse House the day after the above announcement with a stock rise of 11.5%, dropping Netflix shares by 4.5%. And that was *before* they acquired all of Hulu in May of 2019, a service that accelerates Disney's digital streaming capacity.

Want a concrete example of how premium Fox/Disney product is driving Disney+? Love *The Simpsons*, the longest running scripted television series in U.S. history? Starting on November 12, 2019, all 30 seasons will *stream exclusively* on Disney+. Seasons 31 and 32 are already ordered; by the time season 32 ends, there will be a total of 713 episodes. "In its first year, Disney Plus will offer 10 original films and 25 original series, including three 'Avengers' spinoffs… along with nearly all the 'Star Wars' movies, the entire Pixar library and family-focused movies and shows from its Fox library like 'The Sound of Music' and 'Malcolm in the Middle.'

"Disney said it intended to roll out the streaming service in Europe and Asia starting next year. It expects subscribers to total 60 million to 90 million by 2024… 'We are all-in,' [Disney CEO Bob Iger said as he announced his plans]." New York Times, April 11, 2019. While Disney touted an investment in original productions for the channel of $1 billion in fiscal 2020, the content-devouring new channel would need to feast on Disney's vast library at start-up-justified pricing. Represent anyone having upside in a Fox or Disney product?

Smell the opportunity… and the risks? Does the backend now involve puts, fixed payments against a percentage upside – box office bonuses in film and fixed sums as more series cycles are produced against points for TV. Litigators start your engines, from the fees one operating division of affiliate pays another – no matter what the contract appears to waive – to the allocations of revenues between commonly-controlled companies… to potential antitrust violations.

V. Conclusion.

If you aren't shaking in your shoes, you should reread the above. Add to this quagmire the impact of bankruptcies past – from MGM to The Weinstein Company – to the bankruptcies that will inevitably ripple through the entire industry. Rights and income lost, as post-Chapter 11 libraries are now bought and sold like baseball trading cards.

Notice how I mostly skipped over social media? Oh, a little on privacy and a touch of "fake news" regulation, but the *phenomenon* of social media is now old news. While issues still abound, Europe and Asia will beat up Facebook, Twitter, Google, etc., etc. Don't worry about it. But

practicing law in this brave new world requires much more than complicated statutory and compliance. Pretty much everything has changed.

Now is not the time to use those same-old, same-old forms. Most forms are going to need a ground up redo. It is also not the time to take your last deal and up it by 10% on your next; deals are likewise going to require a ground-up revaluation, from cash upfront to upside or the very necessary substitutes we need going forward.

Entertainment lawyers, unite. Change is upon us. Change like we have never seen before. Hyper-accelerating change. Prepare! One more time: Equally, now is the time to laugh, and laugh hard, when some studio or network business affairs executive utters a word that needs to be banned from the entertainment industry forever: PRECEDENT.

OPTION AGREEMENT
SCREENPLAY

As of August _____, 2017

_____
_____
_____

Re: [NAME OF PROJECT]

Dear _____,

The following will confirm the Agreement between _____, of _____ (sometimes called "Producer"), and you (sometimes called "Writer"), regarding the screenplay written by you entitled "_____" ("the Screenplay"). The first theatrical feature based on, or substantially based on, the Screenplay is called the "Picture".

1. Option: In consideration of the sum of One Dollar ($1.00) (the "Initial Option Fee") and other good and valuable consideration, Writer hereby grants to Producer the exclusive option ("Option") to purchase all rights in and to the Screenplay, for exploitation in all media now known or hereafter devised or discovered throughout the universe, in perpetuity, including but not limited to motion picture, television, home video, digital transmission, ancillary, subsidiary, underlying and merchandising rights to the Screenplay, as such rights are more fully set forth in Exhibits "A" and "B" affixed to this agreement.

2. Options

(a) First Option Period: The length of the term for the initial Option ("First Option Period") shall be for two (2) years following the date of this Agreement.

(b) Second Option Period: Producer may extend the Option for an additional eighteen (18) months from the end of the First Option Period ("Second Option Period") by giving written notice to Writer, along with a payment of One Dollar ($1.00) prior to the expiration of the First Option Period.

3. Purchase Price:

(a) If Producer exercises the Option, as consideration for all rights granted and assigned to Producer and for Writer's representations and warranties, Producer agrees to pay to Writer, and Writer agrees to accept, _____ percent (_____%) of the direct certified production budget for the Picture less contingencies, financing costs, bank fees, interest, and bond fees (the "Purchase Price"), payable upon exercise of the option to acquire the Property or the commencement of principal photography of a Picture based on the Screenplay, whichever occurs first, but in no event less than _____ Dollars ($_____) and not more than _____ ($_____).

(b) The Purchase Price shall be paid to you upon our notice to you that Producer is exercising the Option, but not later than the first day of principal photography of the Picture.

(c) In addition to the above and if you receive screen credit as a writer for the Picture, you shall be paid a sum equal to either (i) _____ percent (_____%) of 100% of the Net Profits, if any, received by Producer in the United States in U.S. dollars from the distribution and exploitation of the Picture if you are accorded a shared Screenplay By or Written By credit on the Picture; or (ii) _____ percent (___%) of 100% of the Net Profits, if any, received by Producer in the United States in U.S. dollars from the distribution and exploitation of the Picture if you are accorded a sole Screenplay By or Written By credit on the Picture.

(d) For the purposes hereof, "Net Profits" shall be defined, computed, accounted for, and paid as follows:

(i) if a single entity both finances one hundred percent (100%) the production of the Picture and distributes the Picture in all territories of the world, then in accordance with the standard definition utilized by such entity, subject to such changes as the parties may agree to in writing following good faith negotiation within customary motion picture industry parameters for a person of Writer's professional stature; provided, however, that the definition of net profits applicable to Writer hereunder shall be no less favorable than the definition applicable to the individual producer of the Picture (excluding any so-called over budget penalties or cross-collateralization provisions);

(ii) if one entity does not so finance and distribute the Picture, then in accordance with Producer's standard definition of net profits, subject to such changes as the parties may agree to in writing following good faith negotiation within customary motion picture industry parameters for a person of Writer's professional stature; provided, however, that the definition applicable to Writer hereunder shall be no less favorable than the definition applicable to the individual producer of the Picture (excluding any so called over budget penalties or cross-collateralization provisions).

4. Rights Granted: In consideration of the above Purchase Price, and on condition that the Option is timely exercised and the Purchase Price is paid to Writer, Writer hereby grants and assigns to Producer all rights (including but not limited to motion picture, television, home video, digital transmission, ancillary, subsidiary, underlying and merchandising rights, and Rental and Lending Rights as defined and agreed to in Schedule 1 of Exhibit “B” to this agreement), throughout the universe, in all media, in perpetuity in and to all writings by Writer concerning the Screenplay, including but not limited to the story, all treatments, and all drafts of the Screenplay, and any other drafts or rewrites written to date or in the future (herein collectively called the "Writings"), which Producer shall own in its entirety. Such grant of rights is further set forth in Exhibits “A” and “B” to this agreement, which Exhibits are incorporated into this agreement by this reference.

5. Credits.

(a) Writing credits on the Picture shall be determined and given pursuant to the WGA West Basic Agreement and Credit Manual, whether or not the Writers Guild has jurisdiction. If the Writers Guild has jurisdiction, the Writers Guild will determine all writing credits on the Picture. If the Writers Guild does not have jurisdiction, and the parties cannot agree on writing

credits, they shall be determined by expedited arbitration conducted in Chicago, Illinois under the rules and procedures of the American Arbitration Association, using a single arbitrator who shall be a neutral attorney familiar with the entertainment business. The arbitrator shall use the Writers Guild Credit Manual. Whether or not the Basic Agreement applies, the writing credit shall be given on screen and in paid ads as required by the Basic Agreement.

(b) All other aspects of such credit shall be determined by Producer in its sole discretion. Producer shall contractually require all distributors with whom Producer enters into agreements to honor all credit obligations to Writer, but no casual, inadvertent or third party breach of the credit provisions of this agreement shall constitute a breach of this agreement. In the event of failure to give credit, Producer shall use its best efforts, on a prospective basis, to require such distributors to correct any omission or failure to give Writer credit.

6. Representations and Warranties. Writer represents and warrants that (a) Writer has the legal right and authority to enter into this Agreement and to grant the rights being granted hereunder; (b) the Writings are and shall be totally original with Writer, do not infringe upon the copyright of any third party, and do not invade the privacy of any third party, defame any third party or in any other way violate the rights of any third party; (c) Writer is the sole author of the Writings; (d) the Writings have not been published; (e) no written or oral agreements or commitments whatsoever with respect to the Writings or with respect to any right therein, have heretofore been made or entered into by or on behalf of Writer; (f) there are no monies due third parties by reason of the execution of this Agreement and/or the exercise of the Option hereunder; and (f) there are no claims, demands or any form of litigation pending or threatened with respect to the Writings. Writer agrees to indemnify, defend, and hold Producer and its officers, employees, successors and assigns harmless from and against any and all claims and costs, including, without limitation, reasonable attorneys' fees and disbursements, arising, directly or indirectly, from or out of any breach or alleged breach of such representations and warranties, the cost of enforcing any right to indemnification hereunder, and the cost of pursuing any insurance providers. Producer similarly indemnifies Writer with respect to any material Producer or its assigns furnishes to Writer or adds to the Screenplay, and hold Writer harmless from and against any and all claims and costs, including, without limitation, reasonable attorneys' fees and disbursements, arising, directly or indirectly, from or out of the use in the Screenplay or Picture of any material furnished by Producer or its assigns.

7. Short Form Option and Assignment: Attached to this agreement is Exhibit "A" (Short Form Option) and Exhibit "B" (Short Form Assignment). Writer shall date and execute all copies of Exhibits "A" and "B." Exhibit "B" shall be held in trust by Producer. If the Option expires without being exercised, Producer shall return all copies of Exhibit "B" to Writer.

8. Notices: All notices to be given under this agreement shall be in writing, and shall be personally delivered, mailed with delivery confirmation, sent by ground or air freight with delivery confirmation, faxed by confirmed fax (by a printout confirming delivery of the fax), or given by confirmed email (by a printout of the email) to the parties at their respective addresses as follows:

Producer: _____
_____
_____
_____

With a simultaneous copy to:

_____
_____
_____
_____
ATTN: _____

Writer _____
_____
_____
_____

Any party can change their address under this agreement by notifying the other parties of the new address by a notice satisfying this paragraph.

9. Additional Provisions.

(a) If Producer is furnished with transportation and lodging to the first domestic premiere of the Picture, Writer and Writer's guest shall also be furnished with round trip air transportation (if applicable), ground transportation and location amenities and tickets in the V.I.P section for the first domestic premiere of the Picture, if out of town. If in town, Writer shall be furnished with two tickets in the V.I.P. section.

(b) If Writer receives sole written by or screenplay credit on the Picture the following shall apply: Writer shall have the first opportunity to write the first theatrical sequel, prequel or remake to the Picture, if any, for compensation to be negotiated in good faith, with the writing fee to be, unless agreed otherwise, WGA minimum for a first and final draft screenplay, not original, with no treatment; the purchase price shall be negotiated in good faith, but not less than the cash compensation payable under this agreement for the Picture plus _____ percent (_____%) of 100% of the Net Profits derived from such sequel, prequel or remake if Writer is accorded a shared Screenplay By or Written By credit on the sequel, prequel, or remake; or (ii) _____ percent (___%) of 100% of the Net Profits, if any, received by Producer in the United States in U.S. dollars from the distribution and exploitation of the sequel, prequel, or remake if Writer is accorded a sole Screenplay By or Written By credit on the sequel, prequel, or remake. All writing fees paid to the Writer for any such sequel, prequel or remake to the Picture shall be deducted from the purchase price. If Writer receives sole written by or screenplay credit on the Picture, and elects not to write the first theatrical sequel, prequel or remake to the Picture, if any, Writer shall be paid fifty percent (50%) of the Purchase Price paid to him for the Picture, on the first day of principal photography of such production, plus a sum equal to _____ percent (_____%) of 100% of the Net Profits, it any, derived from such first theatrical sequel, prequel or remake.

(c) Writer hereby grants to Producer the right to use and to authorize others to use Writer's name, likeness and other elements of Writer's identity and biography for purposes of advertising, publicizing and exploiting the Picture, but any such use of Writer's name or likeness may not be used as an endorsement without Writer's prior written consent.

10. Notice and Cure: In the event either party is in material breach or alleged material breach of this Agreement, the non-breaching party shall give Producer written notice describing such alleged breach, and the breaching party shall have ten (10) business days after receipt of such

notice to cure any such alleged breach. If the breaching party cures such alleged breach within such ten (10) business day period, the breaching party shall not be deemed to be in breach of this agreement.

11. Arbitration: Any dispute between the parties shall be settled by binding expedited arbitration, using a single neutral arbitrator, in accordance with the rules of the American Arbitration Association, with hearings to take place in Chicago, IL. Any judgment rendered by the Arbitrator(s) may be entered in any court having jurisdiction thereof. The prevailing party may be awarded attorney's fees and other costs, damages and expenses to be determined by the Arbitrator(s) but neither party shall have the right to seek injunctive relief which would enjoin the distribution or other exploitation of the Picture in any medium or market. The arbitrator shall have the right to decide any and all issues relevant to the arbitration including, without limitation, the arbitrability of all issues.

12. Miscellaneous:

(a) This Agreement contains the entire agreement between the parties concerning the subject matter hereof and supersedes any and all prior and contemporaneous agreements, both oral and written, pertaining to that same subject matter. This Agreement cannot be changed except by a written document signed by the parties.

(b) This Agreement shall be governed by and construed in accordance with the laws of the State of Illinois, which shall be binding on and inure to the benefit of the parties' respective heirs, successors and assigns.

(c) Producer has the right to assign this Agreement, or any part of this Agreement, to one or more third parties, but Producer shall remain secondarily liable under this Agreement unless the Agreement is assigned to, and the obligations are assumed in writing by, that third party (ies).

(d) Producer shall have the right, during the Option Periods as they may be extended (and thereafter if the Option is exercised), at its expense, to enter into development, pre-production and production activities with respect to any and all productions or works intended to be based on the Writings, and any and all materials (literary or otherwise) prepared by or on behalf of Producer in connection therewith shall, as between Producer and Writer, remain the sole and exclusive property of Producer. Writer hereby grants to Producer the exclusive right during the Option Periods to create, write, produce, distribute, exhibit, reproduce, transmit and perform one or more works to make the general public aware and potential studios/distributors of the Screenplay and Picture and to incorporate into those works one or more characters from the Writings.

(e) The Option Periods and any extensions of the Option Periods shall automatically be suspended for a period of time equal to the duration of any of the following contingencies: (i) Producer's development of the Picture is prevented, hampered, or delayed by reason of any law or ordinance of any jurisdiction, governmental order, or other regulation, fire, act of God or public enemy, labor dispute, strike or threat of strike, or by reason of any other cause, thing, or occurrence not within Producer's control, either of the same or any other nature (including, but not limited to, a strike or other work action by any guild or union, and/or the death, illness, or incapacity of any director or principal cast member); (ii) Writer's material default hereunder;

and/or (iii) any third party claim in connection with the Option and/or any of the rights granted and/or Writer's representations and warranties hereunder.

(f) In the event of an alleged material breach or material breach by Producer, or in the event of a failure to give Writer credit on the Picture pursuant to the Credits paragraph above, Writer's sole remedy shall be an arbitration for monetary damages, and in no event shall Writer be entitled to terminate or rescind this agreement or seek equitable relief, including but not limited to seeking to enjoin or restrain the distribution or exploitation of the Picture.

(g) This Agreement may be signed in counterparts, and may be signed by fax or by scanned email attachment (which fax or email attachment shall include the entire agreement).

(h) The paragraph headings contained herein are for convenience only, and they shall not affect the construction of any provision contained in this Agreement.

IN WITNESS WHEREOF, the parties have executed this Agreement as of the date first written above.

_____

By_____

Title_____

AGREED TO AND ACCEPTED:

_____

EXHIBIT "A"

SHORT FORM OPTION AGREEMENT—SCREENPLAY

KNOW ALL PERSONS BY THESE PRESENTS: for good and valuable consideration, receipt whereof is hereby acknowledged, the undersigned, _____ does hereby grant to _____ (hereinafter referred to as "Purchaser"), and its heirs, representatives, successors, licensees and assigns forever, the exclusive and irrevocable right and option to purchase and acquire from the undersigned all of his right, title and interest (including but not limited to the sole and exclusive motion picture rights [silent, sound, talking], television motion picture and other television rights, soundtrack, merchandising, literary publishing, music publishing, stage and radio rights, throughout the world in perpetuity) in and to that certain original literary work described as follows:

TITLE: "_____" (WT)
WRITTEN BY: _____
PUBLISHER: Unpublished Screenplay
COPYRIGHT APPLICATION NO.: _____

including all contents thereof, all present and future adaptations and versions thereof, and the theme, title and characters thereof, and in and to the copyright thereof, and all renewals and extensions of such copyright.

The option herein granted may be exercised by Purchaser, or its heirs, representatives, successors, licensees or assigns as provided in that certain Option Agreement dated as of August _____, 2017 between Purchaser and the undersigned, which agreement is incorporated herein by reference.

IN WITNESS WHEREOF, the undersigned has executed this instrument as of _____.

_____

EXHIBIT "B"
ASSIGNMENT OF ALL RIGHTS—SCREENPLAY

1. The undersigned, _____ ("Assignor"), for valuable consideration, receipt of which is hereby acknowledged, does hereby assign, grant, bargain, sell, transfer, convey and set over (all herein called "grant") forever, unto _____ ("Assignee"), the literary material described as follows:

All of Assignor's right, title and interest in and to a screenplay written by Assignor tentatively entitled "_____", including the underlying story ideas and including the results and proceeds of past and future writing services in connection therewith, together with all now or hereafter existing rights of every kind and character whatsoever therein, and the complete and unconditional and encumbered title therein for all purposes, including all titles thereof, and all elements, themes, ideas, stories, plots, incidents, music, lyrics, arrangements, choreography, dialogue, characters, character names, action, revisions, dramatizations, sequels, and other parts and components contained therein, now or hereafter in existence as well as all copies of any and all manuscripts thereof, and all versions and translations thereof, all hereinafter referred to as the "Work".

Assignee shall have full ownership of the Work, including all copyrights to the Work throughout the world, the right to alter, change or rewrite the Work, and to add to or delete from the Work, and the right to use all or only part or parts of the Work, in its sole discretion, and Assignor hereby waives all rights in connection therewith including, but not limited to, the "droit morale" of authors.

2. Without limiting the above, Assignor hereby grants to Assignee the right to produce one or more motion pictures or other productions based on the Work and to exploit, publicize and use such motion pictures or other productions in all media throughout the world in perpetuity, by all means whether or not now known, including but not limited to theatrical, television, digital transmission, and home video exploitation, and exploitation of ancillary and subsidiary rights, including live stage, novelization, merchandising, music publishing, soundtrack and all other exploitation of the Work and all motion pictures or other projects based on the Work. Without limiting the generality of the foregoing, Assignor specifically grants to Assignee, without limitation: the sole and exclusive right, throughout the universe, in perpetuity, to exhibit, record, reproduce, broadcast, televise, transmit, publish, sell, vend, distribute, advertise, exploit, publicize and use for any purpose, in any manner, and by any means, whether or not now known, invented, used of contemplated, the Work, and each and every part thereof, and any and all versions, adaptations, copies and mechanical or other reproductions of all thereof; all publication, novelization, dramatization, performing, merchandising, mechanical reproduction, radio, television and motion picture rights in the Work and each and every part thereof in such manner and to such extent as Assignee may, in its sole discretion, desire; the right to translate the Work and all such versions and adaptations into all or any languages; the right to use the name and likeness of the Assignor as the author of the Work upon which said versions and adaptations, or any of them, is based; the right to use all titles of the Work and any other title or titles, in conjunction with any such versions and adaptations and the right to use all titles of the Work in connection with literary, dramatic and other works not based upon the Work; Rental and Lending Rights as defined and agreed to in Schedule 1 of this Exhibit "B"; and the right to refrain from exercising all or any part of the rights herein granted.

3. Assignor specifically grants to Assignee, without limitation, all copyrights throughout the world including all renewals, extensions, and continuations thereof, whether common law, statutory, or otherwise, in and to the Work, and each and every part thereof, together with the exclusive right to obtain and register copyright and renewal copyright or analogous protection for the Work, whether in the name of the Assignor, Assignee, or otherwise, in Assignee's sole discretion. Assignor further assigns to Assignee all actions and causes of action whether past or future, for infringement or violation of any rights in and to the Work, and all damages, profits, penalties and other recoveries, and all other rights of every kind and character which Assignor may now or hereafter have, directly or indirectly as a result of any such infringement or violation.

4. Assignor agrees to execute, acknowledge and deliver, or to procure the execution, acknowledgement and delivery of all further documents which, in the sole judgment of Assignee, may be necessary or expedient to effectuate the purposes and intent of this Assignment. Assignor irrevocably appoints Assignee or its nominee as Assignor's attorney-in-fact, with full power of delegation, substitution and assignment, for the sole benefit of Assignee, but at Assignee's expense to procure, execute, acknowledge, register and record any and all such copyrights, renewal copyrights and documents, and to institute and prosecute such proceedings as Assignee may deem expedient to protect the rights herein granted and purported to be granted and to the effect the recovery by Assignee of the full benefit of all rights herein granted and purported to be granted. Assignee may take any of the aforesaid actions in its own name, or in the name of Assignor, and at its option, may join Assignor as party plaintiff or defendant in any suit or proceeding affecting the Work.

5. Assignor hereby represents and warrants that (a) the Work is original with Assignor and does not violate the copyright of any third party, and to the best of Assignor's knowledge does not defame, infringe upon or violate the rights of privacy or other rights of any person, firm or corporation; (b) Assignor is the sole author of the Work; (c) the Work has not been published; (d) no written or oral agreements or commitments whatsoever with respect to the Work or with respect to any right therein, have heretofore been made or entered into by or on behalf of Assignor; (e) there are no monies due third parties by reason of the execution of this Agreement and/or the exercise of the Option hereunder; and (f) there are no claims, demands or any form of litigation pending or threatened with respect to the Work. Assignor agrees to indemnify, defend, and hold Assignee, its assigns and licensees harmless from and against any costs incurred by Assignee or its assigns (including attorney's fees) arising out of any breach or alleged breach of the aforesaid representations and warranties. Assignor agrees to execute such documents and do such other acts and deeds as may be required by Assignee or its assignees or licensees to farther evidence or effectuate its rights hereunder, and in connection therewith.

6. The exercise by Assignee of any of said rights shall not be deemed a waiver or abandonment of any other of said rights. All rights herein granted and assigned shall be fully transferable, in whole or in part, without restriction, and shall inure to the benefit of the Assignee's successors, assigns, and licensees. This Assignment is executed by Assignor for himself and his heirs, executors, administrators, next of kin, personal representative, successors and assigns, and shall be binding upon said persons jointly and severally. As used herein, the term "person" includes any association, organization, partnership, business trust or corporation.

7. This Assignment shall be subject to the terms and conditions of the Option Agreement between Assignee and Assignor dated as of August _____, 2017.

IN WITNESS WHEROF, the undersigned has executed this Assignment of All Rights as of _____.

_____

SCHEDULE 1 TO EXHIBIT "B"

EUROPEAN COMMUNITY ("EC") AND OTHER DIRECTIVES CONCERNING RENTAL AND LENDING RIGHTS

(a) Rental and Lending Rights: Assignor acknowledges that the compensation payable under the agreement to which this document is attached includes adequate and equitable remuneration for the "Rental and Lending Rights" (as defined below) and to the fullest extent permitted by applicable law, constitutes a complete worldwide buyout of all Rental and Lending Rights, in perpetuity. Assignor hereby irrevocably grants to Assignee throughout the world in perpetuity, the right to collect and retain for Assignee's own account all amounts payable to Assignor in respect of Rental and Lending Rights and irrevocably directs any collecting societies or other persons or entities receiving such amounts to pay them to Assignee.

(b) Definition: "Rental and Lending Rights" means all rights of Assignor to authorize, prohibit, control or receive money from the rental, lending, fixation, reproduction of other exploitation of the materials, results and proceeds of Assignor's services, or any motion picture, program or other production based thereon, by any media or means now known or hereafter devised as may be conferred upon Assignor under applicable laws, regulations or directives, in any jurisdiction throughout the world, including any so-called rental and lending rights pursuant to the European Community directives or enabling or implementing legislation, laws or regulations enacted by member nations of the European Community. The payments made by Assignee to Assignor under the agreement to which this document is attached are deemed to include sufficient remuneration for all so-called rental and lending rights pursuant to the EC directives, enabling or implementing legislation, laws and regulations enacted by the member nations of the EC.

AGREED TO as of _____

_____

WHAT'S THE SCORE WITH SYNCHRONIZATION RIGHTS

As the composer of a film or TV score or as a songwriter whose song is used in a movie, TV show, advertisement or video game, under the copyright law you own 100% of the copyright in your work from the moment you create the work and "fix it in a tangible medium." However, a composer or songwriter must be careful what documents he or she signs so that those rights are not signed away without fair compensation for the work.

When it comes to the use of music there are two copyrights: one in the musical composition or song and one in the sound recording which is the fixation of the sounds that make up the music. When music is used in synchronization with visual images, whether it is created especially for the particular score or whether it is a pre-existing song that the director wants to use in a scene in a TV show or film, this is referred to as the "synchronization" of music with visual images. Permission in the form of a synchronization license (sometimes referred to as a "synch license") must be procured by the makers of the audio/visual production from both the owner of the sound recording (the artist or record company) and from the owner of the song copyright (the songwriter or publishing company) Sometimes these are one and the same person or entity, sometimes they are not.

A synchronization license may take various forms. If a producer, director or music supervisor decides that a certain pre-existing song is right for a particular scene in a film, TV show, commercial or in a video game, then a synch license covering the master and the composition would be requested. Depending on the length and prominence of the use, if limited solely to use in the film the price can range from a few hundred dollars to tens of thousand of dollars, or more. If the movie company also wants the right to include the music on a soundtrack album, then additional provisions would be required for that use which would pay royalties for each record sold. Also, the song should be registered with the author's performing rights society (e.g., ASCAP, BMI, SESAC, etc.) so that revenues from performances in foreign movie theaters (U.S. movie theaters do not pay performance royalties) and from television broadcast can be collected and paid to the author.

On the other hand, a songwriter may be specifically employed to write incidental music for a film or for a TV commercial. Such an arrangement may be structured as a "work made for hire" whereby the songwriter is employed to write specific music which may ultimately be owned by the producer of the film. There is no set fee for such an arrangement - it can range from a few thousand dollars for a small budget project to hundreds of thousands for a blockbuster film score. However, in such circumstances, since the production company would own the copyright, the author may not be entitled to performance royalties from its performing rights society. This would depend on the negotiation of the contract between the parties.

Since this is a complicated area the details of which are beyond the scope of this article, I would suggest that if such an offer is made to any composer or songwriter, an experienced entertainment lawyer would be a good investment.

My advice on such matters to a prospective client is always "don't sign anything – other than an autograph – unless you have a lawyer review it first!"

Wallace Collins is an entertainment and intellectual property lawyer based in New York with more than 30 years of experience. He was a recording artist for Epic Records before attending Fordham Law School. Tel: (212) 661-3656; www.wallacecollins.com

MUSIC LICENSING FOR U.S. PRODUCED TELEVISION PROGRAMMING/2019

By Jeff Brabec
Todd Brabec

NEGOTIATING THE TELEVISION LICENSE FOR A PRE-EXISTING SONG:

When a producer wants to use an existing musical composition in a television program, weekly series, special, limited series or movie, permission must, with few exceptions, be secured from the music publisher who owns the song. The producer or music supervisor of the show will decide what song he or she wants to use in the program and the scene in which it will appear, how the song will be used (e.g., theme to the show, background vocal or instrumental, sung by a character on camera, over the opening or ending credits, etc.), and the media needed (e.g., free television, pay television, subscription television, pay-per-view, video on-demand, direct to consumer streaming, closed circuit, internet, basic cable, etc.).

The producer or its "music clearance" representative will then contact the owner of the composition (which is usually a music publisher), describe the context of the program and particular scene in which the song will be used; ask for a specified period of time to be able to use the song in the program, negotiate a fee, and then sign what is known in the television business as a "synchronization license."

If you're a songwriter or writer/artist, it is essential that you know the type of email that you will receive from a music supervisor or licensing clearance person from a television series or program that is considering using your song.

The request will include:

- Identity of Production Company
- Identity of Program
- Episode Number
- Synopsis of Series
- Identity of Composition
- Scene Description
- Use of the Composition in the scene or scenes (visual vocal, background vocal, instrumental, theme, etc.)
- Duration of the Use (30 seconds, full usage, 20 seconds plus 15 seconds in multiple uses, etc.)
- Territory (world or universe, U.S. and Canada, Internet, additional territories to be added on an option basis, etc.)
- Term (life of copyright, 2 years with options to extend for longer periods, etc.)
- Rights Requested (worldwide all media including downloads and streaming, U.S. and Canada television with options to extend into additional media, etc.)
- Fee ($500, $5,000, $12,000, $25,000, etc.).

It should be noted that virtually all shows have music budgets and, unless you have a song that they have to have, the fee must fit within that budget.

If the song is actually used in the program, cue sheet information will also be requested many times as part of the fee quote.

A CHANGING LANDSCAPE:

In a world of ever-expanding media options, distribution platforms, marketing plans, divergent audience viewing patterns, advertiser preferences, current and expectant markets, new technology distribution methods (known or which will be developed in the future), monetization of ancillary profits, etc., licensing music for television has taken, depending on the program or type of series, on a new simplicity for some shows and a new level of complexity and intricacy for others.

DRAMATIC SERIES:

Many network series (especially the successful ones) have fairly straight forward licensing schemes (e.g., “all media, excluding theatrical”, “all television with a home/personal video buyout option”, and “all television and home/personal video combined license,”).

(a) All Television Media With Home/Personal Video/Electronic Sell Through Options:
Some producers will ask for an “all television” or “all forms of television” synchronization license, usually for the life of copyright of the composition being used. Pursuant to the terms of such a license, the producer is able to distribute the program via any television medium without having to re-secure permission from the music publisher. In most of those licenses the producer has the right to extend rights to home/personal video via an option for an additional fee.

(b) All Television and Home/Personal Video/Electronic Sell Through:
Some successful series use an all television and home/personal video combined license without any option language which pays for all rights when the agreement is signed.

(c) All Media Licenses Excluding Theatrical:
Many studios (and this is becoming more the norm for dramatic series) are requesting “all media, excluding theatrical” licenses, for much of their dramatic programming—a license that includes, television, home/personal video, electronic sell through, the Internet, mobile phone use, and any other media over which television shows can be

distributed. Such licenses include all TV transmissions such as free, pay, cable, satellite, subscription, hotel/motel to any type of monitor or receiver; all digital or broadband transmissions including streaming and downloading rights; all audiovisual devices (linear formats) such as DVDs, and other digital media; all other non-theatrical uses (including common carriers); and “in context” trailers, ads or promotions. If the producer wants to use the song in an out-of-context manner (e.g., over a number of scenes from the program in a promo vs. how the song was actually used in the show), an additional synch fee will be negotiated and paid.

(d) Additional Theatrical Option:
Since certain television programming is being shown in motion picture theaters (e.g., episodes from Game of Thrones), this will become an extra option in television licenses or may, in the future, be included in an all media license.

MUSIC PERFORMANCE/DANCE BASED SERIES:
On the non-drama side, series like "The Voice", "America's Got Talent", “Dancing with the Stars,” “The Masked Singer”, “So You Think You Can Dance”, American Idol and similar shows will have numerous options which cover a large number of different types of uses, timing of uses and distribution media.

For example, one series in this genre requests for the following terms and options:

Initial Term: Five (5) Years, United States, Canada, Bermuda, Caribbean, Latin America, Asia and Disney Cruise Lines in All Television Media, including but not limited to Free, Basic Cable/ Satellite/HDTV, Pay, Subscription, broadcast-on-demand, including video-on-demand and Direct-by-satellite (DBS) and internet/mobile streaming (including in-context promotion in All Media).

Options:

1. Extension of initial All TV/streaming term to worldwide,perpetuity;
2. World perpetuity, All media, now known and hereafter devised excluding Theatrical; and
3. Clip Streaming.

In addition to the above, each license will further divide the options and fees depending on the actual use of the composition. For example, the following separate use categories are included in the license, and all with different dollar fees.

Use**:**

A. Visual Dance: up to 2 minutes;
B. Short Recap: single recap up to 25 seconds in future episodes;
C. Single/multiple Recaps: up to full repeat in future episode;
D. Bumpers and Rejoin **(various timings)**: single/multiple recaps up to full repeat in a future episode;
E. Last Dance/Closing Credits: up to 2 minutes;

F. Extended Dance: over 2 minutes;
G. The View, Good Morning America and LIVE with Kelly Performances.

An additional example follows:

Another series requests that the territory be the U.S. and Canada plus internet for the world, the term be for 2 years, and the media being all forms of television now known or hereafter devised (including without limitation on demand services), wireless,, mobile, internet streaming, non-permanent downloads, in context trailers and promos and the right to include clips and/or entire show plus the right to pan lyrics and lead sheets during rehearsal packages and to use lyrics as graphic elements during rehearsal packages and performances with options to review the rights for 2 years, renew for life of copyright, extend the territory to the world outside the U.S. and Canada and to extend the distribution channel to include electronic sell-through, among other things. Audio downloads are licensed and paid for at the statutory mechanical rate.

SONGS USED AS TELEVISION SHOW THEMES:

Show	Theme
NCIS: New Orleans	"Boom Boom"
CSI	"Who Are You"
CSI: Miami	"Won't Get Fooled Again"
The Sopranos	"Woke Up This Morning"

Rather than hire a composer to write a theme song for a new television series, many producers will use a well-known song as the show's opening and closing theme. When presented with such a request, a music publisher may take one of a number of different approaches to handle the licensing, the most prevalent being a per-show fee for each series episode. It is common for a life-of-copyright all media, excluding theatrical license to be negotiated for use of the song in the series. Each case, however, must be treated on its own merits, recognizing the stature of the song being requested (e.g., current hit, well-known standard, or prior hit in need of new exposure), the budget for the series, the policies of the production company producing the show, the performance monies that will be earned from ASCAP, BMI, SESAC, or GMR, and the possibility of a television series soundtrack album or hit single coming from the program.

Many times there is a guarantee that a certain number of series episodes will use the song as the theme (and payment made), even if the series is unsuccessful and the guaranteed number of episodes are not broadcast or even produced. For example if a series has an initial twelve episode order, an agreement might guarantee payment for eight episodes regardless of whether or not eight episodes are produced and/or broadcast. Most agreements also provide that the song and, if applicable, the master recording of that song will be available for uses as the theme to the series for a number of seasons into the future via options with fee increases normally provided for each new season. Obviously, if a pre-existing master recording is being used (vs. a re-record of the song), the show's producer will also have to secure a license from the record company that owns the master. On-screen credit is also one of the issues negotiated.

FUTURE BACK END MUSIC PUBLISHER/SONGWRITER ROYALTIES:

Though there are many possible additional ways that licensed songs earn income beyond the initial television synchronization fee, the primary source of all future income is generated via the Performance Right. This is the world of ASCAP (the American Society of Composers, Authors and Publishers), BMI (Broadcast Music Inc.), SESAC and GMR (Global Music Rights) in the U.S. and foreign performing rights organizations (PROs) throughout the world. Writers and music publishers join these organizations who in turn negotiate music licenses with the users of music, collect those license fees and then distribute them to writers and music publishers based on the individual performances of their works.

This particular right of copyright comes into play when a television series episode is broadcast on over the air free television, cable, pay per view, etc. as well as streaming services and motion picture theaters outside the U.S. Each airing of an episode, in most cases, generates a royalty for the writer and music publisher of the song.

To put this area into perspective, ASCAP, BMI, SESAC and GMR combined annual receipts total of approximately 2.7 billion dollars. In the U.S., approximately 700 million dollars of domestic license fees come from all forms of broadcast television, cable and satellite with a significant additional amount coming from television and film performances in foreign countries.

The actual payments received by writers and publishers for all types of television performances are set forth in each PRO's payment schedules/Weighting Rules with the basic categories of theme song, score and feature performance(visual vocal or visual instrumental) determining the specific dollar value of each performance. Other factors include the media, license fee of the station, duration of the use (i.e., the number of seconds), etc. In the foreign marketplace, duration of the use is many times the primary factor in determining value in addition to the license fee of the particular station or service.

SOME FINAL THOUGHTS:

Familiarity with how certain programs license music, the knowledge of the range of fees possible in each situation (e.g., successful or new show, a "most favored nations" program where all songs in a defined use category are paid the same, past hit song or new artist release, whether the show is a "take it or leave it" entity or has flexible negotiating norms in place), an understanding of the original writer's grant of rights to the music publisher (any licensing restrictions, approvals, etc.) and knowledge of the many other factors which could affect the anticipated backend royalties (e.g., status of ASCAP, BMI, SESAC and GMR licenses in all relevant media, Copyright Royalty Board decisions, pending litigation, copyright legislation, foreign country online and traditional media licensing schemes, etc.), are all essential if one is to give the immediate and appropriate response that is necessary in today's world of television licensing where

decisions have to be made quickly- licensing that goes well beyond the initial television broadcast.

This is a revised version of an article that first appeared in the ABA Entertainment and Sports Lawyer (Volume 27, Number 3)

If an AI creates a work of art, who owns the rights to it?

qz.com/1054039/google-deepdream-art-if-an-ai-creates-a-work-of-art-who-owns-the-rights-to-it/

Artificial intelligence is already capable of creating a staggering array of content. It can paint, write music, and put together a musical. It can write movies, angsty poems, and truly awful stand-up comedy. But does it have ownership over what it produces?

For example, an AI at Google has managed to create sounds that humans have not heard before, merging characteristics of two different instruments and opening up a whole new toolbox for musicians to play around with. The company's DeepDream is also capable of generating psychedelic pieces of art with high price tags; last year two sold for $8,000—with the money going to the artists who claimed ownership over the images.

An example of the work Google's DeepDream algorithms can create. (Google Deep Dream)

As it stands, AIs in the US cannot be awarded copyright for something they have created. The current policy of the US Copyright Office is to reject claims made for works not authored by humans, but the policy is poorly codified. According to Annemarie Bridy, a professor of law at the University of Idaho and an affiliate scholar at Stanford University's Center for Internet and Society, there's no actual requirement for human authorship in the US Copyright Act. Nevertheless, the "courts have always assumed that authorship is a human phenomenon," she says.

Eran Kahana, an intellectual-property lawyer at Maslon LLP and a fellow at Stanford Law School, doesn't believe we should award authorship to AIs. He explains that the reason IP laws exist is to "prevent others from using it and enabling the owner to generate a benefit. An AI doesn't have any of those needs. AI is a tool to generate those kinds of content." He likens the idea to a computer word processor using spell check. If you make a spelling mistake in something you're writing and the computer corrects it, who owns the copyright to the final product? "Obviously not the computer", Kahana quips. "The computer has no ownership of your writing."

AI also raises some thorny issues by potentially impinging on the IP rights of others. This is especially true if a creative work is based on machine learning, a technique that allows an AI to learn for itself from data it is provided. If the input on which a creation is based—the data—is made by someone else, shouldn't then be the owner of

whatever work is created from it? And even if work is produced by an AI independently, can it really be classed as original?

A good case of this is the AI designed to imitate the works of the Dutch artist Rembrandt. " The Next Rembrandt" project asks "can the great master be brought back?" The AI creates original pieces in the style of the Dutch master, which it has been trained to make via data input from hundreds of paintings—but does that mean that Rembrandt should own the work, the person who gathered the data, or the AI itself?

Bridy says another important legal question here would by who is liable for copyright infringement. "Obviously, you can't sue software," she says, concluding that existing legislation means there would likely be a liability on the part of the programmer or owner of the infringing code. Kahana concurs, saying "You'd be accused, as the owner, of using a tool that caused infringement on others."

In order to glean insight as to how AI IP may be regarded in the future, we can look to court case currently unfolding in California—but instead of it involving AIs, it involves animals.

Naruto, a rare macaque monkey, shot to fame in 2011 when it picked up a British photographer's camera and seemingly took a selfie. David Slater, the photographer in question, claims he owns the copyright to the stunning images, despite him not being the one who held the camera or clicked the shutter. Instead, he says the images belong to him because of the work he did in setting up the shot.

A court in San Francisco agreed with the US Copyright Office, determining that human authorship is a requirement for copyright protection, and therefore Naruto cannot own the photographs it took. The case is now being appealed, with the People for the Ethical Treatment of Animals (PETA) arguing that the copyright belongs to Naruto. They insist that "in every practical (and definitional) sense, he [Naruto] is the 'author' of the works." The case is ongoing.

Without developing some form of framework recognizing AIs as legal persons, just as monkeys are not, we cannot award an AI copyright. "And we're a long way from that moment, if we'll ever get there," Bridy says. The most likely near-term solution would be to award copyright to the owners of the AI itself, which would be similar to how employers automatically own the work their employees produce.

As the sophistication and complexity of AI continues to grow, so will the work it produces. This promises great benefits in the fields of science, technology, and medicine—but it does in the creative realms, too. If we don't resolve these thorny issues of ownership now, we risk delaying the delivery of these benefits across all industries. Our laws need to adapt to the reality of the modern world, and they need to do so quickly.

You can follow Rob on Twitter. Learn how to write for Quartz Ideas. We welcome your comments at ideas@qz.com.

SUZETTE TOLEDANO
ATTORNEY AT LAW
TOLEDANO ENTERTAIMENT AND ARTS LAW
ENTERTAINMENT LAW ABOVE THE HOUSE OF BLUES®
215 DECATUR STREET, SUITE 300
NEW ORLEANS, LOUISIANA 70130
(504) 525-2552
FAX (504) 525-2550
suzettetoledano@gmail.com

Date

Ms. _____
Address
Phone

By Email to: _____

Dear _____:

I accept with pleasure your engagement of me as counsel to provide legal services regarding your music business career.

My fees are based upon the reasonable value of my services. You will be billed at the following hourly rates:

Suzette Toledano, Principal Counsel	$_____
_____, Associate	$_____
Legal Assistants	$_____ (copyright registration work)

My hourly rates will be subject to increase from time to time, however you shall be notified in writing prior to being charged any increase in my hourly rate. My statements will be payable upon receipt.

The above charges for my services do not include expense items such as travel, transportation, lodging, meals, telephone calls, telex messages, courier or messenger services of outside vendors. All photocopies will be charged at a rate of $.20 per page. Outgoing faxes will be charged at a rate of $.50 per page. Long distance telephone may be charged at a rate of $15.00 per month that I am actively making such calls. Any such expenses which I may incur on your behalf will be itemized in my invoices and will be your responsibility.

You may be billed periodically. Although I shall attempt to capture all time charged and disbursements made in your behalf through the closing date set forth on each statement, there may be charges for a particular time period which will not get into certain statements. Any such charges will appear on subsequent statements.

I shall expect the statements to be paid within fifteen (15) days of presentation. If an invoice is not paid promptly, interest will accrue thereon at 1% per month and I will have no further duty to represent you regardless of the status of any matter at the time of non-payment. You further agree that in the event of a dispute between us over collection of an invoice, in addition to any other legal rights and remedies that may be available to me, such dispute may be submitted for mediation in the

City of New Orleans before a mutually agreeable certified mediator knowledgeable in the entertainment business. You further agree to participate in good faith in such mediation process, if any.

It is my policy to require an initial cash retainer in the amount of _____ ($_____) Dollars for new representations, [however for this matter the initial cash retainer has been reduced to $_____.] Such retainer shall be applied against my fees (but not against any expenses incurred by me on your behalf).

Either of us is free to terminate this agreement at any time upon thirty (30) days written notice. In such an event, you are responsible for all fees due to me, together with any expenses incurred through the date of termination and I shall work with you to effect an orderly transition of matters. Any termination on my part will be consistent with the then applicable standards for such actions set forth in the Louisiana Code of Professional Responsibility. If my representation of you should terminate at any time prior to the time the reasonable value of my services equals the amount of your retainer, I will refund the excess promptly.

At the conclusion of this matter, I will retain your legal files for a period of five (5) years after we close our file. At the expiration of the five-year period, I will destroy these files unless you pre-notify me in writing that you wish to take possession of them. I reserve the right to charge administrative fees and costs associated with researching, retrieving, copying and delivering such files.

I contemplate rendering my services to you on the foregoing basis. Please call me if you have any objections to any of the foregoing or any questions prior to signing this Agreement. I highly regard your business and feel all aspects of my representation are appropriate subjects of discussion.

You hereby acknowledge that we have discussed the fee arrangements provided herein and that you fully understand them. Notwithstanding, I strongly urge you have this agreement examined by an independent attorney of your choice.

This Agreement may be signed in multiple counterparts. I would appreciate it if you would print out two originals of this letter; sign at the place indicated and thereafter return both originals to me together with your initial payment to me in the sum of $_____. I once again thank you for selecting me to represent you and I look forward to serving you.

Sincerely,

Suzette Toledano

Accepted and agreed to on the _____
day of _____.

_____

By: _____

SUZETTE TOLEDANO
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215 DECATUR STREET, SUITE 300
NEW ORLEANS, LOUISIANA 70130
(504) 525-2552
FAX (504) 525-2550
suzettetoledano@gmail.com

Sample Billing Procedure

Legal billing is processed through Clio, an online service.

Each lawyer tracks her hours with a description of work performed, as well as expenses per Client and either enters it into Clio herself or emails this information to an assistant. All time tracking entries or emails, as applicable, are created just after the work is performed. Putting it off until later is a mistake to avoid because the time may either be over or underestimated depending on the lawyer's good or bad memory of doing the work.

The lawyer, or assistant if you are lucky enough to have one, logs the time and expenses received from the lawyer with the appropriate Client within Clio. If the assistant is handling, a copy of the lawyer's email to the assistant is attached to the draft bill and later filed.

At the end of each calendar month, the lawyer, or assistant, creates a draft invoice for each Client, prints it out, attaches the printouts of the time tracking and expense emails, and if the assistant is creating the drafts, he submits the drafts and documentation to the lawyer for approval. The lawyer corrects any description or time errors on the draft bill and approves them before submitting them back to the assistant.

Once completed and/or approved, each invoice is marked as approved in Clio and printed out to be submitted to the client via mail or the invoice is emailed to the Client.

If the Client has a current trust balance it will be applied to the outstanding amount on the bill and submitted to the accountant, if you are lucky enough to have one, as part of a monthly trust payout.

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ATTORNEY AT LAW
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ABOVE THE HOUSE OF BLUES®
215 DECATUR STREET, SUITE 300
NEW ORLEANS, LA 70130
(504) 525-2552
FAX (504) 525-2550
suzettetoledano@gmail.com

Statement

Invoice # 12345
Date: 08/01/2017

Client Name
1234 Client Address
New Orleans, LA 70130

Type	Date	Attorney	Description	Quantity	Rate	Total
Service	07/04/2017	ST	Emails to client; Draft of Recording Artist Agreement	4.00	$250.00	$1000.00
				Total		**$1000.00**

Detailed Statement of Account

Current Invoice

Invoice Number	Due On	Amount Due	Payments Received	Balance Due
12345	08/01/2017	$1000.00	$0.00	$1000.00
			Outstanding Balance	**$1000.00**
			Amount in Trust	**$2500.00**
			Balance in Trust	**$1500.00**

Please make all amounts payable to: SUZETTE TOLEDANO

Payment is due upon receipt.

“The Broadway Musical: Composer, Lyricist and Songwriter Royalties and Deals”

(Article based on information contained in the Broadway chapter of the 8th edition of “Music, Money and Success: the Insider’s Guide to Making Money in the Music Business”)

By:

Jeff Brabec
Todd Brabec

Broadway and the Road, a 3.5 billion dollar business in the United States, represents for composers, lyricists and songwriters involved in the field, a significant source of royalties and in the case of a hit, a lifetime annuity. Each year, Broadway produces many new musicals in addition to revivals of musicals from the past. Most of these shows never recoup their financial investment but when a “Hamilton”, "Beautiful: the Carole King Musical", "Wicked", "Jersey Boys", "Lion King", "South Pacific", "Phantom of the Opera" or "Mamma Mia" succeeds, the financial returns can be staggering both for investors as well as creators as well as other royalty participants.

This article will discuss the many different types of music licensing deals, contracts and practices that govern music in the theatre.

Types of Broadway Musicals

Musicals can take many forms with the particular form many times dictating the type of contract and royalty structure received by composers, lyricists and songwriters as well as the music publishers involved. The most common types of musicals are a new show with original music and lyrics ("Hamilton", "Kinky Boots", "A Gentleman's Guide to Love & Murder"), a "catalogue/jukebox musical" which uses pre-existing songs ("Beautiful: the Carole King Musical", “Ain’t Too Proud”," "Rock of Ages", "Jersey Boys", "American Idiot") and shows that combine new compositions with pre-existing works. In many cases, an additional royalty participant will also be involved in cases where the show is adapted from a work in another media such as a book, feature film, television program or comic book (“Moulin Rouge”, "Aladdin", "School of Rock", "Rocky", "Doctor Zhivago", " the Lion King", "Beauty and the Beast", "Spider-Man: Turn Off the Dark", "the Addams Family", “Frozen”, "Dirty Dancing"). This latter category sometimes uses the originally composed music as well as lyrics, other times uses entirely new compositions or utilizes a combination of both old and new.

Weekly Costs of a Broadway Musical

The starting point for most royalty calculations is the weekly operating costs of the musical. These costs are many and determine whether the show is making money, losing money or breaking even on a weekly basis. Most Broadway musicals' weekly operating costs are in the area of $400,000-$750,000 but some shows are known to exceed $1,000,000 in a week.

A representative breakdown of the costs associated with a musical with weekly running expenses of $600,000 are as follows: Physical Production ($49,000/carpentry, electrical, etc.), Salaries ($132,000/cast, general manager, stage manager, press agent, music director, musicians, etc.), Re-Occurring Fees($11,000/ music coordinator, technical supervisor, etc.), Taxes and Benefits($40,000/ union pension and welfare benefits, etc.), Rehearsals and Casting($1,000/ studio rental), Advertising and Promotion($120,000/ artwork, television media, marketing, photography, print media, website, etc.), Theatre Venue Expenses($190,000/fixed weekly theatre charges, theatre share, local musicians and crew, etc.), General and Administrative Expenses($20,000/legal, accounting, payroll expenses, office charges, insurance, etc.), Royalties($35,000/author, producer, director, choreographer, music supervisor, original venue royalty, etc.) and Miscellaneous($2,000).

It is important to note also that there is a huge amount of money expended prior to the show's "opening night" and first week's operating costs. Those are the figures involved when you hear that a musical costs 10 to 20 million dollars in investors' money just to get the show to the Broadway opening. This is the total amount that investors need to recoup prior to the musical returning a profit.

These costs include any option fees paid (book writer, lyricist, composer), possible image and likeness royalties, fees payable to the organization that initially presented the production, scenery, props, costumes, sound, creative fees (lighting, sound, costume and scenic designers, musical supervisor, dance music arranger, orchestrator, choreographer, director, etc.), production fees (general manager, casting directors, production managers, accounting, legal, etc.), rehearsal salaries and fees, theatre rental, hauling and storage and general and administrative costs (executive producer and production consultant fees, office operating costs, payroll service, insurance, etc.). In some cases, the theatre itself has

to be reconstructed which can lead to additional costs over and above those related directly to the musical.

Music Licensing Agreements

There are three basic contracts/license arrangements that cover most situations on Broadway. They are (1) the Dramatists Guild of America (DGA) Approved Production Contract (APC), (2) Royalty Pool arrangements and (3) Fixed Dollar royalty shows. Variations of these are found in practically all Broadway productions from original shows, to revivals to "catalogue musicals."

1. DGA/APC:

The Dramatists Guild of America is a professional association of playwrights, composers, lyricists and librettists for the stage. As part of its role, the DGA provides model contracts for all levels of production (Broadway, touring companies, amateur, etc.) and gives advice to members on how their contracts compare to industry standards. The "model contracts" are very comprehensive and are designed to make sure creators receive fair compensation as well as retain significant control over their works. They cover every important area including advance payments, option periods, copyright ownership, royalty adjustments, production rights and subsidiary rights, among others.

The APC contract deals with what happens to productions before, during and after they are produced. When a Producer becomes interested in a property, he or she will enter into an APC to acquire an option to produce the play from the book writer, composer and lyricist. This option provides exclusive rights to produce the play as well as the time frame within which to do so. The APC requires certain minimum payments prior to the actual Broadway opening. The minimum option payments are $18,000 total for the Author (composer, lyricist and book writer combined) for the period of 12 months following the effective date of the contract, $9,000 total for a second consecutive 12-month period and $900 total per month for a maximum of 12 additional consecutive months. Option payments are non-returnable but shall be deductible from royalties.

For the first 12 out-of-town performance weeks prior to the Broadway opening, the composer, lyricist and book writer are guaranteed a total of $4,500 for each full performance week of 8 performances, pro-rated for weeks in which a smaller number of performances is given. Commencing with the 13th week, the three creative participants re-

ceive 4.5% of the Gross Weekly Box Office receipts (GWBOR) until such time as all production costs are recouped. Once the show recoups its entire investment plus a return on that investment (normally a figure of 110% of the total), the 4.5% figure is increased to 6% of the GWBOR with the composer, lyricist and book writer each receiving 2%.

A number of additional APC clauses affect royalties including how the initial writer guarantees are treated as well as the possibility of additional payments to the writers based on the amount of capitalization of the show. Keep in mind that the DGA contract is a model contract and not mandatory though numerous productions still use it. Many others use its provisions as a guide or as a starting point for negotiations. Also, for writers of a certain stature, as in other areas of Entertainment, "everything is negotiable."

A good example of how the DGA APC formula works is as follows: A new show opens on Broadway and is a smash hit. It has weekly box office grosses of $1.25 million. The composer and lyricist would receive 3% of this total (2/3 of the 4.5 % royalty figure) prior to full recoupment and 4% of the total (2/3 of the 6% royalty figure) once the show finally recoups its total investment. In this example, the total weekly composer and lyricist pre-recoupment dollar figure would be $37,500 with the weekly post recoupment number at $50,000 (in each case less some minor deductions).

It is important to keep in mind that the copyright ownership of intellectual property is very different in the theatre world than in most other areas of entertainment. To quote the DGA, "The author (book writer, composer and lyricist) shall retain sole and complete title, both legal and equitable, in and to the play and all rights and uses of every kind except as specifically herein provided. Further all contracts for the publication of the music and lyrics of the play shall provide that the copyright be in the names of the composer and lyricist". In recent years though, there have been exceptions to this long standing practice- namely motion picture and television studios where musicals are being made from feature films or television series where all of the original music was written under "work for hire" agreements or where "work for hire agreements" are a company's business norm when hiring writers to create original compositions.

2. Royalty Pools:

The most common type of formula being used on Broadway today is the "Royalty Pool" arrangement whereby all royalty participants (for example, music and lyric writers, book writer, director, choreographer, underlying rights owner, producer, etc.) share in an

agreed-upon percentage of the weekly operating profits of the musical with certain guaranteed minimum per-point royalties. The total amount of money in the royalty pool is based on a show's operating profits, which is the difference between the Gross Weekly Box Office and the actual weekly running expenses of the show.

For example, a show grossing $1.25 million in GWBOR with operating costs of $700,000 would have operating profits of $550,000. If the royalty pool percentage for this show was 35%, the royalty participants would receive a total of $192,500 (35% of $550,000) with the investors receiving $357,500 (65% of $550,000).

Once the royalty pool percentage of GWBOR is set, all royalty participants are assigned points in the pool and distributions are made based on the number of points each participant has. If there were a total of 20 points and the composer and lyricist had 3 points each with the remaining 14 points allocated to all other royalty participants, the royalty split on $192,500 would be $28,875 to the composer, $28,875 to the lyricist and $134,750 payable to all others.

In addition, there is a minimum royalty (sometimes referred to as a "point") that must be paid to all royalty participants if the show is not running a weekly profit (i.e., it is breaking even or operating at a loss). This royalty is based on a set dollar value for each royalty point that a participant has in the pool. If the minimum per point value was $500, each party would multiply their points by $500 and that would be their respective royalty for that week. Finally, the royalty pool percentage can be increased once a show achieves 110%-125% full investor recoupment of total capitalization. For example, it can go from a 35% pool to a 40% pool. This minimum royalty clause insures that the royalty participants will receive some compensation during periods when the show is trying to find an audience, is struggling or is just in a temporary "down period". Occasionally, royalty participants may forego or reduce these minimums if it helps to keep the show open.

Royalty calculations and payments are normally paid after each four week performance period commonly referred to as a "cycle".

3. Fixed Dollar Shows/Combination with Royalty Pool:

In situations where the Broadway show is using pre-existing songs, the producer sometimes may try to negotiate a specified weekly dollar payment (e.g. $600 per song per week). Under such a plan, the Producer does not have to deal with a percentage of box office receipts formula or a royalty pool. Whether the show is a hit or a flop, the figure

remains the same. These payments are normally based on an eight performance week and are reduced proportionally if there are less than eight.

In the case of so called "Catalogue Musicals", many times two formulas will be used. Well-known songs and songs integral to the story may be paid on a Royalty Pool basis or a percentage of box office receipts calculation (as in the DGA/APC discussed above) whereas other songs in the show receive Fixed Dollar weekly amounts. Obviously, this is an area for negotiation as it can have a significant effect on the amount of royalties a songwriter and his or her music publisher receive especially if the show is a hit.

Since it often takes years to develop a musical for presentation as a first run commercial production, the agreement for use of a pre-existing song in a musical will provide for a development period . For example, an agreement might read that the producer will have two (2) years to have the musical open on Broadway or other first run venue. During this period, the right to make theatrical use of the compositions often will be exclusive to the producer for live theatrical use and there will be a payment made to secure these rights (sometimes in the form of an advance, recoupable from future royalties).

Since you never know how long it is going to take to fully develop a theatrical musical, to say nothing of securing the necessary financing, the producer usually has an option to extend the development period for an additional period of time (one year, two years, etc.) with payment of an additional advance to the composers and lyricists (and/or music publisher, if applicable).

It should also be noted that, depending on the amount of money being paid for the commitment to be able to use the composition or compositions in the “to-be-developed musical,” the rights may or may not be exclusive since exclusivity ties up the composition for use in this area for a period of time with no guarantee that the show will actually be produced. Thus, the money being paid can be a very important issue when the producer introduces the concept of “exclusivity" into the negotiations as opposed to “the non-exclusive right to use the composition” in the show. For example, a license might read " Licensor grants Licensee the non-exclusive, limited right during the term and territory to use and perform the composition in live dramatico-musical performances of the specific Production. Licensor may grant others the right to use the composition in other live stage productions."

Subsidiary Rights/ Producer Vesting

It is important to remember that the Author (a term that includes the book writer, composer and lyricist jointly) owns and controls the play and has the right to exploit the work in other media or in other ways besides First Class live stage performances, including audio-visual productions (motion pictures, television, soundtrack albums), commercial use products (toys, games, clothes), stock, amateur and ancillary performances and performances in other territories, as well as revivals, remakes, prequels, sequels and spinoffs after the expiration of the Producer's right to produce the play in the originally agreed upon territory.

When a Producer has presented the show in the territory for a specific number of consecutive First Class Performances (a combination of out of town performances, previews, official Press Opening in New York City as well as regular performances), the Producer becomes “Vested” in subsidiary rights (assuming the producer is not in breach of any provision of the contract) and becomes entitled to certain decision-making and financial participation rights with respect to the disposition of Subsidiary Rights in the territory and, in some cases, the rest of the world. The Producer's participation is a specific percentage of the Author's compensation for media productions, stock and ancillary performances, amateur performances and commercial use products. The Producer also must be given a reasonable opportunity to consult fully with the Author in connection with the exploitation of such rights. Finally, there are limits placed on the length of time that a Producer continues to participate in Subsidiary Rights with the sole exception of media productions which continue in perpetuity. The "Vesting" concept recognizes the contribution that a Producer's successful production has made to the value of other rights in the play.

Grand Rights Song License Agreement

When a Producer wants to use a pre-existing composition in a musical, the negotiated agreement between the copyright owner (usually the music publisher or administrator) and the Producer is referred to as a Grand Rights License Agreement. (The term “grand rights” is used to distinguish dramatic performances, i.e., those within a musical play or other dramatico-musical work, from non-dramatic or small right performances, which are performances without any dramatic element (that is, no book, staging, costumes, dramatic gestures, etc.) that are most often licensed through a performing right society. This 8-10 page agreement grants the live stage rights (Grand and Dramatic) to the

Producer for a specific Broadway or Off-Broadway production. The publisher grants an "exclusive option" to present an initial First Class (or Second Class) production in the United States and Canada within a specified period of time usually with advances paid if option periods are involved. If the Producer presents the required number of public theatrical performances, Producer will have "Vested" and will have the right to license additional productions throughout the territory.

The royalty structure for the pre-existing composition can either be a fixed dollar amount per week, a royalty pool arrangement with a minimum weekly guarantee or a GWBOR formula pursuant to the Dramatists Guild APC contract. The Producer will also negotiate a Subsidiary Rights clause with specified fees and royalties if the production is licensed for presentation in motion pictures, radio, television, cast albums or any other audio or audio-visual format. The Producer also has the right to arrange the composition provided it does not alter the fundamental character of the composition. Warranties and dispute resolution procedures are also set forth in the agreement.

Writing a New Song for a Musical

The basic structure for this type of agreement is as follows:

As to Services, the writer is hired to compose the music and lyrics to one song for the new musical. Composer is to deliver the composition according to an agreed upon schedule and revise upon request. The Producer, in the case of a non-work-made-for-hire situation, acquires the sole and exclusive license to use the song in any and all versions, productions, etc. of the musical as well as the writer's name and likeness, right of publicity and promo rights on a non-exclusive basis. If the song is included in the official opening night, the Producer's rights will be perpetual. Further, if the song is used, the Producer can place it on cast albums and merchandise and has the right to embody the composition in a motion picture, television or other audio-visual adaptation. If the song is not used in the Broadway opening or a 1st class production within a certain period of time, all rights will revert back to the writer except for any intellectual property elements in the song owned by the Producer. A creative writing fee would be negotiated (e.g. 1/3rd upon signing the agreement, 1/3rd upon delivery of a final version and 1/3rd if the song is included in the full draft of the script) along with royalty clauses either reflecting the APC percentages, a Royalty Pool or some other arrangement as well as all customary composer and lyricist shares of subsidiary rights income as set forth in Article XI of the Dramatists Guild Approved Production Contract (APC). Credit, warranty and indemnification clauses, among others, would also be negotiated.

Underlying Rights Agreement

The Underlying Rights agreement is negotiated when a Producer wants to make a musical from a pre-existing work. Obvious examples are musicals based on motion pictures. Considering that practically all of the original music in a film (score and songs specifically written for the film) are written under work for hire contracts, the underlying rights owner (the studio, for example) already controls all rights in the work including the music. The Underlying Rights/Copyright owner normally receives a royalty percent equal to the composer, lyricist or book writer under the APC contract and is normally in the area of 2% of the GWBOR with a possible increase upon recoupment.

This agreement grants a license to produce and present one dramatico-musical play based upon the motion picture entitled____and upon the original screenplay upon which the play is based. The Grant of Rights includes the worldwide live stage dramatico-musical rights in and to the property and all component parts of the property including without limitation the unrestricted right to adapt , translate, change, rearrange, interpolate in, add to (including the addition of music and lyrics) and subtract from the property all in the Producer's sole discretion. In addition, the Producer has the right to engage persons to write or revise the play based on the property and compose music and lyrics for the play in accordance with the provisions of the overall agreement. The Producer also has the right to exploit the publication, mechanical reproduction, synchronization and small performance rights in the separate music and/or lyrics of the play. The underlying rights owner many times has the right to approve the musical's book writer, composer and lyricist and also participate in a share of the Subsidiary Rights proceeds.

It is important for any composer, lyricist or songwriter who created works under a work-for-hire agreement for the feature film now being made into a musical to determine what royalty structure will govern their compositions if used in the final Broadway production. The possibilities include the Dramatists Guild pre and post recoupment percentages, a royalty pool participation, a creator's Schedule A royalty addendum attached to the original work-for-hire agreement or some other arrangement.

CONCLUSION

Musical theatre-expensive to get into, difficult to write and many times very costly to get out of. But for the composer and lyricist of hit new musicals and past successful shows and songwriters and music publishers of pre-existing compositions used in "catalogue" musicals and dramatic plays, the theatre can be a significant source of income.

Though Broadway hits are "where the money is," there are many examples of shows which never recouped their initial Broadway investment but have lived on for decades in stock, regional, resident, dinner, university, concert, amateur and foreign country performances providing continuing royalties to all those involved. The size and scope of those royalties though are most often determined by the original contract signed. Contracts and licensing arrangements can be, and are, very different based on the type of show, the particular music use and the negotiating tactics, knowledge, experience and bargaining power of the respective parties. Good advice- know your contracts, your license agreements and definitely know and understand the field you are dealing in. Without that knowledge, "fame and fortune may very well be fleeting"- if it comes at all.

(Versions of this article have appeared in the American Bar Association “Entertainment and Sports Lawyer” and the Society of Composers and Lyricists “Score” journal.)

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The Austin Music People Biennial White Paper: 2015

The AMP Biennial White Paper: 2015
was researched and produced with
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GSD&M

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FOREWORD

In late 2014, the City of Austin Music & Entertainment Division commissioned the first-ever Austin Music Industry Census. Analytics firm Titan Music Group spent eight months collecting and analyzing data from some 4,000 respondents, and presented the sobering results at the largest-ever Austin Music Commission meeting on June 1, 2015. Census data quantified what many in the community already knew to be true:

The Austin Music Industry is at a tipping point. Every day, opportunities for innovation, for creation, and for the economic development of Austin's music industry are being lost because of long-standing systemic issues, an outdated land development code, an arcane city permitting process, and an unprecedented affordability crisis.

- 50% of Austin's working musicians, even with day jobs, qualify for Section 8 housing that isn't available.
- Nearly a third make $15,000 or less a year, from all income sources.
- Venues are struggling, and sometimes closing, under the concurrent pressures of rapidly increasing rents, changing consumer behavior, inconsistencies with policy enforcement, and the city's "confusing and arcane permitting process."[1]
- Our burgeoning music industry and associated small businesses report that a lack of affordable office space is a critical barrier to their success, and weak connectivity between these businesses is slowing the economic growth of this sector.

As the Live Music Capital of the World, Austin appreciates that our music industry is more than the creative soul of our city and a compelling part of our shared social history. It's also a powerful economic driver for our community, generating more than $1.6 billion annually.[2]

As our city grows, and as the music industry reinvents itself in response to new technology and changes in consumer behavior, our political leadership and the music community must work together to ensure that Austin's music ecosystem is supported and can continue to

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[1] The Austin Music Census: A Data-Driven Assessment of Austin's Commercial Music Economy (2015), Titan Music Group, LLC. Commissioned by the City of Austin Economic Development Department and its Music & Entertainment Division. https://www.austintexas.gov/sites/default/files/files/Austin_Music_Census_Interactive_PDF_53115.pdf

[2] The Economic Impact of the Creative Sector in Austin (2012 Update), TXP Inc. Commissioned by the City of Austin Economic Development Department. http://austintexas.gov/sites/default/files/files/creative_sector_impact2012.pdf

drive job creation, spark economic development, and attract companies and residents alike to move here. Austin must protect its brand and take significant steps to ensure its sustainability.

PURPOSE

This is a pivotal time for Austin music, and AMP is committed to helping drive the solutions that fuel and sustain the local music industry. The AMP Biennial White Paper: 2013, our original report on the state of the Austin music industry, was one of the first of its kind; now, just two years later, a large body of professional and academic work is emerging that explores and evaluates local, national, and international issues impacting the state of music industries across the globe. The newly available amount of rich local data, like that collected in the Austin Music Industry Census, and groundbreaking reports on international best practices, like Music Canada and IFPI's new *The Mastering of a Music City* report,[3] give both civic and industry leaders timely, data-driven resources to inform our strategic planning.

The AMP Biennial White Paper: 2015 focuses on specific solutions and ideas that demand the attention of our civic, creative, and political leadership. It recommends specific actionable strategies to protect, preserve, and amplify the economic and creative impacts of our live music industry in the years ahead.

Since its inception in 2012, AMP's primary focus has been the continued economic development of Austin's music industry. As we have grown, we have learned that our responsibility for the health and stability of our industry is a shared one, requiring the creation of solutions that leverage multiple voices and perspectives. Austin's network of non-profit resources is vast and diverse, with a multitude of exceptional organizations offering specialized services and tools to Austin's music community that are far beyond AMP's scope and resources. We are grateful to them for their many contributions to the quality of life for our creatives and for our city.

Given this landscape, then, AMP leadership has elected to refine the organization's scope to remain in step with both industry best practices and the demands of a growing city and its creative economy. We have chosen to sharpen our focus on ideas and solutions that create conditions that will preserve venues, enhance economic development, and spark impactful

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[3] The Mastering of a Music City: Key Elements, Effective Strategies, and Why It's Worth Pursuing (2015), MusicCanada and IFPI, in association with MIDEM. http://www.ifpi.org/downloads/The-Mastering-of-a-Music-City.pdf

discussions. We call on our colleagues in our city's non-profits, our real estate community, our creative sector, and our businesses and industries: join us in this conversation, help us craft shared solutions, and stand with us as we demand that the Austin music ecosystem gets the attention, the resources, and the seat at the table it deserves.

"Music is part of the financial and cultural fiber of Austin. The city is right to sound the alarm."

Austin American-Statesman Editorial Board (June 2015)

RECOMMENDATIONS FOR ACTION

The AMP Biennial White Paper: 2015 is organized into three sets of recommendations under the following subject headings:

- **Repair & Enhance** – short-term and immediate changes that will have an impact (one year or less to implementation)
- **Sustain & Grow**– larger ideas that can be accomplished in 12-18 months
- **Foundation for the Future** – bigger ideas to set Austin's music ecosystem up for sustained success

If we are to sustain the brand that Austin markets to the world – and from which all our citizens benefit – a concurrent and aligned community effort on each of these levels is required, involving every facet of the industry from grassroots organizations and music-based businesses to regulatory authorities and elected officials.

I. REPAIR & ENHANCE:

Short-term / Immediate Recommendations for Action

1. TARGETED CITY SUPPORT

A. Add one Full-Time Employee (FTE) in FY2015-16 in the Economic Development Department (EDD) to be focused on the real estate/land-use needs of Austin's music/creative industries. [4] [5] [6] [7]

Duties would include, but would not be limited to:

- Creating and maintaining master lists of:
  - Existing spaces designated for music and creative activities, including alternative performance and creative venues[8]
  - Underutilized or end-of-life City-owned facilities
  - New creative concepts and groups / businesses ready for a space
  - Development projects seeking retail or office tenants
  - Ground-floor retail spaces that are not leased and have potential as temporary (or longer) creative co-working or performance spaces until they are leased long-term

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[4] Imagine Austin: Priority Program 5 - Develop new financial resources and strategies to sustain and expand the creative industry sector.

[5] CreateAustin C4: Develop a toolkit/catalogue/handbook for cultural organizations and developers explaining tools and mechanisms for affordable cultural space development.

[6] CreateAustin: C1: Create an inventory of available cultural spaces and an interactive website to promote access to the information and enable "matchmaking." Include private and public (city, county, and state) properties within Austin, and create mechanisms to keep the list up to date. Include links to other cultural web sites to enhance awareness of the cultural spaces inventory.

[7] ImagineAustin: Reducing the number of obstacles facing local, small, and creative businesses, such as the availability of physical space for industry and business incubation, affordable commercial rents, education and training.

[8] Imagine Austin: C A5 Promote the use of non-traditional venues (such as parks, schools, streets, and vacant buildings) for impromptu and small scale performances and events.

  - Existing resources and tools available to current and prospective small business owners
  - Resources and tools available to developers who are considering creative spaces in new developments

- Facilitating introductions and relationships between the creative sector and real estate developers.
- Exploring the mechanics of the many ideas presented in this White Paper.
- Advising creative organizations and businesses pursuing space and negotiating for space.
- Facilitating credit and tax guidance.
- Providing credible and meaningful endorsements of well-operated and sustainable creative sector businesses.

2. FACILITATE ORGANIC GROWTH[9] [10]

A. Immediately incorporate the following actions into the City's response[11] to the Zucker Report: [12] [13]

- Incorporate Agent of Change Principle[14] into all permitting and development for potentially affected creative venues.
- Actively engage music industry representation in process improvement conversations.[15]
- Ensure that Special Events, the bedrock of the music ecosystem, are vigorously and assertively supported to facilitate growth that is in line with its overall economic impact to the City.
- Create a Case Management system and software that is common across city departments to allow for effective project management.
- Provide a consolidated application that incorporates any required permits.

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[9] Imagine Austin: Priority Program 5 - Develop new financial resources and strategies to sustain and expand the creative industry sector.

[10] ImagineAustin C A-2: Incorporate the arts and cultural preservation themes and elements into small area plans, such as neighborhood and corridor plans.

[11] City of Austin response to Zucker Report (July 2015). http://www.austintexas.gov/edims/pio/document.cfm?id=234828

[12] Planning and Development Review Department Workflow Organizational Assessment, Zucker Systems (2015). Commissioned by the City of Austin. http://www.austintexas.gov/edims/document.cfm?id=230625

[13] Imagine Austin: Grow and invest in Austin's creative economy. Create a regulatory framework to foster a business-friendly environment by simplifying and clarifying the development review process, including one-stop shop review, enforced timelines, and set targets for responsiveness and accountability.

[14] The **Agent of Change Principle** says that the person or business responsible for a change is responsible for managing the impact of the change. It has successfully been applied in the UK and Australia as it relates to noise mitigation measures in situations of mixed land use. If the "agent of change" is a new apartment building that is being built near a pre-existing music venue, the apartment building is responsible for sound attenuation. On the other hand, if the music venue is new and therefore is the "agent of change" in the neighborhood, it is responsible for noise mitigation.

[15] ImagineAustin C P18. Explore existing City policies, processes, and regulations regarding the arts to determine what changes can be made to coordinate these with other goals, such as historic preservation

- Implement an entertainment license policy that lessens the procedural and financial burden on venues from yearly requirements to every two years.
- Clarify that Outdoor Music Venue permit challenges for renewals should only be allowed based on substantial and significant changes to the current permit.
- Require written instructions or requirements from inspectors to document requested changes.
- Address inconsistencies in enforcement and penalties.

B. **Address staffing issues:**[16]

- Train City staff on customer service-oriented model.
- Appoint a Permit Ombudsman for the creative business community.
- Designate an accountable official with substantial, real-world event experience to oversee the Temporary Event permitting process.

3. ACCOUNT FOR MUSIC INDUSTRY IN CURRENT CHANGE MODELS [17] [18]

A. **Resolve that the impact on the music industry and the creative community should be considered a priority** through the ongoing CodeNext and Imagine Austin processes; improve outreach to music and creative community.

B. **Explore a new Creative zoning category** in new, large mixed-use developments (e.g. Mueller) that further stipulates Retail/Commercial Zoning.

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[16] Imagine Austin: Grow and invest in Austin's creative economy. Create a regulatory framework to foster a business-friendly environment by assigning city staff devoted to helping businesses navigate the system and troubleshoot.

[17] ImagineAustin C P18. Explore existing City policies, processes, and regulations regarding the arts to determine what changes can be made to coordinate these with other goals, such as historic preservation

[18] ImagineAustin C A-2: Incorporate the arts and cultural preservation themes and elements into small area plans, such as neighborhood and corridor plans.

4. SOLIDIFY MUSIC & ENTERTAINMENT DIVISION BUDGET AND RESOURCES

A. **Allocate appropriate financial and staffing resources** for office supporting a $2 billion industry.

B. **Expand the Music Venue Assistance Program** to provide financial assistance for creative businesses.

C. **Permanently reassign non-music permitting and code compliance issues** from this office to Austin Center for Events or other appropriate office.

II. SUSTAIN & GROW:

Medium-term Recommendations for Action (12-18 months)

1. CREATE POLICY THAT VALUES THE MUSIC INDUSTRY [19] [20] [21]

A. Explore funding options and specifically review an expansion of the **Business Retention and Enhancement Program**[22] to:

- Include additional eligible uses that focus on creative/music venues.
- Expand the eligible area to focus on creative venues outside of current eligible area.

B. Make Creative Community and Industry space a priority in the City's **Strategic Facility Planning process**[23] by executing a comprehensive examination of City-owned facilities and usage.

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[19] CreateAustin: Develop policies and incentives, such as density bonus; access to historic, energy, low income and/or New Market Tax Credits (if available); tax and fee abatements; and low-cost financing to encourage the private sector to develop and/or make available low-cost space in new construction or current existing facilities to creative individuals and organizations for rehearsals, studios, performance, or exhibit spaces and offices.

[20] ImagineAustin E P6. Support up-to-date infrastructure, flexible policies and programs, and adaptive reuse of buildings, so local, small, and creative businesses thrive and innovate. (See also LUT P8, HN P7, HN P12, C P8, C P15)

[21] Imagine Austin: Grow and invest in Austin's creative economy. Create a regulatory framework to foster a business-friendly environment by identifying impacts on businesses of zoning, permitting and licensing requirements, tax requirements, etc.); creating development incentives (including tax incentives), density and floor-to-area ratio (FAR) bonuses, reduced and alternative parking requirements, expedited review, etc.; and simplifying and clarifying the development review process, including one-stop shop review, enforced timelines, and set targets for responsiveness and accountability.

[22] City of Austin Business Retention and Enhancement Program (Downtown: Congress/ E 6th Street), Economic Development Department. https://www.austintexas.gov/department/business-retention-and-enhancement-program-downtown-congress-e-6th-street

[23] City of Austin Strategic Facility Planning report (2015). http://www.austintexas.gov/edims/document.cfm?id=232828

C. **Revise the Density Bonus.**[24][25] This updated program could be targeted to very specific areas, like the Red River Cultural District.

- Add a category of Community Benefit to the Density Bonus program in certain areas, i.e: "Preservation of existing creative venue/business"
- Take out the "in lieu of" option (Development Bonus Fee).
- Remove 501c3 requirement for Cultural Uses.
- Explore what else can be offered to developers in exchange for having a Creative Use, including:
  - Expedited permit review & approval
  - Austin Energy costs
  - Increased entitlements on this or other projects
  - Fee waivers (permit, capital recovery, construction, etc).
  - License agreements with COA to allow encroachment of air rights over public ROW

D. Consider changes to the **Planned Unit Development (PUD) and Variable Mixed Use (VMU)**[26] **ordinances** that would provide for new creative space as well as preservation of existing spaces.[27] For example:

- Allow for VMU zoning consideration if a music/creative venue is preserved.
- Change Chapter 25-2(E) to unlock VMU zoning for using at least 15% of retail commercial square footage for a creative venue.

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[24] Summary of Density Bonus Program for the City of Austin (2009). http://www.austintexas.gov/edims/document.cfm?id=130645

[25] Imagine Austin: Priority Program 5 - Develop new financial resources and strategies to sustain and expand the creative industry sector.

[26] A VMU Primer, Austin Contrarian (2007). http://www.austincontrarian.com/austincontrarian/2007/11/a-vmu-primer.html

[27] ImagineAustin C A-2: Incorporate the arts and cultural preservation themes and elements into small area plans, such as neighborhood and corridor plans.

2. ESTABLISH A PARTNERSHIP WITH A CREATIVE TRUST[28] [29]

A. Establish a partnership with a to-be-developed **creative trust** that functions like a land bank for creative space/business preservation and development.

3. EXPAND AND SOLIDIFY CULTURAL DISTRICT PROCESS[30] [31]

A. Add the Red River Cultural District as a "sending" area for **Transfer of Development Rights.** [32]

B. Explore an **overlay of the Red River Cultural District**[33] that allows for:

- Preservation of existing creative uses
- Integration of new or redevelopments into the MVVA Waller Creek Master Plan[34]
- Proposed new or redevelopment to be approved by the Red River Merchants Association
- Specific community benefits to be required in new or redeveloped properties.

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[28] Imagine Austin: Priority Program 5 - Develop new financial resources and strategies to sustain and expand the creative industry sector.

[29] CreateAustin C4: Develop a toolkit/catalogue/handbook for cultural organizations and developers explaining tools and mechanisms for affordable cultural space development.

[30] ImagineAustin: Reducing the number of obstacles facing local, small, and creative businesses, such as the availability of physical space for industry and business incubation, affordable commercial rents, education and training.

[31] ImagineAustin C A-2: Incorporate the arts and cultural preservation themes and elements into small area plans, such as neighborhood and corridor plans.

[32] How Does TDR Work?, Austin Chronicle (2009). http://www.austinchronicle.com/news/2009-09-11/841909/

[33] ImagineAustin C P18. Explore existing City policies, processes, and regulations regarding the arts to determine what changes can be made to coordinate these with other goals, such as historic preservation

[34] City of Austin Waller Creek Master Plan (2010). http://www.austintexas.gov/sites/default/files/files/Planning/exec_summ_background.pdf

- A percentage of retail space in new developments to be offered for 70% of retail market rates for local creative businesses.
- Integration into any CodeNext base zoning.
- Offering tax credits for property owners in the Red River Cultural District who voluntarily restrict their deeds in perpetuity and sell the restricted rights.

4. CREATE A MUSIC ENTERPRISE ZONE[35] [36]

A. Create a **Music Enterprise Zone (MEZ)** in an area most compatible with active music uses.

B. Creation of an **Economic Development Corporation** to manage and fund the Music Enterprise Zone.

C. Develop **City incentives** to recruit music-focused businesses specifically for clusters or VMU developments based on music/creative themes. These new developments should include office space for creative businesses as well as venue/performance space(s) and affordable housing for creatives.

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[35] Imagine Austin: Priority Program 5 - Develop new financial resources and strategies to sustain and expand the creative industry sector.

[36] Imagine Austin: C P9. Encourage artists and other creative individuals by promoting the creation of live/work spaces and creative industry hubs, districts, and clusters as retail, community, or neighborhood anchors and activity generators to attract and support other economic and community enterprises. (See also LUT P3, HN P4, E P3)

III. FOUNDATION FOR THE FUTURE:

Long-term Recommendations for Action (2-10 years)

1. INVEST IN THE FUTURE

A. Ensure that the next General Obligation Bond program includes facilities and/or strategies for Austin's creative industries, specifically including music.

2. CREATE A TEN-YEAR VISION FOR THE MUSIC INDUSTRY

A. Creation of a **City-level, long-term music industry development strategy** aimed at retaining and attracting musicians and foundational assets, engaging both public and private partners.

B. Recalibration of all City and nonprofit music organization programs and services (including workshops and education) toward **higher professional standards in all industry areas**, including business training and professional development.[37]

C. Develop and implement a **collaborative process** to craft strategies to create and sustain the live music industry while addressing noise compatibility.[38] [39]

D. Fund and implement a multi-year, multimodal **audience development/consumer education campaign**[40] with community partners.

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[37] Imagine Austin: C A16 Support programs to engage the business development community to assist creative economy start-ups and to develop business and management skills.

[38] Imagine Austin: C P5. Continue to explore and identify solutions to support live music venues, while addressing sound abatement issues.

[39] Imagine Austin: C A10 Develop regulations to mitigate the sound from live music venues through a collaborative process that includes the City of Austin, musicians, venue operators, property owners, and residents.

[40] CreateAustin: Create and implement a comprehensive arts and creativity marketing and audience development plan. Tourism marketing should also build upon this.

APPENDIX: FRAMING THE ISSUES

ISSUE 1: AFFORDABLE COMMERCIAL SPACE[41]

Maps to recommendations: I.1.A; I.3.A and B; II.1.A, B, C, and D; II.2.A; II.4.A, B, and C; III.1.A; III.2.A

> "Failure to address affordability endangers the economic security of us all. A sizable segment of Austin's economy and the city's brand is based on the entertainment industry. **Businesses attract new talent based on the city's reputation, whether their core products are semiconductors or homes."**
>
> *Austin American-Statesman Editorial Board (June 2015)*

In 2012, Imagine Austin anticipated two key challenges for the future of our city's multibillion dollar creative economy:

- **Affordable**, accessible, and functional studio, performance, rehearsal, and office spaces for small organizations and individual artists.
- **Affordable** residential units and transportation options for artists and creatives as housing costs and land values in the urban core rise.

The Austin Music Industry Census data validated these predictions, as well as what many creatives already knew from hard personal experience: our local musicians and music venue owners are finding it more and more difficult to live and do business in a city that is increasingly becoming unaffordable for middle- and lower-income workers.

Downtown development of relatively expensive condos and apartments are pushing low and middle-income artists and industry workers further out of the central City core. Anecdotal evidence suggests that musicians are beginning to move out of Austin altogether due to the cumulative effect of affordability issues.

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41 *The residential and commercial affordability issues facing those in Austin's music industry are shared with thousands of other working-class Austinites. Our city's real estate value growth is outpacing regional income growth across a variety of occupations and industries. For purposes of this white paper, however, we focus on occupations that have been consistently identified with the music sector.*

A recent article in the *Austin Business Journal*[42] noted that "sections of the city immediately east of I-35 and in the downtown core had the most stark losses of creative workers...The 10 Census tracts with the largest growth in their share of creative economy workers had median incomes of about $49,100 per year in 2012. By comparison, the 10 Census tracts that saw their creative economy worker populations shrink had median incomes of about $55,900 per year in 2012. With average median household income at about $64,400 per year in 2012, the shifting demographics lend credence to concerns that **artists and food workers are increasingly being priced out of central Austin and into less-expensive suburbs**."

The article further noted that commercial affordability is also "a concern for city officials and arts and business boosters...who worry that creative businesses...are facing similar pressure from the city's growth. **The possible disappearance of live music venues, art spaces and other Keep Austin Weird-type businesses in favor of mixed-use condominium developments could undermine the city's reputation as a creative hub, which helped fuel its growth in the first place."**[43]

Our growing music industry and associated small businesses report that a lack of affordable office space is a critical barrier to their success, and weak connectivity between these businesses is slowing the economic growth of this sector.[44]

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[42] The Affordability Exodus: Where Austin's Creative Class is Headed (April 22, 2015), Austin Business Journal. http://www.bizjournals.com/austin/blog/creative/2015/04/the-affordability-exodus-where-austins-creative.html

[43] Ibid.

[44] Austin Music Industry Census (2015).

ISSUE 2: REVENUE CREATION AND WORKFORCE DEVELOPMENT SUPPORT

Maps to recommendations: I.4.A and B; II.3.A and B; III.2.A and B

> "Austin's music community is an economic development engine that generates a complex ecosystem with...music industry innovators at its center. That music industry engine also benefits Austin with **thousands of jobs and hundreds of millions of dollars** of music tourism revenue. Music tourism creates cash flows that come directly to the City's General Fund, as well as **international branding** that is a key factor for local companies outside the music industry to compete for high quality workforce recruitment, and also attracts technology companies and other employers to locate in Austin."
>
> *Austin Music Industry Census (2015)*

VENUES

Rising commercial costs, especially in the downtown entertainment areas like the Red River Cultural District and other Central Business District locations, result in "a live music venue circuit that is in a perilous and precarious state, facing an uncertain future at real risk despite the passion of the people involved in it." [45]

The presence of a healthy venue ecosystem of **various sizes and style of music clubs** is a critical anchor for industry development and revenue earning opportunities for local musicians. The smaller venues – the ones operating on the very thinnest of margins – are where many of our songwriters and musicians make their debuts. As UK music executive Mark Davyd observed, small venues are the "grassroots and bedrock" of the music industry, creating thousands of jobs and significant economic impacts. He notes that "these venues are the research and development department of [our music industry's] success."[46]

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[45] The Mastering of a Music City (2015).

[46] Ibid.

In Austin, 93% of venues employ some full-time or equivalent staff, with 67% of these establishments employing six or more people full-time. Nearly 30% of venue respondents to the census each provide 20 full-time jobs or more.[47]

Additionally, live music venues provide a higher percentage of income to Austin's musicians than any other single category of revenue.

MUSIC BUSINESSES

INVESTING IN SMALL BUSINESS: MENTORING AND SKILL DEVELOPMENT

> "The ability to offer excellence is critical to Austin's competitiveness as a distinct, authentic, world-renowned city and cultural brand. A relentless drive and commitment to fresh, original, independent, groundbreaking and **best-in-class product development will confirm Austin as a leading creative force**, and help position it in the global market for cultural tourist destinations. As such, the **pursuit of and investment in excellence is necessary** for all creative endeavors that have the potential to be attractive to cultural tourists. This should be kept top of mind by both organizations who administer existing pools of money to fund creative projects, as well as any new or future funds that become part of the economic mechanism of growing the creative sector."
>
> *Meredith Powell, Public City (2015)*

Successful Music Cities host a deep bench of music businesses and music professionals who work together in teams supporting their artist-entrepreneurs. A best-in-class bench features labels, managers, agents, lawyers, publicists, experienced recording engineers and producers, and more.[48] While Austin's bench has shown slow and steady organic growth, **we must identify gaps in our infrastructure, based on the realities of today's music industry, and develop a plan to create or recruit the professionals we need.**

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[47] Austin Music Industry Census (2015).

[48] The Mastering of a Music City (2015).

Bobby Garza of Transmission Events calculates that filling some of these gaps with professional training programs and mentorships would help expand Austin's $2 billion music industry to **$3 or $4 billion annually**.[49]

A variety of additional barriers to engagement of the broader music community were identified by music industry experts interviewed for the *Making of a Music City* report:

- The informal, almost cloistered, do-it-yourself nature of most music creation and distribution today
- The involvement in music of many part-time workers and hobbyists
- The reality that many small and medium-sized businesses and artist entrepreneurs are, by necessity, focused exclusively on making ends meet
- The lack of sufficient professional artist-entrepreneur advisors (managers, agents, etc.)
- Competitive issues among key stakeholders

The music industry census made similar findings for the Austin ecosystem.

BUSINESS HUBS: CLUSTERS, INCUBATORS, ACCELERATORS, AND COWORKING

> "More music-related jobs of more types will help **build the 'economic cluster' activity** that exists in local music industries of cities like New York and Nashville. Austin has a great base of live music companies and is a fertile environment for music-related creative industries like technology, gaming, and film...With those types of structural advantages coupled with our high quality of life, we should be recruiting more companies that live **at the nexus of music and other key industries**. We've spent a lot of effort bringing companies like Facebook and Google to Austin; it's time we put the same type of focus on recruiting companies like Soundcloud, BMI, ASCAP, and Bandcamp."
>
> *Mayor Steve Adler (2014)*

Austin's tech sector has demonstrated the value of hosting start-up companies and entrepreneurs in shared workspaces, and the music sector can most certainly benefit from

[49] The Mastering of a Music City (2015).

the model as well. In the US and Canada, we're seeing a promising new trend in clustering music businesses together and creating industry hubs to build community and drive innovation. Projects in Nashville, Toronto, Chicago, New Orleans, Memphis, and Detroit are well underway and offer options for Austin to explore.

Benefits of a music business hub that brings these smaller enterprises together would include, but are not limited to:

- Shared resources like accounting assistance, office space and legal guidance, so entrepreneurs can focus on their core business, rather than administrative duties.
- Access to peers dealing with shared issues, providing a built-in community that can serve as both a support system and a think tank.
- Guidance from a tight, committed group of mentors and advisers, who share their talent and experience freely.

Our city has dipped a toe in this potentially lucrative pool, starting with the remarkable shared campus for Austin Film Society and Austin Film Studios. The new "Innovation Zone" being designed around the future Dell Medical Teaching Hospital will bump up against the existing Red River Cultural District, hopefully to the benefit of both. **It's now time for Austin to make a similar commitment its music industry with a "Music Enterprise Zone,"** and to fully support public/private partnerships for commercial music businesses from venues to small business hubs and beyond.

ISSUE 3: VENUE PRESERVATION

Maps to recommendations: I.2.A; I.3.A and B; I.4.A and B; II.1.A, B, C and D; II.2.A; II.3.A and B; II.4.A, B, C; III.2A, C, and D

MUSIC VENUES, GENTRIFICATION, AND SOCIAL HISTORY

Even the most successful Music Cities around the world struggle to address competing demands for limited land and space. In many cases, the development pattern goes like this:

1. A low rent area, possibly a bit downtrodden, becomes attractive for music venues, recording studios or rehearsal spaces and artists in general because it is more affordable;
2. Artists and music businesses move in, and over time make it an attractive, cool area to visit;
3. Property values rise and more people and businesses want to move to the area;
4. Landowners see the opportunity to sell their properties to developers who build residential units or condominiums;
5. Rising costs (sometimes resulting from new requirements for noise reduction) and/or higher rents cannot be met by music venues, studios or artists, forcing them to go elsewhere.[50]

The cycle sounds familiar, but it's not inevitable, **if a community truly values the contributions of its artists and creatives**. Mark Davyd, CEO of Music Venue Trust in London, UK suggests that even though multi-use buildings can generate more profit than live music venues, we need to consider the long game: "The reason the people want to build in these spaces is because they have a cultural history. (But) if by building there, they decimate the cultural activity, no one will want to live there."[51]

Promoter Martin Elbourne, author of the Adelaide [Australia] City Council Live Music Action Plan, agrees that politicians and elected officials must understand the value of live music venues and the importance of protecting them. He declares, "Most cities don't need that

[50] The Mastering of a Music City (2015).

[51] Ibid.

many venues...[b]ut the loss of the one cool place to gather can mean young people aren't attracted to the city."[52]

THE ROLE OF HISTORIC DESIGNATION

Historical preservation and designation are, at their core, about protecting something of value to a community; traditionally, that value has been interpreted strictly as that contained in or represented by physical structures, rather than for places representing social history. "It's a lot easier to make a case for ornate places because they have stature, but heritage doesn't always have to be pretty," says Mary MacDonald of the City of Toronto's Heritage Preservation Services. "Sometimes the grotty needs to be protected."[53]

Designation alone may have some value, in that it could encourage a new owner to continue to use a property as a live music venue in keeping with its social history and landmark status. But it's no guarantee. Specific legislative support is also needed.

THE OPPORTUNITY COSTS OF LOST VENUES

In 2012, Imagine Austin anticipated increasing economic pressures, and specifically called for the City to "create incentives and programs to preserve iconic and established music venues...throughout Austin and its extraterritorial jurisdiction (ETJ)."[54]

Little has been done to date, however. As former Austin Music Commissioner Brad Spies notes, "Iconic spaces and venues are being priced out for creative endeavors due to the confluence of rising real estate prices and property taxes. Many are in danger of closing."

Austin is certainly not the only Music City to have these issues, although the very rapid growth of the Austin MSA has perhaps left policy makers little time to plan ahead for these contingencies. **Many other Music Cities have decided that retaining music venues and other**

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[52] The Mastering of a Music City (2015).

[53] Ibid.

[54] Imagine Austin Comprehensive Plan (2012).

creative attractions in their CBD areas is a critical piece of their economic development plan, and have enacted some interesting and effective strategies that prioritize maintaining a strong venue ecosystem, despite growth and cost pressures.[55]

[55] The Mastering of a Music City (2015).

ISSUE 4: REGULATORY ENVIRONMENT IMPROVEMENT

Maps to Recommendations: I.2.A and B; I.4.C; II.1.A, B, C, and D; II.3.A and B; II.4.A; III.2.A, B and C

> "Governments, the music community, and other stakeholders should work collaboratively to avoid situations where regulations have unintended consequences or prevent reasonable commercial activity by assessing perceived problems and developing appropriate, well-crafted regulatory responses. **Regulations should be carefully calibrated to respect community standards and the needs of residents and other businesses, but at the same time ensure a vibrant music scene."**
>
> *The Mastering of a Music City (2015)*

Policies and ordinances have a direct impact on a Music City's economic viability and success, as do the decisions of city management and staff. A city's level of "music-friendliness" and "musician-friendliness" is closely tied to those factors.[56] Working with the music community is the best way to maximize Music City benefits, resolve issues, and avoid unintended consequences of regulation and enforcement. Some simple questions can help determine whether Austin is truly music-friendly:

- **Do music businesses like live music venues, record labels, recording studios, and promoters receive the message that they are wanted and valued in Austin?**
- **Are Austin's musicians valued as artist entrepreneurs? Are they respected for both their creative and economic contributions?**
- **Is music valued as a creative pursuit on our city? Is Austin music considered a vital cultural component?**[57]

There is a range of government policies and management practices that, together, can ensure that the answer to these questions is "yes." These include, but are not limited to:

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[56] The Mastering of a Music City (2015).

[57] Ibid.

- Adoption of the Agent of Change Principle
- Permitting
- Parking and transportation
- Sound ordinance enforcement
- Land-use planning, including music and entertainment districts
- Taxes and incentives

THE AGENT OF CHANGE PRINCIPLE

As previously noted, many Music Cities are struggling with the balance between residential developments and existing commercial land uses, which can include music venues. Ironically, often it is the music venues and other nightlife activities that draw residents to move into the city's core, and yet these preexisting businesses can get forced out by noise complaints and onerous regulations, or by higher rents and property values.

The **Agent of Change Principle** determines which party is required to adopt noise mitigation measures in situations of mixed land use. If the "agent of change" is a new apartment building that is being built near a pre-existing music venue, the apartment building is responsible for sound attenuation. On the other hand, if the music venue is undergoing renovations and therefore is the "agent of change" in the neighborhood, it is responsible for noise mitigation.

PERMITTING

Whether discussing the regulations themselves or the service orientation of the City staff charged with implementing them, the feedback was consistent and emphatic: **the experience of the Austin music industry is not one of interacting with a 'best-managed city."** Census findings – and the Zucker report – leave no doubt that regulatory inefficiencies are creating productivity loss for both music venues and City staff. Further, venue respondents described the City's permitting system was inefficient, cumbersome, and confusing. 61% of respondents found it extremely or moderately difficult to communicate with the proper officials. These unnecessary bureaucratic obstacles – **both policy and management** – disproportionately stifle local, small, and creative businesses.

PARKING AND TRANSPORTATION

Parking and transportation bylaws can also directly impact music businesses. One of the most frequently cited challenges is loading and unloading of equipment. Cities such as Seattle, Melbourne, and Austin have created loading and unloading zones near music venues, specifically for musicians.

In Austin, 30-minute active loading and unloading zones have been established through a cooperative program between the ATX Music & Entertainment Division and the City Transportation Department. According to Music Program Manager Don Pitts, this "makes the task of handling musical gear both easier and safer for performers while also restoring mobility and freeing up parking for other downtown traffic." The same consideration could be given to recording studios, music schools, and rehearsal spaces in high-traffic areas.

SOUND ENFORCEMENT

Many of Austin's live music venue operators and managers fear that an additional dBC rating, in addition to the current dBA rating, would dramatically affect their business. Nearly two-thirds of respondents said that it would be "difficult/impossible to comply with a dBC rating in addition to the existing dBA rating."[58]

In focus groups, **this single item was the only issue in which multiple established venues said that this change could put them out of business**. Several focus group members said they came to the focus group just to talk about and express their concern around this specific issue, and their experience was that they had largely been overlooked or ignored by City officials in discussions regarding this potential policy change.

Venue operators commented that "the combined effects of 1) the sound ordinance, 2) current zoning practices that put residences within feet of existing venues, and 3) developer building requirements collide in a way that catches venues in the crosshairs."[59]

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[58] Austin Music Industry Census (2015).

[59] Ibid.

As downtown real estate prices have driven many venues out of the city core, the venues have found themselves in much closer proximity to neighborhoods, creating a new set of sound issues. At the same time, an influx of residents moving close to existing live music venues has resulted in increased conflict over noise issues.[60] In some cases, even a few frustrated neighbors can be enough to put a venue owner's livelihood, and those of his or her employees, in peril.

Responsible sound ordinances need to consider two elements: the source and the receiver. In 2012, the Austin Music Commission requested a proposal from the Music & Entertainment Division for a Venue Toolbox that would support the city's live music industry in policing itself. The toolbox included a Good Neighbor Program, a Bad Actor Program, sound ordinance training for venue managers and sound engineers, and a revolving low-interest loan program to help small businesses invest in sound mitigation construction and technology. The program was adopted and has proven successful.

A complementary effort on the receiver side, however, primarily aimed at new construction within 600 feet of existing entertainment districts, met with significant resistance and effectively died in commission, despite a council resolution asking specifically for a plan for receiver action.

[60] Imagine Austin Comprehensive Plan (2012).

ISSUE 5: CIVIC & COMMUNITY ENGAGEMENT

Maps to recommendations: I.1.A; I.4.A, B, and C; II.4.A; III.2.A, B, and D

Involving members of the larger music community is vital to the health and prosperity of a Music City. However, as that study notes, "collaboration across the different segments of the music community doesn't always come naturally as the sector is composed primarily of small and medium-sized businesses. Many operators of these businesses wear various hats, work only part-time in music, and struggle just to make a living."

The Austin Music Census confirms this finding: 52.8% of respondents' music industry businesses are proprietor-only businesses, and a total of 89.9% have between zero to five employees. The reports notes that, "Musicians and entrepreneurs seem to work inside their own niches, so 'siloing' seems to be an unintentional but very pervasive byproduct of this growth."

Indeed, the Census' survey results, focus group responses, interviews, and text write-ins confirmed a sobering shared finding: Respondents across all industry sectors said that "lack of civic engagement to make changes that would benefit the music industry" was of great concern. Yet, respondents also reported that civic engagement was one of their weakest skills in the Skill & Expertise Areas.

The Austin Music Census data and focus groups also confirm an increasing number of new entrants into the Austin music industry job market, an indication that the industry is growing. Out of 74 possible music industry sub-sectors, Austin business owners and proprietors operate in an impressive 63 of them, from touring insurance to CD manufacturing. Austin can also claim more than 135 music-based nonprofits among its community resources. But most census participants were unaware of the industry's expansion or of the many free or low-cost resources available to support them in their careers.[61]

In the last three years, Austin Music People has worked to stake a place for the local music industry at the decision-making table, and to accrue political and policy support. Progress has been steady, but slow. As noted above, our music businesses, with a few notable

[61] Austin Music Industry Census (2015).

exceptions, are small operations whose employees often work multiple jobs – including at night, which can make it impractical for them to attend meetings at City Hall. Our musicians themselves have widely varied interests; they also skew younger, they are renters, and they tend to be skeptical of large public agencies and of politics in general. It can be an uphill battle to make their voices heard over well-heeled corporate interests, large industry associations, and those in a financial position to spend hours at City Hall each week. But it is possible.

Building consensus and broad support in the music community can lead to impressive results. Bobby Garza of Transmission Events points to music community organization as the catalyst for the creation of Austin's Music Division, while Austin Music People's Jennifer Houlihan credits music community engagement in part for the decision to allow Uber and Lyft to officially enter the Austin market and provide patrons of live music venues with more options for a safe way home.

> "[Commissioning the Austin Music Industry Census] is a signal that **Austin intends to continue to lead as a world-class music city**, and that it is going to build **a uniquely Austin-solution to do so.** It is a signal that Austin believes it has the tools and knowledge to build a music economy that other cities will aspire to equal; to start with data and do things a little differently, and end up as **a uniquely Austin 21st century music city.**"
>
> *Austin Music Industry Census (2015)*

ABOUT AUSTIN MUSIC PEOPLE

In 2010, when a residential development went up in one of the city's busiest live music corridors, the neighborhood got the just the type of dense housing stock it badly needed. But when developers moved to have live music end two hours earlier in deference to the neighborhood's new residents, it became clear that Austin's pro-growth live music industry needed a seat at the table. We knew there was a path to prosperity for Austin that included compact and connected commercial and residential development, a high quality of life for residents, and a warm welcome for new businesses – all set to the soundtrack of the Live Music Capital of the World.

Owners of affected properties conferred, reached out across the music industry, spoke with City leaders, and in 2011, Austin Music People was born. Today, AMP is an unprecedented alliance that includes some of Austin's most successful entrepreneurs, as well as midsize and small music businesses, professional musicians and artists, and devoted fans of Austin's music scene. And today, that residential development offers a great return on investment, while celebrating residents' easy access to great live entertainment.

The AMP coalition exists to strengthen the music sector for the ongoing benefit of the regional economy. Together, we are committed to making the economic development of the Austin music industry a priority for our political, civic, and cultural leaders, and to connecting and empowering Austin's live music community by providing powerful advocacy tools, participating in policy development, and representing live music interests in public and private forums.

In the past, of this economic network's component parts, the Austin music industry was conspicuously lacking a unified voice for its issues, a watchdog for threats to its survival, and a vision for its future. **Austin Music People is that voice.**

ADVOCACY

Constantly monitor development initiatives, lawmaking, and constituent behaviors; identify opportunities and challenges facing the local music industry with an eye toward sustainability, growth and leadership

ENGAGEMENT

Mobilize an informed local electorate, helping those invested to make their support of Austin music known; nurturing collaboration between the music industry and community stakeholders

RESEARCH

Explore ideas, policies, issues and initiatives facing the music industry focused on solutions, success and sustainability

www.AustinMusicPeople.org

FB: AustinMusicPeople

T: @AustinMusicPpl

E: info@AustinMusicPeople.org

EXPLANATION OF TERMS

What is a Music City?

The term "Music City" is becoming widely used in creative communities and has penetrated the political vernacular in many cities around the world. Once identified solely with Tennessee's storied capital of songwriting and music business, Nashville, Music City now also describes communities of various sizes that have a vibrant music economy which they actively promote. Alliances are being formed among cities that see value in partnering to enhance their music success, Music City accreditations are being discussed and defined, and Music City panels are popping up at conferences around the globe. Outside the creative community, there is growing recognition among governments and other stakeholders that Music Cities can deliver significant economic and employment benefits beyond the long-acknowledged cultural and social benefits.

What is Imagine Austin?

This comprehensive plan, required by City Charter, addresses Austin's most pressing issues and will guide how our city transforms in the future. The plan, adopted unanimously by City Council in 2012, was co-created with thousands of Austin residents, businesses, and organizations to reflect our city's shared values and aspirations. Today, Imagine Austin is being "co-implemented" with contributions throughout the city. Austin Music People is an official Community Partner for the Imagine Austin plan. Learn more at austintexas.gov/imagineaustin.

What is CodeNEXT?

CodeNEXT is the City of Austin initiative to revise the Land Development Code, which determines how land can be used throughout the city — including what can be built, where it can be built, and how much can (and cannot) be built. The process is a collaboration between Austin's residents, business community, and civic institutions to align our land use standards and regulations with what is important to the community. This initiative to revise the Land Development Code is a priority program out of Imagine Austin, our plan for the future adopted by City Council in 2012. Learn more at austintexas.gov/codenext.

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THE AUSTIN MUSIC CENSUS

A DATA-DRIVEN ASSESSMENT OF AUSTIN'S COMMERCIAL MUSIC ECONOMY

BY TITAN MUSIC GROUP, LLC
FOR
THE CITY OF AUSTIN ECONOMIC DEVELOPMENT DEPARTMENT'S
MUSIC & ENTERTAINMENT DIVISION

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= ALL RESPONDENTS WHO TOOK THE SURVEY

= MUSICIAN-ONLY RESPONDENTS

= MUSIC INDUSTRY EMPLOYEE/CONTRACTOR + OWNER RESPONDENTS

= MUSIC INDUSTRY BUSINESS OWNER-ONLY RESPONDENTS

= VENUE OWNER/MANAGER-ONLY RESPONDENTS

= CHARTS BY AGE CATEGORY

= TEXT ANALYSIS CHARTS OF WRITE IN RESPONSES

Executive Summary and Key Findings

INTRODUCTION

The ATX Music Industry Census and Needs Assessment (the "Austin Music Census") provides a starting point to plan initiatives to best serve Austin's music industry growth and establishes a benchmark for future measurements. With nearly 4,000 survey respondents, eight focus groups and 20 interviews, the Census is the most detailed survey of the Austin commercial music industry undertaken to date. No previous studies of this kind existed to be used as best practices or for comparison data.

The Austin Music Census measures three key categories of music industry innovators: musicians, music industry entrepreneurs and employees, and live music venues. At its core, the Census is the collective thoughts and opinions of nearly 4,000 Austin musicians and music industry operators. The ATX Music and Entertainment Office is a division of the City of Austin's Economic Development Department, which is tasked with leading the global business recruitment, urban regeneration, small business development, cultural arts, and music efforts for the City of Austin.[1] Don Pitts, the Manager of the City of Austin's ATX Music and Entertainment Office commissioned this study to improve the Division's understanding of these categories of music industry innovators and their needs for future growth of jobs, salaries, and revenues. Perhaps even more important is that the Austin Music Census was commissioned because of a strong desire *to listen* to the public, and to find ideas and best practices to provide best-in-class services to the Austin music industry based on a holistic, broad-based view of its participants.

Austin's music community is an economic development engine that generates a complex ecosystem with the three key categories of music industry innovators at its center. That music industry engine also benefits Austin with thousands of jobs and hundreds of millions of dollars of music tourism revenue. Music tourism creates cash flows that come directly to the City's General Fund, as well as international branding that is a key factor for local companies outside the music industry to compete for high quality workforce recruitment, and also attracts technology companies and other employers to locate in Austin.

Austin is now the 11th largest city in the U.S., and the fastest growing city by a wide margin of all of the largest 25 cities.[2] The Austin Median Family Income (MFI) is well above the Texas MFI, and general prosperity indicators have increased for Austin's population year over year.[3] The Austin Music Census provides many measurements and insights into the Austin music industry, including comparisons of certain demographic and income data from the three key categories of music industry innovators to Austin's population as a whole.

Austin has been a leader among cities in presenting itself as a "music city." There are exciting things happening within the sphere of public initiatives developing regionalized commercial music industries; in fact, the first-ever Music Cities Convention will take place in May 2015 in Brighton, England with presenters from around the world.

This is an opportune moment to commission the Austin Music Census. In some ways, cities are becoming the new structural unit for developing music economies. Many cities around the world are beginning to understand that there is a distinct advantage in retaining or building an artist class as a critical means of becoming innovative, thought-leading and prosperous hubs, and are acting on those ideas. Many of the

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[1] City of Austin Website, Economic Development Department. Web. 8 May 2015. http://austintexas.gov/department/economic-development.

[2] Cohen, Darryl T. "Population Trends in Incorporated Places: 2000 to 2013." *United States Census Bureau*. U.S. Census Bureau. Mar 2015. Web. 27 Apr. 2015. <http://www.census.gov/library/publications/2015/demo/p25-1142.html>.

[3] US Census Bureau, *Texas QuickFacts*. Web. 8 May 2015. http://quickfacts.census.gov/qfd/states/48000.html.

most innovative efforts are focused on using "design thinking" to plan city and private sector roles in building stronger, creative industries.

What does all this mean for Austin given our many historical successes in growing and capitalizing on a local commercial music industry with a unique, Austin-centric character? How should Austin's city planners and other invested stakeholders understand what the local industry should look like in ten years, and how the industry will get there? Can and should the City set goals for specific changes, and what should those goals be?

The Austin Music Census provides a clear, data-driven view of the current state of Austin's commercial music industry to help policy makers answer these questions.

The data presented here regarding key needs and gaps represents the collective opinions of a very large cross-section of the Austin music industry. We have analyzed and highlighted key issues for future policy consideration and presented research on best practices used in other cities that may be relevant. However, any detailed exploration of policy recommendations, feasibility issues, or other considerations is outside the scope of this study.

Rather, we collected and present both qualitative and quantitative data that establishes a current baseline of information as well as a working methodology for future measurements of Austin's music industry to enable policy makers to formulate effective policies for future growth.

GOALS OF THE AUSTIN MUSIC CENSUS

The Austin Music Census was conceived by the ATX Music and Entertainment Division to accomplish two main goals:

- Benchmark a comprehensive inventory of Austin's music industry by eliciting granular information from three main private sector categories: Live music venues, individual musicians and music industry workers. Respondents answered demographic questions as well as a broad series of questions about how they earn income, what they thought was going well in Austin and what could be better for themselves and in Austin's music industry generally.

- Assess key needs and gaps by analyzing Austin Music Census data and propose next steps and key criteria to assist City of Austin policy makers in identifying economic development opportunities.

The Austin Music Census includes a substantial amount of data from original research on the three key categories of music industry innovators, which is presented in charts and other appendices of the Census. Much more can and should be learned from these charts through further investigation and analysis. The Austin Music Census can become a reference resource to which Austin's policy makers can return as strategic planning and policy-making evolves.

ROLES FOR PRIVATE SECTOR, NONPROFITS, AND CITY OF AUSTIN

The private sector clearly drives the Austin music industry, but nonprofits and the City of Austin each have an essential role to play in developing and executing a long-term plan for music industry retention and growth. Each of these actors brings distinct capabilities and assets to bear, and a successful plan should utilize them all. A fundamental finding of the Census is that maturation of some parts of the Austin music economy creates new opportunities. Simultaneously, growing "fault lines" in other parts of the industry suggest the wisdom of bringing a new emphasis to a comprehensive economic development strategy among the private sector, nonprofits and the City of Austin to retain and develop Austin's creative assets.

The Austin Music Census may help inform those discussions on topics such as minimizing venue regulations, developing affordable housing stock, building commercial music industry hubs and presenting professional development and education opportunities.

CENSUS ANALYSIS STRUCTURE: THREE CATEGORIES OF MUSIC INDUSTRY INNOVATORS

Dividing the Austin music community into the three categories of musicians, music industry workers and live music venues allows the Austin Music Census to elicit information about each category, compare each to the Austin Metropolitan Statistical Area ("MSA") as a whole, and observe the interdependence of each category with the others. This is particularly true of the needs and gaps analysis as each category has its own unique issues that also affect the other. Three examples of interdependence are declining cover charge, regulatory requirements and rising commercial and residential property costs.

Census respondents identified declining cover charge as directly affecting income for musicians and revenue for live music venues. Live music venue respondents also identified a less obvious pressure on revenues: Increased operating costs from the City's regulatory processes. Confusing regulations is a key challenge to venues in growing jobs and investing in their businesses. Fewer job creators at live music venues mean lower income and less opportunity for certain job categories of music industry workers.

Alternatively, rising prices of Austin's rental stock for both venues in commercial real estate and musicians and industry workers in residential properties forces hard questions for the City and private sector about how to make Austin work both now and in the future.

Austin has a strong and growing base of music business entrepreneurs across many subsectors that are working with musicians, events, and music venues, and the data show exciting potential trends for future growth. But for that potential to become reality, new efforts will need to focus on creating more efficiency and less fragmentation in the Austin music industry.

METHODOLOGY: IMPORTANCE OF SAMPLE SIZE IN THE AUSTIN MUSIC CENSUS

The Austin Music Census is the first benchmark of its kind in the Austin music community. Because there is no prior data for comparison, it was important to elicit responses from a high number of respondents to help set a benchmark for demographic and income information, and an exhaustive effort was made to elicit responses from the Austin area music community.

The Austin Music Census questionnaire was made available online and was publicized widely. Respondent answers included in the data analysis were limited to individuals who work at least part time in the Austin area. Responses from fans and others who did not fit into the three categories were excluded from analysis.

After these controls were applied, the Austin Music Census has 3,968 respondents to the survey questions, and an additional 1,501 free-form text write-in responses. There were also eight formal focus groups and over 20 individual interviews conducted with a wide variety of industry representatives that helped to focus the Austin Music Census questionnaire and added significant depth to the implications of the data collected.

KEY TRAITS AND CHARACTERISTICS

Respondents to Survey: There were a total of 3,968 usable responses to the Austin Music Census survey (detailed information is provided in the Methodology section below). Of those respondents:

- 60.0% are "Musicians: Performers and Songwriters" (2,380 individuals)
- 35.3% are "Music Business: Owners, Employees, & Contractors" (1,401 individuals)
- 4.75 are "Venues & Nightlife Establishments: Owners & Managers" (187 individuals)

Complex Economic Ecosystem: The Austin Music Census data show that the Austin music industry is a rich economic ecosystem entrenched across many traditional industry sectors, and not just a population of musicians, festivals and venues. Music businesses exist across Austin in 13 main employment sectors as defined in the North American Industry Classification System, including manufacturing, retail, education, information sciences and intellectual property creation, professional support services, hospitality, as well as tourism and branding. Respondents identified with 72 out of 74 possible sub-sectors of employment in the

music business. The data suggest that strategic planning around any Austin-based "music industry" is better understood as a broad ecosystem based around commercial music.

Desire for Greater Civic Engagement: Respondents across all industry sectors said that "lack of civic engagement to make changes that would benefit the music industry" was of great concern. Yet, respondents *also* reported that civic engagement was one of their weakest skills in the Skill & Expertise Areas.

General Prosperity Indicators: Musician income is significantly below the Austin MSA average, music industry worker income is very slightly below average, and venue owner/manager income is slightly above average. (See Appendix III for line chart comparison data of each sector).

Higher Racial Diversity: The Austin musicians and industry are somewhat more racially diverse (67.0% white) than the Austin MSA population as a whole (79.8% white)[4].

Most Jobs in Live Events: Respondent industry sectors are most populated in the "Event Producers and Event Promoters" categories by a wide margin.

The Majority of Respondents are Working Multiple Jobs: Respondents' means of employment in most cases is quite complex, with over 60% of *all* respondents (2,266 out of 3,749 respondents) working two or more jobs to create their income. Some are working multiple jobs within the music industry or are working a combination of jobs on a contract basis. Many are also working part-time or full-time jobs in other industries. This implies that a large number of working families in Austin are embedded in not only music, but many other industries as well.

KEY STRENGTHS

Strong Foundational Assets: Austin's music industry economy has a number of strong foundational assets including a diverse ecosystem of music venues supporting a wide variety of musical styles and performances; a growing base of music tourism revenue flowing to the City; substantial and vital support from nonprofit organizations for both musicians and music industry professionals; and job growth in the live music business sector.

Concentration of Key 25-39 Age Group: 49.1% of all respondents are in the 25 to 39 age group (17.1% of the Austin MSA population are 25 to 34 years)[5]. This is the age group that many cities work hard to attract[6], as they are typically builders of economies in their prime work years. The age group brings innovation, new thought, front-line product trends and economic development to cities. The Austin Music Census data suggest that Austin has attracted a particular concentration of this group in the music industry.

Some Sectors of Austin's Music Industry Appear to Be Poised for Growth: There is a healthy percentage of new entrants to the local music industry job market - 18.2% of the respondents have been working in the industry for two years or less. This could be an indication of steady job growth in certain segments of the music industry, but without another source of local music industry employment data to which this can be compared from a past measurement, there is no way to be sure. At a minimum, however, this data does show that nearly 20% of survey respondents have entered the music industry job market within the past two years.

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[4] US Census Bureau, *ACS Profile Report: 2013 (1-year estimates)* http://www.austintexas.gov/sites/default/files/files/Planning/Demographics/CoA_ACS_Profile_2013.pdf

[5] US Census Bureau, *ACS Profile Report: 2013 (1-year estimates)* http://www.austintexas.gov/sites/default/files/files/Planning/Demographics/CoA_ACS_Profile_2013.pdf

[6] Carol Coletta, City Observatory, *How We Build Our Cities: What's At Stake.* Published December 12, 2014. http://cityobservatory.org/coletta-guest-post/m (Last visited April 12, 2015).

Venues Create Jobs
93% of venues employ full time or equivalent staff, with 67% of these establishments employing six or more people full-time. And 29% of our venue respondents provide more than 20 full-time jobs. Additionally, live music venues provide a higher percentage of income to Austin's musicians than any other single category of revenue. Private event bookings and customer "VIP" experiences are contributing new sources of revenue for many venues.

Significance of HAAM and SIMS Foundation for Austin Musicians: Based on respondent data, the Health Alliance for Austin Musicians provides health services to 12.4% of the Austin musician population. While another 18.9% of all these respondents have no health insurance, the uninsured rate of the general population of the Austin MSA is 19.9%.[7] Because of HAAM, the uninsured 18.9% rate is actually *lower* than the uninsured in Austin's general population. Without HAAM's assistance, Austin's musician population without health insurance would be 31.3%. (The geographic scope of data used in the final dataset for analysis and reporting is limited to those residing in the Austin-Round Rock-San Marcos area, collectively defined by the U.S. Census Bureau as the "Austin MSA").

KEY CHALLENGES

Stagnating Musician Income: The single highest rated issue on Austin Music Census "Needs and Gaps" questions: 81.2% of all respondents say that "Stagnating Pay for Musicians Makes It Difficult to Make a Viable Income" has an "Extreme or Strong Impact". Analysis of the income data from the 1,882 musicians who answered survey income questions illustrates why this issue appears to be urgent to musicians: nearly one-third of them are earning $15,000 or less per year in pre-tax income (including all income sources), and approximately three-fourths of them are earning below the Austin MSA Mean Annual Wage. [8]

Income stagnation and declining revenue issues are present throughout the music industry nationwide. It is very likely that Austin is not the only city to have a large artist population with urgent poverty and affordability issues. Any city that provides a home for a large artist class and is also experiencing the kind of annual growth that creates rapidly increasing cost of living – and that does not take counteractive measures - may likely experience similar issues.

Affordability and Cost of Living Edging Out Musicians: Living and affordability issues of all types – housing for rent and purchase, cost of living in food, utilities, and transportation – were enormously important to ALL respondent groups, but are having the greatest effect on musicians. Musicians and music industry workers are paying more for rent, mortgages, property taxes, and other costs of living. Downtown development of relatively expensive condos and apartments are pushing low and middle-income artists and industry workers further out of the central City core. There is some indication that musicians are beginning to move out of Austin altogether due to the cumulative effect of affordability issues.

Increasing Silo and Fragmentation Effects: The Austin Music Census data and focus groups confirm an increasing number of new entrants into the Austin music industry job market. These new entrants suggest that the local industry as a whole is growing. However, most participants in the Census were not aware of how much the local industry has expanded or how large it actually is, or what networks and resources exist within it. 52.8% of respondents' music industry businesses are proprietor-only businesses, and a *total of 89.9% have between zero to five employees*. Musicians and entrepreneurs seem to work inside their own niches, so "siloing" seems to be an unintentional but very pervasive byproduct of this growth. One major consequence of siloing is increased fragmentation and atomization of industry small businesses and sole proprietors. Focus groups noted another issue that arises out of this trend: this type of working environment

[7] US Census Bureau, *ACS Profile Report: 2013 (1-year estimates)*
http://www.austintexas.gov/sites/default/files/files/Planning/Demographics/CoA_ACS_Profile_2013.pdf
[8] Austin-Round Rock-San Marcos, TX - May 2014 OES Metropolitan and Nonmetropolitan Area Occupational Employment and Wage Estimates." *Bureau of Labor Statistics*. United States Department of Labor, May 2014. Web. 28 Apr. 2015.

does not raise the bar for professionalism, and can create a league of amateur or mid-level performers, with no obvious means of developing a more competitive set of skills and contacts.

Music Business Entrepreneurs are a Key and Underserved Inflection Point for Industry Growth: Through detailed analysis in *Section 4: Music Industry*, it would appear that a key issue for Austin Music Industry economic growth may be in creating better opportunities for growth of entrepreneurs and small business operators, who support the ecosystem of industry growth. This trend perhaps has significance from a policy perspective. If policy makers can facilitate increased capacity for entrepreneurs to focus on building or growing their companies, those policies may pay off, both for the entrepreneurs' income earning ability and for their increased capacity to hire more full-time employees.

Changing Trends in Austin Music Consumer Behavior: A recurring theme from respondents is that a "cover charge" for local Austin musicians has all but evaporated for many venues, despite the high number of quality local artists. In fact, it appears from the Austin Music Census that some local residents are less willing to pay a typical $5 to $10 cover charge for a night out of local live music than they have been at any time in the past decade.[9] Respondents to the Austin Music Census told us that cover charges have typically stayed the same or declined from ten years ago, or in some cases, disappeared entirely.

This phenomenon has effects on both venues and musicians. While there are exceptions, respondents said that the decline in cover charge has left venues with an annual revenue loss hovering as high as 30%.[10] While some venues have been able to make up some portion of the loss of cover charge through clever marketing, increased private events, and other practices, respondents indicated that generally speaking, the decline in cover charge has resulted in venues paying most local bands *less* than (or in the best case, the same as) they would have ten years ago.

A Confluence of Operating Pressures Are Creating Critical Vulnerabilities for Music Venues

Venue income and profit is under pressure from a convergence of several factors, some market based, some regulatory. While each venue's situation is slightly different depending on venue location and other factors, respondents seemed to operate on narrow margins that are getting progressively narrower over time, particularly for small and medium-sized venues. Many of the respondents from these small to mid-size venues who participated in interviews and focus groups indicated that they are operating on very thin profit margins, ranging from 6%-15% annually. Like other small to medium sized businesses, venue profit margins can quickly go from net-positive to net-negative and incurring debt if they experience an unexpected capital expenditure, such as a high-cost repair or equipment replacement. Respondents particularly identified expensive leases, high operating costs, short-term lease contracts, productivity losses from perceived regulatory inefficiencies, and declining "cover" revenue as particularly important contributors to declining operating margins.

Regulatory Inefficiencies Appear to be Creating Productivity Loss for both Venues and City Staff: Venue respondents found the City's permitting system to be inefficient, cumbersome, and confusing. Respondents indicated both in survey data as well as focus groups and interviews that the process was very difficult to navigate and time consuming. Also, since there is no single department or point of contact at the City that is designated to handle venue questions, many felt that there is a "no man's land" problem of getting stuck in a system in which different departments or personnel may provide conflicting information to applicants, but there is no single point of escalation or path to resolution.

Inconsistency with City Communication and Enforcement: 61% of venue respondents found it extremely or moderately difficult to communicate with the proper officials - a concern that was echoed by focus group and interview members as well. Difficulties in understanding ordinances and changes as well as poor communication with officials often leave venue owners frustrated and without a process to obtain consistent

[9] Venues and Nightlife Establishments Focus Group conducted by Titan Music Group 6 Oct. 2014.
[10] Venues and Nightlife Establishments Focus Group conducted by Titan Music Group 6 Oct. 2014.

answers. Respondents said that it is often difficult to find the appropriate person or department who can give an answer - and receiving contradictory information when talking to more than one person (even within the same department regarding the same permit) happens with some frequency. Enforcement of outdoor music venue permits has been an equally problematic issue: 62% of venue operator respondents say that "Inconsistent info and enforcement from APD regarding Sound Ordinance" is having an "Extreme/Strong" or "Moderate" impact on their business. This is a worrisome data point, because it does not indicate that a few "outside the margin" operators don't like the sound ordinance, but rather that *nearly two-thirds of all venue respondents* are experiencing trouble with inconsistencies in sound ordinance enforcement. It would appear that there are some systemic enforcement problems that are not yet solved.

It is also important to note that nearly 63% of respondents also feel that it is difficult for City permitting and enforcement officials to keep pace with City growth. Venue owners are sympathetic that these departments are overworked. Venue owners and managers feel that most of the problems with permitting and enforcement are likely systemic and unintentional, and not related to any specific individual department or authority figure. Respondents seemed to believe that the problem might simply be that given Austin's current and historical rate of growth, particularly around major events, festivals, and music tourism traffic, appropriate staffing in these departments has not kept pace.

KEY POLICY CONSIDERATIONS

Need for City-Level, Long-Term Industry Development Strategy: The results of the Austin Music Census show that respondents perceive a clear mismatch between City brand marketing and City policy regarding Austin's music. While likely entirely unintentional, the lack of focus around a clear, long term forward-thinking plan, followed by good execution coupled with real municipal commitments has become evident to respondents.

The data indicates that it is more important now than ever to have an identifiable, communicable, specific, and consistent industrial development strategy from which specific program, policy, and investment decisions can be made and executed over at least a three to five year period. The City may consider working with private industry and local nonprofits to develop a long-term strategy to retain Austin musicians and foundational assets. Good city planning followed by sustained execution and policy changes could have a profound effect on the shape of Austin in the future. Austin has an opportunity to continue a leadership role among "music cities."

Faster Economic Growth Through Cluster Development: The "clustering" concept has gained ground in Austin in the last ten years in other industries – the newly designated medical "Innovation Zone" around the new Dell Medical Teaching Hospital and the Austin Film Studios/Austin Film Society campus for film creators are two examples. Yet Austin has yet to engage in any meaningful pursuit of a strategic, long-term plan to develop music industry clustering. The strategy of governments and public entities investing in the creation of economic clusters via policy support, land/building grants, financial investment or other means is certainly not new, and has been well proven in a substantial number of case studies and other research to be very effective in certain situations. Well-designed clusters are able to create a competitive advantage as well as faster innovation for industry over cities that do not include clustering activities as a prominent component of their economic development strategy.

Need for Functional, Formal Entertainment Districts: All respondents supported the creation of formal, City-codified entertainment districts. Expanding the concept of geographical entertainment districts to encourage music industry cluster development for the private sector may also be an important and long-term strategic policy strategy for economic development. The creation of formalized entertainment districts creates geographic boundaries for specific City-level policy action, and may also enable additional potential funding sources from the State of Texas and public-private development partnerships. Entertainment Districts are contemplated in Chapter 9 of the City of Austin Development code, but that only speaks to sound ordinance regulations within a geographic area, and not to the other benefits that meet state eligibility guidelines for business growth funding and preservation allocations.

Expectations for Musician Income and Dedicated Affordable Housing: Musicians are seeing those around them experience benefits of an upwardly mobile and innovative city, while over 20% of them live below the Federal poverty line and 50% have incomes that qualify for Federal Section 8 Housing Subsidies.

The Census data clearly illuminate a level of poverty and lack of income relative to the rest of Austin for a large sector of musician respondents in particular, many of whom are not sharing in the prosperity growth. The clear data from the Census around this issue has caused deep concern among some Austin constituents. It is important to put these numbers in a broader context of the nationwide music industry revenue decline experienced over the past decade. The Austin income figures are anecdotally similar to other cities with a concentration of musicians, particularly U.S. cities experiencing rapid growth and affordability issues. It appears that Austin is the first U.S. city to conduct a granular economic analysis like the Census. It is entirely possible that musicians in Austin are no worse off relative to their counterparts in other comparable U.S. cities, but there are simply no parallel data with which to compare the findings in the Austin Music Census.

But rather than focusing on how Austin compares to other cities in this regard, it may be more productive for the Austin music industry stakeholders to contemplate what the expectations should be around questions of shared prosperity for its musicians, and how the Austin music industry, nonprofits and the City of Austin could work together to create revenue and remove financial impediments to work towards that expectation. Already, early indications from the Census are that some respondents are planning on leaving Austin.

Respondents indicated that dedicated affordable housing for artists is one critically important tool for impacting musician affordability barriers. At present, Texas State law precludes the City of Austin from providing some types of direct dedicated, affordable housing for artists, but there may be public-private partnership models worthy of exploration to circumvent these barriers.

There are other cities that very recently are making significant commitments to artist retention by providing dedicated affordable housing for artists and offering innovative solutions that could be useful in Austin.

Creation of a Commercial Music Industry Hub with Affordable Co-Working Space Economic activity "clustering" around a given industry is a market phenomenon that can happen organically, as companies form around a particular local asset - certainly this is what private industry operators have already done around the Austin music industry to a limited extent.

Respondents strongly indicate that a centralized Commercial Music Industry Hub building with plentiful and affordable co-working space, meeting rooms, resource & tools, and more is an important next step – and one that is already happening in other key music cities. Clusters can bring tangible benefits, such as increased efficiency of connections and operations, better access and speed to "insider" information, and a high-energy environment of both competitive *and* cooperative relationships – all of which may create faster time to market with more opportunities to build relationships and revenue.

Easier Permitting and Streamlined Regulation for Live Music Venues and Nightlife Establishments: Ensuring that the Austin area has a robust ecosystem of live music venues that support local music is a key anchor for growing both music businesses and musician income. For a majority of small to medium-size music venues that focus on *local* music, a number of factors such as rising operating costs, zoning and development issues, decline of "cover" revenue, and costly inefficiencies from unwieldy permitting processes are creating very thin and potentially fragile profit margins and overhead pressures.

To address these vulnerabilities, respondents suggested that the City could consider: 1) overhauling the cross-departmental permitting system to be streamlined, consistent, and more customer-friendly; 2) create better communication resources, such as an easy one-stop online resource site and quarterly meetings for venues with City departments, and 3) add cost-reduction incentives for live music venues that hire local musicians consistently and that operate without violating City ordinances.

STRATEGIZING PAST THE TIPPING POINT

The Austin Music Census uncovers fault lines developing that if left unchecked, may allow the erosion and disintegration of critical parts of the Austin music community. Tracing these fault lines into the future suggests that they converge in a tipping point – one we are reaching very rapidly. The Austin community will need to do what Austinites have done so well for so long—come together and plan our way around these problems.

The key takeaway is that this planning will not happen on its own, and will require purposeful intent and a sustained focus for a number of years in developing and executing a clear plan. That is the intention of this Census – to help identify the fault lines underlying the Austin music community to better understand a strategy to address them.

It is a bold step for a City to move beyond the nationally competitive rhetoric of which city is best, and to actually take an unflinching measurement of what is happening at the individual, citizen level: a musician, a studio engineer, a retail record store clerk, a show promoter. While this may seem like an exposing of vulnerabilities, in truth, it is a move of confidence and maturity. Only a city with a reasonable certainty that it will be able to address the issues with focused, realistic solutions and long-term planning would invest in asking these difficult questions.

It is a signal that Austin intends to continue to lead as a world-class music city, and that it is going to build a uniquely Austin-solution to do so. It is a signal that Austin believes it has the tools and knowledge to build a music economy that other cities will aspire to equal; to start with data and do things a little differently, and end up as a uniquely Austin 21st century music city.

As one focus group participant said:

> *"Because we have little history of established major industry here, we are sort of ripe for whatever the new model is rather than having something that's got huge legacy barriers to overcome. As the city grows hopefully there's a way to make that industry growth follow this model where it does respect the purity of the music and acknowledges the things that are these strengths of Austin's uniqueness."*

SECTION 1

METHODOLOGY

Methodology

KEY FACTS AND ASSUMPTIONS

The Austin Music Census is somewhat unique in its attempt to measure music industry economic and demographic data at a fairly granular level in an environment in which there is no existing benchmark, or even a defined population. As such, we set out to articulate the assumptions and key facts that have a direct influence on how we built the design, scope, and data collection processes of the study. Those key facts and assumptions are:

- There is no existing repository of data that contains 100 percent of the "universe" of individuals or companies that comprise Austin's music industry outside of broad census data. Neither is there existing data that definitively measures the specific size and composition of the Austin music industry workforce.

- While there are certain directories based on voluntary sign-ups and economic impact studies, the total size of Austin's music industry population and the number of workers by industry category is effectively unknown and has only been measured through approximations.

- The Austin Music Census data collection process was structured to include a high number of respondents in the survey population in an effort to increase the reliability of the survey data and to help fill in some of these blanks.

- The only known source of information available on the number of jobs and employment figures for some sectors of the Austin music industry is the Bureau of Labor Statistics Employment and Wage information. However this data is compiled from Internal Revenue Service tax return information, which does not capture a large percentage of the cash transactions, nor does it effectively categorize individuals that have more than one job, and many sectors are grouped together, making this data ineffective for many analytical purposes.

- The composition of the working population by industry sector in Austin is also unknown and has never been measured. There is no existing source of information that provides a "profile" of total industry workforce by percentage of industry category.

- Since the size of Austin's music industry population is unknown prior to the Austin Music Census, these results may or may not be representative of the total music population in any given category. Some segments of the industry may have higher response rates than others.

FOCUS GROUPS

Titan Music Group, LLC conducted eight formal focus groups consisting of representatives from different music industry sectors. 79 people participated in a two-hour discussion about the positives and negatives of Austin's music environment and then shared ideas for improvement. 19 one-to-one interviews were conducted with various Austin music industry stakeholders.

Focus groups and interviewees consisted of musicians, artist managers, nonprofit organizations, music production workers, venue owners, and ancillary music business personnel. (See Appendix XII for focus group discussion summaries).

We used information provided by these industry workers for context and insight to develop the Austin Music Census survey questionnaires. We also used focus group and interview data throughout the survey and the analytical report to provide more robust insights.

SURVEY DESIGN

Titan Music Group, LLC used best practices in research methodology and question and answer design to minimize self-selection bias - the potential that respondents would feel their interests would be best served by giving an inaccurate response to a question. Data collection for the survey was conducted online only to reduce any distortion or social bias from an in-person or phone interview.

In the survey instructions, respondents were clearly informed that no personal identifiers would be used. We also emphasized to respondents that there would be very limited access to any data outside of Titan Music Group, LLC and no personally identifiable data would be released to City officials or to anyone else. There would be no connection between survey answers and personal identities.

The survey was created as a branching survey. The respondents self-selected their role in the music industry. They survey consisted of common questions that all respondents answered, and then different questions were asked depending on how the respondent self-classified their role in the music industry. These respondent "branch" questions were based on division into the following three groups:

- Music Industry: This group includes small business owners, sole proprietors, CEO's, as well as all employees, workers and contractors (full-time and part-time) of music businesses, and venue employees and workers.
- Musicians, and
- Venue Owners and/or Venue Managers

Question Design

Demographic questions were designed in a multiple choice answer format. Industry needs and ideas were measured by a five part graduated scale, ranging from "Extreme Impact" to "No Impact". The survey included areas for write-in suggestions for needs and gaps within the industry and suggestions from respondents for future solutions.

Survey questions and survey answer choices to multiple-choice questions and to "grid" format questions were randomized by survey software to reduce or eliminate order bias.

For questions with sensitive information such as income, explanations were given as to why the data was needed and respondents were informed that accurate answers would help measure the current environment and allow for consideration of additional resources. We clearly stated there were no right or wrong answers.

Income questions were asked in a range format rather than soliciting a specific number. Breakdown of income brackets are compatible with the U.S. Census and other professionally administered surveys for demographic and income information.

The U.S. Office of Management and Budget issues guidelines and specific question formats for demographic data collection that are implemented by the U.S. Census Bureau as well as other federal and state agencies. The Austin Music Census utilizes the OMB and the U.S. Census Bureau question format so that demographic data will be comparable to other data utilizing these standards. [1]

Since there was no previous identification of industry sectors in Austin, Titan Music Group, LLC used common language from how workers describe their jobs in the music industry to identify 33 job classifications in Austin. Some of these classifications were then broken into subsectors, for a total of 74 industry sector choices. We then internally mapped these job classifications to correlate with the NAICS sectors and titles

1 "Methodology for the United States Population Estimates: Vintage 2014, Nations, States, Counties, and Puerto Rico-April 1, 2010 to July 1, 2014." U.S. Census Bureau. Web. 4 May 2015. <https://www.census.gov/popest/methodology/2014-natstcopr-meth.pdf>.

based on the official 2012 NAICS Manual published by the U.S. Office of Management and Budget.[2] This data can be used for future comparisons to other types of industry-standard employment information data sets from the U.S., Canada, and Mexico. It is worth noting that although many think of the music industry as a rather small field with few types of jobs, music industry jobs in this study were mapped to 13 different NAICS Sectors and 66 subsectors.

Titan Music Group, LLC administered a pretest of the survey on November 4, 2014 to approximately 30 people representative of the survey population. The pretest respondents completed the questionnaire in a controlled environment. Immediately after completion of the survey, Titan Music Group, LLC staff interviewed each pretest respondent individually. Feedback about question wording and general understanding of issues provided the opportunity to improve instructional language and question design before official rollout.

DATA COLLECTION

The goal with the Austin Music Census is to create an understanding of the entire group of jobs and industries that comprise the Austin music economy. This includes not only the commonly associated roles of venues and musicians, but also: producers, promoters, rehearsal spaces, musical equipment/instrument/merchandise manufacturing/retailing; music product retail digital/physical stores; professional services such as accounting, legal, and consulting; technology, software and app development; service industry jobs; transportation; event production; tourism services; music education vocational training; radio/other forms of media; studio production; and many more.

The target population for survey dissemination included musicians, music businesses, and individuals who work in the commercial music industry. The geographic scope of data used in the final dataset for analysis and reporting is limited to those residing in the Austin-Round Rock-San Marcos area, collectively defined by the U.S. Census Bureau as the "Austin MSA".

The online survey was open to respondents from November 12th, 2014 to January 27th, 2015.

Surveys were distributed as widely as possible, to all "known universe" and "unknown universe" populations, through all available avenues and means, with the intent of reaching as many musicians and industry workers as possible. The goal was to achieve the highest possible response rate and to achieve the largest number of respondents, given time and resource constraints.

Methods of survey dissemination included:

- The collection of individual names and emails of industry businesses and workers, who were sent an email with the survey link.
- Marketing partners who agreed to disseminate the survey information. These partners included nonprofit and for profit businesses that had a database of music industry workers or musicians and were willing to reach out to their members or customers via email and/or social media.
- Targeted advertisements through Facebook and the Austin Chronicle to reach unknown qualified participants.
- Flyers and posters in targeted locations during the survey period to alert potentially qualified participants.
- A high profile survey kick-off event to alert the media about the survey and reach a large audience that would include musicians and music industry workers.

2 "North American Industry Classification System (NAICS)." *United States Census Bureau*. U.S. Census Bureau, 5 Nov. 2014. Web. 4 May 2015. <http://www.census.gov/eos/www/naics>.

- Individuals hired to canvass and obtain responses in Austin nightlife establishments for a period of one week.

Since the survey was open to the public at large, we created a self-selected category for "Music Fans" that allowed us to separate any non-industry public respondents from the rest of the data so that the final dataset for analysis only contained the target population of those involved in the music industry economy.

STATISTICAL METHODOLOGY AND ANALYSIS TECHNIQUES

Responses to questions were tallied either for the entire dataset or by specific category of respondent. Due to some respondents dropping off without finishing the survey, the total completion rate is 66%, so the number of responses for each question varies. In the computation of percentages, missing data was excluded so that all percentages sum to 100% (to within rounding error).

Survey Respondent Statistics:

Total Responses: 5709 Individuals:

- "Music Fan" Responses: 1333 Individuals (removed from Final Data Set used for analysis)
- "Incomplete" Responses that dropped off after Question #1: 326 Individuals (removed from Final Data Set used for analysis)
- "Test Data" Responses: 6 Individuals (removed from Final Data Set used for analysis)
- "Live Outside of the Austin MSA Area" Responses: 76 Individuals (removed from Final Data Set used for analysis

Total Relevant Responses: 3968 Individuals, which comprises the "Final Data Set" used for all analysis.

SUMMARY OF QUANTITATIVE AND QUALITATIVE DATA USED IN ANALYSIS

- Survey Responses, Quantitative Data:
  - 3,968 total responses, segmented by the following categories:
  - 2,380 Musicians
  - 1,401 Music Industry Workers, Owners, Contractors, and Employees
  - 187 Venue Owners or Managers
- Survey Responses, "Write-in" Suggestions
  - "Needs and Gaps" Write-ins: 1,025
  - "Ideas and Proposals" Write-ins: 449
  - Venue Owner/Manager Sector – "Anything Else" Write-ins: 72
- Focus Groups: Eight formal focus groups, including 82 individuals and 20 hours of discussion time
- Informational Interviews: Sixteen separate interviews with 19 individuals and over 23 hours of discussion time

SECTION 2

MUSICIANS

Austin Musicians Characteristics and Priority Needs

This section summarizes some of the most important results of the musician survey for review and analysis to identify selected critical needs and gaps. A full set of charts from the musician survey is in Appendix IV for comprehensive review. A steady loss of Austin's musicians could have unknown long term effects on the local economy. The Austin Music Census suggests that Austin's prosperity is not finding its way to the musicians consistently.

MUSICIAN SURVEY RESPONSE STATISTICS

Musicians represent 60% of the total number of respondents to the Austin Music Census – over 2,300 individuals. Through this high survey response rate, as well as very active participation via "write-in" responses to questions, interviews, and focus groups, it is evident that Austin musicians are *very* focused on the state of the music economy in Austin. They are eager to articulate the reality of being a working musician in Austin, and discuss improvements that can be made as a community.

Musician Survey Response Rate Statistics:

- Total Musician Responses to Survey: **2,380** (59% of all respondents)
- Total Completed Surveys: **1,584**
- Completion Rate: **67%**
- Total Musician Additional "Write-In" Responses to "Needs and Gaps" Question: **707** (69% of all write-ins to this question)
- Total Musician Additional "Write-In" Responses to "Ideas and Proposals" Question: **296** (66% of all write-ins to this question)

The Austin Music Census suggests that Austin's prosperity is not finding its way to the musicians consistently.

SELECTED DEMOGRAPHICS AND CHARACTERISTICS

The following is a description of selected data from the 2,380 musicians who took this survey. Musician responses are compared to corresponding statistical information for the Austin-Round Rock-San Marcos Metropolitan area from the U.S. Census Bureau's American Community Survey 2013 Profile ("Austin MSA").[1]. The comparative U.S. Census information is highlighted in orange under the heading "General Population".

LOCATION	**60%** have been living in Austin for 11 or more years
WORK HISTORY	**54%** have been working or in the music industry for more than 10 years; **46%** have been working in the industry for 10 years or less
HEALTH CARE	**63%** have paid health insurance via an individual, company, or spouse/partner's plan; **18%** receive assistance from HAAM and SIMS, and **17%** have no health care coverage. [General Population: 66.8% paid health insurance, 19.0% with no health insurance at all]

[1] "ACS Profile Report: 2013." US Census Bureau, 2013. Web. 27 Apr. 2015. <http://www.austintexas.gov/sites/default/files/files/Planning/Demographics/CoA_ACS_Profile_2013.pdf>.

HOUSING	**43%** own their home, **57%** rent their home. **68%** have other household contributors to the rent or mortgage. [General Population: 58.2% own their home, 41.8% rent their home]
AGE	**50%** are 25-39 years old, **27%** are 40-54 years old [General Population: 17.1% are 25-34 years old, 15.5% are 35-44 years old, and 12.8% are 45-54 years old].
GENDER	**80%** are male, **20%** are female [General Population: 50.1% Male, 49.9% Female]
RACE/ETHNICITY	**4.4%** African American, **10.4%** Hispanic (any race), **66%** White [General Population: 7.2% African American, 31.9% Hispanic (any race), 79.8% White]

AREAS OF EXPERIENCE AND EXPERTISE

These musicians' self-described areas of expertise are impressively wide and varied. Across 40 separate possible skill categories provided in the survey, 32 categories have responses numbering 100 or more people, and some categories have as many as 1,943 people. The boxes below show the strongest and weakest self-identified skill areas. (For a full response list, see Appendix IV.)

STRONGEST SKILL AREAS	WEAKEST SKILL AREAS
o Live Performance	o Music Legal Issues
o Songwriting/Composing	o Venue Management
o Audio Engineering	o Financing or Venture Capital
o Audio Mixing	o Advocacy/Lobbying
o Music Arranging	o Ticketing
o Event Promotion	o Software Development
o Social Media	o Radio Production
	o Manufacturing

MUSICAL GENRES

Musician respondents represent 27 genres of music – a wide variety of styles and influences that creates a lot of diversity in music listening choices for fans. The highest-ranking genres among survey respondents (in this order) are:

- Rock
- Americana
- Alternative
- Folk/Acoustic
- Pop Rock
- Jazz
- R&B/Soul
- Country & Western/Swing
- Blues

Austin's musicians embrace diverse musical genres and styles. This diversity leads to more innovative musical art forms developed through a rich bed of collaborative projects, which also attracts other artists to relocate to Austin. This diversity of musical styles is one of Austin's unique assets.

PREFACE TO INCOME DATA: THE NATIONAL CONTEXT OF THE MUSIC INDUSTRY

The National Context: Recorded music industry revenues have declined by nearly 40% from the high in 1999[2]. Virtually everyone who works either as a musician or in the music industry in the United States in the past 15 years has experienced the repercussions of a music market in free fall. The industry is reorganizing itself, and many sources of revenue have yet to recover or be replaced by new sources of revenue.[3] This trend has been especially true in recorded music, where net sales of CD, vinyl, and digital album sales have fallen 11% and single song downloads have fallen another 12.5% - just in 2014.[4] As the Austin Music Census shows, Austin musicians have not made up this shortfall in recorded music revenue either.

On a national level, the live event music business has been somewhat insulated from these effects as fans have supported festivals, events and other large scale live music experiences.[5],[6] Austin's economy and brand have certainly benefited from the music tourism attracted by large-scale local festival events. Respondents indicate that some of this benefit has flowed to local venues, but less so to local musicians.

CHANGING TRENDS IN AUSTIN MUSIC CONSUMER BEHAVIOR

Vanishing Cover Charge Reduces Revenues for Venues and Musicians: A recurring theme from respondents is that a "cover charge" for local Austin musicians has all but evaporated for many venues, despite the high number of quality local artists. In fact, it appears from the Austin Music Census that local residents are less willing to pay a typical $5 to $10 cover charge for a night out of local live music than they have been at any time in the past decade.[7] Respondents to the Austin Music Census told us that cover charges have typically stayed the same or declined from ten years ago, or in some cases, disappeared entirely.

This phenomenon has effects on both venues and musicians. While there are exceptions, respondents said that the decline in cover charge has left venues with an annual revenue loss hovering as high as 30%.[8] While some venues have been able to make up some portion of the loss of cover charge through clever marketing, increased private events, and other practices, respondents indicated that generally speaking, the decline in cover charge has resulted in venues paying most local bands *less* than (or in the best case, the same as) they would have ten years ago.

In this regard, the industry is very effectively responding to the market shift in consumer trends: booking more touring acts and fewer local ones for prime nights and slots.

Economic Trends in the Austin Music Industry: While large-scale events help sustain Austin's year-round music tourism business, the Austin Music Census shows that local venues and musicians receive lower overall financial support from Austin patrons than they did before this shift in consumer preferences, and the large-scale events are not making up for that shortfall for local musicians.

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[2] "Reversing Trend, World Music Revenue Inches Upward." AP Online 26 Feb. 2013. Web. 27 Apr. 2015. <http://www.highbeam.com/doc/1A1-9a8a3c0b6f51494b86161c240ed1a5a5.html?>. See also "Global Music Revenue Dips 3.9 Pct on Japan Decline." AP Worldstream 18 Mar. 2014. Web. 27 Apr. 2015. <http://www.highbeam.com/doc/1A1-bb43fb0f7eca4561ac1a8c98ea1d1097>.

[3] Dredge, Stuart. "UMG Boss Lucian Grainge: 'We Want to Accelerate Paid Subscription'" Music Ally. Music Ally, 19 Feb. 2015. Web. 27 Apr. 2015. <http://musically.com/2015/02/19/umg-lucian-grainge-we-want-to-accelerate-paid-subscription/>.

[4] Peoples, Glenn. "Nielsen Music's Year-End: Streaming Is Not Killing the Record Business." Billboard Biz. Billboard, 2 Jan. 2015. Web. 27 Apr. 2015. <http://www.billboard.com/biz/articles/news/digital-and-mobile/6429356/nielsen-musics-year-end-streaming-is-not-killing-the>.

[5] "Live Nation Entertainment - Concert Revenue 2014 | Statistic." Statista. (accessed 27 Apr. 2015.) <http://www.statista.com/statistics/193710/concert-revenue-of-live-nation-entertainment-since-2008/>.

[6] Musician Focus Groups conducted by Titan Music Group 29 Sep. 2014 and 1 Oct. 2014.

[7] Venues and Nightlife Establishments Focus Group conducted by Titan Music Group 6 Oct. 2014.

[8] Venues and Nightlife Establishments Focus Group conducted by Titan Music Group 6 Oct. 2014.

The Austin Music Census data suggests that touring bands perform in Austin more frequently now than ever. Respondents indicated that this is because Austin is now a larger, more populated market that can support those tours even with ticket prices ranging from $35 - $100. This change in local consumer trends creates a market shift that venues must respond to: there is less incentive to book local shows if the market won't pay to see them, which means that the promoter must take all the risk on a local show via whatever revenue comes through alcohol sales, and is less able to pay the band a reasonable wage out of bar sales with little to no revenue from the door cover charge. In this regard, the industry is very effectively responding to this market shift in consumer trends: booking more touring acts with cover and fewer local ones without cover for prime nights and slots.

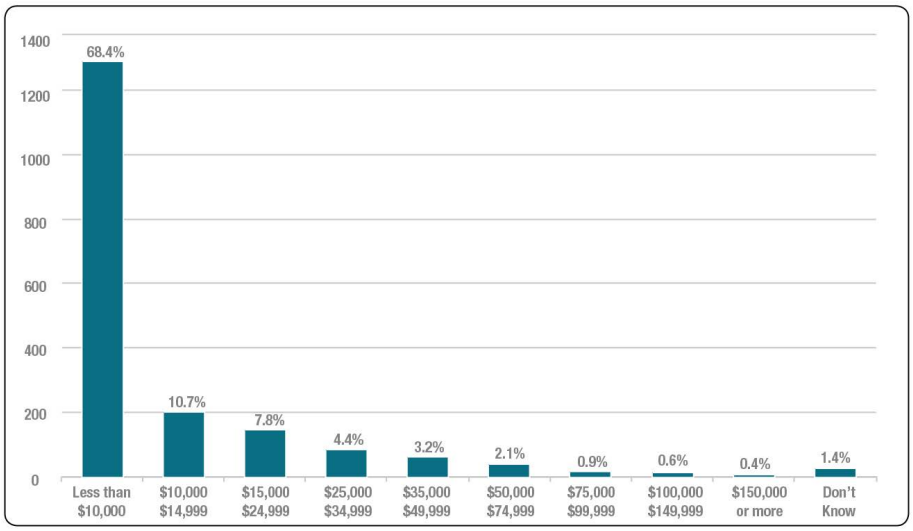
The repercussions of these combined factors are becoming clearer as demonstrated in the Austin Music Census data. The quantitative survey information gives credibility to the perception that focus group members shared repeatedly: Local musicians are gradually being squeezed out of the Austin area.

Combined with the loss of recorded music revenue, these live music revenue regressions suggest that income of Austin musicians is declining or are at best stagnating. While many that work in the music industry know these trends anecdotally, the Austin Music Census provides quantitative data to illustrate these trends concretely.

MUSICIAN INCOME DATA

The chart below shows income that musician respondents earned solely from music-related activity. This could be sales, performances, music licensing (such as motion pictures, television or commercials), songwriting, or any other music income. The chart also includes respondents' income derived from supplemental or music-related employment such as teaching music lessons, producer fees, studio session work, and other music-related employment.

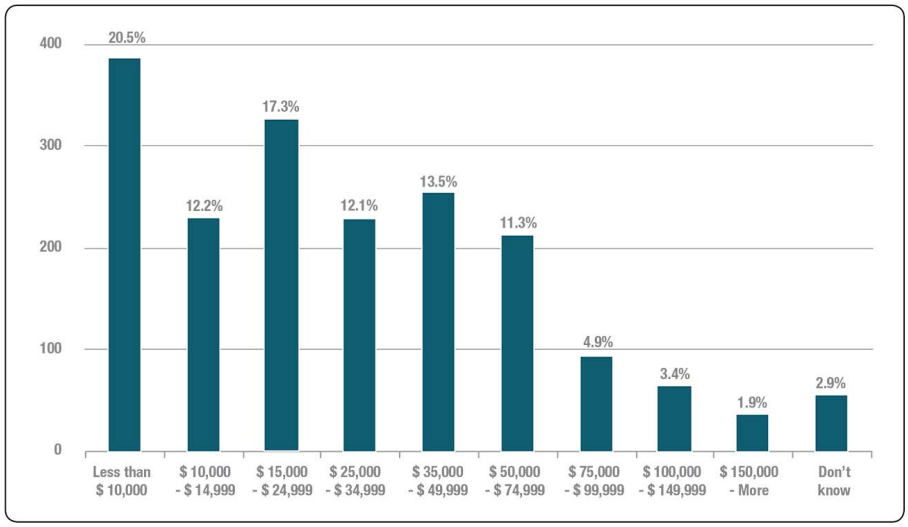
Fig. 1 2013 Pre-Tax Individual Income (All Musicians, Music Industry Income Only)



1,883 musicians answered this question. Figure 1 illustrates that **68.4%** of respondents (or 1,288 people) earned less than $10,000 from all music industry-related income in 2013.

The following data in Figure 2 represents ALL income that musician respondents make from **all types of employment**, including all music-related jobs and non-music related jobs or income:

Fig. 2 2013 Pre-Tax Individual Income (All Musicians, All Income Sources)



A total of 1,882 musicians indicated their income from all sources. Figure 2 shows that nearly 1/3 of musician respondents – including ALL types of employment income – are living on $15,000 or less per year in pre-tax income. When compared below to incomes in the Austin MSA, musician respondents' income levels are well below the average.

When compared to incomes in the Austin MSA, musician respondents' income levels are well below the average.

The data above confirms musician focus group member comments about income levels. Many musicians also said they lived with numerous roommates in small apartments or duplexes and/or had spouses whose jobs supported a significant portion of their living costs.

MEANS OF EMPLOYMENT

Very few respondents are able to make a livable wage from music income alone, which means the Austin Music Census suggests that Austin's "professional" musician sector is relatively small. Our musician respondents earn income in the following ways:

- **56%** work another full or part-time job(s) in a non music-related industry
- **15%** work another full or part-time job(s) within the music industry
- **22.7%** are full-time musicians
- **3.5%** are currently unemployed
- **2.7%** are musician students.

As this data shows, only **22.7%** of musician respondents claim to be full-time musicians, even though 54% of all respondents have been working as musicians as more than ten years.

We applied a filter to the respondent data to create Figure 3 below by selecting ONLY those respondents who said they are full-time musicians. Figure 3 reflects 2013 annual income ONLY from full-time musicians with no non-music income, a total of 452 respondents:

Fig. 3 2013 Pre-Tax Individual Income (Only Musicians w/ 100% Income from Music

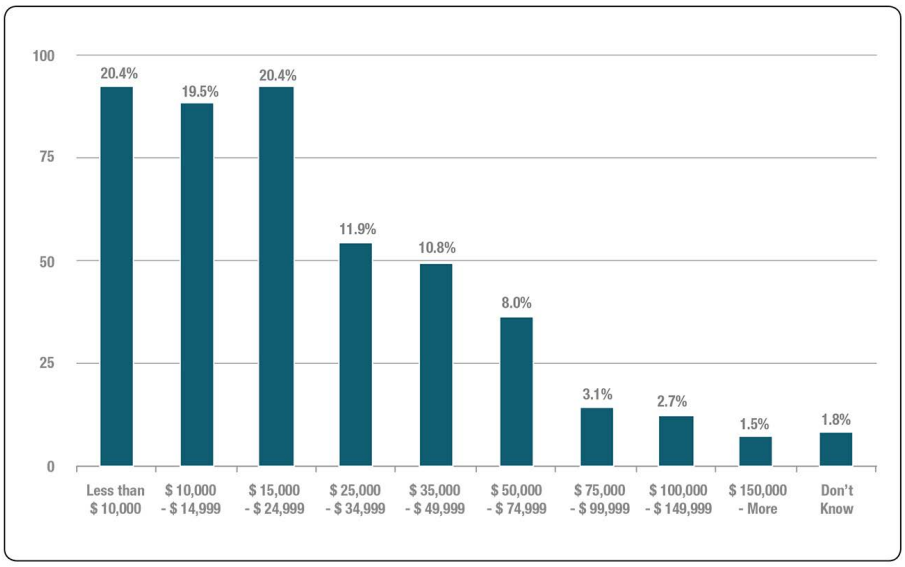


Figure 3 shows us that nearly **40% of full-time musicians** - with no other sources of income - **are earning $15,000 or less in pre-tax annual income, and nearly 2/3 are earning less than $25,000.**

MUSICIAN INCOME IN CONTEXT: COMPARISON TO FEDERAL, STATE, AND CITY OF AUSTIN METRICS

In order to understand what respondents' income data means in the context of Austin's recent growth and prosperity, and how these figures compare to the general population of the Austin-Round Rock Metropolitan Area, musician respondents' income is shown below in comparison to the Austin-Round Rock-San Marcos MSA (the "Austin MSA") employing some commonly used metrics. The figures used to calculate the percentages in the "MUSICIAN" column are taken from Figure 2 above, "2013 Pre-Tax Individual Income Only Musicians w/ 100% Income from Music Industry**".**

Fig. 4 Comparison Metrics: Austin MSA vs. Musician Survey Respondents – All Income Sources

MUSICIANS: ALL SOURCES OF INCOME, Pre-Tax 2013:	
More than **20.5%**	Are Below 2014 Federal Poverty Level of $11,670[9]
More than **50%**	Qualify for Section 8 Housing Subsidies[10]
Approx. **75%**	Are Below the Austin MSA Area Mean Annual Wage[11]
More than **62%**	Are Below the Austin MSA Area Median Annual Wage[12]

[9] "2014 Poverty Guidelines." *Office of the Assistant Secretary for Planning and Evaluation*. U.S. Department of Health and Human Services, 22 Jan. 2014. Web. 28 Apr. 2015. < http://aspe.hhs.gov/POVERTY/14poverty.cfm/>.
[10] "Applying For Housing Assistance." *Housing Authority of the City of Austin*. Housing Authority of the City of Austin, 2015. Web. 28 Apr. 2015. <http://www.hacanet.org/apply/hcv.php#Elighousing>.
[11] "Austin-Round Rock-San Marcos, TX - May 2014 OES Metropolitan and Nonmetropolitan Area Occupational Employment and Wage Estimates." *Bureau of Labor Statistics*. United States Department of Labor, May 2014. Web. 28 Apr. 2015. <http://www.bls.gov/oes/current/oes_12420.htm#00-0000>.
[12] Ibid.

Figure 4 shows how Austin musicians are faring in comparison to the general Austin MSA population. This comparison data reveals that:

Approximately three-fourths of Austin musicians are not participating in the same prosperity as the Austin MSA general population

- Approximately **three-fourths** of Austin musicians are not participating in the same prosperity as the Austin MSA general population with earnings well below the Austin MSA mean (average) wage of $48,150.[13]

- Nearly **two-thirds** of Austin musicians are also earning below the median (mid-point) wage of $36,640.[14]

- **More than half** of the musician respondents qualify for Section 8 Federal Housing Subsidies, according to the City of Austin's Housing Authority guidelines (taken from the Federal Housing and Urban Development annual guidelines for federal assistance).

- Perhaps most disturbingly, **more than 20.5% of musician respondents are *below* the 2014 Federal poverty level**. The poverty level of the Austin MSA area in 2013 (the most recent available data) is 14.0%.[15]

And lastly, we turn to minimum wage standards. The Texas state-mandated minimum wage is $7.25 per hour, and a full-time minimum wage worker makes $15,080 in annual income.[16] A recent news story about rising housing costs in Austin by local radio station KUT found the following:

> *Austin has the highest average rent in the state of Texas. And Austinites trying to afford housing on minimum wage need to work close to three full-time jobs. For Austinites earning an hourly minimum wage of $7.25, it takes:*
> - *88 hours a week to afford a one-bedroom apartment, and*
> - *111 hours for a two-bedroom. That's equal to nearly three full-time jobs.*[17]

Austin Music Census data shows that nearly one-third of musician respondents are earning ***below*** the minimum wage annual income.

Respondent data shows that Austin musicians are not participating in Austin's prosperity growth relative to the average Austin MSA population. Based on focus groups, interviews, and over 700 musician respondent "write-in" answers, the Austin Music Census also found that these musician respondents are aware of that discrepancy.

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[13] Ibid.
[14] Ibid.
[15] "ACS Profile Report: 2013 (1-year Estimates) at Chart E4 "Persons Aged 18-64 in Poverty"." U.S. Census Bureau, 2013. Web. 1 Apr. 2015. < http://www.austintexas.gov/sites/default/files/files/Planning/Demographics/CoA_ACS_Profile_2013.pdf>. Since the Austin Music Census was not available to anyone under 18 years old, and total respondents aged 65 or older was 2.6%, the 18-64 year old US Census group presents the most accurate means of comparison.
[16] "What Are the Annual Earnings for a Full-time Minimum Wage Worker?" *Center for Poverty Research University of California, Davis*. UC Davis. Web. 28 Apr. 2015. <http://poverty.ucdavis.edu/faq/what-are-annual-earnings-full-time-minimum-wage-worker>.
[17] Weber, Andrew, and Wells Dunbar. "A Minimum Wage Job in Austin Gets You a Two-Bedroom Apt. – And a 111-Hour Work Week." *KUT.org*. KUT.org, 15 Mar. 2013. Web. 28 Apr. 2015. <http://kut.org/post/minimum-wage-job-austin-gets-you-two-bedroom-apt-and-111-hour-work-week>.

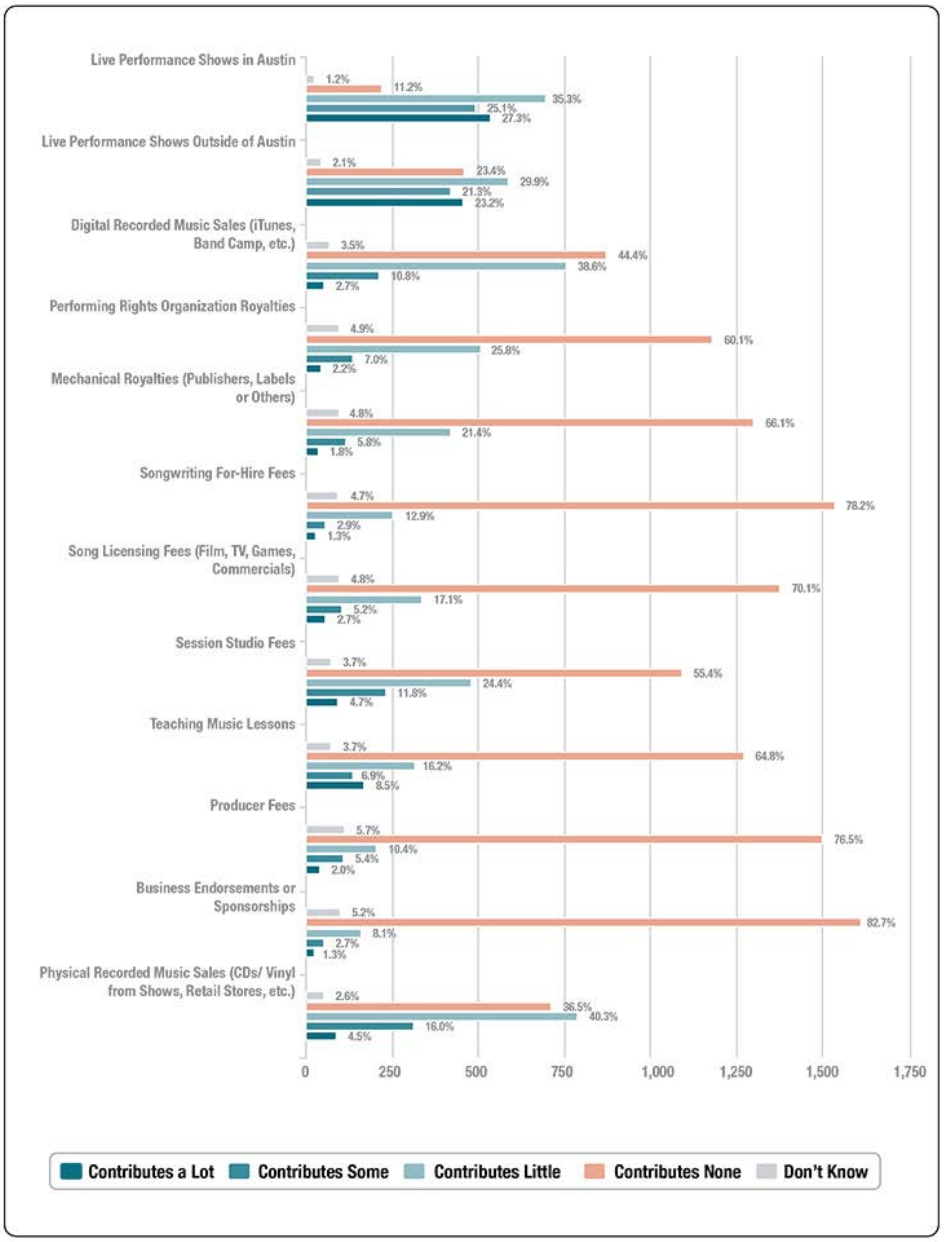
MUSICIAN SOURCES OF REVENUE

To better understand what sources of revenue contribute to musician income, the musician respondents were presented with questions about how they make money from music. Respondents were asked to rank 12 different major categories of common music industry revenue streams based on how much each category contributed to their own individual income. For each of these 12 categories, respondents were asked to select one of four choices:

- ☐ Contributes a Lot
- ☐ Contributes Some
- ☐ Contributes a Little, or
- ☐ Contributes None.

Figure 5 below shows the responses:

Fig. 5 Revenue Contribution by Activity Type



Some key facts from this chart include:

- Only one category breached a threshold of 25% or more of respondents saying that revenue stream "Contributes a Lot".

- Of the 12 revenue streams, **75% or more of respondents said 10 of the 12 categories "Contributes Little" or "Contributes No" Income.**

- **"Live Performance Shows in Austin" has the highest percentage of respondents who answered "Contributes a Lot" (27.3% of respondents)**, followed by "Live Performance Shows Outside of Austin" (23.2%). The next closest item "Teaching Music Lessons" was ranked a distant third with 8.5% of respondents answering "Contributes a Lot".

- The **four activities with the *least* contribution to income are** "Business Endorsements or Sponsorships" (82.7% "Contributes No Income), "Songwriting For-Hire Fees" (78.2% "Contributes No Income), "Producer Fees" (76.5% "Contributes No Income"), and "Song Licensing Fees for Film, TV, Games & Commercials (70.1% "Contributes No Income").

NEEDS AND GAPS: LIVING AND AFFORDABILITY

In addition to income and demographic questions, respondents answered a series of questions describing gaps in Austin's music industry infrastructure and professional development needs. These needs and gaps were identified by Census focus groups as important external factors that participants perceived as delaying or inhibiting the growth of their careers and earning potential.

These gaps and needs were separated into four categories of questions:

- Industry Resources

- Connectivity and Collaboration

- Professional Education and Skills Development

- Living and Affordability

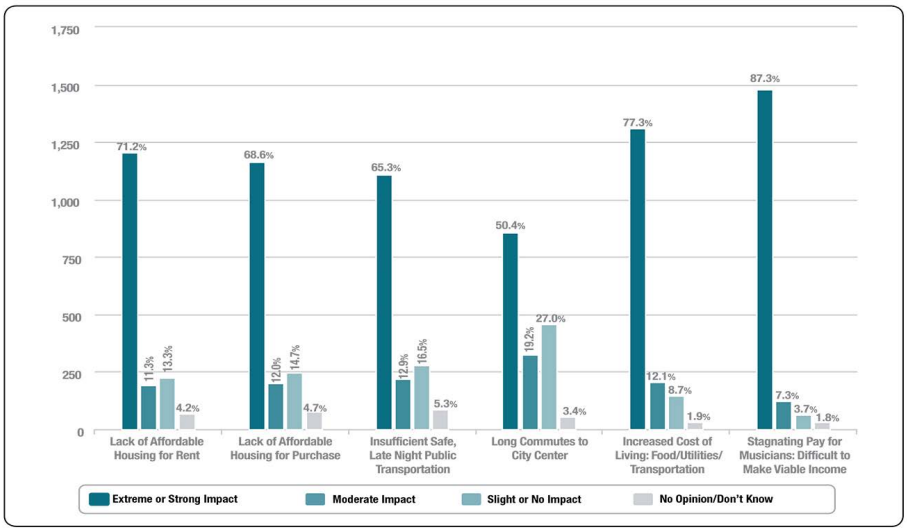
Respondents were asked to rank the questions in each of these categories regarding impact on their career development with a 5-point scale incrementally from "Extreme Impact" to "No Impact".

Living and Affordability Ranked Highest: The "Living and Affordability" category was ranked as having "Extreme or Strong Impact" more frequently than any of the other categories of questions. In all but one sub question in this category, 65% or more of musicians ranked the questions as having "Extreme or Strong Impact".

The highest ranked factor was "Stagnating Pay", with 87.3% of respondents ranking this issue as the highest contributing factor for Living and Affordability.

The musician responses to all the "Living and Affordability" questions are given in Figure 6:

Fig. 6 Musician Needs and Gaps: LIVING AND AFFORDABILITY



Given the very large percentage of respondents who chose "Extreme or Strong Impact" on "Living and Affordability" questions, the Austin Music Census suggests that affordable housing, cost of living, and stagnating income are the most important priorities to musicians for their ability to continue to live, work, and create in Austin.

This clear demonstration of need confirms the extremely low annual income of musicians across all genres as shown in Figures 1-3 above.

The Austin Music Census suggests that affordable housing, cost of living, and stagnating income are the most important priorities to musicians for their ability to continue to live, work, and create in Austin.

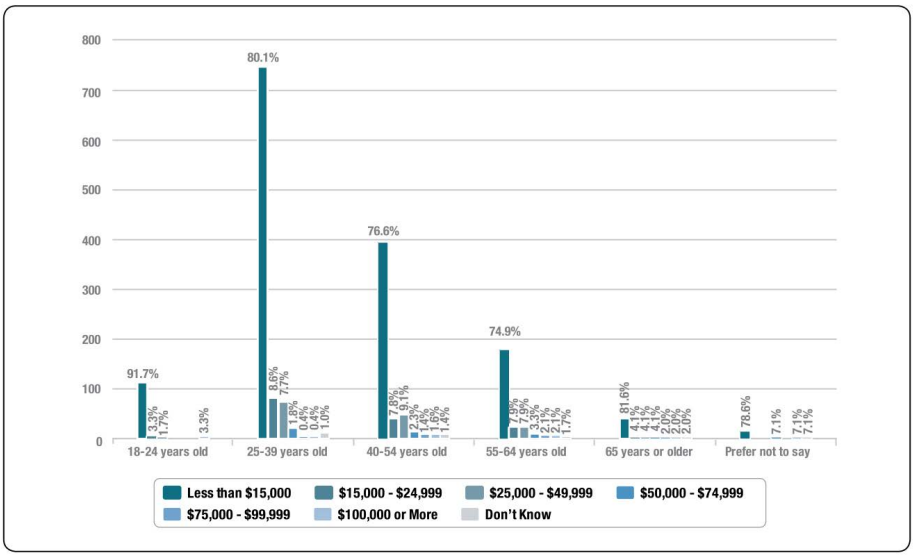
THE ISSUE OF STAGNATING PAY

The highest number of respondents – **87% of all musician respondents** - say that "Stagnating Pay for Musicians/Difficult to Make a Viable Income" has "Extreme or Strong Impact" on their lives. This answer was so dominant in the Austin Music Census data that it warrants several other analytical views of artist income data to try to understand what other factors might explain "stagnation" in income.

The first factor considered was the age of respondents compared to income from music industry sources only.

Figure 7 shows musician income from music industry sources only based on respondent age:

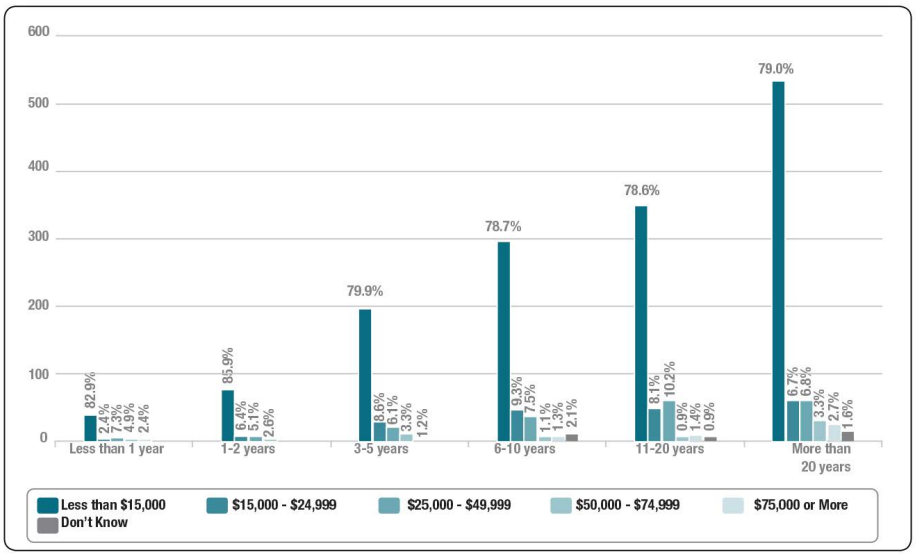
Fig. 7 2013 Pre-Tax Musician Income by Age (All Musicians, Music Income Only)



There appears to be a significant change in income from the lowest income category (less than $15,000) by approximately 11% of respondents in the 18 – 24 year old category compared to respondents 25 years old and above. However, there is little other difference in the relative percentage of respondents in each age group compared to income, indicating that age does not have a significant effect on earning ability.

Next, we analyzed the amount of time a musician has lived and worked in Austin, and whether that geographical stability has any effect on income. Presumably, time in market would result in a larger local fan base, local networking and business connections, and other activity that may lead to greater earning ability over time. Figure 8 below shows this analysis:

Fig. 8 2013 Pre-Tax Musician Income By Years in Austin (All Musicians, Music Income Only)



It appears that the number of respondents earning less than $15,000 declines slightly with time in market. However, the Austin Music Census data shows approximately 74% of respondents earn $15,000 or less from music regardless of how long they have lived in Austin, which indicates essentially static income levels regardless of either age or time invested working as a musician in Austin. Interestingly, the Austin Music

Census data suggests that $15,000 in annual pre-tax music income is an abiding barrier to pierce for a wide variety of musician respondents.

Compared to Austin MSA: To put these responses in context: real per capita income for the Austin region as a whole has grown every year since 2010, with a total growth of 4.64% between 2010 and 2013[18]. Yet for our musician respondents, 57% have seen either flat or declining earnings over the same period.

For our musician respondents, 57% have seen either flat or declining earnings over a three-year period.

OTHER AFFORDABILITY ISSUES: HOUSING AND COST OF LIVING

Musician respondents to the Austin Music Census also ranked other Living and Affordability issues (shown above in Figure 6) as having "**Extreme or Strong Impact"** on their lives and career development:

- **77% -** Increased Cost of Living: Food, Utilities, & Transportation
- **71%** - Lack of Affordable Housing for Rent
- **69%** - Lack of Affordable Housing for Purchase

High cost of living and affordable housing in Austin's growing city center have become policy concerns for the City of Austin, and these issues also clearly resonate with musician respondents and appear linked to musician apprehension about income stagnation.

CIVIC ENGAGEMENT: CONNECTIVITY AND COLLABORATION

"Civic Engagement" is the next highest-rated "Extreme or Strong Impact" question after "Living and Affordability" questions. Musician responses to these questions suggest some degree of desire to participate in a dialog for change. Figure 9 below illustrates a series of responses to questions about better connectivity and collaboration, both within the industry and between the music industry and Austin's civic leaders:

[18] "Austin-Round Rock-San Marcos Texas Household Income." *Department of Numbers*. Department of Numbers. Web. 28 Apr. 2015. <http://www.deptofnumbers.com/income/texas/austin/>.

Fig. 9 Needs and Gaps: CONNECTIVITY AND COLLABORATION

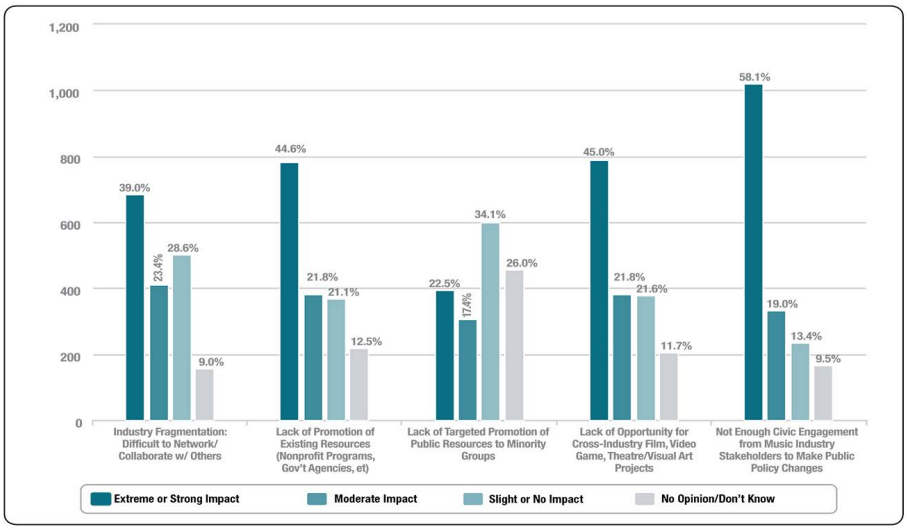


Figure 9 shows that nearly 60% of musicians believe that a lack of civic engagement from music industry stakeholders to make public policy changes has had an "Extreme or Strong Impact" on their lives and careers. That survey response data also confirms focus group responses, interviews, and text write-ins in the Austin Music Census.

TOP CITY POLICY CONSIDERATIONS FOR MUSICIANS

A complete policy plan of action for the City of Austin would require detailed recommendations, a study of funding mechanisms and feasibility issues, and an implementation plan. Such a policy plan is outside the scope of the Austin Music Census. However, based on the needs revealed through the data analysis, a few ideas and brief findings of best practices employed in other cities are presented here that may warrant further exploration by City staff and policy makers.

RETAINING AUSTIN'S CREATIVE CLASS

The Austin Music Census demonstrates a fundamental and systemic issue - that Austin's growing prosperity has not been shared by those who both have a critical role in creating that prosperity, and who also have built the foundation of Austin's brand as the "Live Music Capital of the World". Musicians are seeing those around them experience benefits of an upwardly mobile and innovative city, while over 20% of them live below the Federal poverty line and another 30% hover just above it.

It is important to reiterate that income stagnation and declining revenue issues are present throughout the music industry nation-wide. It is very likely that Austin is not the only city to have a large artist population with crisis-level poverty and affordability issues. Any city that provides a home for a large artist class and is also experiencing the kind of annual growth that creates skyrocketing affordability prices may likely experience similar issues.

However, there are three key ways in which Austin may be different than other cities at the moment:

- Austin seems to be the only city to date to have granular measurements of musicians' income, which is now made visible via the Austin Music Census;
- Affordability issues are more pronounced in Austin due to the area's rapid growth rate, and are having an unequal effect on Austin's musicians vs. the Austin MSA general population; and

- Austin has always prided itself on being an artist-centric, enthusiastic home not just for musicians, but creators of all types.

Given the severity of the combined effect of long-term income stagnation and serious affordability concerns, the Austin Music Census data identifies those two issues as priorities that City policy makers should consider addressing in the near term to slow musician flight away from Austin.

Austin musicians may have reached a tipping point due to increasing economic hardship. It may no longer be realistic or sustainable for musicians to stay, even if they would prefer not to relocate.

The conventional wisdom is that the benefits of living in Austin have outweighed the difficulties, so there is no risk of musician flight. However, the Austin Music Census data, both quantitative and qualitative, strongly suggests that Austin musicians may have reached a tipping point due to increasing economic hardship. It may no longer be realistic or sustainable for musicians to stay, even if they would prefer not to relocate.

Through our Austin Music Census focus groups, interviews, and over 1000 write-in answers from musicians, there is significant evidence suggesting that musicians *may already be moving away from Austin or are actively considering moving in the short term.* While other cities may be perceived as less "hip" than Austin, musicians faced with affordability issues may find that they offer a more sustainable future. As the artist class is often on the forefront of creating new enclaves of excitement and activity, these other cities could become the new centers of creativity, innovation, and strong economic growth if they successfully attract artists who currently live in Austin. Furthermore, the Austin Music Census data shows a confirming trend in that *the number of musicians who say that they have moved to Austin within the last two years is a smaller percentage of the musician population relative to the number of new general population arrivals compared to the total population.*

There are other large U.S. cities that have some similar demographic traits to Austin and are actively working to engage and execute on principles of new urbanism and creative class development and retention to build innovative, thriving cities. The asset-based model of economic development has been studied widely, and has become well established as a measurably effective means to achieve those goals. Finding ways to enable the continuation and growth of a vocational, middle class artist population is broadly recognized as a key component of asset-based economic development.

As we shall see below, some of those cities have been investing in data collection and analysis to support a commitment of partnerships, policy changes, and financial resources in specific programs to address artist retention.

DEDICATED AFFORDABLE HOUSING FOR ARTISTS

From a city policy perspective, there are more obvious tools and opportunities to directly impact cost and affordability issues than clear ways to increase musician revenues that respond to the marketplace.

Dedicated affordable housing for artists is one critically important tool for impacting musician affordability barriers. At present, Texas State law precludes the City of Austin from providing real solutions for dedicated, affordable housing for artists - an issue which city policy makers may want to review.

However, there are other cities that very recently are making significant commitments to artist retention by providing dedicated affordable housing for artists. At the time of publication, at least three major U.S. cities have made specific commitments to their artist community with the announcement of city-supported, dedicated artist affordable housing.

New York: Bill de Blasio, Mayor of New York City, "used his State of the City address…to highlight his plan to create 1,500 new units of affordable housing for artists by 2024" as a part of his more expansive affordable housing platform to reduce poverty in New York City.[19] The City of New York has recently become unequivocal in making this long-term commitment, with Tom Finkelpearl, Commissioner of the Department of Cultural Affairs adding "We just can't allow artists to be priced out of New York City. They're important for the soul of the city, they're important for neighborhoods, they're really important for the economy".[20]

That commitment is in addition to a plan to designate 500 artist workspaces in New York on city-owned sites, and in addition to the existing converted city properties for affordable artist housing, such as Artspace PS109 in Harlem.[21]

Minneapolis: The City of Minneapolis recently announced a new adaptive reuse of a national historic landmark building – the former Pillsbury Mill -, which will be retrofitted to create 251 apartment units for artists.[22]

Nashville: Lastly, there is evidence that Nashville – like Austin – is also grappling with the nation-wide decline of music revenues and the effects on its large resident musician class. Some reports indicate a recent decline of full-time songwriters in Nashville as high as 80% of that population, a situation that is being described by some as "the collapse of Nashville's musical middle class".[23]

In 2013, Nashville opened its highly successful, subsidized working musician housing development called Ryman Lofts, which now has a long waiting list.[24] Recently, a Nashville-based US Treasury Department-certified Community Development Financial Institution (CDFI) called The Housing Fund announced a new grant, the Make a Mark program, to "help lower- and middle-income artists buy, rehabilitate, and construct live-work spaces…[so] that the artistic community will have an affordable, permanent stake in neighborhoods throughout Nashville and Davidson County".[25]

Although Austin City Council recently approved six new affordable housing projects in Austin, only $3.7 million in affordable housing tax credits are currently available from the State of Texas, which will be enough to develop only 2 or 3 of the six projects.[26] Furthermore, the Housing Authority of Austin recently opened applications for the Housing Choice Voucher/Section 8 Program for the first time since 2009. The application was open for approximately one week, and then closed again, with 19,175 applicants selected by a lottery system for 2,500 slots on the waiting list.[27] Clearly there is dire need for affordable housing in Austin.

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[19] Stephens, Alexis. "3 Cities Make Affordable Housing Plays to Hold on to Artists." *Next City*. Next City, 6 Feb. 2015. Web. 28 Apr. 2015. <http://nextcity.org/daily/entry/cities-affordable-housing-for-artists>.
[20] Bergin, Brigid. "De Blasio to Unveil New Artist Housing, Workspace." *WNYC*. New York Public Radio, 2 Feb. 2015. Web. 28 Apr. 2015. <http://www.wnyc.org/story/de-blasio-unveil-new-artist-housing-workspace>.
[21] Stephens, Alexis. "3 Cities Make Affordable Housing Plays to Hold on to Artists." *Next City*. Next City, 6 Feb. 2015. Web. 28 Apr. 2015. <http://nextcity.org/daily/entry/cities-affordable-housing-for-artists>.
[22] Ibid.
[23] Rau, Nate. "Nashville's Musical Middle Class Collapses." *The Tennessean*. A Gannett Company, 28 Jan. 2015. Web. 28 Apr. 2015. <http://www.tennessean.com/story/entertainment/music/2015/01/04/nashville-musical-middle-class-collapses-new-dylans/21236245/>.
[24] Littman, Margaret. "Why Nashville Is Still America's Music City." *Next City*. Next City, 1 Dec. 2014. Web. 28 Apr. 2015. <http://nextcity.org/features/view/why-nashville-is-still-americas-music-city>.
[25] Pitcher, John. "$200K Grant Helps Nashville's Local Artists Find Affordable Housing." *Nashville Scene*. City Press, LLC, 3 Feb. 2015. Web. 28 Apr. 2015. <http://www.nashvillescene.com/countrylife/archives/2015/02/03/200k-grant-helps-nashvilles-local-artists-find-affordable-housing>.
[26] Rockwell, Lilly. "Austin City Council Gives Blessing to Six Affordable Housing Projects." *Austin American-Statesman*. Cox Media Group, 12 Feb. 2015. Web. 28 Apr. 2015. <http://www.mystatesman.com/news/news/local/austin-city-council-gives-blessing-to-six-affordab/nj9ky/#1a174214.3819518.735642>.
[27] "Applying For Housing Assistance." *Housing Authority of the City of Austin*. Housing Authority of the City of Austin, 2015. Web. 28 Apr. 2015. <http://www.hacanet.org/apply/hcv.php#Elighousing>.

The City of Austin may wish to explore ways to partner with developers as well as review State law constraints on housing to find a path to commit to dedicated affordable housing specifically for musicians. This method of artist retention has been recently affirmed as a best practice in other competitive, growing, and dynamic cities.

STIMULATING MUSIC REVENUE CREATION

The data from the Austin Music Census suggests at least two ways to approach music revenue creation through economic development policy and potential adjustments or changes to the status quo. Listed below are some policy ideas to consider.

Redirected Use of Existing City Resources & Other Assets:

- ☐ Since one of Austin's unique assets is its important and diverse ecosystem of live music venues, and live shows are a mainstay of local artist revenue, invest in ensuring that venue ecosystem stays viable, healthy, and supports the development of local live music. This idea is explored in more detail in Section 4: "Music Venues and Nightlife Establishments" of this study.

- ☐ Create an "Austin Arts Loyalty Program" that encourages/incentivizes use of Austin music by other Austin-based companies in mediums such as films, television, games, commercials, advertising, etc.

- ☐ Prioritize allocating a small percentage of existing (and growing) tourism revenue funds to pay for incentives, cost cuts, and grant programs for artists that might include performances, tour/export expansion, and licensed, commissioned works.

- ☐ Create more integrated partnerships with ACVB as well as tourism boards and associations to leverage high tourist traffic and develop targeted tourist-based programs to increase revenue flow to local musicians.

- ☐ Invest in better, targeted professional development: Shift the professional development services focus to methodically and consistently address needs of existing working professional musicians rather than entry-level or early stage musicians and bands. Provide professional, best-practices training on expanding revenue opportunities; focus on expanding the connection of Austin's musicians to businesses and revenue opportunities in other cities and countries via investment in better networking and connections; bring experts from other locations for training sessions and networking; and increase trade export opportunities to connect professional musicians to more revenue.

- ☐ Reduce costs for professional artist business operations by creating access to useful (but individually expensive) subscription tools such as Pollstar Pro, All Access radio support subscriptions, and others – see more expansive discussion about this in Section 3: "Music Industry" under "Top City Policy Considerations".

Cultivating New Music Revenue Sources:

There are also some very good best practices and initiatives that focus on revenue building already in place in other cities like Chicago, Nashville, and Denver that could be explored for potential use in Austin. Guiding principles for revenue stimulation initiatives should ensure that the revenue will directly reach professional musician pockets in measurable ways.

Some ideas to explore locally that utilize other divisions within the Economic Development Department could include:

- ☐ Work with the Global Business Recruitment and Expansion Division on two separate fronts:

- Identify Business Recruitment Opportunities - create a framework for attracting & retaining businesses that create more financial opportunities for local artists
- Export & Trade Development – Identify and execute on opportunities for Austin music, either live or recorded

- ☐ Explore export and trade partnerships in other music cities, especially with the burgeoning city-to-city music trade alliances in which Austin is already active and which are coming to fruition around the globe.

SECTION 3

MUSIC INDUSTRY

Austin Music Industry Characteristics and Priority Needs

DEFINING THE "MUSIC INDUSTRY" IN THE AUSTIN MUSIC CENSUS

This section summarizes some of the most important results of the Music Industry section of the Austin Music Census to identify critical needs and gaps. A full set of charts from the Music Industry survey is provided in Appendix V for comprehensive review.

The Austin Music Industry represents a large group of companies, workers, employees, and contractors that produce and support both local music and music tourism festivals and events. Typically, professional research studies concerning labor issues will use the U.S. Federal North American Industry Standard Classification System (NAICS) codes to categorize respondent data. This approach has the advantage of making the data easily comparable to other research studies that use the same method, which can be useful for comparisons or other activities. However, a drawback to using this system to measure the Music Industry is that the standard NAICS classifications do not directly map to the way the Music Industry operates or describes itself in everyday language. For instance, each of the line items below demonstrates a common music business job description and its associated NAICS code:

Artist Management……NAICS Sector 71: Arts, Entertainment & Recreation
Record Label……...NAICS Sector 51: Information
CD/Vinyl Retail Store……..NAICS Sector 44-45: Retail Trade
Marketing & Promotions……....NAICS Sector 54: Professional, Scientific & Technical Services
Instrument Maker……...NAICS Sector 31-33: Manufacturing
Audio Gear Rentals……NAICS Sector 53: Real Estate & Rental and Leasing

Because these Sector Codes are so different from common industry job descriptions, when Music Industry people are asked to describe their job or role in NAICS terms, they may mistakenly classify themselves into the "Arts, Entertainment & Recreation" sector.

The Austin Music Census seeks to capture the best of both worlds – a set of data that will be comparable to NAICS national data sets, and also one that would help respondents accurately describe their job within the Music Industry so that the data will be both accurate *and* useful for comparisons.

The segmentation design contains 33 main Music Industry job sectors (and 74 sub-sectors) using common music industry job terminology, and then contains an internal (invisible to the respondent) mapping system, in which each of these "common" job descriptions is then mapped to an NAICS Sector and Subsector. For the purposes of the Austin Music Census, all of the analysis is explained using the common industry job descriptions rather than NAICS classifications.

However, there is an important point about this mapping issue: when viewed through the Federal NAICS labor coding system, the Music Industry is much more than a niche cultural sector within a city. *It is actually an entire economy unto itself.* The core of this economy of course is the musicians, but the presence of those musicians spin off the creation of at least 13 other major NAICS economic activity sectors (and a correlating 66 sub-sectors), including all of the following:

The Music Economy Described in NAICS Sector Codes

Sector 31-33 Manufacturing

Sector 42 - Wholesale Trade

Sector 44-45 - Retail Trade

Sector 48-49 - Transportation and Warehousing

Sector 51 – Information

Sector 52 - Finance and Insurance

Sector 53 - Real Estate & Rental and Leasing

Sector 54 - Professional, Scientific & Technical Services

Sector 56 - Administrative and Support and Waste Management and Remediation Services

Sector 61- Educational Services

Sector 71- Arts, Entertainment & Recreation

Sector 72 - Accommodation and Food Services

Sector 81 - Other Services

The thinking and strategic planning around any city-based "Music Industry" is better understood as a number of industries that comprise a large economic system based around commercial music.

The jobs that are financially related and interdependent with a music economy are a much broader spectrum of activities than a casual observer might assume. The thinking and strategic planning around any city-based "Music Industry" is better understood as a number of industries – Manufacturing, Hospitality, Wholesale Trade, Information, Education, etc. – that comprise a large economic system based around commercial music.

In the Austin Music Census, there are respondents in all but 2 of the 74 Music Industry sub-sectors. Some of those sectors are heavily populated and others are not. The Austin music industry is comprised of people who work in a variety of jobs: full-time employees, people with 2 or more part-time jobs, self-employed small business owners or contractors, and people who also augment full or part-time work in the Music Industry with other types of employment.

This study includes respondents that work in a variety of ancillary support services that have a financial relationship to the Music Industry, such as photographers, graphic designers, writers who create copy for biographies or websites, and others. These have all been clearly categorized in the Austin Music Census classification system, but for purposes of simplicity in discussion in this section, ALL of these sectors collectively are referred to simply as the "Music Industry". Later in this section, there is a simple segmentation of the "Music Industry" between "Employees" and "Business Owners" to better examine differences among those respondents. It is important to note that this "Music Industry" section discussion *does not* include venue owners and managers, who are discussed separately in Section 4.

MUSIC INDUSTRY SURVEY RESPONSE STATISTICS

Music Industry respondents represent 35% of the total number of respondents to this survey – over 1,400 individuals.

Total Music Industry Responses to Survey: **1,401**

-Total Subset of Business Owners or Proprietors: **534**

-Total Subset of Music Business Employees & Contractors: **655**

-Total Subset of Music Venue Employees & Contractors: **212**

-Total Completed Surveys: **925**
- Completion Rate: 66%
- Total Music Industry Additional "Write-In" Responses to "Needs and Gaps" Question: **318** Responses
- Total Music Industry Additional "Write-In" Responses to "Ideas and Proposals" Question: **153** Responses

SELECTED DEMOGRAPHICS AND CHARACTERISTICS

The following is a description of selected data from the 1,401 Music Industry and support service participants who took this survey. Music Industry responses are compared to corresponding statistical information for the Austin-Round Rock-San Marcos Metropolitan area from the U.S. Census Bureau's American Community Survey 2013 Profile ("Austin MSA").[1] . The comparative U.S. Census information is highlighted in orange under the heading "General Population".

LOCATION — **57%** have been living in Austin for 11 or more years

WORK HISTORY — **41%** have been working or in the music industry for more than 10 years; **59%** have been working in the industry for 10 years or less

HEALTH CARE — **73%** have paid health insurance via an individual, company, or spouse/partner's plan; **4%** receive assistance from HAAM and SIMS, and **21%** have no health care coverage at all [General Population: 66.8% paid health insurance, 19.0% with no health insurance at all]

HOUSING — **42%** 0wn their home, **58%** rent their home. **61%** have other household contributors to the rent or mortgage. [General Population: 58.2% own their home, 41.8% rent their home]

AGE — **49%** are 25-39 years old, **28%** are 40-54 years old [General Population: 17.1% are 25-34 years old, 15.5% are 35-44 years old, and 12.8% are 45-54 years old].

GENDER — **55.2%** are male, **44.8%** are female [General Population: 50.1% Male, 49.9% Female]

RACE/ETHNICITY — **2.7%** African American, **11%** Hispanic (any race), **67%** White [General Population: 7.2% African American, 31.9% Hispanic (any race), 79.8% White]

AREAS OF EXPERIENCE AND EXPERTISE

Many people working in the Music Industry have worked numerous jobs and roles during their industry careers. They often have a wealth of training and experience that may not be directly relevant to their current job, but nonetheless is a set of experience they bring to bear in the market. In an attempt to gain a broad perspective about what general areas of expertise (and gaps) exist in Austin's local industry, respondents were asked to select as many expertise areas as they felt applied to them.

Since the Music Industry respondents are the companies and individuals providing the backbone of support and growth for Austin's music economy, it is interesting to think about their areas of expertise, as well as gaps, and what implications this may have for future growth.

There are the expected areas of strength for a city that specializes in live music and events – "Event Promotion" and "Event Production" are the biggest outliers, with approximately half of all respondents claiming these as areas of expertise. There are also a few surprises (e.g., Austin has 114 individuals who claim

[1]"ACS Profile Report: 2013." US Census Bureau, 2013. Web. 27 Apr. 2015. <http://www.austintexas.gov/sites/default/files/files/Planning/Demographics/CoA_ACS_Profile_2013.pdf>.

"Accounting" expertise). Across 40 separate possible skill categories provided in the survey, 31 of them have responses numbering 100 or more people, and the largest – "Event Production" has 632 people. The boxes below show the strongest and weakest self-identified skill areas. (For a full response list, see Appendix V).

STRONGEST SKILL AREAS	WEAKEST SKILL AREAS
○ Event Production ○ Event Promotion ○ Marketing ○ Social Media ○ Artist/Live Performance ○ PR & Publicity ○ Artist Management ○ Booking/Talent Buying	○ App/Software Development ○ Financing or Venture Capital ○ Manufacturing ○ Film/TV Composer ○ Music Legal Issues ○ Advocacy/Lobbying ○ Music Arrangement ○ Radio Production

Some of the responses in the "Weakest Skill Areas" are telling: App/Software Development and Financing/Venture Capital are both related to future revenue stimulation and business growth capability, while Music Legal Issues and Advocacy/Lobbying both relate to protection of business interests.

MUSIC INDUSTRY SECTOR JOB TRENDS

Industry Sector Population Size: In order to understand the relative size of each sector of the industry, respondents were segmented into their self-selected "Current Main Job". A total of 1,386 people responded to this question.

Figure 10 illustrates the sector segmentation:

Fig. 10 Music Industry Subsector Breakdown

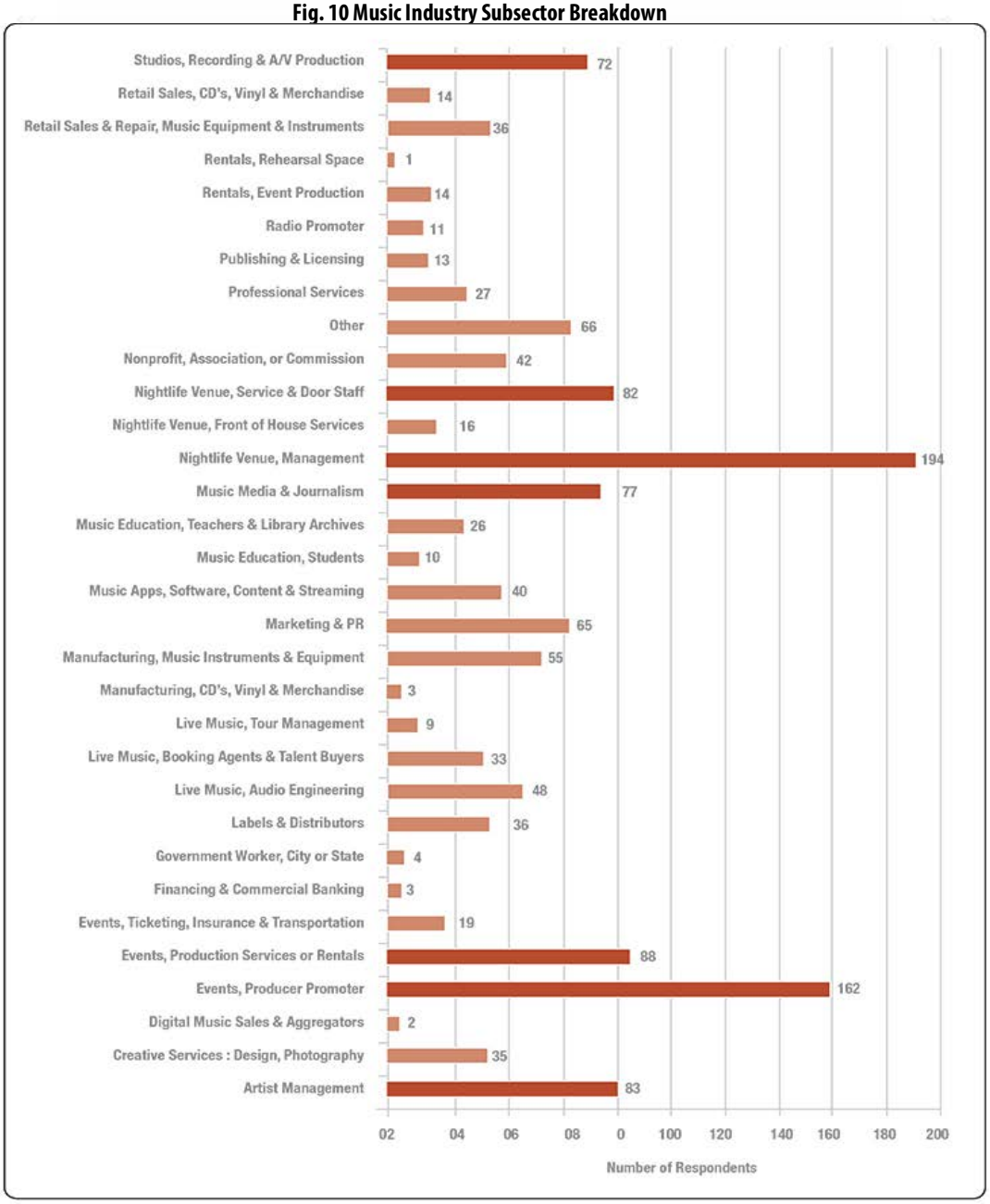


Figure 10 shows how the Music Industry respondent population is comprised of varying sectors, and the relative size of each segment of the Austin Music Industry. The dark orange bars signify any sector that contained 5% or more of the total respondents, ranging from "Studios, Recording & A/V Production" at 5.2% to "Nightlife, Venue Management" at 14%. (Venue management is included in this chart for comparative purposes of sector size. Venues are otherwise excluded from this section and discussed in Section 4).

MUSIC INDUSTRY SECTOR INCOME

Income By Sector Segmentation

In order to locate potential trends in current earnings or salaries, another segmentation was created by looking at some sample industry sectors and their associated self-selected income ranges. A total of 636

people responded to this question. (Appendix V provides a detailed set of Income by Sector information and a more complete view of which sectors currently have better income).

While most job sectors have the majority of workers earning in the lowest income bracket ($25,000 or less), a few jobs sectors had typically better earnings:

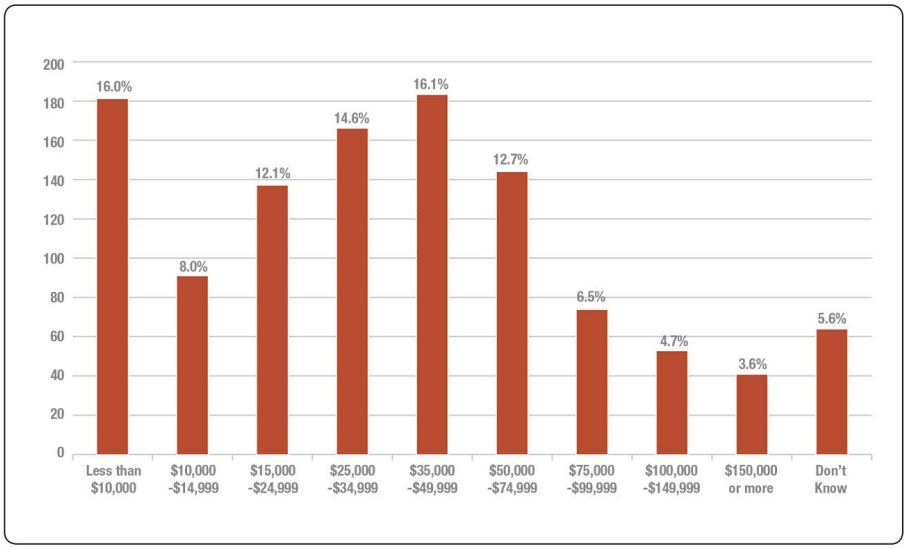
Job Sectors in which the highest percentage of respondents *is not* in lowest income bracket:

- Labels and Distribution
- Events: Ticketing, Insurance, & Transportation
- Event Production: Rentals
- Retailers: CD's, Vinyl & Merchandise

Income Figures

The following figure represents ALL income that Music Industry respondents make, including **all types of employment**, including music-related and non-music related jobs. 1,134 individuals answered this question.

Fig. 11 2013 Pre-Tax Individual Income (All Music Industry EMPLOYEES + OWNERS, All



This figure shows 16% of the Music Industry making $10,000 or less, including all income sources, which is higher than the current poverty rate of 14% for the Austin MSA area.[2] The $10,000 or less income category is also second highest of all categories, with the $35,000-$49,000 category (the mid-way point or median on the income scale) registering slightly higher at 16.1% of respondents. In total, there are more respondents below the median income category than above it, indicating that Music Industry jobs on the whole are not particularly high-earning occupations, and there is certainly room for income growth and wealth accumulation through increased market opportunities. Still, with the exception of the slightly higher than

[2] "ACS Profile Report: 2013." US Census Bureau, 2013. Web. 27 Apr. 2015. <http://www.austintexas.gov/sites/default/files/files/Planning/Demographics/CoA_ACS_Profile_2013.pdf>.

average poverty rate, the figure approaches a "bell curve" distribution of earnings, with the highest number of respondents at the mid-way point.

There are a healthy percentage of new entrants to the local Music Industry job market – 18.2% of the respondents have been working in the industry for two years or less. This could be an indication of steady job growth in certain segments of the Austin Music Industry.

Other Income Trends of Note

- 40.4% of all Music Industry (Owners and Employees/Workers) has *one* full-time job within the industry.
- A total of 56.8% work full time in Music Industry, either with one job or two or more part-time jobs.
- There are a healthy percentage of new entrants to the local Music Industry job market - 18.2% of the respondents have been working in the industry for two years or less. This could be an indication of steady job growth in certain segments of the Music Industry.
- Income trends of the Music Industry are more positive on the whole than the Austin Musician population – income for over the past three years for 18.2% of respondents has decreased (compared to 23.2% of musician respondents).

MUSIC INDUSTRY INCOME IN CONTEXT: COMPARISON TO FEDERAL, STATE, AND CITY OF AUSTIN METRICS

Figure 12 below provides a better understanding of what these numbers mean in the context of Austin's recent growth and prosperity, and how these figures compare to the general population of the Austin MSA. The figures used to calculate this comparison data are taken from Figure 11 above, "2013 Pre-Tax Individual Income (All Music Industry EMPLOYEES + OWNERS, All Income Sources).

Fig. 12 Comparison Metrics: Austin MSA vs. Music Industry Survey Respondents – All Income Sources

MUSIC INDUSTRY OWNERS, EMPLOYEES & CONTRACTORS: ALL SOURCES OF INCOME, Pre-Tax 2013	
More than **16%**	Are Below 2014 Federal Poverty Level of $11,670[3]
More than **36%**	Qualify for Section 8 Housing Subsidies[4]
Approx. **67%**	Are Below the Austin MSA Area Mean Annual Wage[5]
More than **51%**	Are Below the Austin MSA Area Median Annual Wage[6]

[3] "2014 Poverty Guidelines." *Office of the Assistant Secretary for Planning and Evaluation*. U.S. Department of Health and Human Services, 22 Jan. 2014. Web. 28 Apr. 2015. <http://aspe.hhs.gov/POVERTY/14poverty.cfm/ >.
[4] "Applying For Housing Assistance." *Housing Authority of the City of Austin*. Housing Authority of the City of Austin, 2015. Web. 28 Apr. 2015. <http://www.hacanet.org/apply/hcv.php#Elighousing>.
[5] "Austin-Round Rock-San Marcos, TX - May 2014 OES Metropolitan and Nonmetropolitan Area Occupational Employment and Wage Estimates." *Bureau of Labor Statistics*. United States Department of Labor, May 2014. Web. 28 Apr. 2015. <http://www.bls.gov/oes/current/oes_12420.htm#00-0000>.
[6] "Austin-Round Rock-San Marcos, TX - May 2014 OES Metropolitan and Nonmetropolitan Area Occupational Employment and Wage Estimates." *Bureau of Labor Statistics*. United States Department of Labor, May 2014. Web. 28 Apr. 2015. <http://www.bls.gov/oes/current/oes_12420.htm#00-0000>.

Figure 12 actually shows the Music Industry to be more or less in line with general Austin population averages, which would indicate a relative health of the sector; poverty level and Median Annual Wage are about equal to all other Austinites. There is one exception: 67% of Music Industry respondents earn less than the Austin MSA Mean Annual Wage, meaning that there appear to be fewer *high-paying* jobs available in the Music Industry relative to other job sectors.

DRILLING DOWN: FINANCIAL TRENDS OF BUSINESS OWNERS VS. EMPLOYEES & WORKERS

The Music Industry workforce in Austin and elsewhere typically has a large proportion of small businesses. While Austin has several large companies such as C3 Presents, Mood Media, Inc., and SXSW Inc. that employ hundreds of individuals, large companies are the exception in Austin rather than the rule.

Since Austin has so many small music businesses, data segmentation is useful to find insights about the difference between being a Music Industry employee versus a small business proprietor.

Additionally, many people (both employees and business proprietors) work a second job outside the Music Industry to augment their income, or have some other source of income. Profiles have been created for four distinct "Music Industry" population segments to better understand these distinctions these trends:

- **Group 1: Music Industry Employee/Worker,** 100% Income from Music Industry
- **Group 2: Music Industry Employee/Worker,** People Who Earn Music Industry + Other Income
- **Group 3: Business Owner,** 100% Income from Music Industry
- **Group 4: Business Owner,** People Who Earn Music Industry + Other Income

The following figures show 2013 Pre-Tax Income information for each of these segments in the form of a line graph of each, so that trend lines can be compared.

Figure 13 shows both of the Employee/Worker segments: Group 1 and Group 2:

Fig. 13 Employee/Worker Income Trends – With and Without Augmented Income

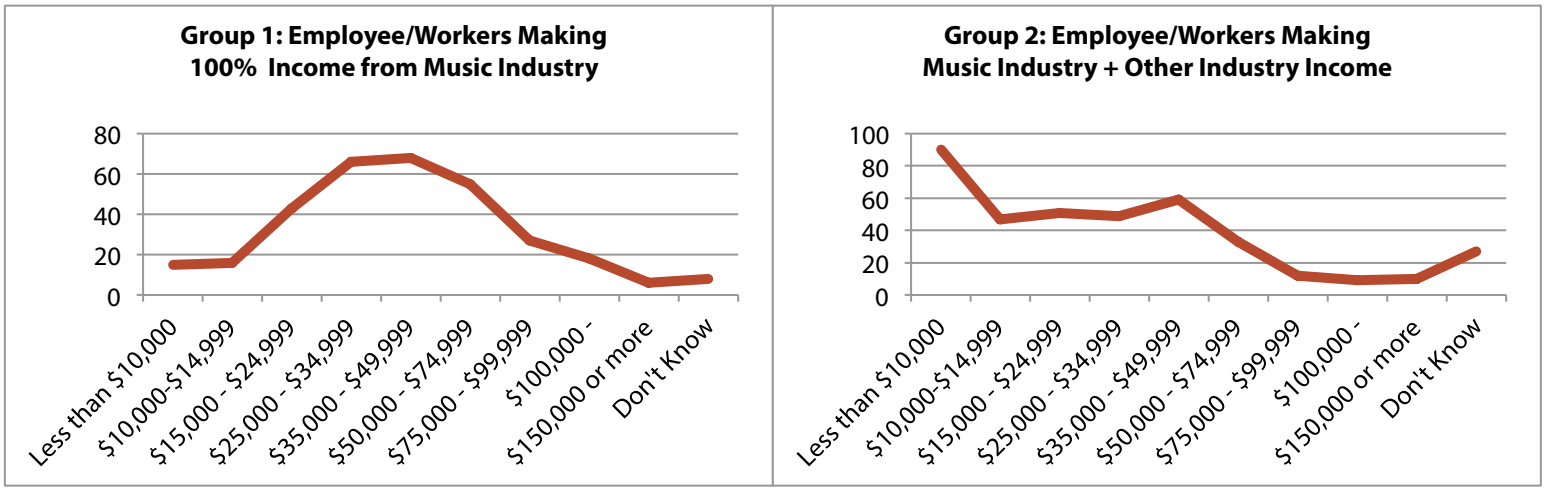
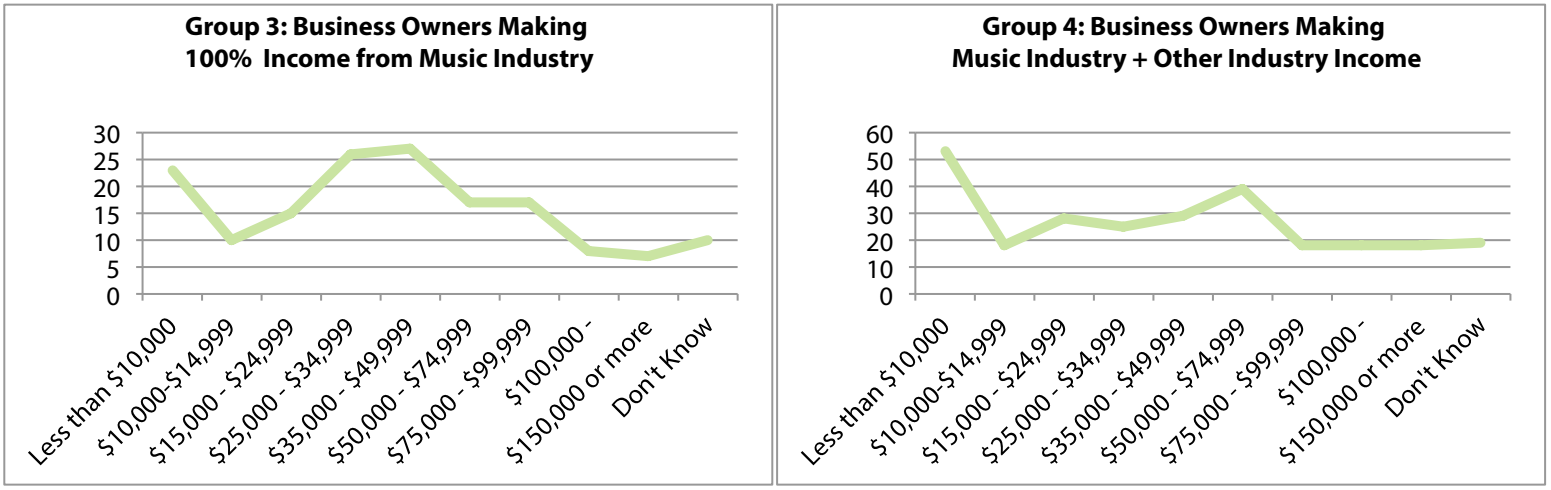


Figure 13 illustrates an interesting and perhaps unexpected trend – employees who are employed only in the Music Industry (versus augmented income) have a much lower risk of earning *extremely low* wages, and a much better chance of earning median-level wages or even better than median-level wages. Group 1 represents a fairly classic "bell curve" distribution, with the added upside of a slight bump in higher than

average wage earners. This appears to be a fairly healthy sign for the stability of this sector, which is likely generated from the growth of larger, more stabile companies that can employ more full-time workers. It may also indicate that if Austin can continue to grow the size and revenue of its hometown companies, it may be able to convert more individuals who are currently in Group 2 – less predictable & stable income with a high percentage of very low wage rates – into Group 1, full-time Music Industry employees.

Figure 14 below shows both of the Business Owner income segments: Group 3 and Group 4:

Fig. 14 Business Owner Income Trends – With and Without Augmented Income



Both Groups 3 and 4 show more upside potential for income than Groups 1 and 2, as a higher percentage of business owners than employees earn above the median income. Both Group 3 and Group 4 also show a high percentage of people earning less than $10,000, which may be somewhat expected amongst a population of entrepreneurs and small business owners who are in the process or perhaps early stages of building a business. In general, business owners experience higher earnings risk, but with the potential for better financial rewards.

But it is interesting to note that the group that *makes all of its income from music is on the whole doing better than the group that is augmenting music jobs with other income sources*. Group 3 has a larger percent of earners in the median income range, as well as a higher percent above the median income, signifying better wealth accumulation by those who are focused just on the Music Industry.

So it would appear that a key issue for Austin Music Industry economic growth may be in creating better opportunities for growth of entrepreneurs and small business operators, who support the ecosystem of industry growth.

There are not yet clear reasons why this disparity exists or what it means, but it is an important observation. This trend perhaps has significance from a policy perspective in that if policy makers can facilitate increased capacity for entrepreneurs to focus on building or growing their companies, those policies may pay off, both for the entrepreneurs' income earning ability and for their increased capacity to hire more full-time employees.

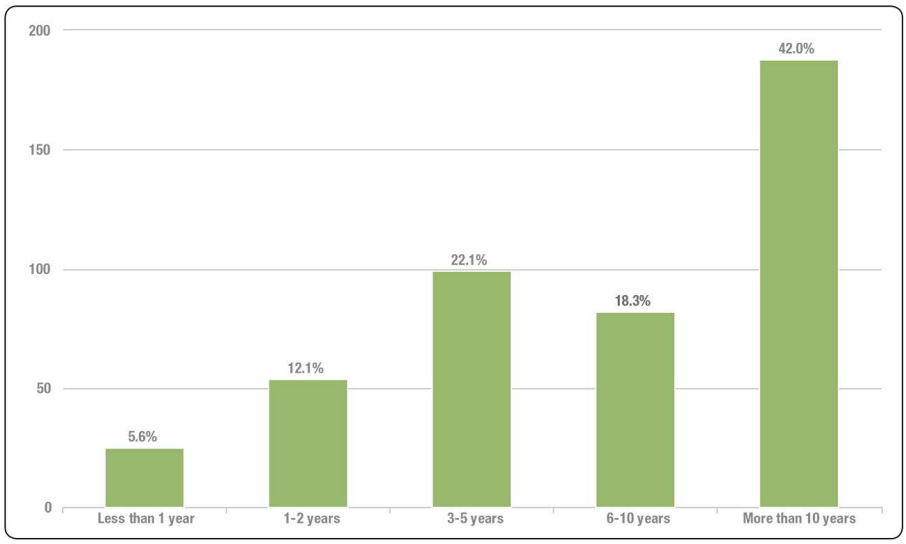
So it would appear that a key issue for Austin Music Industry economic growth may be in creating better opportunities for entrepreneurs and small business operators, who support the ecosystem of industry growth. The following section is dedicated to a deeper exploration of what the Austin Music Census indicates

about the characteristics that comprise the Small Business Owner respondents, and what needs and gaps they feel present the biggest challenges to growth.

BUSINESS OWNERS AND ENTREPRENEURS: AN ASSESSMENT

The Austin Music Census provides a wealth of information about music business entrepreneurs – who they are and how they operate. Appendix VI has a full set of data charts with Business Owner responses. From this point forward, this section will discuss only the music business owner and entrepreneur respondent segment. Figure 15 shows how long these business owners have been operating a business in the Music Industry, and therefore may indicate a proxy for the amount of experience this group has. There were 447 respondents to this question.

Fig. 15 Business Owners – Number of Years in Operation



It is encouraging that almost an equal number of businesses have been started in the last 3-10 years **(40.4%)** as have been operating more than 10 years **(42.1%)**, and **17.5%** of all these businesses have been started within the last 2 years. This appears to be a good sign that new business is developing and growing, which should be encouraged.

Also, net income increases with time working in industry and building business, but on the whole, income growth happens quite slowly. For example:

- **72%** of respondents in business for 1-2 years are making $15,000 or less
- **52.2%** of respondents in business for 6-10 years are making $15,000 or less, and
- **38.5%** of respondents in business for more than 10 years are making $15,000 or less

One consideration is how it might be possible to impact the speed at which these businesses can grow beyond low-wage income into more viable income ranges more quickly.

Another important factor to understand is the age distribution of these business owners; if this population as a whole is "aging out" and not replenishing itself with younger entrepreneurs, the policy rationale may require a different approach. Figure 16 illustrates business ownership by age group. There were 419 respondents to this question.

Fig. 16 Business Owners – Age Breakdown

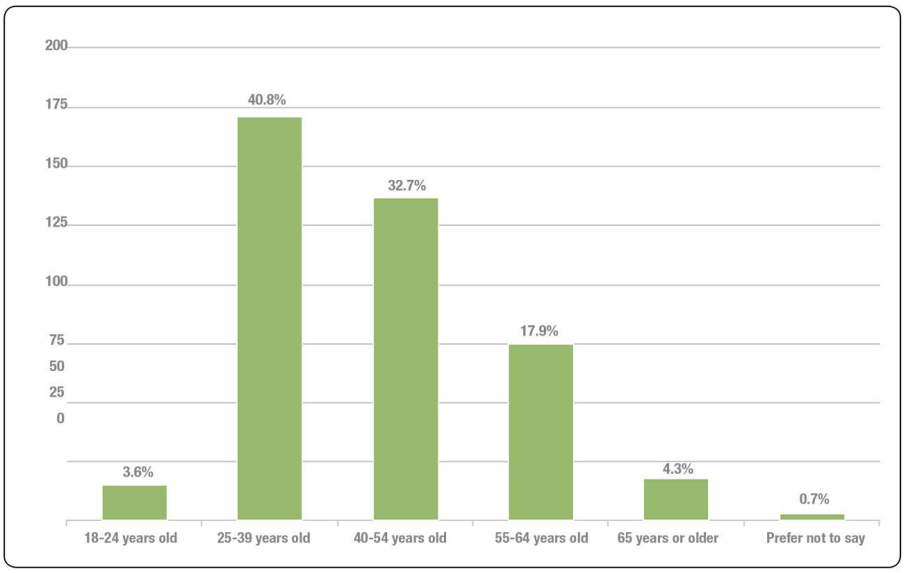


Figure 16 illustrates a promising fact - **40.8%** of respondents are 25-39 years old, and **32.7%** are 40-54 years old. Several implications can be drawn.

First, these are prime earning and career building years, so a strong showing of this age group amongst Austin Music Industry entrepreneurs is a positive sign of potential growth to come.

Second, the 25-34 age demographic is the most coveted age group by most cities and economic development agencies in the U.S.[7] This cohort are highly sought after by most cities since they are the growth engine of the future. In fact, a recent study shows that the Austin metro area has been the highest-ranking destination between 2006-2013 for the so-called "symbolic" segment of the creative class, which is comprised of designer, media, and entertainment workers.[8]

Reviewing the size of these businesses by number of employees provides another insight. Figure 17 shows the number of full-time employees or FTE equivalents from our respondents. There were 447 respondents to this question.

[7] CEO's For Cities. "Attracting College Educated Young Adults to Cities." The Segmentation Company a Division of Yankelovich, 8 May 2006. Web. 28 Apr. 2015. <http://www.centerforhoustonsfuture.org/cmsFiles/Files/Attracting College-Educated Adults to Cities.pdf>.
[8] Florida, Richard. "Where Does the Creative Class Move?" *CityLab*. The Atlantic Monthly Group, 31 Oct. 2014. Web. 28 Apr. 2015. <http://www.citylab.com/work/2014/10/where-does-the-creative-class-move/382157/>.

Fig. 17 Business Owners: Number of Full-Time Employees or FTE Equivalents

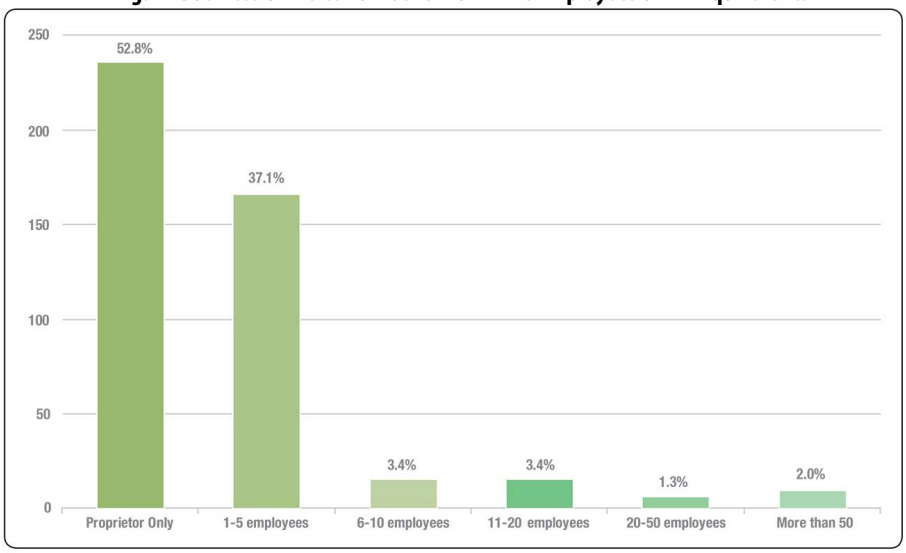


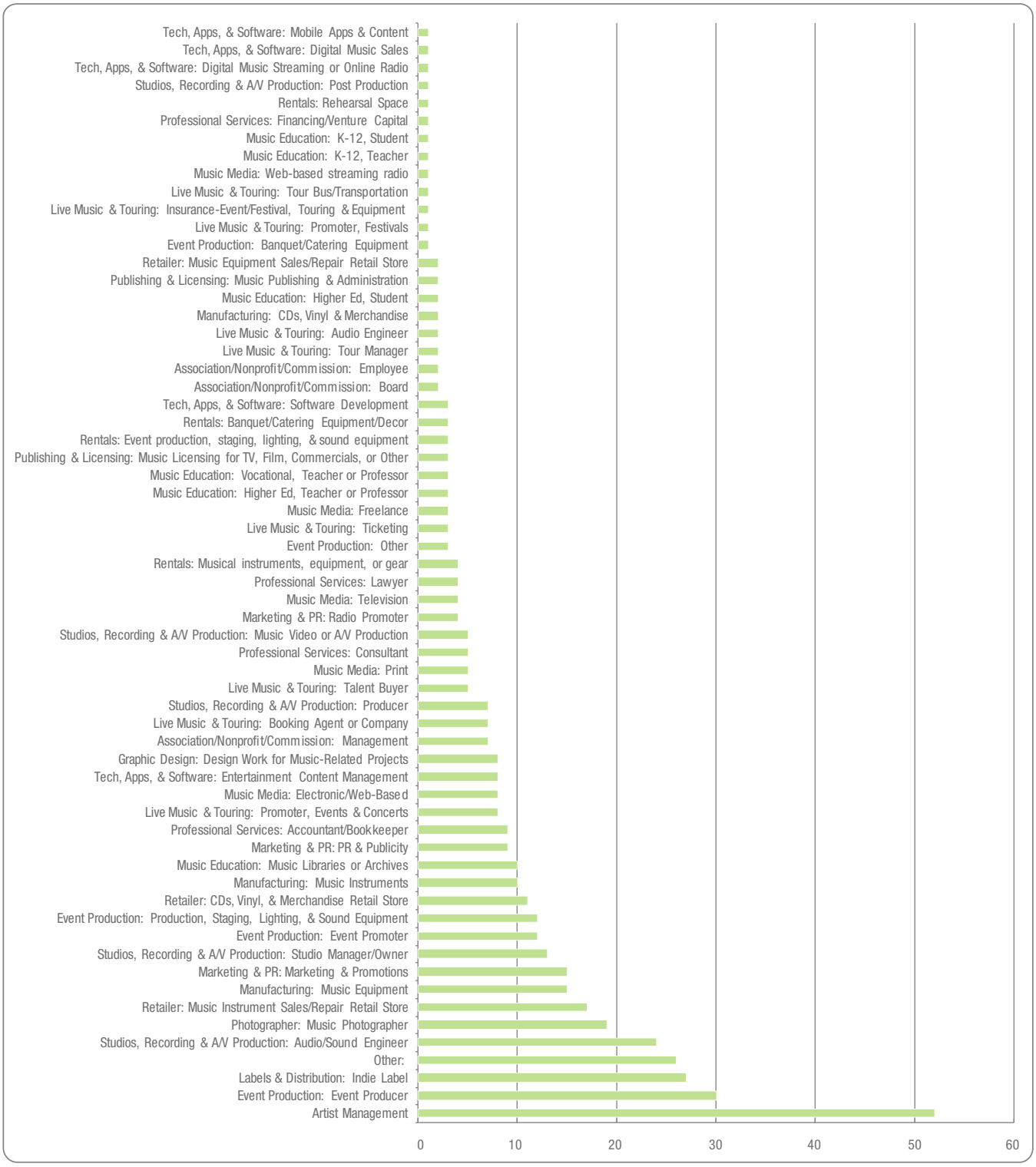
Figure 17 shows that 52.8% or 236 people - over half of the Music Industry business owner respondents - are proprietor-only businesses. Further, *a total of 89.9% of all the respondents' Music Industry businesses have between 0-5 employees*. The number of years in operation appears to have an effect on the number of employees, as time in market contributes some (but not a lot) of company growth: 64.2% of businesses operating for 1-2 years are proprietor-only, and 46.3% of businesses operating for 6-10 years are proprietor-only.

The Austin Music Industry is primarily comprised of individual or very small proprietors who are working out of a home office, with little connection to others in the industry outside of scheduled meetings, events, or online contact.

These facts reflect what was said repeatedly in focus groups: The Austin Music Industry is primarily comprised of individual or very small proprietors who are working out of a home office, with little connection to others in the industry outside of scheduled meetings, events, or online contact. Focus groups noted another issue that arises out of this individualized, fragmented working environment: this type of working situation does not raise the bar for professionalism, and can create a league of amateur or mid-level performers, with no obvious means of developing a nationally competitive set of skills and contacts.

Lastly, to understand how business owners are distributed within the industry, Figure 18 shows the size and segmentation of business owners in a sampling of Industry subsectors. There were 456 respondents to this question.

Fig. 18 Number of Business Owners in Industry Subsectors



The data shows business owners and proprietors operating in 63 out of 74 possible industry sub-sectors. It appears that Austin has a very widespread ecosystem of small business operators throughout the Music Industry economy.

In summary, the Austin Music Census uncovers a number of important facts about these business owners that may be important to future planning and development efforts:

- Business Owners appear to create more Music Industry income when they are able to focus their efforts on one job or company, rather than augmenting income from other sources outside the Music Industry.

- A healthy percentage of these music businesses have been started within the past 2 years, indicating new business growth and possibly an expansion of the number of operators entering the Music Industry marketplace.

- Net income increases with time spent building businesses, but increases slowly.

- Business owners represent a very strong showing of 25-39 year olds, which is nationally a coveted age group from an economic development perspective that the City very likely wants to retain.

- Small business respondents represent 63 out of 74 Industry sub-categories, indicating a widespread population of entrepreneurs throughout the Austin Music Industry economy.

- The vast majority of these businesses are either sole proprietors or very small businesses that are highly atomized, and operate primarily out of home offices.

A very important policy question is how do we retain these entrepreneurs and help them grower better and faster? What do they need to increase their rate and speed of success?

NEEDS AND GAPS: LIVING AND AFFORDABILITY

Many of these respondents' answers to Needs and Gaps align with the summary of facts above, and begin to point the way toward potential policy priorities. In addition to income and demographic questions, respondents were asked to rate a series of questions that described the kinds of needs and gaps that are important factors in delaying or inhibiting the growth of their careers and earnings potential.

These needs and gaps were separated into four Category types:

- Industry Resources

- Connectivity and Collaboration

- Professional Education and Skills Development

- Living and Affordability

Each of these categories was presented in a grid format, with between 4-6 specific questions in each category, and the respondent was asked to rate each question in terms of impact to their career development, with the scale ranging from Extreme Impact – No Impact.

As with all respondents in the Austin Music Census, a large majority of business owners rated issues in the "Living and Affordability" category as critically important. Here are percentages and issues for which respondents gave a rating of "Extreme or Strong Impact" regarding specific affordability questions:

- **78.2%** Extreme or Strong Impact: "***Stagnating Pay for Musicians Makes It Difficult to Make a Viable Income"***

- **70.8%** Extreme or Strong Impact***: "Lack of Affordable Housing for Rent"***

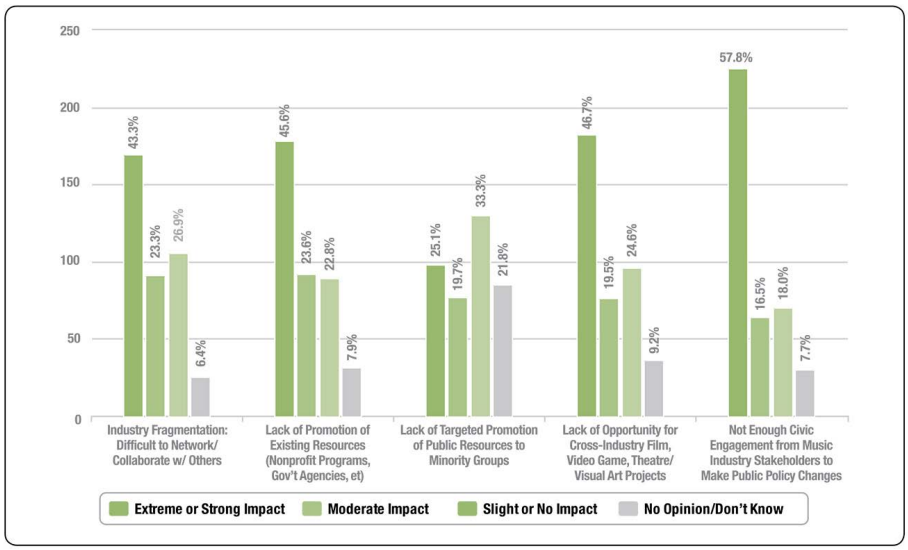
- **69.2%** Extreme or Strong Impact: ***"Increased Cost of Living in Food, Utilities, & Transportation"***

Since Living and Affordability issues have been discussed at length in the Musician section of this study, they will not be discussed again here, but it is clear from their answers that business owner respondents are in alignment with other respondent types regarding Living and Affordability issues.

NEEDS AND GAPS: CONNECTIVITY AND COLLABORATION

Outside of Living and Affordability questions, as a general rule, business owners were less enthusiastic and less clear about identifying needs and gaps than they were about ideas for solutions (with two exceptions, which will be discussed below). There were two specific questions in which there were more than 50% of respondents who ranked the question as having "Extreme or Strong Impact" on career development – one in the "Connectivity and Collaboration" category, and one in the "Industry Resources" category. Figure 19 shows "Connectivity and Collaboration" responses.

Fig. 19 Business Owner Needs and Gaps: CONNECTIVITY AND COLLABORATION



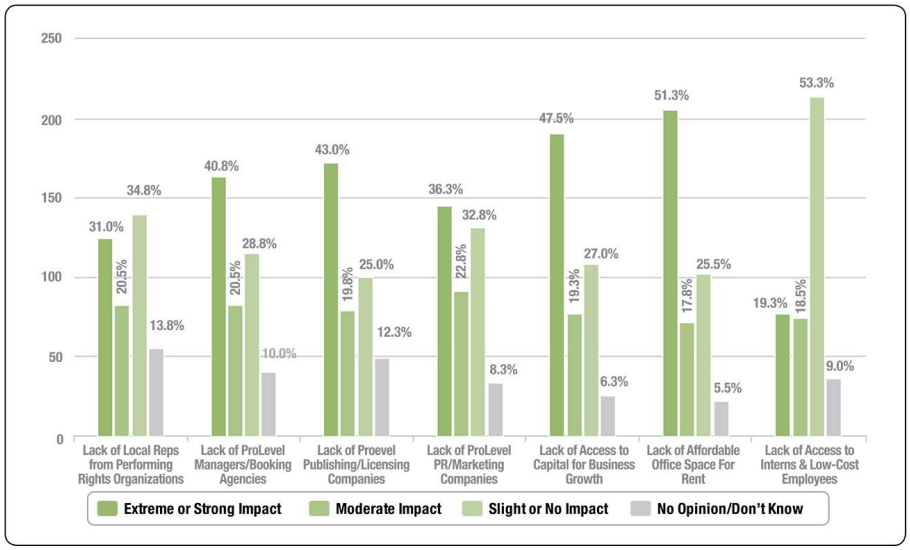
As Figure 19 illustrates, **57.8%** of respondents feel that historically at least*, a lack of civic engagement and advocacy has had a major career impact.*

Equally interesting is that the question regarding "Lack of Opportunity for Cross-Industry Film, Video Game, Theatre/Visual Art Projects" didn't rank higher as an issue for business owners. It may be too early yet to draw conclusions about the meaning of this lack of interest, but it is perhaps an indication that these industries in Austin have been operating in such a partitioned fashion that respondents lack specific knowledge about opportunities that might exist or that could be developed.

NEEDS AND GAPS: INDUSTRY RESOURCES

The next chart, Figure 20, shows "Industry Resources" responses.

Fig. 20 Business Owner Needs and Gaps: INDUSTRY RESOURCES



This chart illustrates that one item registered over 50% as "Extreme or Strong" impact: **51.2% feel that the "Lack of Affordable Office Space for Rent" has been a critical barrier** – a very pragmatic issue that resonates with a majority of the small business entrepreneur population. Affordable office space to grow an enterprise is also an issue that was brought up repeatedly in focus group discussions as well. Additionally, "Lack of Access to Capital for Business Growth" comes in close to **50%** of respondents as a critical issue.

It is also equally insightful to note the issues which seem to have *less* impact: clearly most of these respondents feel that they have fairly easy access to entry-market, lower wage employees and/or intern assistance to utilize, and marketing companies and channels do not appear to be a large barrier. The data shows that there was also a rather lukewarm response to "Professional Education and Skills Training" questions; the majority of business owner respondents do not feel this is a priority need, or it may be a sense that there are other more critical issues at the moment tied to their ability to succeed, such as affordable office space, access to growth capital, and more effective civic engagement and advocacy efforts.

IDEAS AND PROPOSALS: ENTERTAINMENT DISTRICTS AND MARKET DEVELOPMENT

Lastly, survey respondents were given questions with potential ideas for solutions or new proposals, most of which came from focus group discussions. Again these questions were grouped into categories and then presented in a grid of questions related to that category.

These "Ideas and Proposals" were separated into three Category types:

- Career Development and Connectivity
- Tourism and Market Development
- City Programs

Each of these categories contained between 4-6 specific questions, and the respondent was asked to rate each question in terms of how helpful the idea would be for career or business development, with the scale ranging from Extremely Helpful – Not Helpful.

Full results are available in Appendix VI and provide useful information on respondent priorities around Tourism and City Programs. There is clearly some overlapping interest with musician respondents in ideas for new initiatives. For business owners, the following ideas in particular were rated "Extremely or Strongly Helpful" by a strong majority of these respondents:

- ☐ **75.6%** Creation of an "Austin Art Loyalty Program" that encourages/incentivizes use of Austin music in other Austin-based companies
- ☐ **65.9%** Creation of More City-Zoned Music-Friendly Areas (i.e. Red River Cultural District) & Promote to Tourists
- ☐ **64.3%** Creation of City Programs to Develop International Markets & Export Opportunities
- ☐ **64.3%** Use of Density Bonus/Tax Incentives to Increase Live Music Sustainability in City Center

These business owner respondents agreed with musician respondents about new roles in which they would like to see the City become engaged. Specifically, respondents agreed about the value of formal, codified entertainment district designations and other public-private activities to stimulate revenue growth, such as trade and export development and encouraging tourist activity to have more focus on local content.

Though there were ideas in each of the above categories that have very strong and clear support from the business owners, **the standout category receiving the most positive overall response is the "Career Development and Connectivity" section. The following section provides analysis of this category.**

IDEAS AND PROPOSALS: THE CREATION OF A MUSIC INDUSTRY CENTRAL HUB & CO-WORKING BUILDING

Figure 21 below shows all business owner responses to the final category of the Ideas and Proposals section, "Career Development and Connectivity".

Fig. 21 Business Owner: "Career Development and Connectivity" Ideas and Proposals

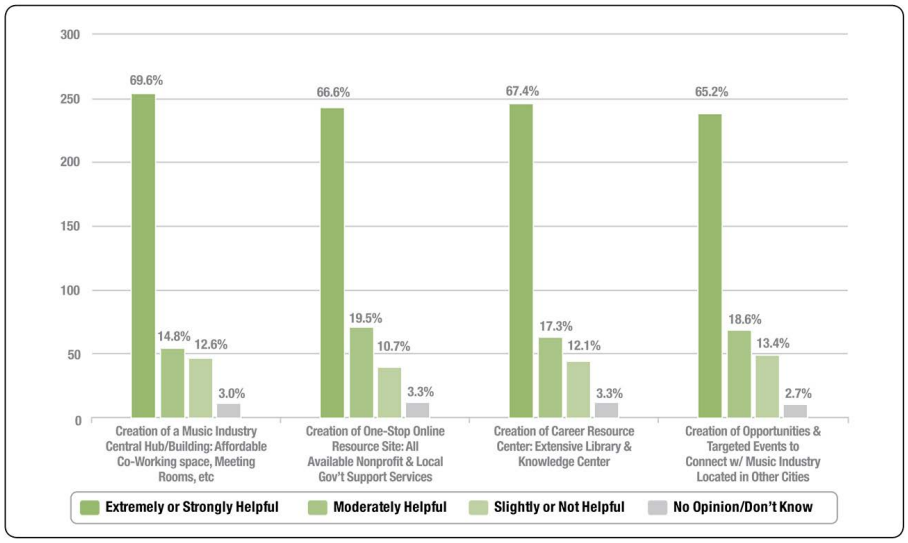


Figure 21 clearly shows that *all* of the ideas in the "Career Development and Connectivity" category ranked as highly important for business owners. It is interesting that the highest ranked Idea or Proposal– *at nearly 70% responding "Extremely or Strongly Helpful" - is the "Creation of a Music Industry Central Hub/Building with Affordable Co-Working Space, Meeting Rooms, etc.".* Also, a physical resource center/library/knowledge center

as well as a comprehensive online resource navigation site to find available support services ranked as priorities as well.

It is interesting that the highest ranked Idea or Proposal – at nearly 70% responding "Extremely or Strongly Helpful" –is "The Creation of a Music Industry Central Hub/Building with Affordable Co-Working Space, Meeting Rooms, etc."

There appear to be two emerging threads that bind the business owner needs and ideas data together:

- The need for better connectivity, and
- More pragmatic affordability solutions for those who are sole proprietors or operating very small businesses.

The music economy and its high number of associated small businesses have perhaps crossed a Rubicon of sorts: the historical ways Austin has worked to connect the industry together through networking events, panels, discussion groups, etc., were appropriate and required at the time, but may simply no longer be sufficient to fill the connectivity needs of the many atomized operators in the city.

The developing visibility of this emerging set of priorities is a positive sign of activity and growth in Austin's Music Industry and its associated businesses. But it would appear that Austin has reached a new stage of maturation which requires different – or additional - solutions if it is to continue that growth. Fragmentation is highly inefficient and costly: opportunities are missed, knowledge sharing is cumbersome or non-existent, businesses grow more slowly, and innovation is substantially hindered. There is also the added issue of "opportunity loss by omission" - people may never hear what others are doing and miss ways to build both business and revenue.

In summary, the focus groups, informational interviews and survey data in the Austin Music Census suggest the following conclusions about what the industry requires for next stage growth. Music industry operators and small businesses need new and more systemic solutions and infrastructure, and Faster and more efficient access to developing business opportunities.

TOP CITY POLICY CONSIDERATIONS FOR MUSIC INDUSTRY GROWTH

A complete policy plan of action for the City of Austin would require detailed recommendations, a study of funding mechanisms and feasibility issues, and an implementation plan. Such a policy plan is outside the scope of the Austin Music Census. However, based on the needs revealed through the data analysis, a few ideas and brief findings of best practices employed in other cities are presented here that may warrant further exploration by City staff and policy makers.

Better Economic Growth Through Cluster Development

In the U.S and other developed countries, cities are the basic social and economic organizing unit of the knowledge-based creative economy. Thus the strategy of governments and public entities investing in the creation of economic clusters via policy support, land/building grants, financial investment or other means is certainly not new, and has been well proven in a substantial number of case studies and other research to be very effective in certain situations. Clustering is a phenomenon that can happen organically, as companies form around a particular local asset - certainly this is what private industry operators have already done around the Austin Music Industry.

The next step, however, may require new ways to implement an intentional, strategic pursuit of cluster development with Music Industry operators. Clusters are recognized to bring certain benefits, such as increased efficiency of connections and operations, better access and speed to "insider" information, and a

high-energy environment of both competitive *and* cooperative relationships – all of which create faster time to market with better ideas and more opportunities to build relationships and revenue. For these reasons, well-designed clusters are able to create a remarkable competitive advantage as well as faster innovation in cities that include clustering activities as a prominent component of their economic development strategy.

Michael Porter, the well-known economist, writer, and Professor at Harvard Business School, has this to say about the benefits of clusters in creating competitive advantage:

> *Clusters affect competition in three broad ways: first, by increasing the productivity of companies based in the area; second, by driving the direction and pace of innovation, which underpins future productivity growth, and third, by stimulating the formation of new businesses, which expands and strengthens the cluster itself. A cluster allows each member to benefit as if it had greater scale or as if it had joined with others formally – without requiring it to sacrifice its flexibility.*[9]

Although this clustering concept has gained ground in Austin in the last ten years in other industries – the newly designated medical "Innovation Zone" around the new Dell Medical Teaching Hospital and the Austin Film Studios/Austin Film Society campus for film creators are two examples - Austin has yet to engage in any meaningful pursuit of Music Industry clustering.

The next step may require new ways to implement an intentional, strategic pursuit of cluster development with music industry operators.

Two potential ideas to further Music Industry clustering development would be:

- Perhaps most important, consider how the City could assist in the creation of the items the Austin Music Census reveals that the business owners feel they most need: a centrally located Commercial Music Hub. This building might include some or all of the following components:
    - Co-Working space: low-cost office space for rent, for either individuals or small companies
    - Meeting rooms for use by the day or hour that can also be available to non-office space renters to use for conferences or meetings
    - Potentially a café/coffee or other social space in the building for gathering and networking
    - Office space to house a number of Austin's Music Industry related nonprofits under one roof
    - Office space that can be rented by out of town Music Industry people for a daily or weekly rate
    - Potentially a suite of "creative" rooms – co-writing spaces for songwriters, video editing suites for multimedia music content, etc.
    - A large resource library for Music Industry and musicians, including access to basic contract templates, and subscription-based access to expensive but critical business tools for working professionals, such as Pollstar Pro, All Access Radio Weekly Add Lists, and numerous other tools.

[9] Porter, Michael. "Clusters and the New Economics of Competition." *Harvard Business Review* (Nov.-Dec. 1998): 80. Print.

- Use the creation of more formal, codified Entertainment Districts designated in the land development code and other development/zoning advancements with appropriate policies and incentives within those areas to encourage music business operators to open storefronts or otherwise have commercial engagement opportunities with the public.

Interestingly, it would appear that Austin is actually behind the times on this particular front. Several other cities already have such hubs in operation. A few examples that may be worth a further review include:

- **Nashville:** InDo Nashville
- **Chicago:** Fort Knox Studios/2112
- **New Orleans:** Musicians Village
- **Toronto:** Ryerson Digital Media Zone and MARSCommons
- **Memphis:** Memphis Music Resource Center
- **Detroit:** Musicians Community Center

Each of these hubs have different offerings and character traits among them based on the needs of that particular city and the feasibility work each has done to create their hubs. For more information on each of these creative hubs, please see Appendix XVII.

None of these is necessarily the "right" fit for Austin. The suggestion is that Austin should do its own feasibility work to determine what makes the best sense for its music entrepreneurs and business owners – what the hub will do, how it will work, who it is for – and then commit through policy and resources to assist Austin's music economy grow to the next phase of maturation and national competitive advantage.

SECTION 4

MUSIC VENUES & NIGHTLIFE ESTABLISHMENTS

Venues and Nightlife Establishments Characteristics and Priority Needs

This section summarizes selected data elicited from venue owner and manager respondents. A complete set of data for these respondents is provided in Appendix VII.

The Austin Music Census was open to any nightlife or entertainment venue in the Austin MSA area. Over **58%** of respondents identified themselves primarily as a live music venue, while an additional **33%** identified as other types of establishments that offer live music (such as a restaurant, coffee shop or community space). In the aggregate, **91.6%** of respondents book live music as a regular part of their business. Live music venues that book solely local artists represent 20% of the respondents; the other 80% book some percentage of touring acts.

The response rate and demographics of venue owner or manage respondents follows.

91.6% of respondents book live music as a regular part of their business. Venues that book solely local artists represent 20% of the respondents; the other 80% book some percentage of touring acts.

VENUE SURVEY RESPONSE RATE STATISTICS

Total Venue Owner or Manager Responses to Survey: **187**
Total Completed Responses to Survey: **118**
Completion Rate: **63%**
Total Venue Additional "Write-In" Responses to "Venue Owner Issues" Question: **72** total, 45 manager /owners and 27 employee/contractors

SELECTED DEMOGRAPHICS AND CHARACTERISTICS

The following is a description of selected data from the 187 venue owner and manager respondents who took this survey. Venue owner and manager responses are compared to corresponding statistical information for the Austin-Round Rock-San Marcos Metropolitan Area from the U.S. Census Bureau's American Community Survey 2013 Profile ("Austin MSA").[1]. The comparative U.S. Census information is highlighted in orange under the heading "General Population".

LOCATION	**71%** have lived in Austin for 11 or more years
WORK HISTORY	**46%** have owned or managed a venue for more than 10 years; **54%** have owned or managed a venue for 10 years or less
HEALTH CARE	**74%** have paid health insurance under an individual, company, or spouse/partner's plan; **2%** receive assistance from HAAM and SIMS, and **21%** have no health care

[1]"ACS Profile Report: 2013." US Census Bureau, 2013. Web. 27 Apr. 2015. <http://www.austintexas.gov/sites/default/files/files/Planning/Demographics/CoA_ACS_Profile_2013.pdf>.

	coverage at all [General Population: 66.8% paid health insurance, 19.0% with no health insurance at all]
HOUSING	**58%** own their home, **42%** rent their home. **58%** have other household contributors to the rent or mortgage. [General Population: 58.2% 0wn their home, 41.8% rent their home]
AGE	**41%** are 25-39 years old, **36%** who are 40-54 years old [General Population: 17.1% are 25-34 years old, 15.5% are 35-44 years old, and 12.8% are 45-54 years old].
GENDER	**71.5%** are male, **28.5%** are female [General Population: 50.1% Male, 49.9% Female]
RACE/ETHNICITY	**1.5%** African American, **4.6%** Hispanic (any race), **74.6%** White [General Population: 7.2% African American, 31.9% Hispanic (any race), 79.8% White]

AREAS OF EXPERIENCE AND EXPERTISE

As expected, venue owners and managers were most skilled in areas related to live music. The boxes below show the strongest and weakest self-identified skill areas. (For a full response list, see Appendix VII.)

STRONGEST SKILL AREAS	WEAKEST SKILL AREAS
○ Venue Management ○ Event Production ○ Event Promotion ○ Booking/Talent Buying ○ Marketing ○ Social Media ○ Artist/Live Performance ○ PR & Publicity	○ Film TV Composer ○ Music Legal Issues ○ Radio Production ○ Software Development ○ Music Publishing ○ Music Licensing ○ Manufacturing

OVERVIEW OF AUSTIN MUSIC VENUES

A complete set of charts and analysis for venue owner and manager respondents is available in Appendix VII.

<u>Venue Characteristics and Live Music</u>

- The largest number of respondents operate venues with a capacity of 100 – 350 people, so it is likely that the majority of the opinions in this respondent data relate to challenges of small to medium-size venues.

- The number of days of live music offered was about equally split between all categories, ranging from less than 1 day per week (e.g. a coffee shop that offers live music shows twice a month) to 7 days per week.

- The largest percentage of respondents (27.8%) indicates they offer between 6-15 hours per week of live music.

- Respondents' work experience in a venue is fairly evenly split with 45.8% working at venues for more than 10 years and 54.1 working at venues for less than 10 years.

Venues Create Jobs

- 93% of venues employ full time or equivalent staff with 67% of these establishments employing 6 people or more full-time. This is in contrast from the music industry section, which showed a total of 89.9% of all our respondents' music industry businesses have between 0-5 employees.

- Live music venues provide a high percentage of income to Austin's musicians: "Live Performance Shows in Austin" had the highest percentage of contribution to musicians' revenue as shown by musician survey responses.

A CONFLUENCE OF OPERATING PRESSURES CREATE THIN MARGINS

Most of the respondents from small to mid-size venues who participated in interviews and focus groups indicate that they are operating on a profit margin ranging from 6%-15% annually. Like other small to medium sized businesses, venue profit margins can quickly go from net-positive to net-negative and incurring debt if they experience an unexpected capital expenditure, such as a high-cost repair or equipment replacement. Respondents identified the following factors as particularly important contributors to declining operating margins:

For perspective, one venue respondent said that planned improvements they hoped to make would wipe out all profit for three years. Another venue manager pointed out that it would be futile to invest $500,000 in a business only to make that investment back in five years but be priced out of their lease in year six.

- Declining "Cover" Revenue: Focus group and interview subjects suggest that patrons in Austin are willing to pay for a touring band or VIP experience, but are generally less willing to pay a cover charge at the door for local artists. Respondents also said that cover charges have either stayed virtually the same for live music shows by local artists over the past 10 years, or in some cases have decreased to zero.[2] Respondents say that declining cover charges not only affect venues being less able to pay show guarantees for local artists, but also reduce venue revenues applied to offset operating expenses.

- Expensive Lease Contracts and Operating Costs May Break Up Live Music Venue Clusters: As property values and rent costs have increased, venues are struggling to stay afloat and compete within the market. Venues have been "priced out" of certain areas of Austin where live music has historically been clustered and been replaced by businesses that can afford increased rent. In addition, respondents said that many business real estate leases in the Central Business District (CBD) now have rental rate "acceleration" clauses. These clauses tie monthly rent payments to Austin's economic performance data, which is affected by Austin's booming growth rate and subsequent rising real estate prices. The consequence of these rate acceleration clauses is to effectively require venues to perform at an unsustainable growth rate equal to other higher earning sectors of the Austin economy, creating a financial pressure on venues that may be unrealistic given other factors.[3] Venues that cannot afford to stay in areas that are traditionally live music venue clusters will be faced with closing or moving. While this phenomenon may be an inevitable market effect, it is well to be aware of this accelerating trend and not be blindsided by venue closings that change the character of City neighborhoods.

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[2] Informational Interview 1. "Venue Owner." In-person interview. 6 Jan. 2015. Informational Interview 6. "Venue Owner." In-person interview. 7 Jan. 2015. Focus Group. "Venue Owners and Managers." 6 Oct. 2014.
[3] Focus Group. "Venue Owners and Managers." 6 Oct. 2014.

- Short-Term Lease Contracts: Respondents identified short-term leases as another manifestation of Austin's rapid growth rate that is negatively affecting their business. Venue owners commented that they find contemporary Austin music fans seem to be attracted toward venues offering "better quality" listening experiences. Short-term leases make it difficult for venues to justify investing in costly fixtures and other leasehold improvements (such as building a patio, refurbishing old bathrooms, installing high-quality sound equipment). Respondents described many live music venue leases within the CBD having terms ranging from 3-7 years. With a market that emphasizes short-term commitments to venue owners, respondents said that they are reluctant to invest the capital expenditures necessary to create "better quality" venues. The simple explanation from respondents was that they may not be able to recoup that investment in fixtures and leasehold improvements before the lease expires, and they are forced to vacate due to either unaffordable rent increases in a new lease, or the owner sells the property for high-priced development.

  For perspective, one venue respondent said that planned improvements he hoped to make would wipe out all profits for three years.[4] Another venue manager pointed out that it would be futile to invest $500,000 in a business only to make the investment back in five years but be priced out of their lease in year six.[5] Respondents said that because the market is dictating shorter lease terms, it often doesn't make sense to take the capital investment risk and make substantial improvements.

- Productivity Loss from Regulatory Inefficiency: Respondents were in agreement on what they perceived to be a confusing and arcane permitting process for nightlife establishments and live music venues. These venues find that they have substantial productivity loss in taking time away from their businesses in order to navigate and comply with what they perceive as the City's burdensome and inefficient permitting requirements.

Culture and history are valuable legacies and tourist attractions. If the venues get turned over every 3-7 years, there is no ability to build and continue that legacy of landmark venues, with a potentially significant domino effect.

- Venue Location Dictates Challenges: The financial pressures on venues in the CBD have incented or driven smaller venues to open or relocate outside of the CBD, including central Austin neighborhoods that are undergoing transition from primarily residential areas to mixed use. Respondents from venues located outside of the CBD that apply for an Outdoor Music Venue permit are often required to also complete a formal, written agreement with the local neighborhood association in order to receive their Outdoor Music Venue and other operating permits. While venues felt that the practice of working with the neighborhoods in an agreement process is a reasonable request, some of the elements of those agreements are consistently problematic. For example, the agreement terms are often only given in 12-month increments, so the neighborhood associations can effectively trigger a revocation of the Outdoor Music Venue permit every 12 months. The short-term nature of these neighborhood agreements does not encourage long-term investment by venues that lease their premises.

  There are other, less visible but critical long-term economic effects of a high rate of venue turnover and the de-centralizing of venues from the CBD. The Austin brand promotes live music as a central attraction, and Austin's tourism boards work to bring tourists here by marketing the music culture,

[4] Informational Interview 6. "Venue Owner." In-person interview. 7 Jan. 2015. Focus Group. "Venue Owners and Managers." 6 Oct. 2014.
[5] Informational Interview 2. "Venue Owner." In-person interview. 14 Dec. 2014. Focus Group. "Venue Owners and Managers." 6 Oct. 2014.

history, and landmark venues that have been a treasured piece of Austin's story. Yet with few exceptions, there is no longer a stock of venues that have been here for decades that continue to build a brand, both locally and internationally. Culture and history are valuable legacies and tourist attractions. If the venues get turned over every 3-7 years, there is no ability to build and continue that legacy of landmark venues, with a potentially significant domino effect.

GROWTH OF PRIVATE EVENTS AND VIP EXPERIENCES AS NEW REVENUE GENERATORS

- VIP Experience Packages: On a more positive note, the venue focus groups and subsequent venue owner interviews said that many patrons are leaning toward more high-priced and higher margin "VIP Experience" nightlife packages. Many venues are working to provide these VIP experiences to meet that demand.[6]

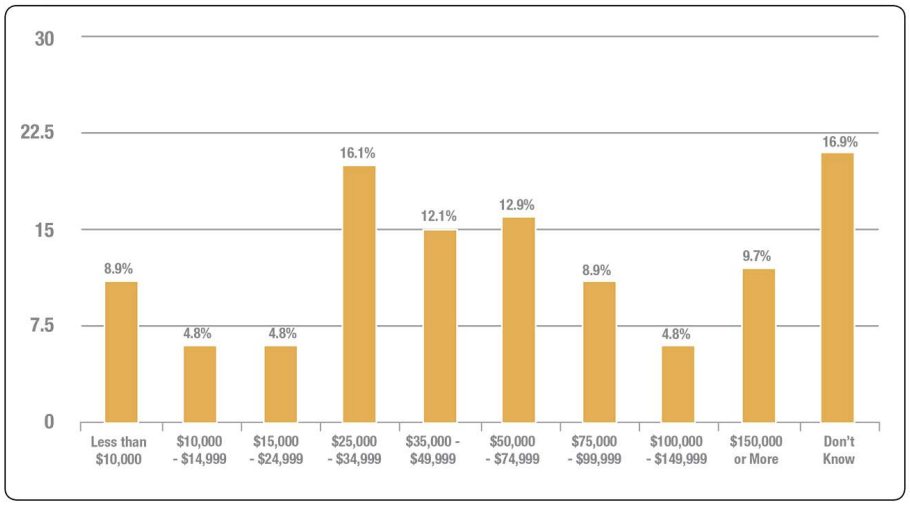
- Private Event Bookings: Private event bookings are another source of increased revenue for many CBD venues. Private events often allow venues to charge substantial rental fees. A number of venue respondents said these private events were primary contributions to profit that essentially allow them to stay in business. However, there is a (perhaps unintended, but important) consequence to the increase in private event bookings, which is the effect on the local musicians. There is a finite universe of calendar days in the year, and even fewer prime days for events such as weekend slots – the total universe of weekend dates is 52 weeks per year multiplied by 3 days per week (Thursday, Friday, and Saturday), for 156 total prime performance days. If even 25% of those are taken by private events and/or touring performances to create financial stability for the venue, it significantly reduces the stock of prime days for booking local artists. This economic force seems to result in local artists being booked on "off days" or "off sets" that are harder to market, such as a Tuesday night at midnight.

[6] Focus Group. "Venue Owners and Managers." 6 Oct. 2014.

VENUE OPERATORS: OWNER AND MANAGER INCOME DATA

The following data represents ALL income that venue owners and managers make, including all types of employment, including music-related and non-music related jobs or income:

Fig. 22 2013 Pre-Tax Individual Income (All Venue Owner/Mgrs, All Income Sources



A total of 124 venue owners or managers answered this question. There are positive data in this chart regarding individual income earnings for venue managers and owners: only **9%** of venue owners report that their total income from all jobs is $10,000, which is well below the Austin poverty rate of 14% in the 18-64 year old demographic.[7] When compared with musician and music industry worker respondents in the Austin Music Census, take-home pay for venue operators is considerably higher on average, including in the $100,000 or more categories.

However, in order to achieve these income levels, **54%** of music venue owners or managers work another full or part-time job outside the music industry to augment their venue manager take-home income. In that regard, venue owners/operators are very similar to the **56%** of musicians working outside of the music industry to supplement income.

OTHER INCOME TRENDS

- Self-Financing: While profit margins are often slim, half of the venue owners surveyed used personal capital to finance or grow the business.

- Venue owner and manager income prosperity trends: **43.9%** of individual venue owners or managers indicated their annual income had increased over the past three years while **35.8%** indicated that their income had remained the same.

[7] " ACS Profile Report: 2013." US Census Bureau, 2013. Web. 27 Apr. 2015. <http://www.austintexas.gov/sites/default/files/files/Planning/Demographics/CoA_ACS_Profile_2013.pdf>. Since the Austin Music Census was not available to anyone under 18 years old, and total respondents aged 65 or older was 2.6%, the 18-64 year old Census group presents the most accurate means of comparison.

VENUE OWNERS & MANAGERS INCOME IN CONTEXT: COMPARISON TO FEDERAL, STATE, AND CITY OF AUSTIN METRICS

Figure 23 below puts responses from venue owners and managers in context by comparing them to the general population of the Austin MSA. The figures used to calculate this comparison data are taken from Figure 22 above, "Venue Owner/Manager 2013 Pre-Tax Individual Income (All Venue Owner/Mgrs, All Income Sources".

Fig. 23 Comparison Metrics: Austin MSA vs. Venue Owner/Manager Survey Respondents

MUSIC VENUE OWNERS AND MANAGERS: ALL SOURCES OF INCOME, Pre-Tax 2013	
More than **9%**	Are Below 2014 Federal Poverty Level of $11,670[8]
More than **19%**	Qualify for Section 8 Housing Subsidies[9]
Approx. **46%**	Are Below the Austin MSA Area Mean Annual Wage[10]
More than **35%**	Are Below the Austin MSA Area Median Annual Wage[11]

Figure 23 again shows that the income of venue owners and manager respondents is higher than both than musician and music industry worker respondents. Notably, they are also higher as a group than the Austin MSA population average.

- **More than half** are making above the mean (average) Austin MSA annual wage of $48,150[12]
- **About two-thirds** are making more than the median wage of $36,640[13]
- The poverty rate is about **5% lower** in this group than in the general Austin MSA population.[14]

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[8] "2014 Poverty Guidelines." *Office of the Assistant Secretary for Planning and Evaluation*. U.S. Department of Health and Human Services, 22 Jan. 2014. Web. 28 Apr. 2015. <http://aspe.hhs.gov/POVERTY/14poverty.cfm/ >

[9] "Applying For Housing Assistance." *Housing Authority of the City of Austin*. Housing Authority of the City of Austin, 2015. Web. 28 Apr. 2015. <http://www.hacanet.org/apply/hcv.php#Elighousing>.

[10] "Austin-Round Rock-San Marcos, TX - May 2014 OES Metropolitan and Nonmetropolitan Area Occupational Employment and Wage Estimates." *Bureau of Labor Statistics*. United States Department of Labor, May 2014. Web. 28 Apr. 2015. <http://www.bls.gov/oes/current/oes_12420.htm#00-0000>.

[11] Ibid.

[12] Ibid.

[13] Ibid.

[14] " ACS Profile Report: 2013." US Census Bureau, 2013. Web. 27 Apr. 2015. <http://www.austintexas.gov/sites/default/files/files/Planning/Demographics/CoA_ACS_Profile_2013.pdf>. Since the Austin Music Census was not available to anyone under 18 years old, and total respondents aged 65 or older was 2.6%, the 18-64 year old Census group presents the most accurate means of comparison.

Fig. 24 Average Percent of Touring (Non-Local) Shows

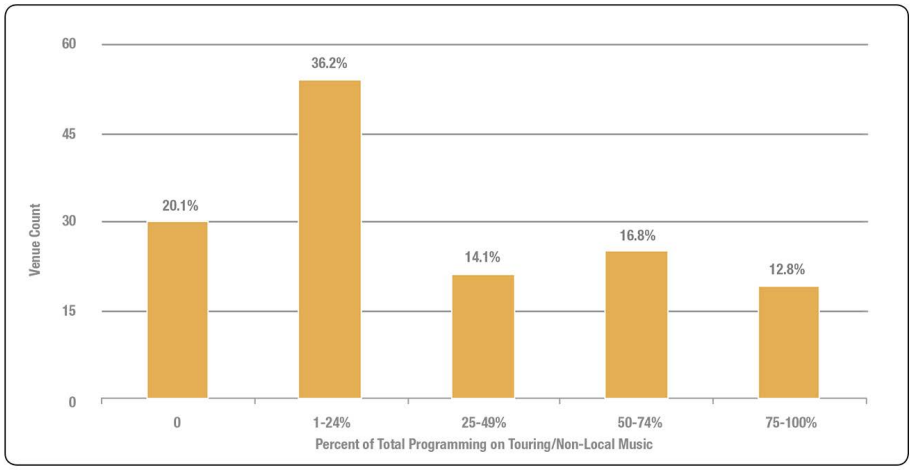


Figure 24 shows that **about 30%** of venue respondents program 50% or more touring acts on average, and about **70%** program more local music than touring acts on average. This may make sense; given **56%** of these respondents have a venue capacity of less than 350 people.

So in summary, these respondents have created the following portrait of Austin music venues:

- Venue income and profit is under pressure from a convergence of several factors some market based, some regulatory. While each venue's situation is slightly different depending on venue location and other factors, respondents seemed to operate on narrow margins that are getting progressively narrower over time, particularly for small and medium-sized venues.

- Because of developing trends in Austin consumers' economic behaviors regarding cover charges for local artists, venues are financially incented to substitute more touring acts for local acts.

- Venues create jobs – over two-thirds of these respondents have 6 or more full-time employees, and nearly one-third have more than 20 full-time employees.

- Venue owner/operator take-home income is better than the Austin average, but 54% work another job to create this income.

NEEDS AND GAPS: LIVING AND AFFORDABILITY

In addition to income and demographic questions in the Austin Music Census, respondents were asked to rate a series of questions eliciting the needs and gaps that respondents perceived as important factors in delaying or inhibiting the growth of their careers and identifying challenges to operating nightlife establishments.

These needs and gaps were separated into four categories:

- Living and Affordability (Same questions given to Musicians and Music Industry Sectors)

- Venues: Cost and Competition

- Venues: City Permits and Enforcement

- Venues: Sound Ordinance and Outdoor Music Venue Permits

Each of these categories was presented in a grid format, with four to six specific questions in each category. The respondent was asked to rate each question on a scale ranging from "Extreme Impact" to "No Impact" on them or their venue.

Needs and Gaps Category: LIVING AND AFFORDABILITY

Venue owners and managers were asked the same questions as the musicians and music industry workers regarding Living and Affordability. While affordability issues had an effect on venue owners and managers, the impact was not as pronounced as in the musicians or music industry categories.

The following are selected responses from venue categories compared to the musician and music industry workers in items rated as having an "Extreme or Strong Impact":

- **61.5%** Insufficient Safe, Late Night Public Transportation (musicians 65% and music industry 69%)
- **56%** Increased Cost of Living: Food, Utilities, & Transportation (musicians 77% and music industry 74.2%)
- **54%** Lack of Affordable Housing for Rent (musicians 71% and music industry 75%)
- **59%** Lack of Affordable Housing for Purchase (musicians 68.6% and music industry 71.5%)

The single highest-ranked line item in this category "Insufficient Safe, Late Night Public Transportation" with 61.5% of venue operators indicating "Extreme or Strong Impact" is notable because that ranking contrasts to the other respondent sectors in the Austin Music Census. Respondents in both of the other respondent sectors ranked the question significantly lower compared to other "Living & Affordability" questions.

In focus groups, venue owners and managers mentioned the lack of public transportation available to patrons as having an effect on their business, especially late night transportation options. It may be that this is an early harbinger of a set of safety issues related to Austin's growing population, and some of the increasing challenges associated with nightlife safety of patrons.

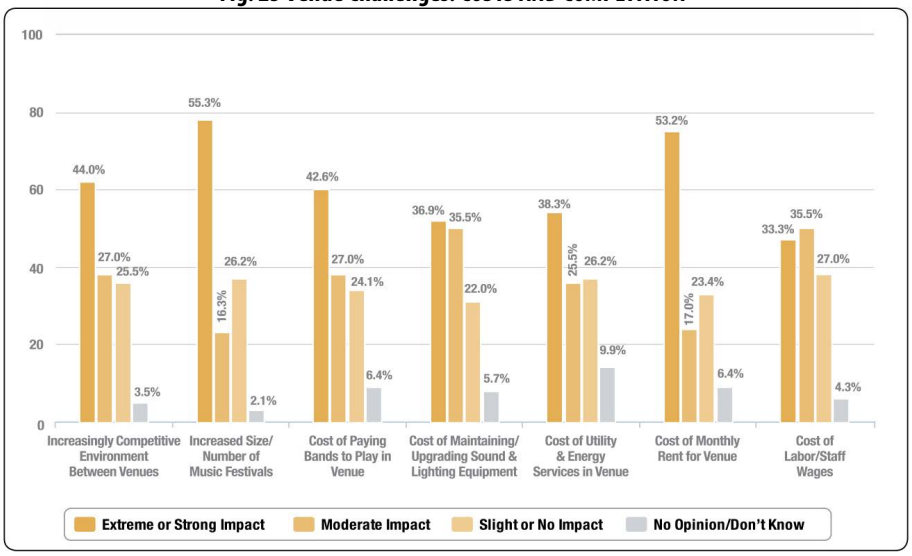
Also, venue operators are the only respondents in the Austin Music Census who rated lack of affordable housing *for purchase* as a more significant gap than lack of affordable housing *for rent*. (Note that "rent" in this context is residential rent not business rent). This disparity may mean that venue owners have higher incomes making home ownership a more tangible reality, or that this group is older and has more commitment or desire to remain in the Austin area.

On the whole though, venue owners and operators did not raise affordability issues as a focal point of priorities in focus groups, informational interviews, or in the data collected in the Austin Music Census questionnaire.

The remaining needs and gaps questions presented to this sector were derived from focus group and other discussions, and are focused on uncovering what respondents ranked as the most problematic challenges for the venues and nightlife establishments.

NEEDS AND GAPS: COSTS AND COMPETITION

Fig. 25 Venue Challenges: COSTS AND COMPETITION



There is an important caveat in understanding the meaning behind all of the Venue Challenges charts: the variety of venues in size, location, amenities, customer base, and focus (e.g. live music programming vs. dance club, young professionals bar, community space, etc.) creates a much more disparate set of needs in this respondent group. Challenges experienced by downtown or CBD venues often vary from venues in residential or outlying areas. While the Musician and Music Industry respondents were more homogenous in many ways, the venues have a wider range of variables that can affect their business, and that appears in the data charts here.

For example, respondents whose venues do not offer live music but who answered questions addressing live music issues created a higher response rate in the "No Impact" or " Don't Know/No Opinion" answer choices. This creates a slight skewing of data that is important if the goal is to understand the impact of these questions *only* to music venues.

To better gauge the impact amongst music venues, it is helpful to look at the relative number of respondents between the "Extreme-Strong Impact" – "Moderate Impact" – "Slight-No Impact" answer choices. A large concentration of answers in the "Extreme-Strong Impact" relative to answers in the other two choices may be more meaningful than the absolute percentage of respondents in each category.

Thus, while Figure 25 shows that these respondents ranked "increased number of music festivals" as creating a significant challenge for venues, it should be pointed out that not all venues felt this was the case. Many venues located in the CBD have seen an increase in private events, many of which are associated with festivals, and have supplemented venue income through rentals.[15] Multiple informational interviewees and some focus group members also stated that SXSW (and other festivals that bring in private event venue rental business) had a positive impact on yearly finances. Two venues stated that most likely they would not have a sustainable year without booking private events associated with the festivals.[16]

[15] Focus Group. "Venue Owners and Managers." 6 Oct. 2014.
[16] Informational Interview 3. "Venue Owner." In-person interview. 7 Jan. 2015. Informational Interview 6. "Venue Owner." In-person interview. 7 Jan. 2015.

53% of all respondents view "Cost of Monthly Rent" as having an "Extreme or Strong Impact". In fact, generally speaking, the respondents rated cost issues as the most impactful overall to business sustainability, a finding that was confirmed by responses in focus groups and interviews.

An important data point in this chart relating to the long term/short term venue or establishment lease issues discussed previously is that **53%** of all respondents view "Cost of Monthly Rent" as "Extreme or Strong Impact". In fact, generally speaking, the respondents rated cost issues as the most impactful overall to business sustainability, a finding that was confirmed by responses in focus groups and interviews.

Other cost-related data trends form Figure 25 include the following:

Over 70% of venue owners and managers indicated they found the following challenges having **"Extreme or Strong" or "Moderate" impact:**

- **71%** - Increasingly Competitive Environment Between Venues
- **72%** - Increased Size and Number of Music Festivals
- **72%** - Cost of Maintaining/Upgrading Sound and Lighting Equipment
- **70%** - Cost of Monthly Rent for Venue
- **70%** - Cost of Paying Bands to Play in Venue

Given that 40% of these venues have been in operation for more than ten years and 60% have been in operation for less than ten years; it appears that these cost issues are common to both newer and established venues.

CITY PERMITS AND ENFORCEMENT

Background on City Permit Requirements

In addition to the daily operations issues that venue owners and managers face, they are also expected to navigate a difficult and often confusing City permitting process. Venue owners had quite a bit to say in focus groups and interviews about the difficulty of operating in the City of Austin regulatory environment.

Research was undertaken as part of the Austin Music Census to understand the City permit process required to operate a live music venue or nightlife establishment, or for an entrepreneur to start a new venue. This research confirms the venue owners' view that it is difficult and costly to locate accurate and relevant information about the permits required to operate a nightlife establishment, with or without music. Research also confirms respondent reports that the process is very challenging, cumbersome, and confusing.

In an attempt to locate venue permitting information, it was discovered that:

- There is no single point of contact at the City of Austin for nightlife or music venues regarding City operating or permit requirements.
- There is no online resource or City website that provides a list of all of the required permits, their cost or how to acquire, maintain, or renew them.

- To the extent the required permits could be identified, it appears that basic venue operating permits (without additional music permits) require contact with and approval from a minimum of seven different City departments.

Nightlife Establishment or Music Venue Basic Required Permits[17]

*Note: A full list of all known required permits with more detailed information on each can be found in Appendix IX. An important caveat to Appendix IX and to the abbreviated information provided below: While many hours were spent researching (both online and calling for information from various departments) and attempting to locate all required permits and regulations, there are still some pieces of information that were unavailable; therefore Appendix IX may not be complete. The inability to find all relevant information despite an exhaustive search confirms that there are some systemic problems with the permitting process – an issue that was emphasized by respondents.

The basic nightlife establishment permits and corresponding City departments are:

1) Certificate of Occupancy	Development Services Dept.
2) Official Occupant Load Card	Austin Fire Dept.
3) Public Assembly	Austin Fire Dept.
4) City of Austin Alcoholic Beverage	Map Sales and Zoning Review
5) APD Liquor License Information Form	Austin Police Dept.
6) Sign Permit	Development Services Dept.
7) Food Enterprise Permit	Health and Human Services Dept.
8) Food Handler Registration Permit	Health and Human Services Dept.
9) Food Manager Registration	Health and Human Services Dept.
10) Change of Ownership Inspection	Health and Human Services Dept.
11) Health Department Plan Review	Health and Human Services Dept.
12) Building Permit	Development Services Dept.
13) Right of Way/Parking	Austin Transportation Dept.
14) TABC Alcoholic Beverage	Texas Alcoholic Beverage Comm.
15) Propane Patio Heaters	Austin Fire Dept.

Additional Music Venue Permits[18]

Other permits for music venues may include:

1) Outdoor Music Venue Permit	Development Services Dept.
2) Sound Impact Plan	ATX Music Office
3) Reserved Parking Permit (to bag meters)	Austin Transportation Dept.
4) City-required Neighborhood/Venue Agreement Plan	ATX Music Office

[17] Please see Appendix IX for a complete list of citations used in compiling this list.

[18] Please see Appendix IX for a complete list of citations used in compiling this list.

Temporary Event Permits[19]

Additional required permits for any temporary event in which a venue or event company is requesting to use a space for a one-time event (such as a private event) in a non-venue space or to get permission to change capacity requirements to an existing venue for a one-time event may include:

1) Temporary Event Sound Permit	Development Services Dept.
2) Certificate of Occupancy	Development Services Dept.
3) Occupant Load Card	Austin Fire Dept.
4) Scaled Sight Plan/Event Route	Austin Transportation Dept.
5) Temporary Event Impact Plan	ATX Music Office
6) Temporary Change of Use Permit (Indoor Event)	Austin Fire Dept.
7) Temporary Use Permit (Outdoor Event)	Development Services Dept.
8) Tent Permit	Austin Fire Dept.
9) Right of Way/Temporary Use	Austin Transportation Dept.
10) Building	Development Services Dept.
11) Queuing Line Plan	Austin Center for Events
12) Parking Plan	Austin Center for Events

If the temporary event is to be held on City-owned public space or parkland, a number of *additional* permits from the Parks and Recreation Department are also required. If the event will have over 7,500 people, a Sound Impact Plan from the ATX Music Office is also required.

In addition to the challenges in navigating the permitting system outlined above, there is another concern amongst focus group members and interviewees about *changing* regulations from various departments, and the lack of a clear notification system to inform permit holders about any changes to permitting requirements that allow operators to stay in compliance.

Lastly, a cursory review of internal City processes reveals that although the city moved in a helpful direction by co-locating related departmental units in the Austin Center for Events (ACE), there are still systemic issues that create barriers to time and labor efficiency for City staffers[20].
For example, core departments of ACE use multiple application and permit workflow software that do not communicate with each other. The Application Management and Data Automation (AMANDA) permitting software system is used primarily by the Development Services Department, with limited access by the Austin Fire Department only to clear building permits, and the Transportation Department only for Right of Way permits for street closures. The Music Office, which is required by code to complete a temporary event impact plan as well as a sound impact plan, only has viewing privileges to AMANDA for sound permits.[21]

[19] Please see Appendix IX for a complete list of citations used in compiling this list.
[20] Informational Interviews. Multiple In-Person Interviews 7 Oct. 2014. Informational Interview. In-Person interview. 21 April. 2015.
[21] Informational Interviews. Multiple In-Person Interviews 7 Oct. 2014. Informational Interview. In-Person interview. 21 April. 2015.

Since there is no single department or point of contact that is designated to handle venue questions, many felt that there is a "no man's land" problem of getting stuck in a system in which different departments or personnel may provide conflicting information to applicants, but there is no single point of escalation or path to resolution.

In all other matters, Austin Fire Department (AFD) primarily uses their own system for record keeping and tracking permits, and the Austin Police Department (APD) uses another and different record keeping system. In an effort to facilitate some form of consistency, some of the ACE departments have been using a communication system to share application information across departments, but that communication platform is not linked to any of the permitting or tracking software systems used by various departments. Therefore, the ability to track permits issued or other pending issues for all relevant departments and divisions is not currently possible through a technology platform.

In summary: Respondents found the City's permitting system to be immensely inefficient, cumbersome, and confusing. Respondents indicated both in survey data as well as focus groups and interviews that the process was very difficult to navigate and time consuming. Also, since there is no single department or point of contact at the City that is designated to handle venue questions, many felt that there is a "no man's land" problem of getting stuck in a system in which different departments or personnel may provide conflicting information to applicants, but there is no single point of escalation or path to resolution. Given the already thin operating margins reported by respondents, the productivity loss to entrepreneurs who must operate in the City's regulatory environment is significant. Music venues are no different that any other business: Less time spent managing government is more time available for entrepreneurs to innovate.

Figure 26 below shows survey respondents' answers to questions about both the permitting process and enforcement issues.

Fig. 26 Venue Challenges CITY PERMITS AND ENFORCEMENT

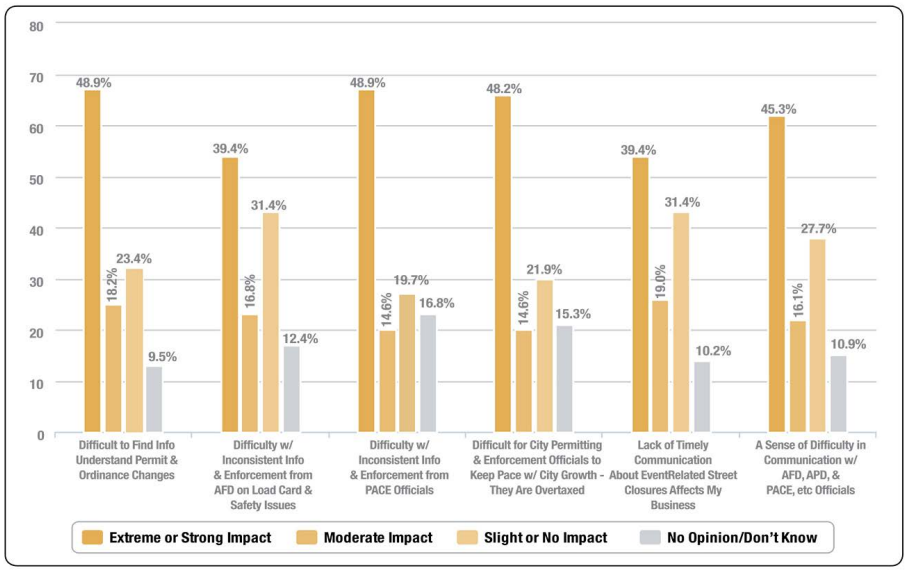


Figure 26 shows that 67.1% of venue owners or managers rate understanding permits and ordinance changes as having an "Extreme or Strong Impact" or "Moderate Impact" on their business.

CONCERNS ABOUT COMMUNICATION WITH CITY DEPARTMENTS

61% of respondents found it extremely or moderately difficult to communicate with the proper officials - a concern that was echoed by focus group and interview members as well. Difficulties in understanding ordinances and changes, as well as poor communication with officials, often leave venue owners frustrated and without a process to obtain consistent answers. Respondents said that it is often difficult to find the appropriate person or department who can give an answer - and receiving contradictory information when talking to more than one person (even within the same department regarding the same permit) happens with some frequency. It would appear that the various departments involved in the process do not always communicate well with each other, and it is not clear to applicants who has the actual authority to make a decision in the event of conflicting information.[22]

Regarding temporary permits for special events, nearly half of the respondents said that the current process – or lack of it – for giving notice to applicants regarding approval or denial of temporary event permits creates a significant and unnecessary financial risk for event promoters. Many focus group participants said that even when applicants submit all the necessary paperwork months in advance, applicants are often notified only a few weeks or days before an event if the permit has been approved. This lag creates critical financial risk for the event operators. In order to secure talent and other vendors for the event, they have already had to sign contracts and make binding financial commitments, whether the permit is approved or not.[23]

It is also important to note that nearly 63% of respondents also feel that it is difficult for City permitting and enforcement officials to keep pace with City growth. Venue owners are sympathetic that these departments are overworked. Venue owners and managers feel that most of the problems with permitting and enforcement are likely systemic and unintentional, and not related to any specific individual department or authority figure. Respondents seemed to believe that the problem may simply be that given Austin's current and historical rate of growth, particularly around major events, festivals, and music tourism traffic, appropriate staffing in these departments has not kept pace. The effects of that gap are rippling through all events across departments, with a loss of productivity for private industry operators and City staffers alike.

INCONSISTENCIES WITH ENFORCEMENT

The respondents indicated difficulties in understanding how enforcement standards are taught to officials and subsequently enforced for regulating use of temporary event and temporary change of use permits (for items such as change of use occupancy load cards) and outdoor music venue or other sound-related permits.

Almost all focus group members expressed that the lack of consistency in enforcement was a top concern and a problem that has been both costly and inefficient for venue operators. For example, in the inspection process for a temporary load card for a Temporary Change of Use permit, there are often more than one set of officials – even from the same department – who will make a site visit, and each set of officials will determine a series of changes that need to be made by venues to meet permit requirements including upgrades, equipment changes or installations, or other actions that need to be taken by the venue. Yet these two sets of officials sometimes provide conflicting required actions or changes. Sometimes this happens after the venue has already invested in making modifications required by the first set of officials, which may have been costly and in some cases unnecessary.

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[22] Focus Group. "Venue Owners and Managers." 6 Oct. 2014. Informational Interview 3. "Venue Owner." In-Person interview. 7 Jan. 2015. Informational Interview 6. "Venue Owner." In-Person interview. 7 Jan. 2015.
[23] Focus Group. "Venue Owners and Managers." 6 Oct. 2014.

Finally, there frequently is no official, written requirements or instructions provided from the site inspectors to the venue applicants for changes required, so that means the venue has no recourse to demonstrate to anyone what they have been asked to do. This also means the department officials do not have a record that provides other members of their department what was required in a given site visit, leaving a lot of room for confusion, misinterpretation, and enforcement inconsistencies.

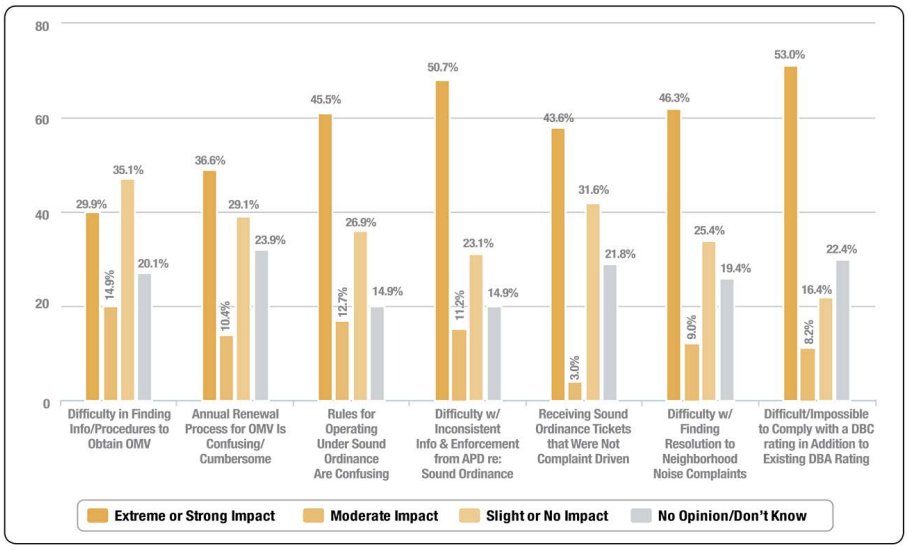
This is a worrisome data point, because it does not indicate that a few "outside the margin" operators don't like the sound ordinance, but rather that nearly two-thirds of all venue respondents are experiencing trouble with inconsistencies in sound ordinance enforcement.

Enforcement of outdoor music venue permits has been an equally problematic issue. A lot of stakeholders, including the Austin Police Department, neighborhood associations, the ATX Music Office, the Austin Music Commission, and others have been involved in numerous discussions focused on a goal of consistent and correct enforcement of the sound ordinance. Yet 62% of venue operator respondents say that "Inconsistent info and enforcement from APD regarding Sound Ordinance" is having and "Extreme/Strong" or "Moderate" impact on their business.

This is a worrisome data point, because it does not indicate that a few "outside the margin" operators don't like the sound ordinance, but rather that *nearly two-thirds of all venue respondents* are experiencing trouble with inconsistencies in sound ordinance enforcement. It would appear that there are some systemic enforcement problems that are not yet solved.

Figure 27 shows all questions given to respondents about Sound Ordinance and Outdoor Music Venue Permits.

Fig. 27 Venue Challenges: SOUND ORDINANCE AND OUTDOOR MUSIC VENUE PERMITS



SOUND ORDINANCE ISSUES

In addition to the respondents' concerns about sound ordinance enforcement, a large majority feared an additional DBC rating in addition to the current DBA rating would dramatically affect their business. Nearly two-thirds of respondents said that it would be "difficult/impossible to comply with a DBC rating in addition to the existing DBA rating". ***In focus groups, this single item was the only issue in which multiple established venues said that this change could put them out of business.*** Several focus group members said they came to the focus group just to talk about and express their concern around this one issue, and *they felt they had largely been overlooked or ignored by City officials regarding this potential policy change*.

Venue operators commented that the combined effects of 1) the sound ordinance, 2) current zoning practices that put residences within feet of existing venues and 3) developer building requirements collide in a way that catches venues in the crosshairs.

An influx of residents moving close to live music venues has resulted in more conflict over noise issues. While developers continue to build high-end living units with no requirements for sound reinforcement within walls or windows in close proximity to existing CBD live music venues, there have been increasing noise complaints from residents that result in limitations on live (and recorded) performance.

Also, downtown real estate prices have driven many venues to seek locations further out, which puts them in closer proximity to neighborhoods, creating a new set of sound issues.

Venue operators commented that the combined effects of 1) the sound ordinance, 2) current zoning practices that put residences within feet of existing venues and 3) developer building requirements collide in a way that catches venues in the crosshairs.

Even though many venue owners meet on a regular basis with neighborhood associations, it was noted that one or two people complaining repeatedly could entirely shut down a venue from offering live music. Venue owners also mentioned receiving sound ordinance citations that were NOT complaint driven and selective enforcement as problems.[24]

Venue Challenges: Other Comments

Parking, loading zones, and street closures: Music venues in the downtown areas noted that parking for patrons and artists is problematic. Many musicians are not willing to play downtown due to low pay coupled with parking costs and loading challenges. Street closures along the 6th Street area were also noted as inconvenient for customers and for load in and out of musicians. Write-in responses in the Austin Music Census were very high in this category. 205 of the write-in responses – nearly 20% of all the write-in comments - included parking and loading issues.

VENUE IDEAS AND PROPOSALS: TOURISM AND MARKET DEVELOPMENT

Venue respondents were in strong agreement with both Musician and Music Industry categories around some of the ideas proposed to potentially increase both revenue and branding for venues that feature local live music. In particular, these ideas received strong endorsements as "Extremely or Strongly Helpful":

- **66%** - Create programs to drive tourist traffic to local venues and shows

[24] Focus Group. "Venue Owners and Managers." 6 Oct. 2014.

- **62%** - Create an official "Live Music Venue" designation/branding program (similar to Nashville's) for quality live music venues

- **61%** - Create City-zoned, formally codified Entertainment Districts

TOP CITY POLICY CONSIDERATIONS FOR VENUES

A complete policy plan of action for the City of Austin would require detailed recommendations, a study of funding mechanisms and feasibility issues, and an implementation plan. Such a policy plan is outside the scope of the Austin Music Census. However, based on the needs revealed through the data analysis, a few ideas and brief findings of best practices employed in other cities are presented here that may warrant further exploration by City staff and policy makers.

A venue environment of rising operating costs, zoning and development pressures, extensive permitting requirements, and decline of cover revenue and attendance at local shows have made it increasingly difficult for venues to maintain a sustainable profit margin. A rapid population increase and rising commercial costs, especially in the downtown entertainment areas, have created a situation where many venues' futures are precarious. As discussed in both the Musician and Music Industry sections, the presence of a healthy venue ecosystem of various sizes and style of music clubs is a critical anchor for industry development and revenue earning opportunities for local musicians.

Austin is certainly not the only music-centric city to have these issues, although the very rapid growth of the Austin MSA has perhaps left policy makers little time to plan ahead for these contingencies. A number of other large metropolitan areas have decided that retaining music venues and other cultural attractions in their CBD areas is a critical piece of their economic development plan, and have enacted some interesting and effective strategies that prioritize maintaining a strong venue ecosystem, despite growth and cost pressures.

Some of those ideas are provided here, and can be used to think about how Austin might make use of similar policies.
There are five policy-related initiatives presented here for further exploration.

1) Enact Live Music Venue Retention Legislation

San Francisco: San Francisco has taken pro-active measures to ensure that venues remain a cultural asset to the City after losing some key venues in the busy, mixed-use commercial and residential central business corridors. A Councilmember has introduced new, first-of-its-kind legislation to San Francisco City Council after months of vetting and work by advocacy groups and Council commissions. The legislation "aims to protect San Francisco's nightlife from being pushed out by swift, large-scale development happening largely in mixed-use neighborhoods where entertainment venues have operated for decades but residential spaces are relatively new."[25]

This live music venue retention legislation specifically:

- Prevents Place of Entertainment venues from being deemed a legal "nuisance" if they are operating within their permit;

- Requires more accurate sound tests before a developer builds near a Place of Entertainment;

- To reduce conflicts later, requires developers to begin working with nearby Places of Entertainment and the Entertainment Commission long before they even start construction;

[25] Moskowitz, Gary. "Noise Ordinance: London Breed Legislation to Preserve Live Music & Nightlife." *SF Weekly*. SF Weekly, 8 Apr. 2015. Web. 2 May 2015. <http://www.sfweekly.com/sanfrancisco/noise-ordinance-london-breed-legislation-to-preserve-live-music-and-nightlife/Content?oid=3526273>.

- Ensures that all potential residents of units near a Place of Entertainment are informed about the [venue] in advance;

- And improves communication between all relevant City departments, while empowering the Entertainment Commission to take an active, early role in these projects. [26]

2) Consider Introducing Cost-Reduction Incentives to Venues that Support Local Live Music

More than any other industry sector in the entire music economy, the music venues and nightlife establishments have exponentially more regulatory and permitting requirements from the City. At the moment, respondents believe and research confirms that this is a system that creates a tremendous amount of "red tape" for a venue simply to operate, and there is no apparent benefit provided for venues that actually work hard to adhere to every permit and departmental requirement. It would be possible to develop a criteria for certain cost-reduction incentives for venues that:

- Abide by City regulations and maintain all needed permits, and

- Focus on local live music performances.

Such cost reduction or rebate programs could help secure a healthy live music venue environment.

Incentives to consider include:

- Energy rebates to assist with utility costs

- Property tax breaks to landlords that sign venues to 10 years or longer leases, potentially with a stipulation to remove rental rate acceleration clauses for the venue tenant for the duration

- Coordination with the State Legislature to offer a TABC tax reduction for venues offering a certain number of hours of local live music per week

- Increase funding for the Music Venue Assistance Loan Program

3) Initialize a Cultural Shift in City Permitting Departments from a Bureaucratic-Centric View to a Customer Service-Oriented Outlook

Music venues are also job creators both for the community and for the City, and they are an important private sector, most of whom are working hard and in good faith to operate great establishments for patrons. There are several ways in which a cultural shift towards viewing these operators as important innovators, employment generators, customers, and taxpayers could be enacted.

One idea is to *streamline and simplify the cross-departmental permitting processes*, and create a single cross-departmental body that has authority to resolve disputes or issues. Some examples from other cities include:

Chicago: In Chicago, a Public Place of Amusement (PPA) license is required, and permitting review for new venues from all relevant departments is *offered on the same day*. Inspections are coordinated between the Buildings, Fire, Health, and Business Affairs departments. Occupancy numbers are given only after the PPA license has been approved. Additionally, for $250, a venue owner can request a "Pre-Inspection" at the location before applying for the required licenses. This inspection checks for zoning and distance requirements and can be helpful if the owner plans new construction or a build at a later date. If a PPA license is subsequently approved, the $250 is credited toward that fee. [27]

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[26] London N. Breed, Member, Board of Supervisors. District 5, City and County of San Francisco. Supervisor London Breed Introduces First-in-the-Nation Legislation to Preserve Live Music Venues. 16 Dec. 2014. Press Release.

[27] Rice, Dylan, Director of Creative Industries-Music, City of Chicago. "Informational Interview." E-mail interview. 10 Mar. 2015.

San Francisco: The City of San Francisco has created an Entertainment Commission to regulate, promote, and embrace nightlife. This Commission, consisting of seven members representing urban planning, law enforcement, entertainment industry, neighborhoods, and public health, has the authority to accept, review, and gather information to conduct hearings for entertainment related permit applications and to issue permits. The Entertainment Commission works with venues, festivals and events, and the community on issues impacting entertainment and nightlife through mediation, conditioning, and outreach, and has a paid staff of five individuals. [28]

Seattle: The Seattle nightlife initiative is a comprehensive approach to manage Seattle's nightlife economy. Goals are to ensure public safety, increase urban vibrancy, and grow the local economy. The effort includes code compliance coordination, professional development, precinct community outreach, requiring safety training, noise ordinance enforcement, late night transportation, targeting disorderly behavior, and flexible service hours. Coordinating city resources has led to a 93% success rate to resolve compliance issues.[29]

4) Create a Better Infrastructure for Consistent, Ongoing Venue Operator/City Communications

The City could also *create venue operator permit education resources* that would create more efficiency both for operators as well as City departments. Some examples might include:

- ☐ Create a One-Stop, User-Friendly Online Resource Page for Venues and Nightlife Establishments listing all possible permits and relevant explanatory information that may be needed for a live music venue. Include a venue-permitting packet that explains all relevant policies and procedures.

- ☐ Hold recurring, regularly scheduled events, seminars, and code compliance courses designed for venue owners and managers

- ☐ Create a monthly email newsletter with upcoming code compliance changes, deadlines, FAQ's, etc. for event and venue permits

- ☐ Opportunities for pre-scheduled meetings with ACE

- ☐ Create a City certification program for local event producers and event planners, training them on best practices and code compliance. Participants that complete the certification program would then be given benefits such as a jump in permit line queuing during major festivals or event times, etc.

Some examples from other cities include:

Seattle: Seattle disseminates best practice information by the production of a Music Safety Summit. The Music Safety Summit provides an opportunity for various city departments such as law enforcement and public health to come together with venue operators, promoters, and artists to discuss strategies and issues surrounding safer music events and festivals. Topics cover event safety, medical situations at events, safety logistics, law enforcement, and electronic dance music.[30]

5) Consider Increased Staffing & Streamlined Software Platforms for Relevant City Departments to Handle Year-Round Event Business

The City may want to look at ways to align resources and Departmental staffing to keep up with the workload created around the demand generated by a high activity level of year-round events, festivals, and

[28] Annual Report FY 13/14 San Francisco Entertainment Commission. Rep. City and County of San Francisco: Entertainment Commission, 2014.
[29] "Seattle Nightlife Initiative." Music Cities Summit. Texas, Austin. 19-20 Mar. 2015. PowerPoint presentation.
[30] Seattle Music Safety Summit, Seattle, Washington. 11 Dec. 2014. Conference Program.

music tourism activity, so that future growth can continue in an efficient and productive manner both for City departments and private sector alike.

There has been an increase in music tourism, festival, and event traffic in Austin *year over year for the past seven years*, and it seems likely that that trend will continue. Austin's brand is centered on music event experiences, and both policy makers and tourism organizations successfully promote this as a unique asset and one that has generated significant economic development activity. The allocations in the budget may not be sufficiently keeping pace with this level of activity to adequately staff the Austin Center for Events and the departments that are working to handle this increased workload. One idea would be to use a small amount from the City of Austin portion of the Mixed Beverage Tax Revenue to support these staffing and software efficiency needs. [31]

[31] Please see Appendix XVI for more information regarding Hotel/Motel Occupancy Tax and Mixed Beverage Tax revenues.

APPENDICES

Appendix I
Special Thanks and Acknowledgements

We would like to thank *all* of the Austin music community who invested time in taking this survey. The incredible number of responses shows that this was truly a community project, and the vast majority of the 1,500 additional "write-in" suggestions were also thoughtful, useful, and exemplary of the kind of people that make Austin such a fantastic music community. We are grateful to you all.

In addition to the Titan Music Group, LLC team that created the study, there are a handful of others whose expertise on this project was indispensable at some critical junctures. Special thanks to: Peggy Ellithorpe for her data-wrangling skills, Ian Pierce for project management, John Regalado for CSS programming, Ron McCain for Excel wizardry, DacPix for chart graphics and layout work, and Eye in the Sky Collective for branding and logo work.

The Austin Music Census would not have been possible without the additional generous support of an enormous group of people who provided assistance in numerous ways. Focus group attendees and individuals who agreed to be interviewed all shared invaluable expertise and experience. Our marketing partners utilized their networks of people to create a wide net of awareness and responses to the survey. Many others still utilized social media to create a viral spread of the survey, and continued to build awareness for many weeks. We are deeply grateful to all of them. As a small measure of our appreciation, we want to acknowledge these individuals and organizations.

Chris	Alberts	Health Alliance for Austin Musicians
Christee	Albino	The Recording Academy, Texas Chapter
Heather	Alden	The SIMS Foundation
Melissa	Alvarado	City of Austin, Public Information Office
Rakefet	Avramovitz	Artist, Rattletree Marimba
Roggie Lynn	Baer	RajiWorld
Ben	Ballinger	Artist
Gretchen	Barber	The Barber Agency
Stephanie	Bergara	City of Austin, ATX Music & Entertainment Division
Aaron	Berkowitz	Knucklerumbler
Nicole	Bogatz	Austin Federation of Musicians
Chris	Brecht	Austin Independent Radio
Eileen	Bristol	Sahara Lounge
Ashley	Buchanan	City of Austin, ATX Music & Entertainment Division
Chris	Castle	Christian Castle Attorneys
Gina	Chavez	Artist
	CJ the Best	Artist
Reenie	Collins	Health Alliance for Austin Musicians
Stefanie	Crock	Paramount Theater
Michael	Cross	Artist
Dave	Dart	Dart Music International
Dominique	Davalos	Artist, The Bluebonnets
Mel	Davis	Artist, The Blues Specialists
Morgan	Davis	Ovrld
Maydee	Distefano	Dozen Street

	Drastik	Artist
Lee	Duffy	Austin Songwriter's Group
Jennifer	Dugas	Autin Music Foundation
Cash	Edwards	Cash Edwards Music Services
Ulrich	Ellison	Artist, Ulrich Ellison and Tribe
Zach	Ernst	Paramount Theater/Austin Theater Alliance
Julia	Ervin	SXSW, Inc.
Michael	Feferman	DoStuff Media
Erica	Flores	Girls Rock Austin
Ray	Flowers	Fifth Column Music
Sage	Fly	SXSW, Inc.
Guy	Forsyth	Artist
Marc	Fort	Texas Music Office
Amanda	Garcia	Austin Convention and Visitor's Bureau
Ryan	Garrett	Stubb's
Bobby	Garza	Transmission Events
Elaine	Garza	Giant Noise
Rich	Garza	Pachanga Fest
Clifford	Gillard	The Victory Grill
Danny	Gillespie	Mood Media
Kellie	Goldstein	Autin Music Foundation
Greg	Gonzalez	Artist, Grupo Fantasma
Doug	Guller	ATX Brands
Chris	Haddad	Special Events Live
Rikki	Hardy	SIMS Foundation
Matt	Harris	Geotrends
Philip	Hastings	Farharbor, LLC
Michelle	Haussmann	Land Use Solutions
Christian	Hawkins	Clive Bar
Matt	Hickey	High Road Touring
Homer	Hill	Urban Music Festival
Jon	Hockenyos	TXP
Lindsay	Hoffman	C3 Presents
Jennifer	Houlihan	Austin Music People
Sara	Houser	Artist, Otis the Destroyer
Theresa	Jenkins	The Recording Academy, Texas Chapter
Rudy	Jones	Browns Town Music
Mary	Jurey	Playing in Traffic Records
Fito	Kahn	Austin Jazz Alliance
Kris	Keys	Artist
Shelley	King	Artist
Freddy	Krc	Austin Federation of Musicians
John	Kunz	Waterloo Records
Andy	Langer	KGSR, Esquire
Marcus	Lawyer	Transmission Events
Sara	Levine	ATX Safer Streets

Lana	Levins	The Scoot Inn
David	Lobel	Diaspora Music Group
Jeff	Lofton	Artist, The Jeff Lofton Trio
Matt	Luckie	FBR Management
Walker	Lukens	Artist
Stephanie	Macias	Artist, Little Brave
Dave	Madden	Artist
Michael	Maly	Above the Radar Productions
Matt	Mandrella	Do512
Neil	Maris	Transmission Events
Emily	Marks	Girls Rock Austin
Sharylin	Mayhugh	Circuit of The Americas/Austin 360 Ampitheater
James	Mays	BandAid School of Music
Gene	Mays	Club 1808
Jill	McGuckin	McGuckin PR
Anne-Marie	McKasckle	Austin Creative Alliance
Jason	McNeely	Hotel Vegas
Jeff	Miller	Event Production Services
Amy	Mitchell	Amy E. Mitchell, PLLC
Casey	Monahan	Texas Music Office
Mike	Mordecai	Elephant Room
Eva	Mueller	Spiderhouse Ballroom
David	Murray	City of Austin, ATX Music & Entertainment Division
Jeremy	Murray	The Blackheart
Bianca	Neal	Artist Manager, ReRoute Inc.
Paul	Osbon	Artist Manager (Quiet Company)
Julie	Paasche	Artemis Strategy Group
Evan	Phelps	Austin Social Innovation
Jessica	Pickett	SXSW, Inc.
John	Pointer	Patronism
Gary	Powell	University of Texas at Austin, Butler School of Music
Mellie	Price	Capital Factory
Joe	Priesnitz	Joe Priesnitz Artist Management
Russell	Rains	St. Edward's University, Bill Munday School of Business
Michael	Ramos	Artist
Stephen	Ray	Texas Music Office
Cory	Reinisch	Artist, Harvest Thieves
Graham	Reynolds	Artist, Golden Arm Trio
Nakia	Reynoso	Austin Music Commission
Glenn	Richter	University of Texas at Austin, Butler School of Music
John	Riedie	Rampant Arts
Ryan	Robinson	City of Austin, Demographer
James	Russell	Trail of Lights
Courtney	Sanchez	Artist, SWAY
	SaulPaul	Artist
Frank	Schaefer	SXSW, Inc.

Jason	Schnurr	Cedar Street Courtyard
Geoffrey	Schulman	Austin Community College, Dept. of Music Business, Performance & Technology
Peter	Schwarz	Cramden Coach Corporation/Asleep at the Wheel
Jennifer	Sinski	RSVPster
	Smackola	Artist, Dirty Wormz
Matt	Sonzala	Pushermania
Carlos	Sosa	Producer, Artist Grooveline Horns
Brad	Spies	SXSW, Inc.
Geno	Stroia	Red Leaf Music School
Tyson	Swindell	Red 7
James	Taylor	Holy Mountain
Jonathan	Terrell	Artist, Not in the Face
Angela	Tharp	Flamingo Cantina
Danielle	Thomas	Big Green House Presents
Christine	Thompson	AMFM Magazine
Joseph	Thompson	Capitol View Arts
Josh	Tinsch	Umbel
Alex	Vallejo	Autin Music Foundation
Lorenzo	Villareal	The Dub Academy
Andrea	Villarreal	Oaks, Hartline & Daly, LLP
Kristopher	Wade	Artist, Hot Nut Riveters
Heather	Wagner Reed	Austin Music Commission
Jerry Jeff	Walker	Artist
Scott	Ward	Strange Brew
Gregg	Ware	One-2-One Bar
Mikey	Wheeler	The Parish
Richard	Whymark	The Good Music Club
Graham	Williams	Transmission Events
Scott	Wilson	Artist

Austin Community College-Music and MBPT Departments
Austin Creative Alliance
Austin Federation of Musicians
Austin Jazz Alliance
Austin Music Commission
Austin Music Foundation
Austin Music People
Austin Songwriter's Group
Capitol View Arts
Health Alliance for Austin Musicians
SIMS Foundation
St. Edward's University, Bill Munday School of Business
Texas Accountants and Lawyers for the Arts
Texas Music Office
The Dub Academy

The Recording Academy, Texas Chapter
The University of Texas - Butler School of Music
Women in Music Professions Society

Appendix II
List of Defined Terms

The Austin Music Census uses a number of defined terms, particularly related to how data is segmented (e.g. "Music Industry" vs. "Musicians", etc.). A list of defined terms is provided below to make it easy for readers to understand the meaning of these terms as they are used throughout the Austin Music Census. These are provided here in sequential order in which they are introduced in the following pages.

DATA SEGMENTATION

Musicians – This group includes anyone who makes at least part of their income from the creation of and/or performance of music.

Music Industry – This is a broad group that includes all people who work in the music industry itself and ancillary services such as graphic design, photography, hospitality, and service industry. Music industry includes workers, employees, contractors, executives, CEO's, small business owners, and sole proprietors. It also includes everyone whose employment is either full-time or part-time. This group EXCLUDES musicians and venue owners/managers (who are in different data segments and given their own analytical treatment).

- **Music Industry Worker** – This group is a SUBSET of "Music Industry" and includes all employees, workers, and contractors both full and part time, who work for in any of the "Music Industry" broad job categories. This group may have additional non-music jobs, but has at least a part time music industry job. This group is the same as "Music Industry" except that it EXCLUDES all business owners.

- **Business Owner** - This group is a SUBSET of "Music Industry" and includes all entrepreneurs, sole proprietors, small business owners, and corporate business owners the music industry EXCEPT venue owners (who are given a separate segmentation and analytical treatment). This group is the same as "Music Industry" except that it EXCLUDES all "Music Industry Workers".

Venue Owners/Managers – This group includes all owners and managers of Austin venues.

OTHER DEFINED TERMS

Venue – Venue includes music clubs, churches, performing arts centers, event centers, coffee shops, restaurants, community spaces, festivals and any nightlife establishment (with or without music) including bars, dance clubs, bars, and other nightlife establishments.

Central Business District or CBD – This is a term used by the City of Austin to describe the downtown area of Austin, encompassing east and west 6th Street, Red River, 2nd Street, and other central business areas. CBD is bounded by Lamar Boulevard to the West, IH-35 to the East, Martin Luther King Boulevard to the North, and Lady Bird Lake to the South.

Mean Annual Wage – This is a standard statistical term. It means using all the salaries of people working in a certain demographic; the mean is the average of those salaries.

Median Annual Wage - This is a standard statistical term. It means using all the salaries of people working in a certain demographic; the median is the one that falls at the midpoint of that range.

Appendix III
All Respondents Chart List

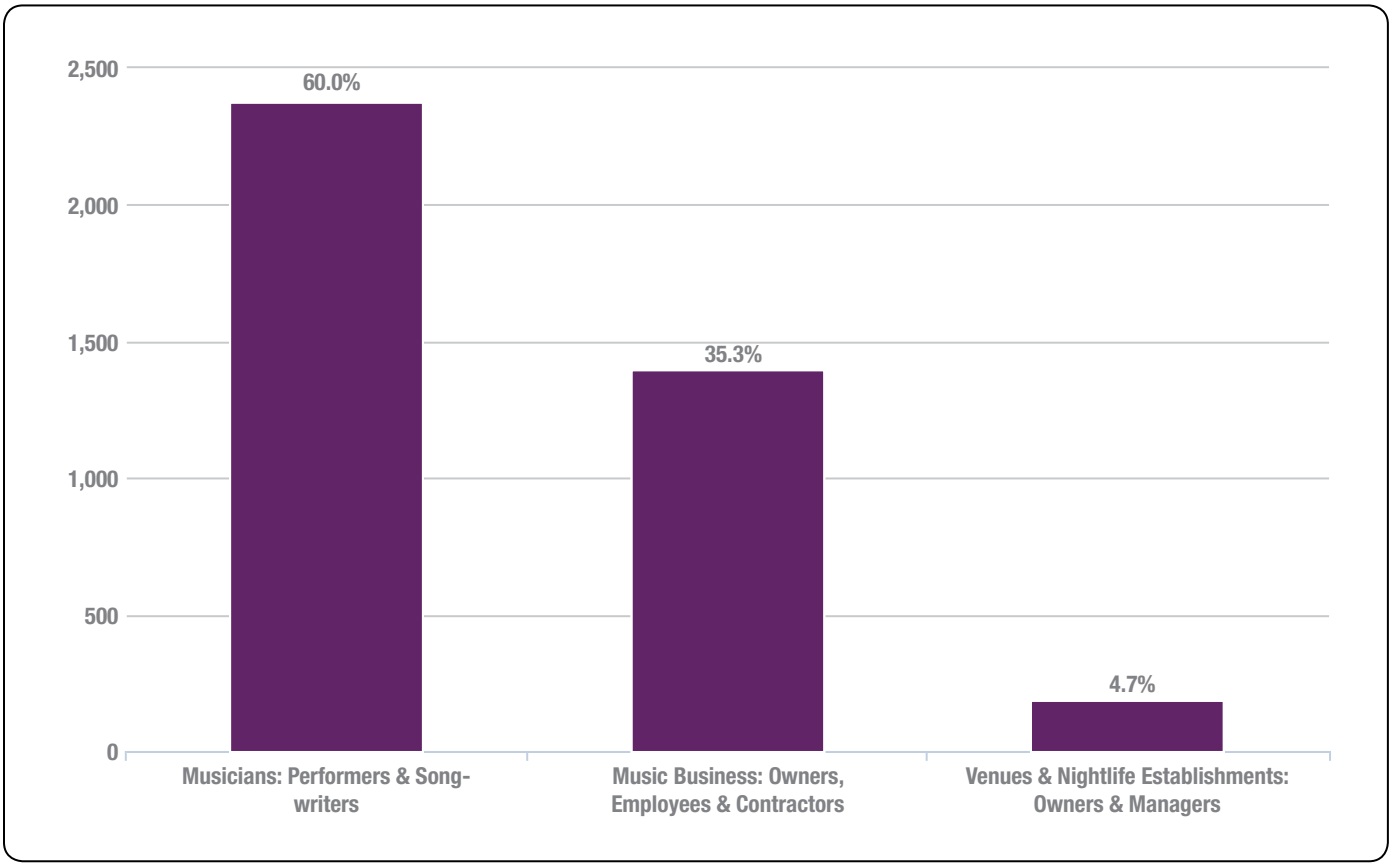
CHARTS APPEAR IN THIS SEQUENCE:

Main Industry Sector Breakdown
Areas of Experience and Expertise
Current Means of Employment
Number of Years Working in Music Industry
Gender Breakdown
Age Breakdown
Race and Ethnicity
Number of Years Living in Austin
Health Care Coverage
Housing: Rent vs. Own
Housing: Type of Residence
Number of Household Contributors to Rent or Mortgage
Prosperity Trends: Individual Income Increase/Decrease Over Past 3 Years
Income Comparison by Major Industry Sector
2013 Pre-Tax Individual Income (All Respondents, All Income Sources)
2013 Pre-Tax Individual Income (All Respondents, Music Industry Income Only)
2013 Pre-Tax Individual Income (Only Respondents w/ Music Industry + Augmented Income)
2013 Pre-Tax Individual Income (Only Respondents w/ 100% Income from Music Industry)
Needs and Gaps Category: LIVING AND AFFORDABILITY
Needs and Gaps Category: CONNECTIVITY AND COLLABORATION
Needs and Gaps Category: PROFESSIONAL EDUCATION AND SKILLS DEVELOPMENT
Needs and Gaps Category: INDUSTRY RESOURCES
Ideas and Proposals Category: CAREER DEVELOPMENT AND CONNECTIVITY
Ideas and Proposals Category: TOURISM AND MARKET DEVELOPMENT
Ideas and Proposals Category: CITY PROGRAMS

Appendix III
All Respondents Data Charts

TOTAL RESPONSES	COMPLETED RESPONSES	COMPLETION RATE
3,968	2,627	66%

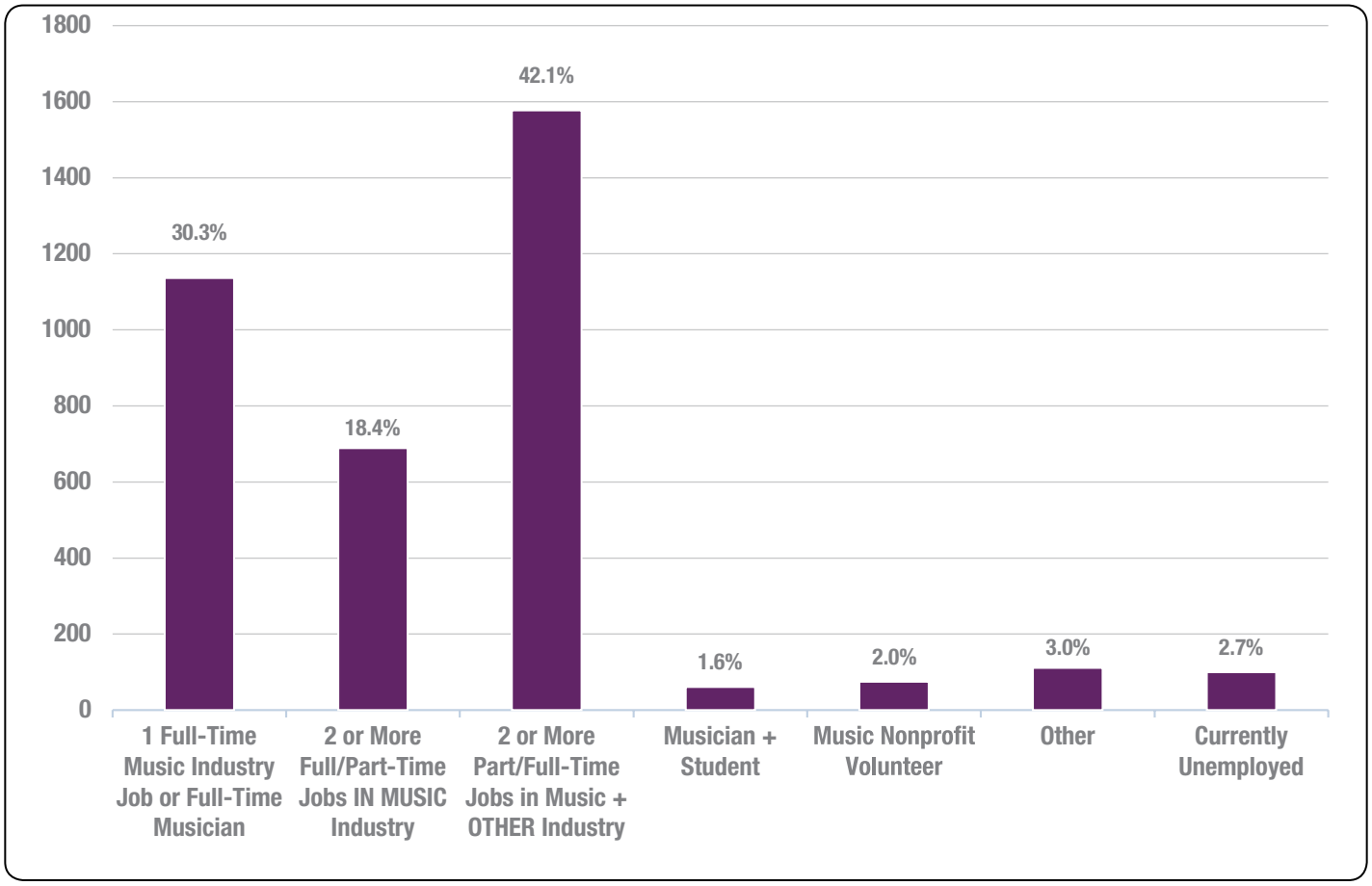
Main Industry Sector Breakdown



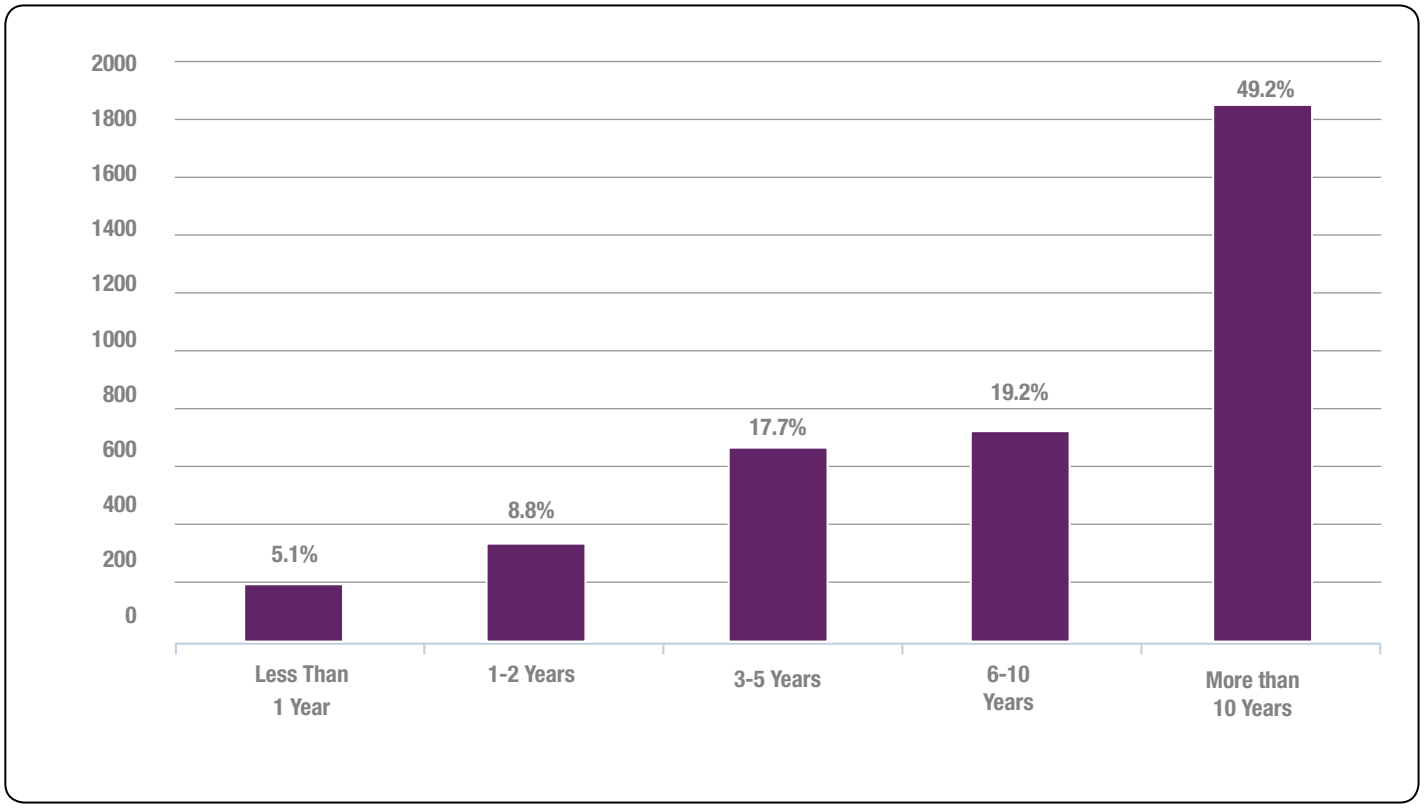
Areas of Experience and Expertise

Response	Count	
Accounting	270	7.6%
Audio Engineering	931	26.3%
Advocacy/Lobbying	142	4.0%
Audio Mastering	314	8.9%
Digital Music Distribution	405	11.4%
Booking/Talent Buying	866	24.4%
Audio Mixing	853	24.1%
Digital Music Sales	261	7.4%
Event Promotion	1249	35.2%
Event Production	1222	34.5%
Distribution	219	6.2%
Film/TV Composer	318	9.0%
Manufacturing	118	3.3%
Graphic Design	549	15.5%
Financing or Venture Capital	71	2.0%
Marketing	900	25.4%
Music Education	636	17.9%
Music Arranger	743	21.0%
Media/Journalism	465	13.1%
Artist Management	720	20.3%
Music Legal Issues	140	3.9%
Nonprofit Services	350	9.9%
Music Publishing	309	8.7%
Music Licensing	260	7.3%
Post Production	323	9.1%
Radio Promotion	266	7.5%
Radio Production	176	5.0%
PR & Publicity	666	18.8%
Record Labels	375	10.6%
Social Media	1048	29.6%
Retail Sales	353	10.0%
Record Production	538	15.2%
Software Development	101	2.8%
Ticketing	163	4.6%
Studio Management	270	7.6%
Artist/Songwriting or Composing	1752	49.4%
Touring Logistics	544	15.3%
Web Design/Development	484	13.6%
Venue Management	436	12.3%
Artist/Live Performance	2383	67.2%
	Total:	3546

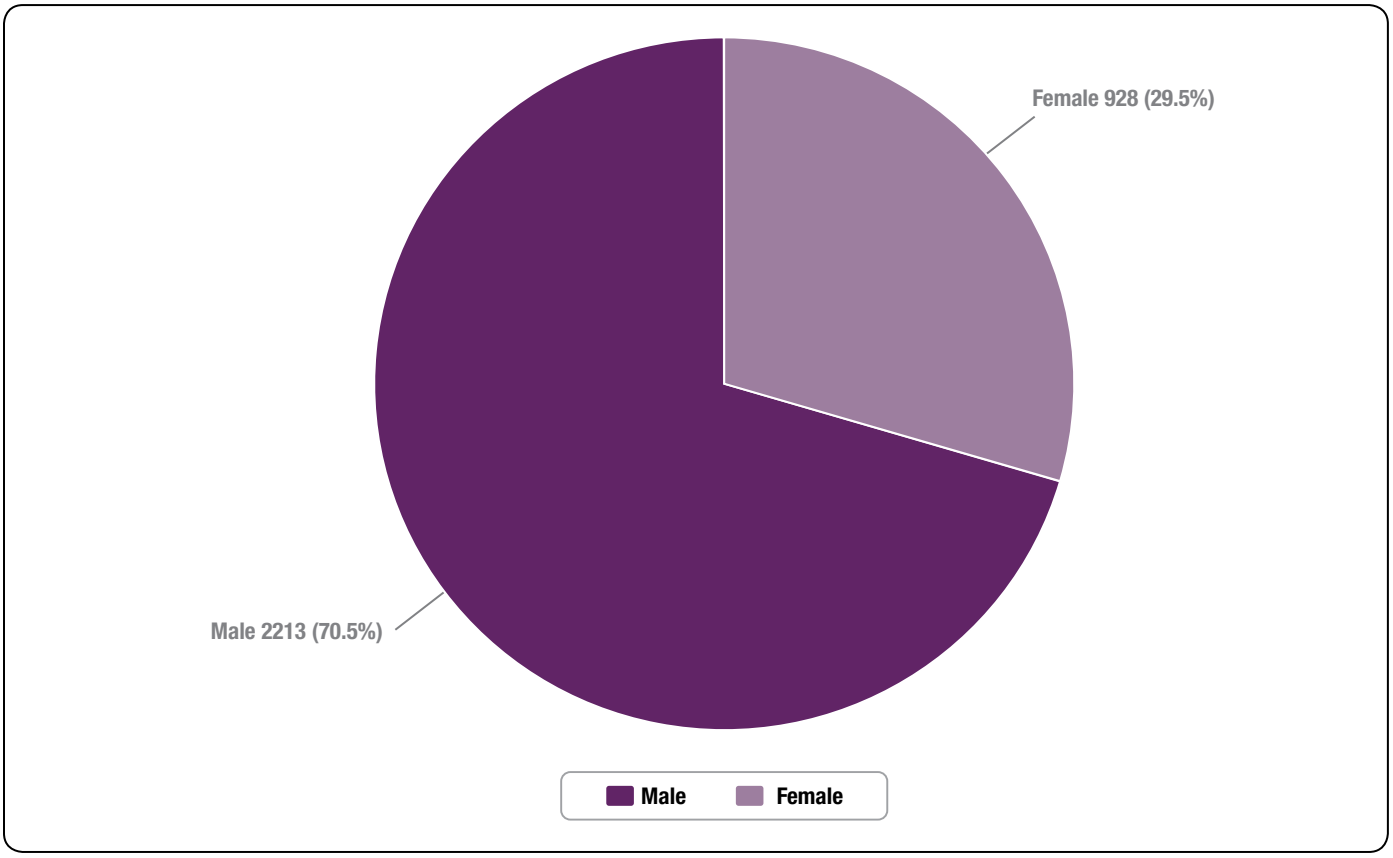
Current Means of Employment



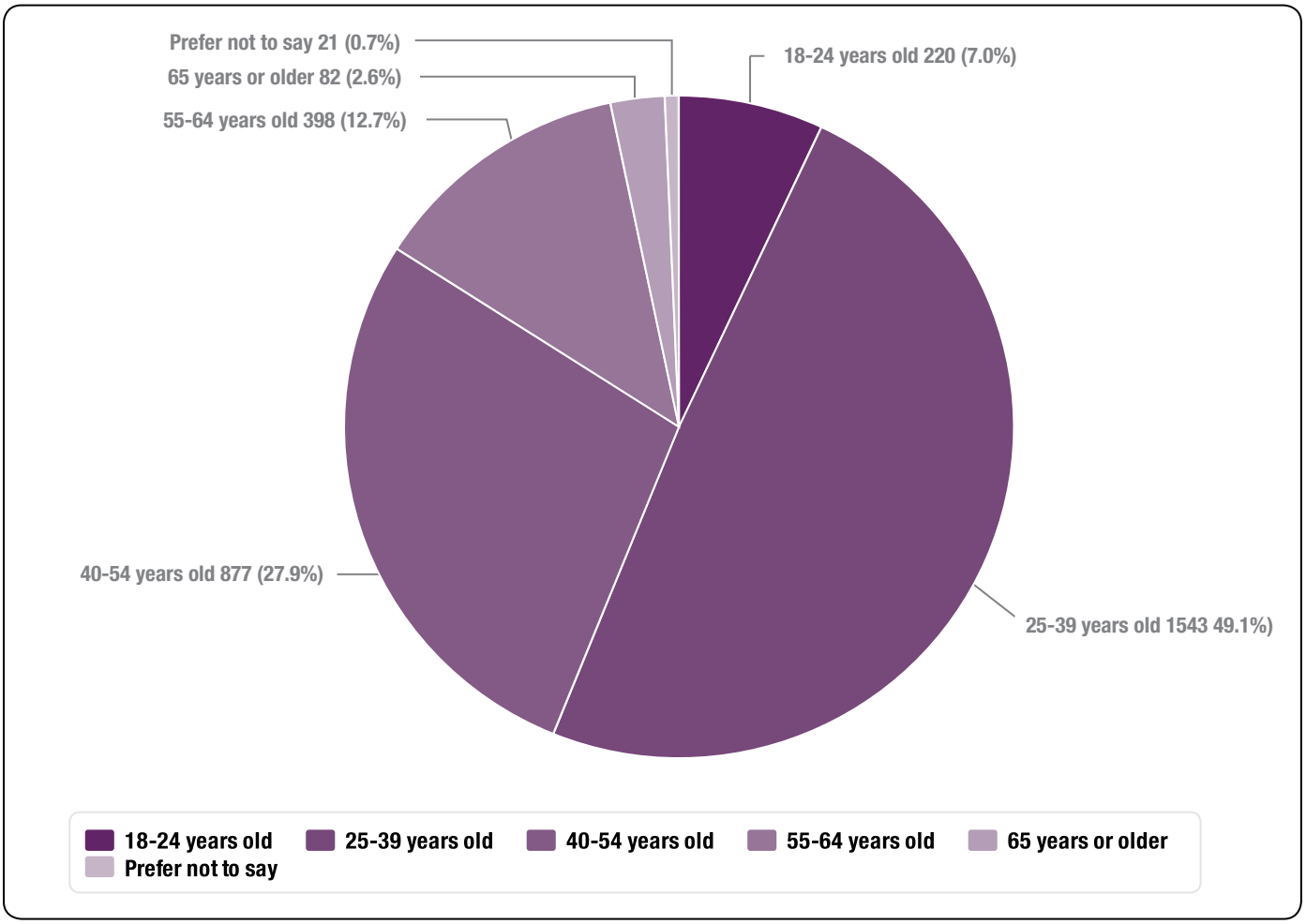
Number of Years Working in Music Industry



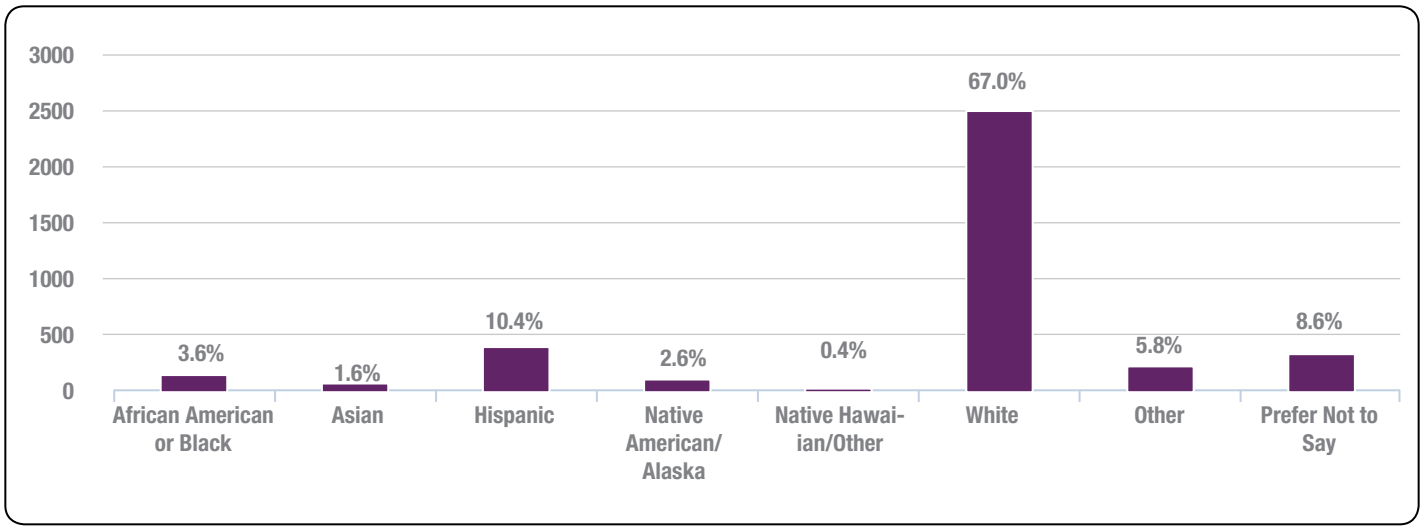
Gender Breakdown



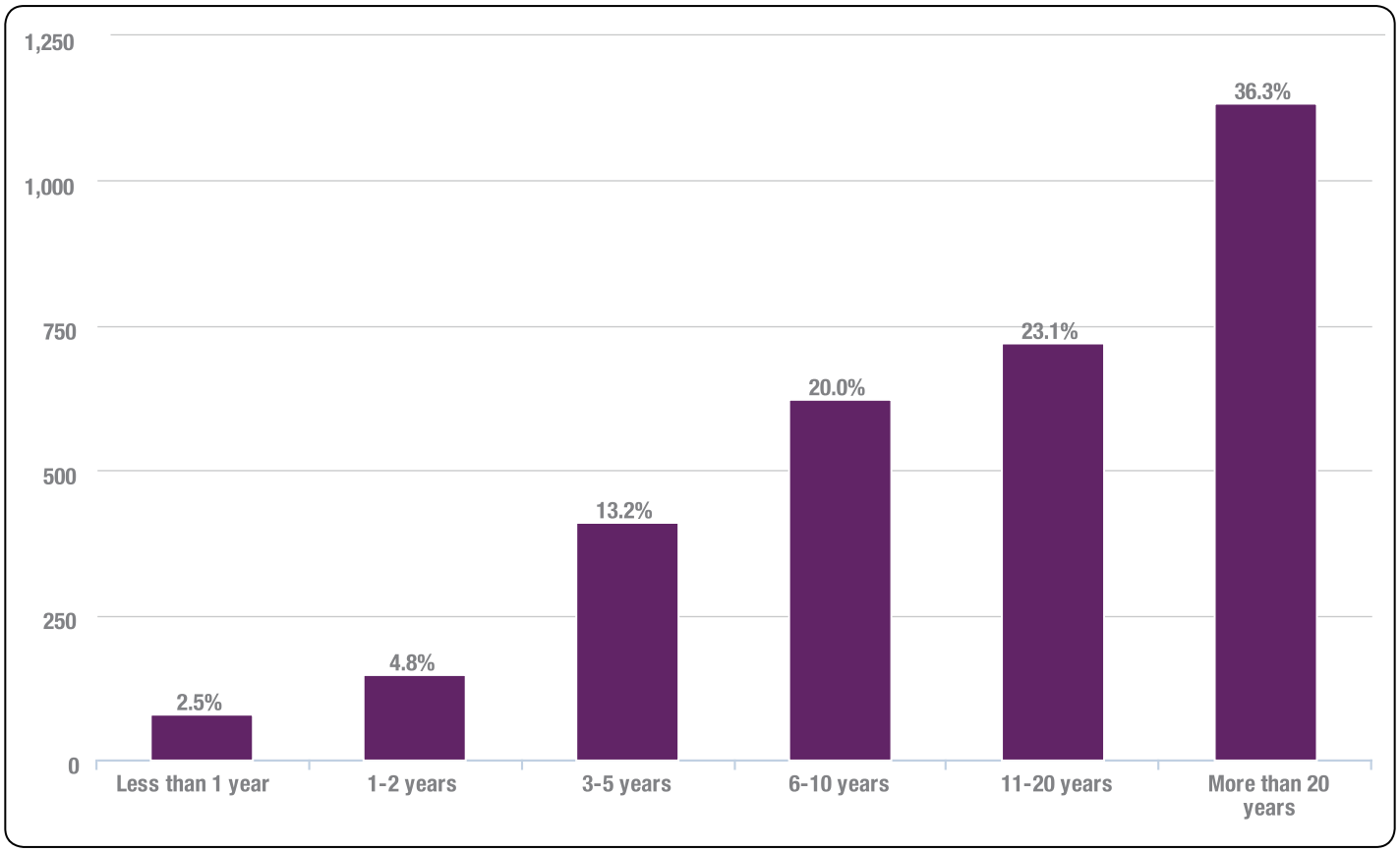
Age Breakdown



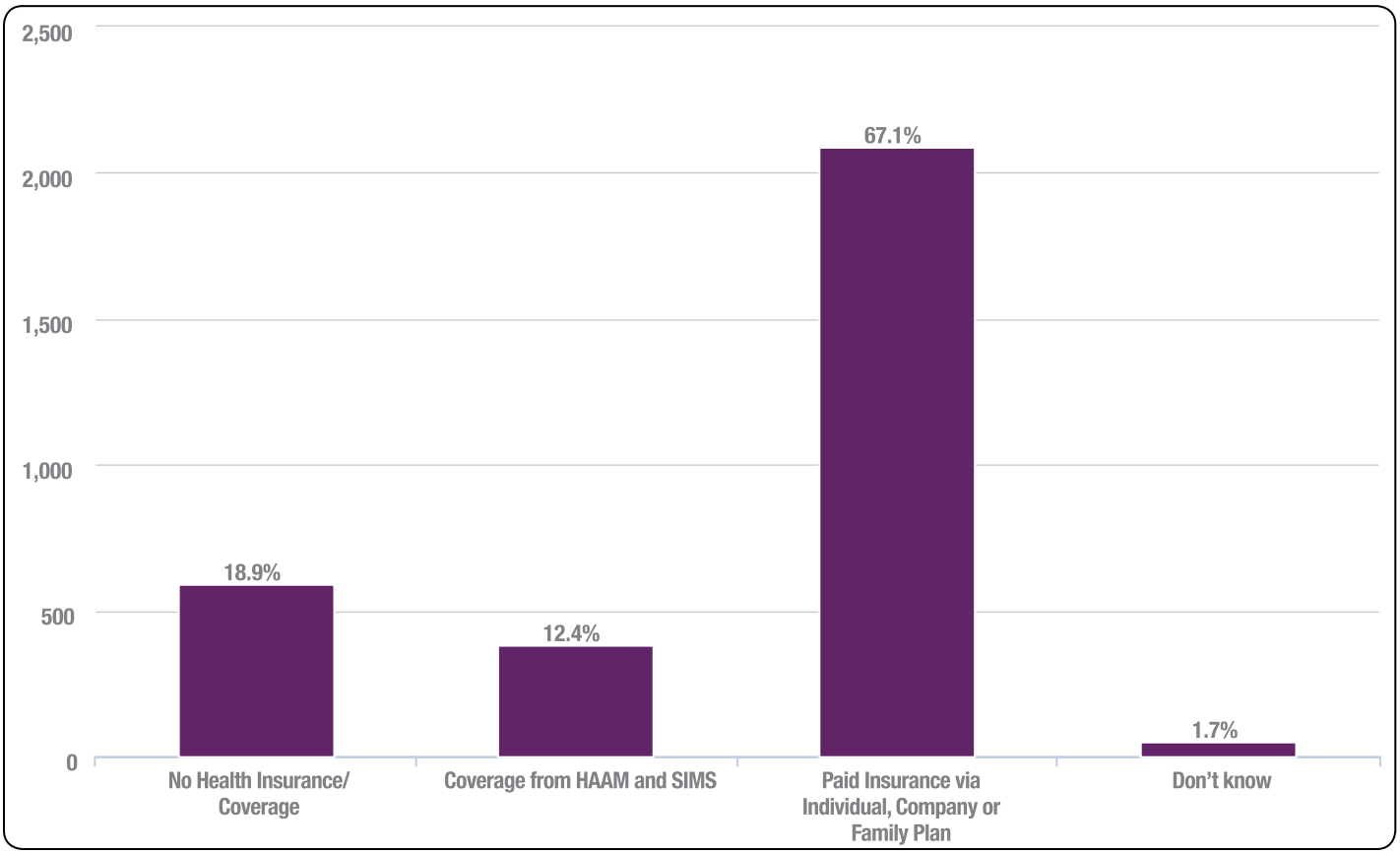
Race and Ethnicity



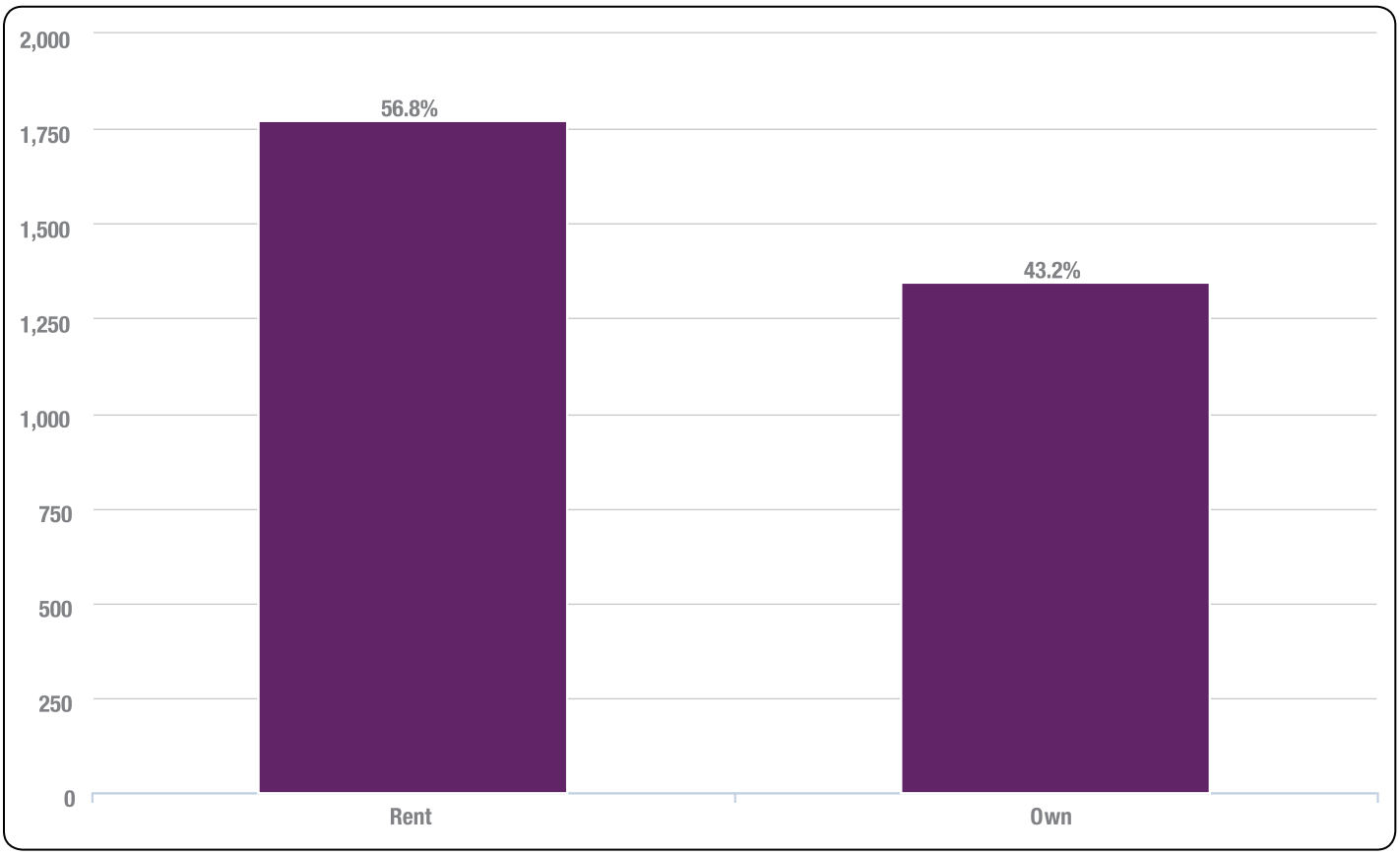
Number of Years Living in Austin



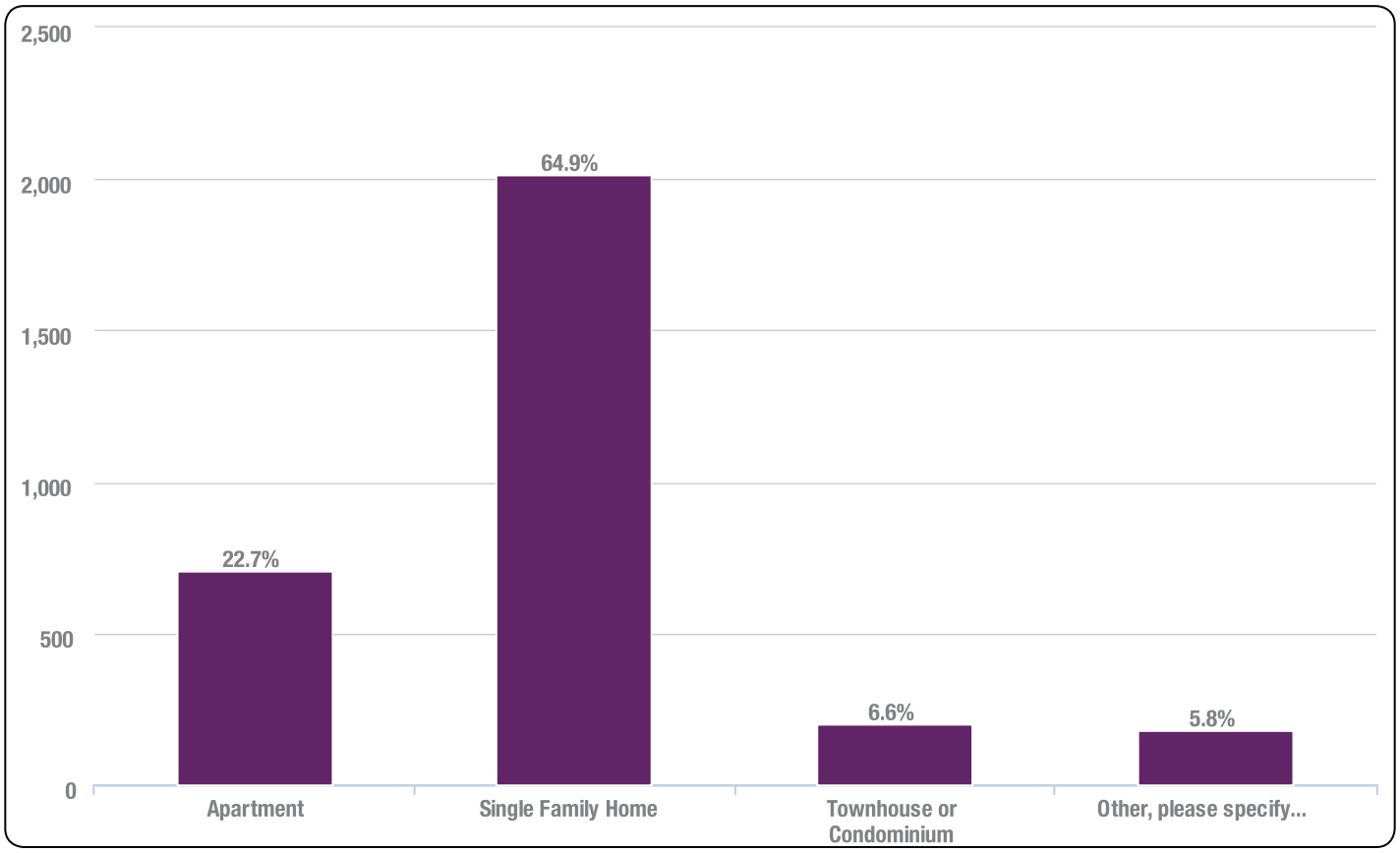
Health Care Coverage



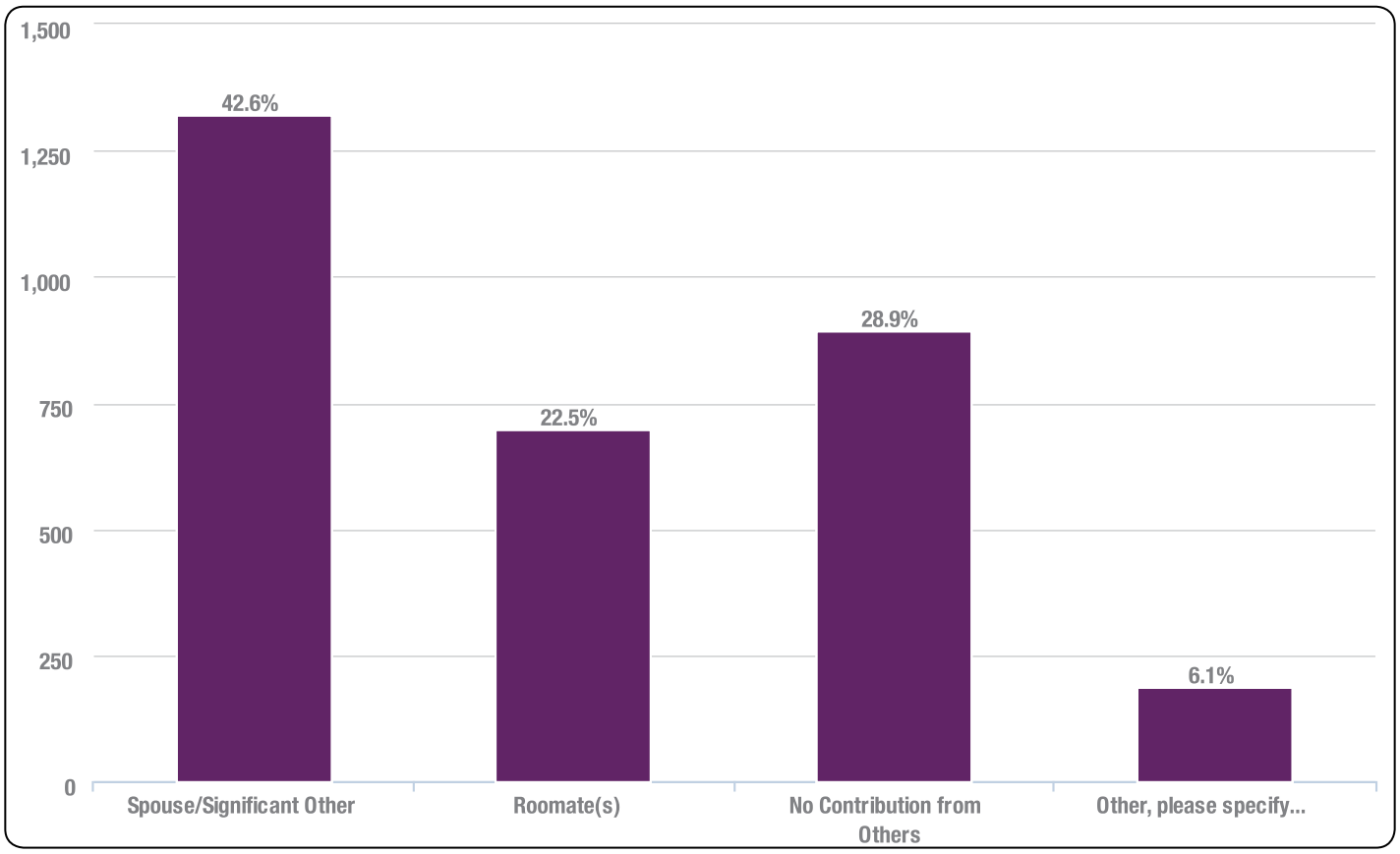
Housing: Rent vs. Own



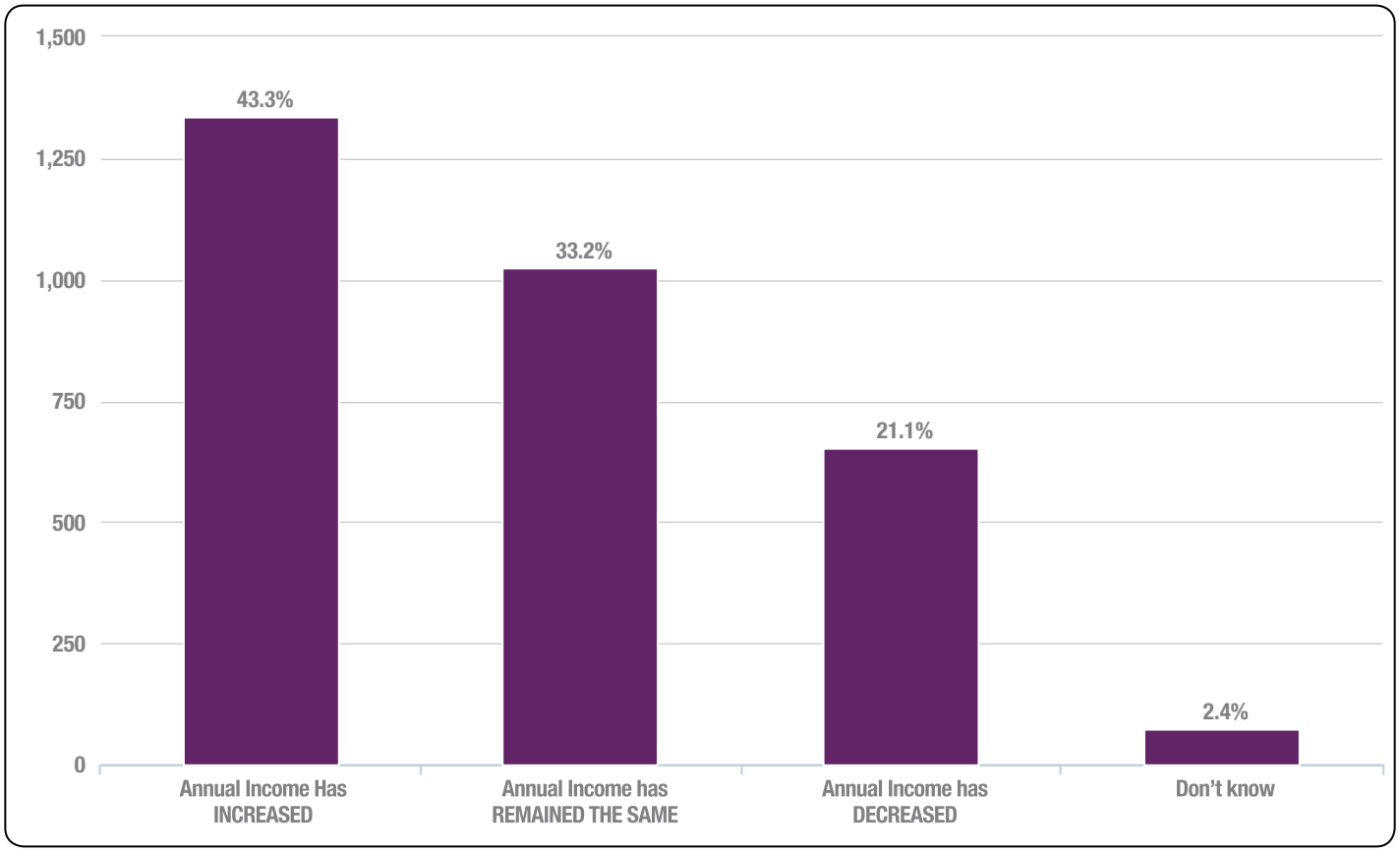
Housing: Type of Residence



Number of Household Contributors to Rent or Mortgage

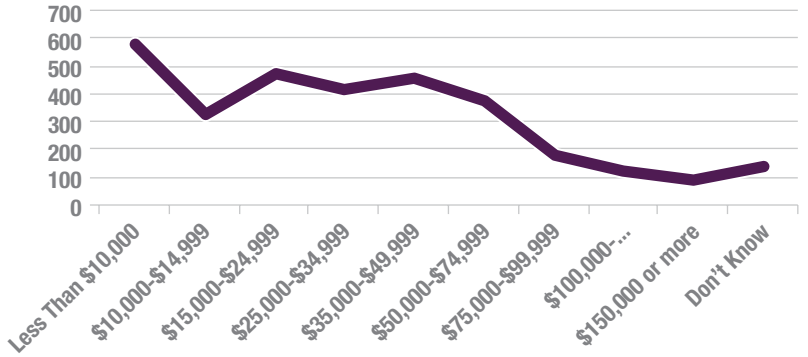


Prosperity Trends: Individual Income Increase/Decrease Over Past 3 Years



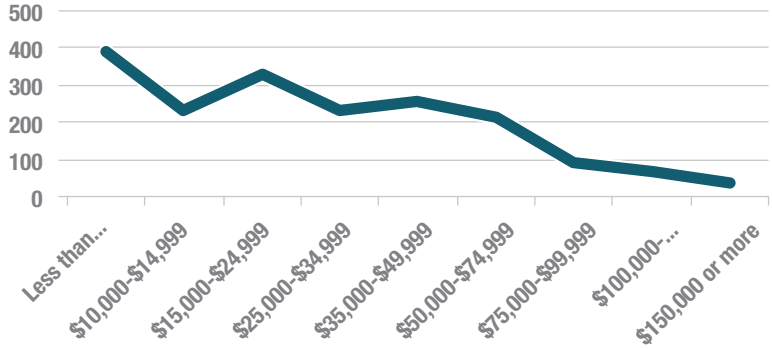
Income Comparison by Major Industry Sector

Population: All Survey Respondents **Income Type: All Income Sources**

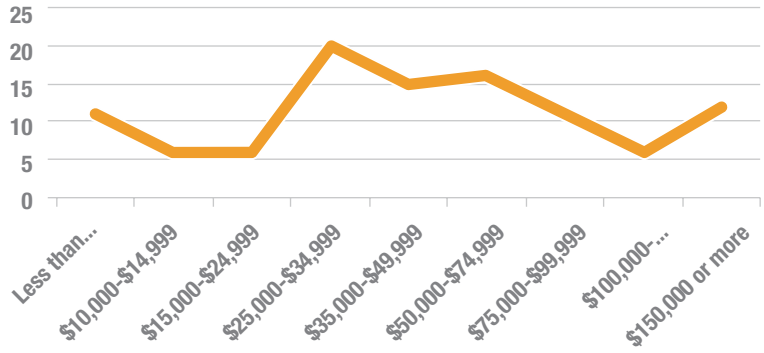


Population: All Music Industry: Business Owners + Employees **Income Type: All Income Sources**

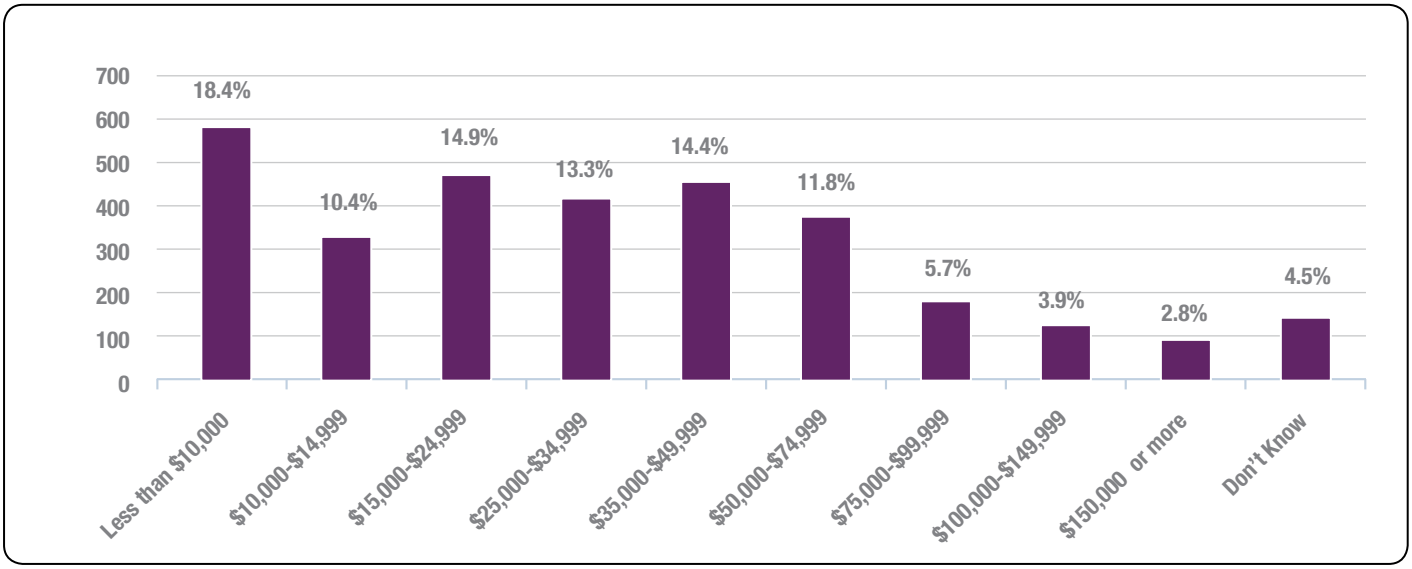
Population: Musicians **Income Type: All Income Sources**



Population: Venue Owners & Managers **Income Type: All Income Sources**



2013 Pre-Tax Individual Income (All Respondents, All Income Sources)



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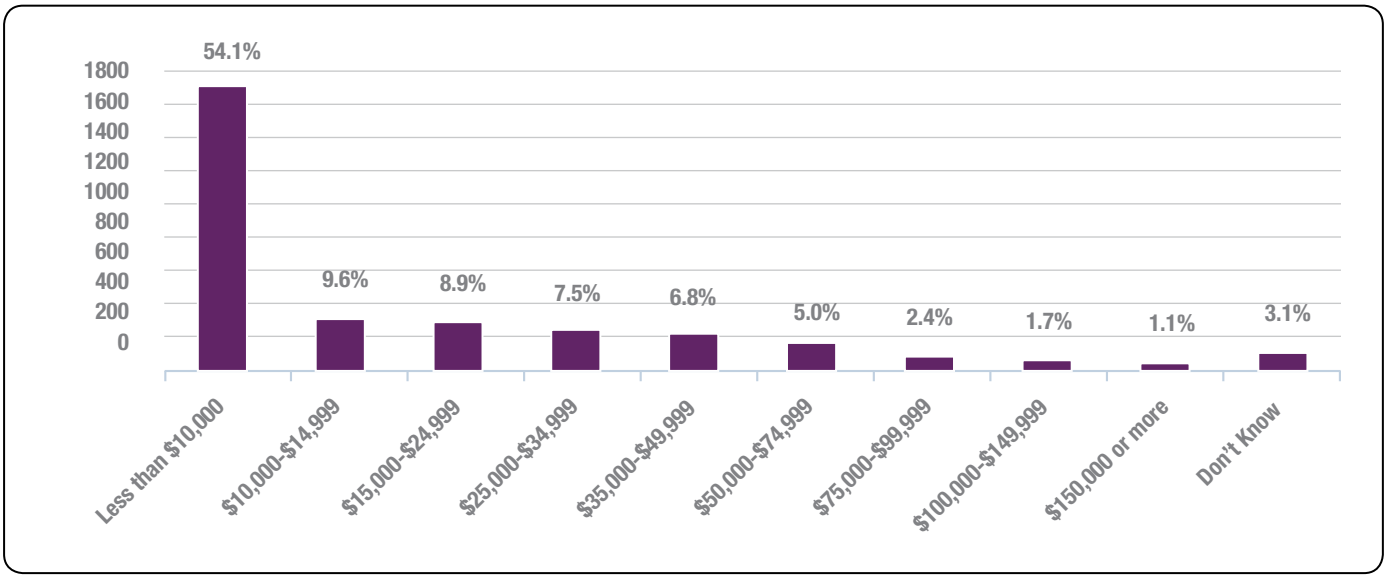
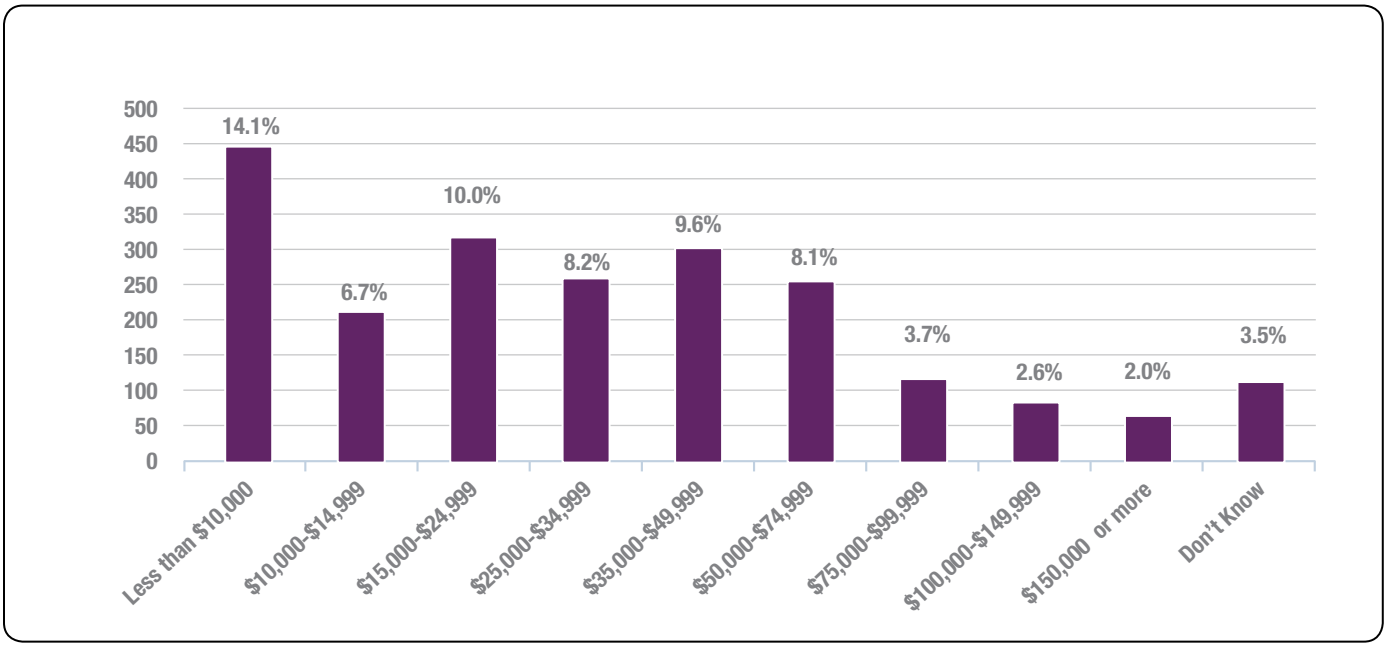
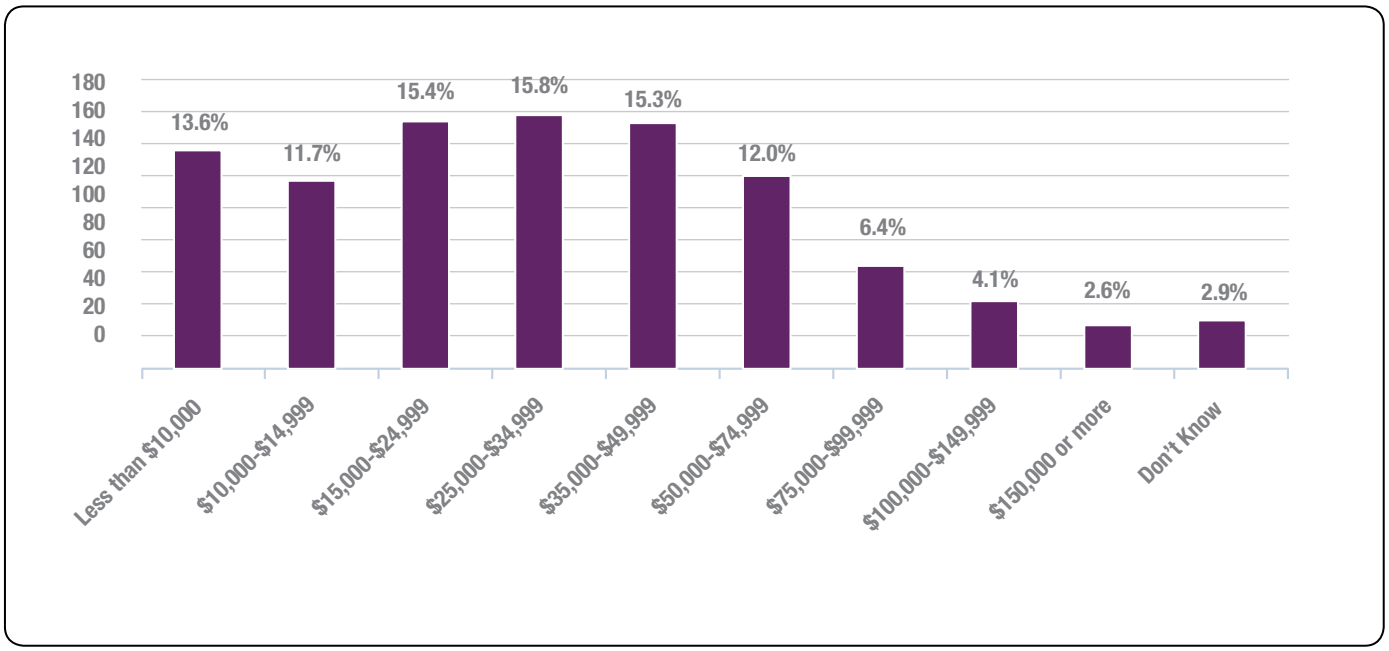


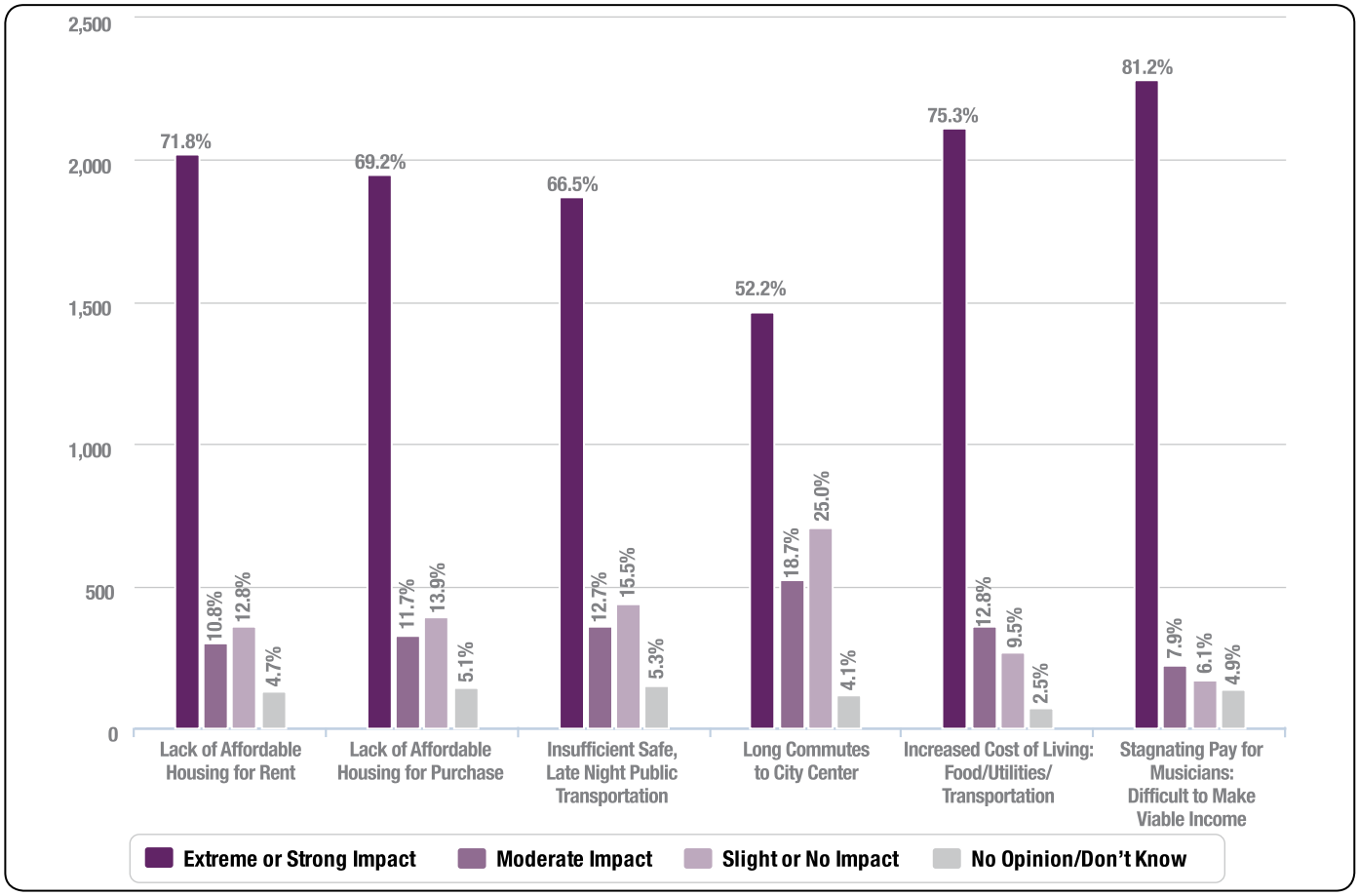
2013 Pre-Tax Individual Income (Only Respondents w/Music Industry + Augmented Income)



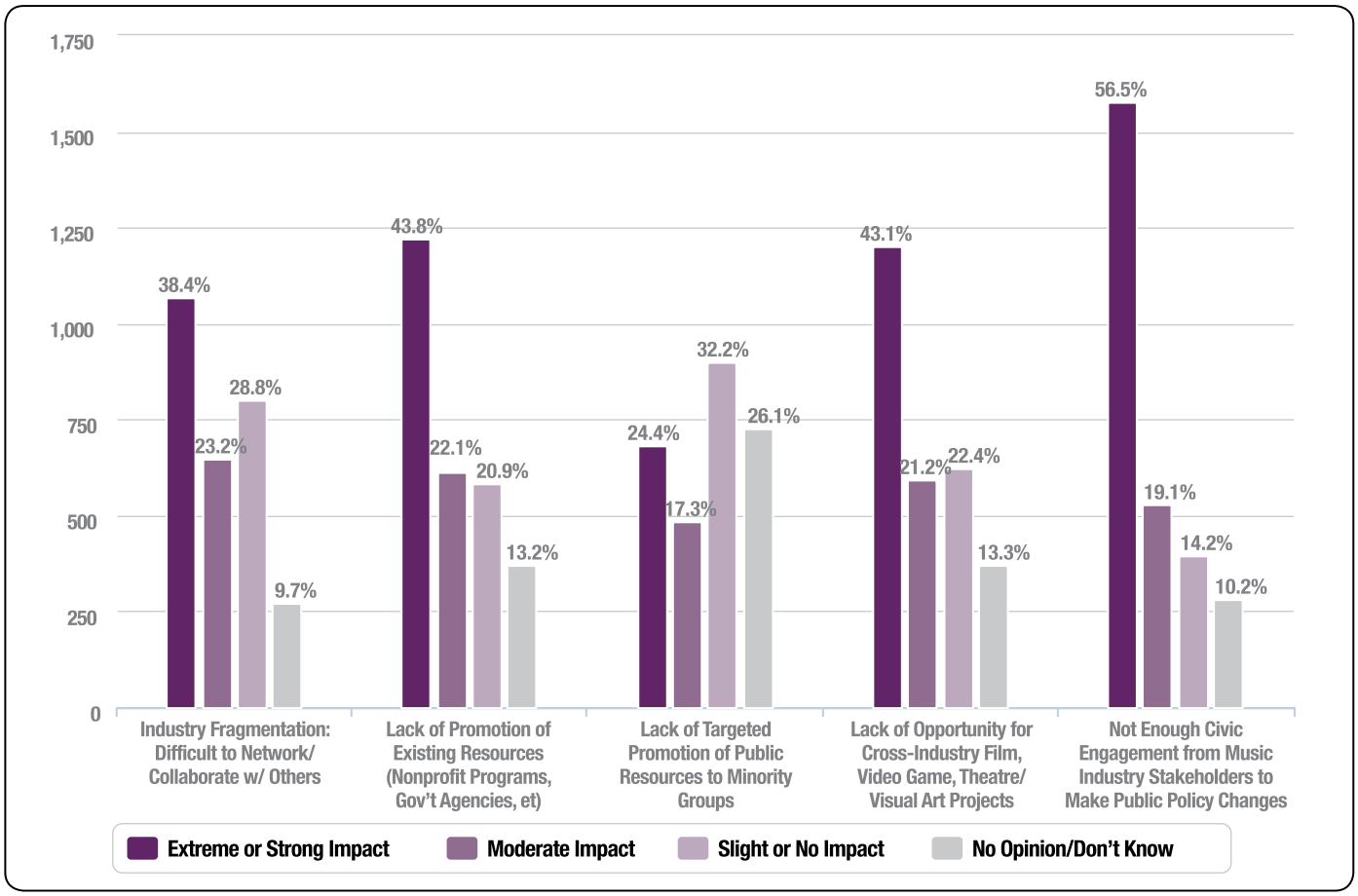
2013 Pre-Tax Individual Income (Only Respondents w/ 100% Income from Music Industry)



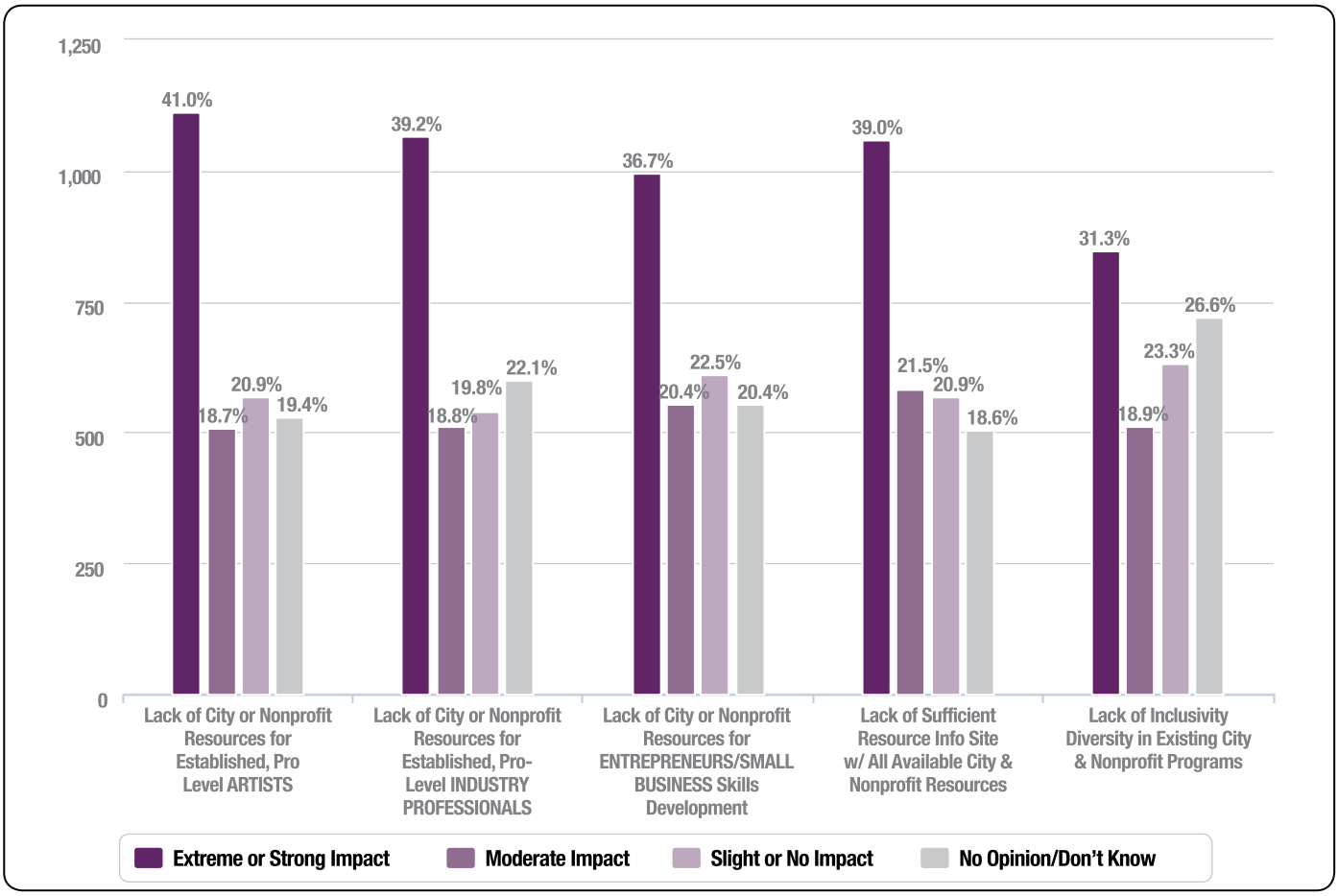
Needs and Gaps Category: LIVING AND AFFORDABILITY



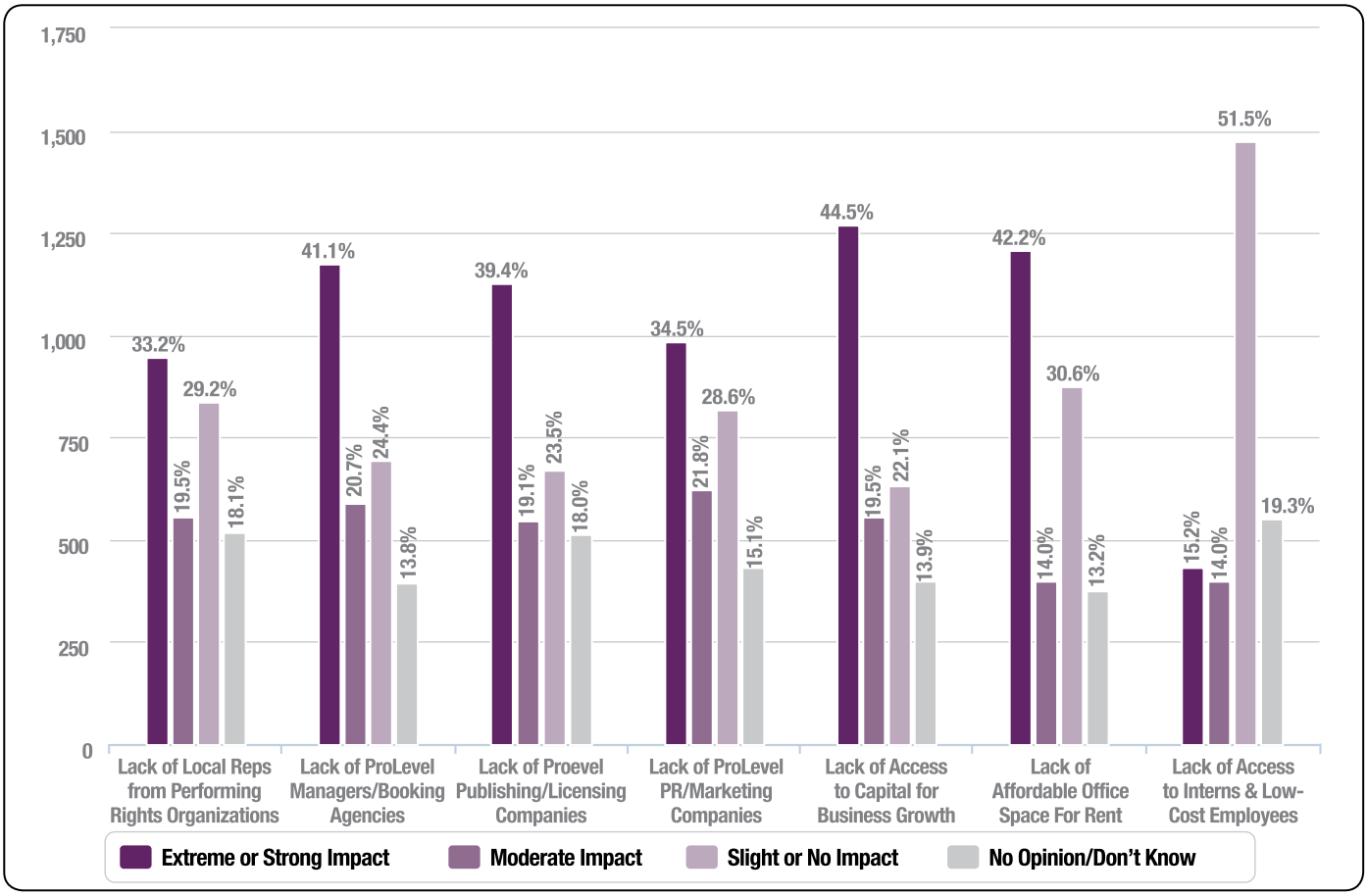
Needs and Gaps Category: CONNECTIVITY AND COLLABORATION



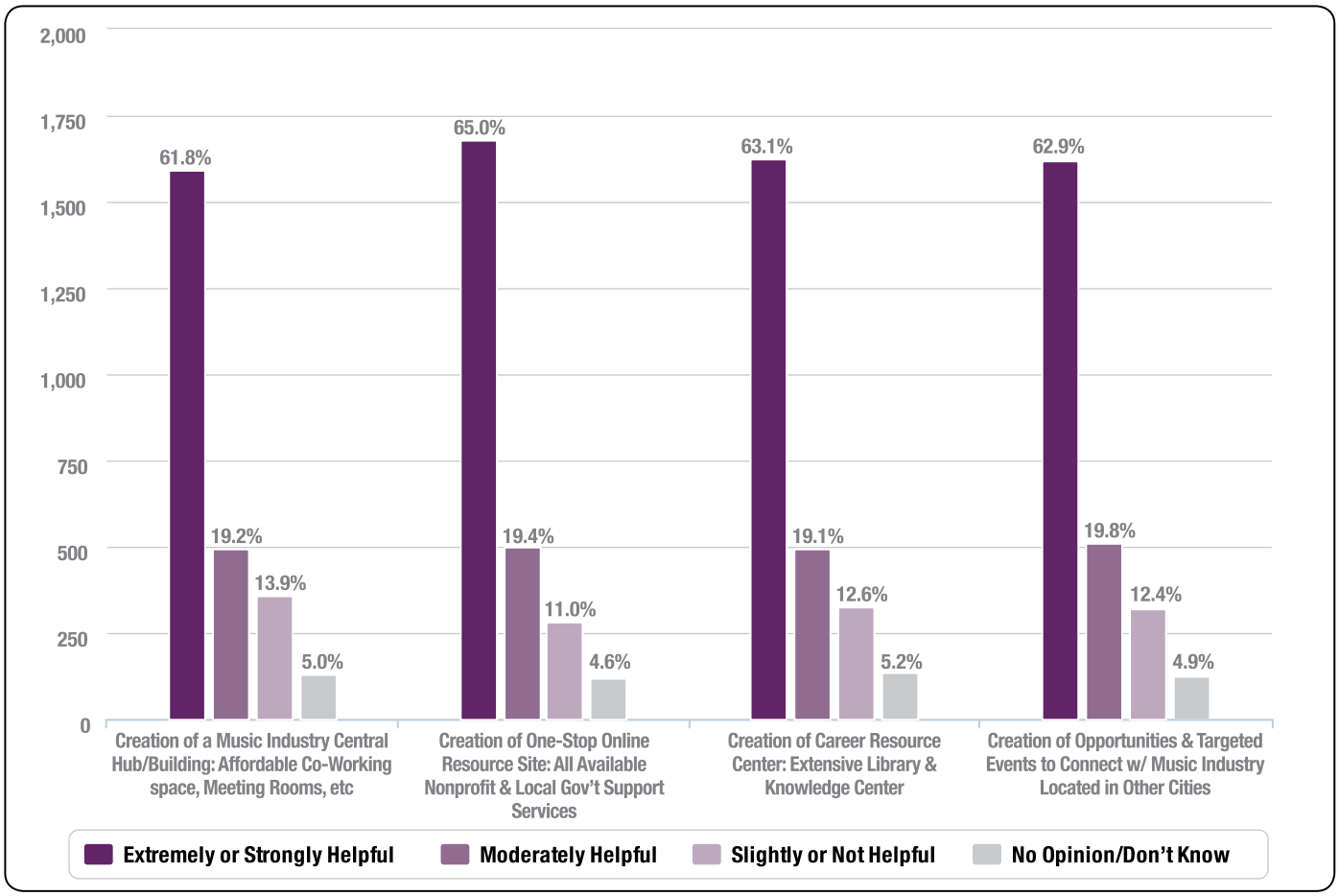
Needs and Gaps Category: PROFESSIONAL EDUCATION AND SKILLS DEVELOPMENT



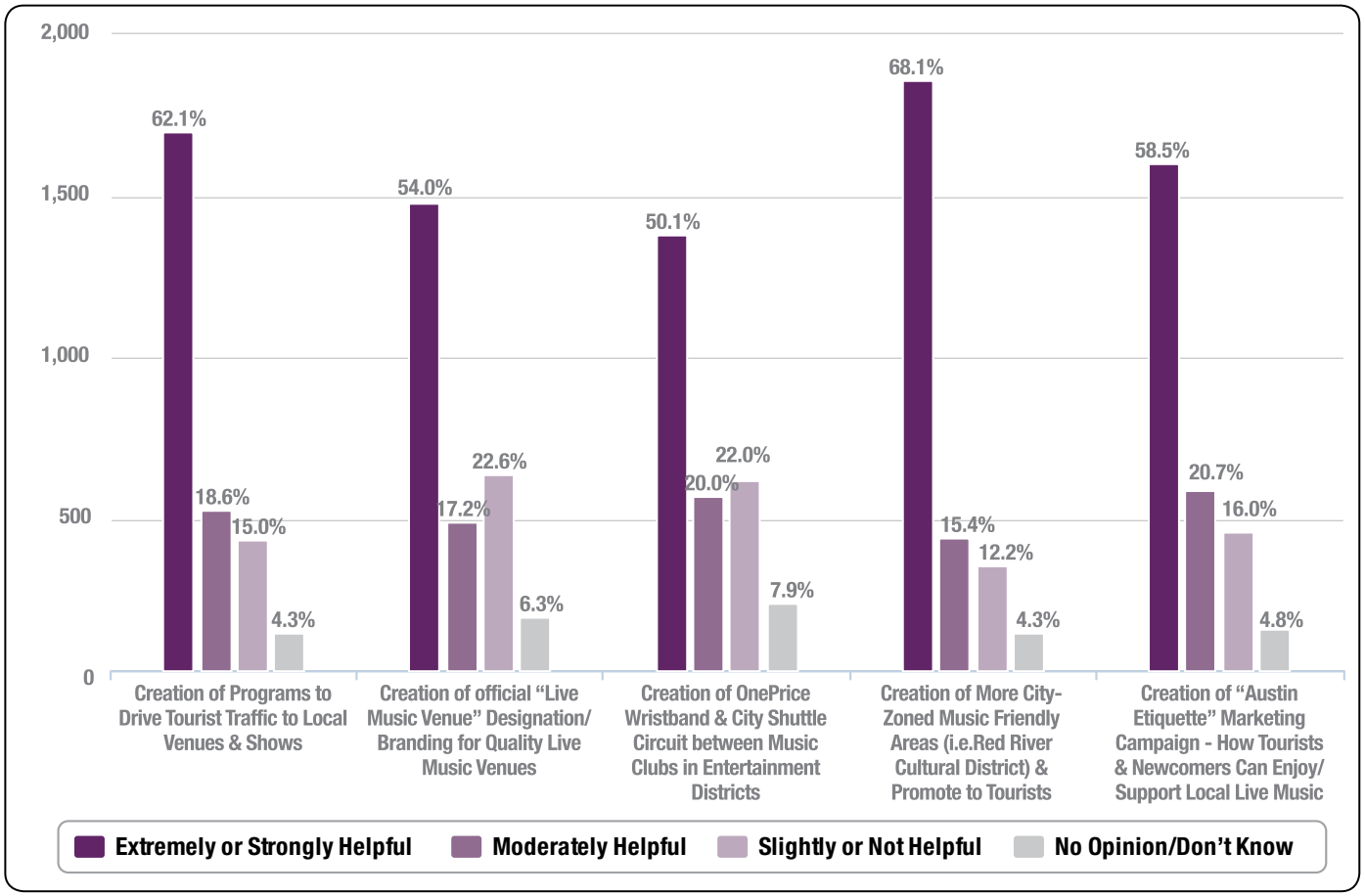
Needs and Gaps Category: INDUSTRY RESOURCES



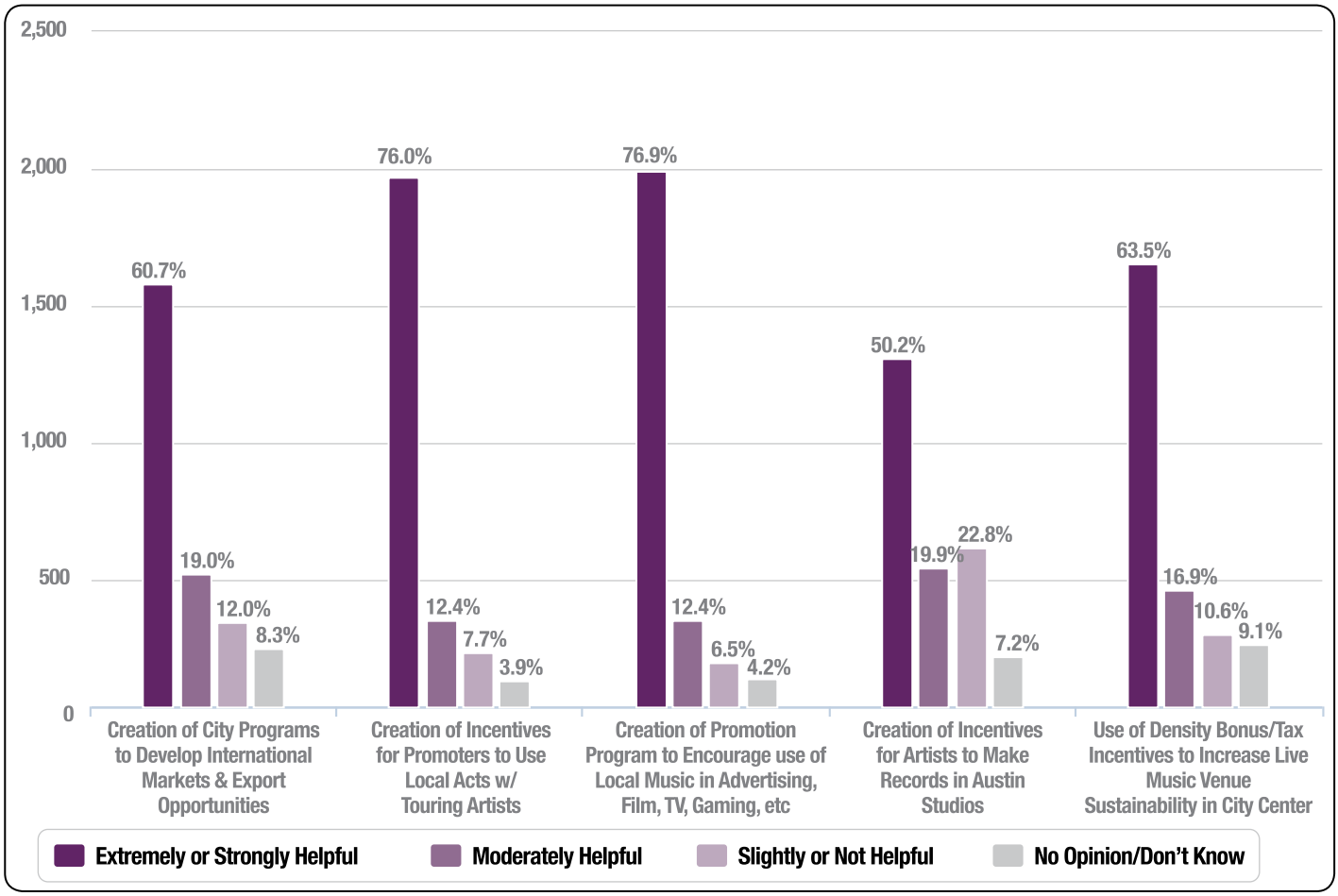
Ideas and Proposals Category: CAREER DEVELOPMENT AND CONNECTIVITY



Ideas and Proposals Category: TOURISM AND MARKET DEVELOPMENT



Ideas and Proposals Category: CITY PROGRAMS



Appendix IV
Musician-Only Respondent Data Chart List

CHARTS APPEAR IN THIS SEQUENCE:

Musical Genre Breakdown
Type of Venue Played on a Regular Basis
Average Number of Austin Area Shows Per Month
Average Number of Touring Shows Per Month
Areas of Experience and Expertise
Current Means of Employment
Number of Years Working in Music Industry
Gender Breakdown
Age Breakdown
Race and Ethnicity
Number of Years Living in Austin
Health Care Coverage
Housing: Rent vs. Own
Housing: Type of Residence
Number of Household Contributors to Rent or Mortgage
Prosperity Trends: Individual Income Increase/Decrease Over Past 3 Years
Band Launch and Growth Financing
2013 Band Gross Income
Revenue Contribution by Activity Type
2013 Pre-Tax Individual Income (All Musicians, All Income Sources)
2013 Pre-Tax Individual Income (All Musicians, Music Industry Income Only)
2013 Pre-Tax Individual Income (Only Musicians w/ Music Industry + Augmented Income)
2013 Pre-Tax Individual Income (Only Musicians w/ 100% Income from Music Industry)
Needs and Gaps Category: LIVING AND AFFORDABILITY
Needs and Gaps Category: CONNECTIVITY AND COLLABORATION
Needs and Gaps Category: PROFESSIONAL EDUCATION AND SKILLS DEVELOPMENT
Needs and Gaps Category: INDUSTRY RESOURCES
Ideas and Proposals Category: CAREER DEVELOPMENT AND CONNECTIVITY
Ideas and Proposals Category: TOURISM AND MARKET DEVELOPMENT
Ideas and Proposals Category: CITY PROGRAMS

Appendix IV

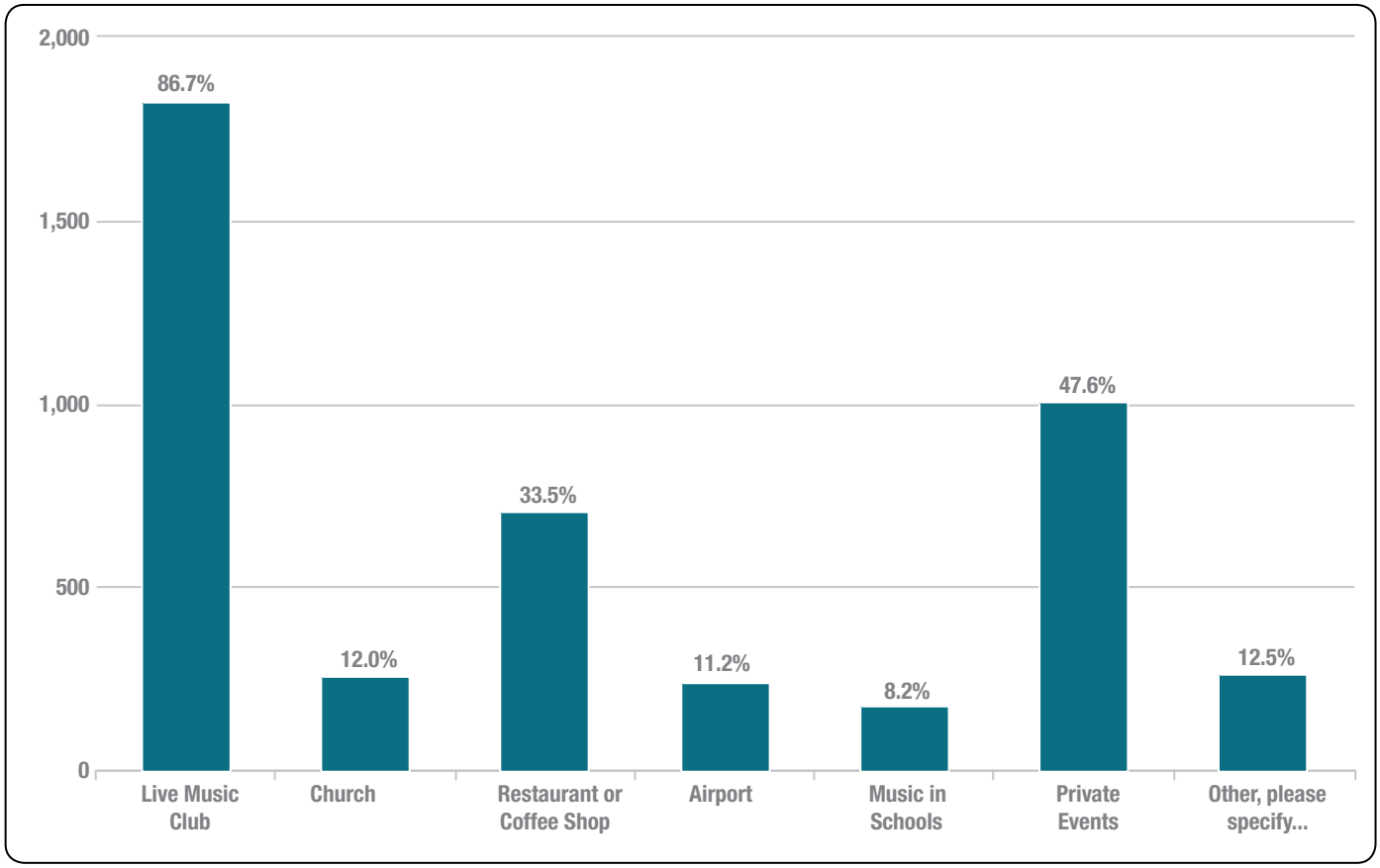
Musician-Only Respondent Data Charts

TOTAL RESPONSES	COMPLETED RESPONSES	COMPLETION RATE
2,380	1,584	67%

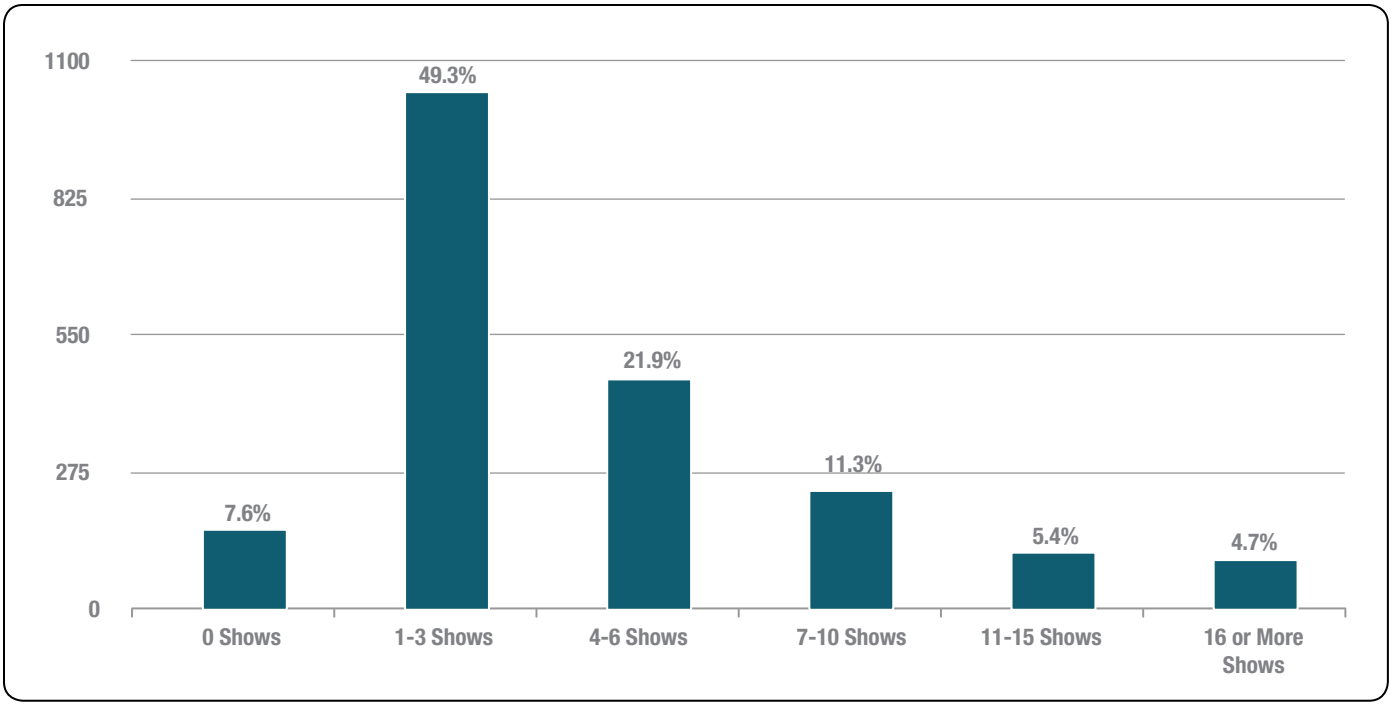
Musical Genre Breakdown

Middle Eastern	2	0.1%
Children's Music	3	0.1%
Cabaret	5	0.2%
Tejano	5	0.2%
Celtic	6	0.3%
Gospel	6	0.3%
Big Band	12	0.6%
Christian	13	0.6%
Bluegrass	17	0.8%
Latin/Spanish/Mariachi	26	1.2%
Cover/Tribute	31	1.4%
Funk	39	1.8%
Dance/Electronic Dance Music	43	2.0%
Metal	53	2.4%
World	65	3.0%
Punk	76	3.5%
Hip Hop/Rap	80	3.7%
Classical	81	3.7%
Blues	85	3.9%
Country & Western/Swing	91	4.2%
R&B/Soul	113	5.2%
Jazz	118	5.4%
Pop Rock	126	5.8%
Folk/Acoustic	145	6.6%
Alternative	213	9.8%
Americana	329	15.1%
Rock	398	18.2%
	Total: 2181	

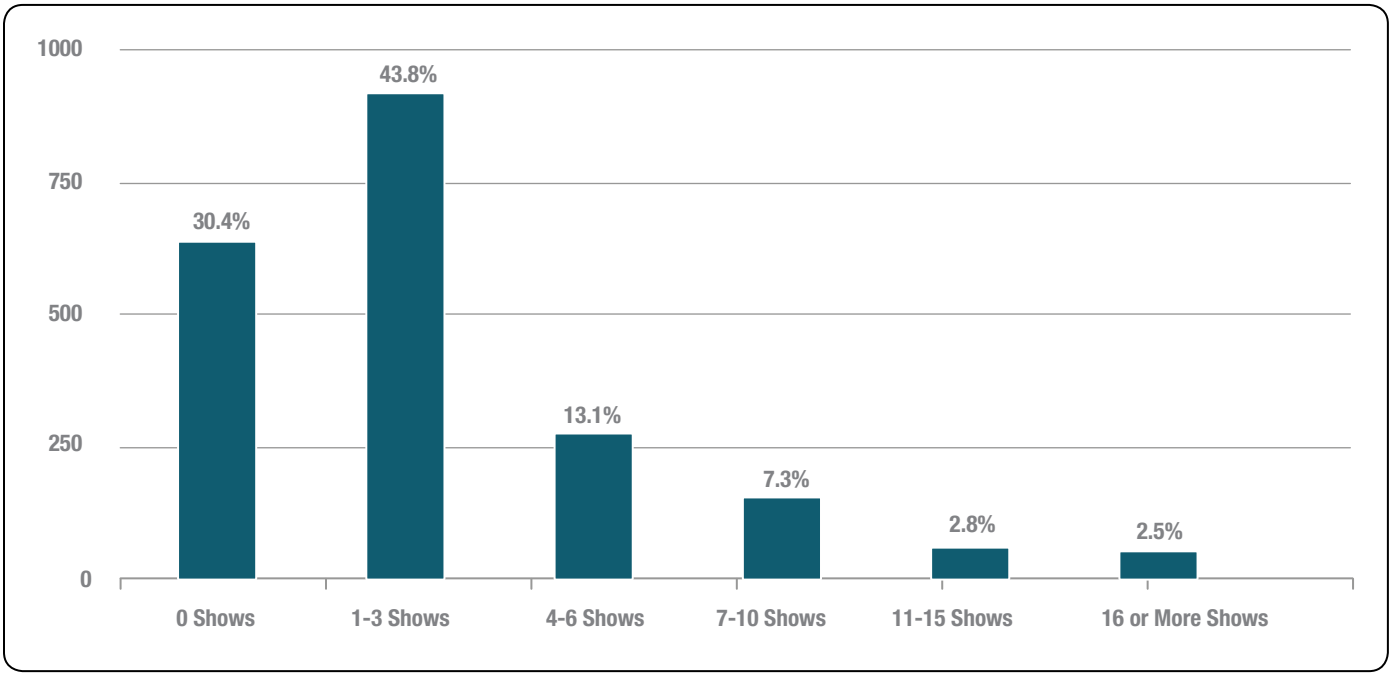
Type of Venue Played on a Regular Basis



Average Number of Austin Area Shows Per Month



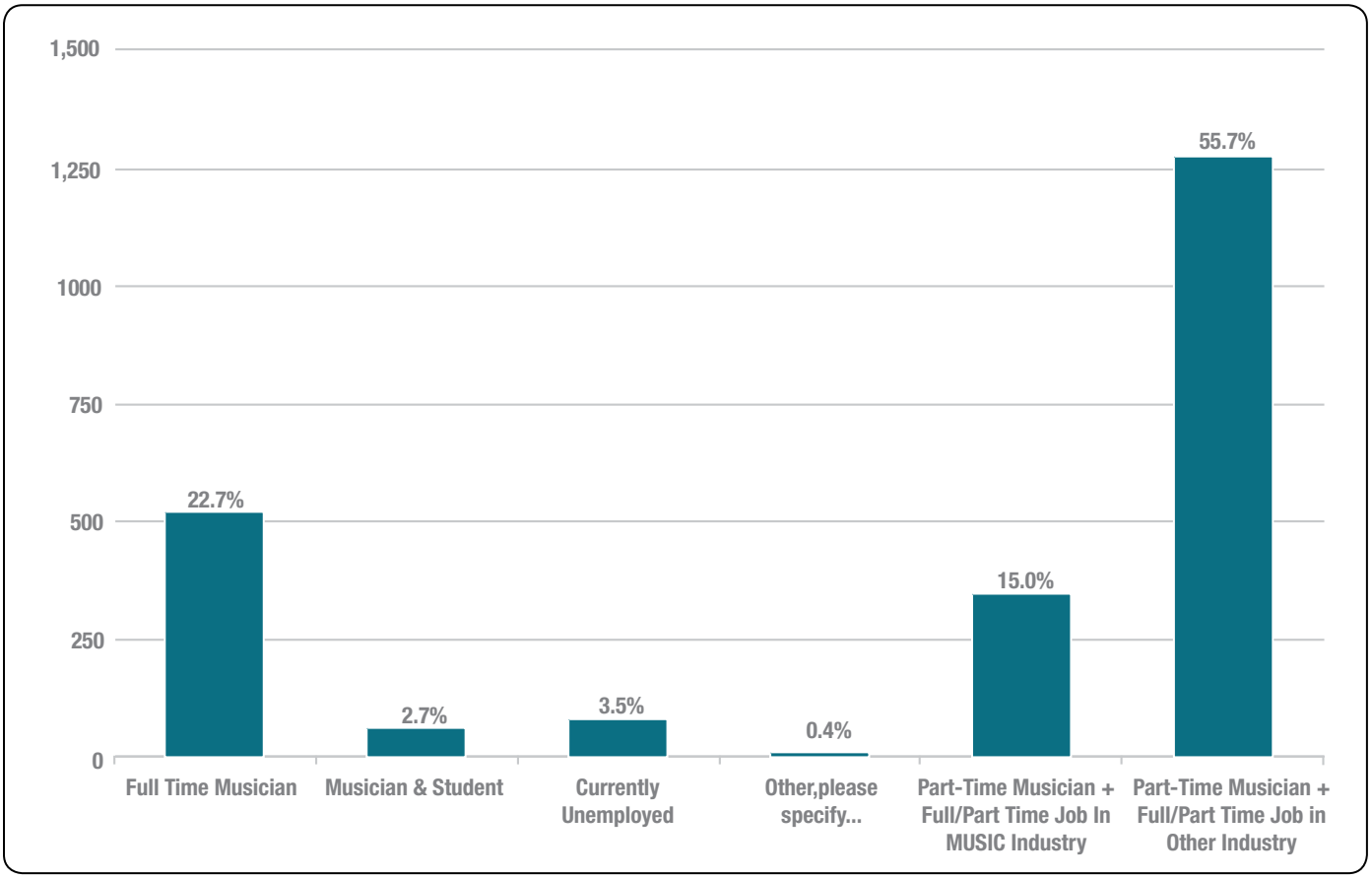
Average Number of Touring Shows Per Month



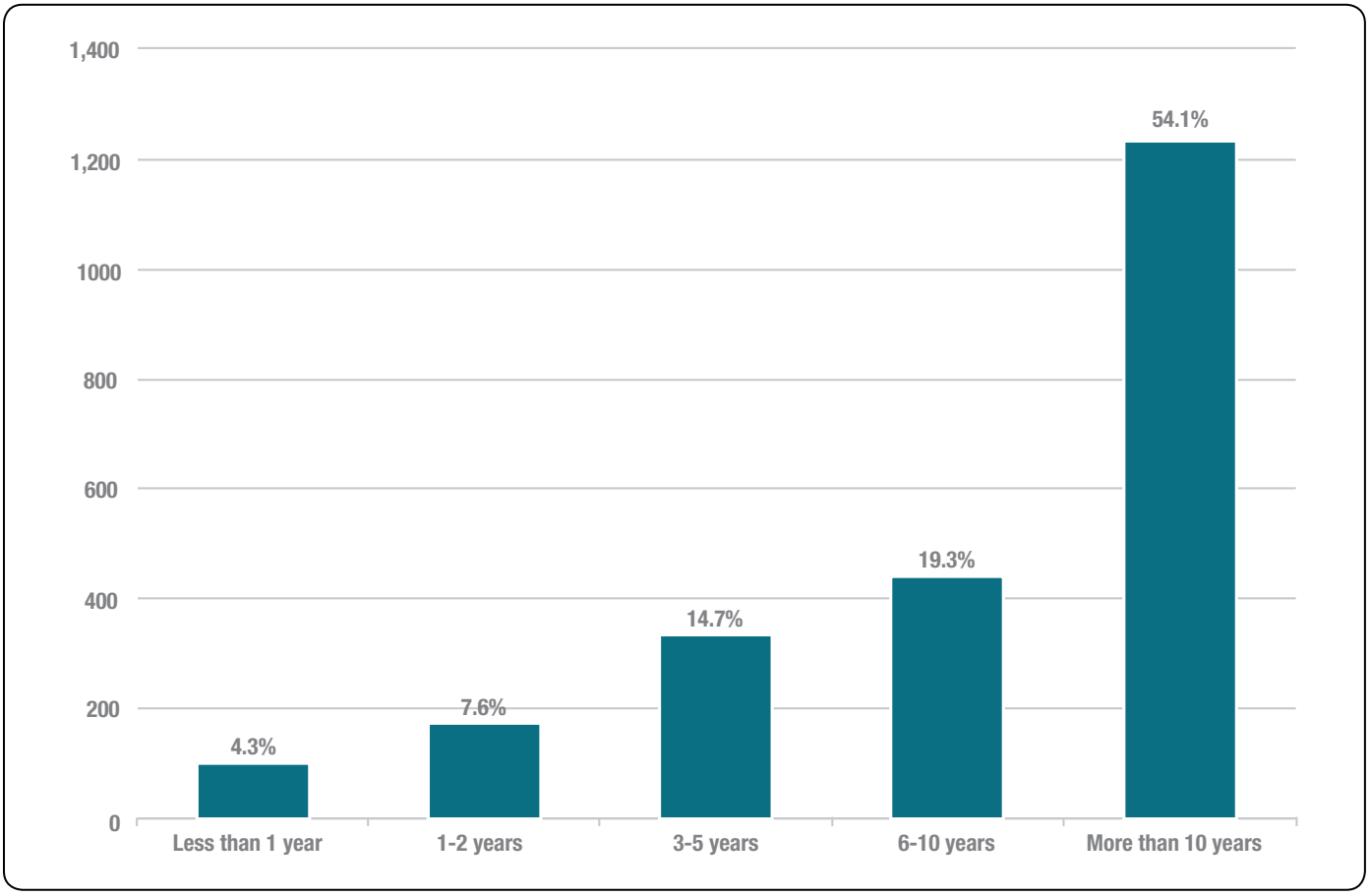
Areas of Experience and Expertise

Response	Count	
Accounting	123	5.6%
Audio Engineering	636	29.0%
Advocacy/Lobbying	49	2.2%
Audio Mastering	203	9.2%
Digital Music Distribution	243	11.1%
Booking/T alent Buying	450	20.5%
Audio Mixing	584	26.6%
Digital Music Sales	156	7.1%
Event Promotion	575	26.2%
Event Production	480	21.9%
Distribution	107	4.9%
Film/T V Composer	250	11.4%
Manuf acturing	62	2.8%
Graphic Design	366	16.7%
Financing or Venture Capital	22	1.0%
Marketing	345	15.7%
Music Education	501	22.8%
Music Arranger	646	29.4%
Media/Journalism	189	8.6%
Artist Management	317	14.4%
Music Legal Issues	61	2.8%
Nonprof it Services	133	6.1%
Music Publishing	198	9.0%
Music Licensing	136	6.2%
Post Production	169	7.7%
Radio Promotion	106	4.8%
Radio Production	79	3.6%
PR & Publicity	255	11.6%
Record Labels	171	7.8%
Social Media	563	25.6%
Retail Sales	166	7.6%
Record Production	360	16.4%
Software Development	59	2.7%
Ticketing	36	1.6%
Studio Management	139	6.3%
Artist/Songwriting or Composing	1540	70.2%
Touring Logistics	309	14.1%
Web Design/Development	311	14.2%
Venue Management	89	4.1%
Artist/Live Performance	1943	88.5%
	Total: 2195	

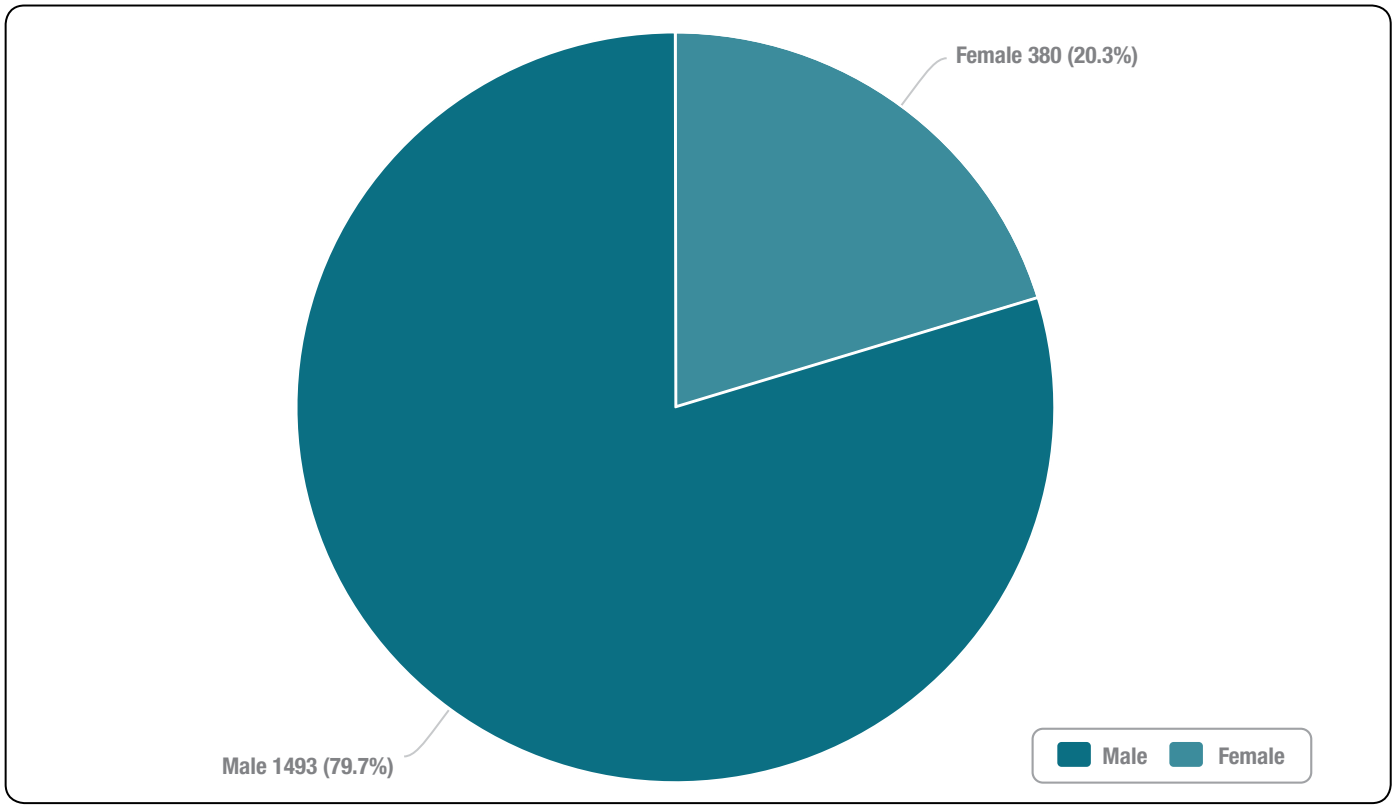
Current Means of Employment



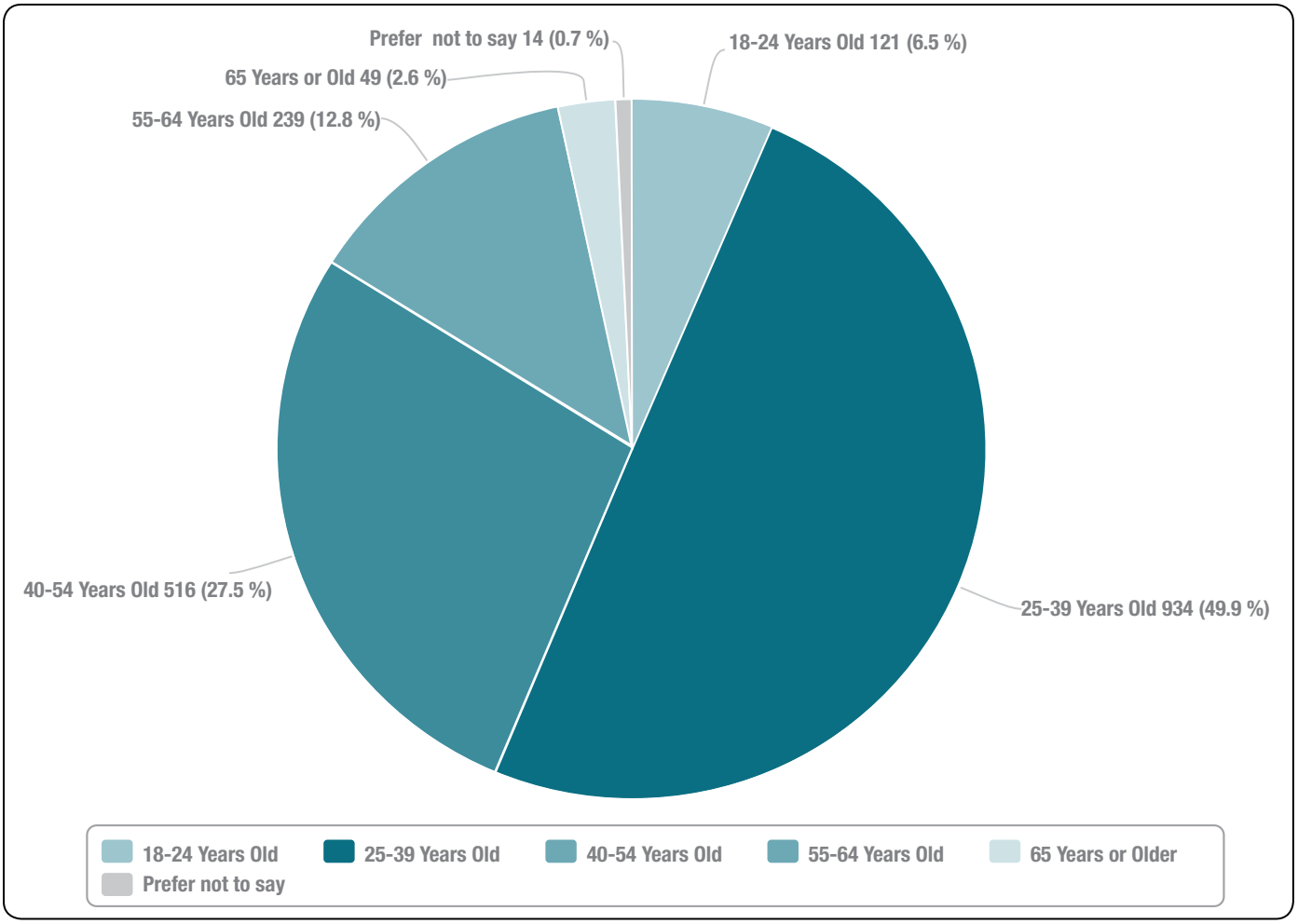
Number of Years Working in Music Industry



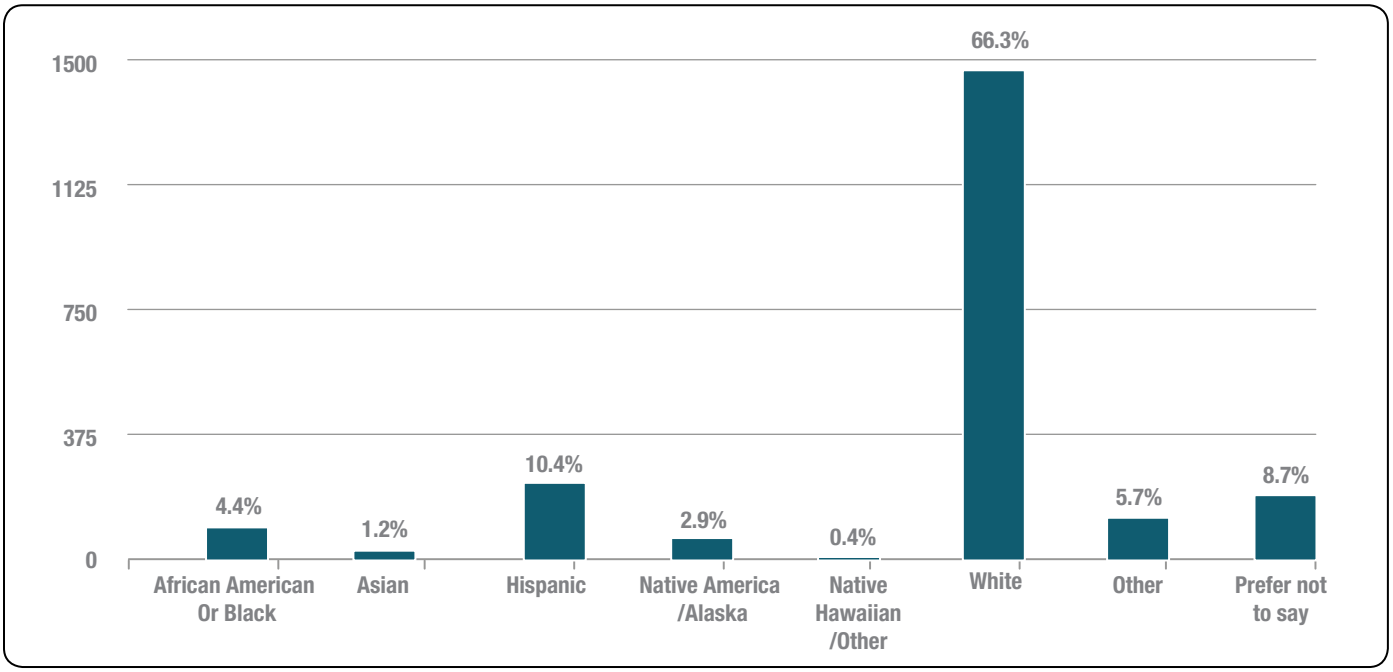
Gender Breakdown



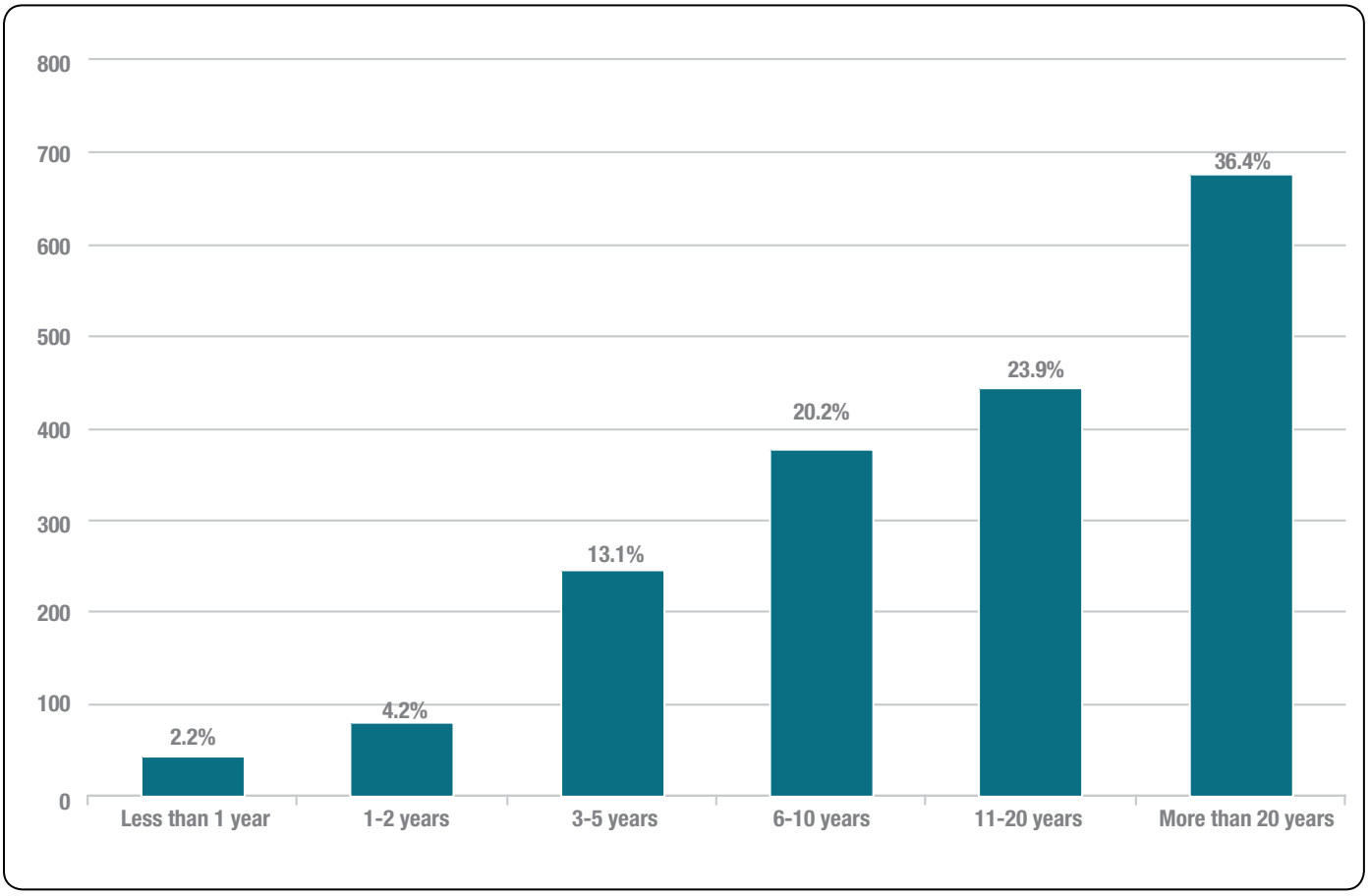
Age Breakdown



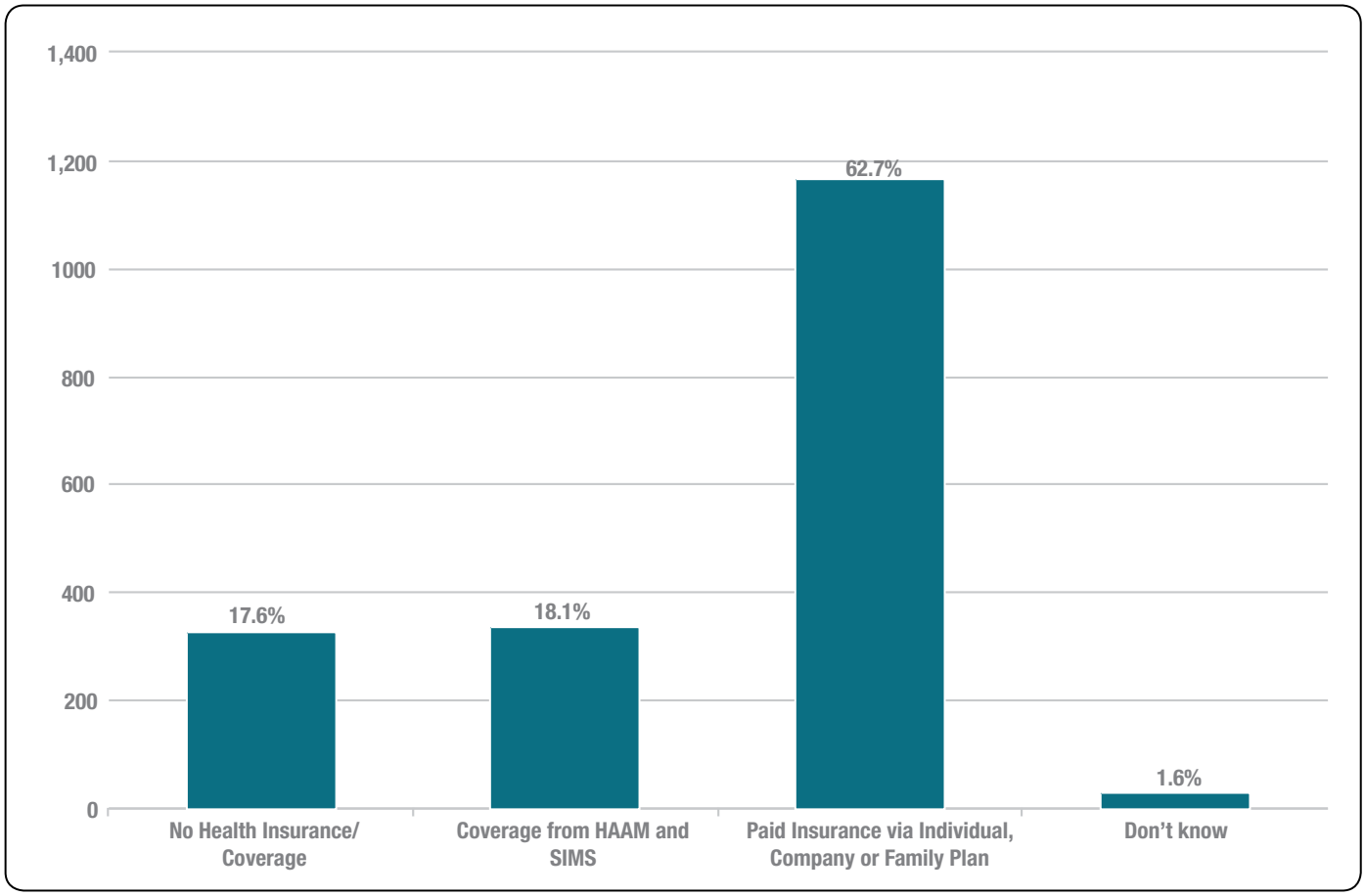
Musicians: Race & Ethnicity



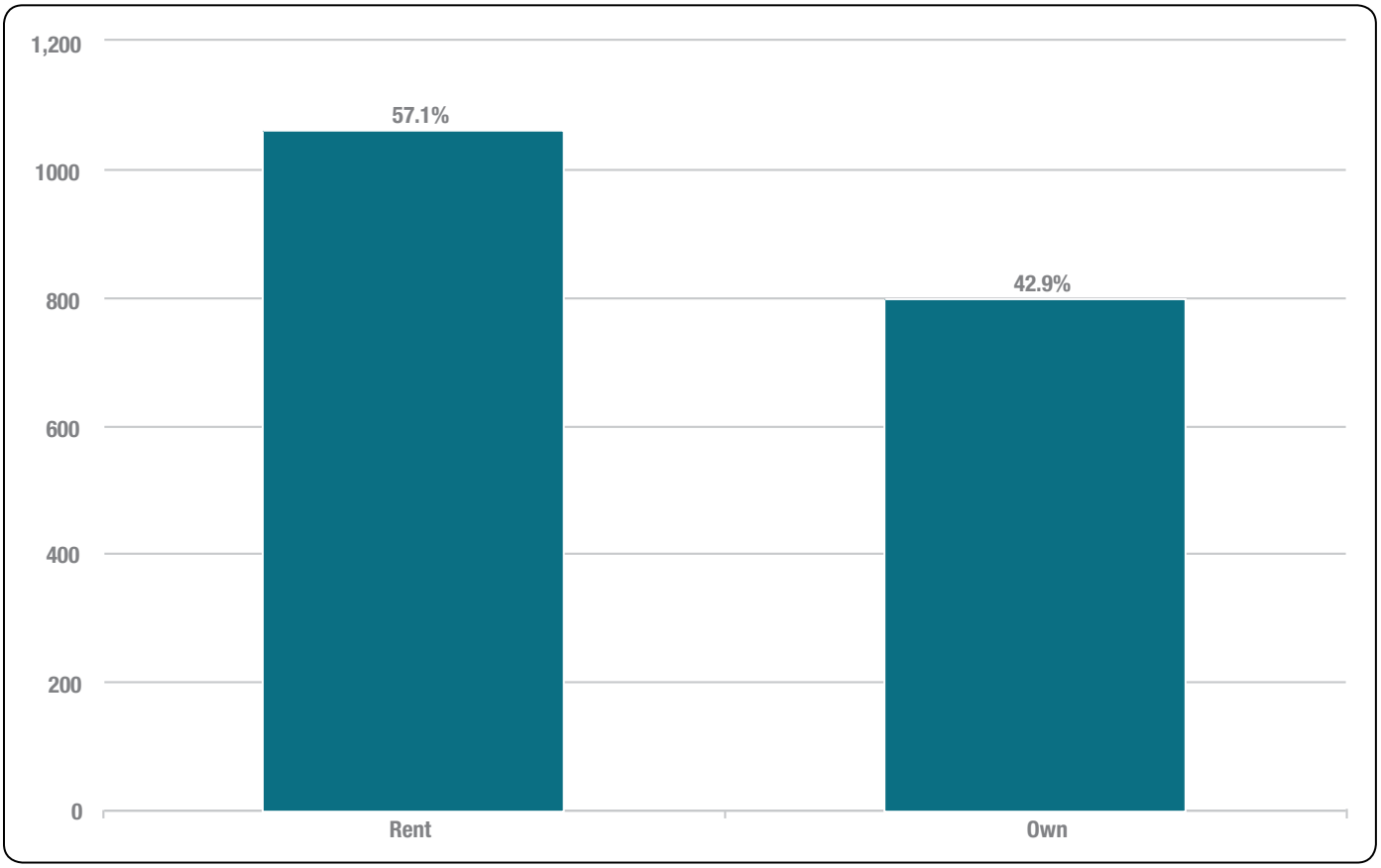
Number of Years Living in Austin



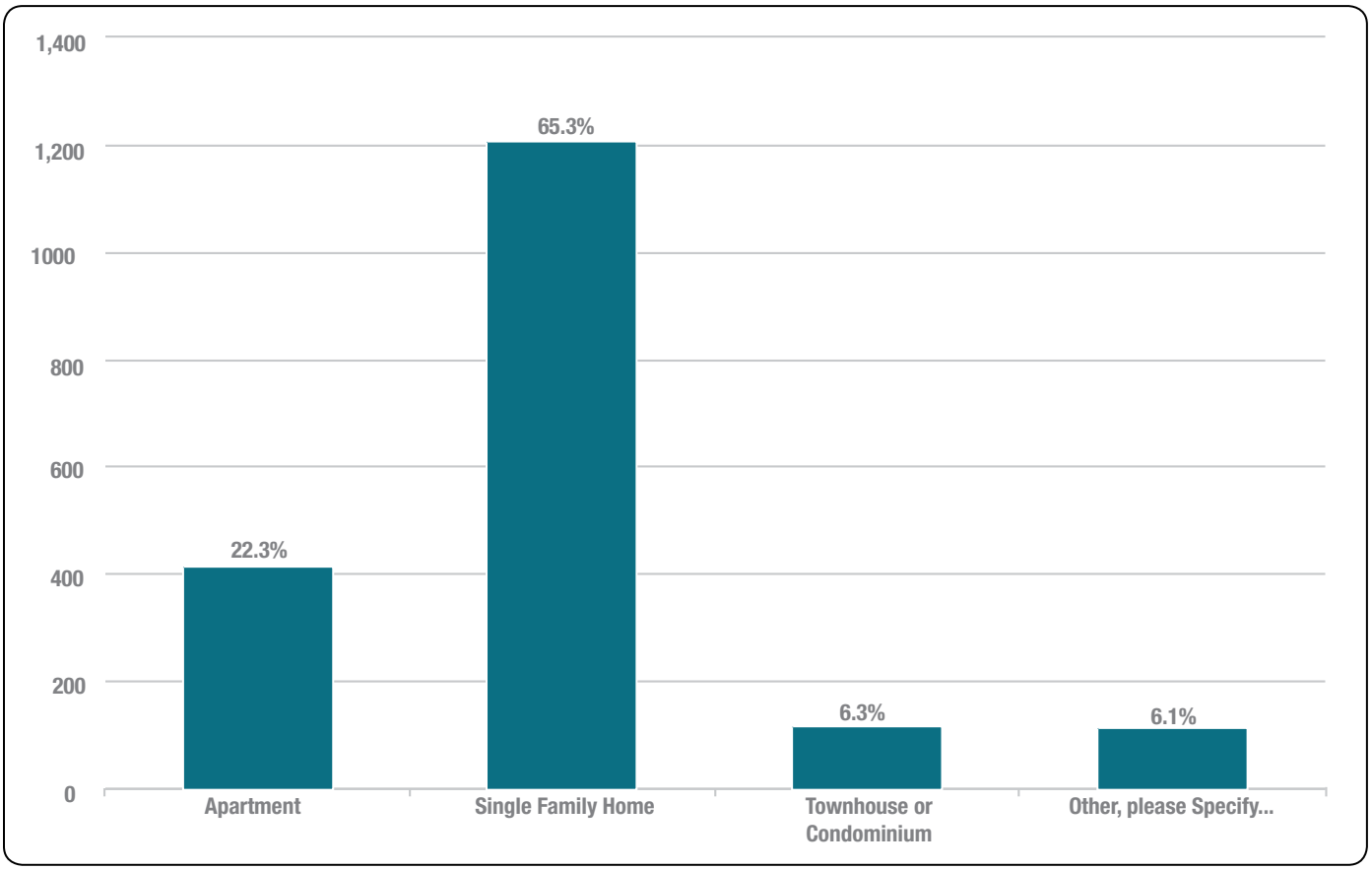
Health Care Coverage



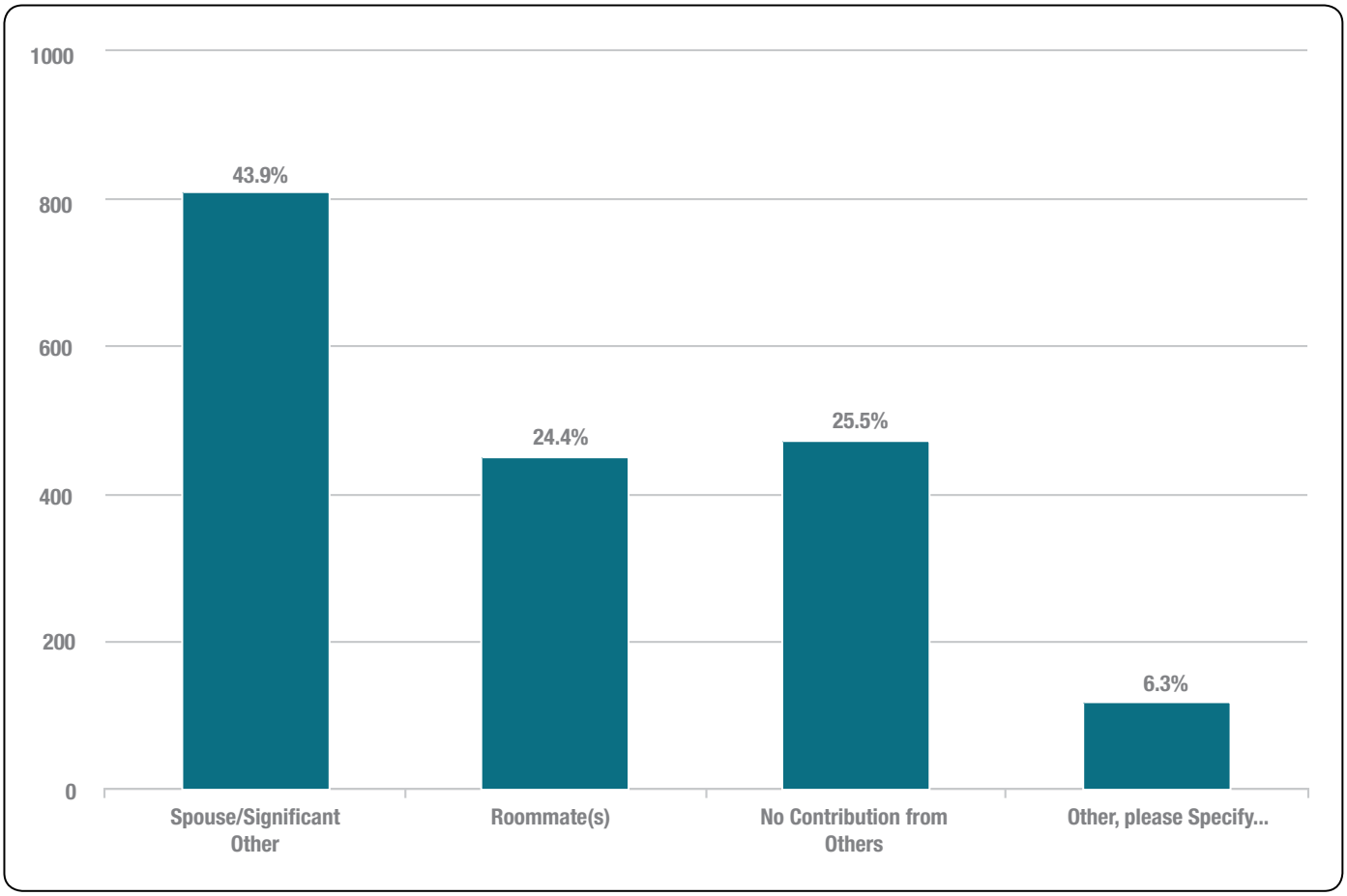
Housing: Rent Vs. Ownership



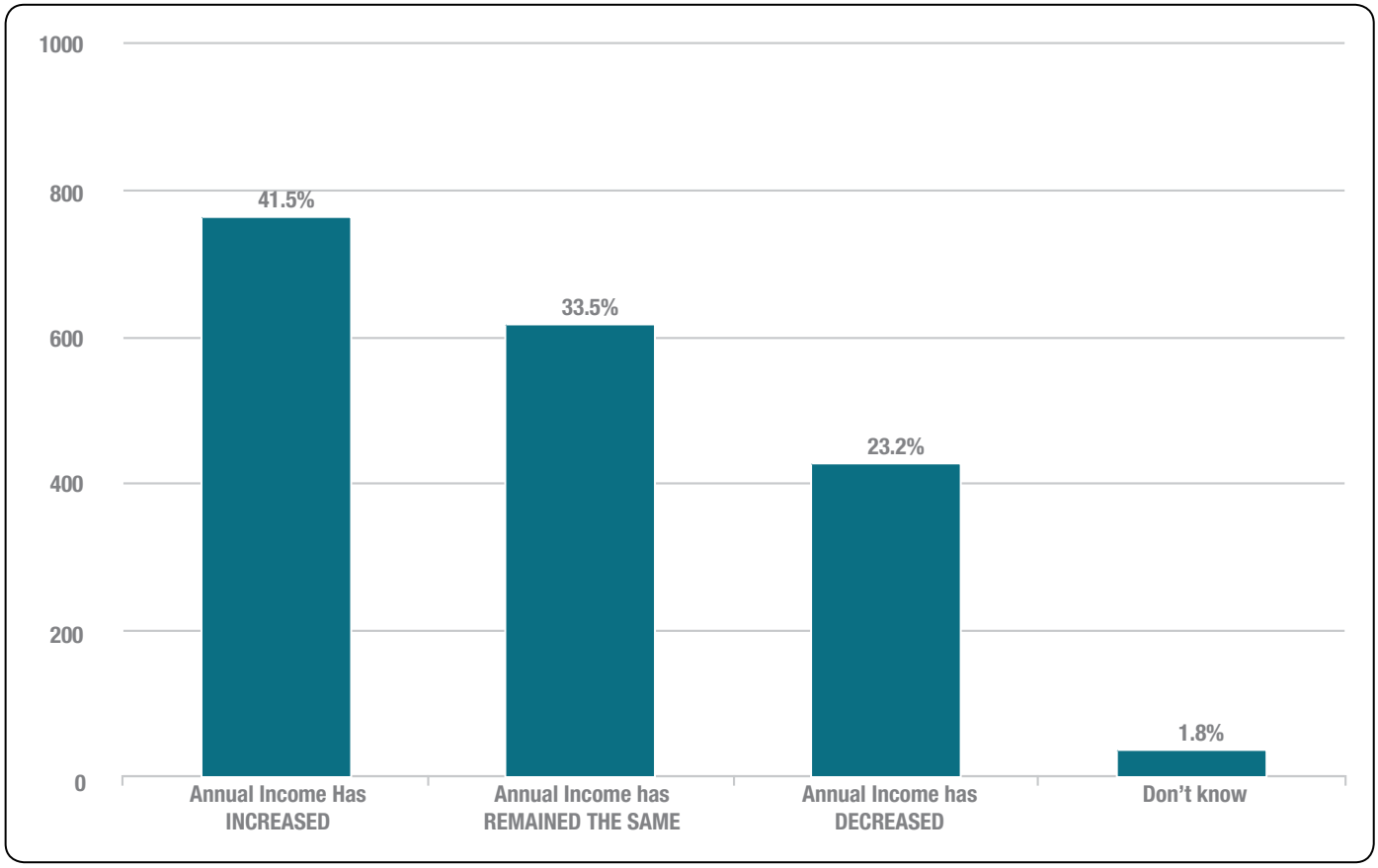
Housing: Type of Residence



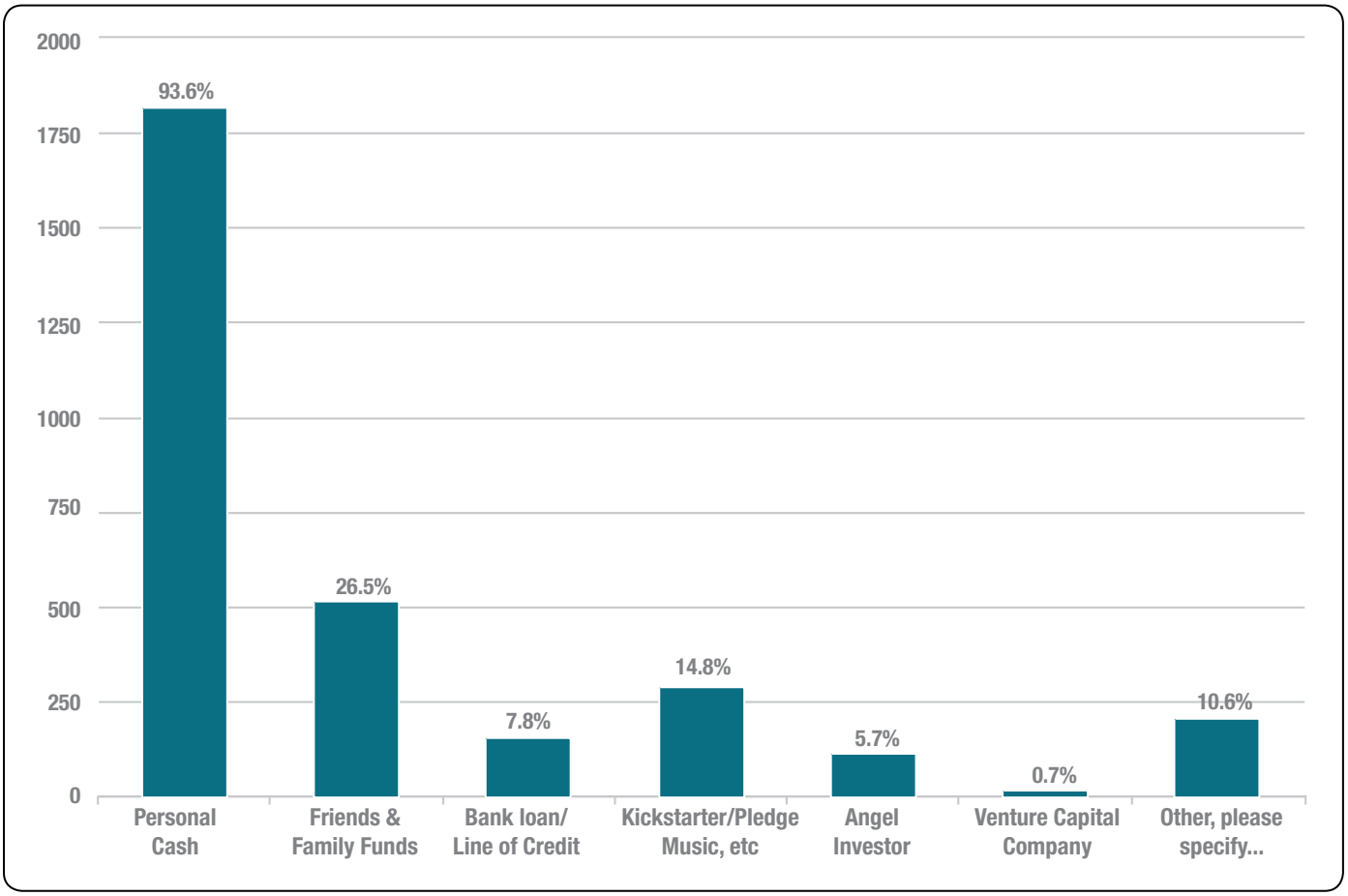
Number of Household Contributors to Rent or Mortgage



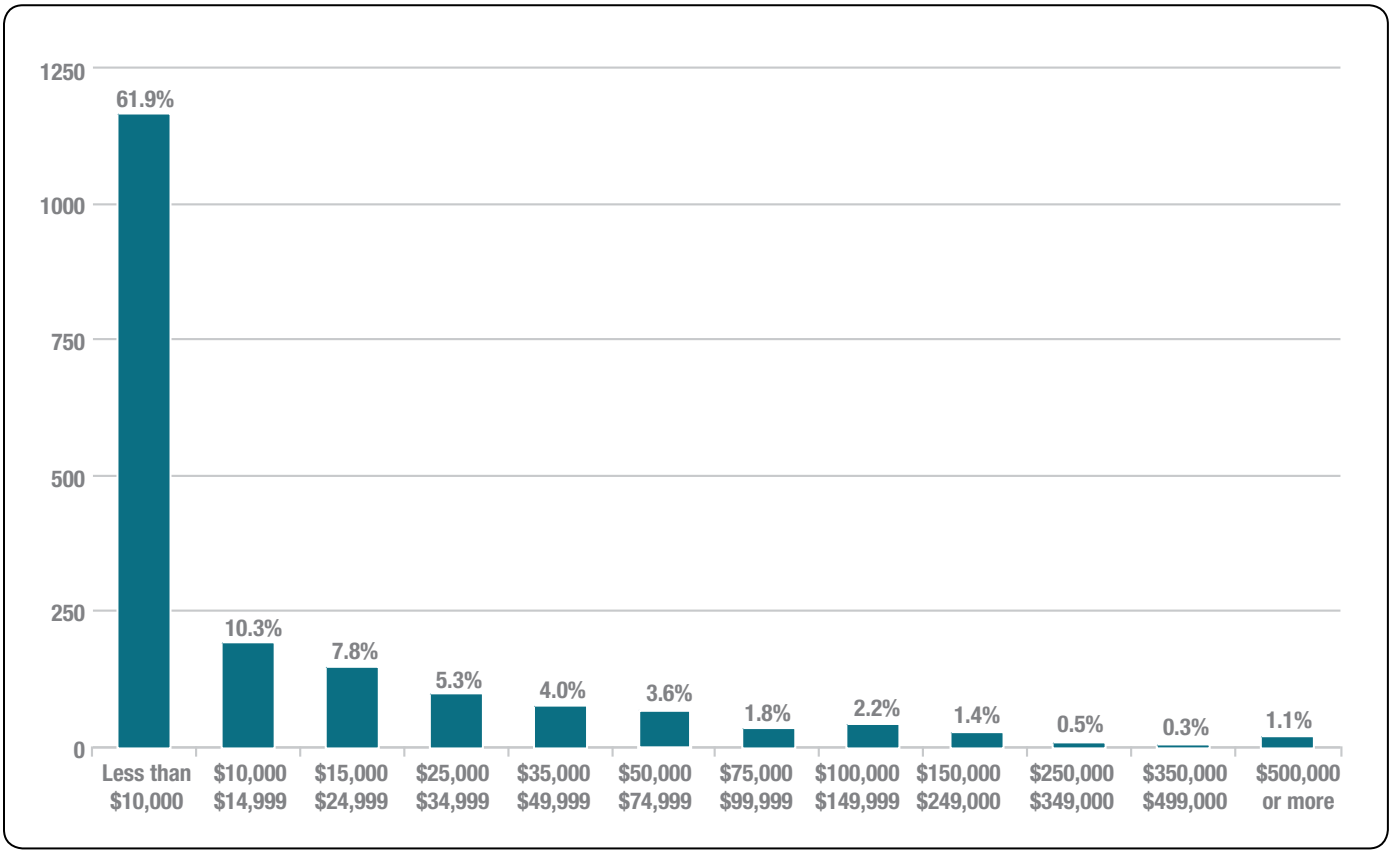
Prosperity Trends: Individual Income Increase/Decrease Over Past 3 Years



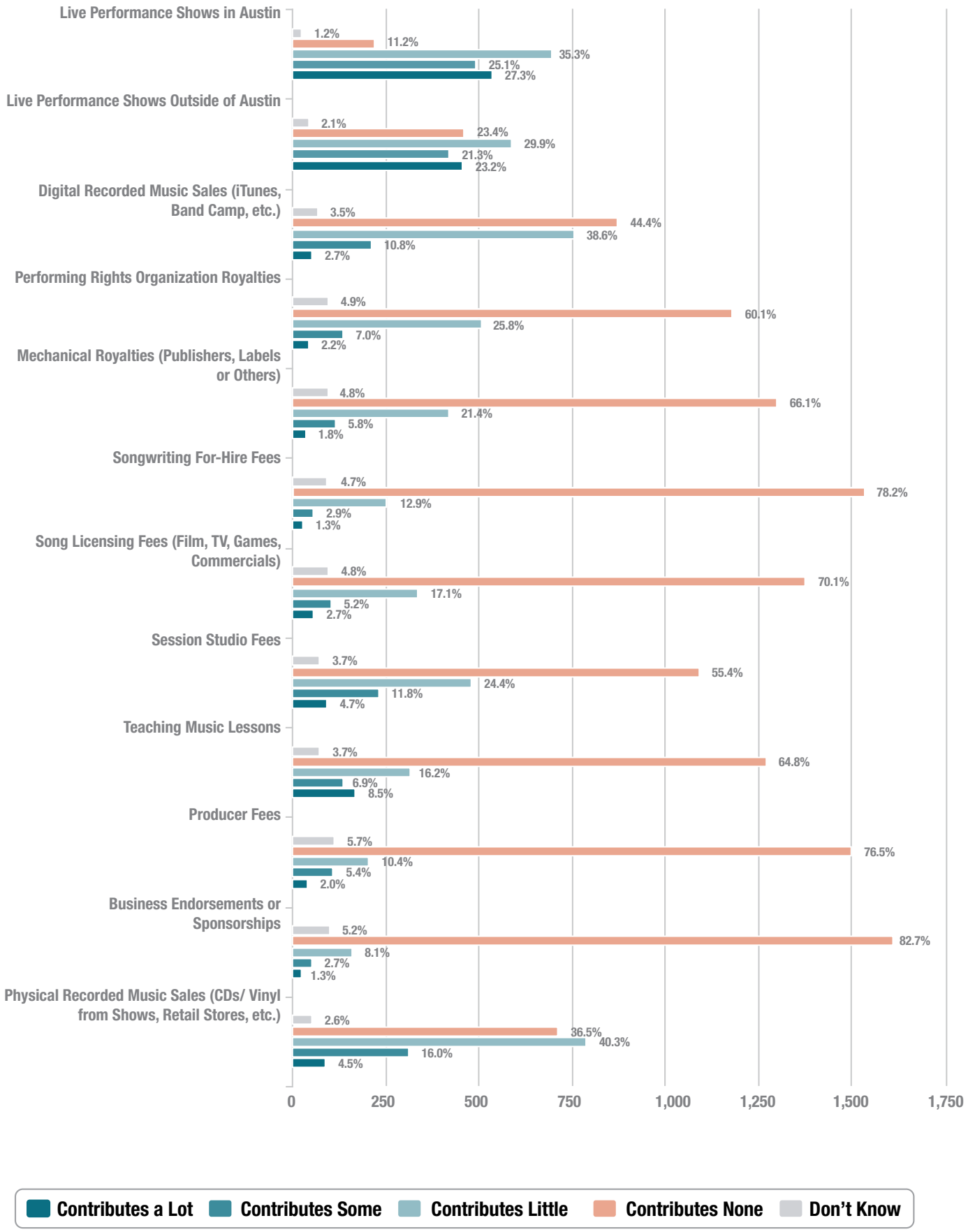
Band Launch and Growth Financing



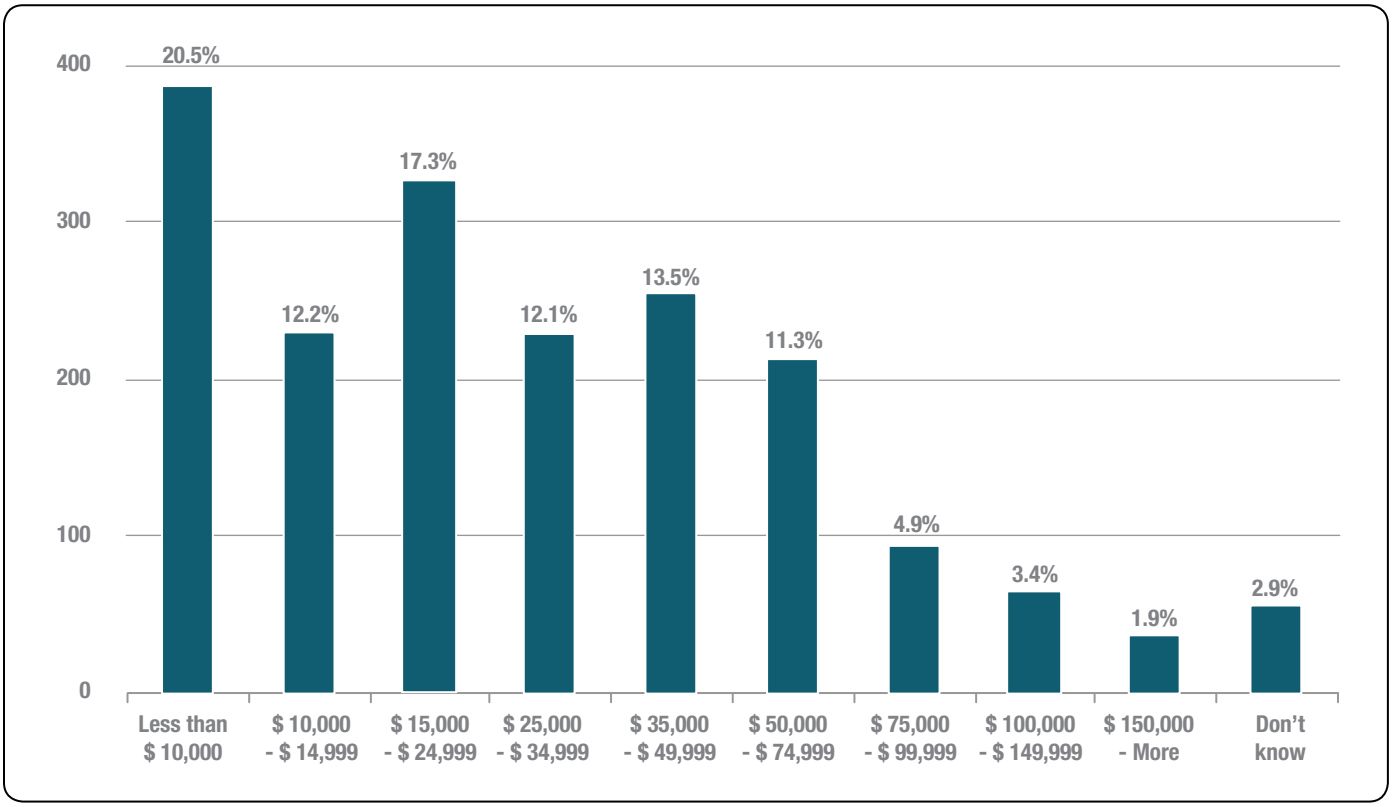
2013 Band Gross Income



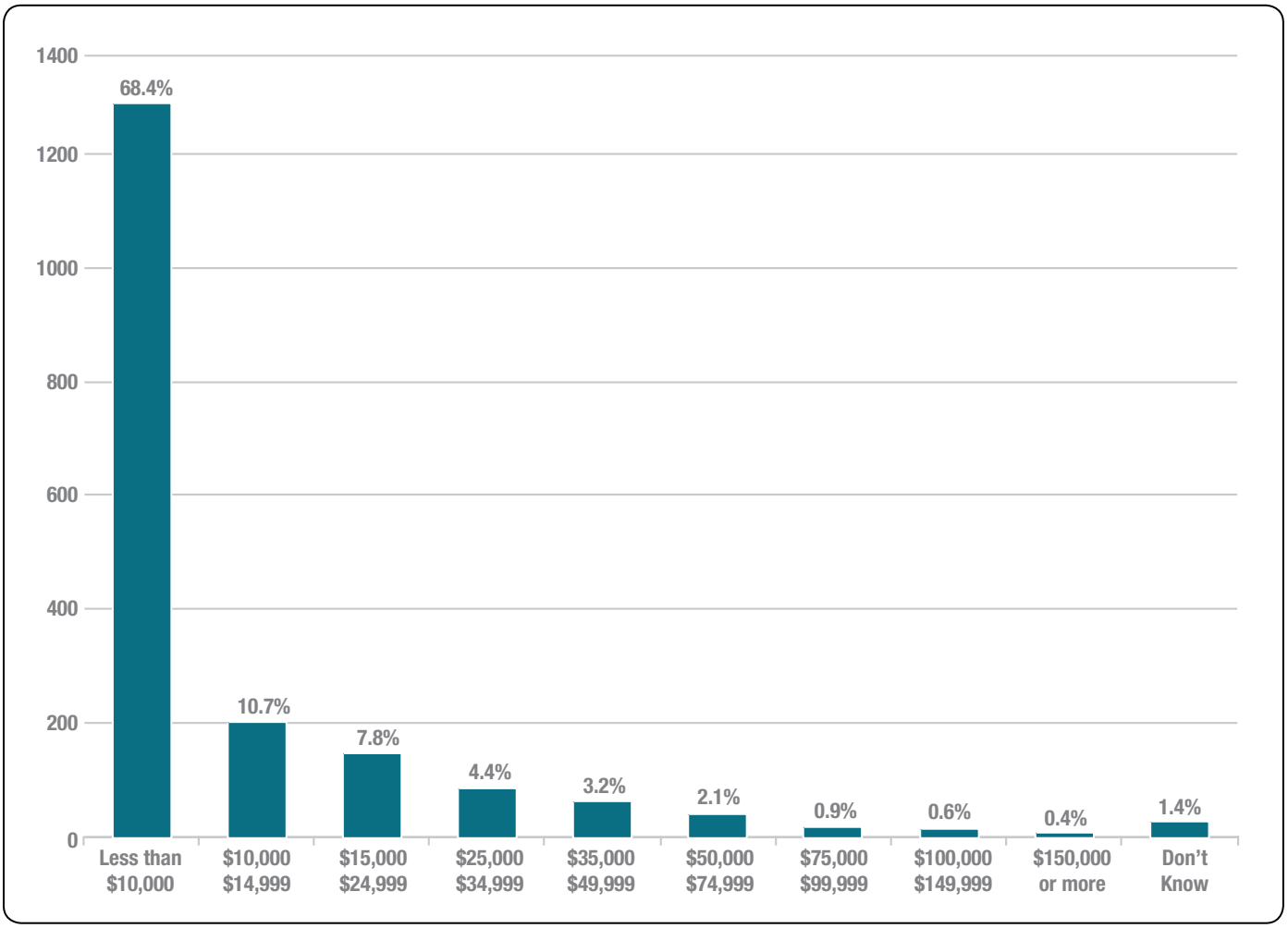
Revenue Contribution by Activity Type



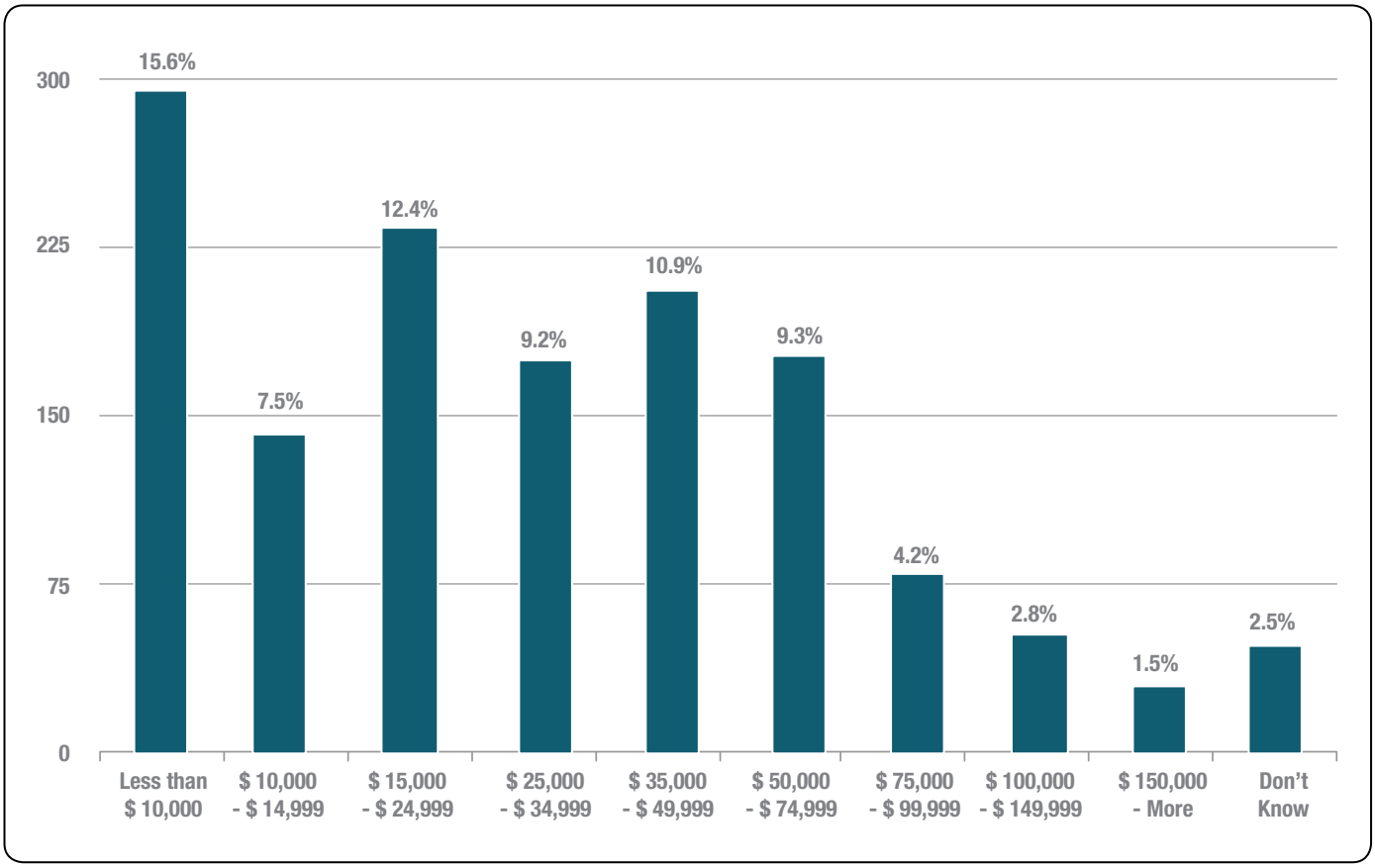
2013 Pre-Tax Individual Income (All Musicians, All Income Sources)



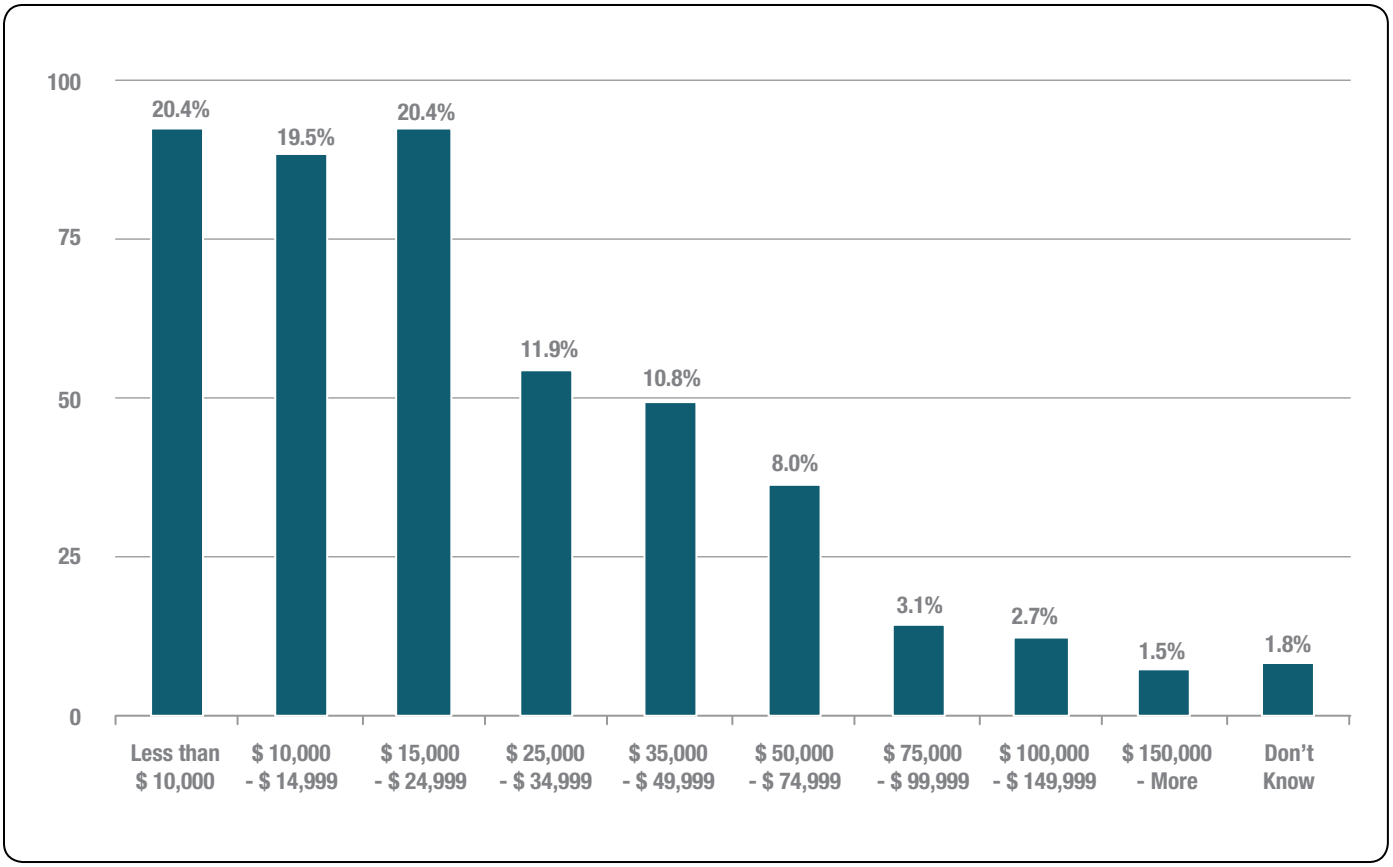
2013 Pre-Tax Individual Income (All Musicians, Music Industry Income Only)



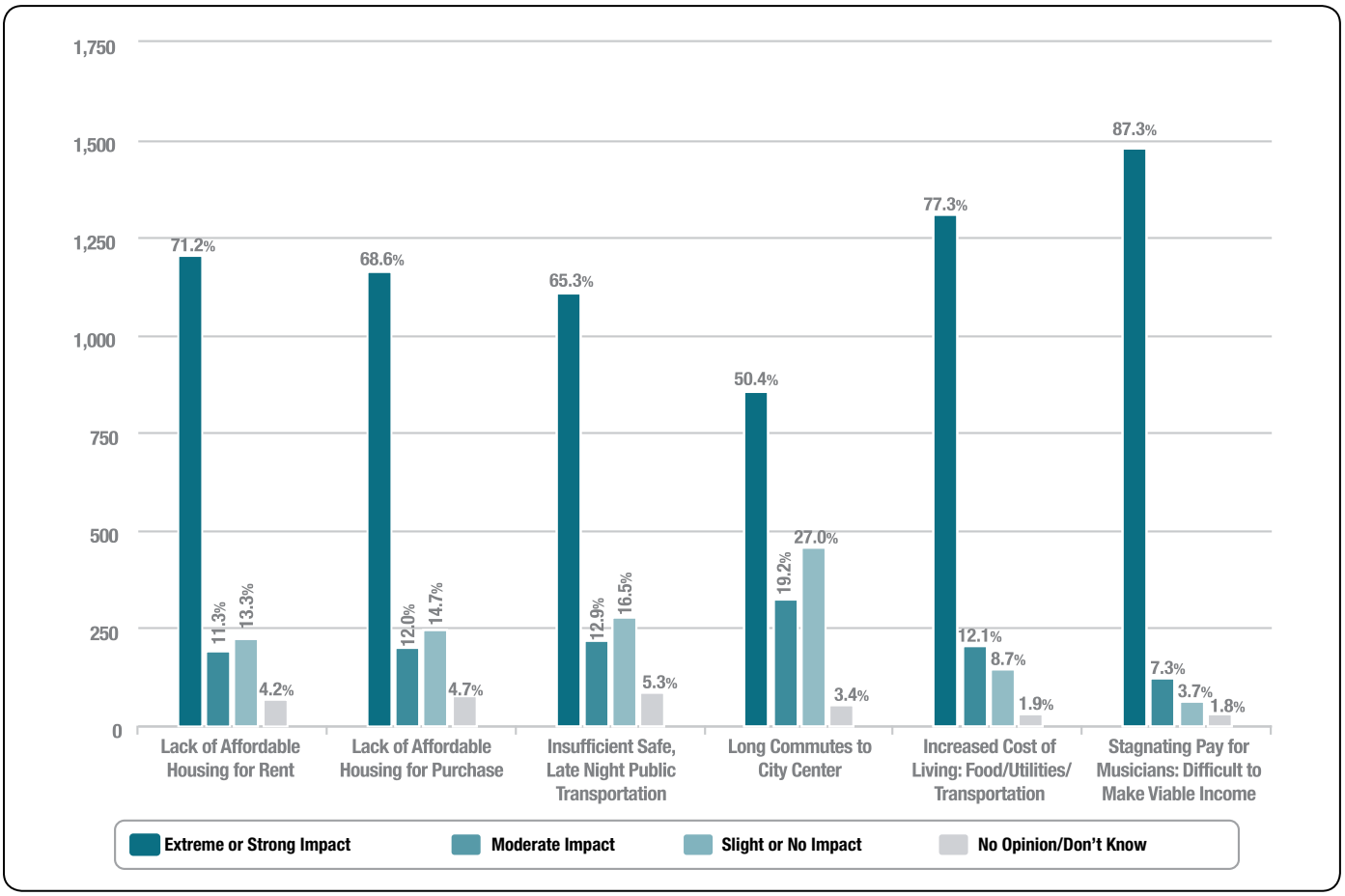
2013 Pre-Tax Individual Income (Only Musicians w/ Music Industry + Augmented Income)



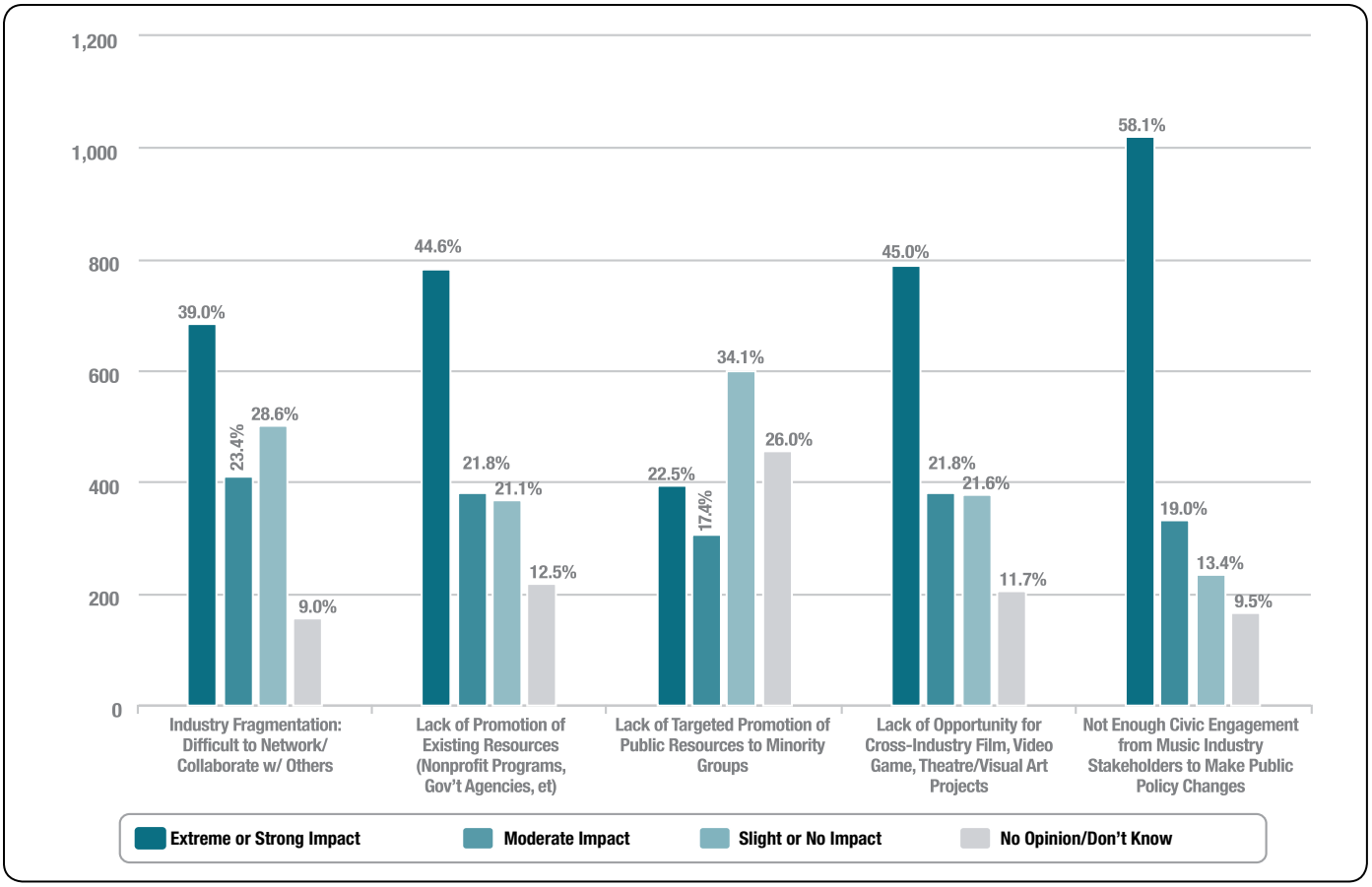
2013 Pre-Tax Individual Income (Only Musicians w/ 100% Income from Music Industry)



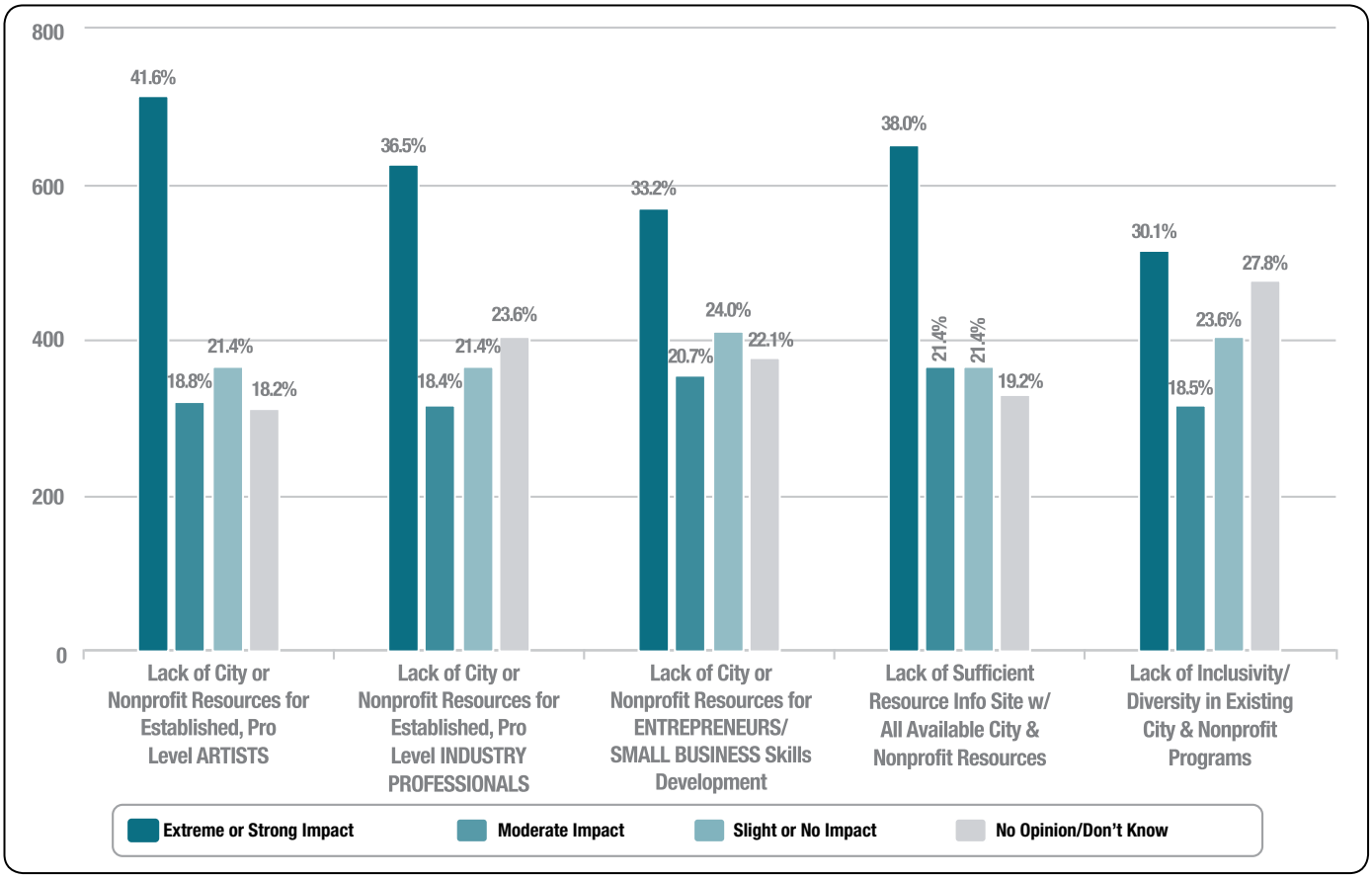
Needs and Gaps Category: LIVING AND AFFORDABILITY



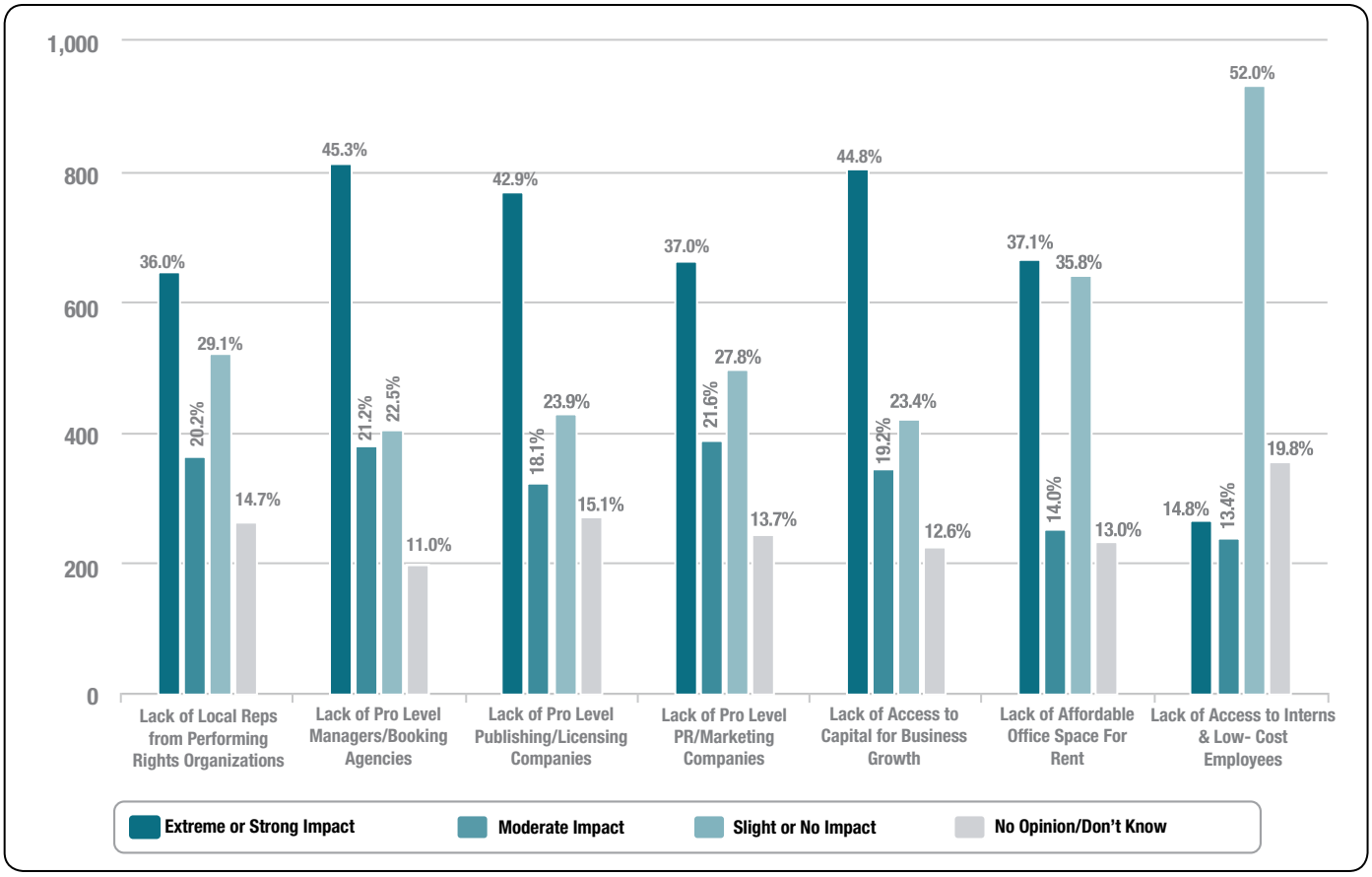
Needs and Gaps Category: CONNECTIVITY AND COLLABORATION



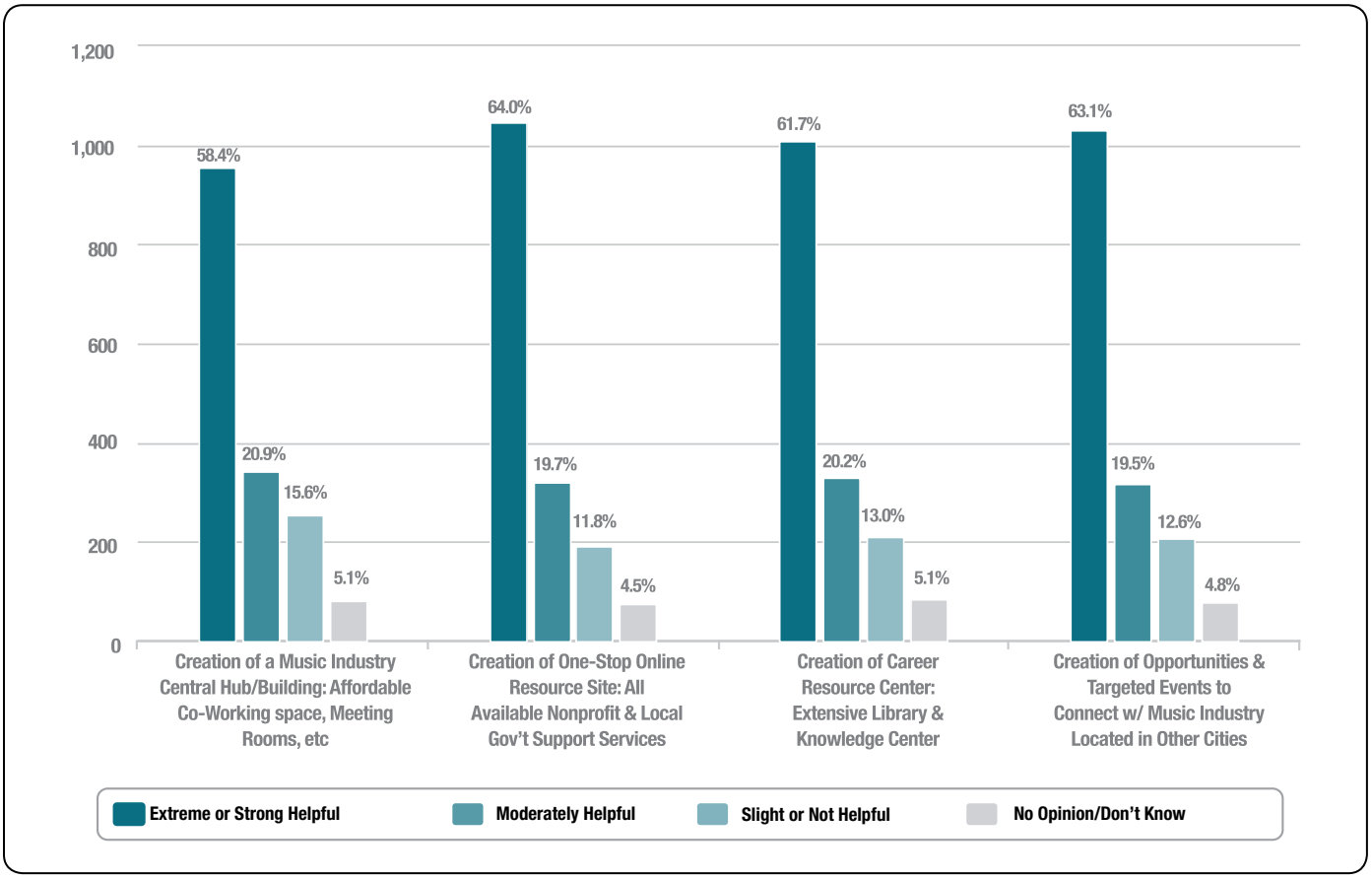
Needs and Gaps Category: PROFESSIONAL EDUCATION AND SKILLS DEVELOPMENT



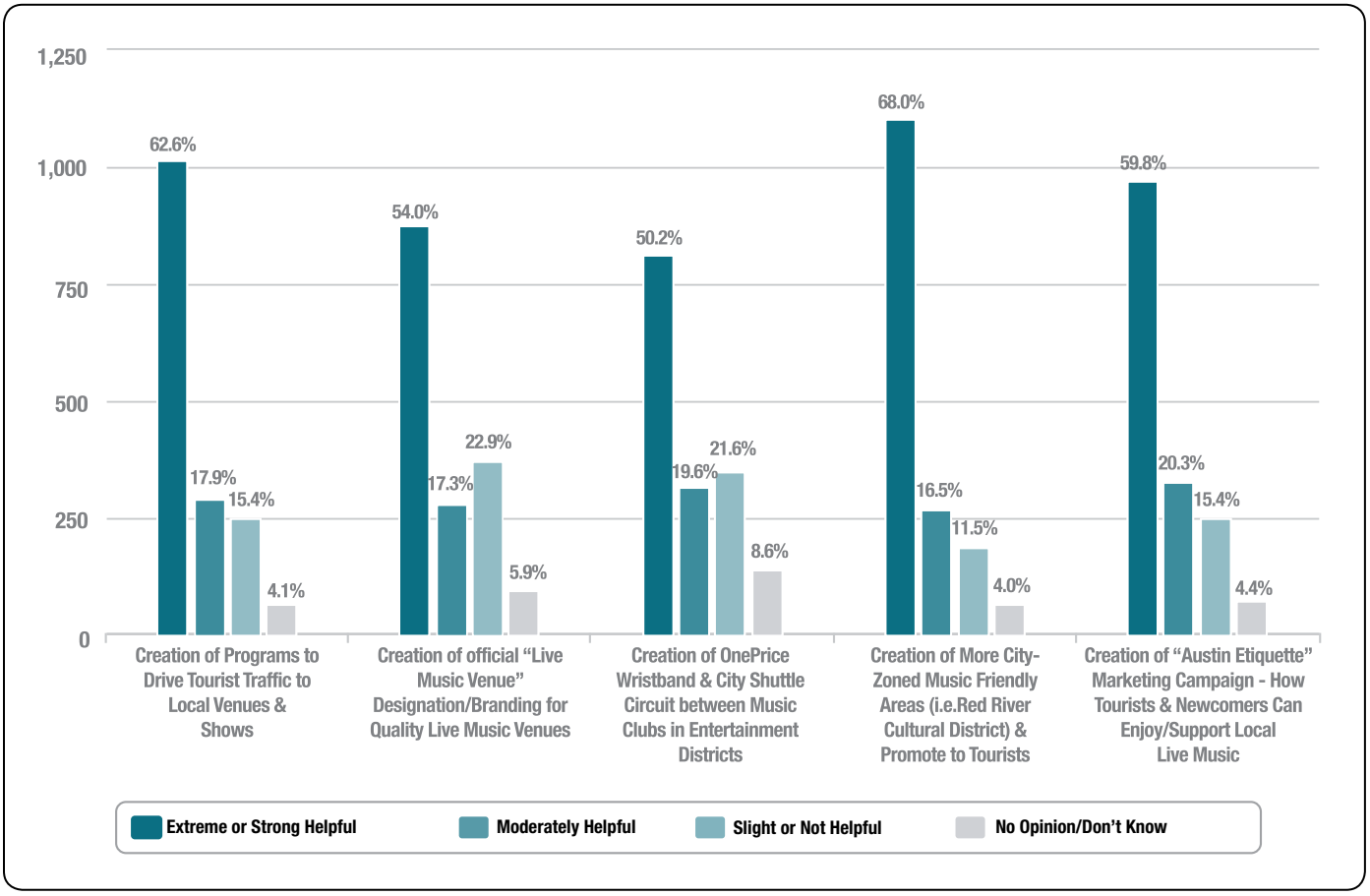
Needs and Gaps Category: INDUSTRY RESOURCES



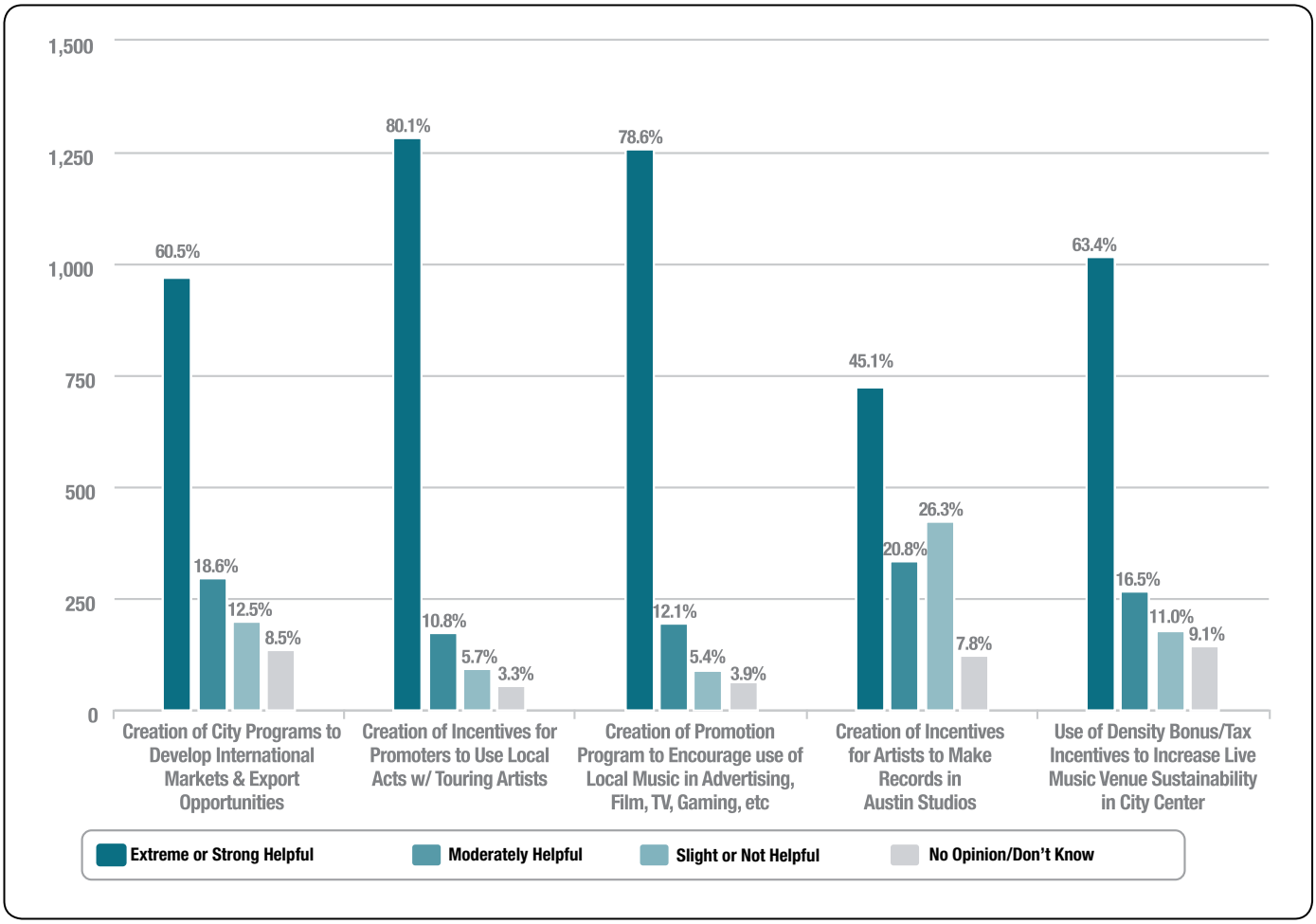
Ideas and Proposals Category: CAREER DEVELOPMENT AND CONNECTIVITY



Ideas and Proposals Category: TOURISM AND MARKET DEVELOPMENT



Ideas and Proposals Category: CITY PROGRAMS



Appendix V
Music Industry-Only Respondent Data Chart List

CHARTS APPEAR IN THIS SEQUENCE:

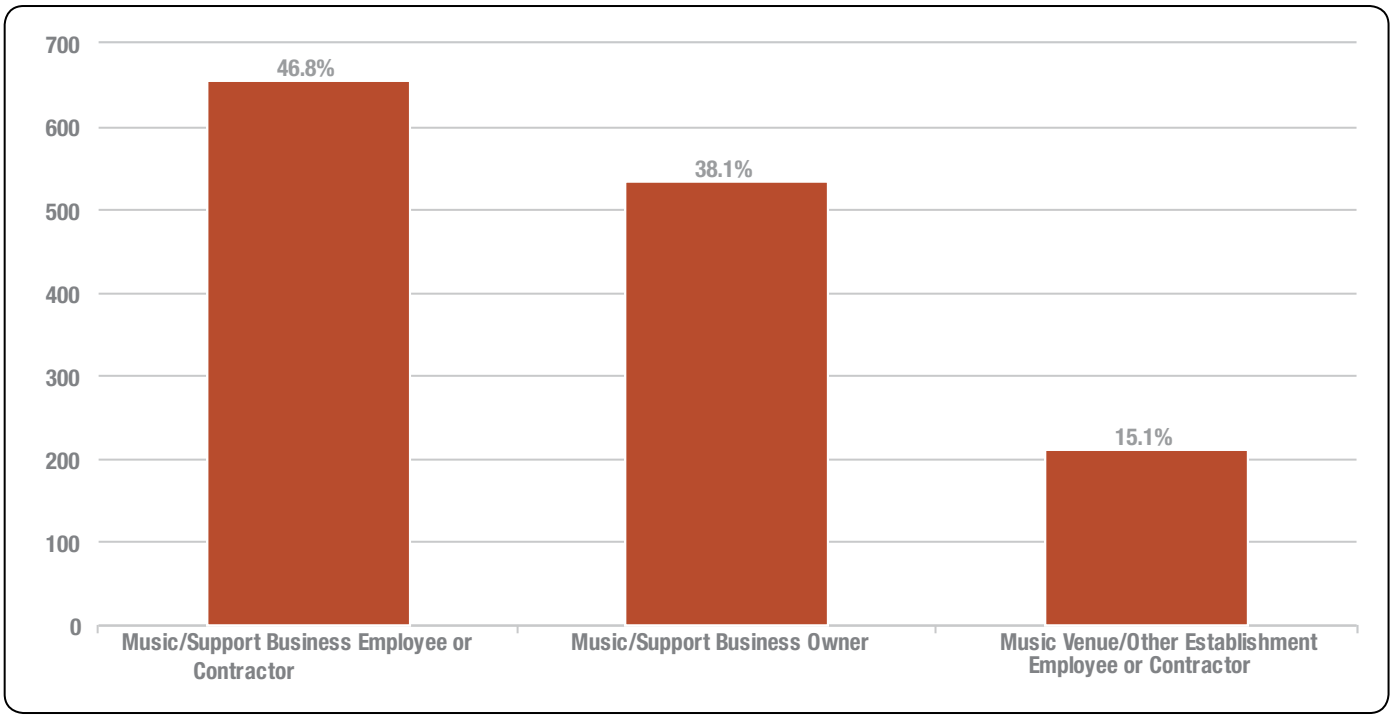
Type of Employment
Music Industry Subsector Breakdown
Areas of Experience and Expertise
Current Means of Employment
Number of Years Working in Music Industry
Gender Breakdown
Age Breakdown
Race and Ethnicity
Number of Years Living in Austin
Health Care Coverage
Housing: Rent vs. Own
Housing: Type of Residence
Number of Household Contributors to Rent or Mortgage
Prosperity Trends: Individual Income Increase/Decrease Over Past 3 Years
Income by Industry SubSector
2013 Pre-Tax Individual Income (All Music Industry EMPLOYEES + OWNERS w/ 100% Income from Music Industry)
2013 Pre-Tax Individual Income (All Music Industry EMPLOYEES + OWNERS, All Income Sources)
2013 Pre-Tax Individual Income (All Industry EMPLOYEES, All Income Sources)
2013 Pre-Tax Individual Income (All Industry EMPLOYEES, Music Industry Income Only)
2013 Pre-Tax Individual Income (Only Industry EMPLOYEES w/ Music Industry + Augmented Income)
2013 Pre-Tax Individual Income (Only Industry EMPLOYEES w/ 100% Income from Music Industry)
Needs and Gaps Category: LIVING AND AFFORDABILITY
Needs and Gaps Category: CONNECTIVITY AND COLLABORATION
Needs and Gaps Category: PROFESSIONAL EDUCATION AND SKILLS DEVELOPMENT
Needs and Gaps Category: INDUSTRY RESOURCES
Ideas and Proposals Category: CAREER DEVELOPMENT AND CONNECTIVITY
Ideas and Proposals Category: TOURISM AND MARKET DEVELOPMENT
Ideas and Proposals Category: CITY PROGRAMS

Appendix V

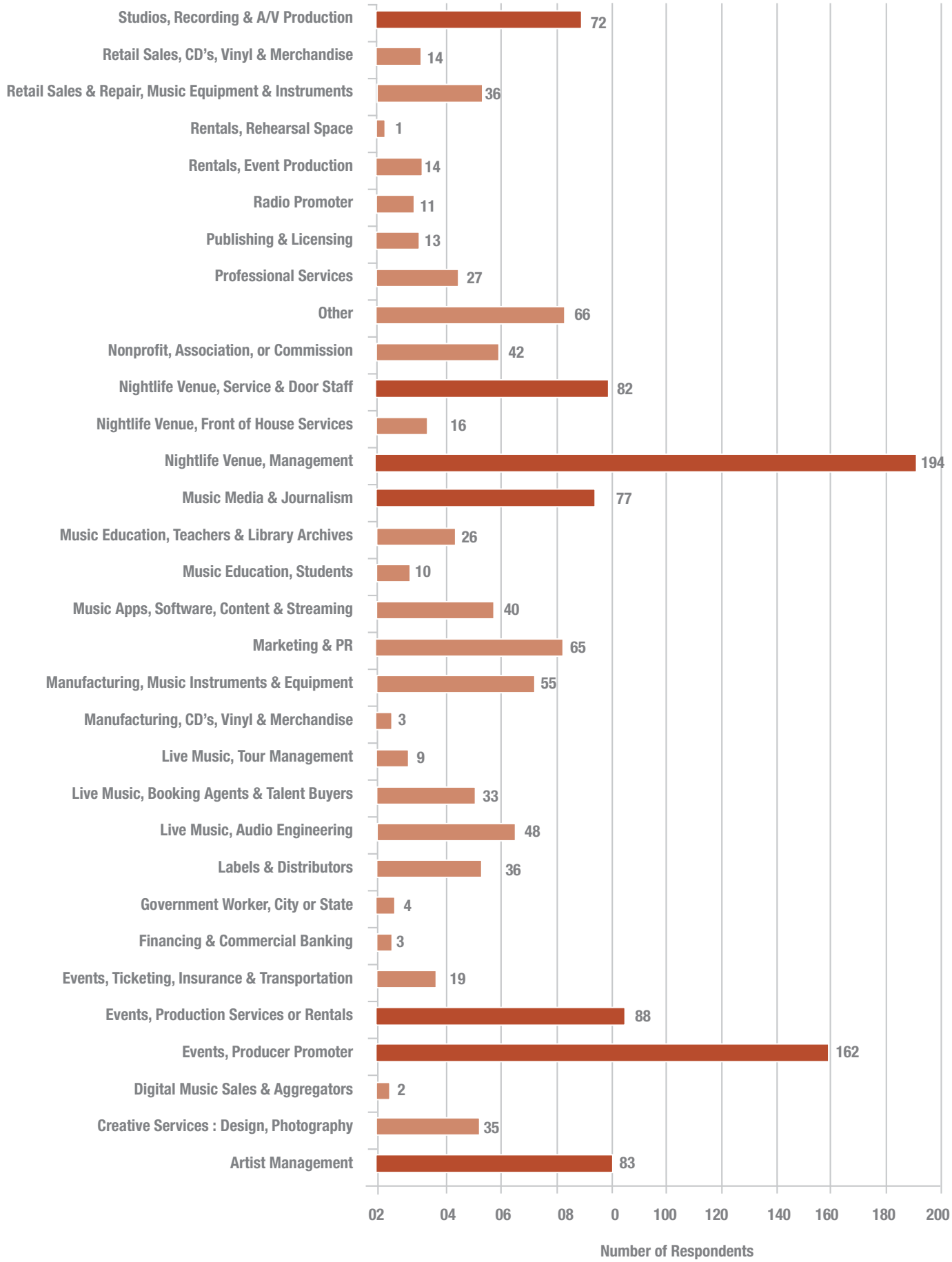
Music Industry-Only Respondent Data Charts

TOTAL RESPONSES	COMPLETED RESPONSES	COMPLETION RATE
1,401	925	66%

Type of Employment



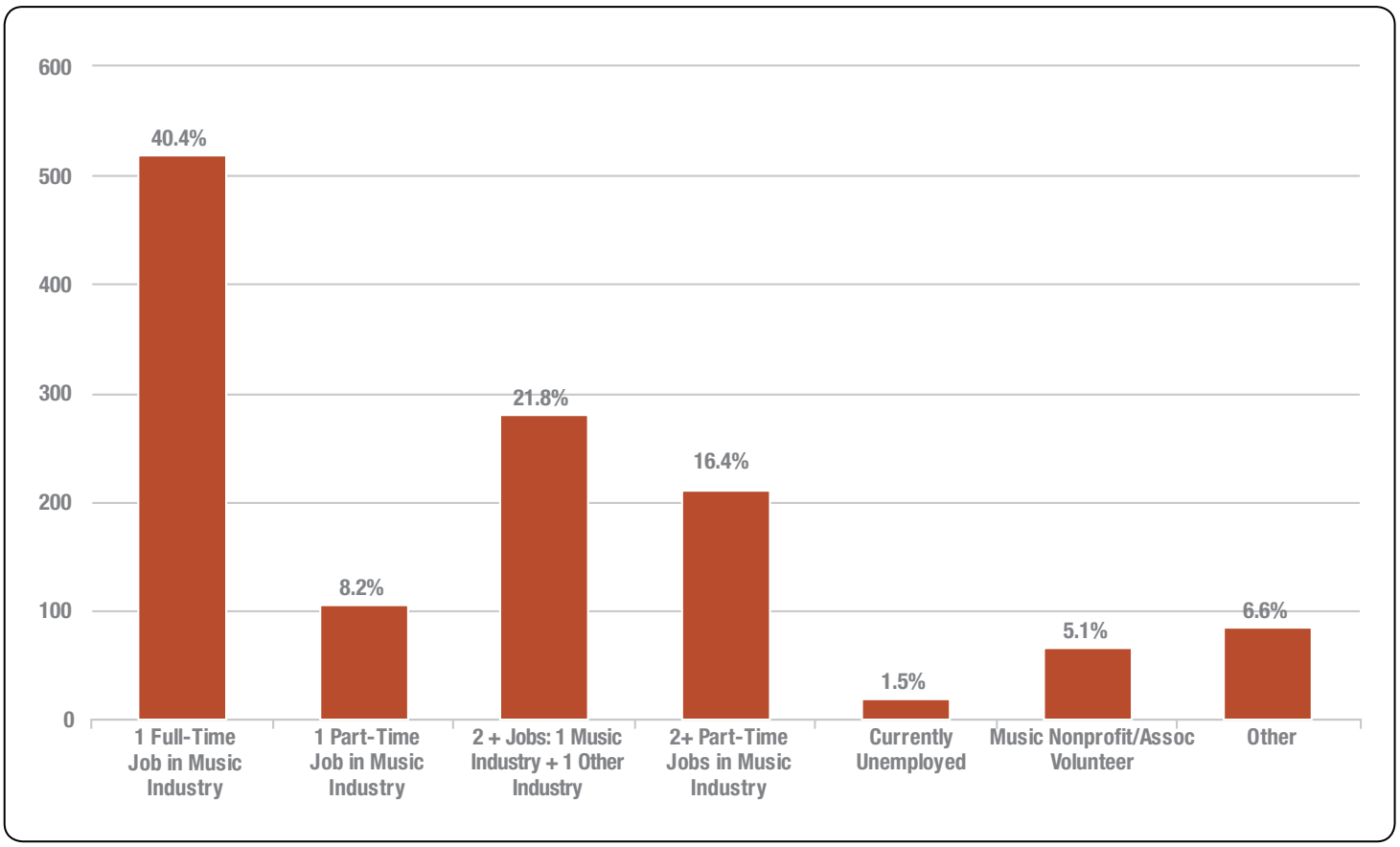
Music Industry Subsector Breakdown



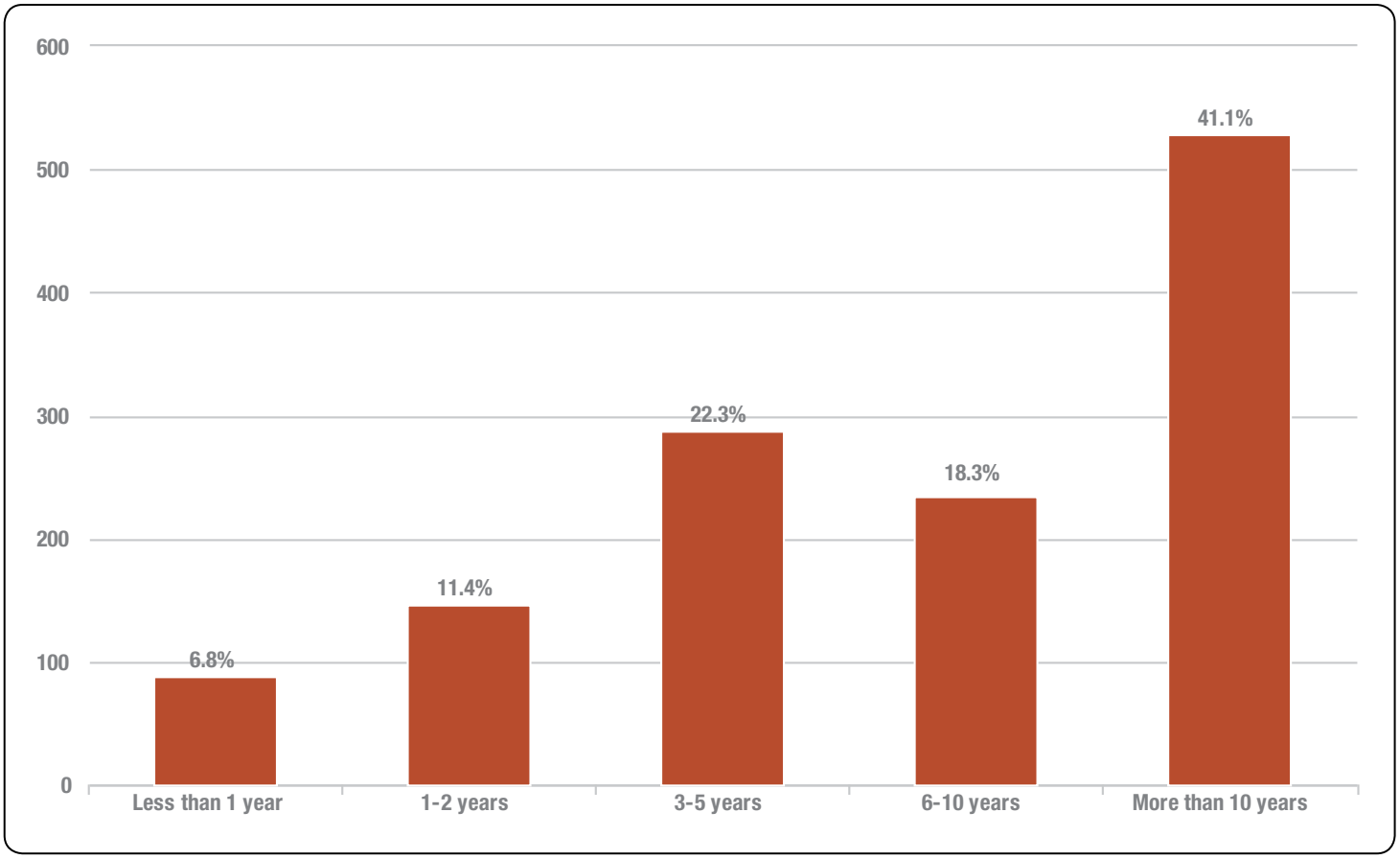
Areas of Experience and Expertise

Response	Count	
Accounting	114	9.7%
Audio Engineering	267	22.7%
Advocacy/Lobbying	82	7.0%
Audio Mastering	102	8.7%
Digital Music Distribution	149	12.6%
Booking/Talent Buying	337	28.6%
Audio Mixing	249	21.1%
Digital Music Sales	95	8.1%
Event Promotion	575	48.8%
Event Production	632	53.7%
Distribution	100	8.5%
Film/TV Composer	63	5.3%
Manufacturing	48	4.1%
Graphic Design	161	13.7%
Financing or Venture Capital	38	3.2%
Marketing	493	41.9%
Music Education	125	10.6%
Music Arranger	88	7.5%
Media/Journalism	260	22.1%
Artist Management	363	30.8%
Music Legal Issues	74	6.3%
Nonprofit Services	190	16.1%
Music Publishing	105	8.9%
Music Licensing	117	9.9%
Music Licensing	117	9.9%
Post Production	145	12.3%
Radio Promotion	150	12.7%
Radio Production	92	7.8%
PR & Publicity	369	31.3%
Record Labels	193	16.4%
Social Media	429	36.4%
Retail Sales	155	13.2%
Record Production	166	14.1%
Software Development	37	3.1%
Ticketing	102	8.7%
Studio Management	119	10.1%
Artist/Songwriting or Composing	194	16.5%
Touring Logistics	213	18.1%
Web Design/Development	159	13.5%
Venue Management	222	18.8%
Artist/Live Performance	389	33.0%
Total:	1178	

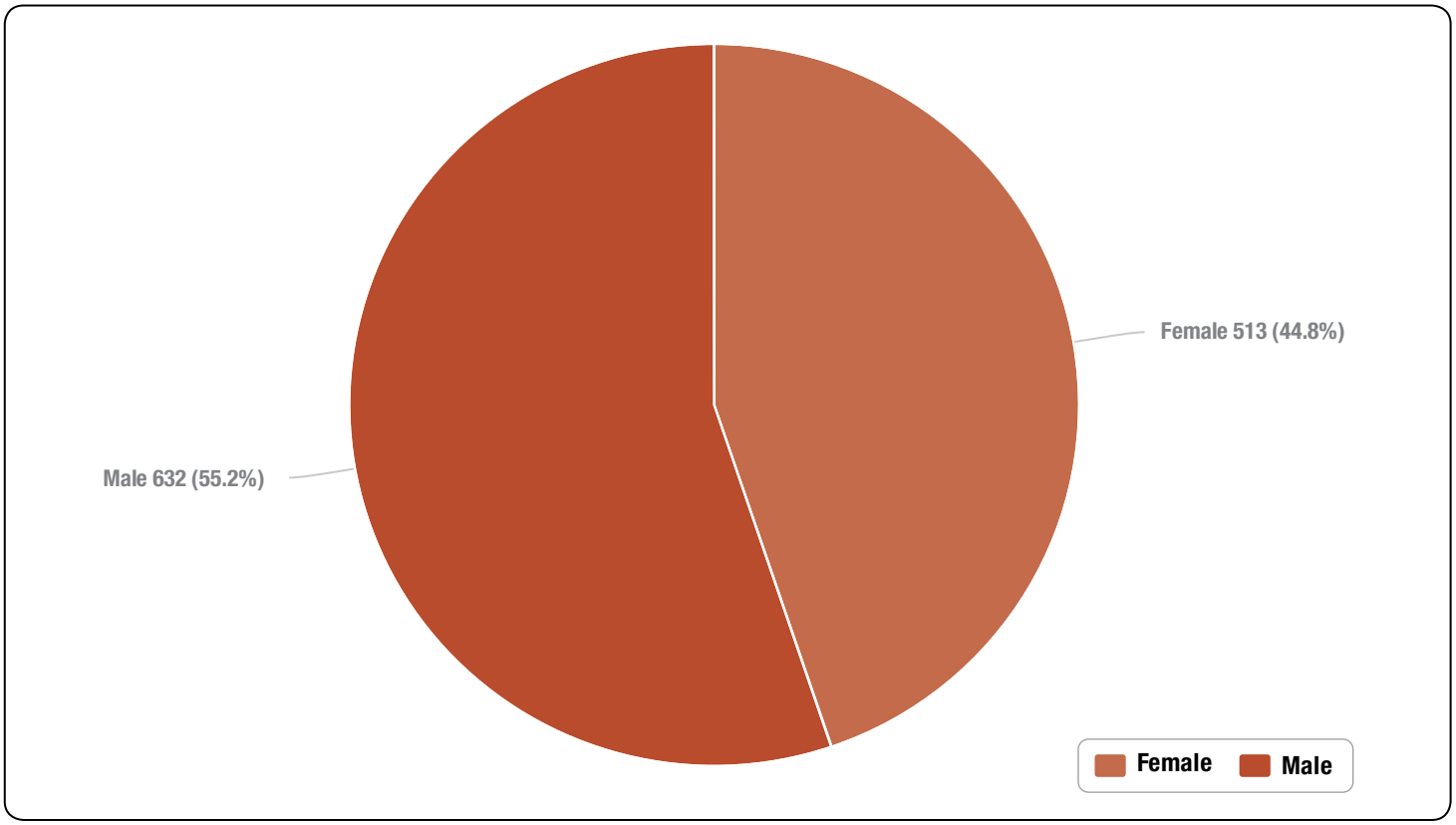
Current Means of Employment



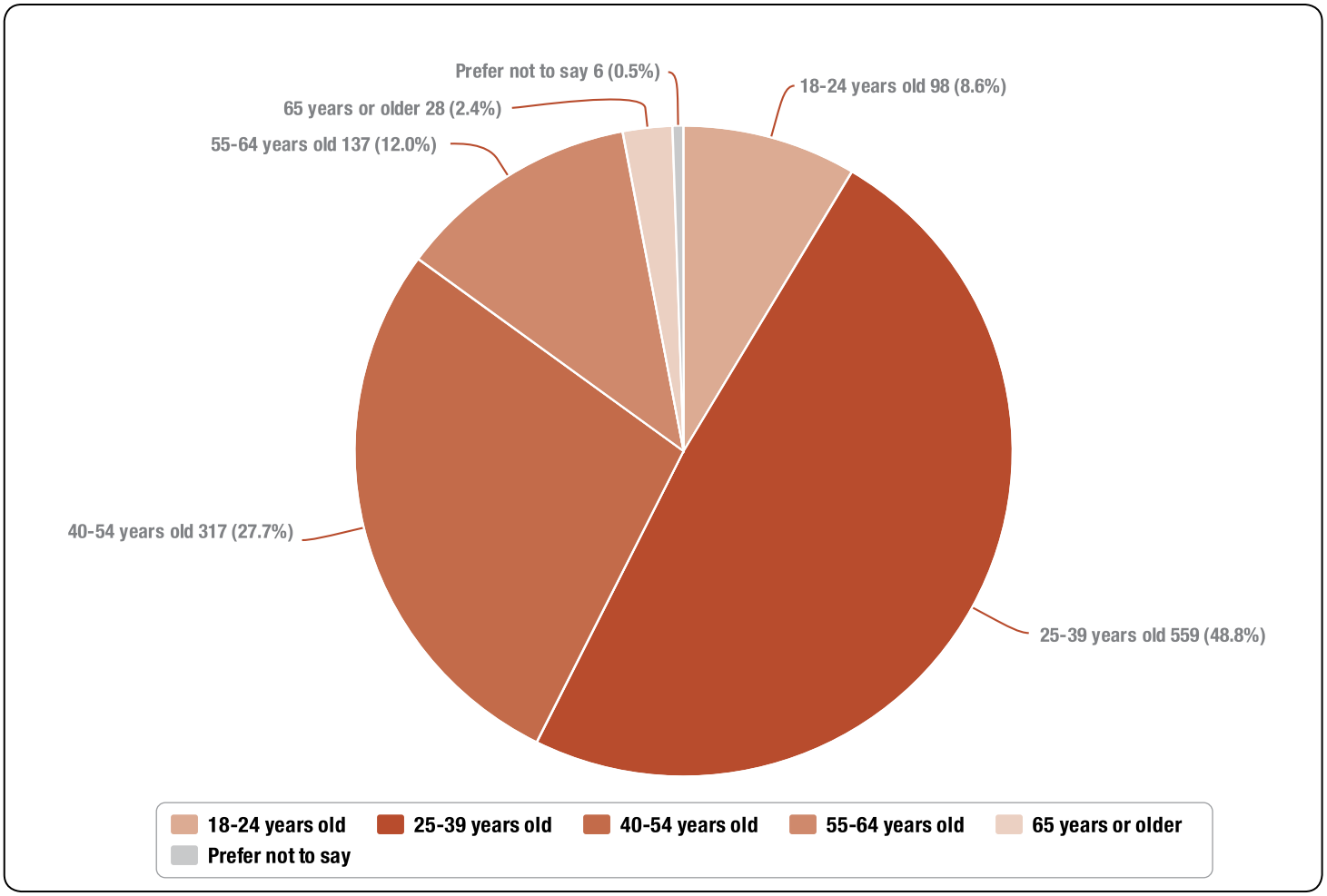
Number of Years Working in Music Industry



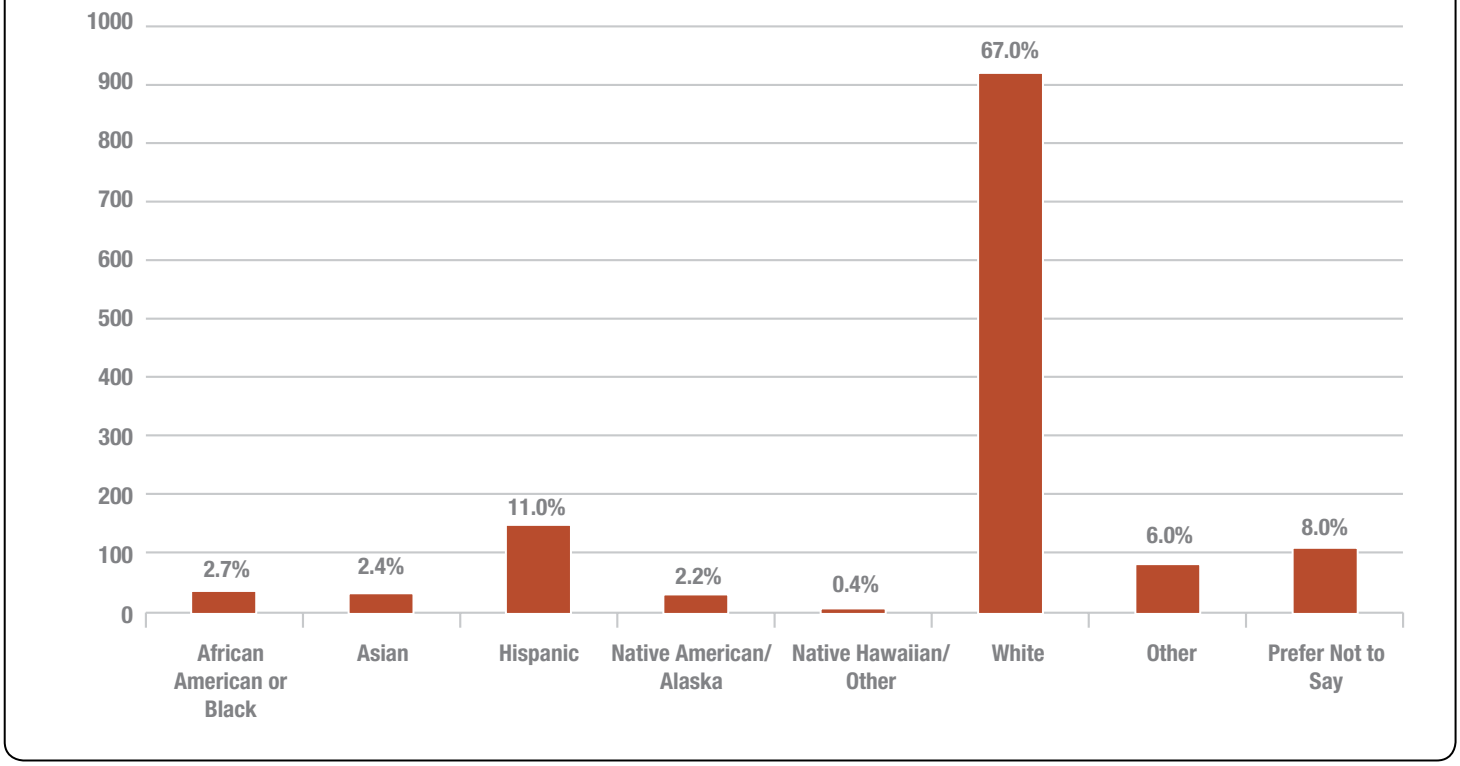
Gender Breakdown



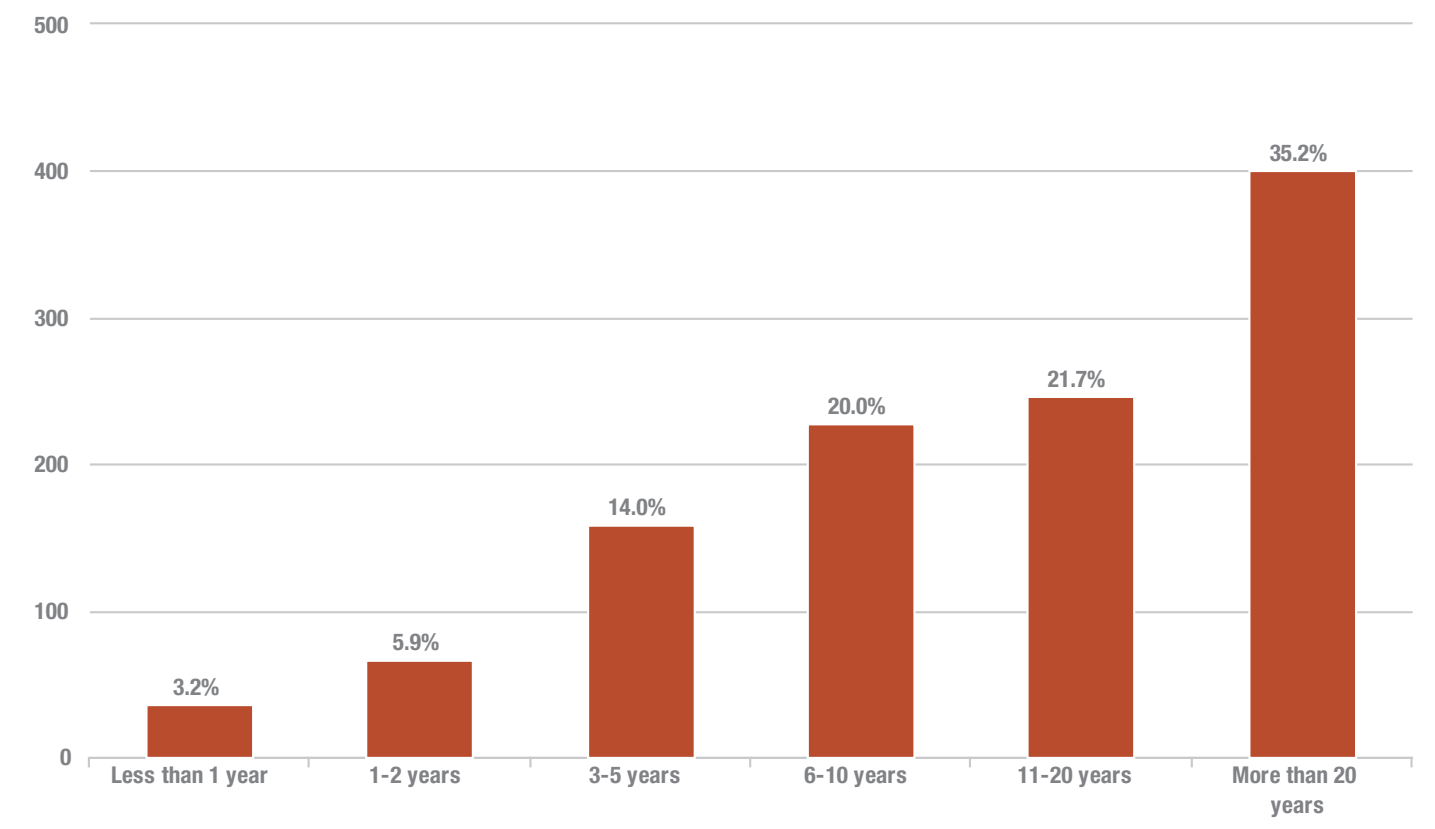
Age Breakdown



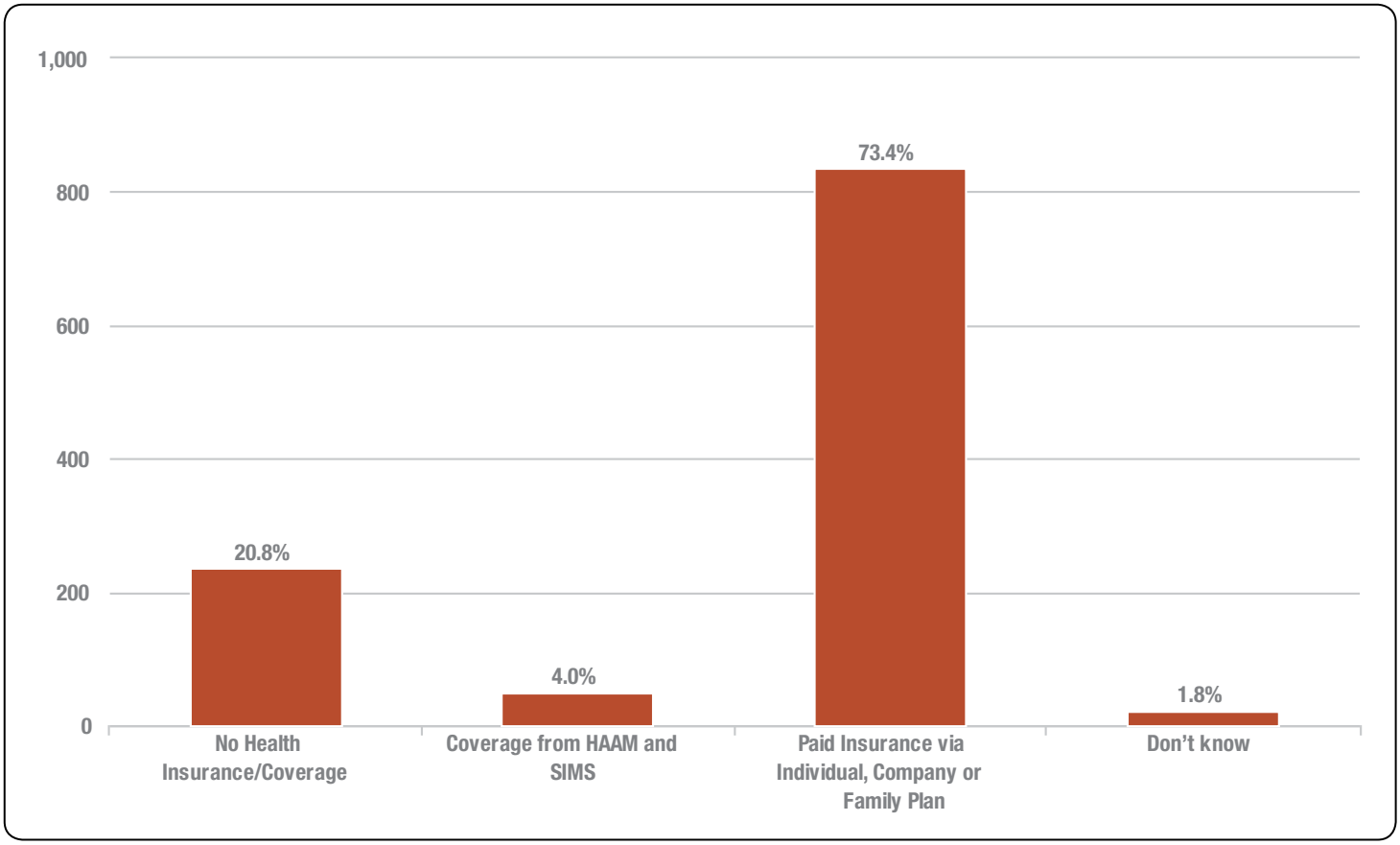
Race and Ethnicity



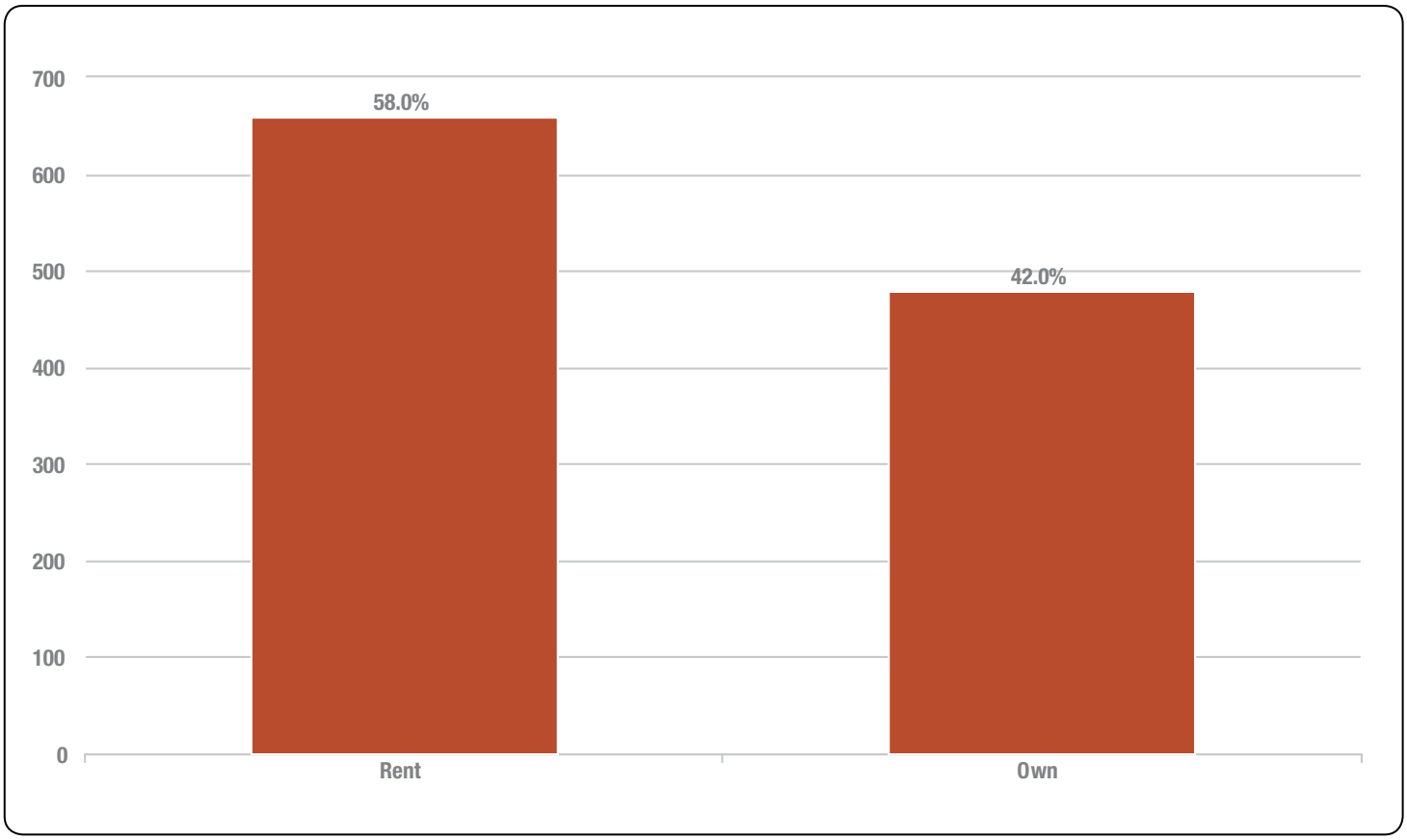
Number of Years Living in Austin



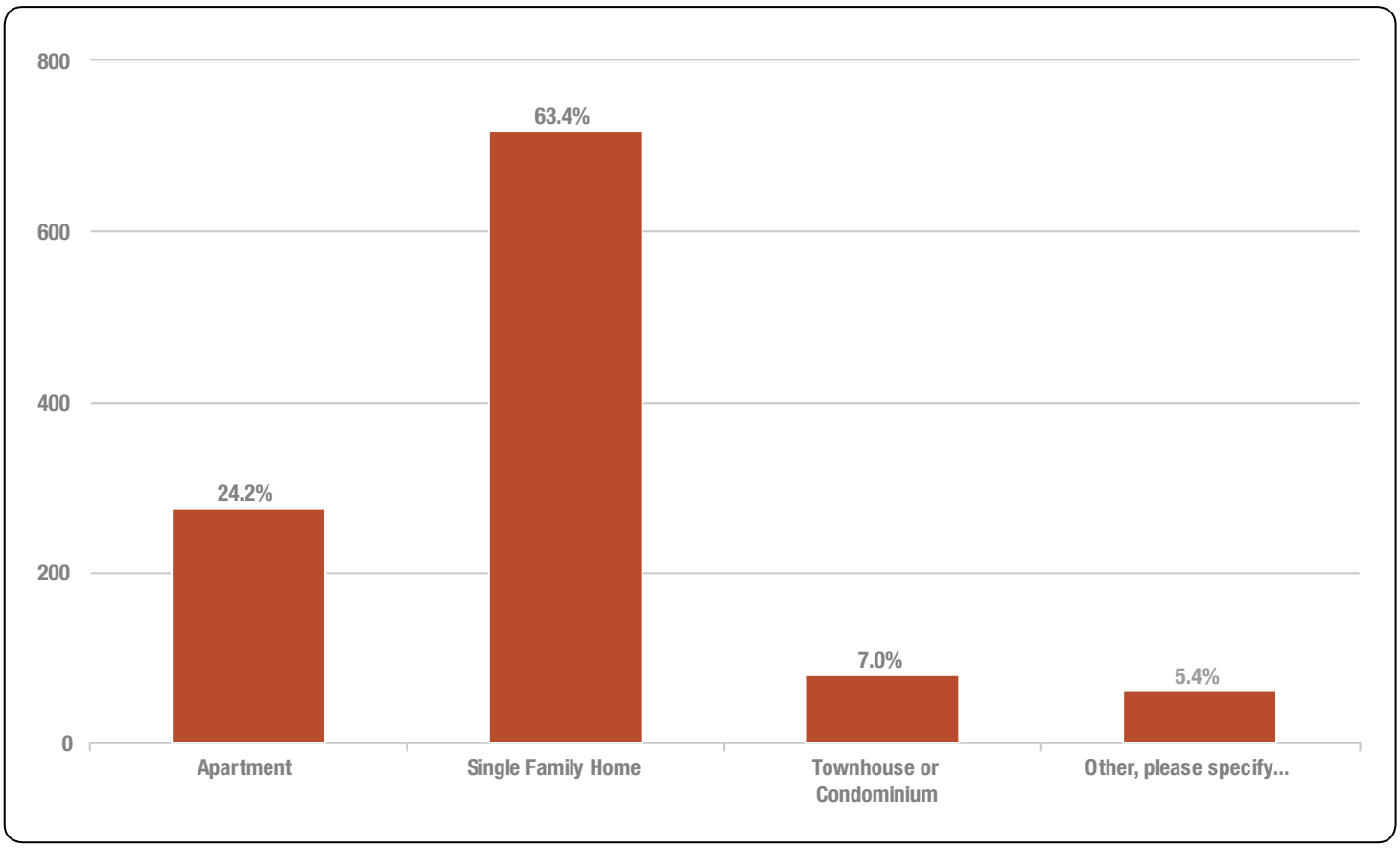
Health Care Coverage



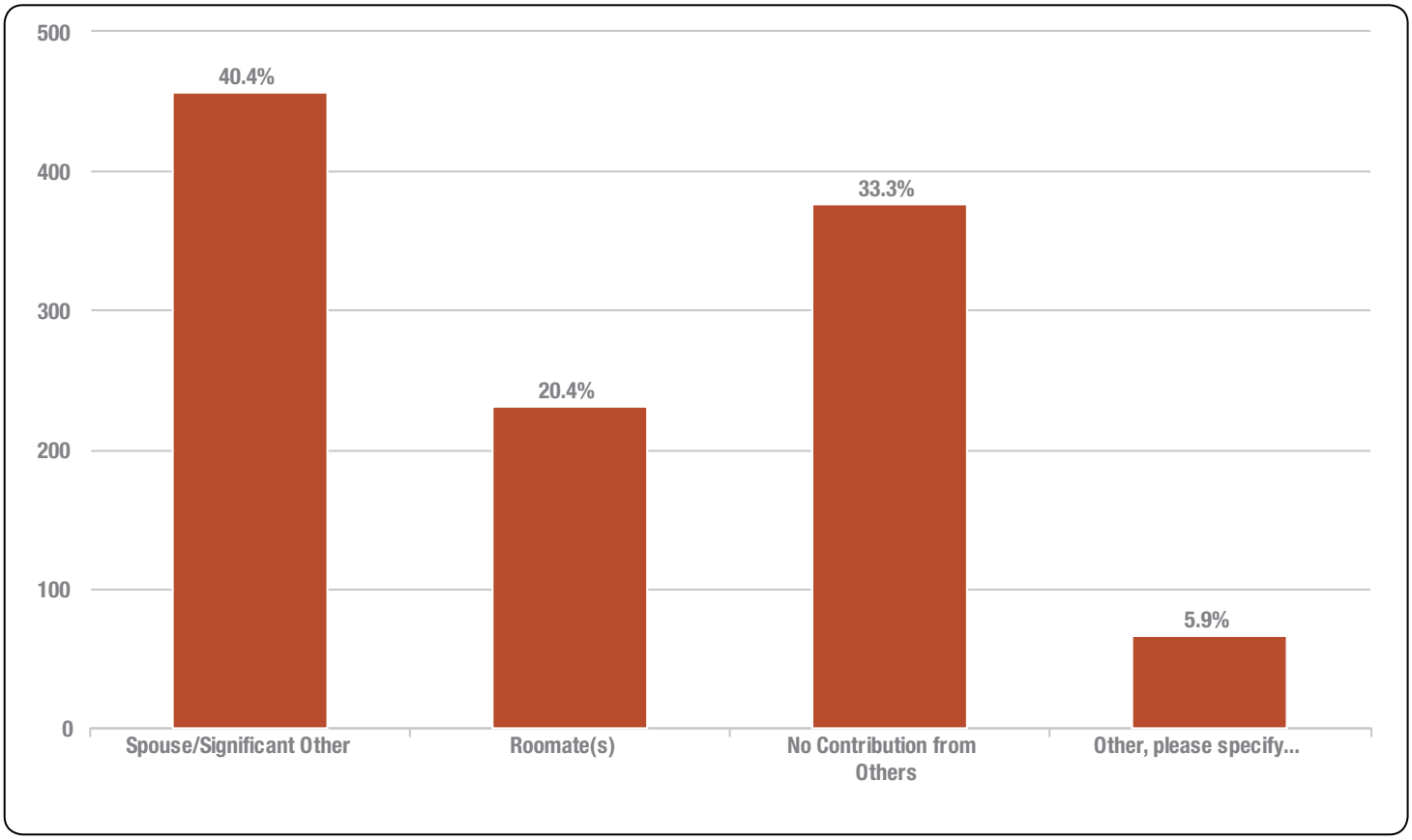
Housing: Rent vs. Own



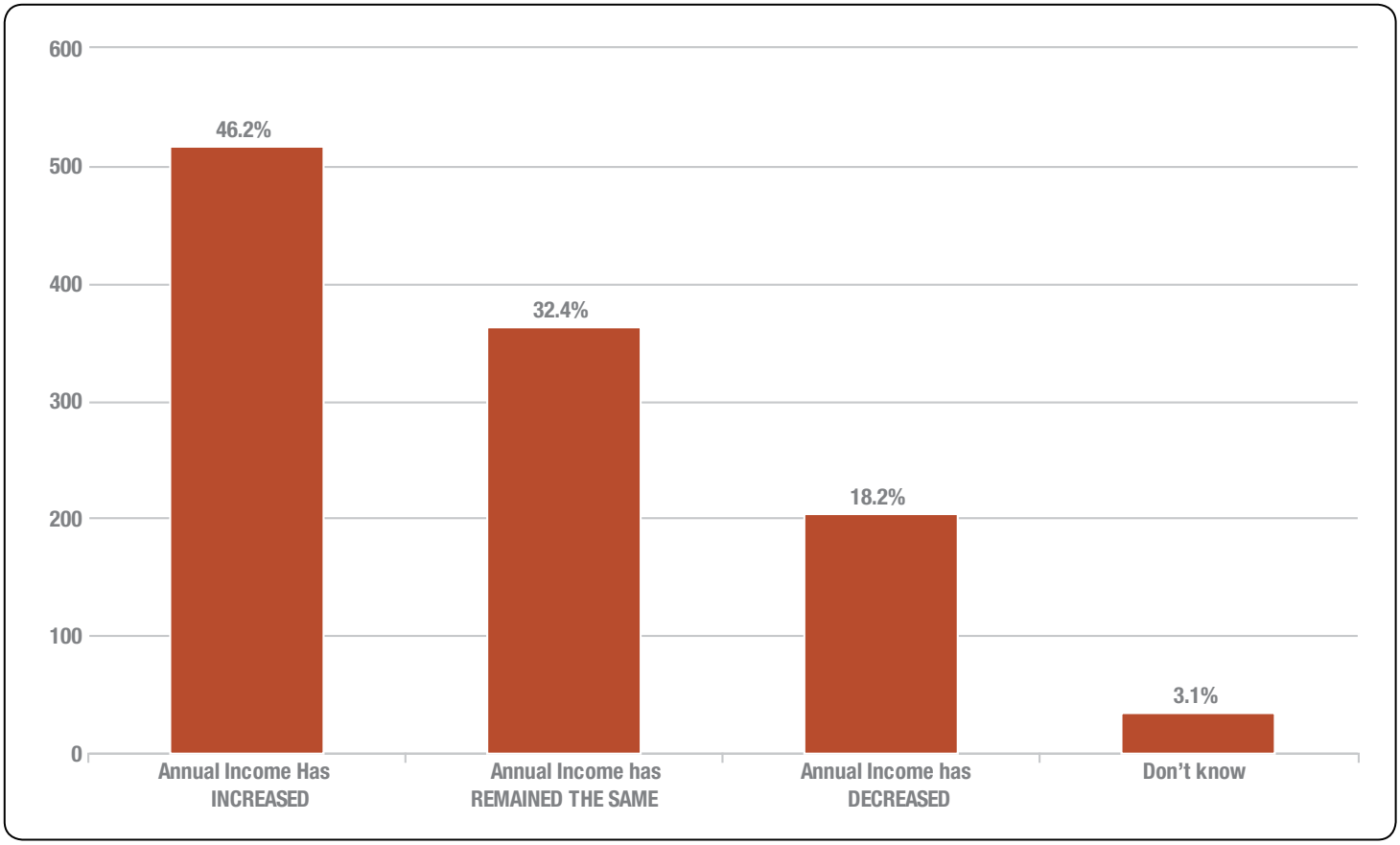
Housing: Type of Residence



Number of Household Contributors to Rent or Mortgage



Prosperity Trends: Individual Income Increase/Decrease Over Past 3 Years



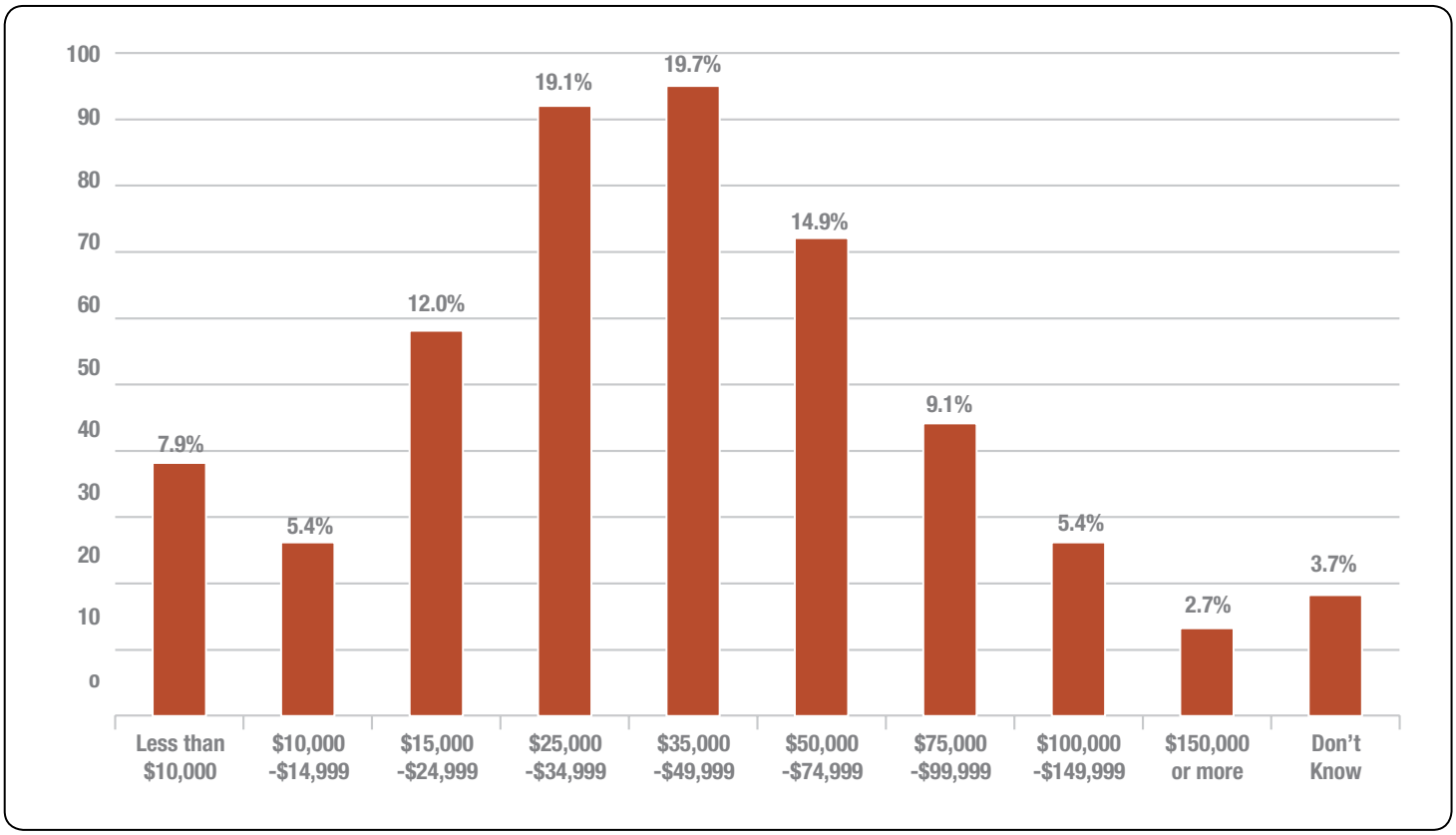
Income by Industry SubSector

Based on a total of 639 Responses	$25,000 or Less	$25,000 -$34,999	$35,000 -$49,999	$50,000 -$74,999	$75,000 or More	Total Responses
Nonprofit, Association or Commission	13 45%	6 21%	6 21%	2 7%	2 7%	29 100%
Events, Producer or Promoter	34 33%	15 15%	19 19%	15 15%	19 19%	102 100%
Event Production, Services or Rentals	34 57%	11 18%	7 12%	4 7%	4 7%	60 100%
Tour Manager	4 57%	0 0%	1 14%	2 29%	0 0%	7 100%
Booking Agents & Talent Buyers	10 53%	3 16%	2 11%	4 21%	0 0%	19 100%
Government, City & State	1 25%	0 0%	1 25%	1 25%	1 25%	4 100%
Labels & Distribution	2 22%	2 22%	1 11%	1 11%	3 33%	9 100%
Events, Ticketing, Insurance & Transportation	3 25%	2 17%	3 25%	2 17%	2 17%	12 100%
Audio & Lighting Engineers	27 56%	12 25%	3 6%4	2 %8	4 %	48 100%
Manufacturing : CDs, Vinyl & Merchandise	1 100%	0 0%	0 0%	0 0%	0 0%	1 100%
Manufacturing : Music Equipment & Instruments	18 64%	3 11%	3 11%	2 7%	2 7%	28 100%
Marketing & PR	17 45%	7 18%	4 11%	5 13%	5 13%	38 100%
Radio Promoter	5 71%	0 0%	1 14%	1 14%	0 0%	7 100%
Music Media	22 45%	8 16%	13 27%	4 8%	2 4%	49 100%
Music Education	5 56%	1 11%	1 11%	1 11%	1 11%	9 100%
Professional Services	4 67%	0 0%	1 17%	0 0%	1 17%	6 100%
Commercial Banking & Financing	2 100%	0 0%	0 0%	0 0%	0 0%	2 100%
Publishing & Licensing	4 57%	1 14%	2 29%	0 0%	0 0%	7 100%
Rentals, Event Production	1 25%	0 0%	1 25%	1 25%	1 25%	4 100%
Retail Sales & Repair, Music Equipment & Instruments	11 65%	3 18%	2 12%	1 6%0	0 %	17 100%
Retailer: CDs, Vinyl, & Merchandise Retail Store	1 50%	0 0%	1 0%	1 50%	0 0%	2 100%
Studios, Recording & A/V Production	14 78%	1 6%6	1 % 0	0 % 0	2 11%	18 100%
Tech: Apps, Software, Content & Streaming	13 52%	3 12%	3 12%	3 12%	3 12%	25 100%
Digital Music Sales & Aggregators	1 100%	0 0%	0 0%	0 0%	0 0%	1 100%
Other	14 67%	1 5%	2 10%	2 10%	2 10%	21 100%
Artist Management	18 67%	2 7%	2 7%	2 7%	3 11%	27 100%
Creative Services: Design, Photography	6 75%	1 13%	0 0%	1 13%	0 0%	8 100%
Nightlife Venue, Service & Door Staff	61 77%	9 11%	6 8%	3 4%	0 0%	79 100%

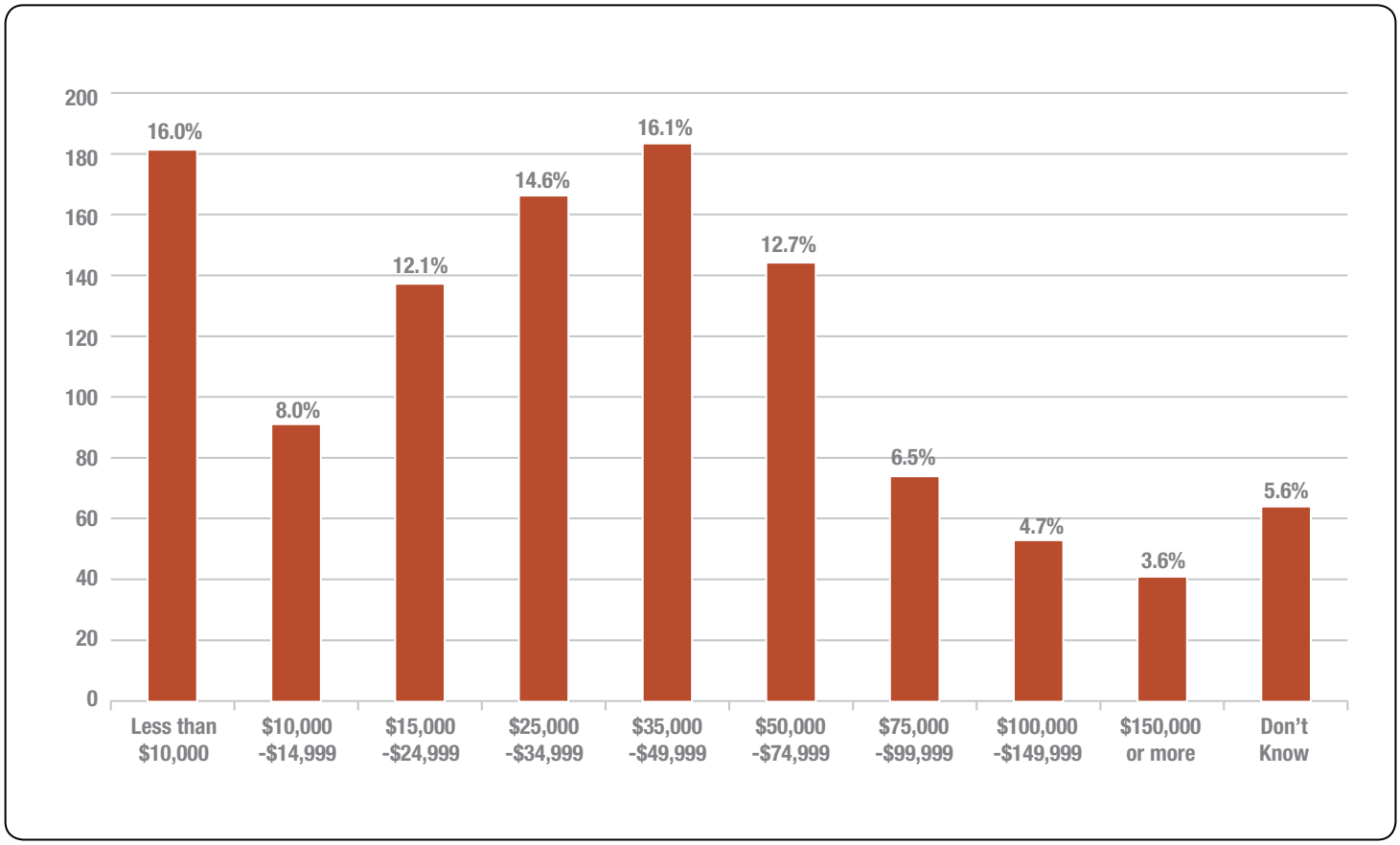
Highest Number of Respondents in This Income Category

Second Highest Number of Respondents in This Income Category

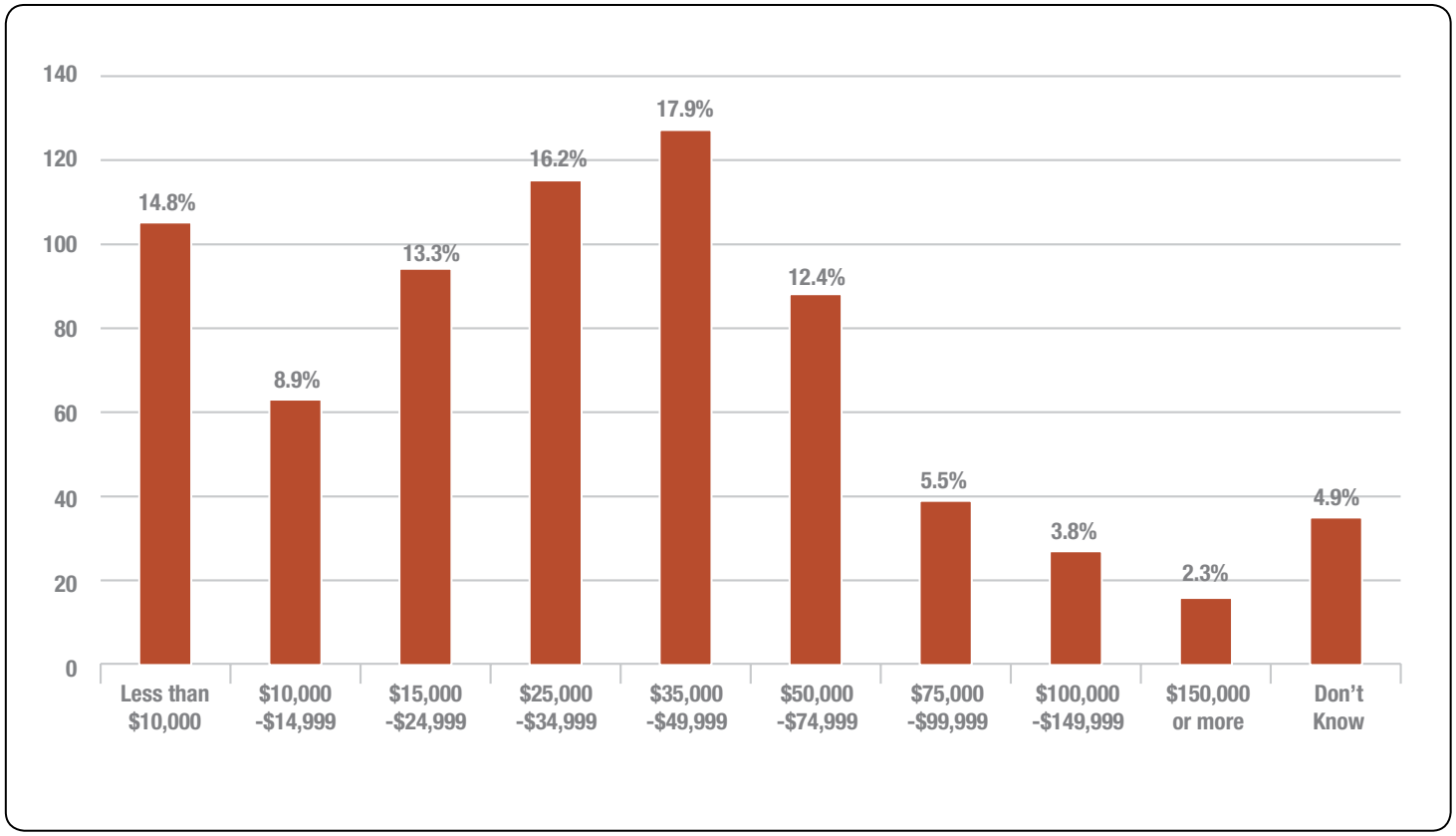
2013 Pre-Tax Individual Income (All Music Industry EMPLOYEES + OWNERS w/ 100% Income from Music Industry)



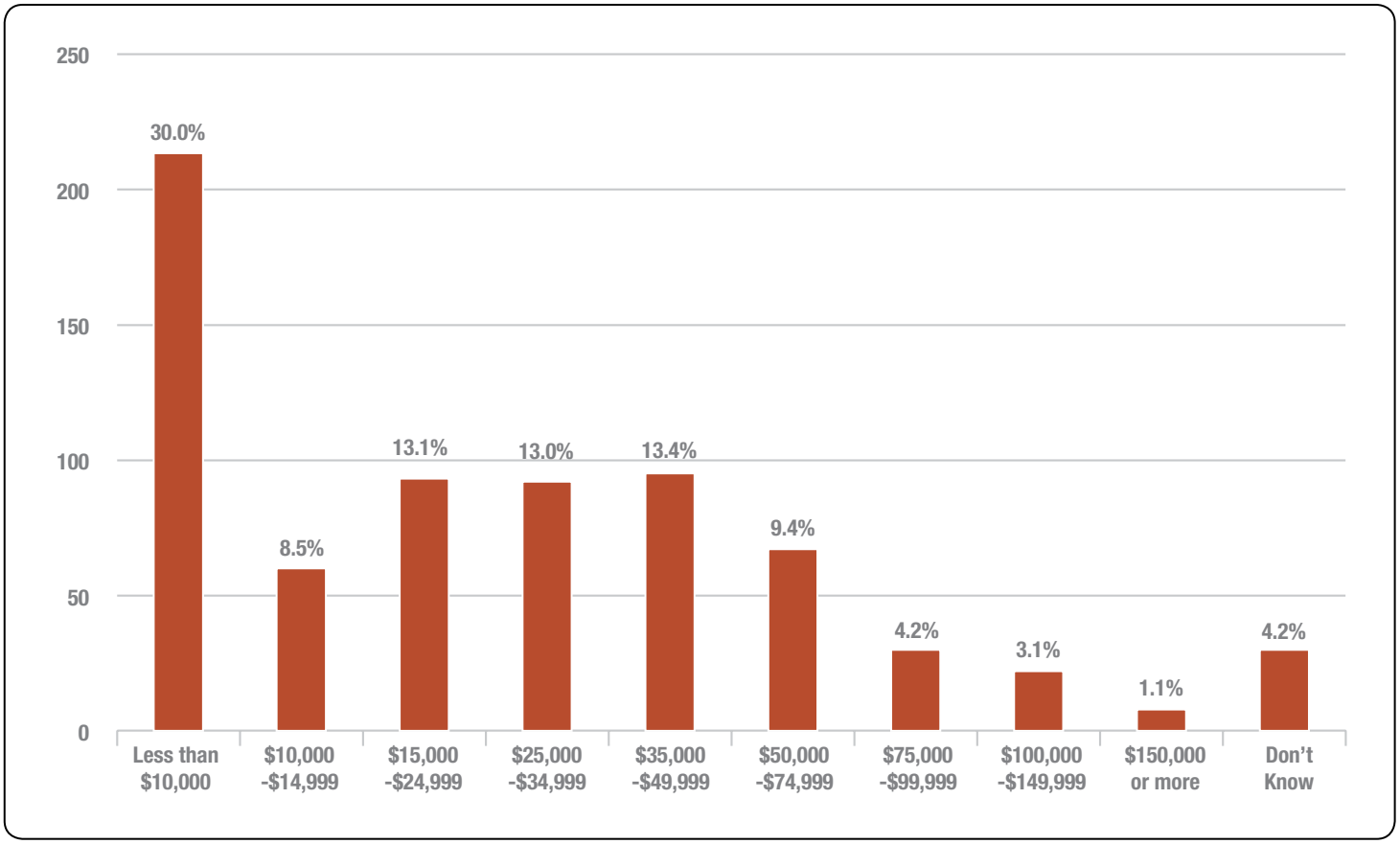
2013 Pre-Tax Individual Income (All Music Industry EMPLOYEES + OWNERS, All Income Sources)



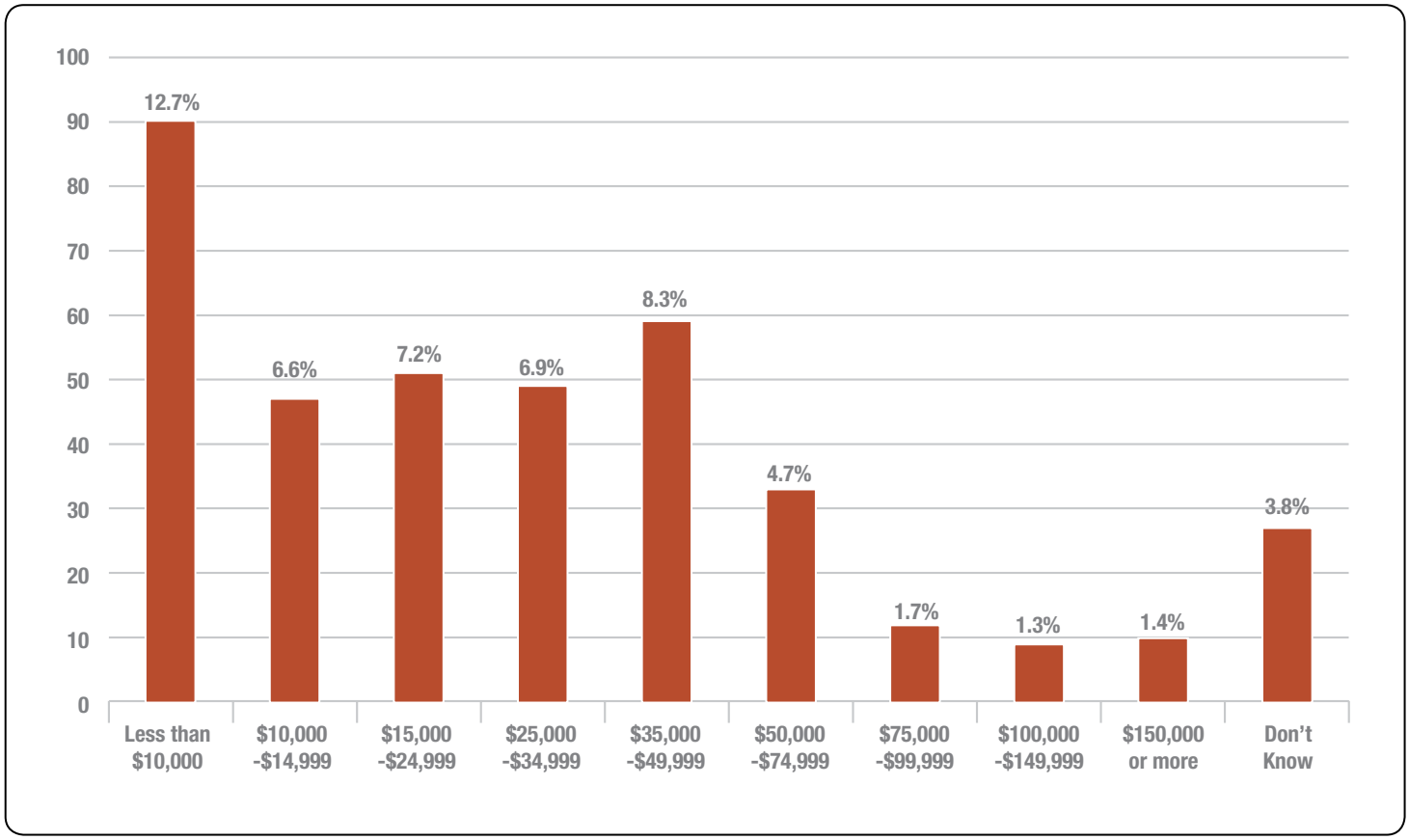
2013 Pre-Tax Individual Income (All Industry EMPLOYEES, All Income Sources)



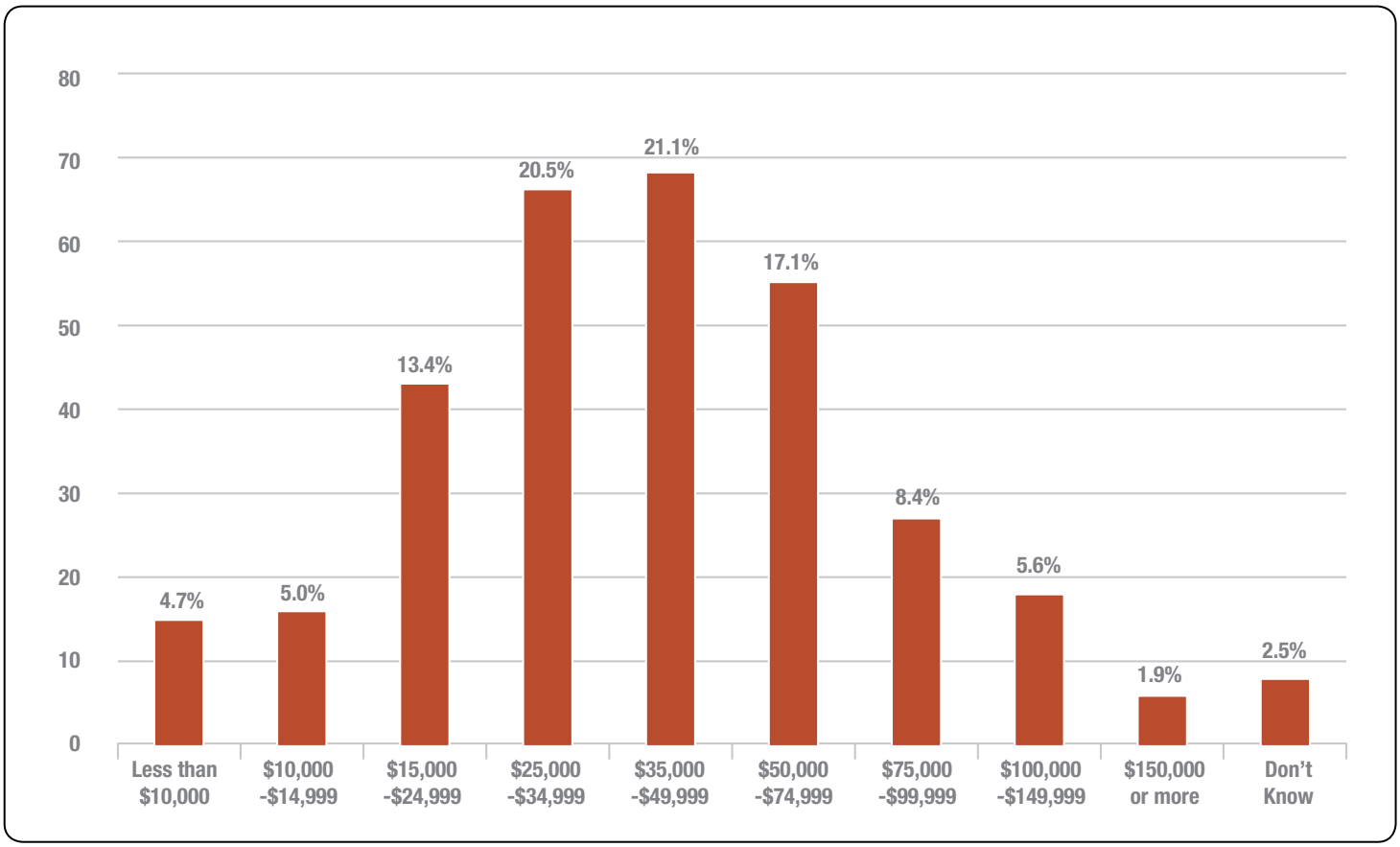
2013 Pre-Tax Individual Income (All Industry EMPLOYEES, Music Industry Income Only)



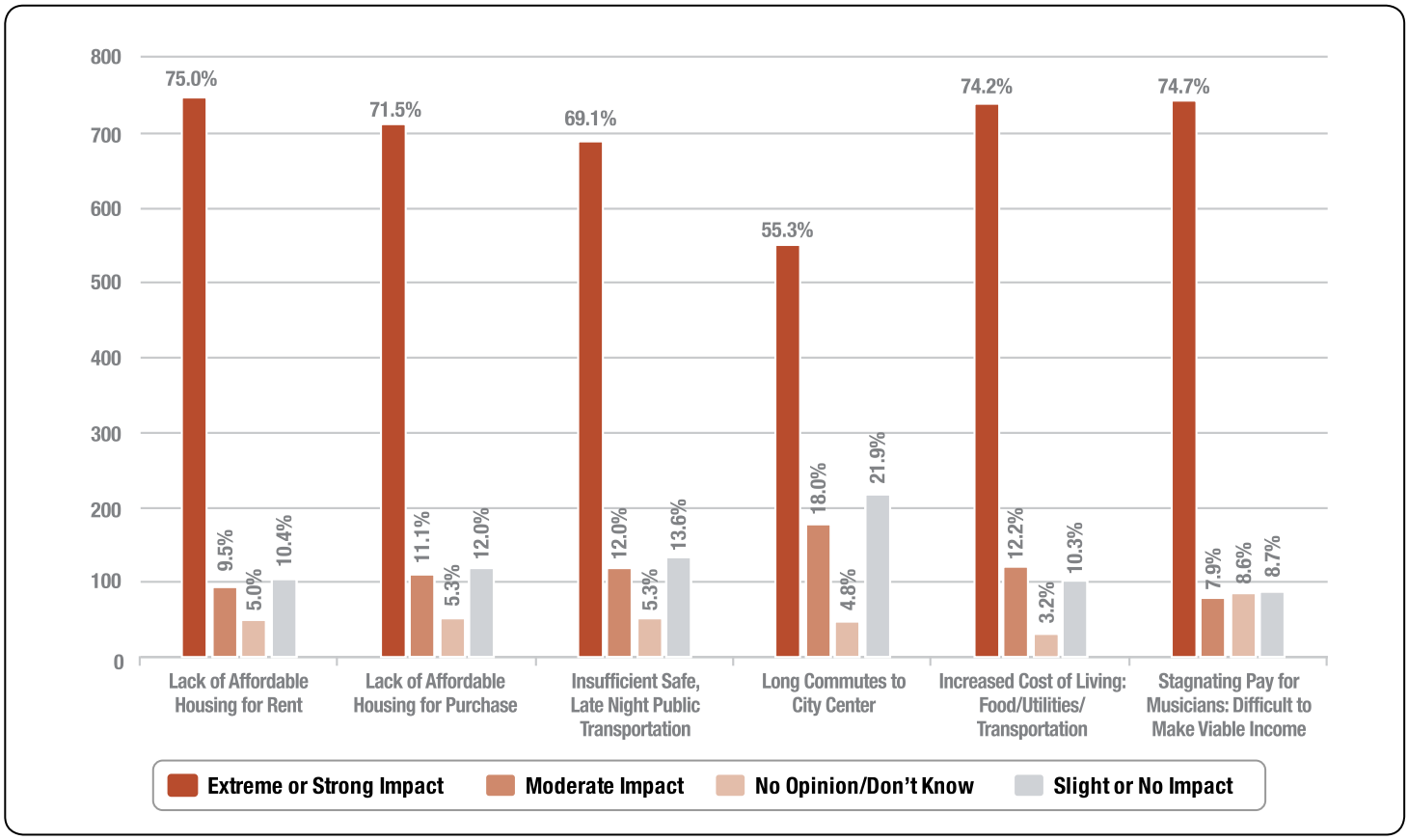
2013 Pre-Tax Individual Income (Only Industry EMPLOYEES w/ Music Industry + Augmented Income)



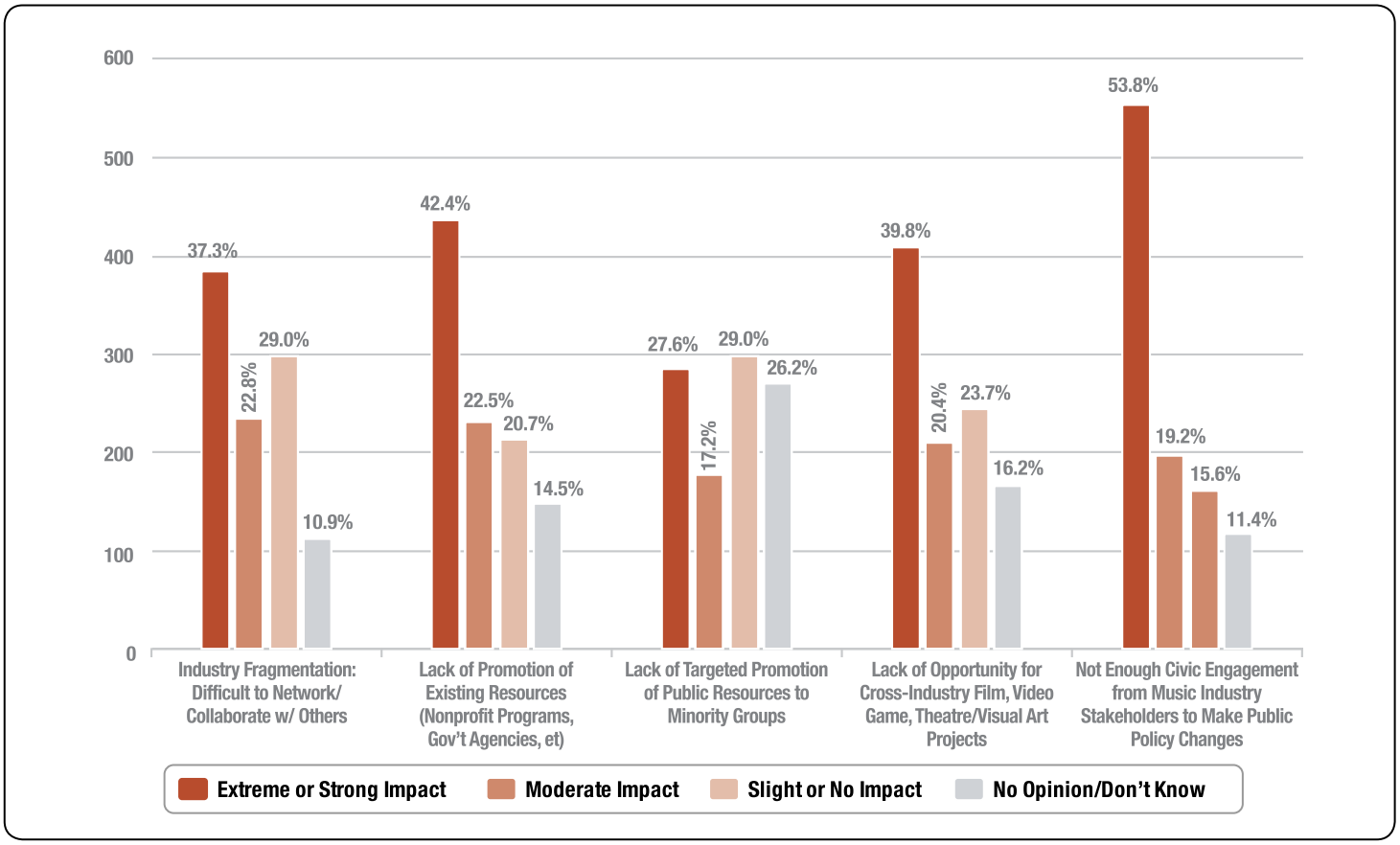
2013 Pre-Tax Individual Income (Only Industry EMPLOYEES w/ 100% Income from Music Industry)



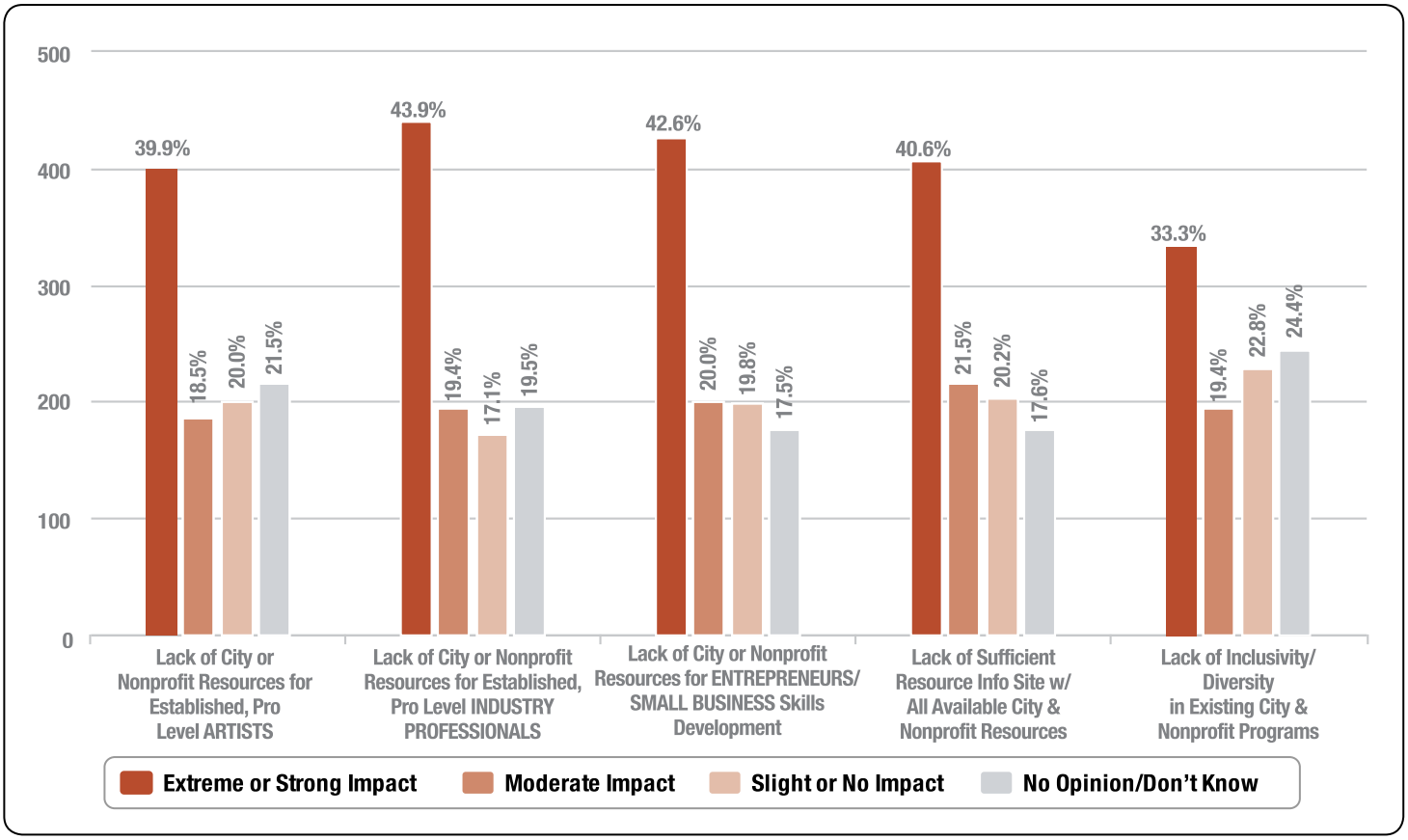
Needs and Gaps Category: LIVING AND AFFORDABILITY



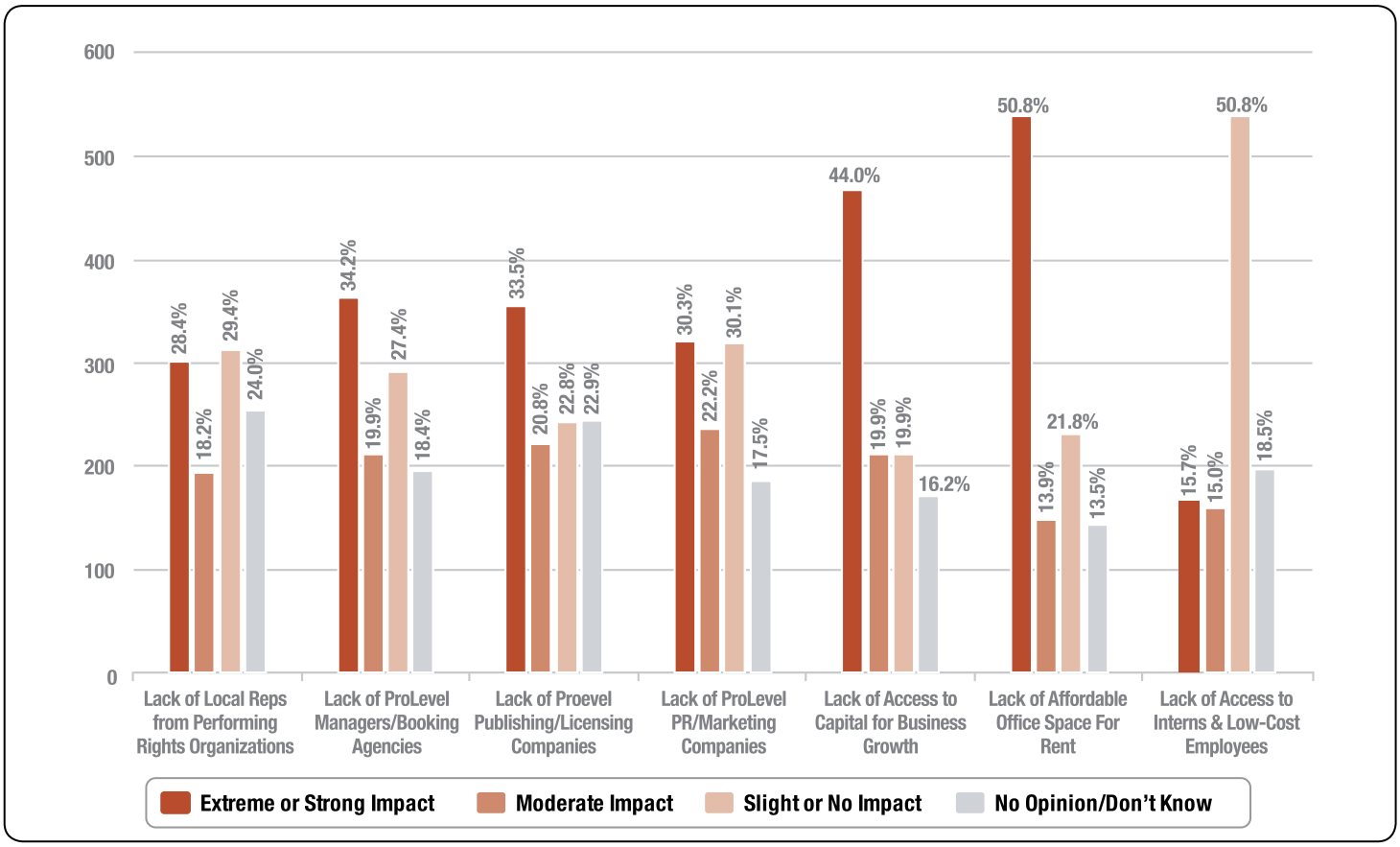
Needs and Gaps Category: CONNECTIVITY AND COLLABORATION



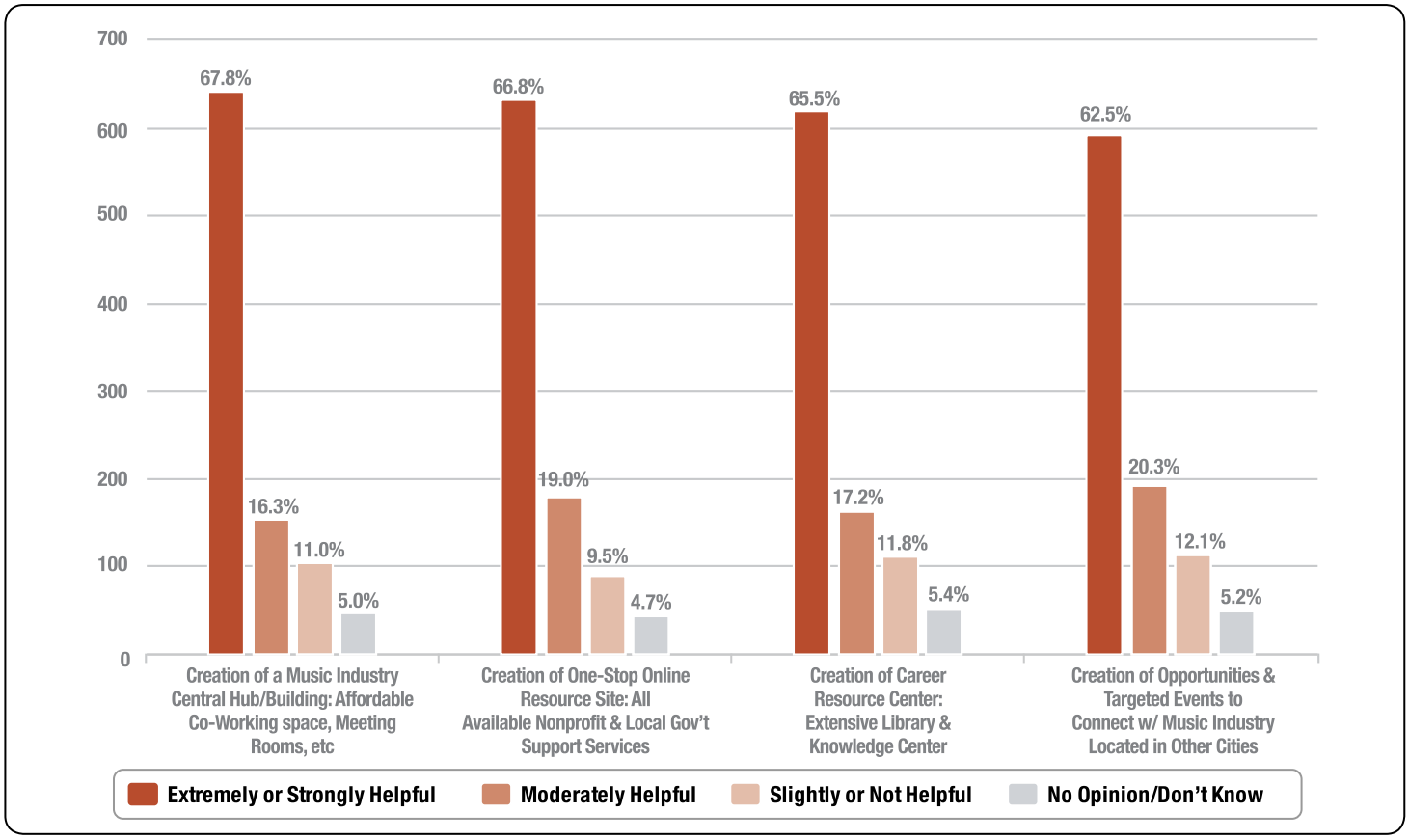
Needs and Gaps Category: PROFESSIONAL EDUCATION AND SKILLS DEVELOPMENT



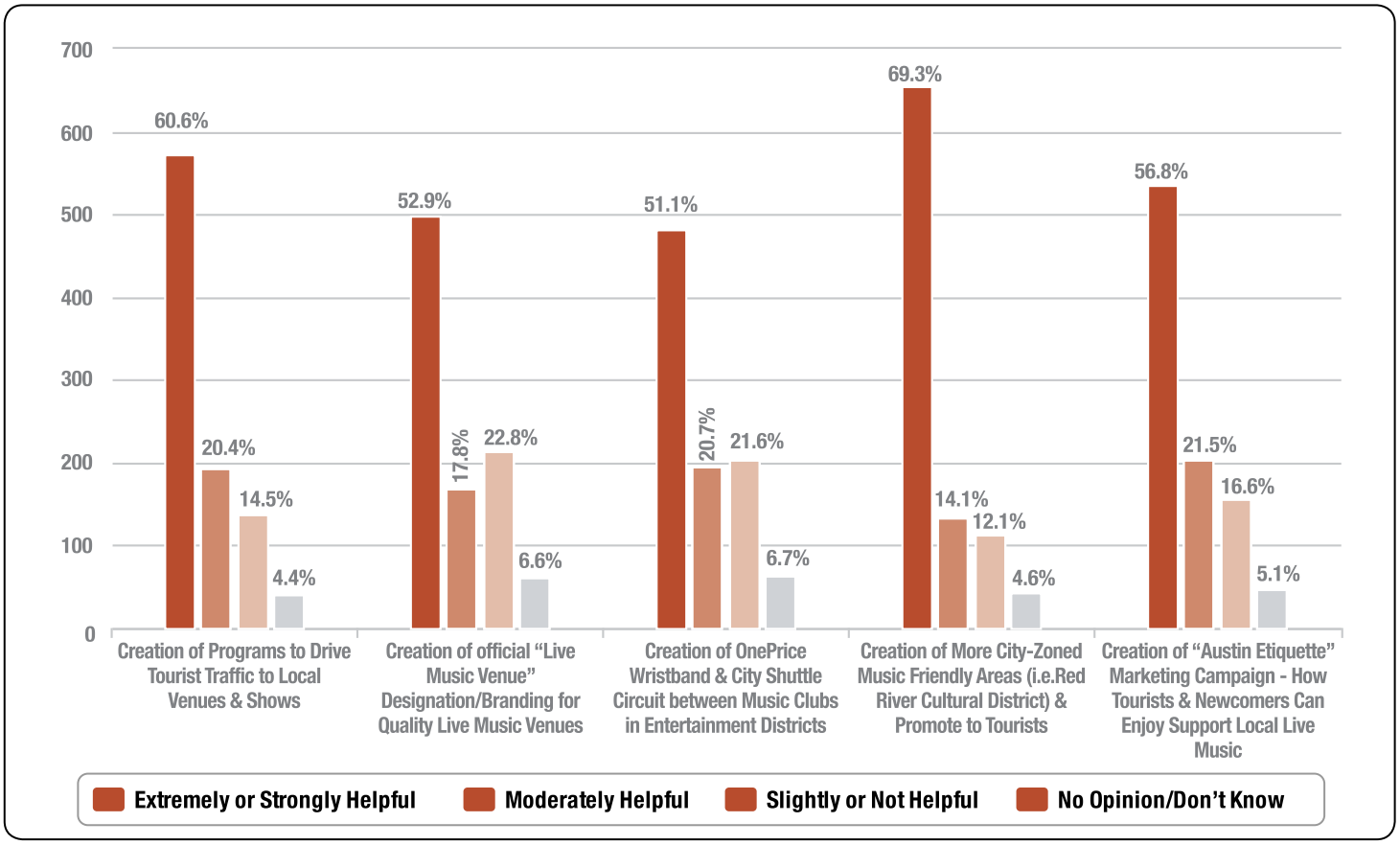
Needs and Gaps Category: INDUSTRY RESOURCES



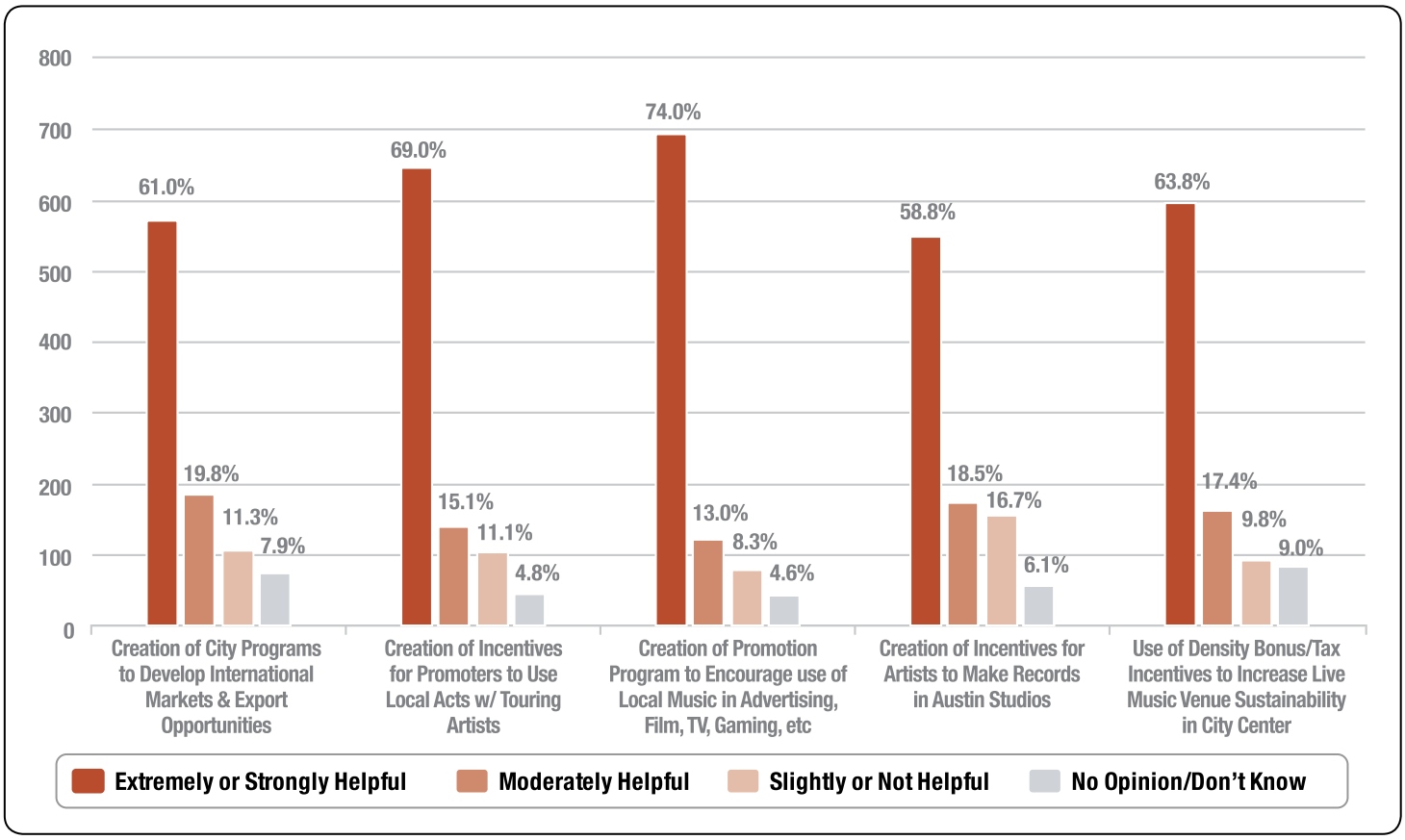
Ideas and Proposals Category: CAREER DEVELOPMENT AND CONNECTIVITY



Ideas and Proposals Category: TOURISM AND MARKET DEVELOPMENT



Ideas and Proposals Category: CITY PROGRAMS



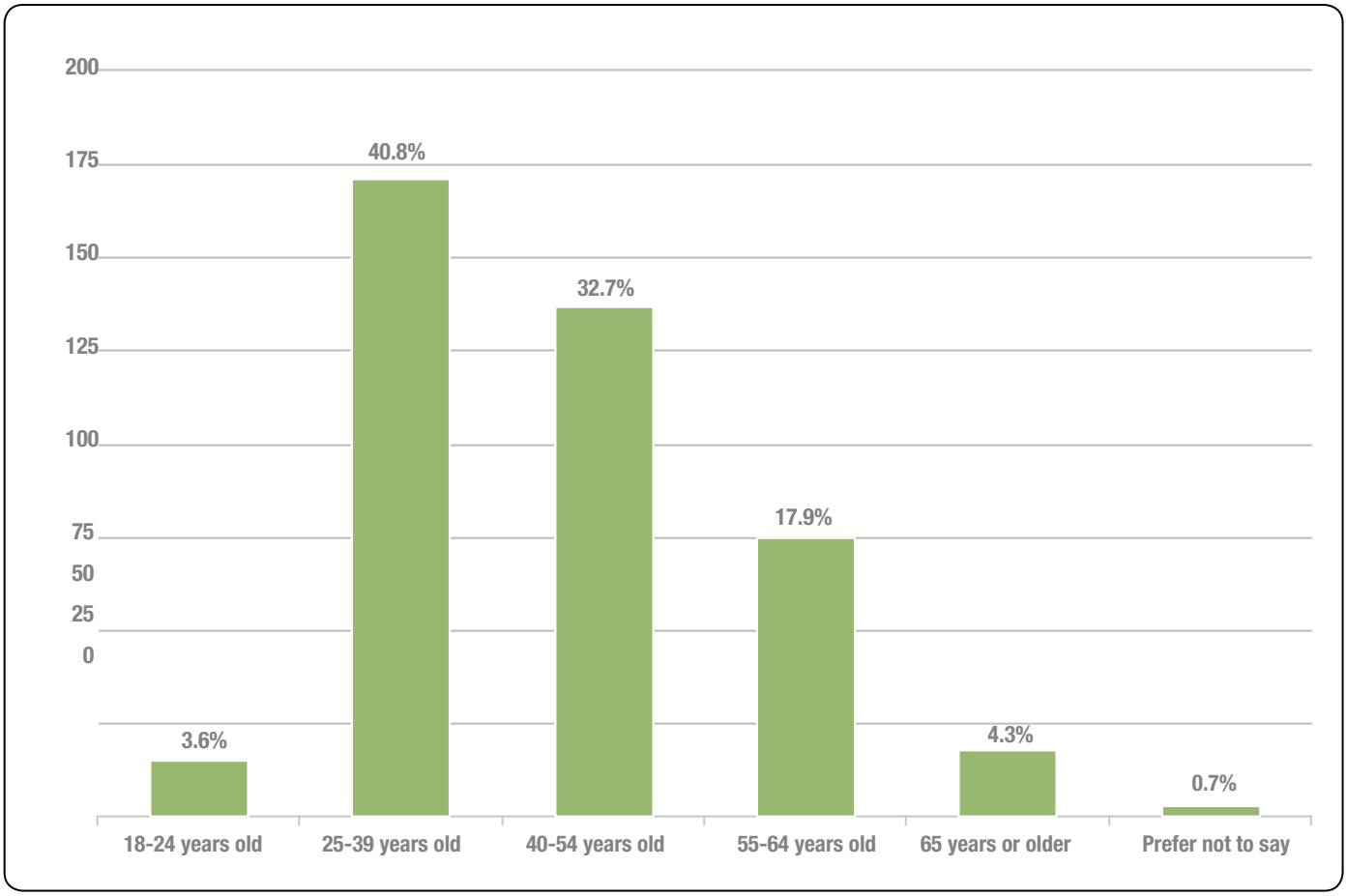
Appendix VI
Business Owners-Only Respondent Data Chart List

CHARTS APPEAR IN THIS SEQUENCE:

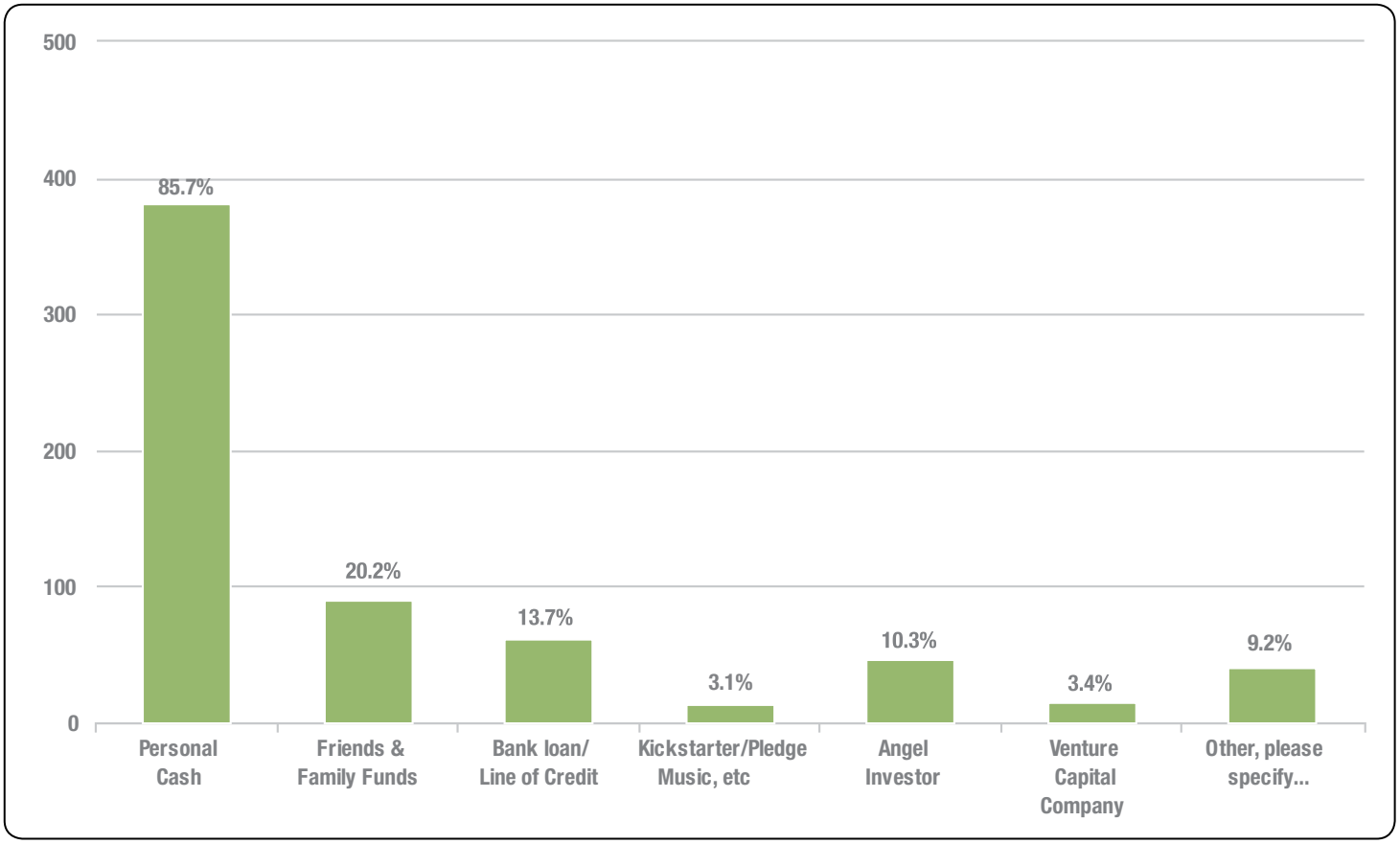
Age Breakdown
Business Launch and Growth Financing
Number of Years in Operation
Number of Full-Time Employees or FTE Equivalents
Number of Employees by Years in Operation
2013 Business Gross Income
2013 Gross Business Income by Years in Operation
2013 Pre-Tax Individual Income (All Industry OWNERS, All Income Sources)
2013 Pre-Tax Individual Income (All Industry OWNERS, Music Industry Income Only)
2013 Pre-Tax Individual Income (Only Industry OWNERS w/ Music Industry + Augmented Income)
2013 Pre-Tax Individual Income (Only Industry OWNERS w/ 100% Income from Music Industry)
Individual Owner Net Income by Years Working in Music Industry
Needs and Gaps Category: LIVING AND AFFORDABILITY
Needs and Gaps Category: CONNECTIVITY AND COLLABORATION
Needs and Gaps Category: PROFESSIONAL EDUCATION AND SKILLS DEVELOPMENT
Needs and Gaps Category: INDUSTRY RESOURCES
Ideas and Proposals Category: CAREER DEVELOPMENT AND CONNECTIVITY
Ideas and Proposals Category: TOURISM AND MARKET DEVELOPMENT
Ideas and Proposals Category: CITY PROGRAMS

Appendix VI
Business Owner-Only Respondent Data Charts

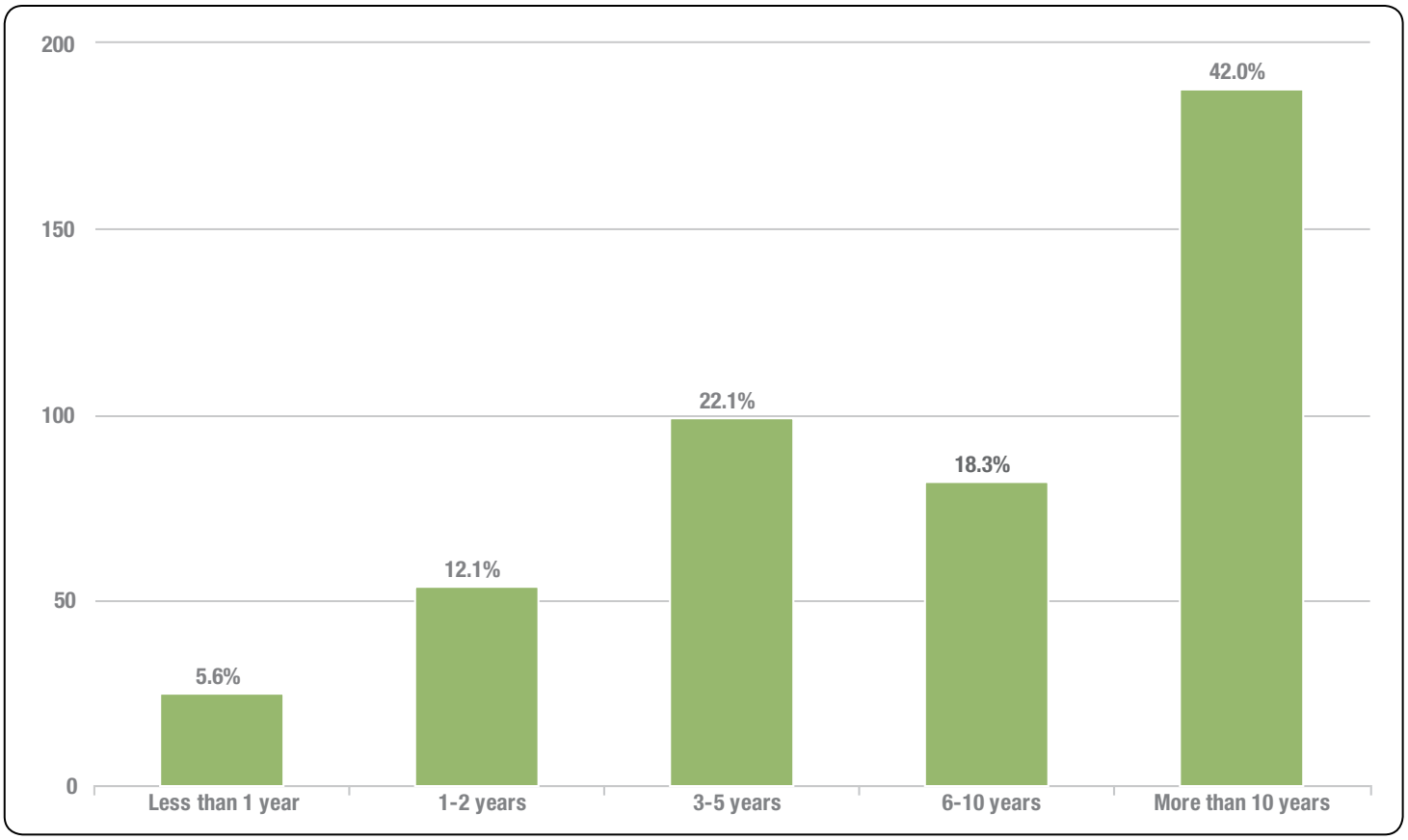
Age Breakdown



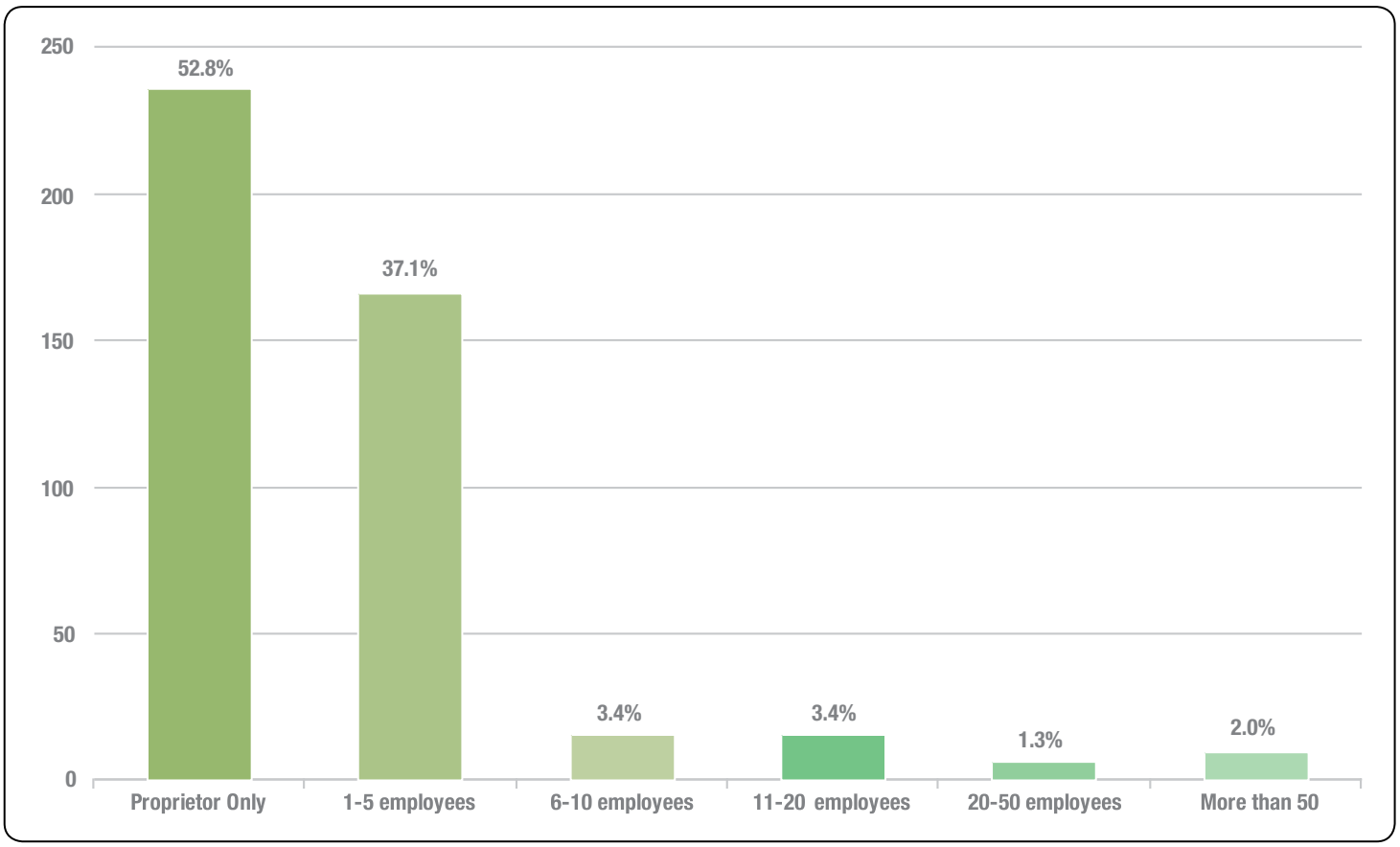
Business Launch and Growth Financing



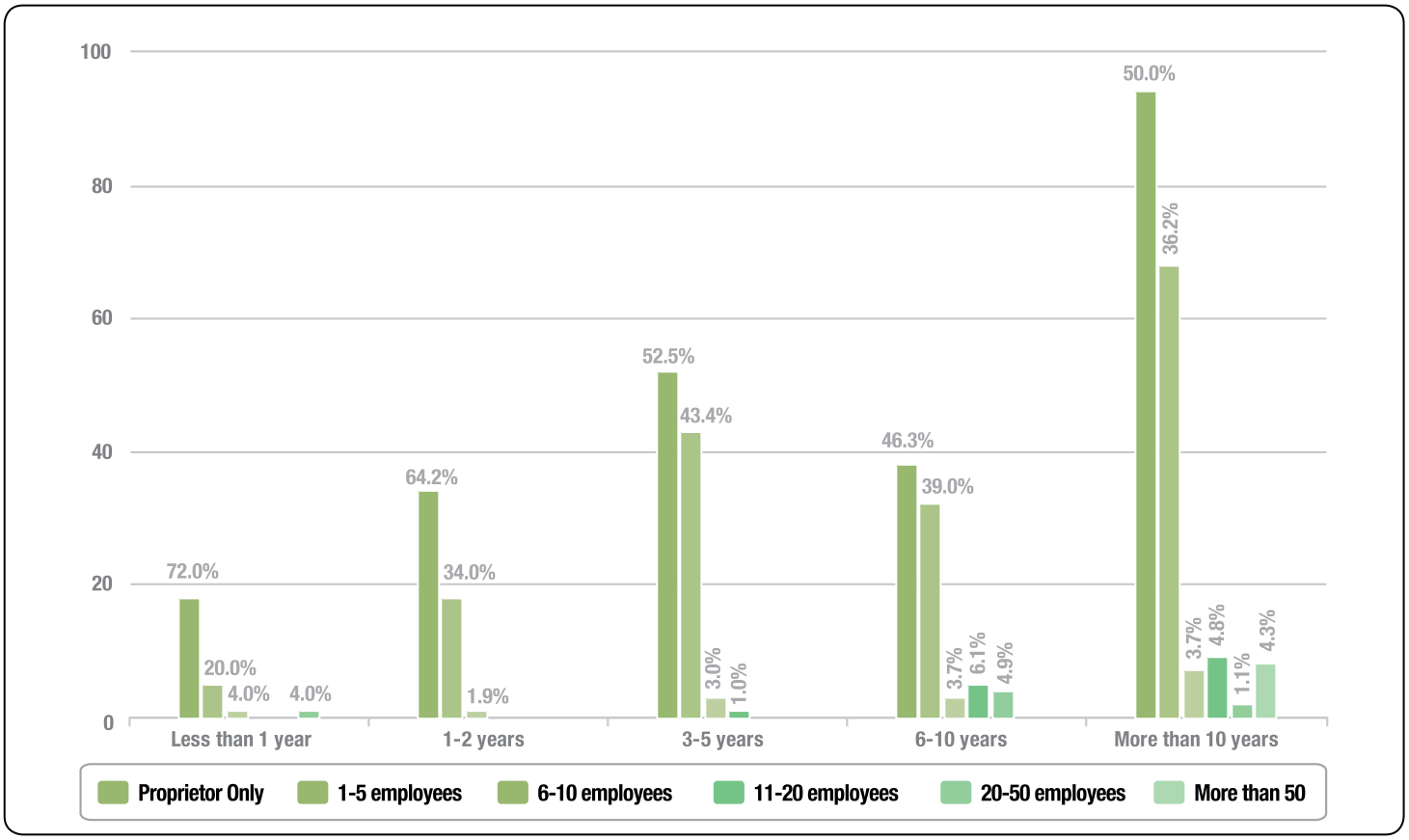
Number of Years in Operation



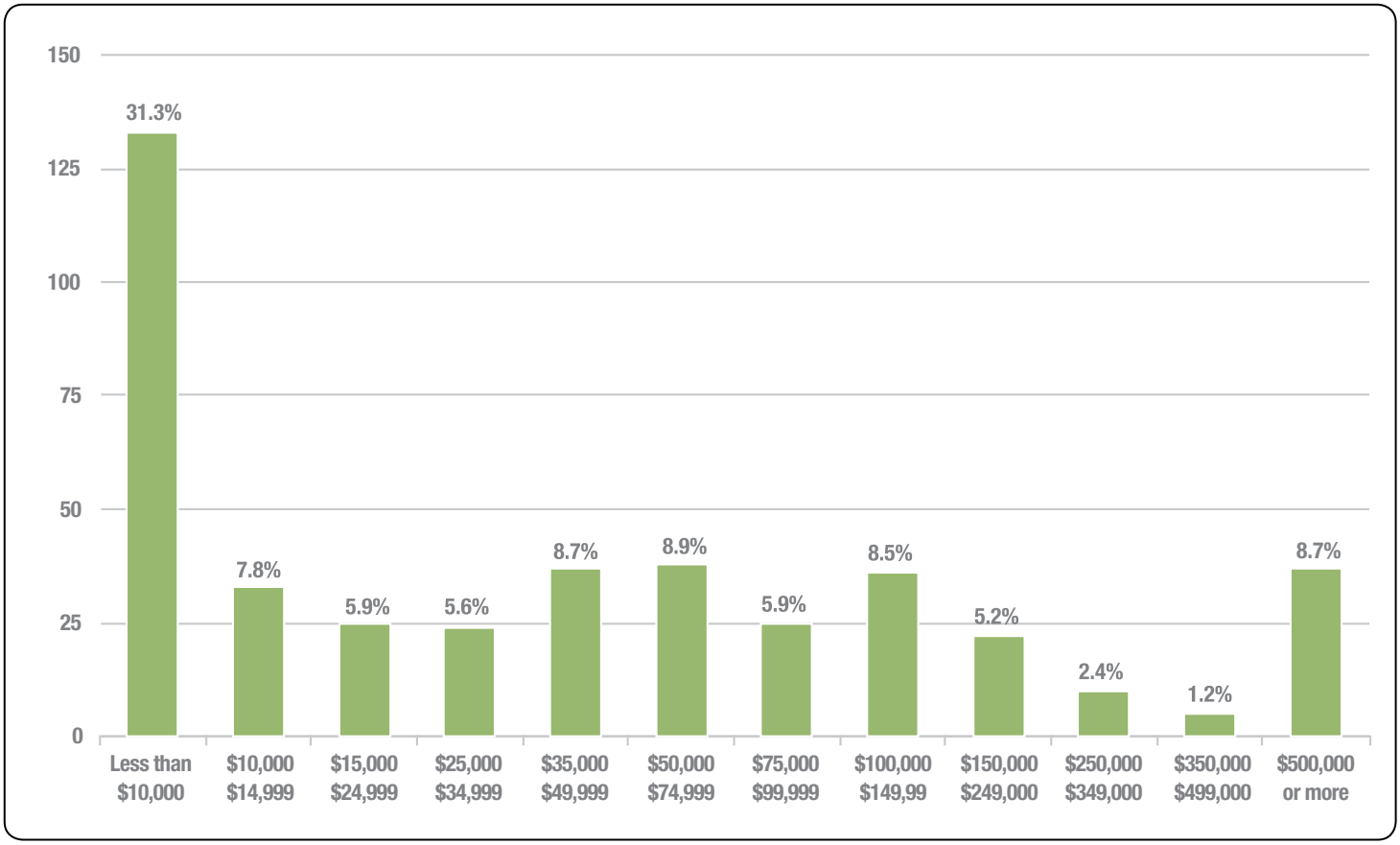
Number of Full-Time Employees or FTE Equivalents



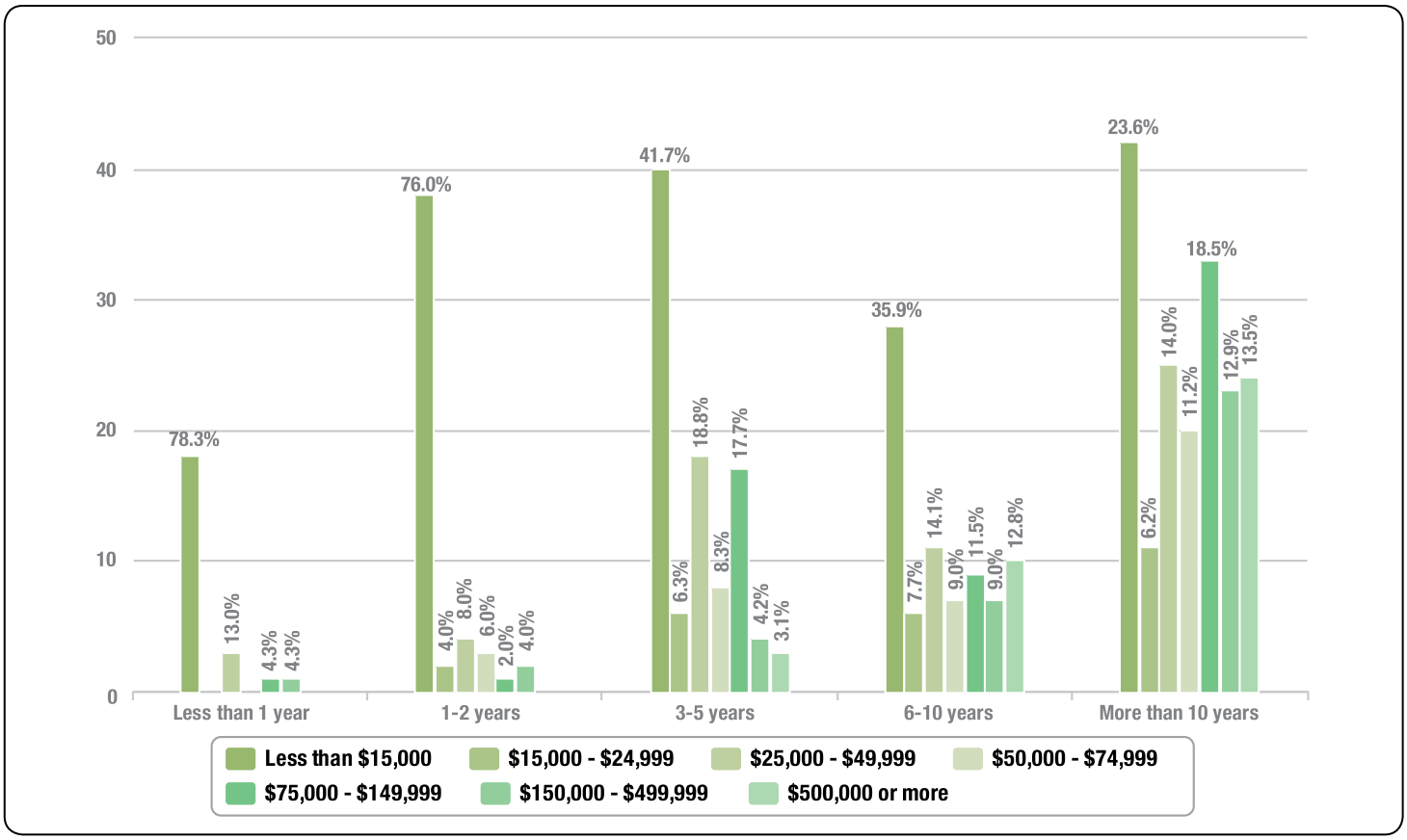
Number of Employees by Years in Operation



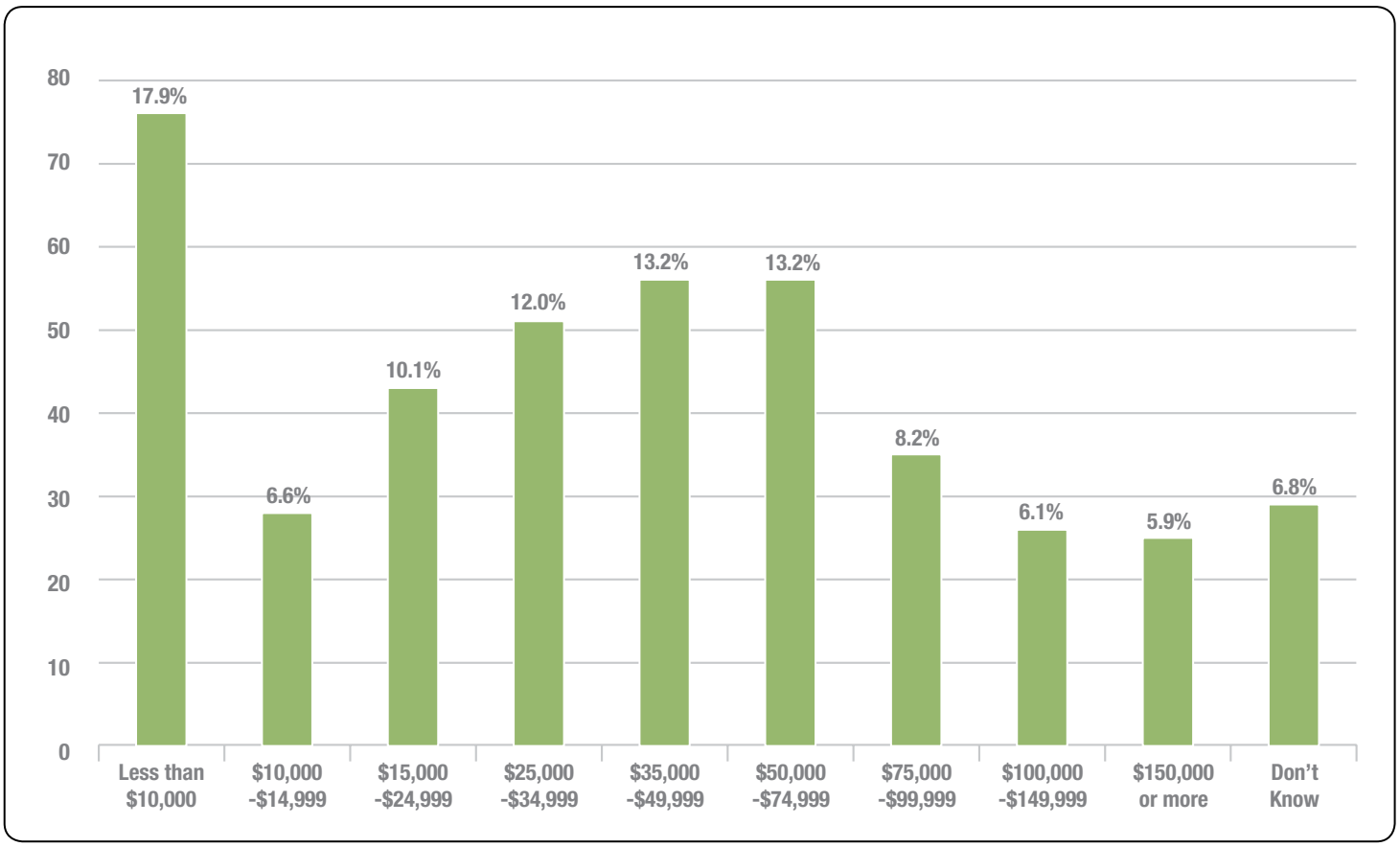
2013 Business Gross Income



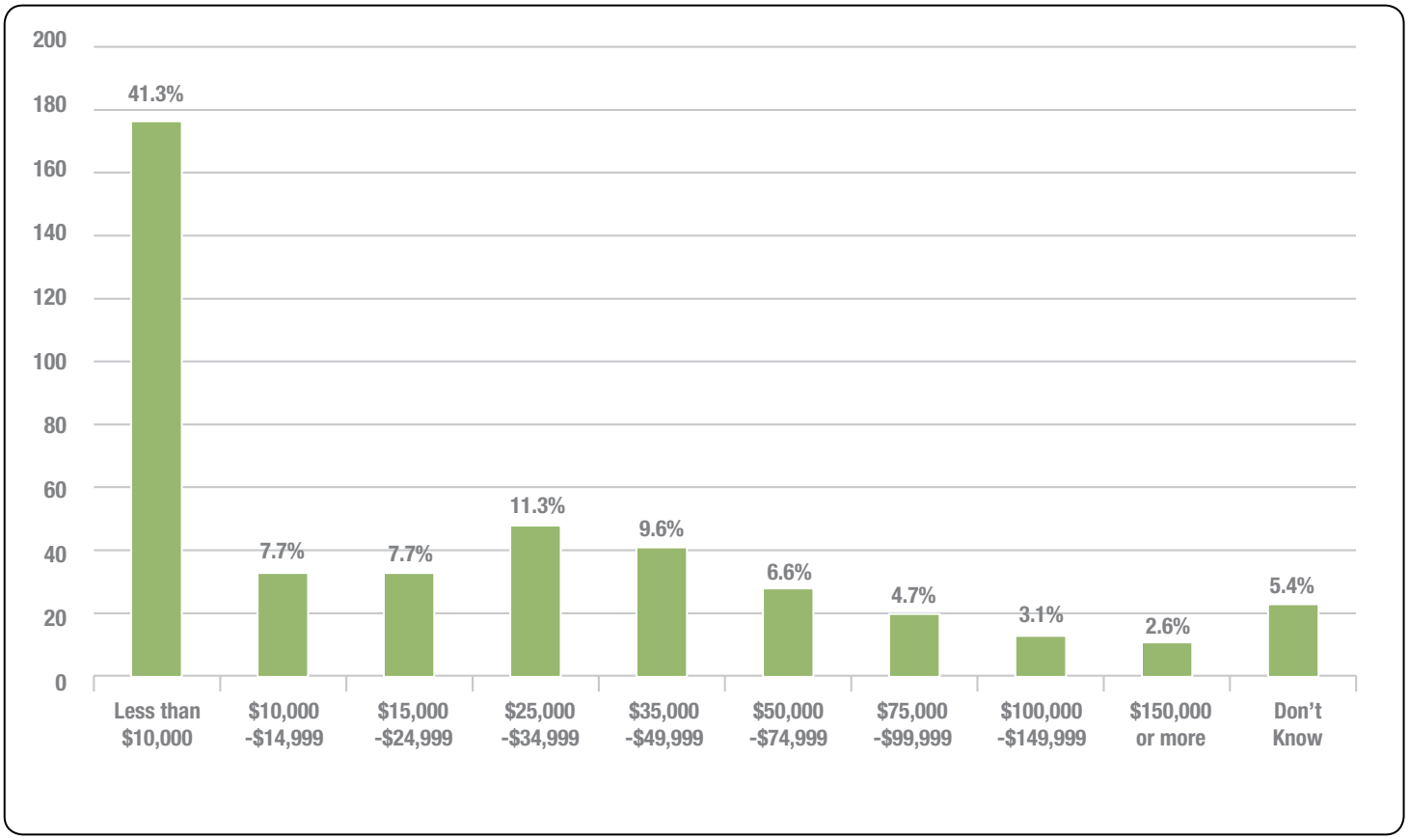
2013 Gross Business Income by Years in Operation



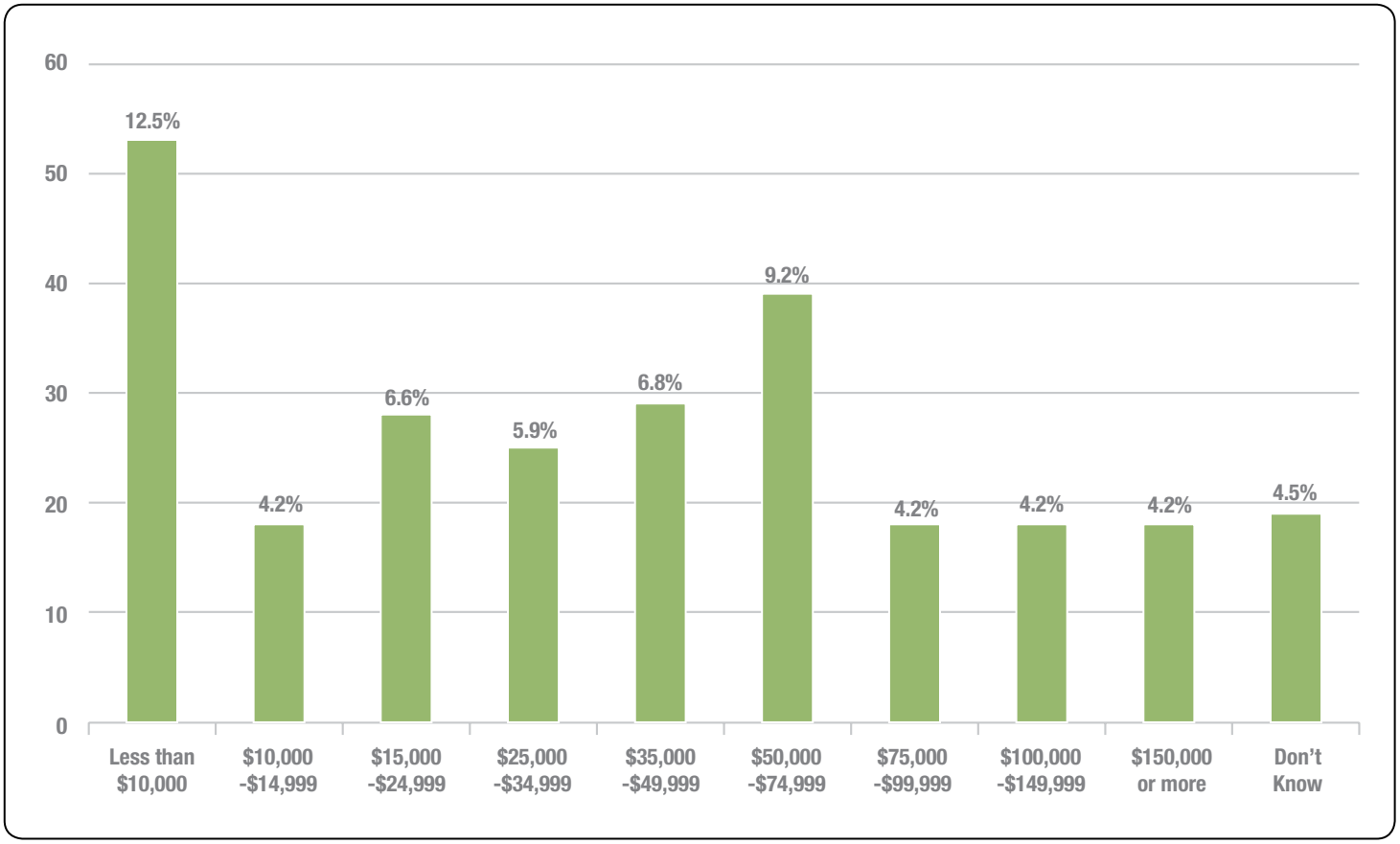
2013 Pre-Tax Individual Income (All Industry OWNERS, All Income Sources)



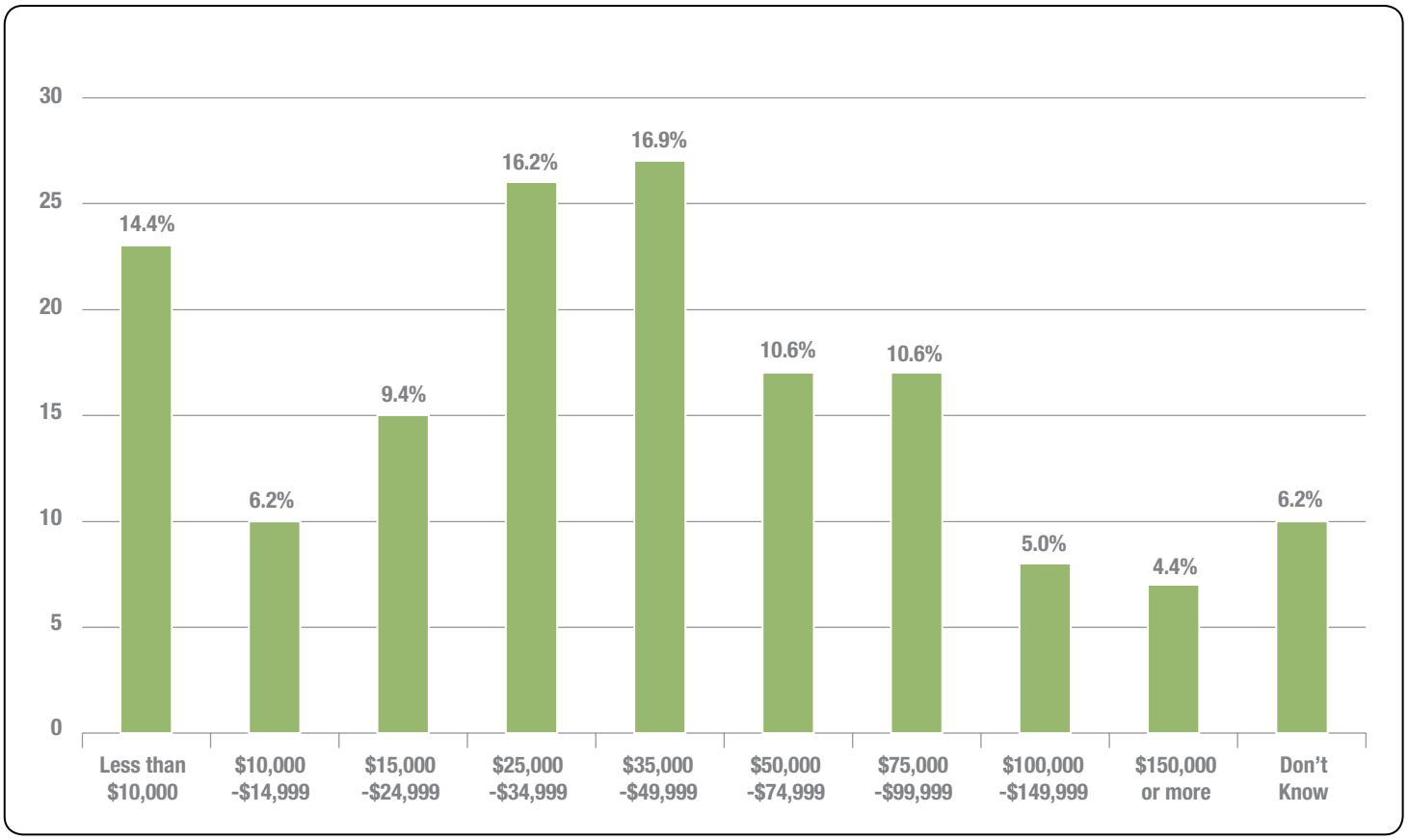
2013 Pre-Tax Individual Income (All Industry OWNERS, Music Industry Income Only)



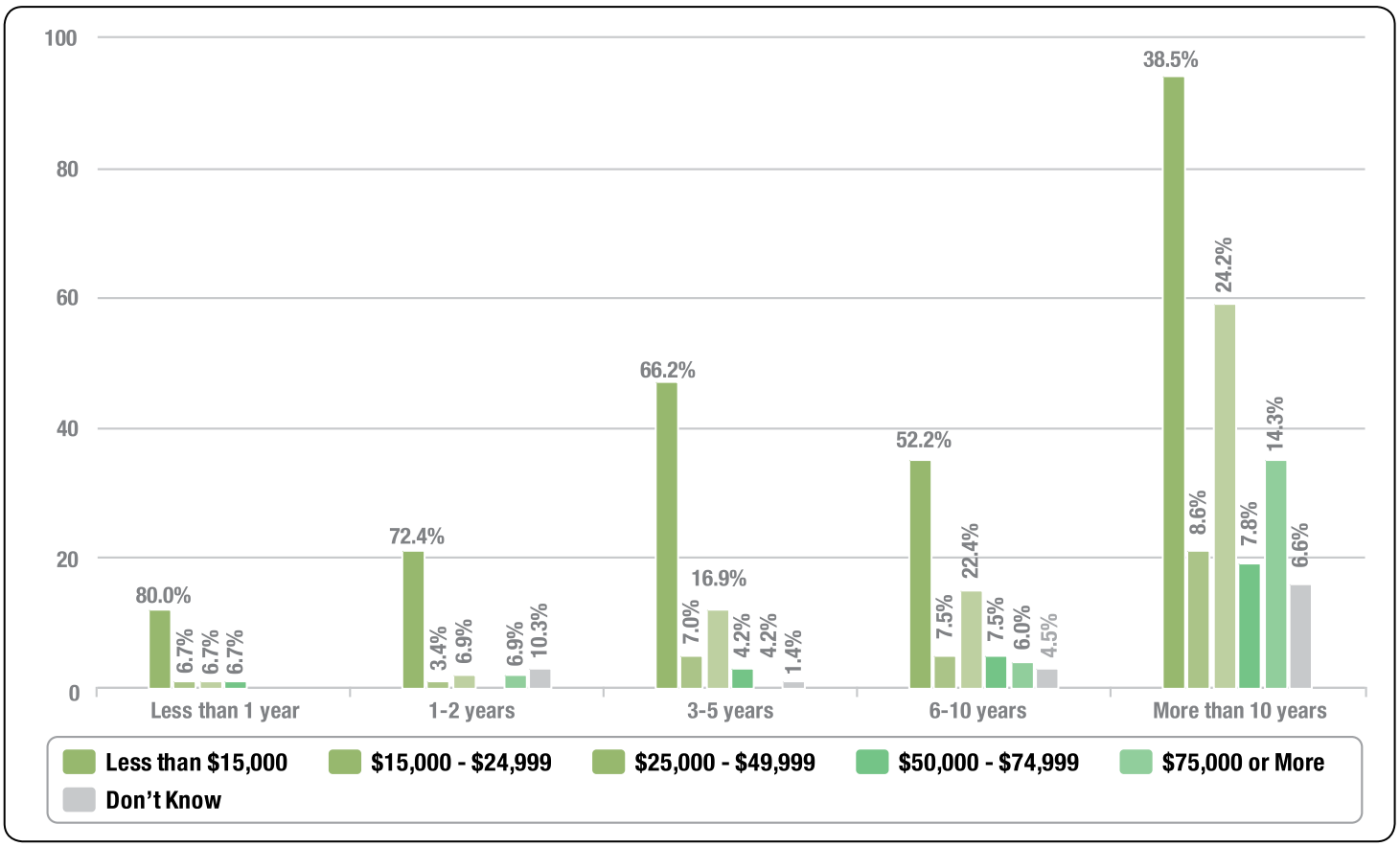
2013 Pre-Tax Individual Income (Only Industry OWNERS w/ Music Industry + Augmented Income)



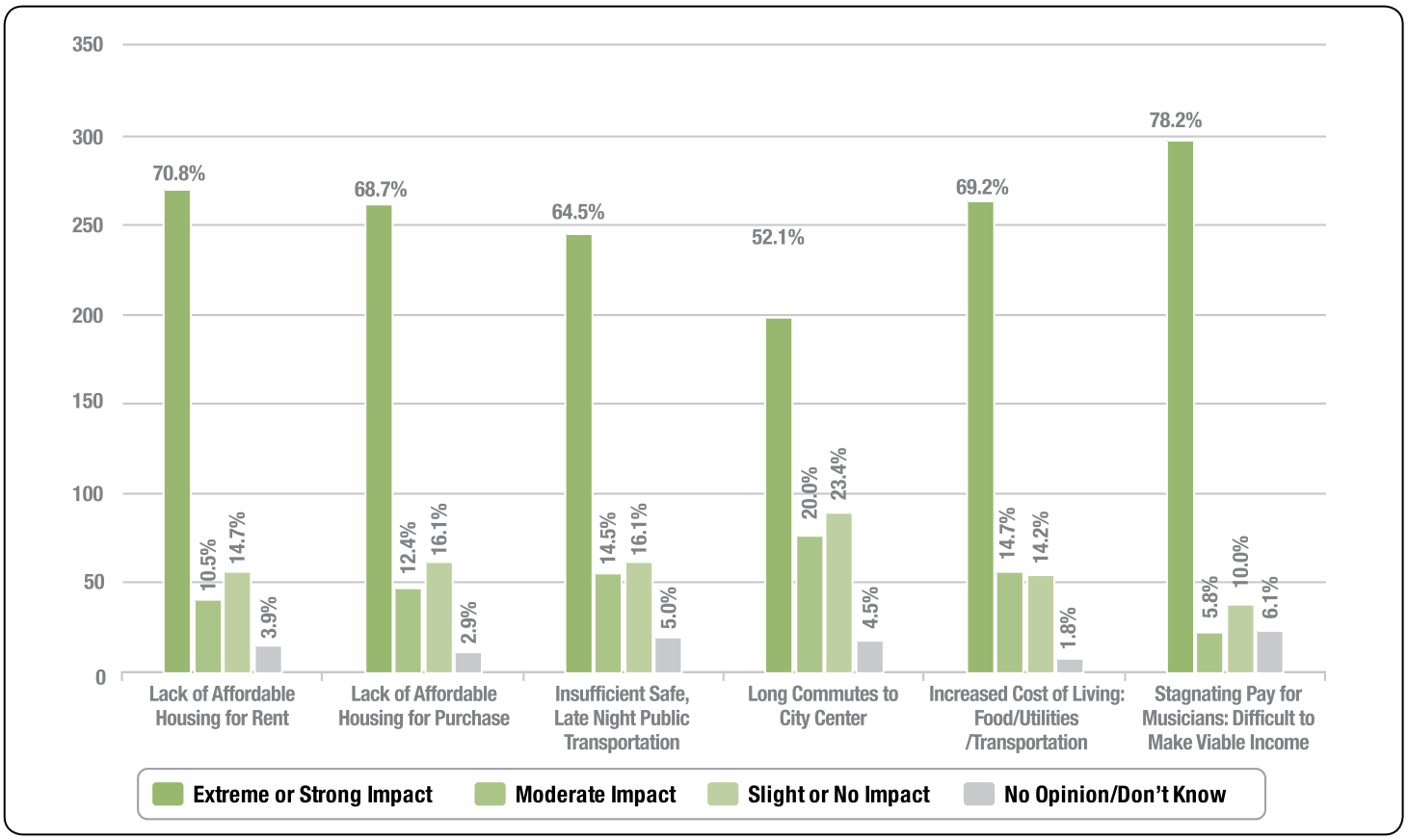
2013 Pre-Tax Individual Income (Only Industry OWNERS w/ 100% Income from Music Industry)



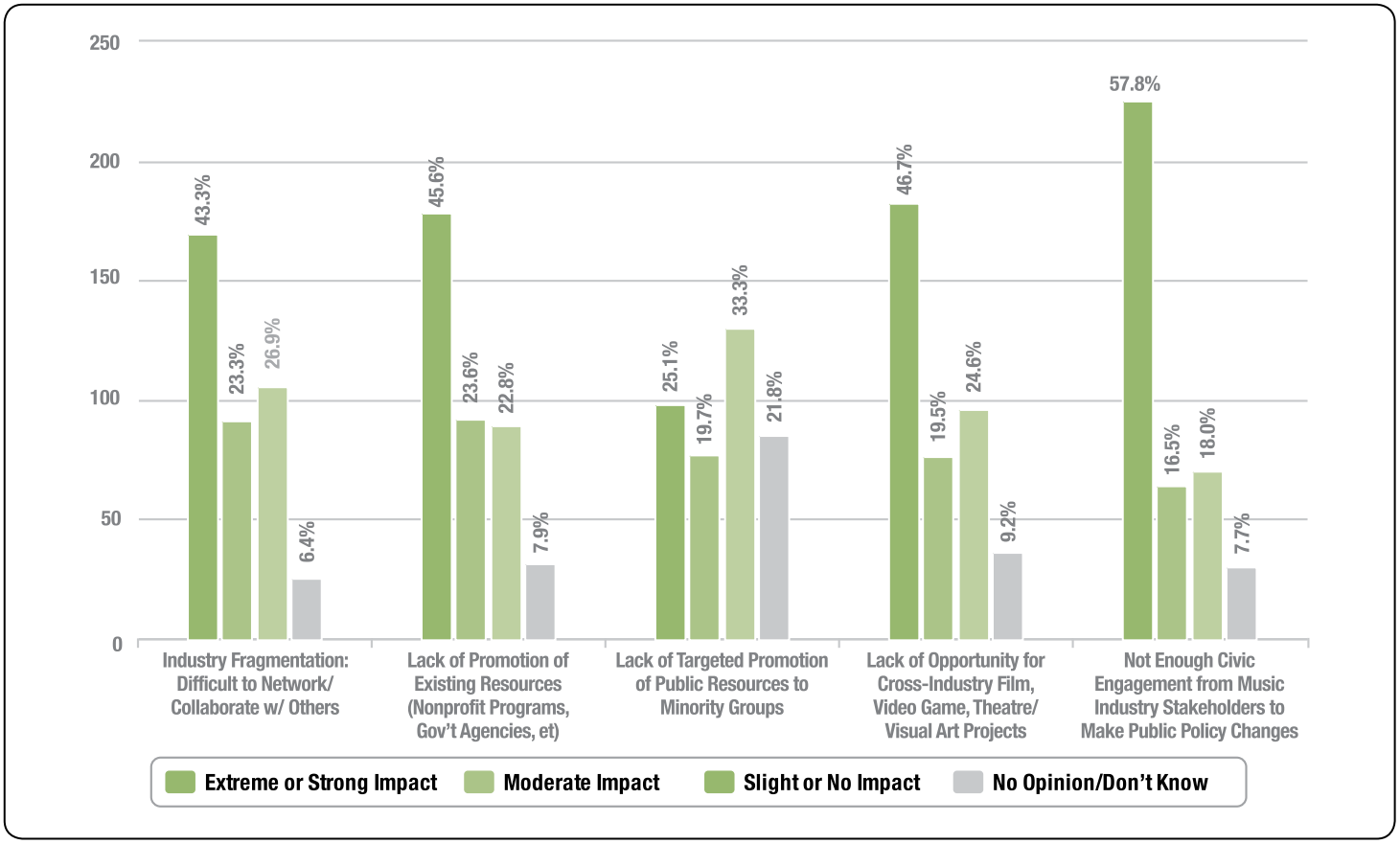
Individual Owner Net Income by Years Working in Music Industry



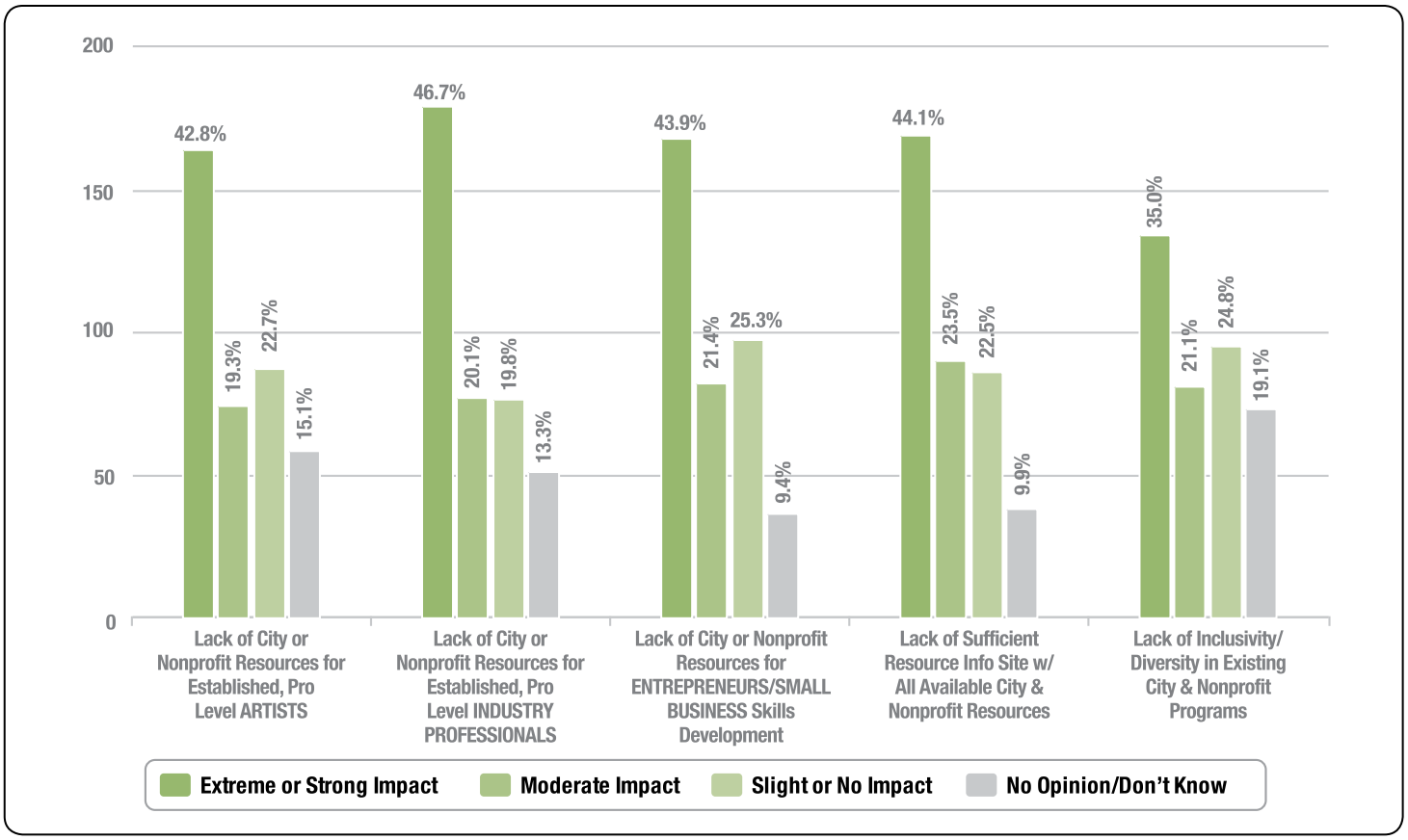
Needs and Gaps Category: LIVING AND AFFORDABILITY



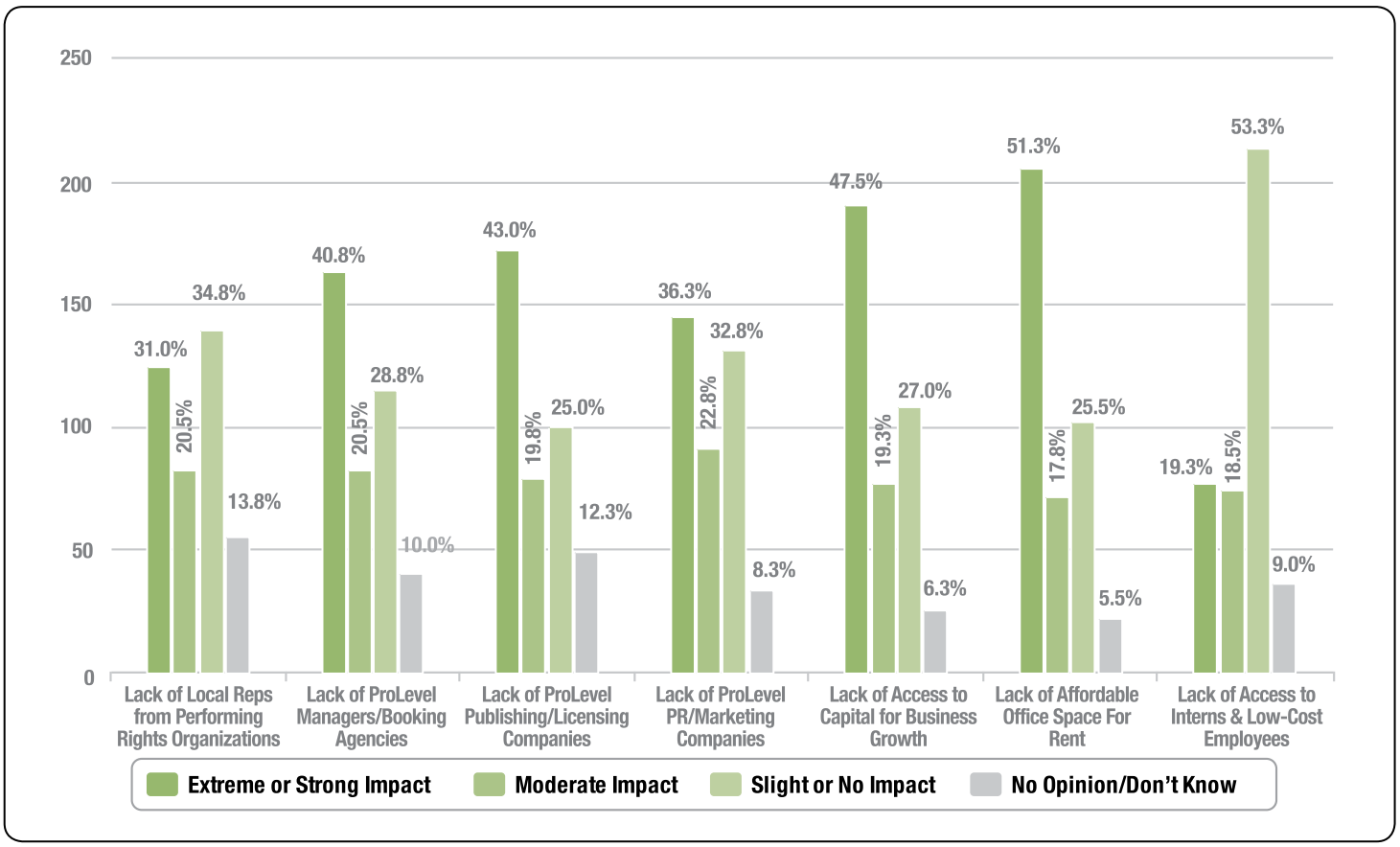
Needs and Gaps Category: CONNECTIVITY AND COLLABORATION



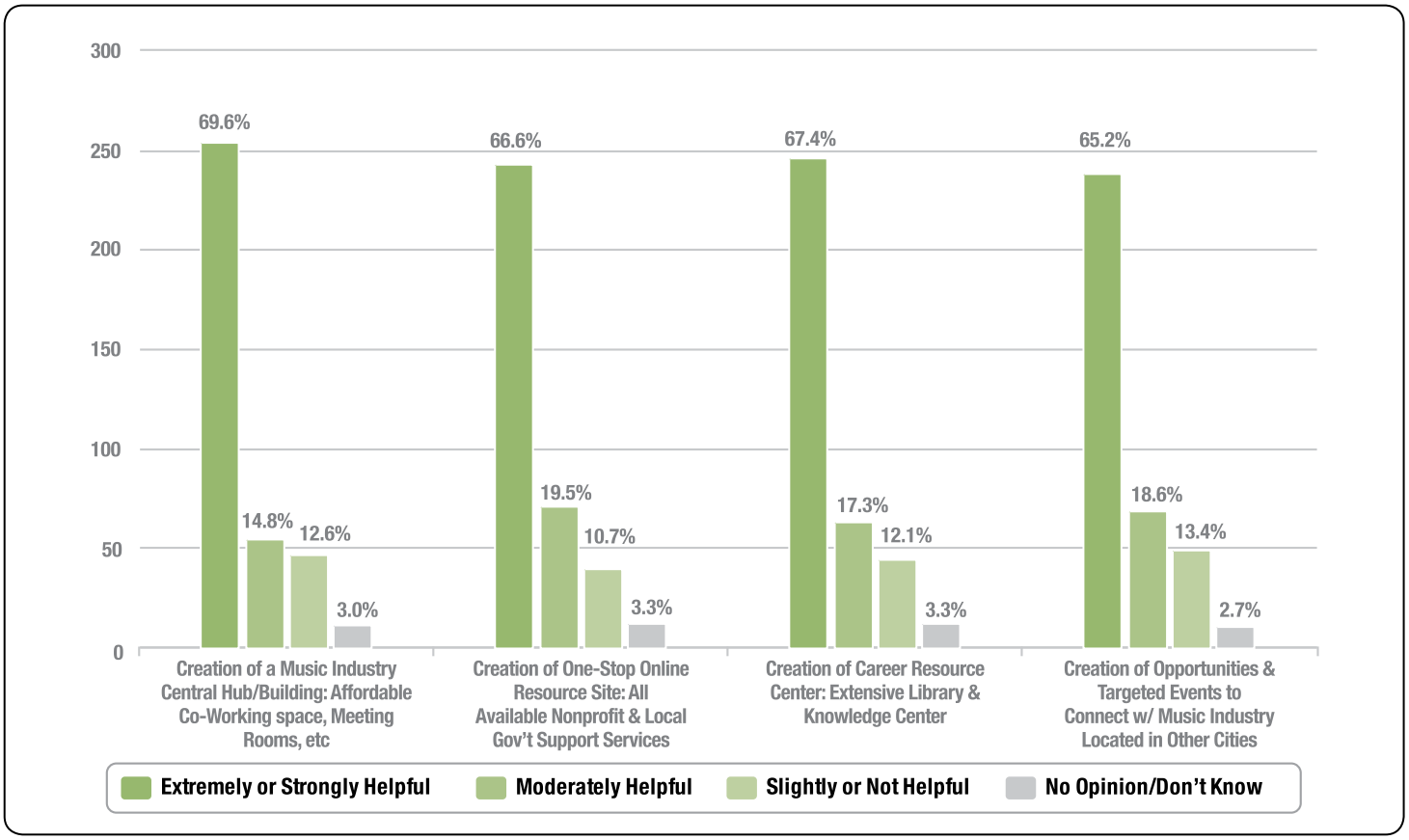
Needs and Gaps Category: PROFESSIONAL EDUCATION AND SKILLS DEVELOPMENT



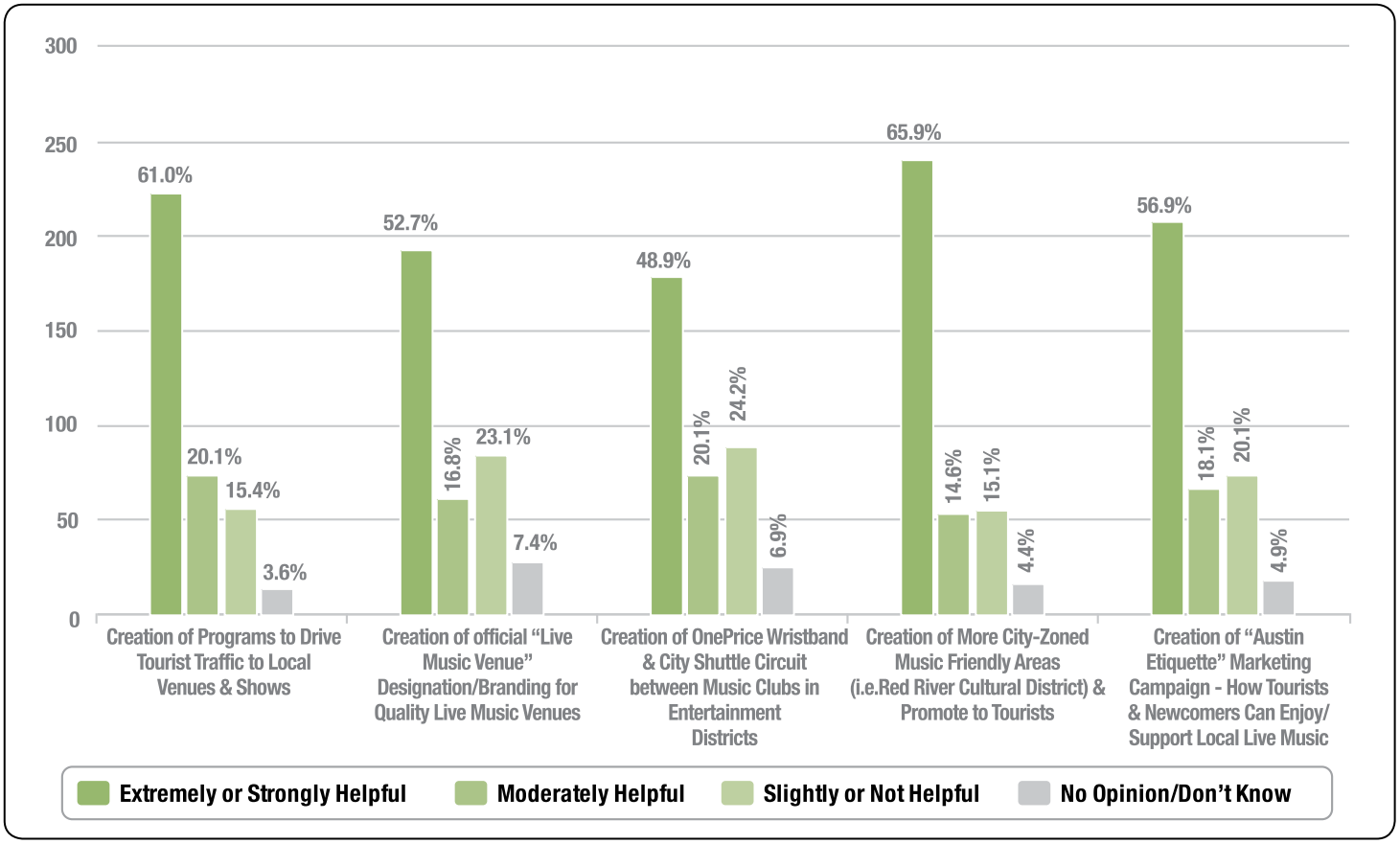
Needs and Gaps Category: INDUSTRY RESOURCES



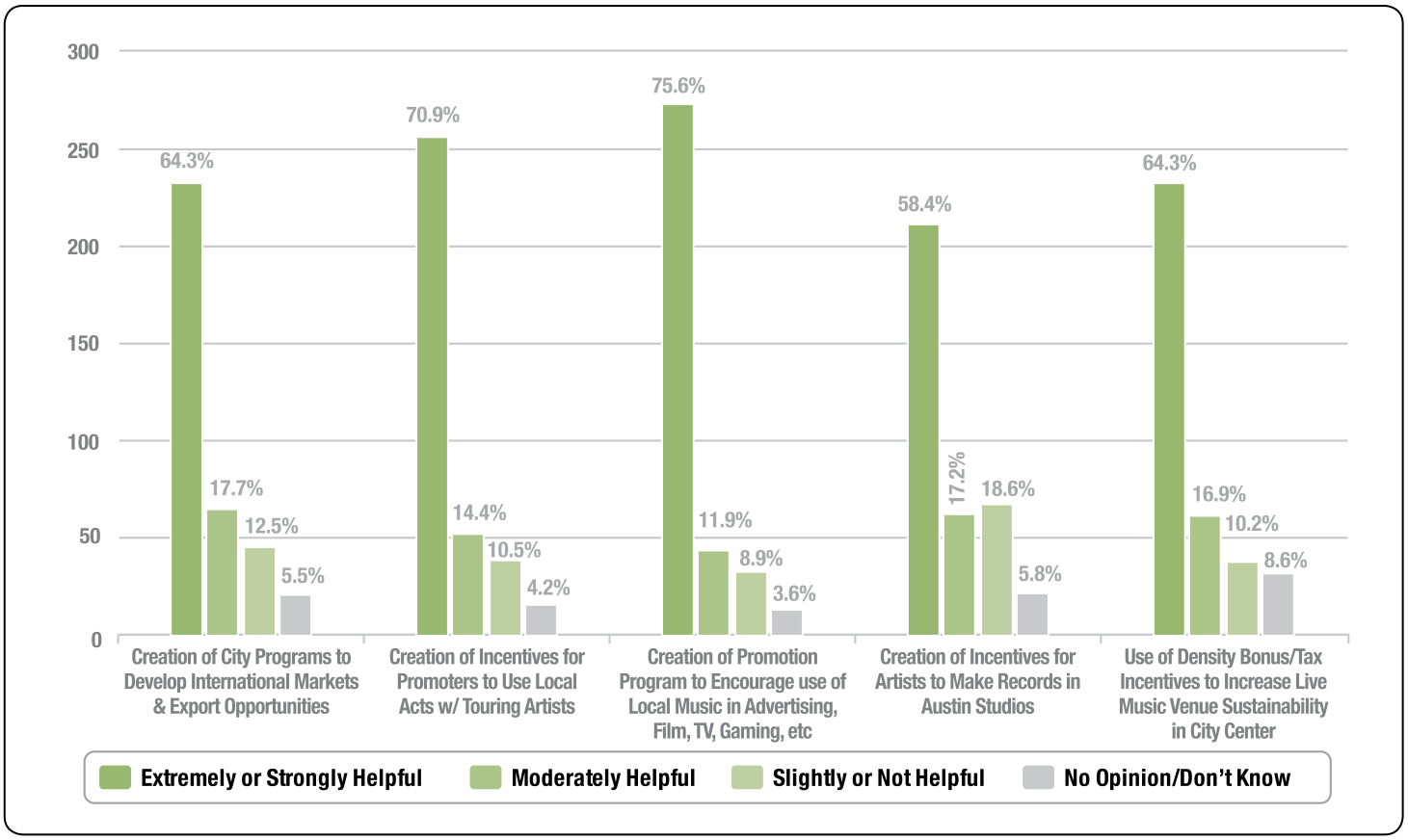
Ideas and Proposals Category: CAREER DEVELOPMENT AND CONNECTIVITY



Ideas and Proposals Category: TOURISM AND MARKET DEVELOPMENT



Ideas and Proposals Category: CITY PROGRAMS



Appendix VII
Venue Owners & Managers-Only Respondent Data Chart List

CHARTS APPEAR IN THIS SEQUENCE:

Venue Type Breakdown
Percent of Venues that Offer Live Music
Venue Capacity
Venues that Have Outdoor Music Permit
Average Number of Nights Per Week of Live Music
Average Number of Hours Per Week of Live Music
Average Percent of Touring (Non-Local) Shows
Venue Launch & Growth Financing
Number of Years in Operation
Number of Full-Time Employees or FTE Equivalents
2013 Venue Gross Income
Austin Energy Utilities Rate for Venue Operation
Areas of Experience and Expertise
Current Means of Employment
Number of Years Working in a Venue
Gender Breakdown
Age Breakdown
Race and Ethnicity
Number of Years Living in Austin
Health Care Coverage
Housing: Rent vs. Own
Housing: Type of Residence
Number of Household Contributors to Rent or Mortgage
Prosperity Trends: Individual Income Increase/Decrease Over Past 3 Years
2013 Pre-Tax Individual Income (All Owner/Mgrs, All Income Sources)
2013 Pre-Tax Individual Income (All Owner/Mgrs, Music Industry Income Only)
2013 Pre-Tax Individual Income (Only Owner/Mgrs w/ Music Industry + Augmented Income)
2013 Pre-Tax Individual Income (Only Owner/Mgrs w/ 100% Income from Music Industry)
Venue Challenges Category: COSTS AND COMPETITION
Venue Challenges Category: CITY PERMITS AND ENFORCEMENT
Venue Challenges Category: SOUND ORDINANCE AND OUTDOOR MUSIC VENUE PERMITS

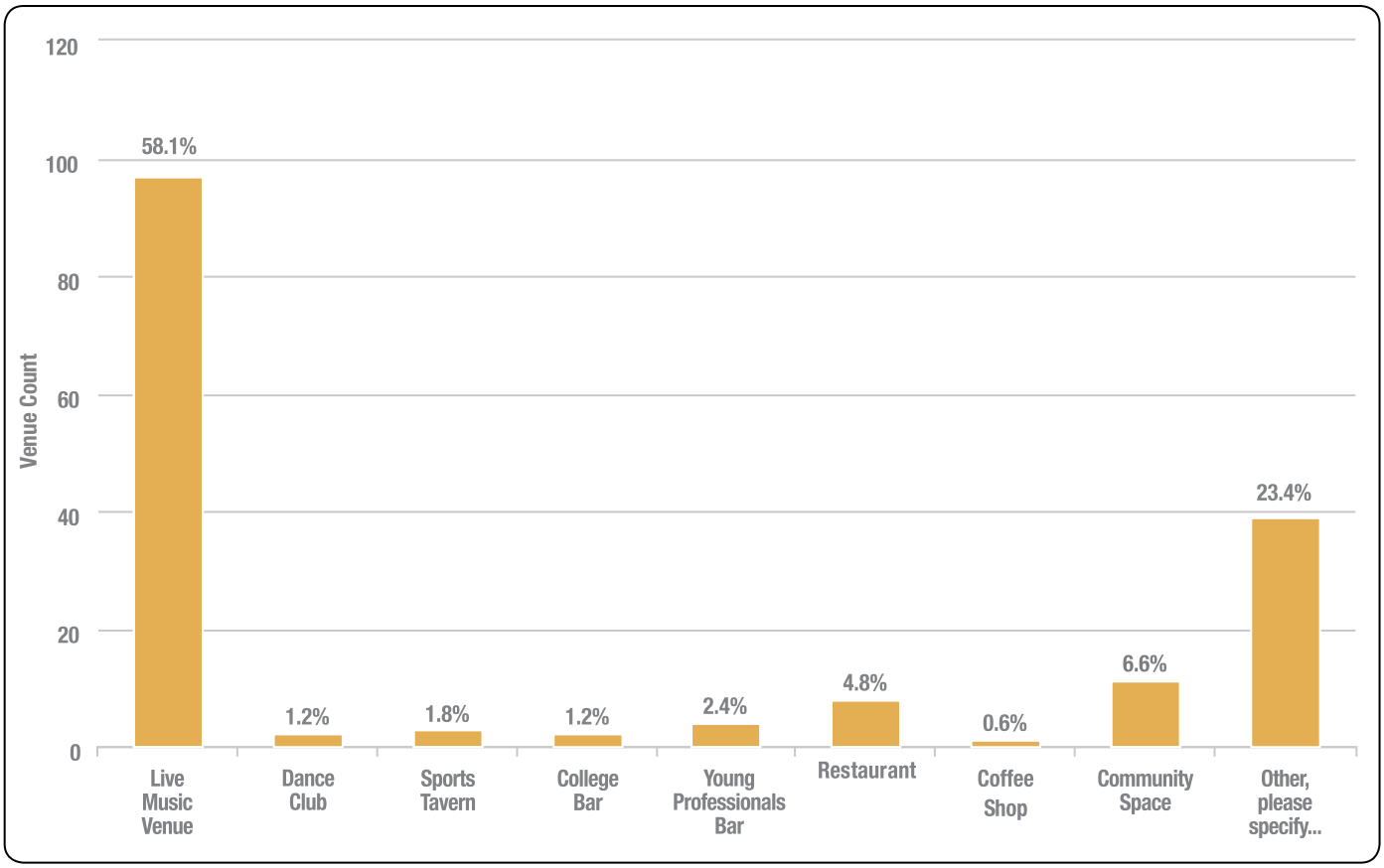
Venue Challenges Category: EVENTS AND TEMPORARY USE PERMITS
Needs and Gaps Category: LIVING AND AFFORDABILITY
Ideas and Proposals Category: TOURISM AND MARKET DEVELOPMENT

Appendix VII

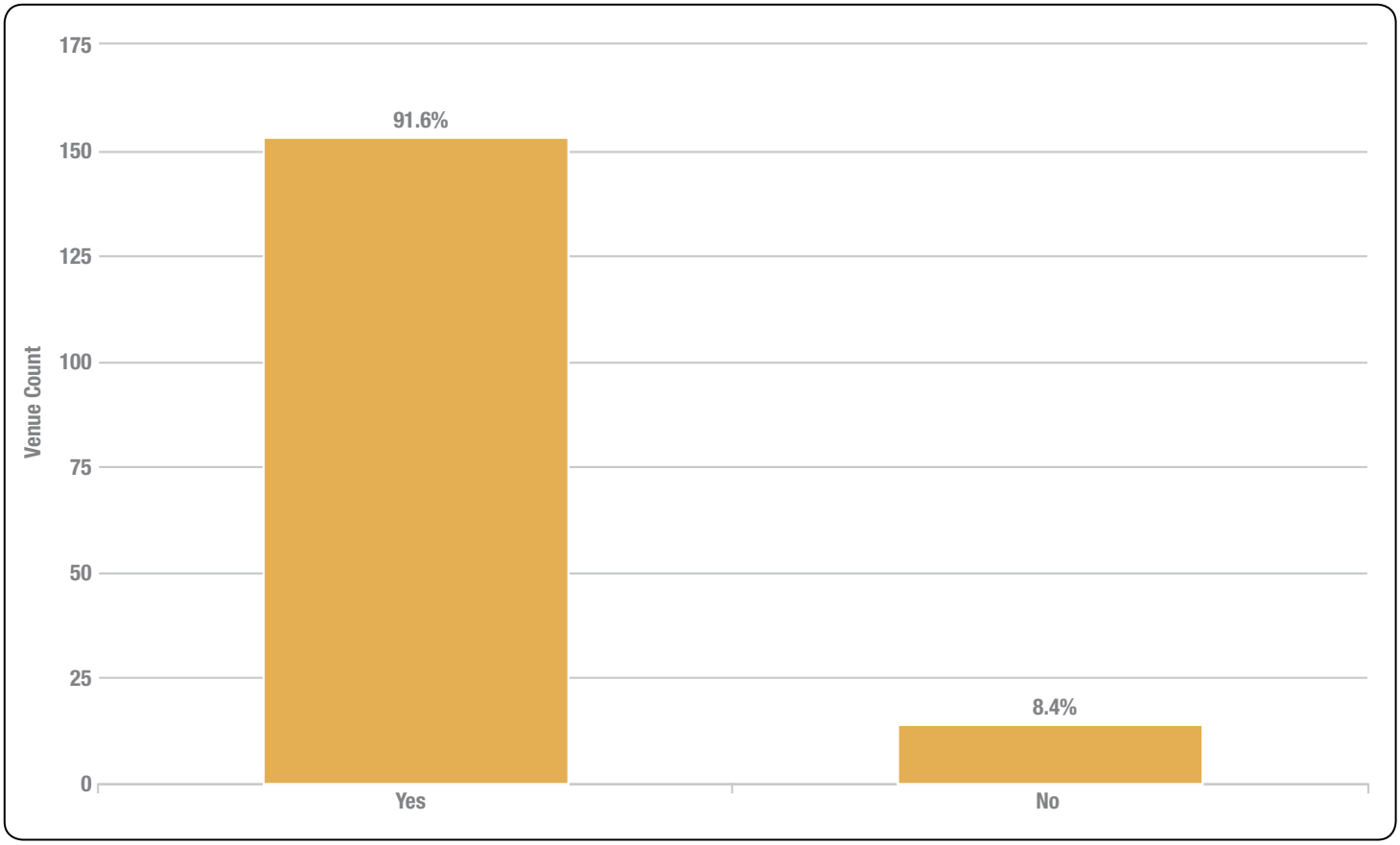
Venue Owner or Manager-Only Respondent Data Charts

TOTAL RESPONSES	COMPLETED RESPONSES	COMPLETION RATE
187	118	63%

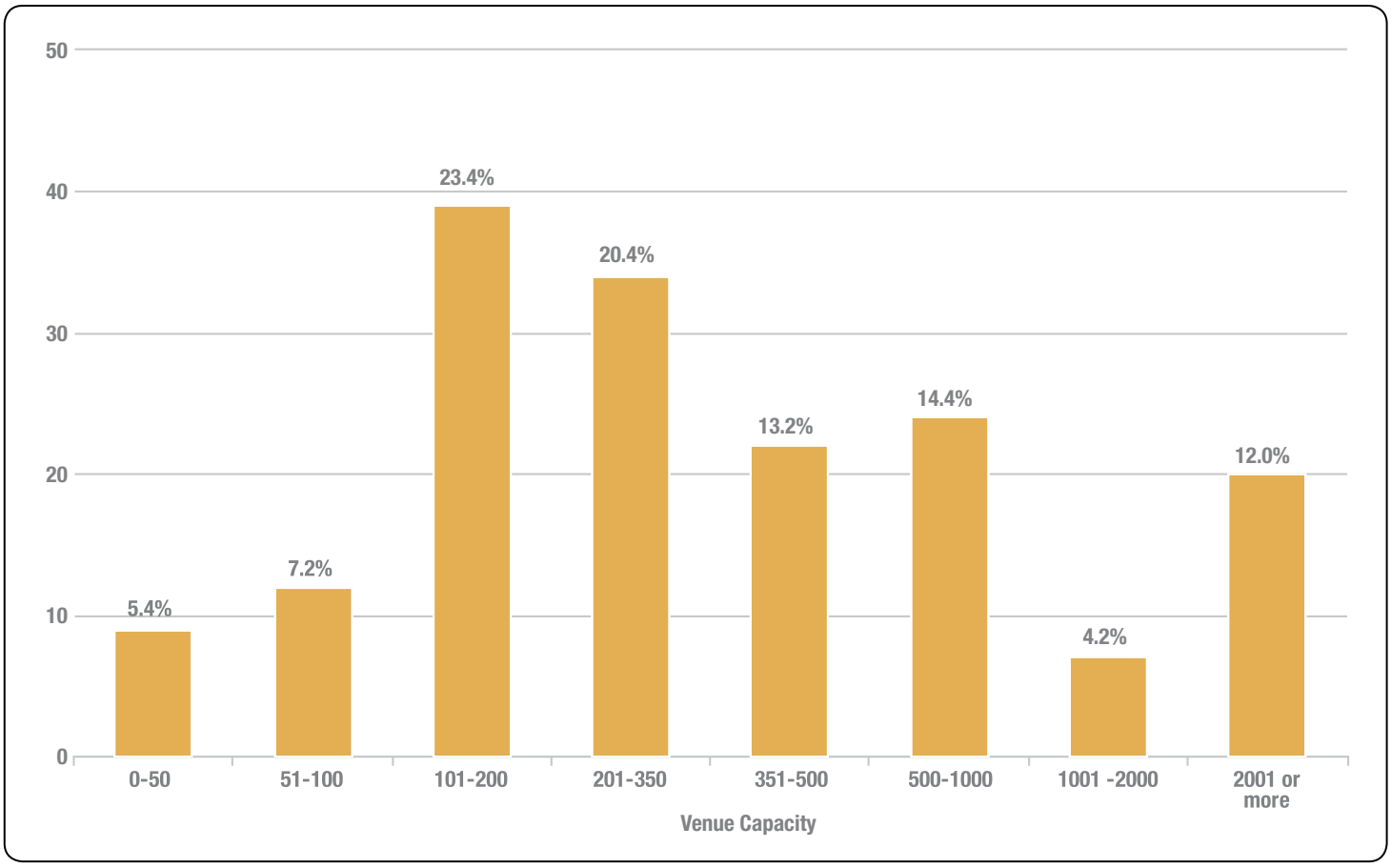
Venue Type Breakdown



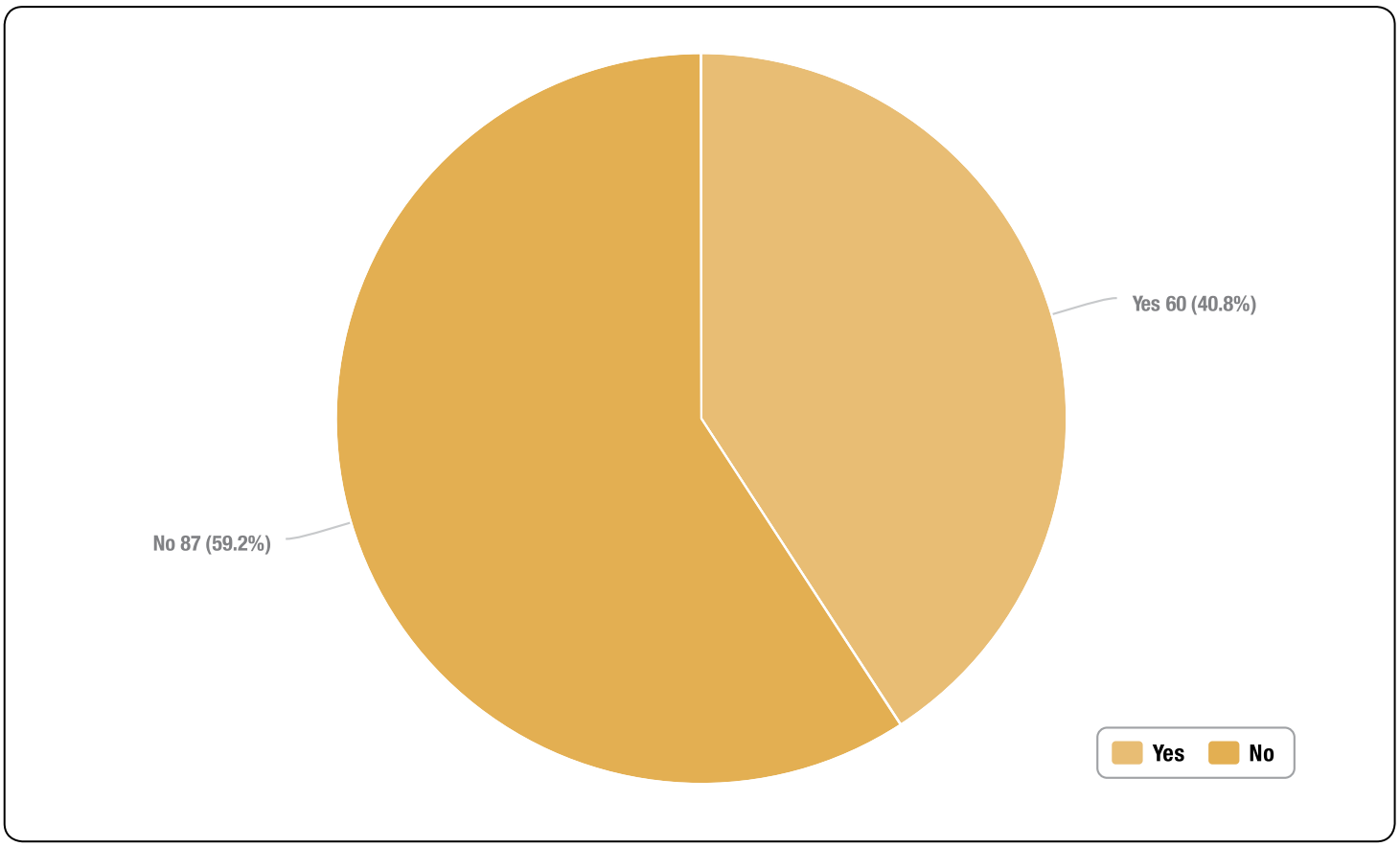
Percent of Venues that Offer Live Music



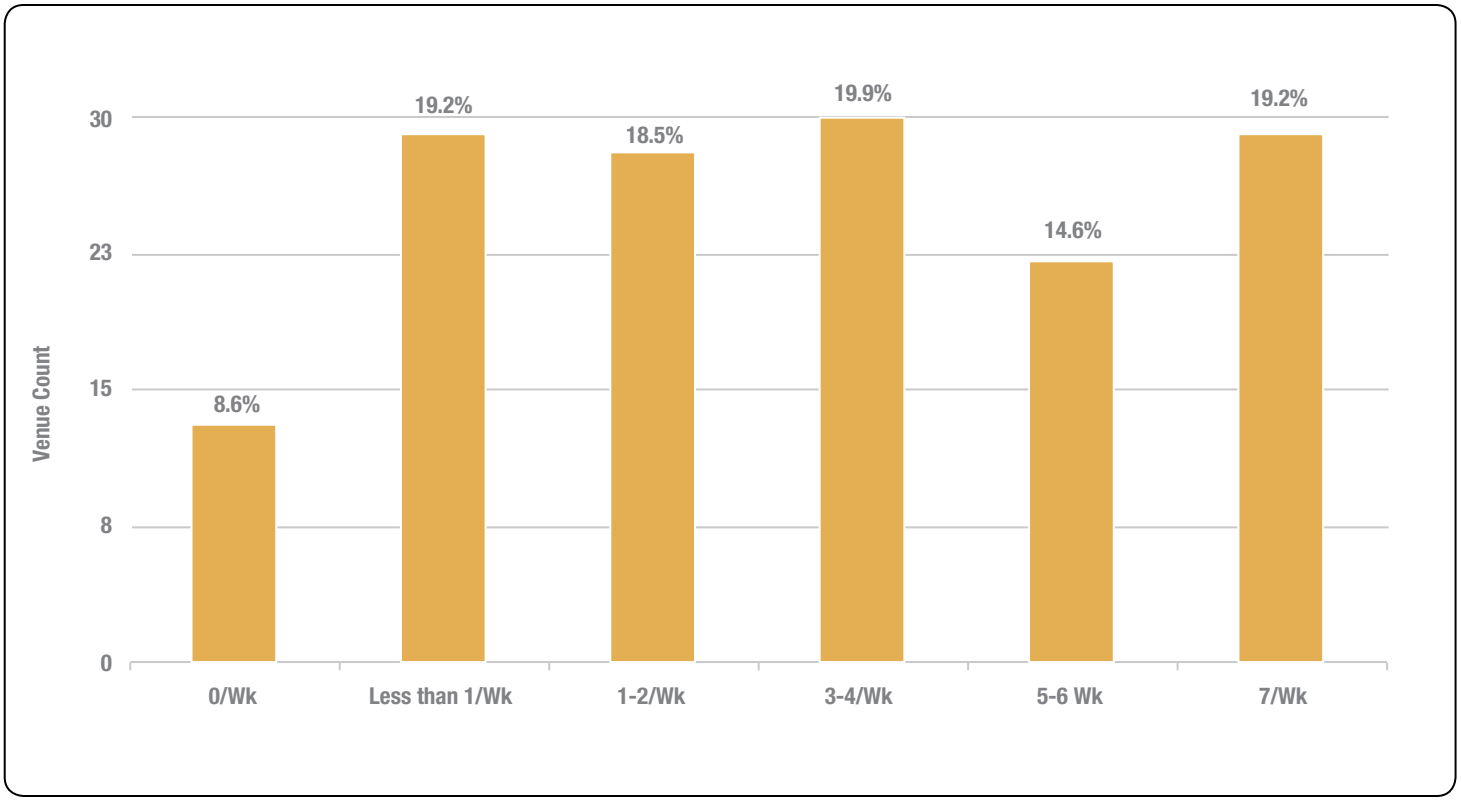
Venue Capacity



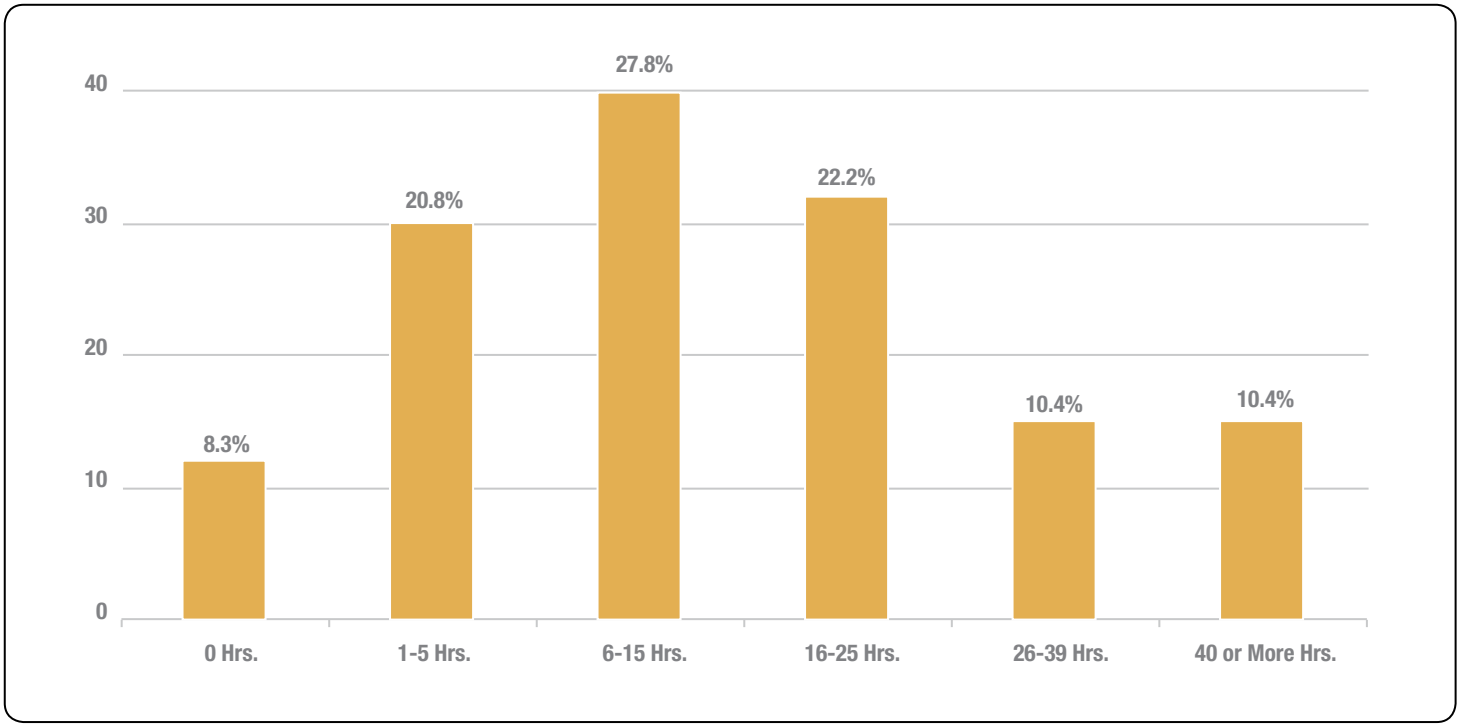
Venues that Have Outdoor Music Permit



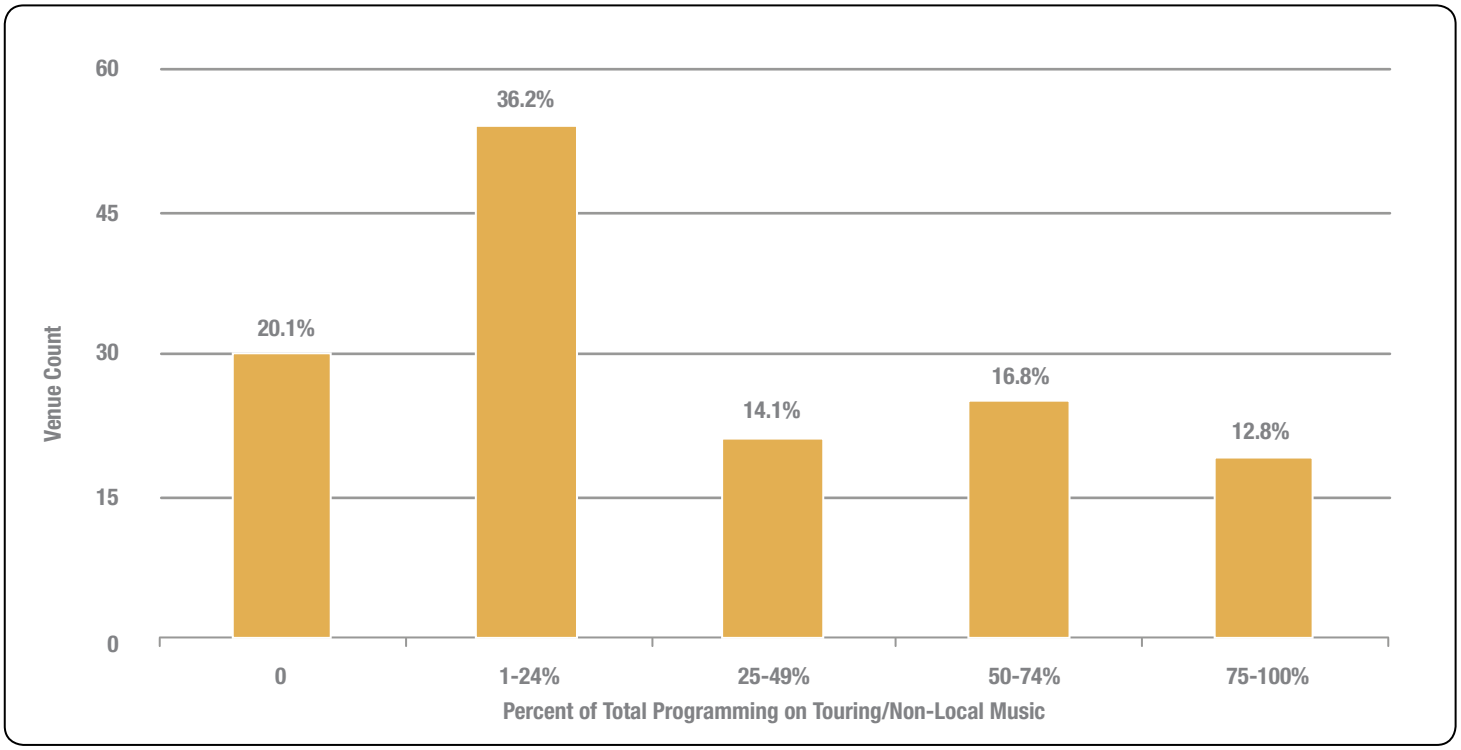
Average Number of Nights Per Week of Live Music



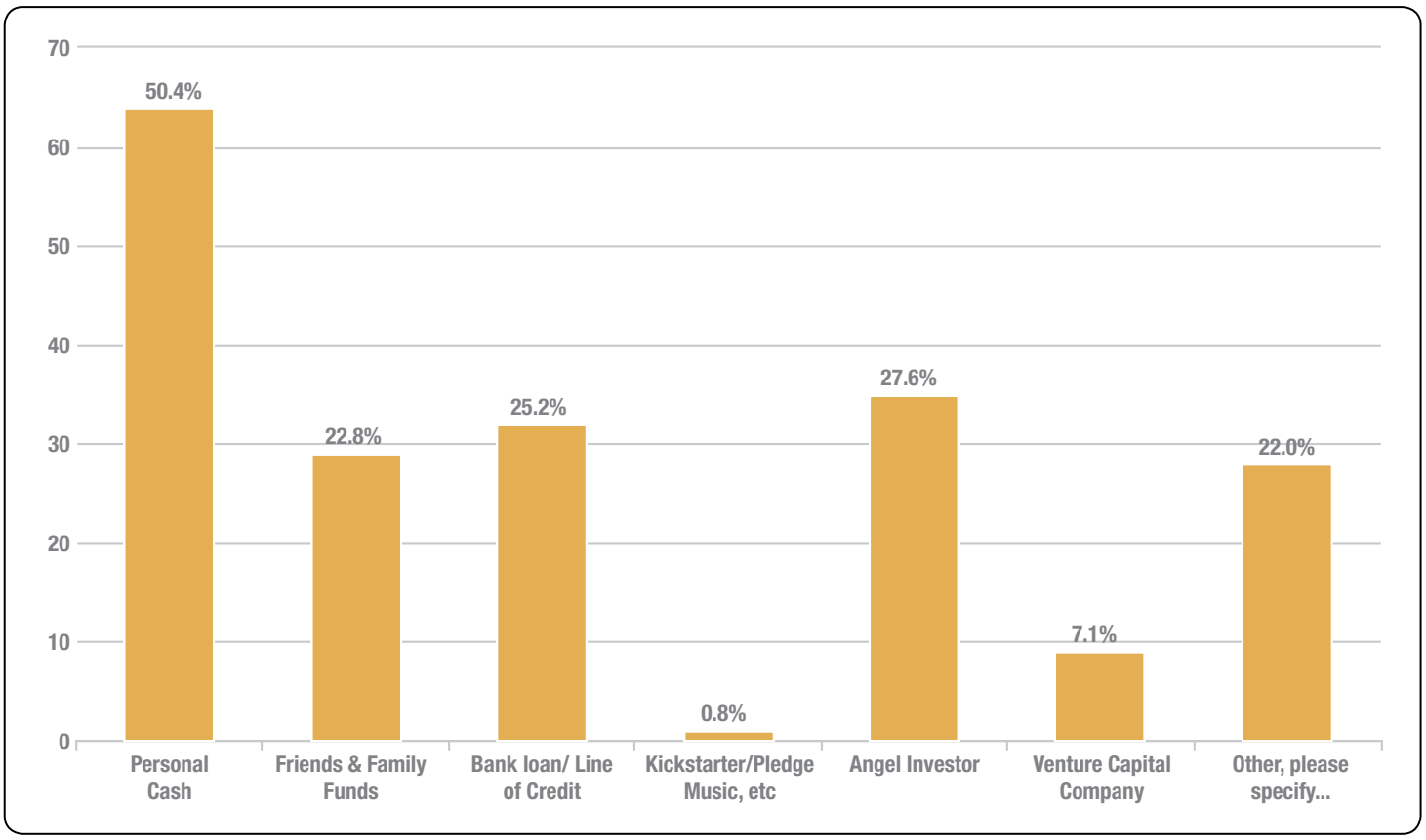
Average Number of Hours Per Week of Live Music



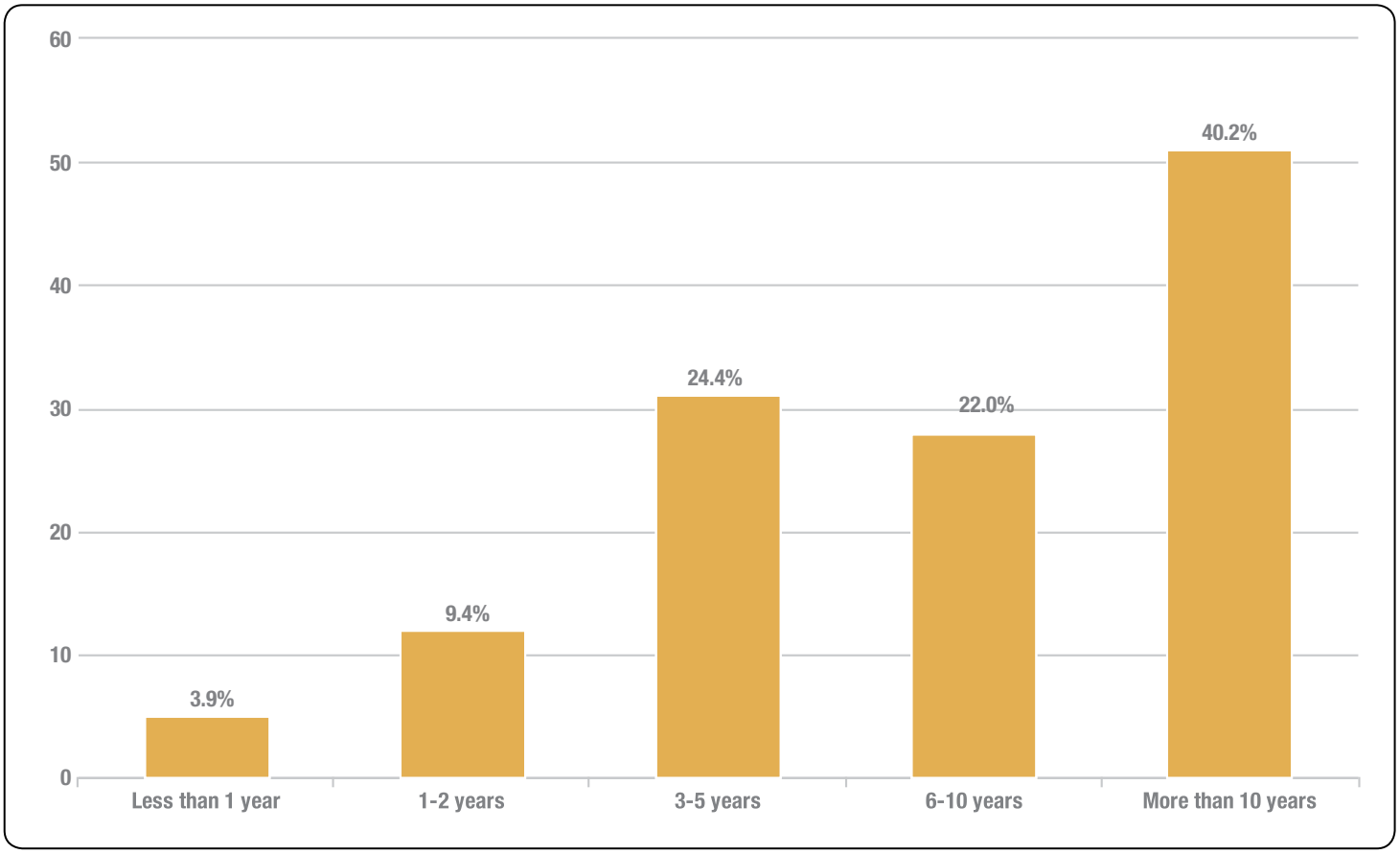
Average Percent of Touring/Non-Local Music



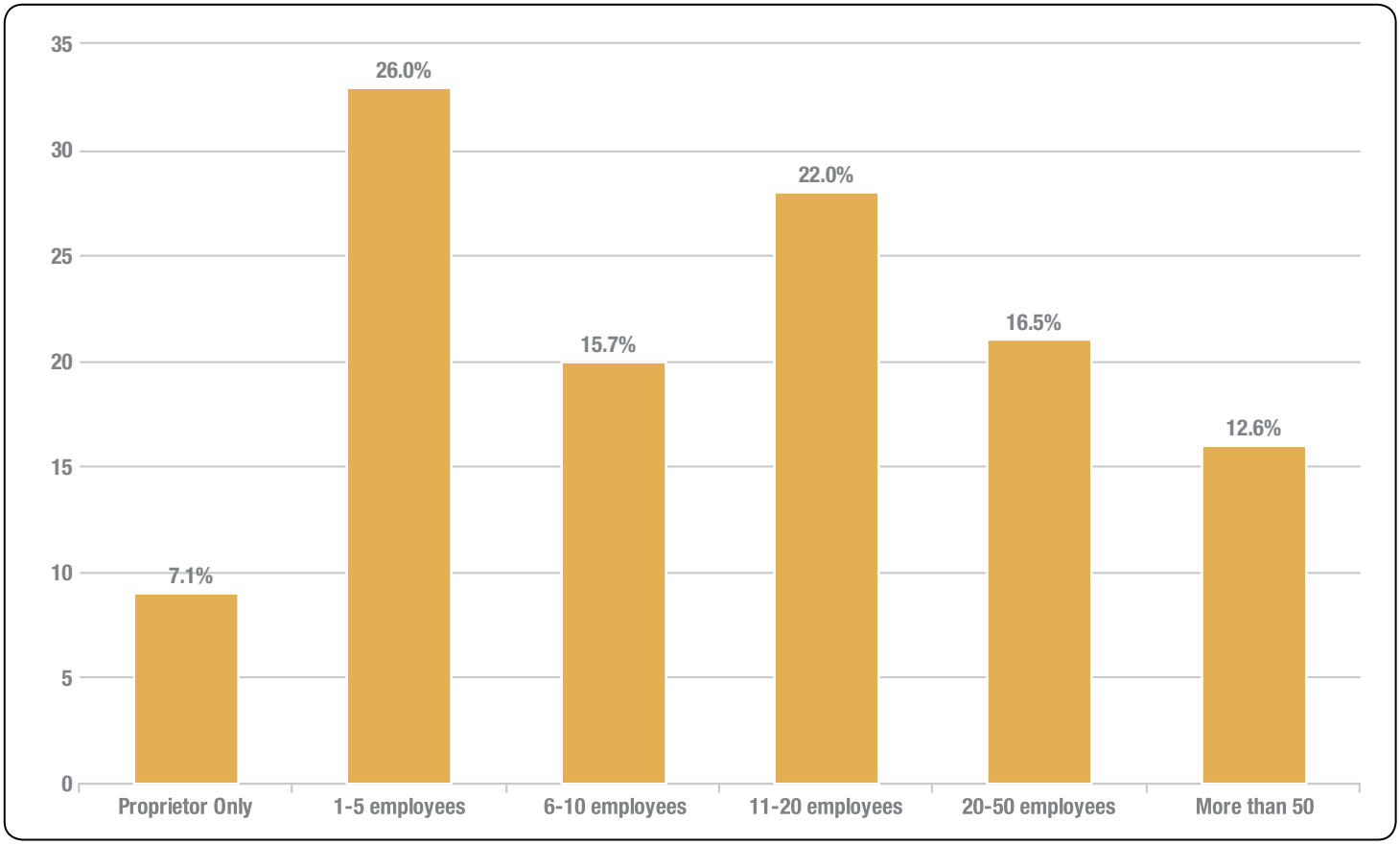
Venue Launch & Growth Financing



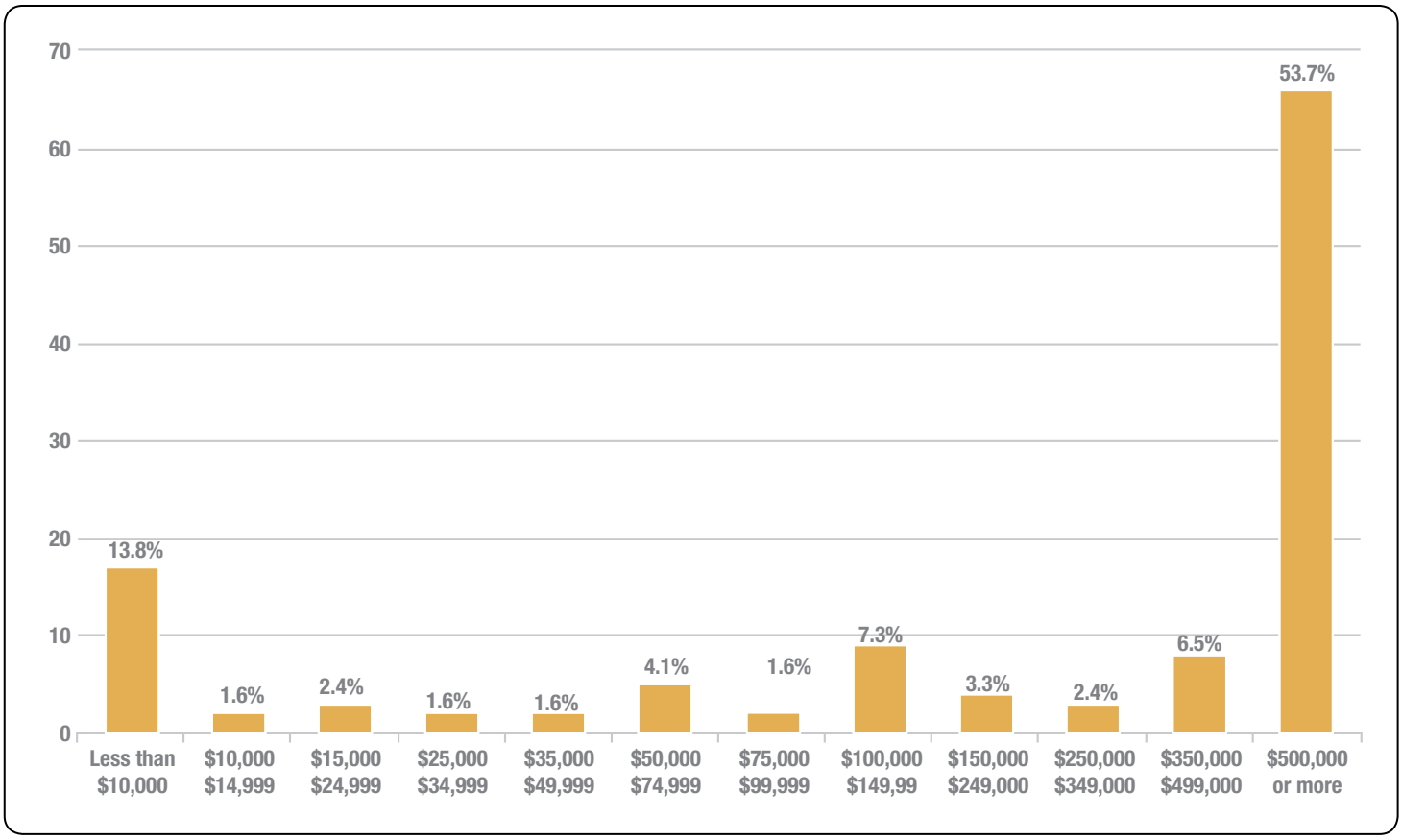
Number of Years in Operation



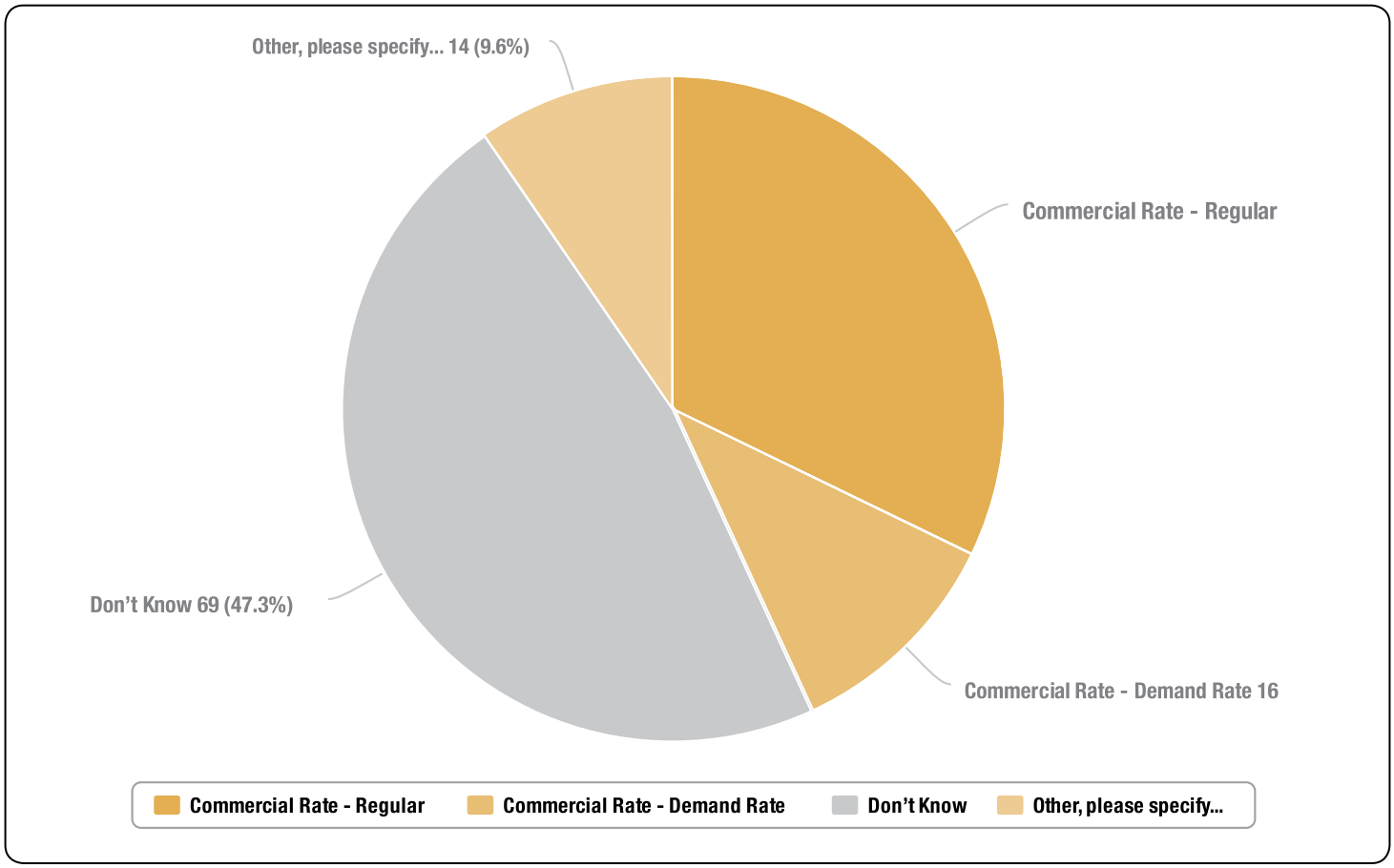
Number of Full-Time Employees or FTE Equivalents



2013 Venue Gross Income



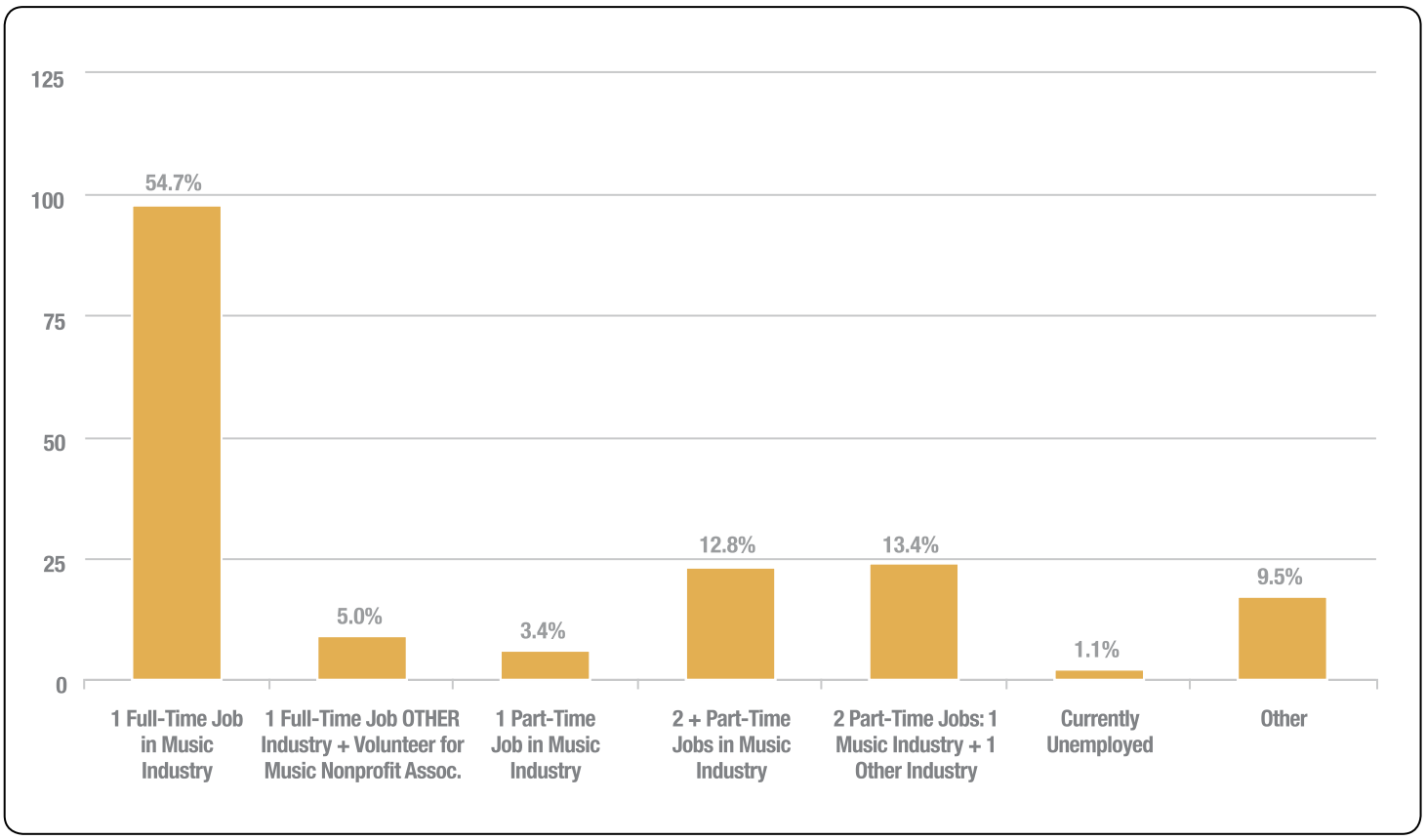
Austin Energy Utilities Rate for Venue Operation



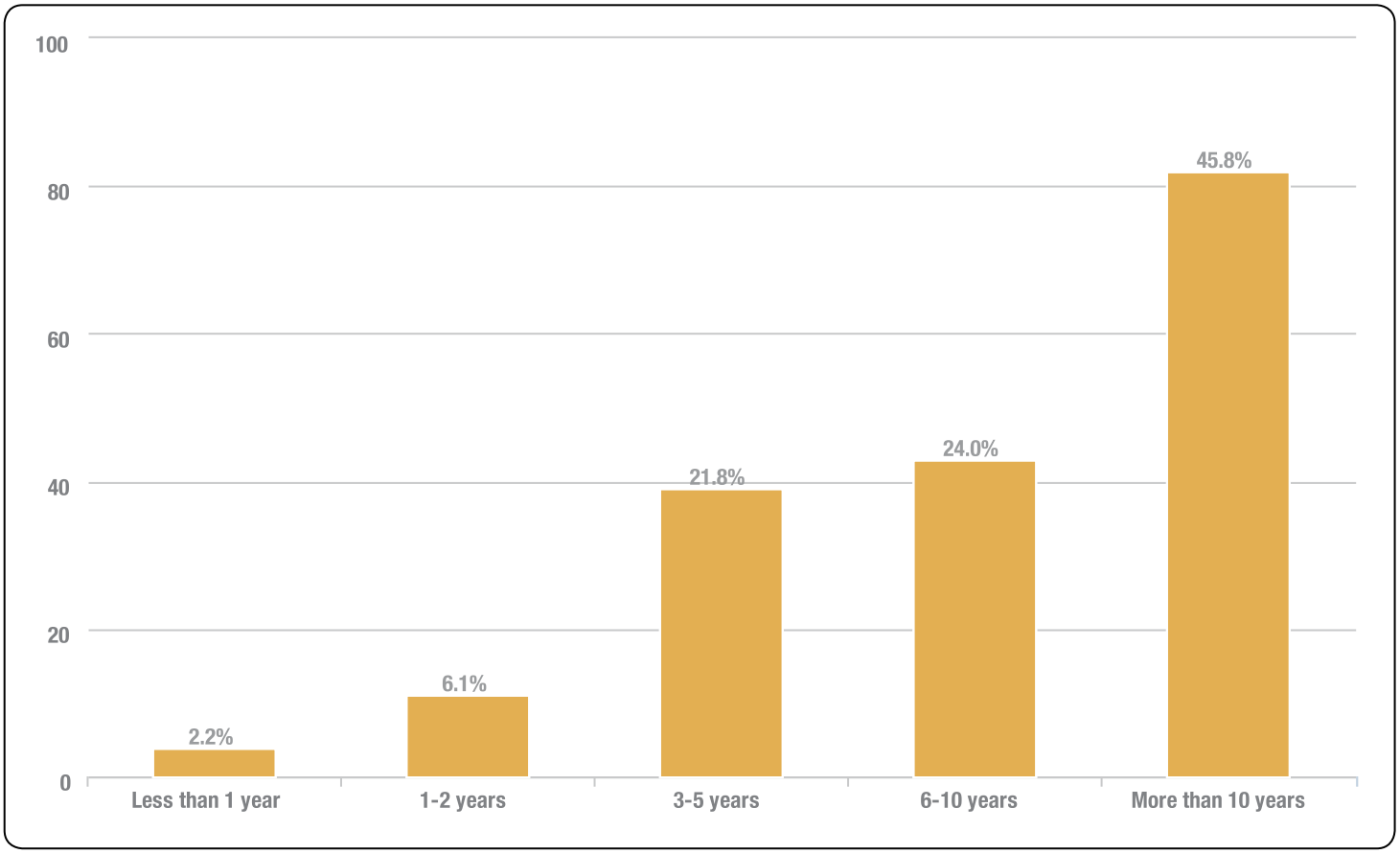
Areas of Experience and Expertise

Response	Count	
Accounting	33	19.1%
Audio Engineering	28	16.2%
Advocacy/Lobbying	11	6.4%
Audio Mastering	9	5.2%
Digital Music Distribution	13	7.5%
Booking/Talent Buying	79	45.7%
Audio Mixing	20	11.6%
Digital Music Sales	10	5.8%
Event Promotion	99	57.2%
Event Production	110	63.6%
Distribution	12	6.9%
Film/TV Composer	5	2.9%
Manufacturing	8	4.6%
Graphic Design	22	12.7%
Financing or Venture Capital	11	6.4%
Marketing	62	35.8%
Music Education	10	5.8%
Music Arranger	9	5.2%
Media/Journalism	16	9.2%
Artist Management	40	23.1%
Music Legal Issues	5	2.9%
Nonprofit Services	27	15.6%
Music Publishing	6	3.5%
Music Licensing	7	4.0%
Post Production	9	5.2%
Radio Promotion	10	5.8%
Radio Production	5	2.9%
PR & Publicity	42	24.3%
Record Labels	11	6.4%
Social Media	56	32.4%
Retail Sales	32	18.5%
Record Production	12	6.9%
Software Development	5	2.9%
Ticketing	25	14.5%
Studio Management	12	6.9%
Artist/Songwriting or Composing	18	10.4%
Touring Logistics	22	12.7%
Web Design/Development	14	8.1%
Venue Management	125	72.3%
Artist/Live Performance	51	29.5%
	Total: 173	

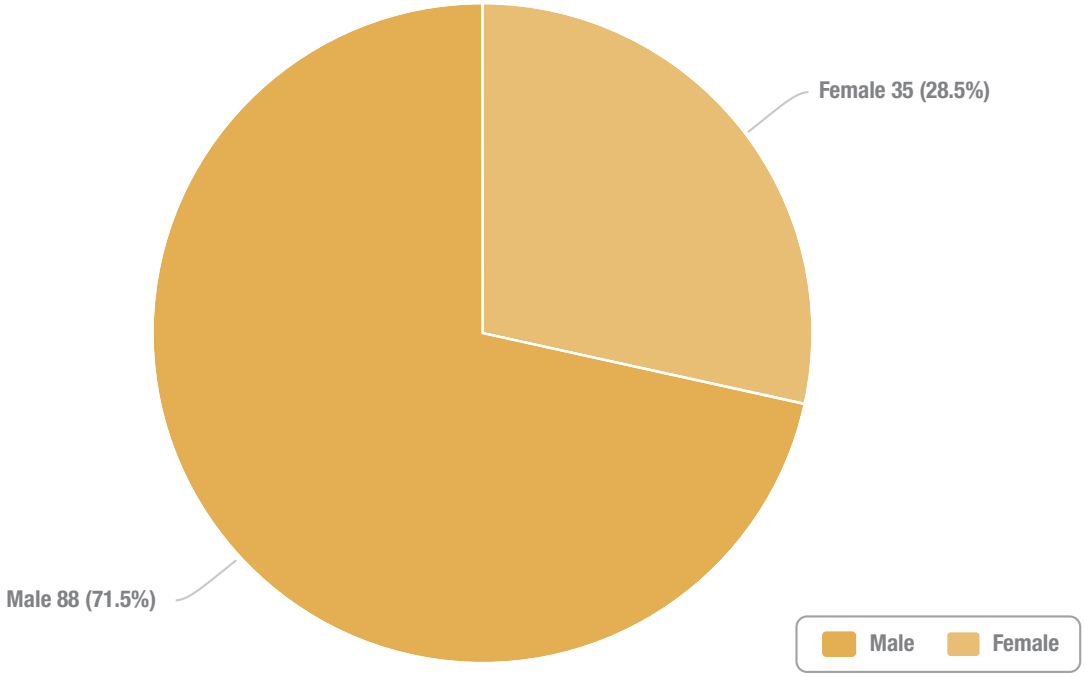
Current Means of Employment



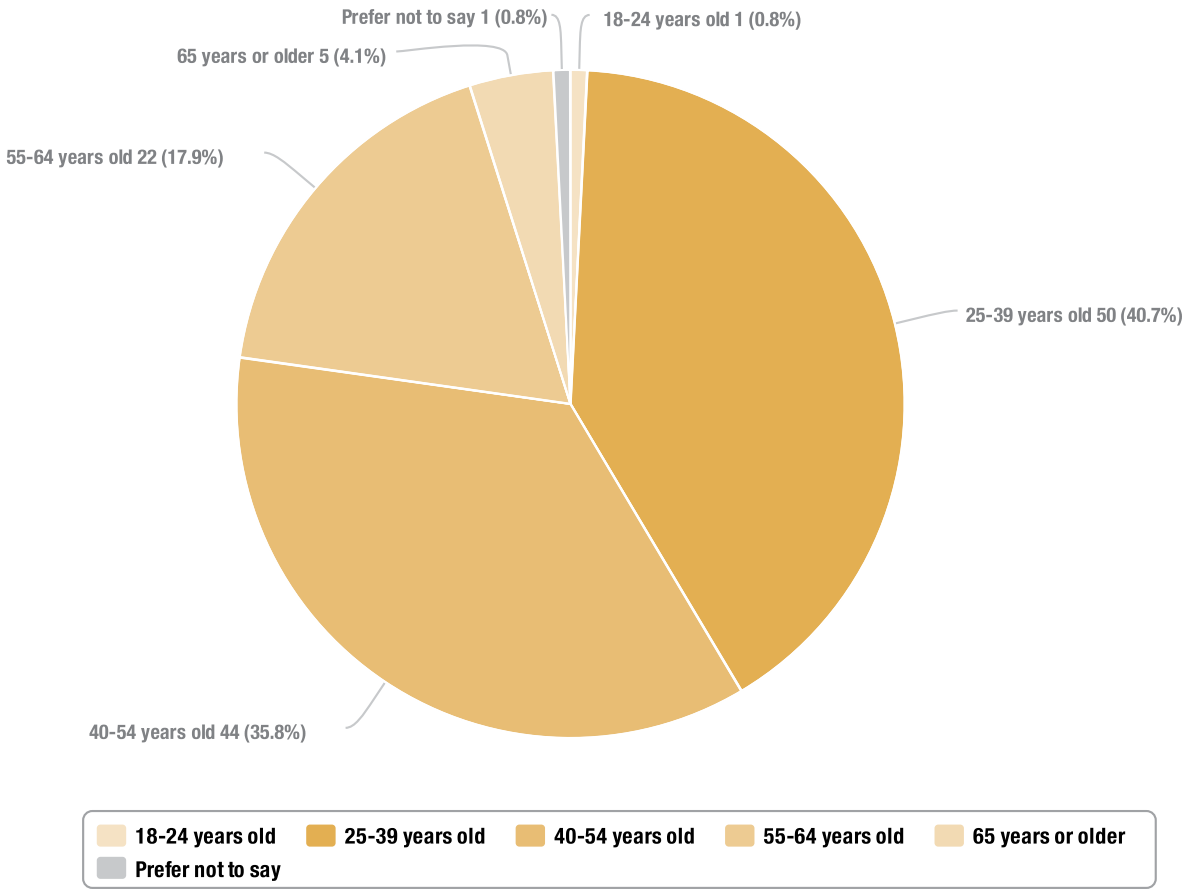
Number of Years Working in a Venue



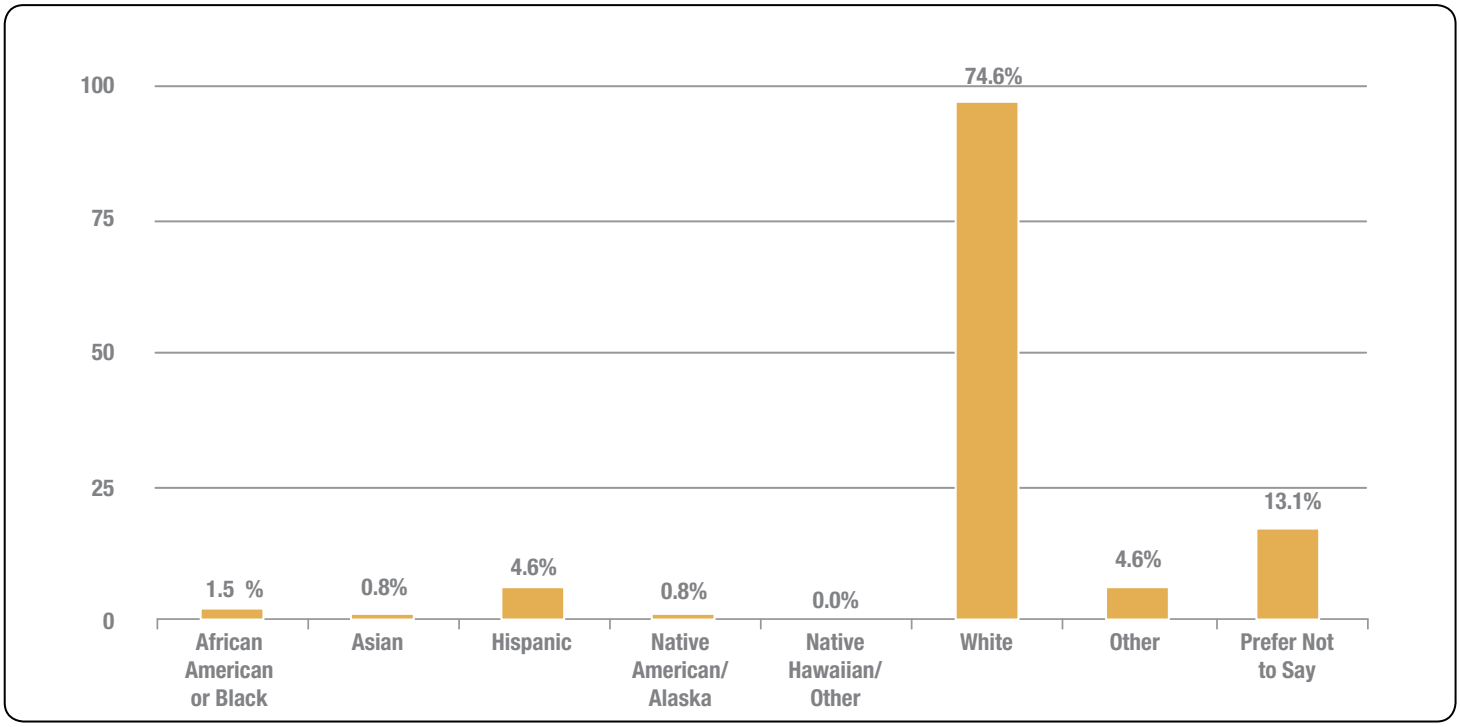
Gender Breakdown



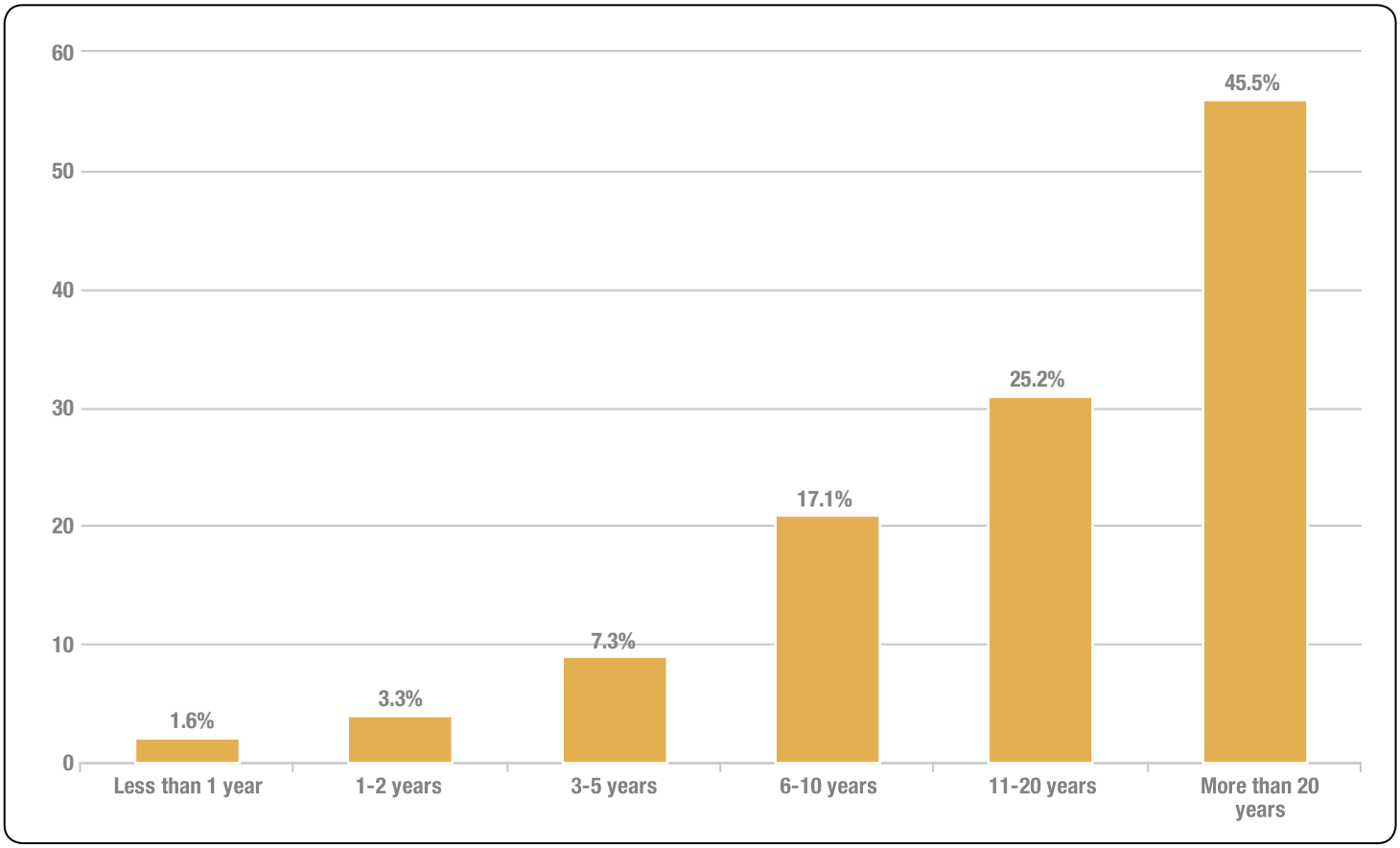
Age Breakdown



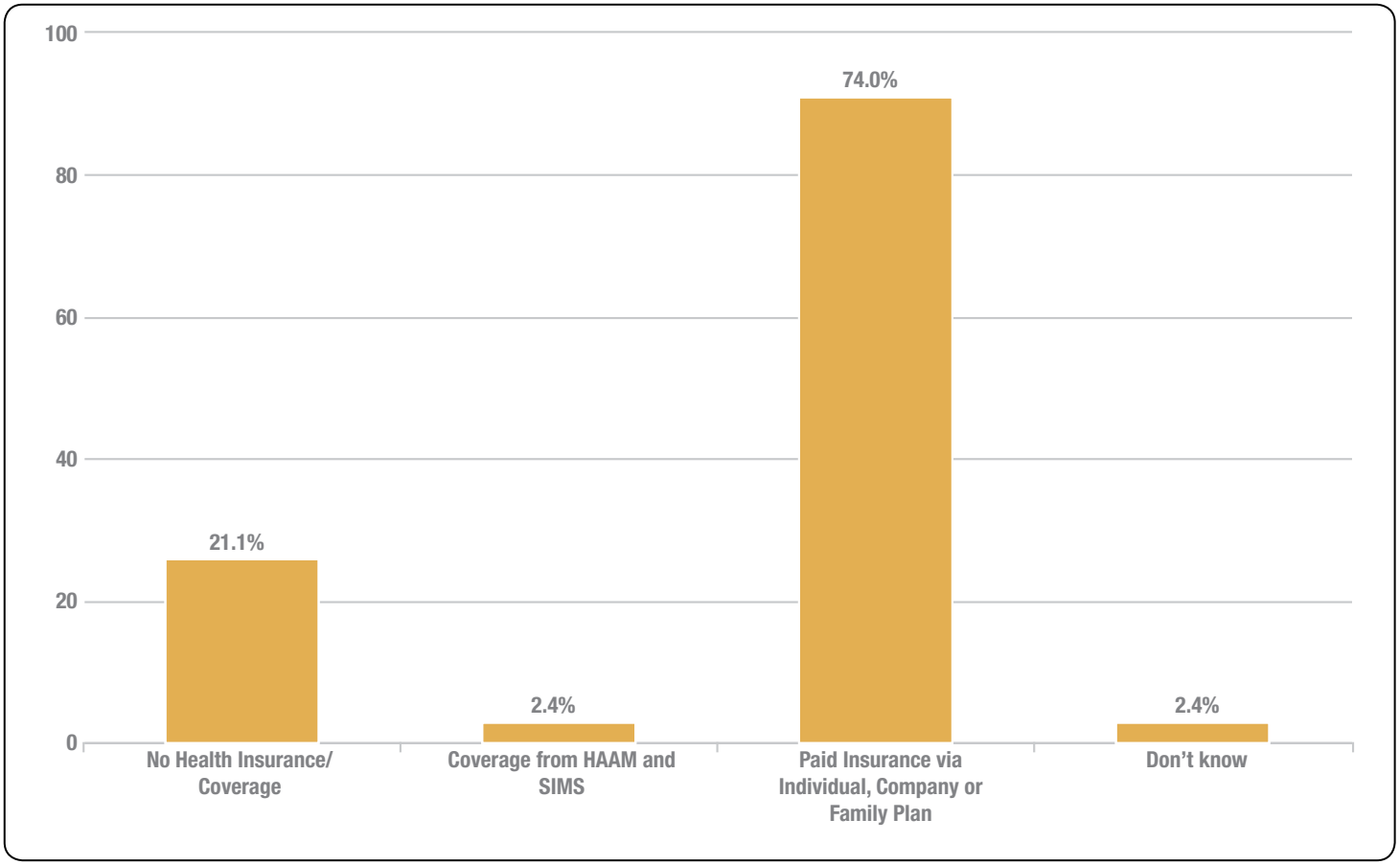
Race and Ethnicity



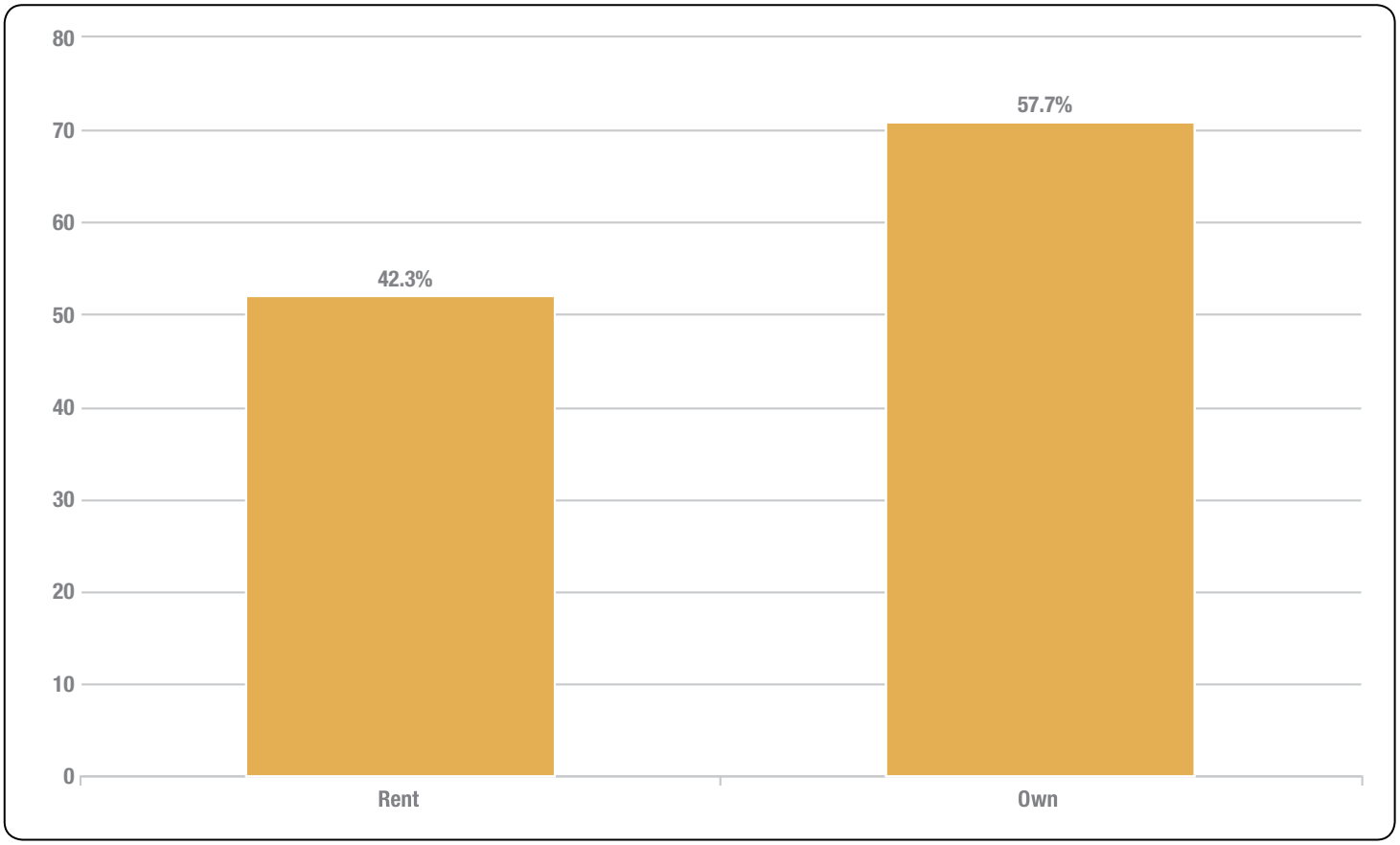
Number of Years Living in Austin



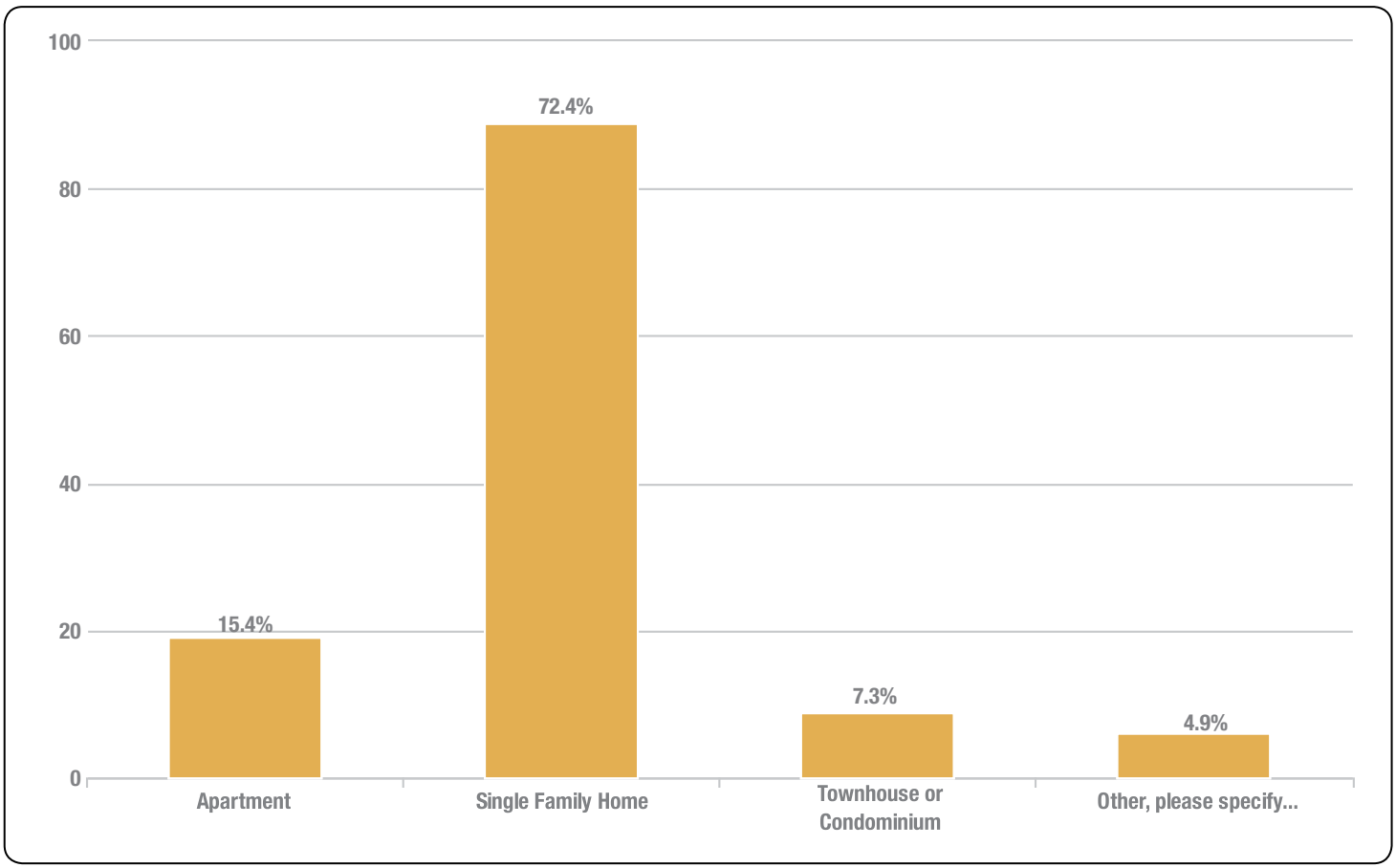
Health Care Coverage



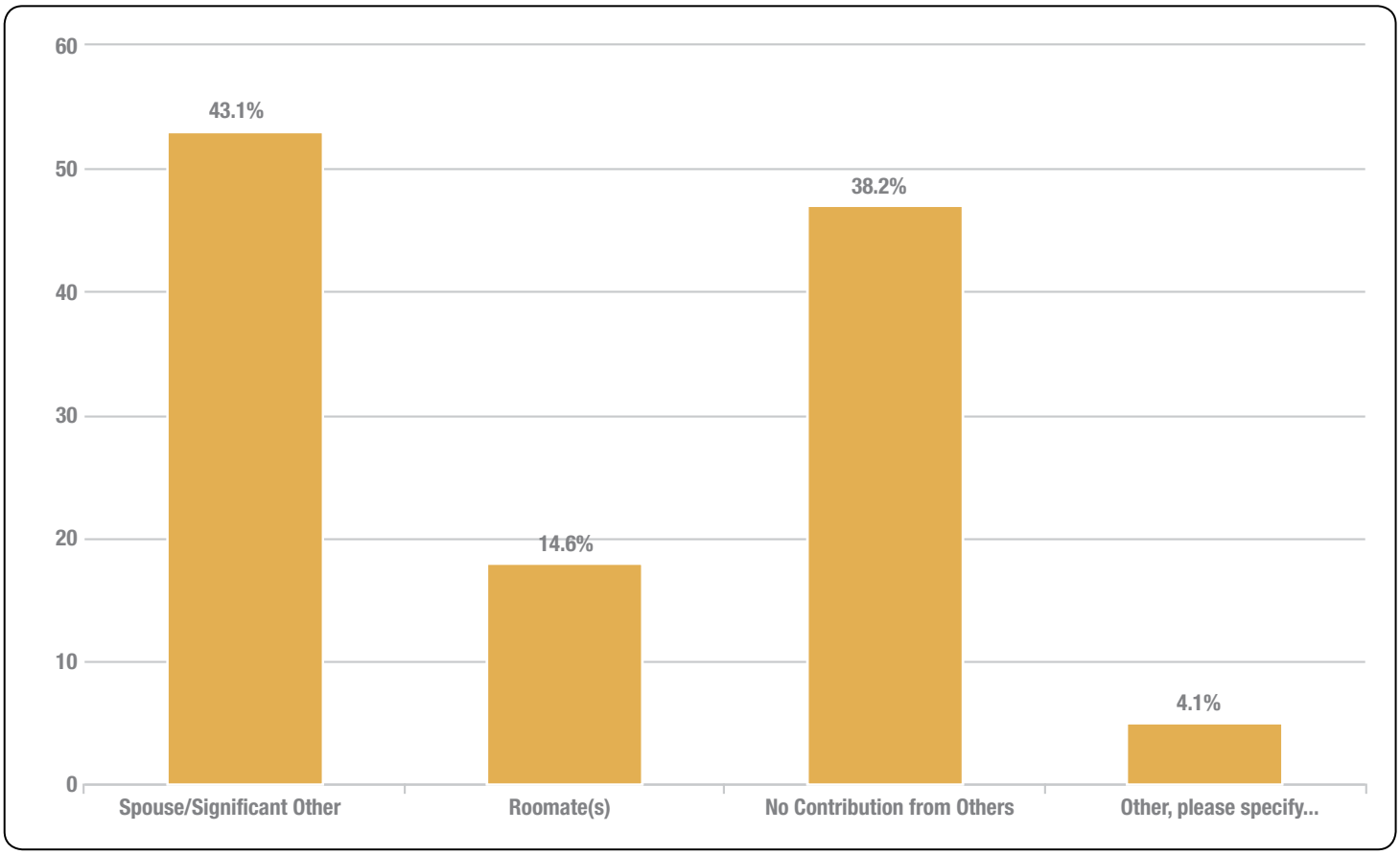
Housing: Rent vs. Own



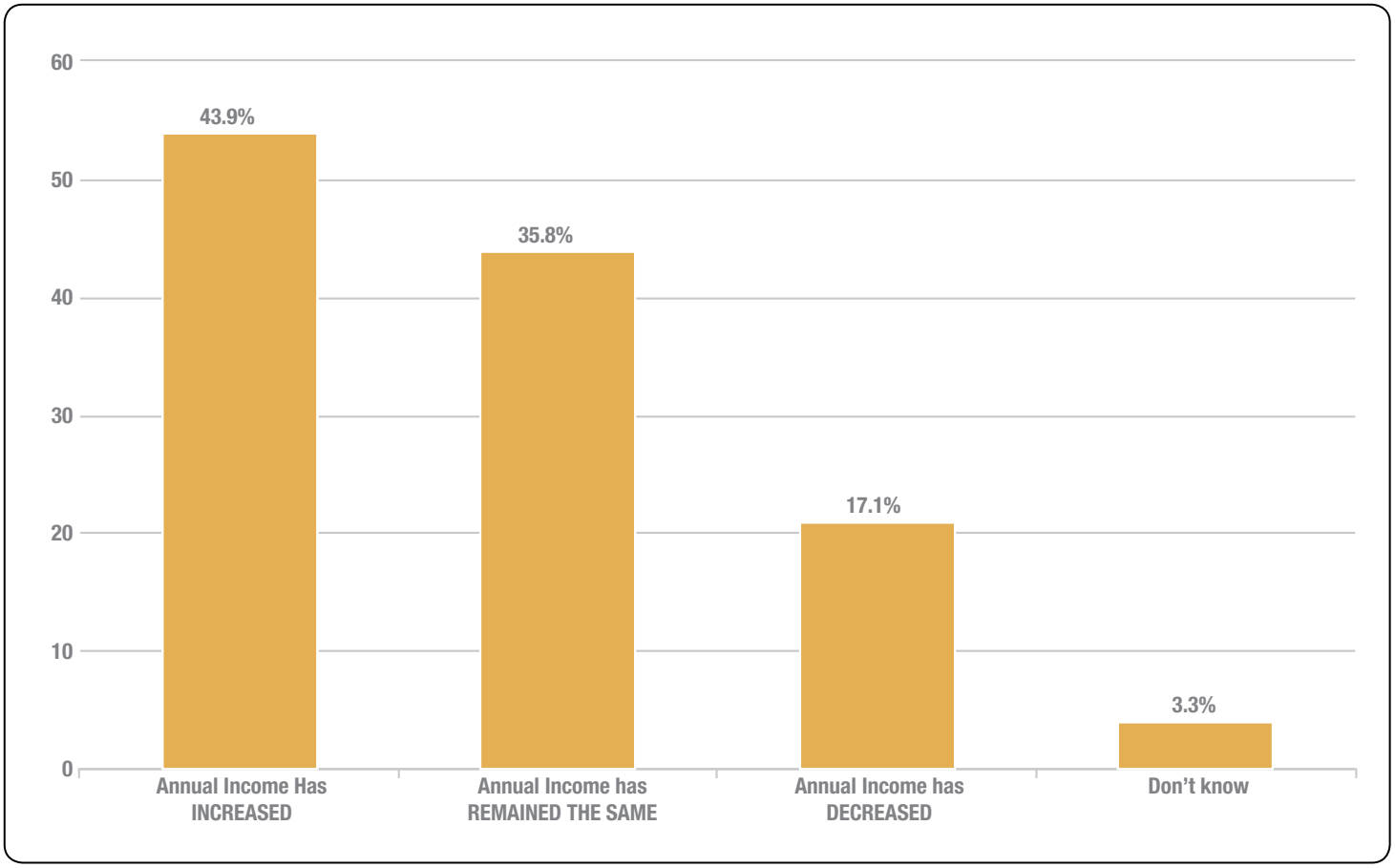
Housing: Type of Residence



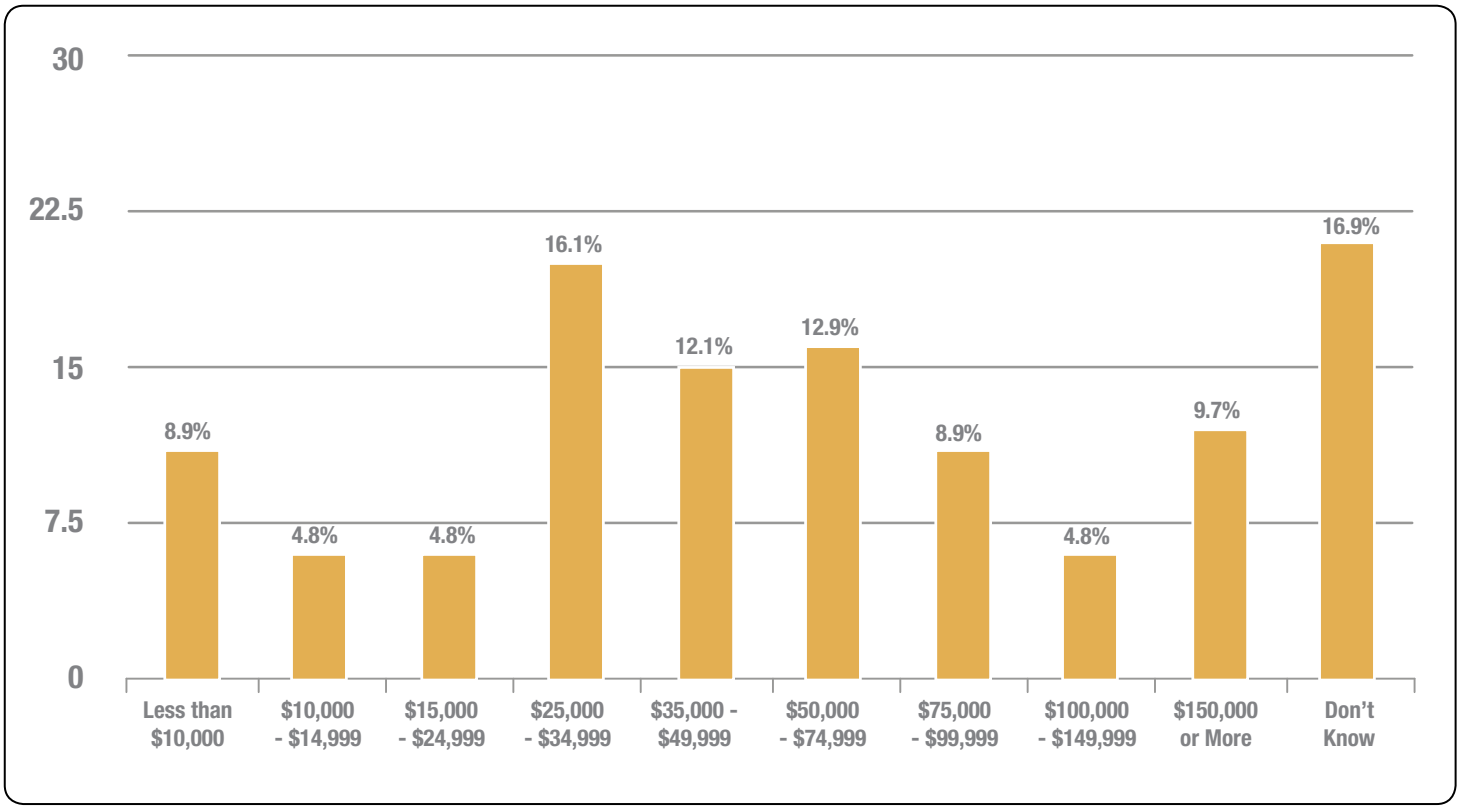
Number of Household Contributors to Rent or Mortgage



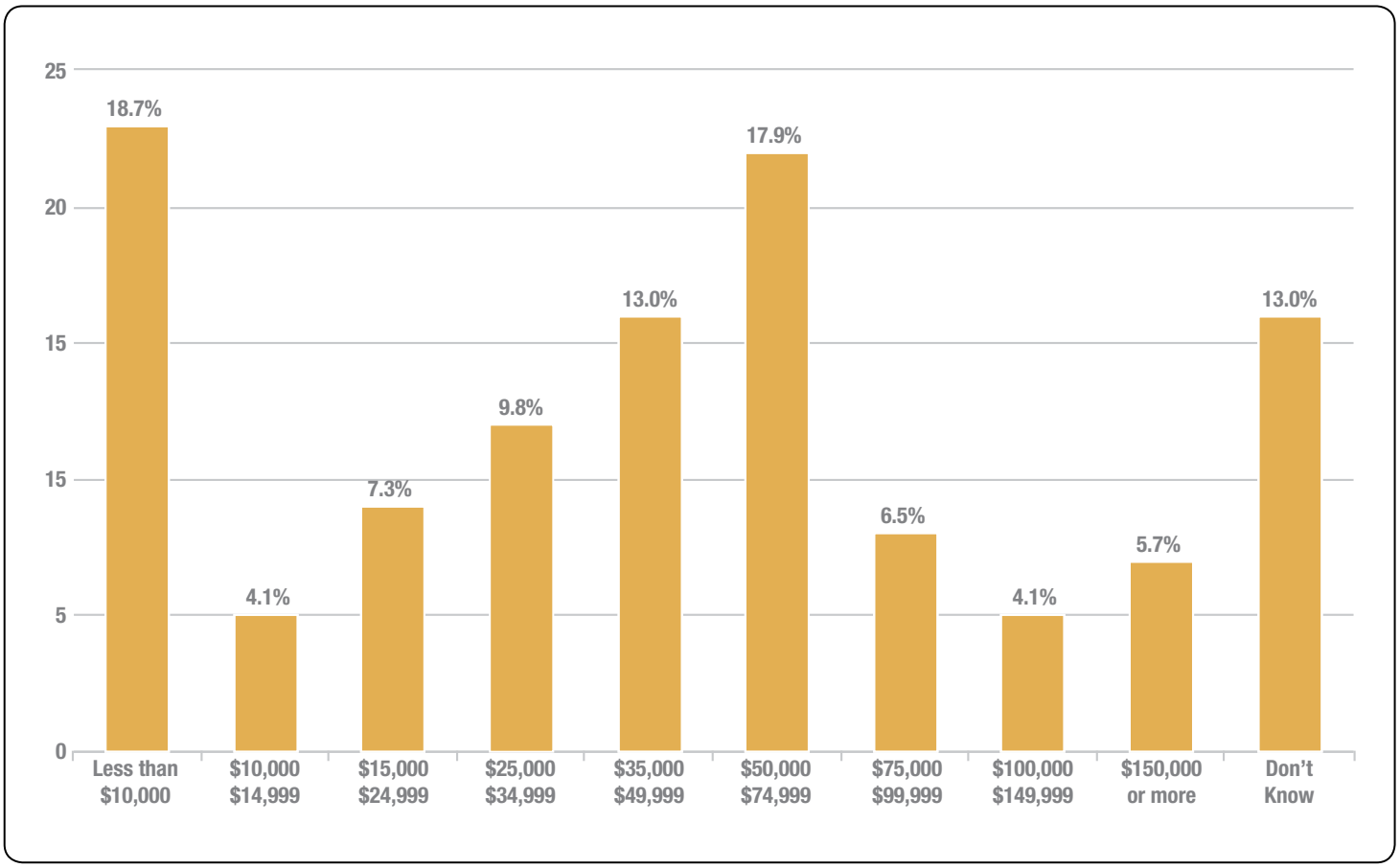
Prosperity Trends: Individual Income Increase/Decrease Over Past 3 Years



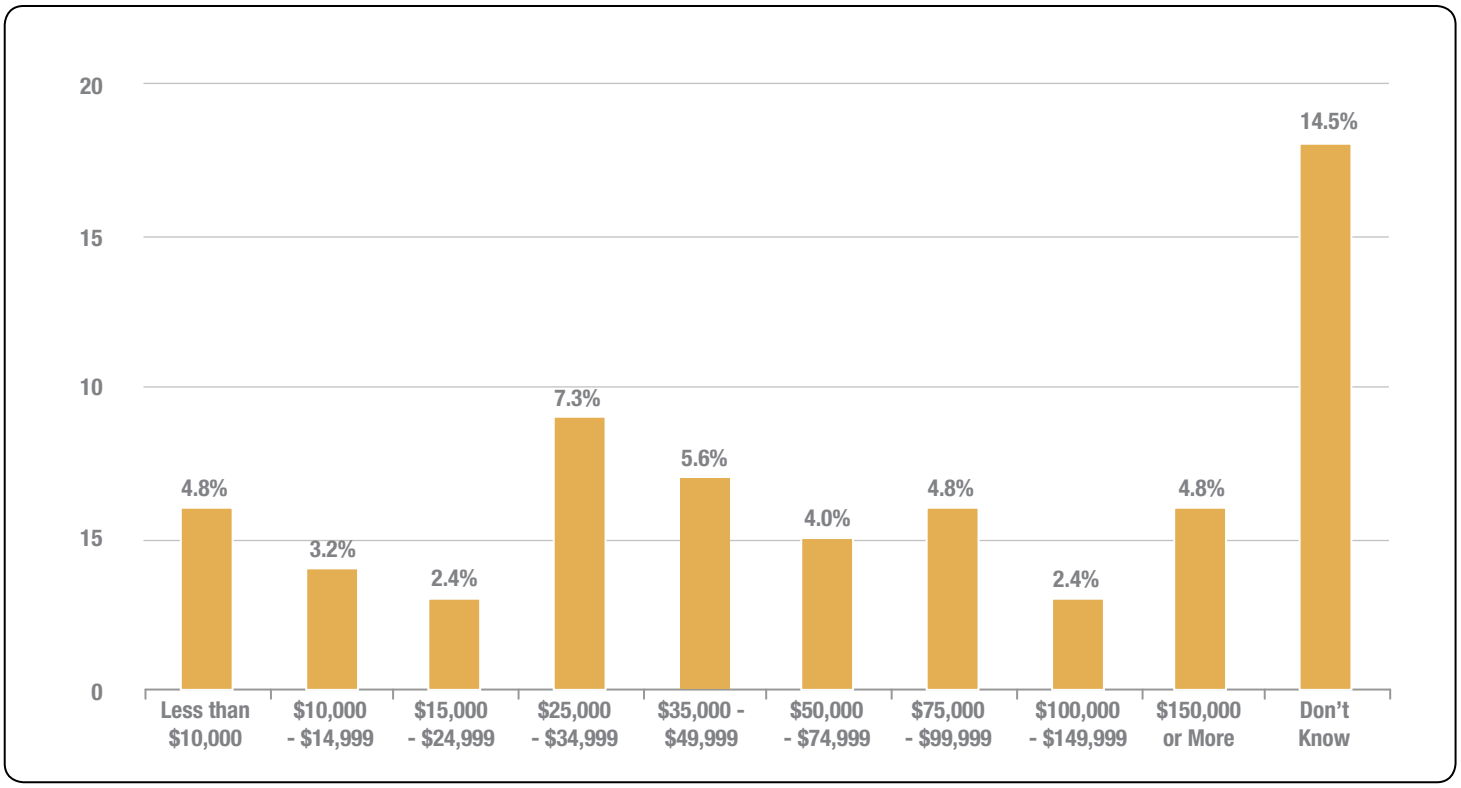
2013 Pre-Tax Individual Income (All Owner/Mgrs, All Income Sources)



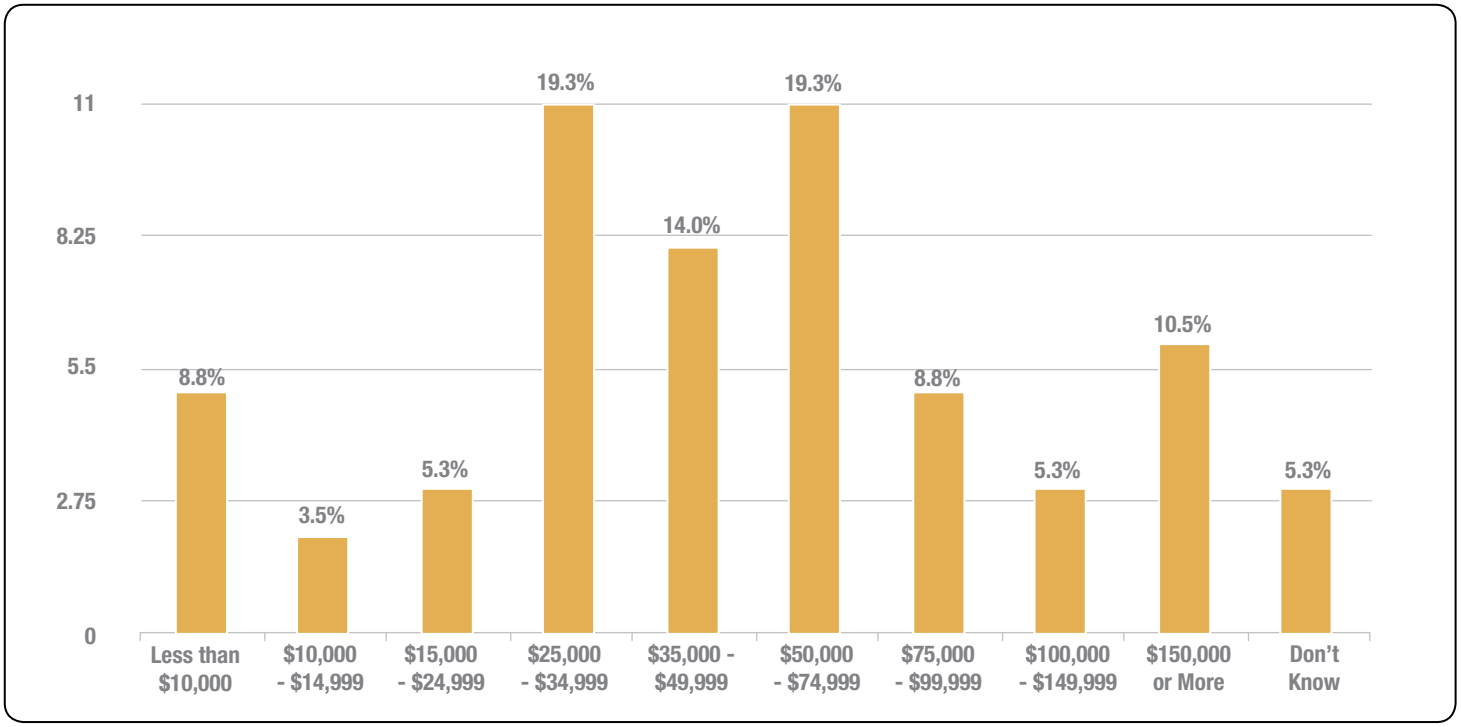
2013 Pre-Tax Individual Income (All Owner/Mgrs, Music Industry Income Only)



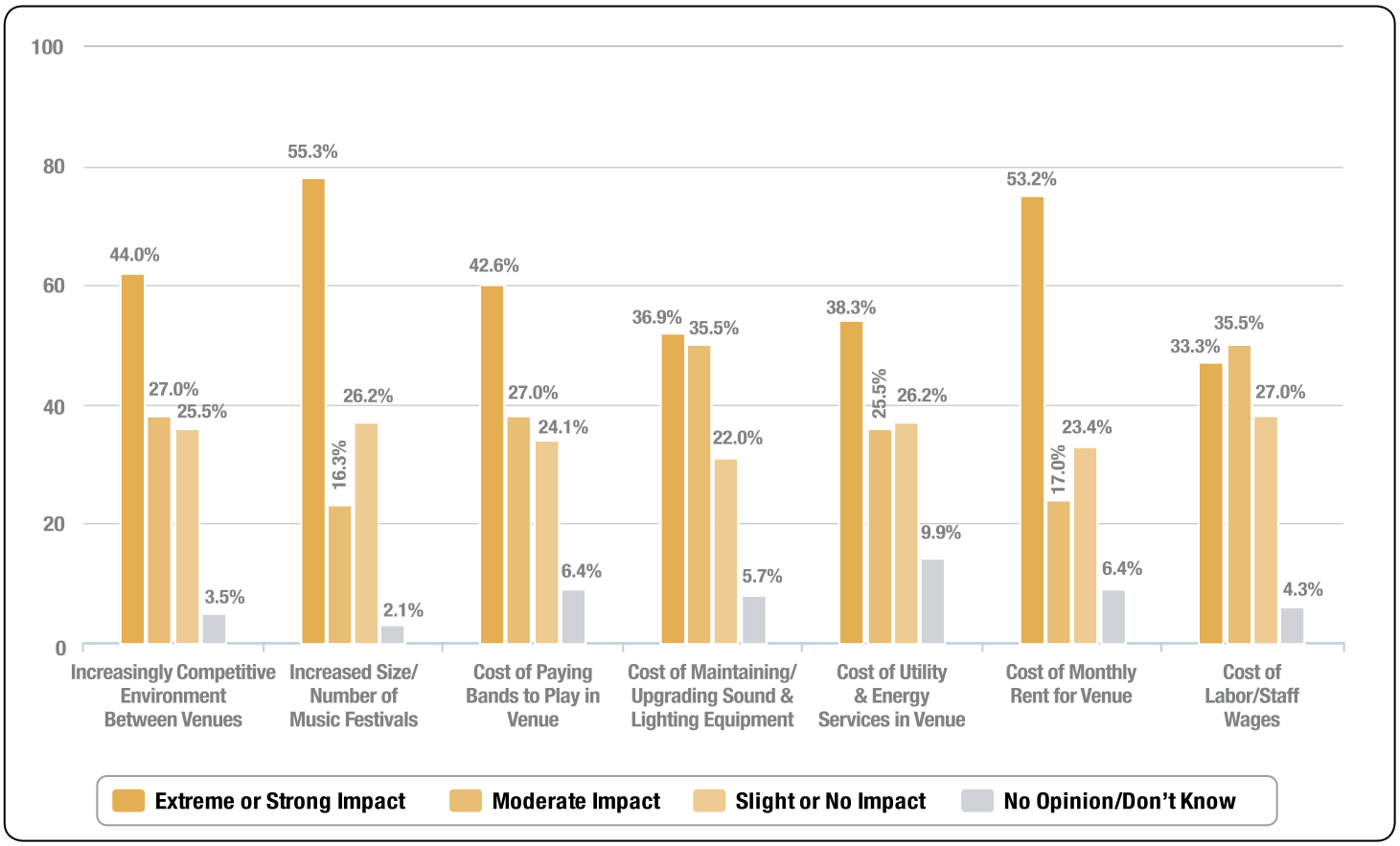
2013 Pre-Tax Individual Income (Only Owner/Mgrs w/ Music Industry + Augmented Income)



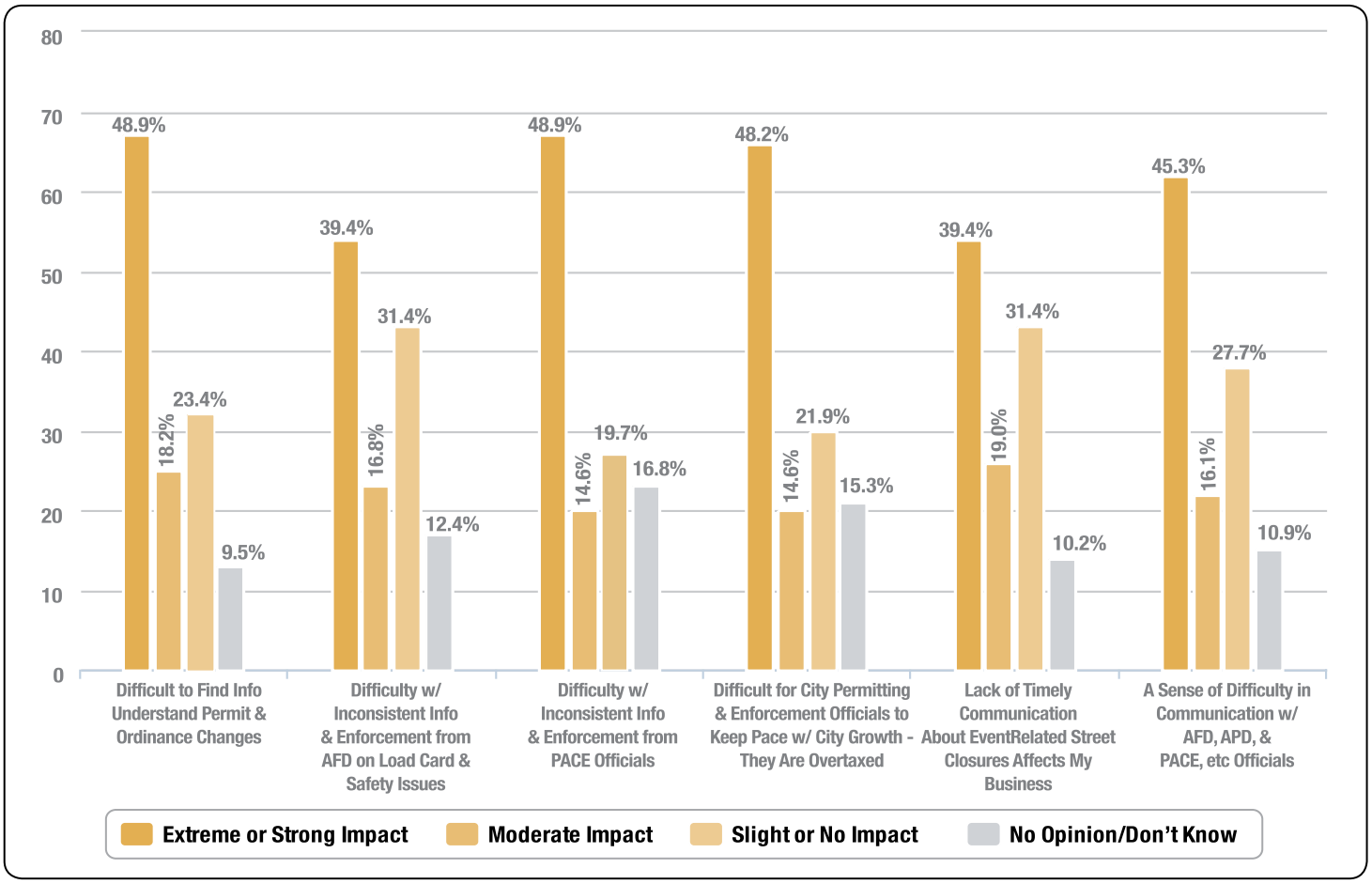
2013 Pre-Tax Individual Income (Only Owner/Mgrs w/ 100% Income from Music Industry)



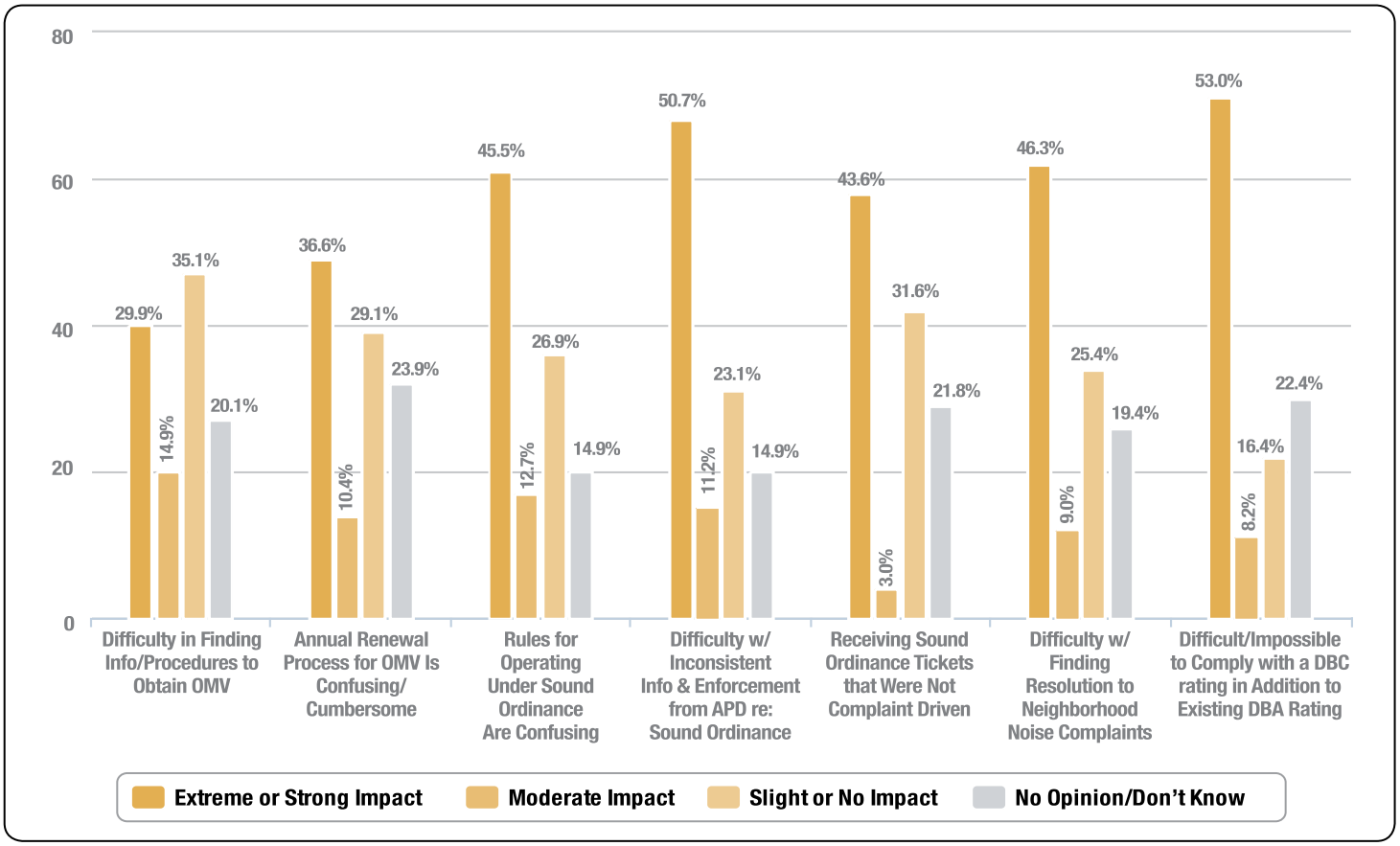
Venue Challenges Category: COSTS AND COMPETITION



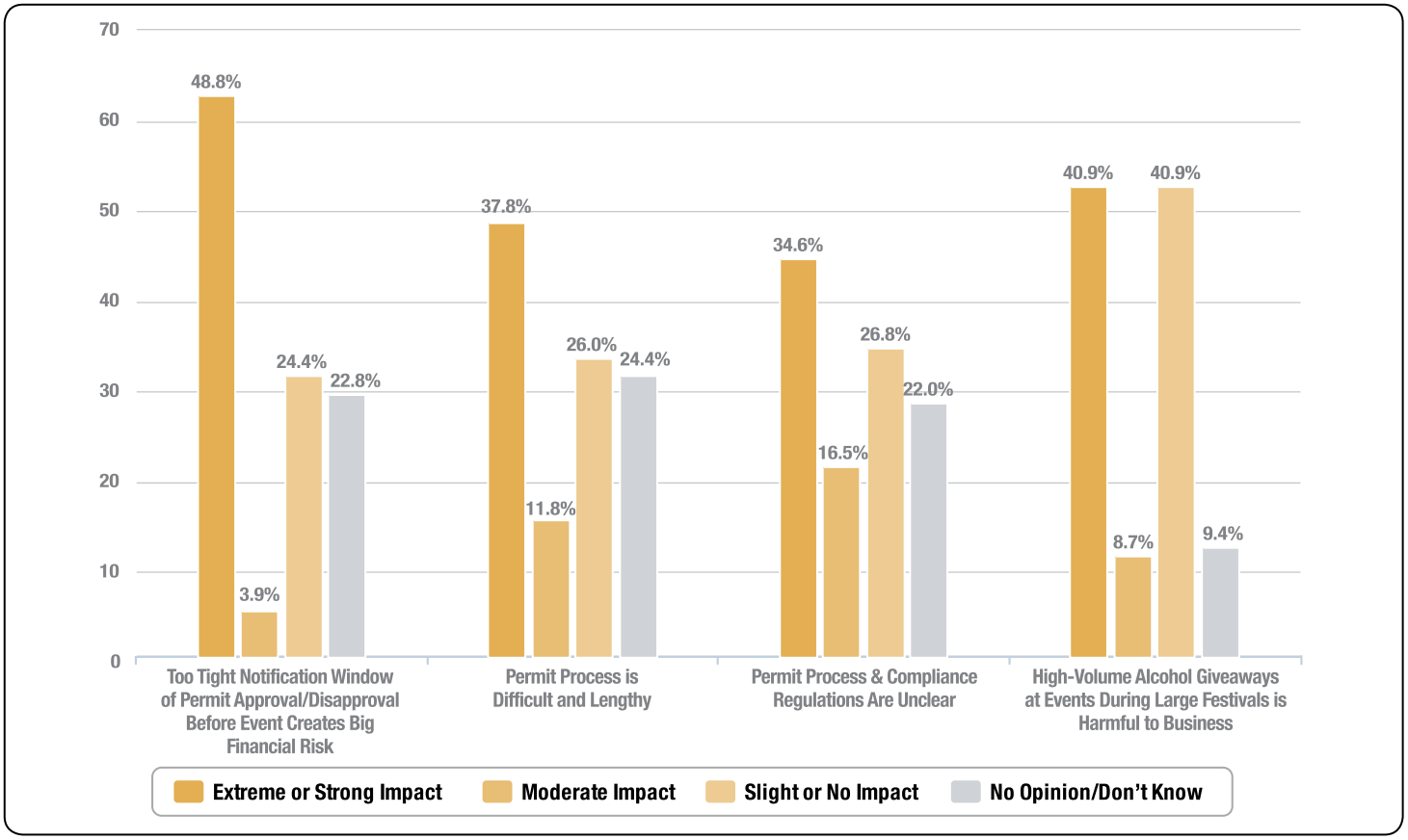
Venue Challenges Category: CITY PERMITS AND ENFORCEMENT



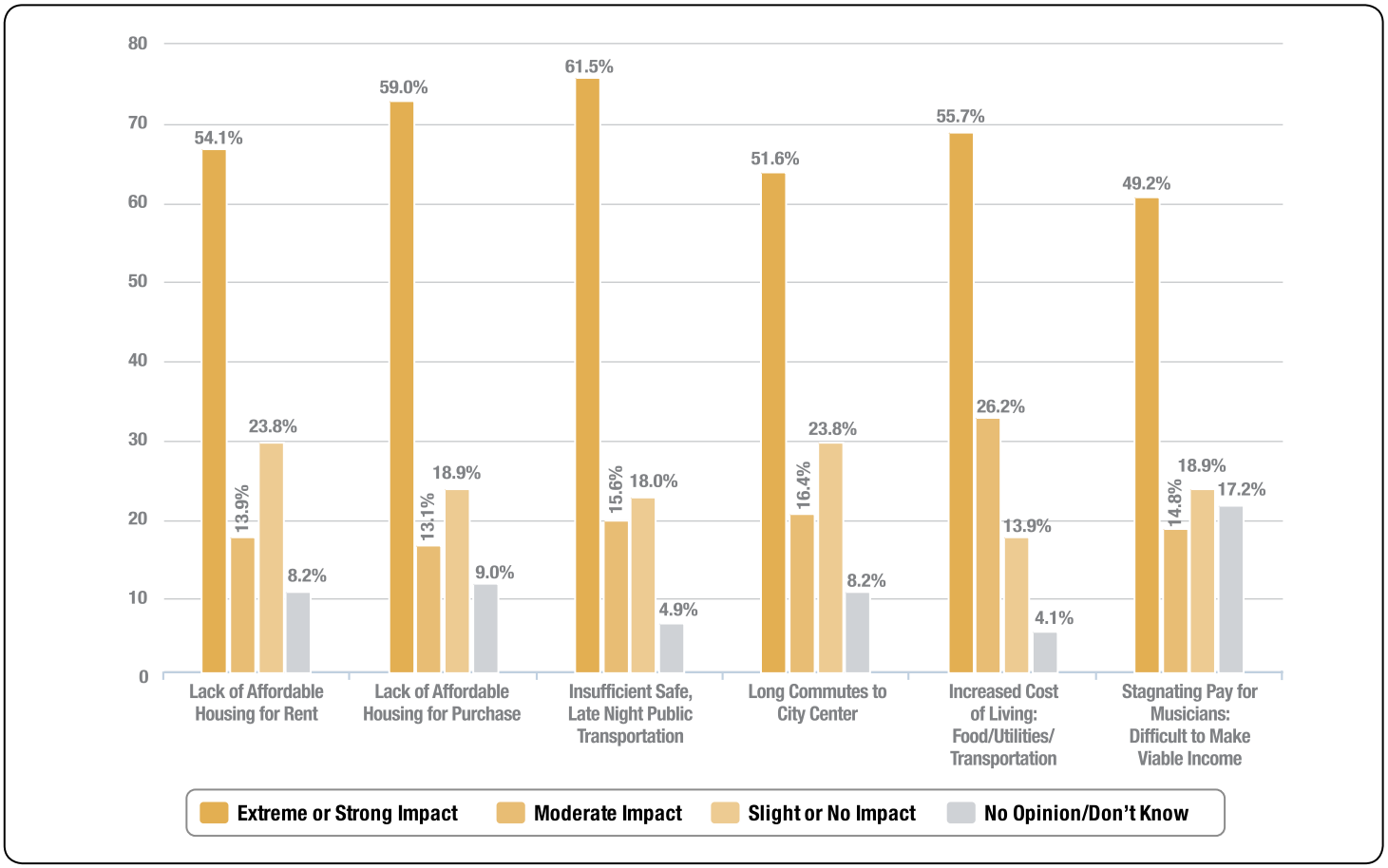
Venue Challenges Category: SOUND ORDINANCE AND OUTDOOR MUSIC VENUE PERMITS



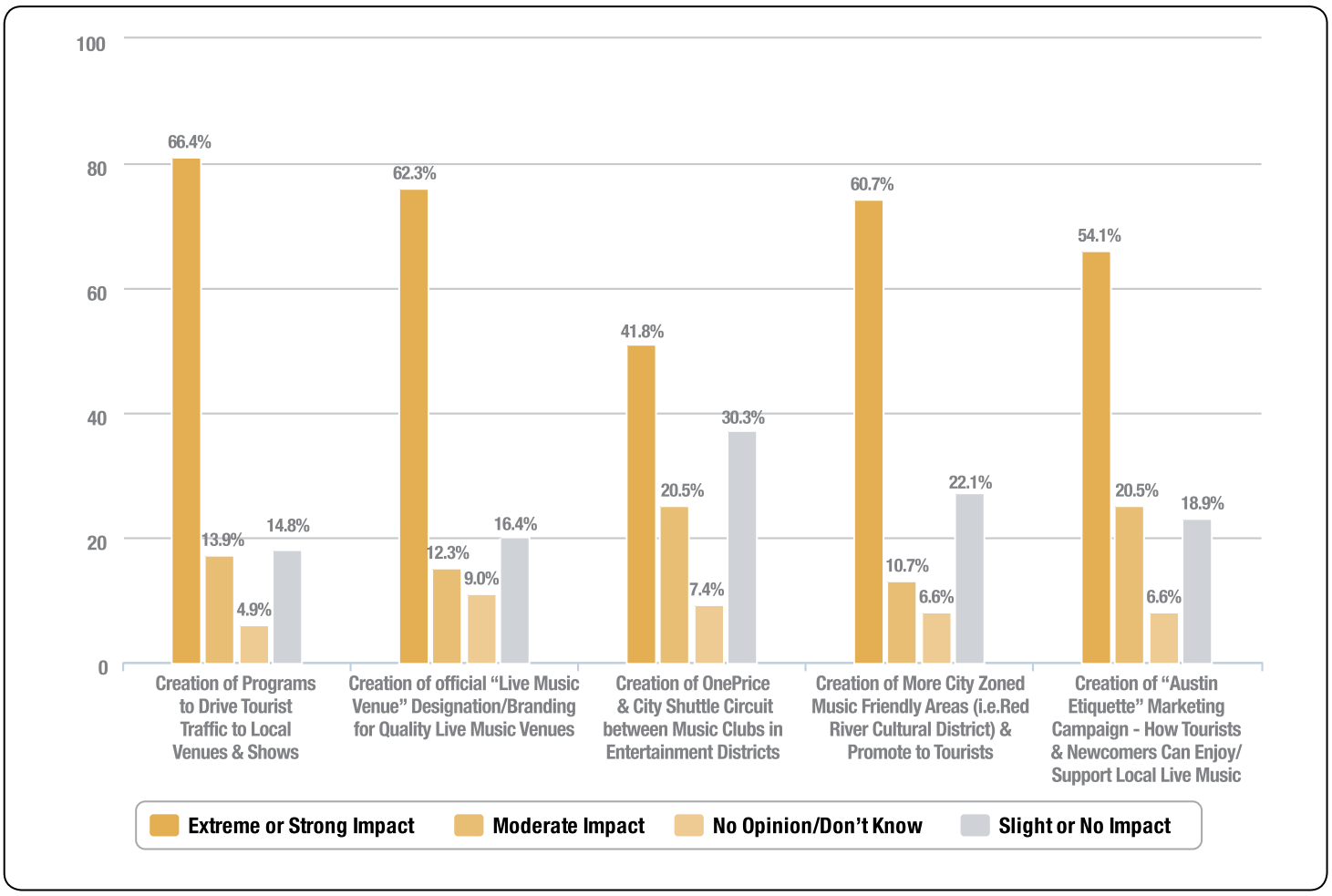
Venue Challenges Category: EVENTS AND TEMPORARY USE PERMITS



Needs and Gaps Category: LIVING AND AFFORDABILITY



Ideas and Proposals Category: TOURISM AND MARKET DEVELOPMENT



Appendix VIII
Respondents by Age Category Data Charts

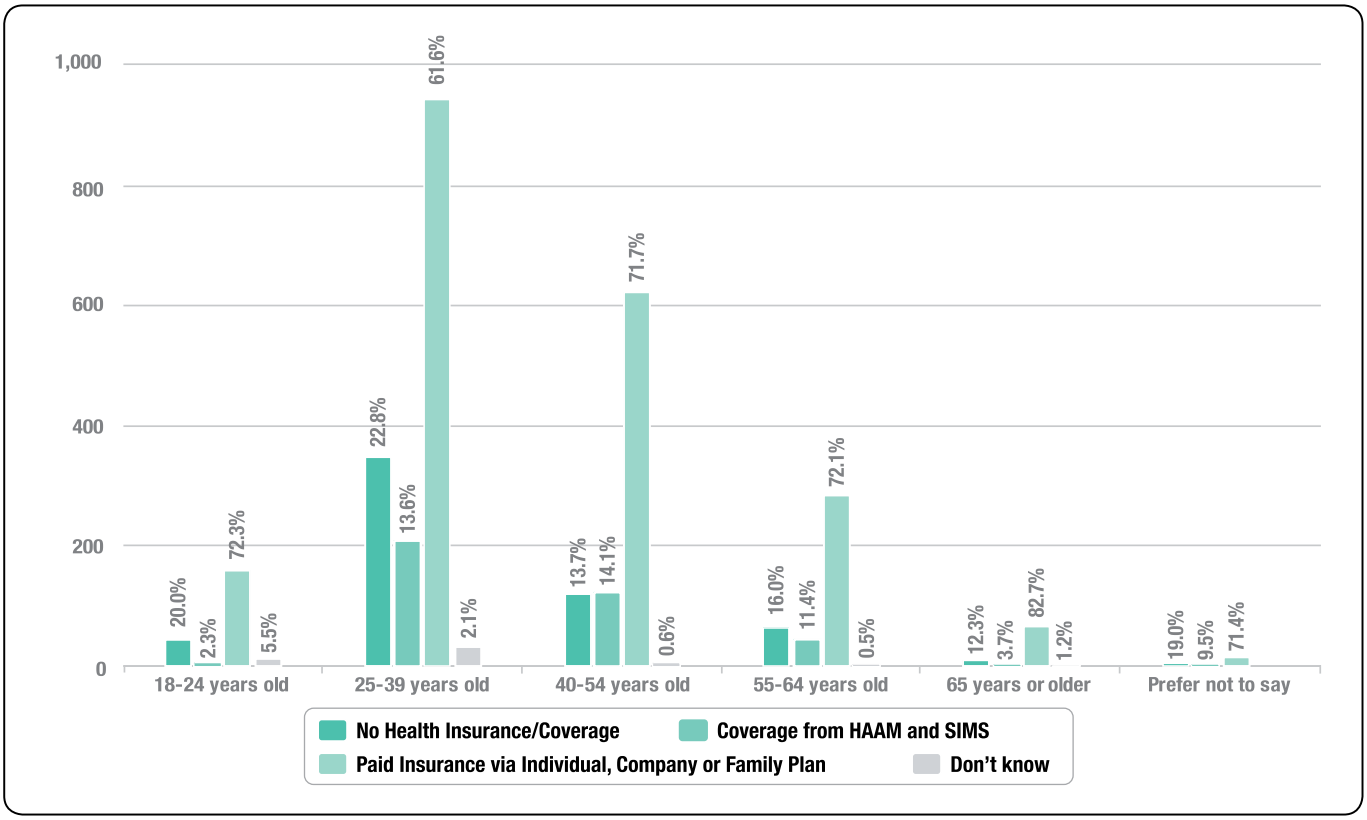
CHARTS APPEAR IN THIS SEQUENCE:

Health Coverage by Age
Number of Years Living in Austin by Age
Prosperity Trends: Individual Income Increase/Decrease Over Past 3 Years by Age
2013 Musician Individual Income by Age, Music Industry Income Only
2013 Business Owner Individual Income by Age, Music Industry Income Only
Lack of Affordable Housing for Rent by Age
Lack of Affordable Housing for Purchase by Age
Difficulty in Earning Living Wage Due to Stagnating Pay by Age
Difficulty with Long Commutes to City Center by Age
Desire for Creation of a Music Industry Hub by Age

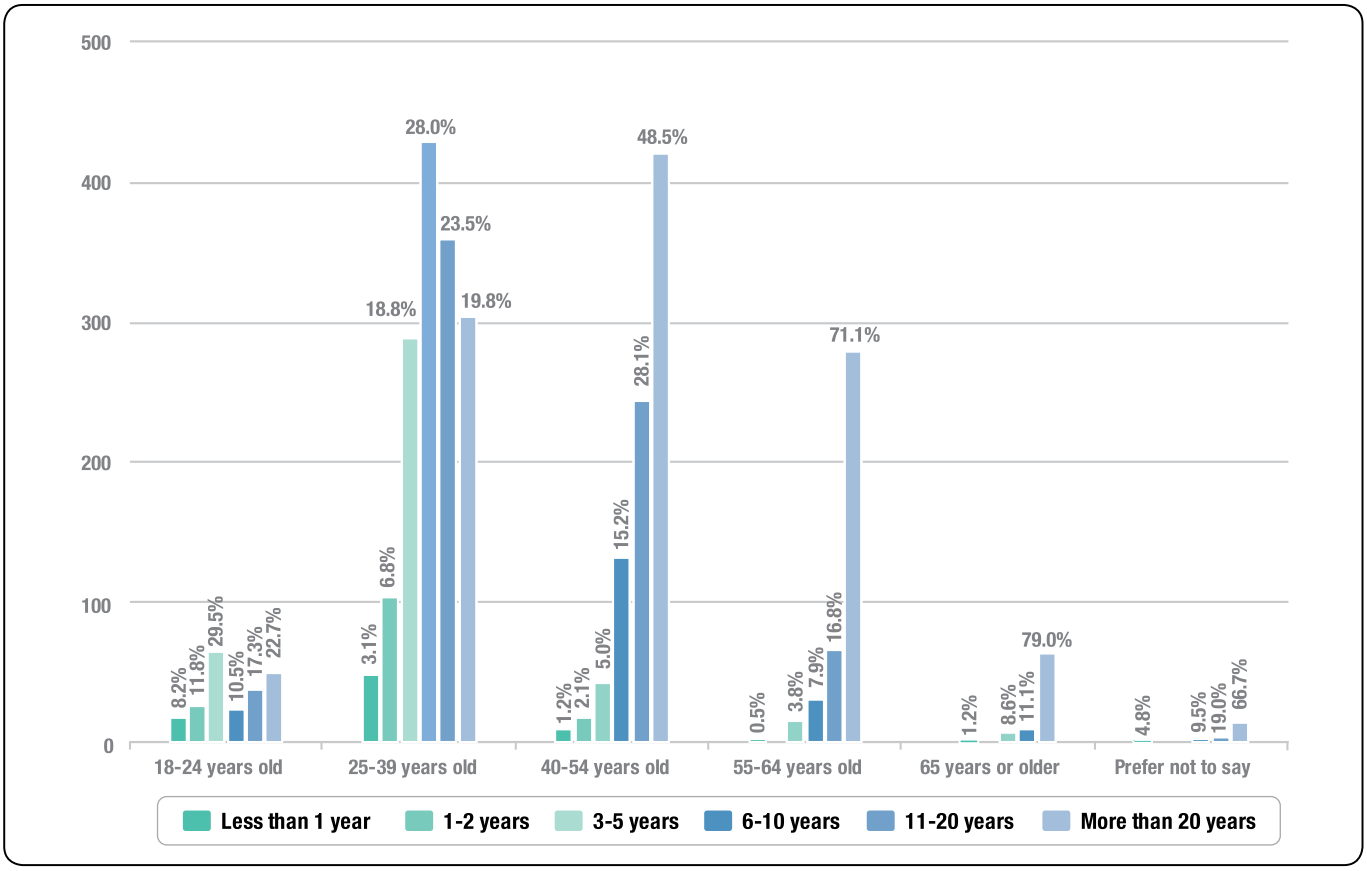
Appendix VIII

Respondents by Age Category Data Charts

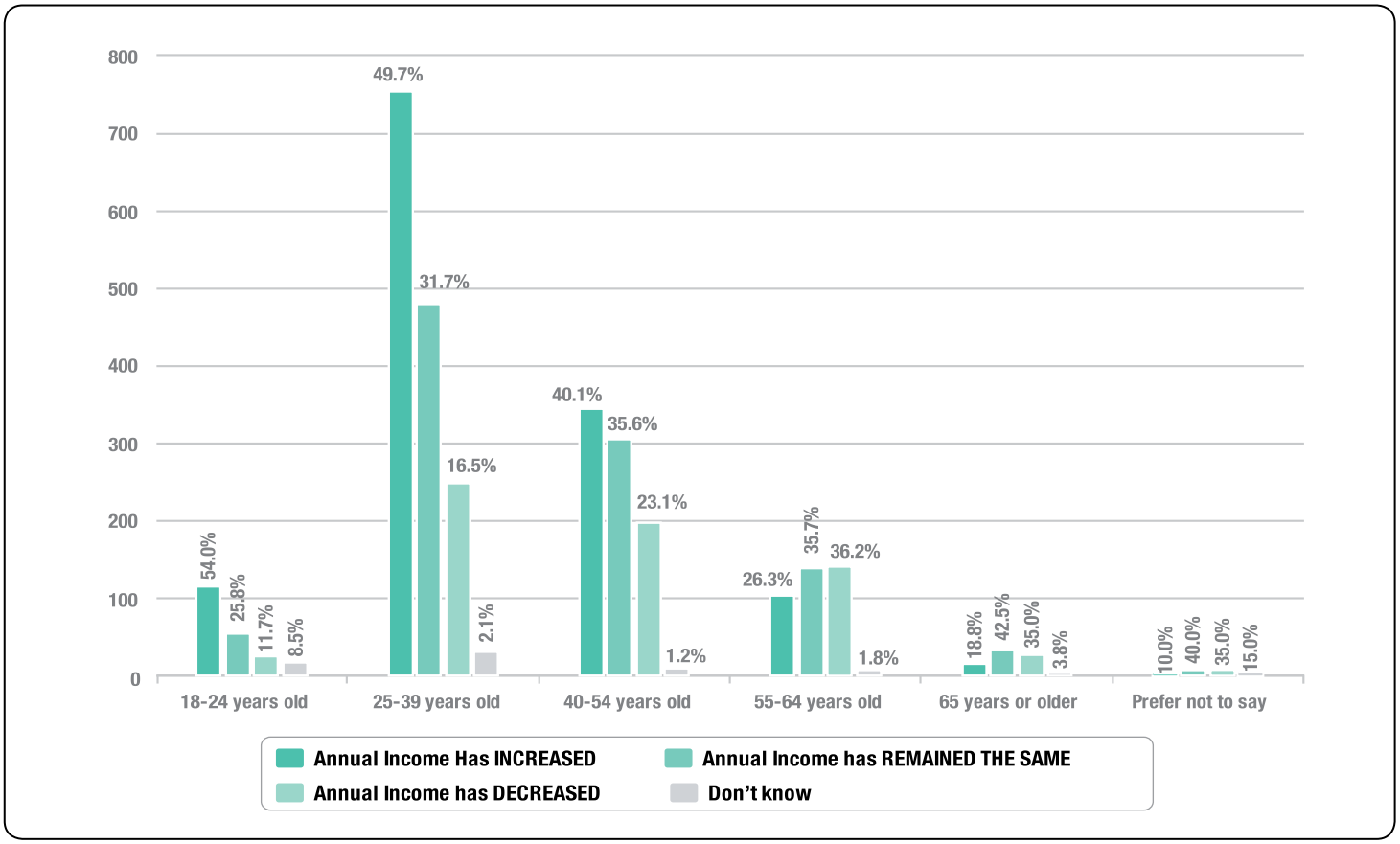
Health Coverage by Age



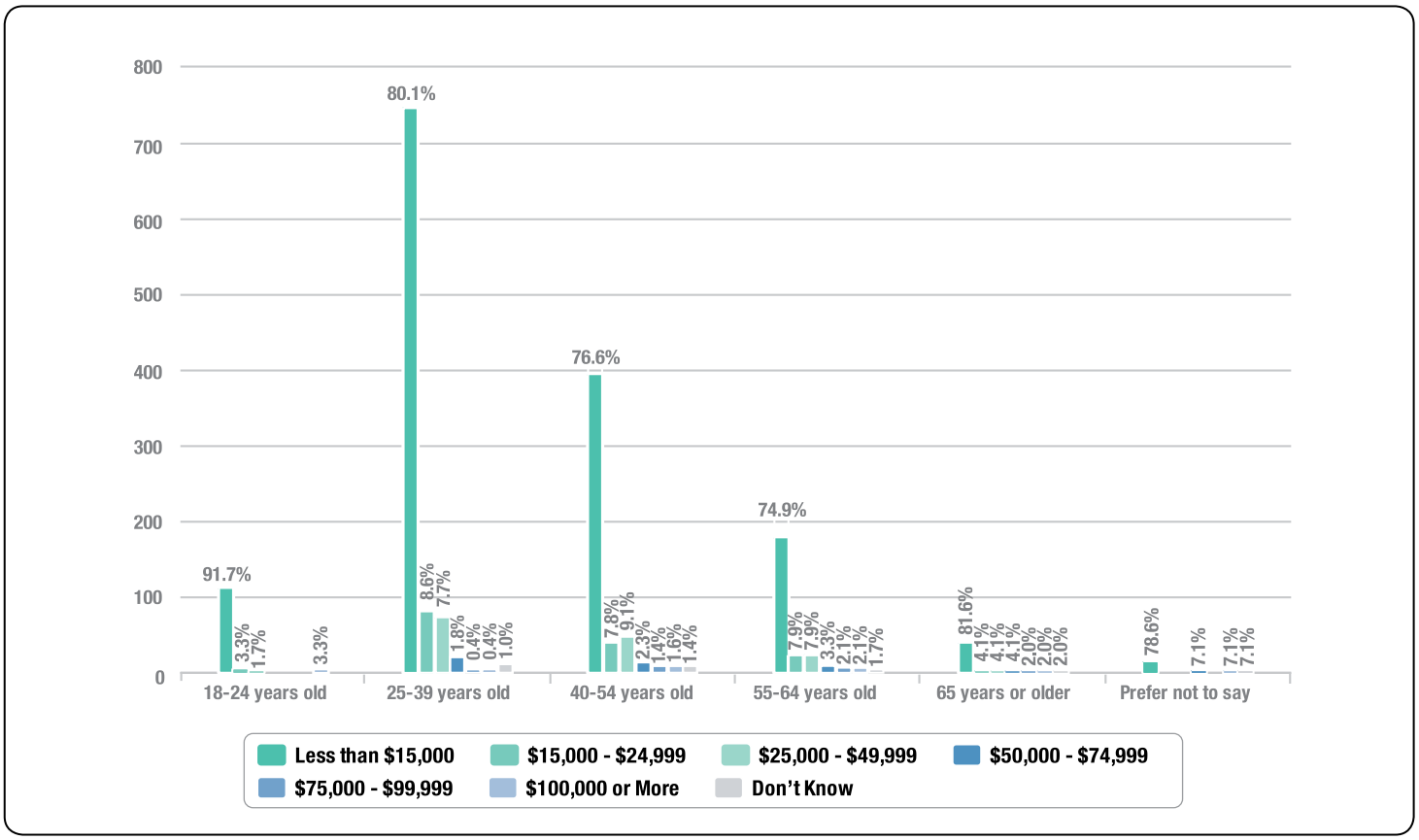
Number of Years Living in Austin by Age



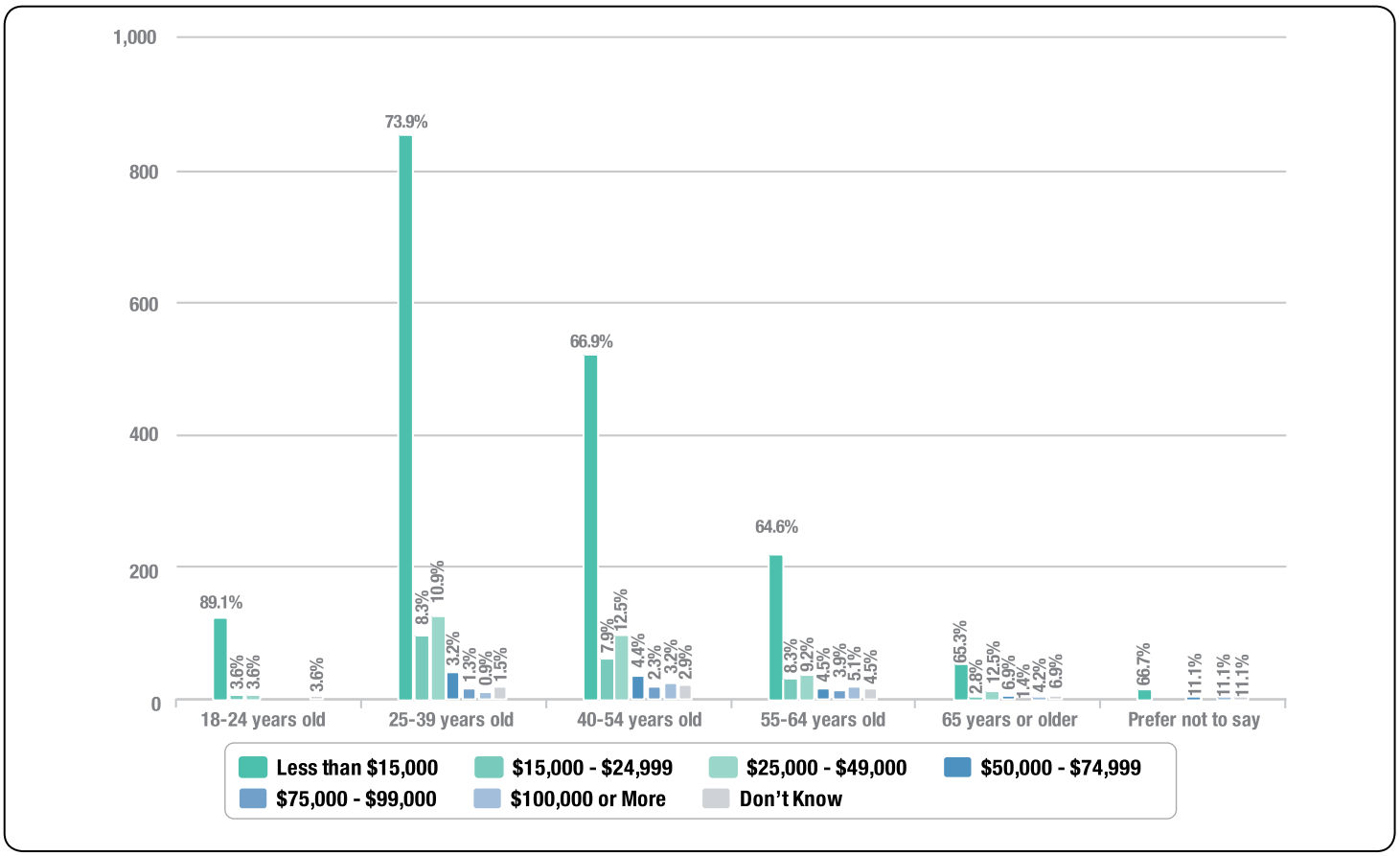
Prosperity Trends: Individual Income Increase/Decrease Over Past 3 Years by Age



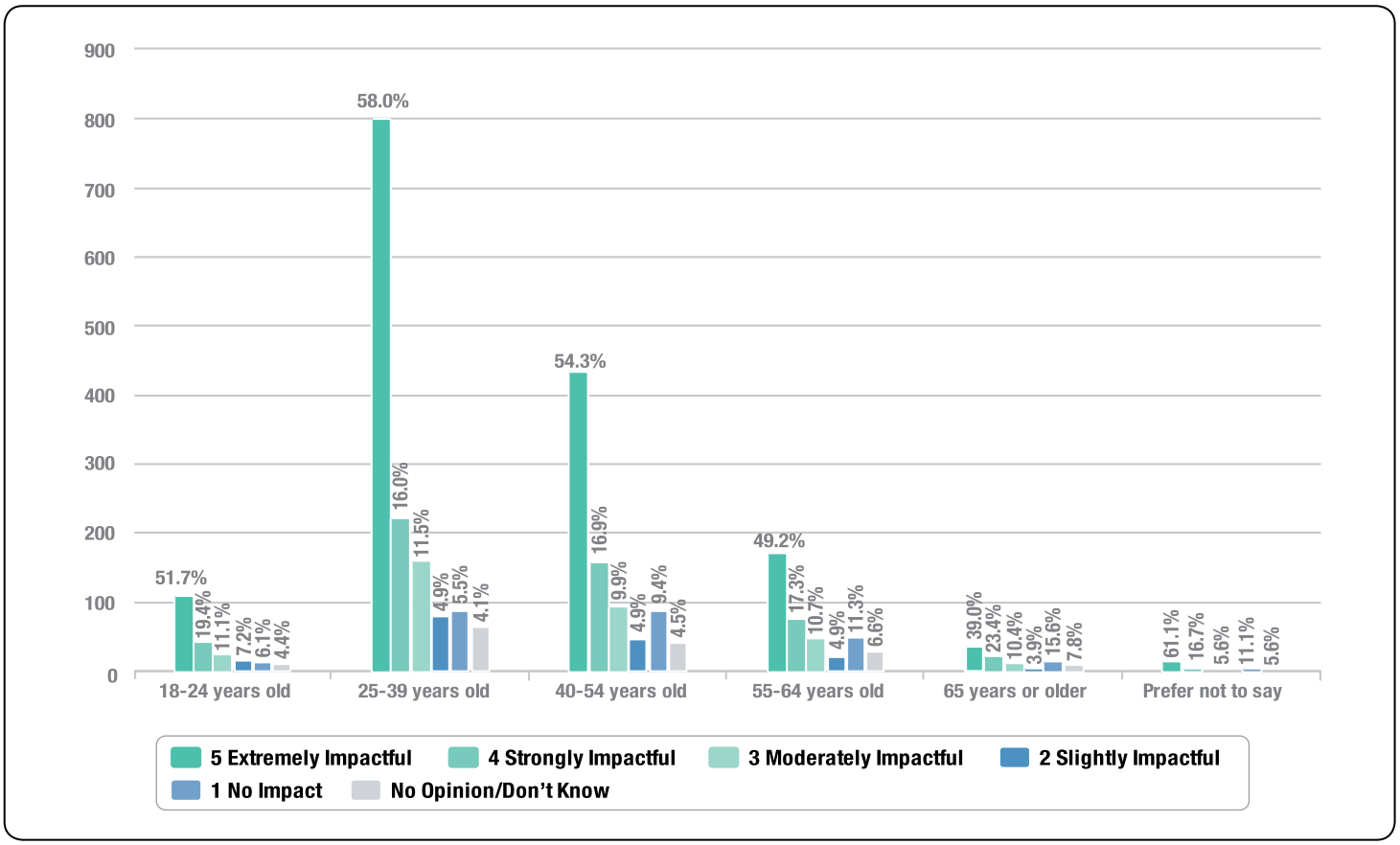
2013 Musician Individual Income by Age, Music Industry Income Only



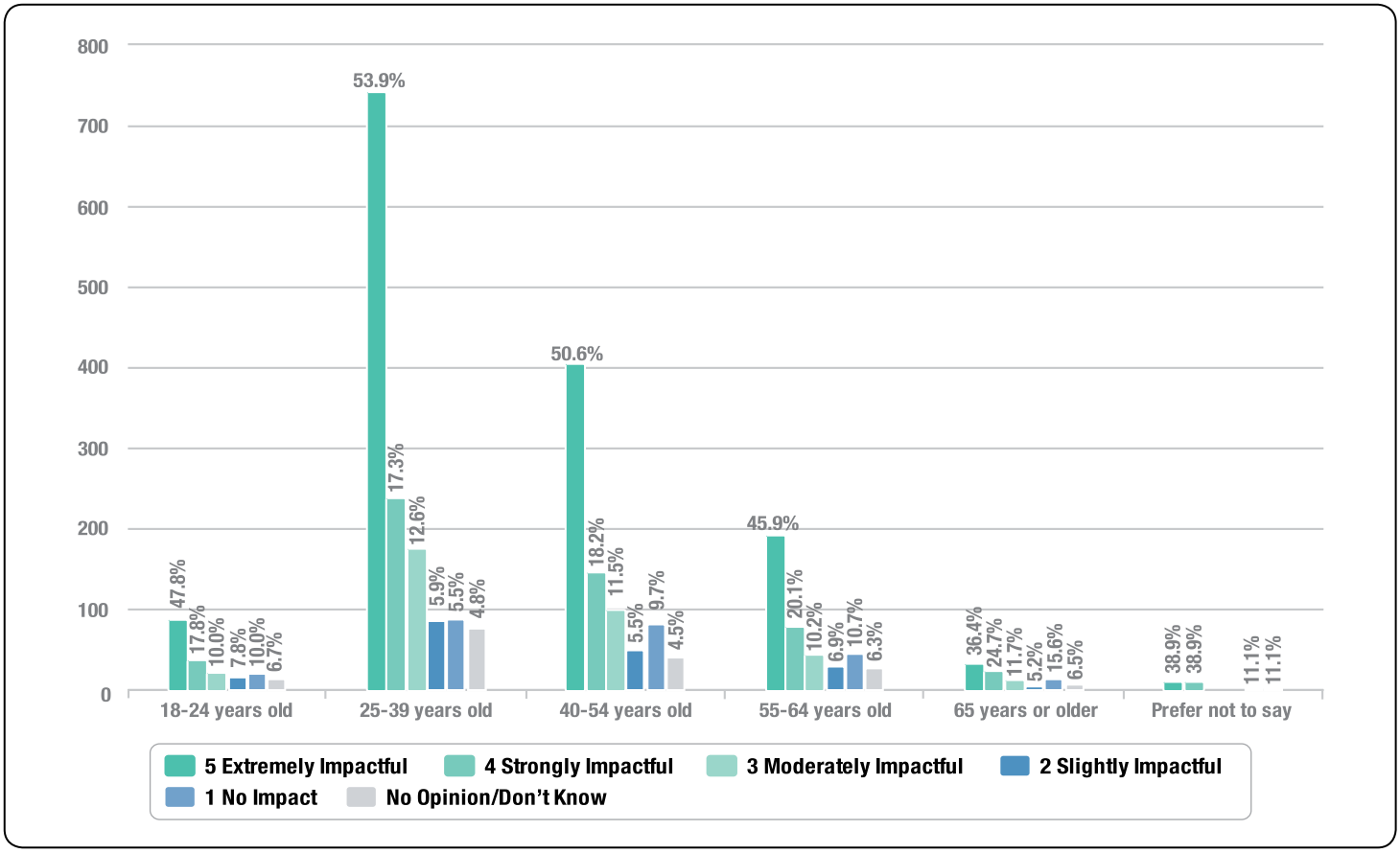
2013 Business Owner Individual Income by Age, Music Industry Income Only



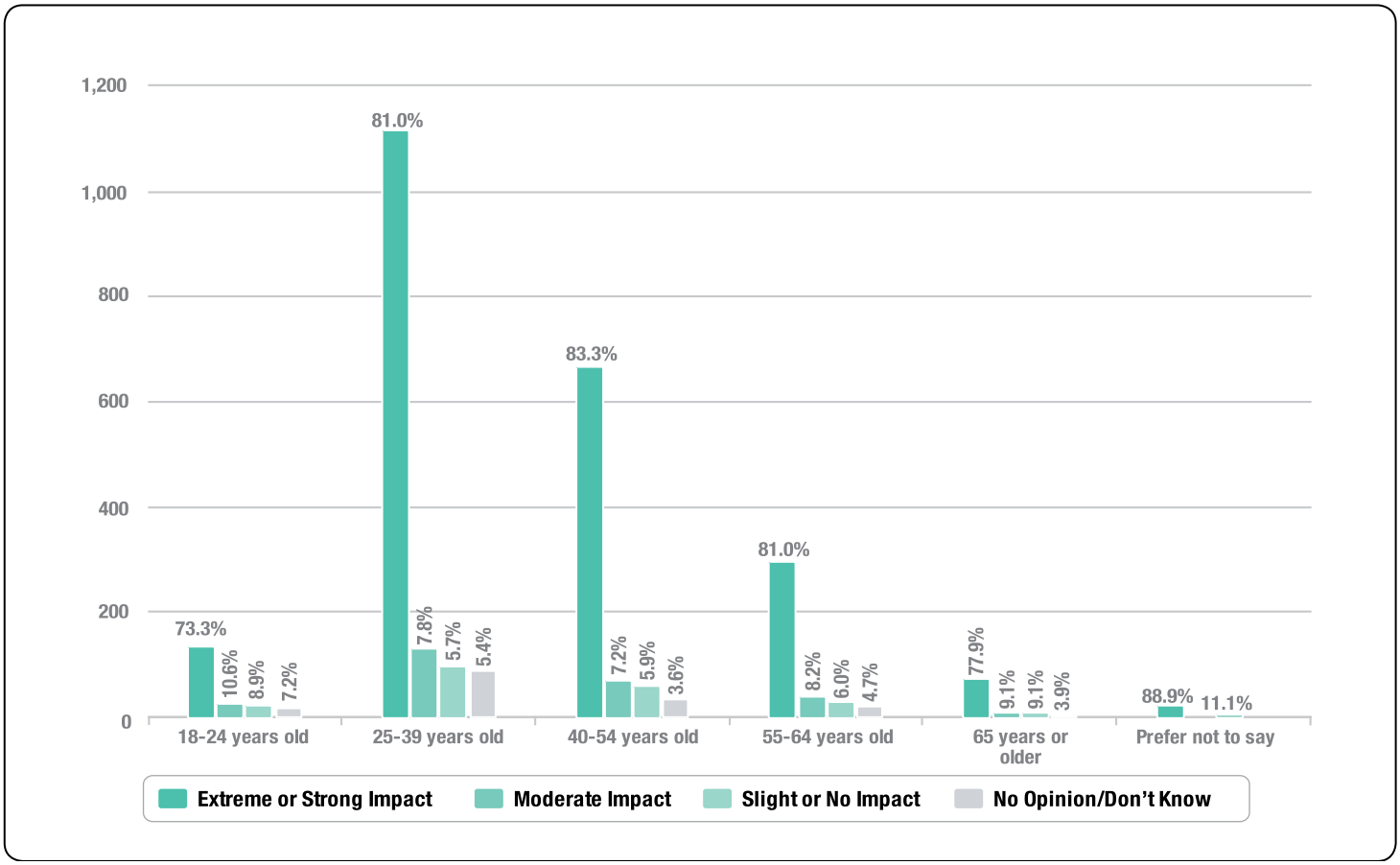
Lack of Affordable Housing for Rent by Age



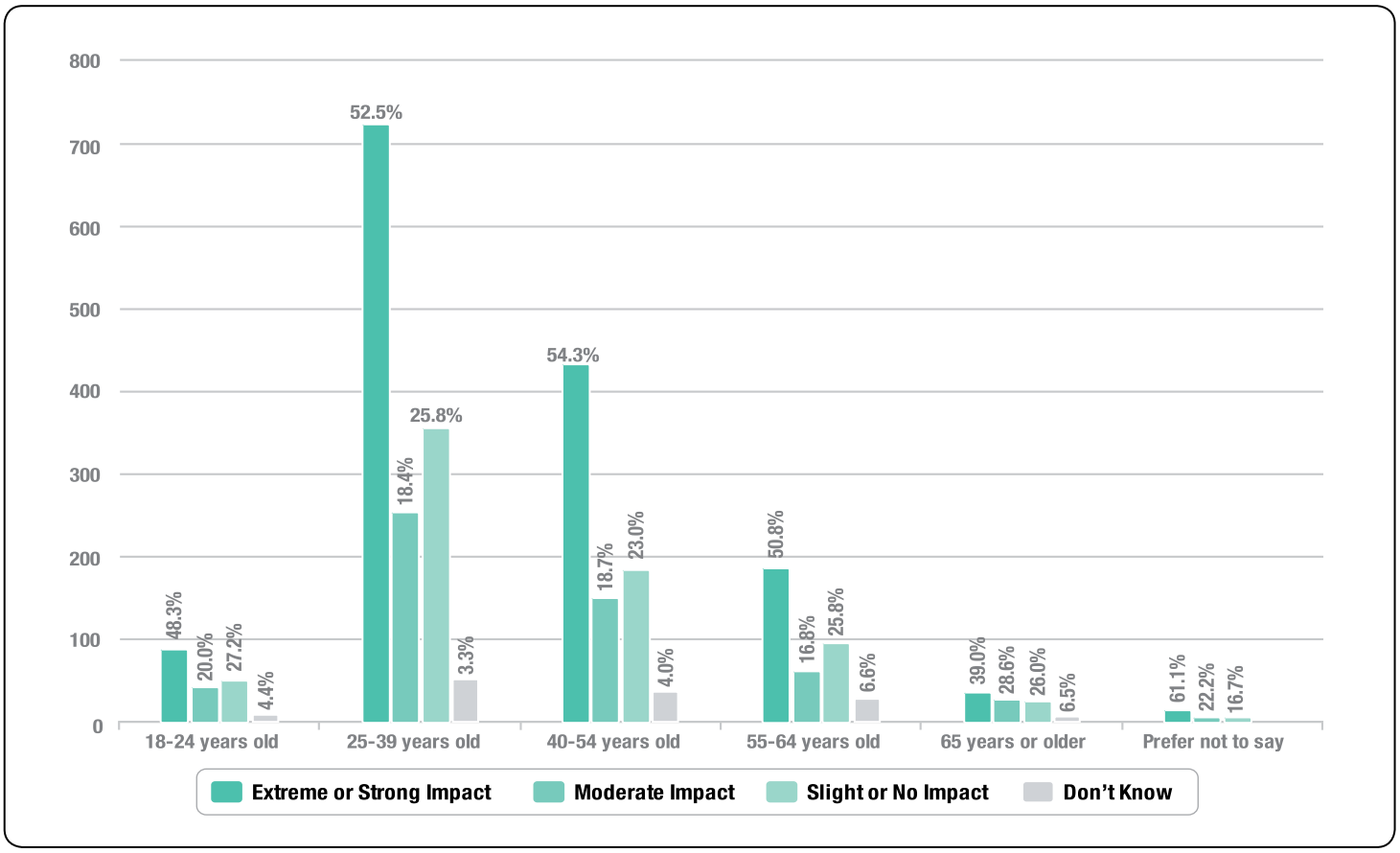
Lack of Affordable Housing for Purchase by Age



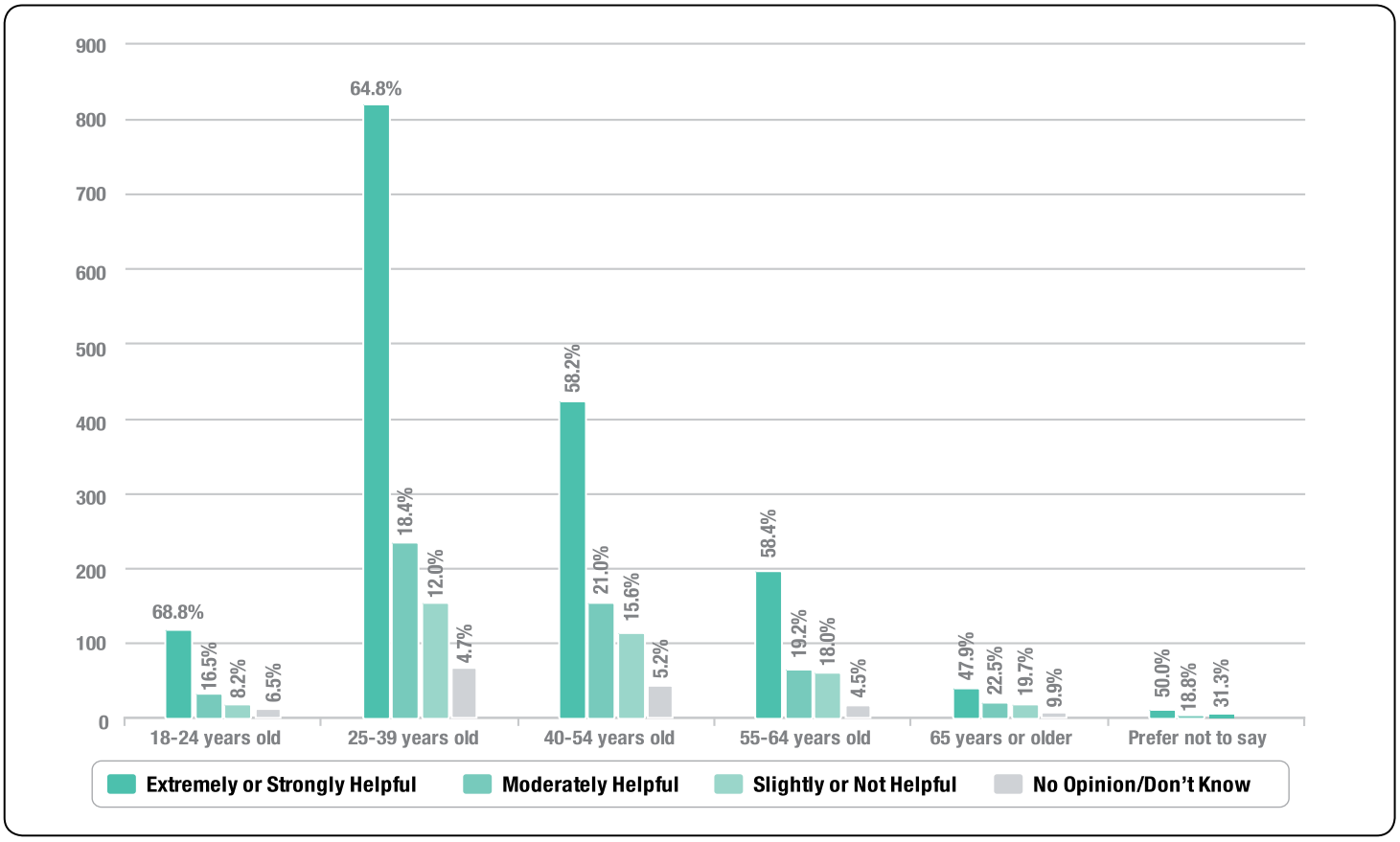
Difficulty in Earning Living Wage Due to Stagnating Pay by Age



Difficulty with Long Commutes to City Center by Age



Desire for Creation of a Music Industry Hub by Age



Appendix IX
City of Austin Permit Requirements for Venues

Part 1: Basic Required Nightlife Establishment and Venue Permits

Permit Name	Department for Application	Duration of Permit	Fee	Other Info.
Certificate of Occupancy [1]	Building Inspections Division	1 YEAR	No charge	The Certificate of Occupancy gives a business owner the right to legally open its doors in Austin and indicates that the building is safe for a particular use. If the building is sold, the CO will convey to the new owner as long as the use of the building stays unchanged.[2]
Official Occupant Load Card [3]	Austin Fire Dept.	1 YEAR		Any public building with a capacity of 50 or more persons is required to have the load card posted.[4] Reviewed during annual public assembly permit inspection.
Public Assembly Permit [5]	Austin Fire Dept.	1 YEAR	$200	Required for public establishments who anticipate or operate at an occupancy rate of 50 or more people, and whose gross sales constitute 51% alcohol.[6]
City of Austin Alcoholic Beverage Permit [7]	Map Sales and Zoning Review			Must complete pre-qualification packet with TABC and information form from the City of Austin. [8]
APD Liquor License Information Form [9]	Austin Police Department			Complete form and send it to the APD Alcohol Control Team. Background checks on all applicants. [10]

Permit Name	Department for Application	Duration of Permit	Fee	Other Info.
TABC Alcohol Beverage Permit [11]	Texas Alcoholic Beverage Commission	2 YEARS	Variable [12]	
Sign Permit [13]	Planning and Development Review Department			Permit application is required for a sign that is located in the planning jurisdiction, visible from a street right-of-way, and used for advertising.[14]
Food Enterprise Permit [15]	Health and Human Services Department	1 YEAR	Variable [16]	NOTE: All bars that serve mixed drinks are required to obtain this permit. Permits are not transferrable.
New Venue - Plan Review and Certificate of Occupancy Inspection [17]	Health and Human Services Department	Prior to Opening	$191 [18]	
Change of Ownership - Change of Ownership Inspection [19]	Health and Human Services Department	Prior to Opening	$177 [20]	A change of ownership inspection is required of all food enterprises before an operating permit can be approved. If an establishment has or will change ownership an inspection must be conducted to verify the new operation has adequate facilities or to verify if any existing equipment must be replaced or upgraded.[21]
Health Inspection [22]	Health and Human Services Department	Twice per year [23]		
Health Department Plan Review [24]	Health and Human Services Dept.		$254 [25]	A Health Department Plan Review is required whenever a building is constructed or substantially remodeled to be a Food Enterprise, whenever a substantial change is made to an existing food facility or if a building permit or other construction related permit is required by the City of Austin. [26]

Permit Name	Department for Application	Duration of Permit	Fee	Other Info.
Food Handler Registration Permit [27]	Health and Human Services Department	2 years	$12 [28]	When the Food enterprise renews its permit, it must provide a list of all food handlers, food managers, or non-food handlers (as established by sworn affidavit). Food Handler registration is required for employees working in a food enterprise. Not required for temporary events. [29]
Food Manager Registration [30]	Health and Human Services Department	2 -5 Years	$28 / 1 yr $56 / 2 yrs $84 / 3 yrs $112/4 yrs $140/5 yrs [31]	Not needed for bars unless food is served.[32] The Austin City Code requires the majority of permitted Food Enterprises in Austin to have one employee to be currently registered as a Certified Food Manager with the City of Austin and to have their current City of Austin Certified Food Manager Certificate prominently posted in the establishment. [33]
Building Permit [34]	Planning and Development Review Department			A building permit is required to erect, construct, enlarge, alter, repair, improve, remove, convert, move or demolish any building or structure within in the City's zoning jurisdiction or in certain Municipal Utility Districts. [35] A trade permit (electrical, mechanical, plumbing, irrigation) may also be required depending on the scope of work. Once final permit has been issued, an inspection must be schedule, and upon final inspection, a Certificate of Occupancy will be issued.[36]
Parking Permit [37]	Transportation Department		Variable[38]	Needed if venue plans on using legal on-street parking for loading in and out of events. [39]

1. "Certificate of Occupancy," at **http://www.austintexas.gov/content/certificate-occupancy,** last visited April 15, 2015.
2. *Id.*
3. *See "Austin Fire Department Event Permits,"* at ***http://austintexas.gov/department/austin-fire-department-event-permits;*** last visited April 15, 2015.
4. *"Austin Fired Dept. Prevention Section,"* located at ***http://www.austintexas.gov/sites/default/files/files/Fire/Prevention/Public%20Assembly%20Maintenance%20Inspections.pdf;*** last visited April 15, 2015.
5. *See "Alcoholic Beverage Permit Process,"* at **http://www.austintexas.gov/page/alcoholic-beverage-permit-process**; last visited April 15, 2015.
6. *Id.*
7. *See "Alcoholic Beverage Permit Process,"* at **http://www.austintexas.gov/page/alcoholic-beverage-permit-process**; last visited April 15, 2015.
8. "Information Form in Connection With Application For an Alcoholic Beverage License," located at **http://www.austintexas.gov/sites/default/files/files/City_Clerk/Alcoholic_Beverage_Permit/information_form.doc**; last visited April 15, 2015.
9. *See "Alcoholic Beverage Permit Process,"* at **http://www.austintexas.gov/page/alcoholic-beverage-permit-process**; Last visited April 15, 2015.
10. *Id.*
11. *Id.; See also "Licensing Forms,"* **https://www.tabc.state.tx.us/forms/licensing.asp***;* last visited April 15, 2015.
12. See, e.g., "Two Year Fee Chart" at **http://www.tabc.state.tx.us/licensing/files/fee-chart-0911.pdf**, last visited April 15, 2015.
13. *See "Business-Related Permits,"* at ***http://www.austintexas.gov/department/business-related-permits***, last visited April 15, 2015.
14. *See Id.; see also "Sign Permit Application"* at ***http://www.austintexas.gov/sites/default/files/files/Planning/Applications_Forms/sign-permit-app.pdf***, last visited April 15, 2015.
15. *See "Starting a Food Business in Austin & Travis County"* at ***http://www.austintexas.gov/sites/default/files/files/Health/Environmental/Food/startingfoodbus_1-12-15.pdf***, last visited April 15, 2015.; *see also* "Application to Operate a Food Enterprise" at ***http://www.austintexas.gov/sites/default/files/files/Health/Environmental/Food/food_enterprise_permitapp_1-23-15.pdf***, last visited April 15, 2015.
16. *See, e.g., "Food Enterprise Operating Permit Fees"* at ***http://www.austintexas.gov/sites/default/files/files/Health/Environmental/ECHU_FY2015_AustinTC_Fees_BW_3_20_15.pdf***
17. *See "Starting a Food Business in Austin & Travis County"* at ***http://www.austintexas.gov/sites/default/files/files/Health/Environmental/Food/startingfoodbus_1-12-15.pdf***, at 3, last visited April 15, 2015.; *see also* "Food Enterprise Certificate of Occupancy Inspection Application," at ***http://www.austintexas.gov/sites/default/files/files/Health/Environmental/Food/foodcertofoccupanyinspectionapp_1-15-15.pdf***, last visited April 15, 2015.
18. *Supra,* note 16.
19. *Supra,* note 15.
20. *Supra,* note 16.
21. "Food Enterprise Change of Ownership Inspection Application," at ***http://www.austintexas.gov/sites/default/files/files/Health/Environmental/Food/foodchangeofownershipapp_1-15-15.pdf***, last visited April 15, 2015.
22. "Food Establishment Requirements," at ***http://www.austintexas.gov/department/food-establishment-requirements***, last visited April 15, 2015.
23. *Id.*
24. *Supra,* note 15; *See also* "Food Enterprise Plan Review Application," at ***http://www.austintexas.gov/sites/default/files/files/Health/Environmental/Food/foodplan_review_app_1-15-15.pdf***, last visited April 15, 2015.
25. *Supra*, note 16.
26. *Supra,* note 15*;*
27. Id.
28. "Food Handler Registration Application," at **http://www.austintexas.gov/sites/default/files/files/Health/Environmental/Food/FH_Registration_app_ENG_1-15-15.pdf**, last visited April 15, 2015.
29. *Supra,* note 15.
30. "Food Manager Certificate of Reciprocity", at ***http://www.austintexas.gov/sites/default/files/files/Health/Environmental/Food/fmc_app_1-15-15.pdf***, last visited April 15, 2015.
31. *Id.*
32. *Supra,* note 15; *see also* Austin City Code §10-3-31(B)(1).
33. *Supra,* note 15.
34. "Building Permits," at ***https://austintexas.gov/page/building-permits***, last visited April 15, 2015.
35. Austin City Code § 25-12-243**.**
36. *Supra,* note 34.
37. *See* "Right of Way Permits," at ***https://austintexas.gov/department/right-way-permits***, last visited April 15, 2015.

38. "Fiscal Year 2013 Approved Fees," at ***https://austintexas.gov/sites/default/files/files/Transportation/Right_of_Way/Fiscal%20Year%202013%20Approved%20Fees.pdf***, last visited April 15, 2015.

39. *Supra,* note 37.

Part 2: Required Music Establishment & Outdoor Music Venue Permits

City of Austin Municipal Code §9-2-35. A live music permit is required under this subpart to use sound equipment for outdoor music that involves the amplification of sound from instruments, vocal and instrument microphones, turntables, and digital or analog devices used as part of a performance requiring human operation from song to song.

Permit Type	Duration, Hours, and Decibel Levels	Event Impact Plan	Notice & Appeal	Fee [1]
24 hr Live Music [2]	1-day permit, with hours of operation and decibel levels set in §9-2-30 unless modified by accountable official.[3]	Temporary Event Impact Plan approved by Music Office and Special Events Office is required [4]		Notification Fee : $377 Sound Impact Eval Fee: $200 Permit Fee: * $11.44/day for matters of public interest or political campaign * $22.88/day for a private party $34.32/day for an advertising event **17.** No fee for a charitable organization or govt agency
Multi-Day Special Event [5]	4-day permit, with hours of operation and decibel levels per Sec. 9-2-30 unless modified by the accountable official.[6]	Temporary Event Impact Plan approved by Music Office and Special Events Office is required [7]	Notice per Sec. 9-2-54. Appeals per Sec. 9-2-56 [8]	same as above
Outdoor Music Venue [9]	1-year permit, with hours of operation per Sec. 9-2-30 unless modified by the accountable official.[10]	Sound Impact Plan required.[11]	Notice per Sec. 9-2-54. Appeals per Sec. 9-2-56 [12]	Notification Fee: $377 Sound Impact Eval Fee: $200 Permit Fee: $67.08

1. "Sound Permits," ***at*** **http://www.austintexas.gov/department/sound-permits,** last visited April 15, 2015.
2. City of Austin Municipal Code §9-2-37.
3. *Id.* at §9-2-30.
4. *Id.* at §§9-2-37, 52.
5. *Id.* at §9-2-38.
6. *Id.*
7. *Id.*, §9-2-52
8. City of Austin Municipal Code §§9-2-38, 54, 56.
9. Id. at §9-2-39.
10. *Id.*
11. Id. at §9-2-41.
12. *Id.* at §§9-2-54, 5

Part 3: Required Temporary Event Permits

Permit Type	Reason for Permit / Other Info	Department for Application	Duration of Permit	Fee
Temporary Event Sound Permit [1]	Necessary if holding a temporary outdoor amplified music event. Must comply with decibel and hours laws. Also requires a Temporary Event Sound Impact Plan. [2]	Austin Center for Events [3]	Up to four days within one month. Can receive up to four permits per site per calendar year. [4]	Notification Fee : $377 Sound Impact Eval Fee: $200 Permit Fee: * $11.44/day for matters of public interest or political campaign * $22.88/day for a private party $34.32/day for an advertising event [5]
Right of Way Event Permit [6]	Required to plan an event on any of the City's streets, sidewalk and alleys. The department provides a case manager for each event to interact and coordinate with all parties involved.[7]	Austin Center for Events		
Temporary Change of Use [8]	Required to use a structure or portion of a structure in a manner as a public assembly (more than 50 people) that does not have a certificate of occupancy for that type of use. Note: A floor plan/site plan must be submitted with the application. [9]	Austin Fire Department Office of Special Events [10]		$100 [11]
Temporary Use [12]	Required when using property in a way not included in any existing site plan or certificate of occupancy (i.e., holding an event in a parking lot, empty lot).[13]	Planning and Development Review Department		

Permit Type	Reason for Permit / Other Info	Department for Application	Duration of Permit	Fee
Official Occupant Load Card	Necessary for all special events. Issued by Fire Department and must be displayed.	Austin Fire Department		
Carnival / Fair /Festival Permit [14]	Required for all events held in parks not covered by the special events permit issued by the Austin Center for Events. [15]	Austin Fire Department Office of Special Events		$100 [16]
Tent Permit [17]	Required for events using tents in excess of 400 square feet. Other requirements for tents as well.[18]	Austin Fire Department Office of Special Events		$50 [19]
Austin Center For Events Permit [20]	Required for most temporary events held within city. In order for permit to issue, must have scaled site plan and proof of event insurance, among other permits. [21]	Austin Center For Events		Notification Fee - $241 Permit Fee: **18.** $11.44/day for matters of public interest or political campaign 40. $22.88/day for a private party $34.32/day for an advertising event [22]
BYOB Permit [23]	Required if not seeking alcoholic beverage permits from the City of Austin and State of Texas. [24] NOTE: Numerous TABC regulations apply. Review carefully.	Planning and Development Review Department		
TABC Temporary Permit [25]	Required to be able to sell alcoholic beverages at an event on a temporary basis. Different permits for different types of drinks sold and duration of permit. [26]	Texas Alcoholic Beverages Commission		Variable [27]

Permit Type	Reason for Permit / Other Info	Department for Application	Duration of Permit	Fee
City of Austin Alcoholic Beverage Permit [28]	Must complete pre-qualification packet with TABC and information form from the City of Austin. [29]	Map Sales and Zoning Review		
APD Liquor License Information Form [30]	Complete form and send it to the APD Alcohol Control Team. Background checks on all applicants. [31]	Austin Police Department		
Temporary Food Event Permit [32]	Required if any of the following: * General Public event * Advertised or sold tickets to the event * Serving OPEN FOOD, open container drinks (mixed beverages with ice, wine, keg beer), OR food that requires refrigeration. [33]	Health and Human Services Department	2-14 days	2-5 calendar days - $98 6-14 calendar days - $145 [34]
Parking Permit [35]	Required for using any legal, on-street parking for purposes of loading and setup.[36]	Transportation Department		Variable[37]
Building Permit [38]	Required for Temporary Structures (e.g., scaffolding, stages, bleachers, etc.) or more than 120 sq ft, and that house more than 10 people.[39]	Planning and Development Review Department.		
Street Banners [40]	Event organizers, nonprofit groups, public and governmental agencies, and public information campaigns may display Street Banners on City lampposts to promote charitable, educational, arts, community, and public interest activities and events. City code prohibits the use of banners for commercial advertising or political campaigns. [41]			Lampost Banner - $250; Over the Street Banner - $564 [42]

Austin Parks and Recreation Department Office of Special Events.

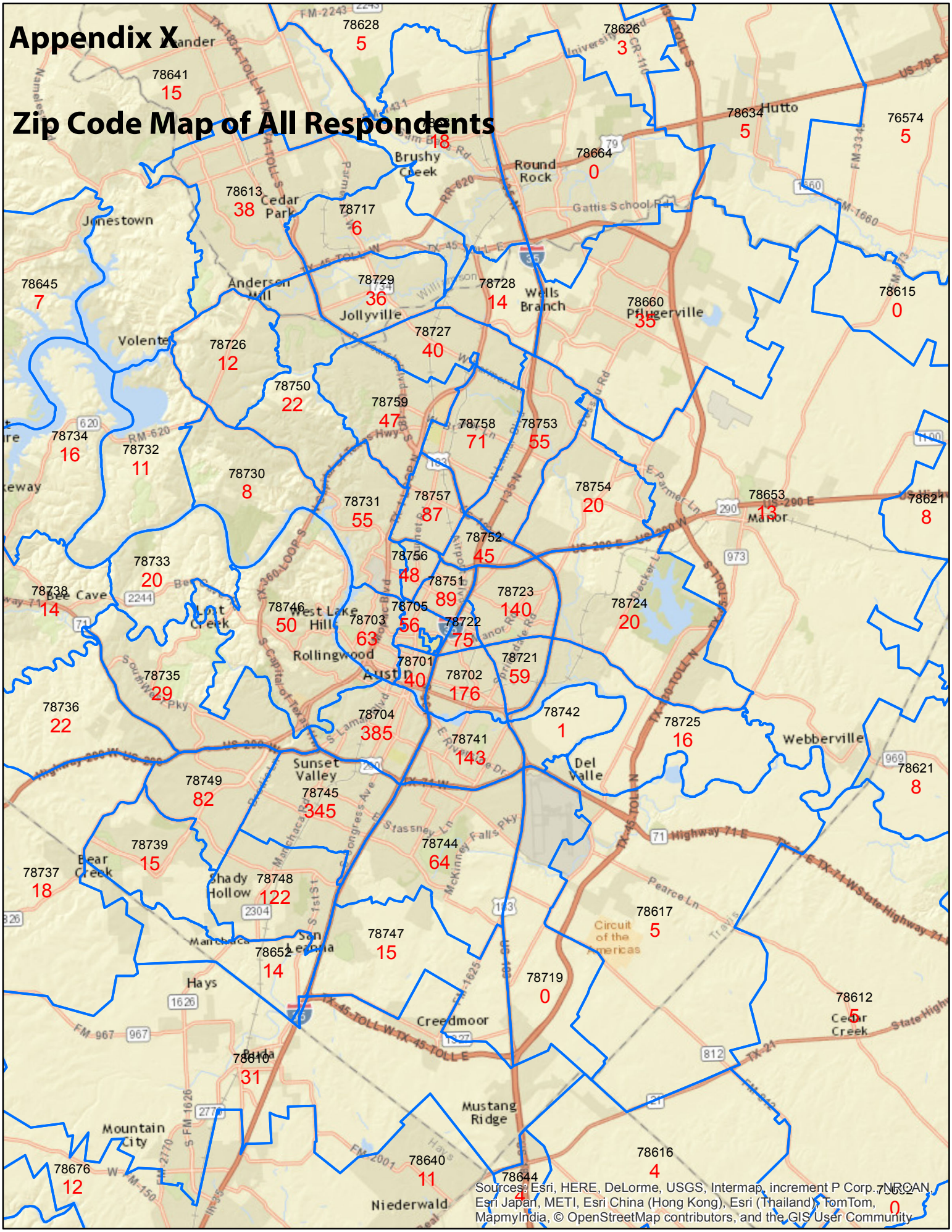
Please Note: If holding a large-scale temporary event on City of Austin Parkland, numerous additional regulations apply. Contact the Office of Special Events of the Austin Parks and Recreation Department. http://austintexas.gov/department/pard-event-permitting.

13. "Sound Permits," at http://www.austintexas.gov/department/sound-permits, last visited on April 16, 2015.
14. *Id.*
15. "Event Planning," at http://www.austintexas.gov/department/special-event-permits, last visited on April 16, 2015; *see also* "Austin Center for Events Application," at http://www.austintexas.gov/sites/default/files/files/Transportation/Special_Events/SpecialEventApplication_08292014_Final_v2.0.pdf, last visited April 16, 2015.
16. *Supra,* note 1.
17. *Id.*
18. "Austin Transportation Department of Special Events," at https://austintexas.gov/department/austin-transportation-department-special-events, last visited April 16, 2016.
19. *Id.*
20. "Temporary Change of Use," at *https://austintexas.gov/department/temporary-change-use*, last visited April 16, 2015.
21. "Temporary Change of Use Permit Requirements," at *https://www.austintexas.gov/page/temporary-change-use-permit-requirements*, last visited April 16, 2015.
22. *Id.*
23. *Id.*
24. "Temporary Uses," at *http://www.austintexas.gov/page/temporary-uses*, last visited April 16, 2015; *see also,* "Temporary Use Application," at *http://www.austintexas.gov/sites/default/files/files/Planning/Applications_Forms/temporary-use-permit.pdf*, last visited April 16, 2016.
25. *Id.*
26. "Special Events Permit Guidelines," available at http://austintexas.gov/sites/default/files/files/CityStage/Fire/guides/special_events_permit.pdf, last visited April 16, 2015.
27. *Id.*
28. *Id.*
29. *Supra,* note 12.
30. "Tent, Temporary Air Supported & Air Inflated Membrane Structures," at http://austintexas.gov/sites/default/files/files/CityStage/Fire/guides/tent_tempairsupport_airinflatemembrane_structures.pdf, last visited April 16, 2015.
31. *Supra,* note 12.
32. "Austin Center For Events Application," at http://www.austintexas.gov/sites/default/files/files/Transportation/Special_Events/SpecialEventApplication_08292014_Final_v2.0.pdf, last visited April 16, 2015.
33. *Id.*
34. *Id.*
35. "Business Related Permits," at https://austintexas.gov/department/business-related-permits, last visited on April 16, 2016; *see also* "Application for BYOB Venue Permit," at http://www.austintexas.gov/sites/default/files/files/Planning/Applications_Forms/byob_venue_permit_app.pdf, last visited April 16, 2015.
36. *Id.*
37. *See. e.g.,* "TABC: Temporary Permits," at https://www.tabc.state.tx.us/licensing/temporary_permits_issued.asp, last visited April 16, 2015.
38. *Id.*
39. *Id.*
28. *See* "*Alcoholic Beverage Permit Process,"* at http://www.austintexas.gov/page/alcoholic-beverage-permit-process; last visited April 16, 2015.
29. *Id.*
30. *Id.; see also,* "City of Austin, Texas Information Form in Connection with Application For an Alcoholic Beverage License," at *http://www.austintexas.gov/sites/default/files/files/City_Clerk/Alcoholic_Beverage_Permit/information_form.doc*, last visited April 16, 2015.
31. *Id.*
32. "Do You Need A Temporary Food Permit?" at http://www.austintexas.gov/sites/default/files/files/Health/eh_tempfoodpermit_letter_6_24_2011.pdf, last visited April 16, 2015
33. *Id.*
34. "Temporary Food Event Permit Application" at http://austintexas.gov/sites/default/files/files/Parks/AARC/Rentals/Temporary_Food_Event_Permit_Application.pdf, last visited April 16, 2015,.
35. "Right of Way Permits," at https://austintexas.gov/department/right-way-permits, last visited April 16, 2016.
36. *Id.*
37. "Fiscal Year 2013 Approved Fees," at ***https://austintexas.gov/sites/default/files/files/Transportation/Right_of_Way/Fiscal%20Year%202013%20Approved%20Fees.pdf***, last visited April 15, 2015.
38. "Building Permits" at *https://austintexas.gov/page/building-permits*, last visited April 16, 2015.

39. "General: What are the building permit requirements for temporary structures and stages?" at *https://www.austintexas.gov/faq/general-what-are-building-permit-requirements-temporary-structures-and-stages*, last visited April 16, 2015.
40. "Street Banners" at *https://austintexas.gov/page/street-banners*, last visited April 16, 2016.
41. *Id.*
42. *Id*

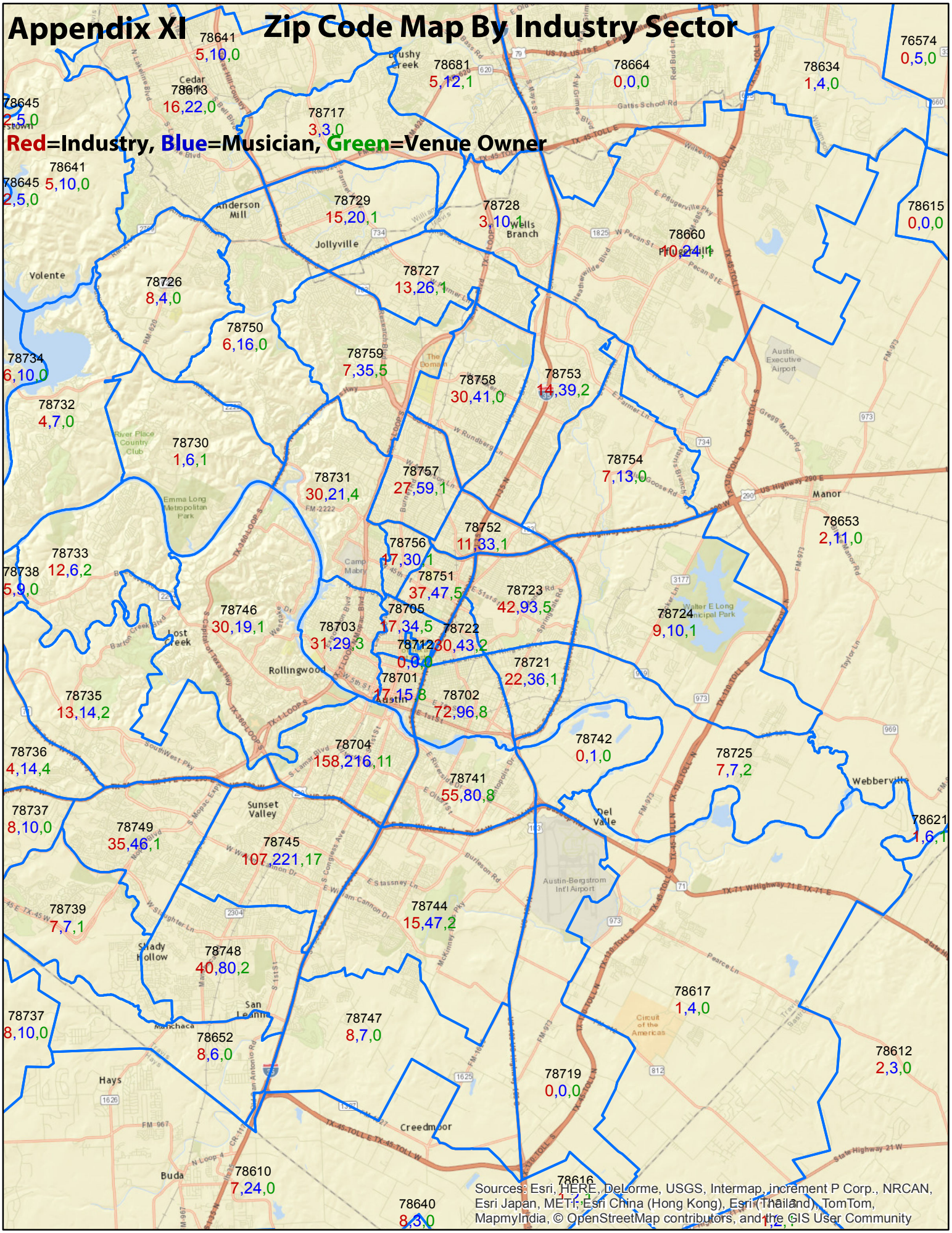
Appendix X

Zip Code Map of All Respondents



Appendix XI Zip Code Map By Industry Sector

Red=Industry, **Blue**=Musician, **Green**=Venue Owner



Sources: Esri, HERE, DeLorme, USGS, Intermap, increment P Corp., NRCAN, Esri Japan, METI, Esri China (Hong Kong), Esri (Thailand), TomTom, MapmyIndia, © OpenStreetMap contributors, and the GIS User Community

Appendix XII
Focus Group Discussion Summaries

MUSICIANS

Session 1 Conducted September 29th, 2014
Session 2 Conducted October 1st, 2014

Two Separate sessions held. Each had a unique set of attendees with no overlap between the groups.

What's Going Well

1. Affordable over other major cities in the country, LA, Boston, NY.
2. Day job takes pressure off. Can find part time, day jobs that allow musicians to continue to pursue career choices. General employment is good here- Tech is prominent.
3. Good support base of music nonprofits and other organizations/businesses (Focus Group participants mentioned: Austin Music Foundation, WIMPS, Capitol View Arts, Girls Rock Camp, Mindpop, Black Fret, Texas Accountants and Lawyers for the Arts, Artists Inc-COA program, AIR, Small Business Development, The Recording Academy, Texas Music Office, Austin Music People, Austin Convention and Visitors Bureau, Cultural Arts Division, Music and Entertainment Division, First Night Austin, HAAM, SIMS, KAZI.)
4. Supportive of younger generation-music education.
5. Tradition of live music that doesn't exist in other cities.
6. Culture and History of live music and support. Music legacy from Austin.
7. Performances at airport.
8. Free week.
9. Texas Commission on the Arts offers booking and touring assistance if you are on their roster.
10. Beneficial to be from Austin when touring. Ability to represent Austin to the world. Being from Austin is cool. Everyone loves Austin. Great reputation.
11. Good sound production more common.
12. Opportunity to perform. Availability of venues, inspiration, open arm atmosphere. Low hanging fruit around Austin via close venues allow opportunity.
13. No pay to play.
14. Great place to hone your craft and build skills.
15. Private Party availabilities.
16. Music festivals-SXSW, ACL, Fun Fun Fun.
17. International draw to Austin.
18. Media support for local music from KUT, KUTX, KOOP, KGSR, KAZI, Fox morning show, Austin Chronicle, Statesman, Good Day Austin, Lone Star State of Mind.
19. Open and collaborative musician and industry community.
20. Inspirational because amount of live music. Like graduate school for musicians. Quality musicians. Helps you to improve, calls to a different level. Surrounded by people who focus on art and develop their craft.
21. Film and art collectives. Symbiotic relationship, collaborations with other art mediums.
22. Ageless. You can work in a band at any age and continue to work.
23. Central place in Texas for touring.
24. Great place to build an audience.
25. Value of original music high. Austin appreciates original music and not necessarily the most popular.
26. Waterloo and Antone's records.

Priority Needs and Issues

1. Affordability is an issue. Cost of living has increased.
2. Musician income stagnant for 30 years.
3. Guarantees are larger in other cities.
4. Musicians make money elsewhere but live here.
5. Everything better except for a viable income. Live Music Capital doesn't have trickle down to the individual musicians.
6. You have to find a job to support yourself and music. Extra work takes away from productivity toward music industry.
7. Hard to break away from the day job. Don't know how to transition into full time musician? Don't know when I can quit day job? Uncertain about future opportunities.
8. You can get by, but barely. Not a good way to live.
9. Have to work a ton of gigs to live, which takes joy out of gigs.
10. Musicians do not see themselves as entrepreneurs.
11. Music business looks at artists as a renewable business.
12. Better communication about available resources to musicians. Need to communicate better to artists.
13. Need better communication with minorities and certain genres. Lack of connections and communications for all communities.
14. Parking situation downtown and moving parking meters to shorter periods have a negative impact.
15. Musicians should speak up and advocate and be pro-active and show up. Better musician participation.
16. Need advocates for our artists.
17. CAD doesn't identify with musicians.
18. Free week not good for artists.
19. Town will force you to play for peanuts 6 nights a week if you would. Venues want you to play for free.
20. Production fees go up. Pass all expenses on to artists. No transparency from venue owners in expenses. Checks and balances between artists and clubs.
21. Club owners often don't do contracts with local artists, and there isn't enough transparency in door deals.
22. Big sponsored shows don't have to play by the same rules & have funding to get consumer attention far beyond what local artists can compete with. "I can't compete with airplane skywriters to promote an event."
23. More welcomed in other cities than Austin.
24. Urban music in particular is hard to book. Few clubs will book hip hop.
25. Opportunities and/or information to some genres, clubs, not marketed equally.
26. No system of guarantees. No venues here give guarantees.
27. Need to lend musicians money with lower interest. Should be easier to get loans and come up with capital.
28. Local musicians don't see any increase in income even though festivals are increasing here.
29. Hard for local artists to work during SXSW. Not paid during SXSW.
30. Poor representation of artists in SXSW and ACL. Austin artists are not represented at festivals/SXSW. No value to local artists.
31. SXSW good for city but not necessarily for local musicians to get gigs.
32. Can't compete with the largeness/big acts of SXSW and their promotional dollars.
33. Promoters & venues should stop saying that exposure is as valuable as money to a band.
34. Industry people not in Austin. Not enough support services. Lack of music industry. Musicians move somewhere else to get to a next level. We have talent but not resources. There is a ceiling here. Artists are outsourcing infrastructure.
35. Velvet rut-come here and hone craft but have to move somewhere else to move forward. You hit a glass ceiling here.
36. Lack of music businesses including labels, PR, management, publishing, PRO's, booking agents, distribution, record companies, music supervisors, management, music sync and licensing, career

management advice, business plan development, artist development, marketing. Need infrastructure.

37. Booking Agents, PRO's and Pro level management with connections seem to be the most needed support services.
38. Need assistance with audience building.
39. Need to make urban music as a whole stronger.
40. Need help to transition from day job to full time musician.
41. Need help to grow from Austin to National scale.
42. Journalists need to cover a variety of genres and need to write good stories. More diverse media.
43. Need more local radio shows.

Ideas for Improvement

1. Affordable housing for artists.
2. Property tax credit for people that could show that their income is made through music.
3. Vouchers for musicians to give landlords. Must show that you're making a living playing music.
4. Create a HUB for music businesses and associated organizations. All non profits together. Career resource center. Contains resources and databases. Local publicist for hire and other music professionals.
5. Hire someone to focus on reaching specific communities. Culturally competent communication. Outreach effort for communities for all genres. Committee to do outreach to different populations. Embrace the diversity.
6. Website that listed everything that could assist musicians. Connects musicians to opportunities.
7. Grants to give away money to musicians.
8. Mentorship and hired services. Pairing industry people with artists-mentors.
9. Networking. Building relationships. Musicians need to be connected with gaming. Growing film community needs to be connected with musicians. More networking within the music business groups, special event planners, bring together industries. Other ancillary businesses that could cross over.
10. Tipping Campaign. Give businesses jars or buckets that are the same to tip the musicians. Branded tip jar. People should tip musicians like they tip bartenders. Education toward people in Austin about live music. PSA's. Austin etiquette campaign.
11. Educational assistance. Musicians need to be treated as business people and given the resources to stay successful. Musicians educated as entrepreneurs. Legal self-defense skills for musicians should be taught. Education about law, music, and business. Career advice on what's next? Need help to figure out your brand. PR for musicians at the individual level. What's a retirement plan? How to plan for retirement and investment. Series on money management.
12. Educate young musicians not to play for free.
13. Training for journalists. Need more journalists writing about local acts and promoting local shows and events. Training for people in our area to start blogs.
14. Ordinance for Live Music Venues. Protect musicians from club owners. Paid minimums for artists. Ordinance or incentives for venues to promote transparency. Checks and balances.
15. Business to have sign/accreditation of live music venue. System to get a rating. It would be desirable for the business to have this accreditation. Rating for venues to provide accountability. 1 star, 2 star etc. Live Music Stamp of Approval.
16. Property tax credit for landlords or owners of musician or music related properties.
17. HOT tax funds designated for music.
18. City should force radio to play Austin artists. Local content rules.
19. Offer music industry business incentives to come here.
20. City should assist musicians with parking and loading issues.
21. More lobbying for the music industry.
22. Encourage more family oriented venues.
23. More Texas showcases. Louisiana invests in their state and it's paying off.
24. Musicians Credit Union.

25. Attract legitimate agents and publishers to Austin. Attract established industry veterans with connections. Give incentives for businesses to move here specific to the music industry.
26. Produce showcases in Austin or other cities to help bands gain support. Create opportunities for local musicians to meet music business people from elsewhere.
27. Assistance with national PR and distribution.
28. Expo with music, gaming, film- just local people.

Appendix XII
Focus Group Discussion Summaries

NONPROFIT ORGANIZATIONS

Conducted on October 1, 2014

What's Going Well

1. Good service organizations for musicians. (Focus Group participants mentioned: Austin Music Foundation, Recording Academy, Austin Music People, Austin Songwriters' Group, HAAM, SIMS, Capitol View Arts.)
2. Good youth oriented organizations.
3. Austin Music and Entertainment Division and Texas Music Office.
4. Low interest loan program for sound mitigation.
5. Attention to the addition of a busking permit.
6. Red River Cultural District.
7. Austin has rich legacy of music.
8. Music tourism on rise.
9. Collaboration between music NPO's and the Music Commission.
10. Austin Music Commission. Pro-active and focused Music Commission.
11. Good leadership coordination among organizations. Benefits all.
12. Increased activity from grass roots organizations.
13. Advocacy opportunities and education available.
14. Being from Austin is beneficial and has a good reputation. Brand is strong
15. Strong club environment.
16. High number of live music venues.
17. Businesses using music to advertise products, commercial opportunities for artists. Music focused branding by other entities
18. Continued growth of artists and fans coming to Austin.
19. HAAM DAY. Opportunities for health care and mental health care.
20. Creative community attracting jobs for tech workers.
21. Wealth of talent, culturally diverse, multi genre musical landscape.
22. Cross collaboration of artistic disciplines.
23. Unexplored potential to build new models.

Priority Needs and Issues

1. Affordability is an issue.
2. Housing should be close to where people live and work.
3. Public transportation options, especially late night need to be improved.
4. Patrons need safe way to get back to homes and hotels.
5. Cross-racial communications are difficult.
6. Nonprofits need more diversity and should reflect the city demographics.
7. Outreach and connections to east side are difficult.
8. Financing of after school programs is difficult in certain areas.
9. Need more nonprofits that do specialized work for east side.
10. Problem with artists playing for free. Hard to get away from the culture of free. This culture and free mindset of the community transfers to new arrivals.
11. ACVB assistance minimal.

12. Musicians unaware of programs and services available.
13. Need favorable and increase in musician loading zones.
14. Parking.
15. Measuring commitment and enthusiasm from stakeholder involvement is difficult.
16. Better civic engagement. Music industry needs to show up at City Hall to induce change.
17. Large percentage of current and incoming businesses are profiting off the reputation of Austin music but not contributing to its sustainability.
18. No infrastructure to support musicians. Need more music industry.
19. Not enough inclusivity in festivals.
20. Music industry fragmented which makes collaboration hard. Always advocating for personal interests.

Ideas for Improvement

1. Expanding Capitol Metro services for late night riders.
2. Access and funding for music education and children is important. High school, university outreach.
3. Educate community on the value of music. Do away with the culture of free. Every time an artist plays they should get paid. Union represents the symphony, orchestra, ballet, and they get paid scale, that's why they make money. City-wide pay your artists focus. Fair trade.
4. Better/expanded leadership coordination with east side groups.
5. Better connectivity with community, particularly African American and Hispanic communities. Increased inclusivity with focus on diversity, to reflect the population. Work to build a bridge to connect and cross pollenate genres and events.
6. Night without music- one night without anyone playing, symbolic action with press.
7. Education about issues and resources that are available to musicians.
8. More access to operational, financial, personnel, publicity resources for nonprofits.
9. More education about needs in our community to increase donations.
10. City of Austin convened leadership meetings would be beneficial.
11. Mentors and braintrust for nonprofits. Provide networking opportunities with other nonprofits.
12. Improve sound and lighting incentives for venues to increases professionalism.
13. Incentives weighted to diversity of performances.
14. Chamber of Commerce, chamber activity for music industry.
15. Cultural deserts in the city. City should better understand where there is access and where there is not.
16. Incentives for export of music, talent.
17. Advertise to people from suburbs to come in and be a part of the City with hotel, dinner, music etc.
18. Increase participation from our industry in civic and industry issues.
19. Get people to show up and register to vote.
20. More diverse board to represent the Music Commission, not just same major businesses.
21. Strong infrastructure needed to keep artists here. Need PRO's and publishers.
22. Provide networking opportunities.
23. Continued funding for artists' professional opportunities, especially to export artists.
24. Create better connections into music industry and music leaders.
25. Financial assistance, personnel, PR for nonprofits and musicians. Getting the word out about the success of nonprofits.
26. Collaboration with other genres like theater and dance. There are parallels to music industry in these other disciplines.

Appendix XII
Focus Group Discussion Summaries

VENUES & NIGHTLIFE ESTABLISHMENTS

Conducted on October 6, 2014

What's Going Well

1. Many venue owners regularly meet with their surrounding neighborhood associations and encourage good communication to address issues with nearby residents.
2. Growth of venues gives musicians and production personnel more opportunity.
3. More competition in mid-size market. Business is up. Fewer shows but produce more income due to higher attendance numbers.
4. Austin market is interested in the VIP experience. There is the ability to sell upgraded ticket at higher price. VIP creates loyalty to venue.
5. Special events, benefits, fundraisers are a lot of business for venues. Venue rentals are strong outside of SXSW week.
6. East side venues are busy on weekends when it's easier to park and navigate the area as compared to downtown. Weekdays are harder. Specialty and curated events help to draw crowds.
7. A cluster of venues can be a positive thing. People go to an area as a destination and feel safe when there are numerous clubs in close proximity.
8. More pro-production teams to work with and more people in the business of producing events. It's easy to find quality people.
9. Some venue owners communicate and text/email each other. Very good relationships.
10. Venues have started the process to look past the competitiveness and work with City and community.

Priority Needs and Issues

1. East side patronage has never been better, but east side venues have had issues with city code compliance.
2. Sound enforcement not complaint driven and venues that have had both live and ambient music for a long time now are starting to get cited without any complaints.
3. Police not enforcing ordinances uniformly.
4. Different enforcement crews require different criteria. No standard expectations or passing of information between City departments. Enforcement and expectations are different for each City staffer. It's difficult to know what to do to comply.
5. Uneven and arbitrary rules lead to intimidation. The rules are not standard or clear.
6. Fire department is not uniform in enforcement and hard to communicate with. Inconsistent information.
7. City infrastructure and staffing not keeping pace with the growth of the City. City staffers are often exhausted, overworked, and mad when they show up. Not enough time to work effectively with the venue owners. Owners are more confused in the end.
8. Code Compliance needs better customer service.
9. Monitoring the DBC rating would hurt many live music venues.
10. DBA enforcement levels are arbitrary.
11. Difficult to plan for growth when you have to get neighborhood re-approval each year to receive permitting.

12. Slow permitting process and last minute approvals for events not conducive for booking and planning purposes. It is stressful to be planning an event and making expenditures when the permitting process takes so long. Notifications are last minute and occur after financial investments have been made and contracts have been signed.
13. Even though applications for permitting are filed with the City months in advance, permits are approved a week or less before the event.
14. You can't book talent more than two weeks before an event if you are waiting for permitting. This is not practical in a business environment.
15. Information on City of Austin website could be clearer. Hard to determine the permitting process.
16. Temporary permitting process is very difficult and having to deal with different departments within the City is confusing. There is conflicting information given on what permits are needed. Too many departments that are not on the same page.
17. Temporary permitting is not consistent.
18. Temporary permits during large events often cause problems for regular businesses. Free alcohol giveaways contribute to this. The non-traditional businesses that do not operate in Austin 365 days a year often cause problems for the long-term established businesses. People who are just here for 10 days producing an event should not get preferential treatment.
19. Street closures are hurting businesses. No notice of street closures to businesses.
20. Many venues noted tourist business, especially on weekends. However, the consensus was that festival and event weekends such as ACL, F1, and X Games did not bring additional patrons. In fact, these large tourist weekends often decreased business.
21. Venue owners agreed that better coordination on proposed amendments to city ordinances would allow for a common advocacy effort.
22. Do not see the same communication between bars that only sell alcohol and those that have live music.
23. "No parking" regulations on 6th street at night have hurt businesses.

Ideas for Improvement

1. Easy to find and understand codes.
2. Comprehensive webpage where all regulations are in one place that effect venues.
3. Seminars/Code Compliance Course would help. Meetings with ACE.
4. Email with updates/changes to the code. Prescheduled meetings and emails with changes and information.
5. Local promoter specific qualifications and event planner certification. System to favor event permits for local promoters and reward local businesses.
6. Option to receive your event permits early if you are a city certified promoter/event planner. Local businesses should be given priority treatment.
7. Local event promoters should have some relationship with the City to be able to work to receive permits simpler and faster.
8. Renewal of permits that have been given in previous years. Create a database of permitting and what has been granted before. Process would simplify year-to-year renewal of the same plan.
9. Permits should be approved at least three months in advance.
10. City could offer reduced rates for venue owners on electric bills.
11. Assistance with parking.
12. Curtail free alcohol give-aways.
13. Discussion to start a merchants association with lobbying power to bring competitors together for a bigger voice.

Appendix XII
Focus Group Discussion Summaries

MUSIC INDUSTRY

Session 1 Conducted October 7th, 2014
Session 2 Conducted October 8th, 2014

Two Separate sessions held. Each had a unique set of attendees with no overlap between the groups.

What's Going Well

1. Austin is affordable in comparison to major music cities at this point in time.
2. Services for musicians (such as HAAM) add to affordability and livability.
3. Austin has fared better than most cities during economic downturn.
4. Good paying jobs for significant others and spouses to support musicians.
5. Supportive infrastructure with nonprofits and others that support artists. (Focus Group participants mentioned: Austin Music Foundation, Black Fret, Austin Music People, Austin Music Commission, HAAM, SIMS, Capitol View Arts, Good Music Club, Austin City Limits TV show.)
6. Educational opportunities for commercial music careers.
7. Music education in general is accessible and prevalent. Lot of music schools, group classes, rock camps. Younger generation is miles ahead of where they used to be in learning to play an instrument.
8. Tourism is helping. Puts your music in front of others. Anyone who visits wants to be a consumer of music as well. Tourist business helps when touring because fans have been to Austin and have experienced the city.
9. Tourists export the brand back home.
10. Being from Austin is positive. Can get you a gig. Brand of Austin is helpful. People want to watch your videos and book you. Even more so overseas. Opens a conversation. Great international reputation. Austin brand is strong when traveling throughout the world.
11. Greek community, social scene, government, social functions, parties to be employed at. Also, health sector, runs, expos, private events book music.
12. Accessibility to major markets- geographically, Dallas, SA, Houston. In middle of country. If you are working on the road it's a great location.
13. Sound engineers and production workers are skilled. Venues care about sound.
14. Ecosystem of venues and artists for various skill levels. Lots of venues.
15. Pay to play hasn't taken hold here.
16. SXSW creates a sustainable business model for venues.
17. Center of gravity around industry side that wasn't there five years ago. People are leaving Nashville, NY, LA and coming here. More industry will equal more economic prosperity.
18. Export offices come here to investigate. Public money from around the world is invested here.
19. Austin with little infrastructure is ripe to accommodate what is next in music industry. Will be easy to accept new models. No legacy of old industry to overcome. No industry barriers here could be a positive for growth.
20. SXSW here is huge plus. SXSW has become a global festival and helped put Austin on the map. Has had a cumulative effect on music.
21. Climate is a positive. Increases event season. More festivals and outdoor activities.
22. Good history for music here… old guard here. Rich music culture. Something to build on and you're a part of something bigger. Camaraderie between old timers and new people. The heritage and

history is still respected and honored. Connection with past music history. Heritage of cool older musicians. Multi genre 50 year legacy. Psych and punk could be argued that they started in Austin. We are the hotbed of culture.

23. Support from community in general-Employers will allow musicians to take off for shows. Non music industry businesses support and hire musicians. Belief in music culture is strong.
24. Community bands together in times of crisis. Stolen equipment is often replaced immediately. Lots of benefits for sick, injured. Community supports and understands.
25. Austin is an incubator: conducive to people coming to Austin and developing their talent and musicality. Hone your craft here, get better here.
26. Collaboration between different creative industries, musicians, actors, film, visual art. Cross collaboration and strong entrepreneurial spirit. Supporting and accessible creative community for collaboration and mentorship.
27. Breaking silos between fields. Ballet, opera, symphony getting more adventurous and collaborating with those that don't have a fine art or higher education background.
28. Music fans disproportionate to other cities this size. Live music is a hobby to consumers in this town.

Priority Needs and Issues

1. Affordability is an issue. Music business start-ups commit to at least three years of living hand to mouth. Office rent and housing rents are too high.
2. Can't afford to live here and people are getting pushed out of central area.
3. Family life is a challenge.
4. Not enough affordable housing.
5. Need more infrastructure-government should find a way to entice people to move or develop here.
6. Music Office needs more staff and money.
7. Cream of crop (established) artists getting most help through tourism.
8. House production costs have gone up.
9. Inconsistency between City departments on permitting.
10. Two major promoters control larger venues. Demands to only play my venue. Bands feel like they have to choose sides. True for Indie Rock. Once you reach a certain stature you have to declare a loyalty. Storm brewing between these two promoters that control fests and larger venues. But this is part of commerce of the business.
11. More musicians per capita then we can sustain. We have more venues then needed except for SXSW. Too many venues and musicians.
12. Huge amount of musicians oppresses the per gig rate. Austin musicians on average make less than they would make in other places.
13. Heavy on artistic, light on business.
14. Have to travel a lot to meet industry people.
15. Fragmentation where people are working in their own silos. Huge fragmentation and lack of awareness of others and local services. Lack of cross awareness of what's going on.
16. Most get out of here to make it in the industry. Have to move out to move up. As soon as you're big enough, you leave for Nashville, NY, LA.
17. No PRO's here. No managers, publishers, labels etc. Booking agents needed badly. Getting a booking agent is the most frustrating thing dealing with in life. No one wants to do sales. (booking) Why aren't booking agents coming here since Austin is inexpensive compared to other music cities and possesses good talent. But still can't get booking agent for band that has been around 5 years and has proven draw.
18. Can't make enough money in Austin as an agency because rent too high, salaries need to be paid, expensive payroll.
19. There is a ceiling here on careers.
20. Music is bringing in a positive economy but no trickle down.
21. Income from festivals may not reach local businesses or artists.
22. Need more representation of Austin acts at festivals.
23. Giant pool of musicians so it's hard to break out.

24. Our local publications could be doing more for our Austin musicians. Too much national coverage and should be more toward local acts.
25. Licensing is oversaturated since record sales down.
26. Lots of people saying that they can get placements, but not so many delivering. Company "X" tried a license database before and invested a lot of money but it didn't work.
27. Idea that exposure is more valuable than money killed license deals.

Ideas for Improvement

1. Private industry co-op that would become a hub with office space. Run by Board. Central area of town. Hub of music industry. Public/Private partnerships.
2. Offer stipends or help to create labels or publishing company. Giving $2000 and putting people in an office together. Here in Austin pool money and share space.
3. Build a place where managers could come and work with each other. Meet each other. Certain percent of managers, publishers, etc. represented. Participants throw in a percent of income to sustain this hub.
4. Influx of capital for up and coming businesses to create a way to stop doing their current job and start a music business.
5. Creating an export music embassy to other cities. Place Austin office in other areas and have a presence in other cities. Office designated to promote Austin music. Private industry cooperative to create an Austin music industry embassy for export purposes.
6. ACVB could automate system for show tickets. Like TKTS in NY.
7. ACVB has a ready artist roster that's pre vetted for recommendations. Website database to preview Austin bands that could be booked for conferences through ACVB.
8. Cross pollination networking platform. Connectivity with other creative sectors.
9. Government incentives for music industry for the growth of infrastructure. Support labels, publicist, booking agents, and other music business professionals. Is there a way the city could help build more incentives?
10. Require festivals to include local artists.
11. Noise ordinance needs to be revamped.
12. More areas set up like the Red River Cultural District.
13. Incentives for Austin businesses to hire and use Austin musicians.
14. Paying artists to come here and record. Give studio time per diem. Hotel rooms. Has to have objective criteria. Would help our studios and get higher level artists in them and could open up other opportunities for our local artists.
15. Bring music supervisors here during SXSW and show them around. Pay for their hotel.
16. Subsidize certain conferences by helping to pay for live music.
17. Incentives to use local creators on technology and film projects.
18. Creating a licensing of local music incentive.
19. Work with ACVB to get tickets to venues on nights that conference people are in town.
20. Ask conference organizers to promote gigs to tourists.
21. Platform to make it easy to access licenses of potential artists. Resource database.
22. Incentives to license or create original content from Austin.
23. Music industry newsletters. Magazines. Disseminate information.

Appendix XII
Focus Group Discussion Summaries

EVENT PRODUCERS

Conducted on January 14, 2015

What's Going Well

1. Music Division doing a good job of assisting with permitting.
2. Venues have improved in the 300-1000 capacity – more options.
3. National interest here with brands past SXSW. Austin is good for promotion.
4. Xgames, F1, Fun Fun Fun , ACL, Euphoria, other events are growing and offer opportunities.
5. Rising Tide lifts all boats. Austin good market for bands, entertainment, brands. Perfect timing for music tech companies to launch.
6. Austin has become in top 10 places to establish a touring market. Austin now considered a large market, selling more tickets than Philadelphia at times. Mohawk, Parish, Stubbs, Emo's brands, University and SXSW help.
7. Better than Seattle and Portland for touring bands, comparable to Denver. Austin is good opportunity for large audience due to festivals and great venues.
8. Closed loop-promoter, producer, and they own a venue- Transmission, C3- this is good.

Priority Needs and Issues

1. City stage website doesn't easily answer yes/no questions.
2. Temporary change of use permitting has improved, but could still be streamlined.
3. Neighborhoods near venues or outdoor festivals complain. A few people have been allowed to be a detriment to the commercial viability of events.
4. Insurance requirements are hard to meet.
5. Many different staff members interpreting the code in fire because of growth.
6. Police take sound readings from different areas inside the venue. Not consistent.
7. Need better response times regarding permitting.
8. Event producers contribute to filling hotel rooms and should have access to HOT tax money.
9. Disproportionate amount of HOT tax money given to arts as compared to music and entertainment.
10. Parking for events.
11. Wild west here. Need more controlled thoughtful growth. Create parameters.
12. What can our market bear and will it collapse on us?
13. Marketing jobs are growing here. Need more on the business side.
14. Artists go other places to record and we still send bands/artists out of town to record music.
15. Brands sitting out SXSW due to venue availability and costs.
16. Some clients are looking to rent year round for basically the same price as during SXSW.
17. If more agencies knew people were here they would use local producers. Could city do outreach to promote what we have here? We have good event producers here.
18. Event insurance is primarily through out of state agencies. Need more local insurance agencies.
19. A lot of young professionals are buying out of town, Driftwood, Wimberly etc. There are going to be creative centers pop up in these locations and Austin will lose creative class.

Ideas for Improvement

1. We should be teaching people how to buy property in this town.
2. Never let a band play free on our watch. Any power that we have to make sure that artists are paid and that gigs are not played for free would help.
3. Could city have a union rate for musicians?
4. Event producers should teach clients that they have to pay for music.
5. Music professionals that are higher up and make more money need to help and become more involved with the struggling musicians.
6. A place where people that work events and can go to as a resource to find jobs. Posting job openings and announcements. Share resumes.
7. Producer round up- get everyone together with police, fire, etc, to make sure everyone has information and is able to work with the City easier.
8. Directory of event services-insurance, clean up, vendors. It hard to find credible people or companies to assist with events. Need program with people and businesses that are city certified and know the City requirements.
9. City needs to take the lead and tell us guidelines and apply them fairly and consistently.
10. City could also take a lead with the neighborhoods. Offer consistency for different events using the same areas.
11. Put up permit parking signs around the Auditorium Shores area. Would be beneficial to everyone year round.
12. Meet with neighborhoods to talk about issues.
13. More collaboration between City and event producers.
14. More touristy music attractions.

Appendix XIII
Text Analysis and Charts from Write In Responses

Use of Free Text Responses and Analysis Method

Write in comments offer more explanation about survey topics and identify other issues not specifically addressed by survey questions, providing a rich additional data source for insight into key issues.

In addition to "closed-ended" questions, which use pre-designated answer choices, the survey offered three opportunities for participants to write in text, providing free form thoughts and comments.

Open ended, text write-in style questions can often be more difficult to analyze than closed ended, multiple choice questions, particularly when there is a high volume of free form writing.

Titan Music Group used the following method to analyze the text write in comments:

1) Respondents' answers to demographic questions in the survey were retained in the rows so that further analysis could be conducted regarding job sector, age, gender, time in Austin, and other factors in conjunction with their write-in free form response.
2) A precursory review of several hundred comments provided the basis to identify common themes or recurring ideas.
3) A coding method of those common themes was devised and then employed to tag text responses accordingly with a correlating number, based on a detailed reading of each comment. Often, comments described more than one theme and therefore may have been assigned more than one coding number.
4) Codes were then quantitatively analyzed to determine the presence of thematic content in the write in responses.
5) Tabulations were then conducted around the other demographic information about the text write-in survey respondents, creating further insights around the text write-in data.

Survey Write-In Opportunities:

Needs and Gaps: At the conclusion of the survey section "Need and Gaps", musicians and music industry business owners and workers had the option to answer: "Did we miss a need in Austin's music industry that is important to you? Tell us about it here."

Ideas and Proposals: At the conclusion of the survey section "New Ideas, Solutions, and Initiatives", musicians and music industry business owners and workers had the option to answer: "Did we miss an idea or initiative proposal that is important to you? Tell us about it here."

Venue: At the conclusion of the survey section "Venue Challenges", venue owners, managers, and staff had the option to answer: "Did we miss an issue relevant to Austin's music venues and establishments that is important to you? Tell us about it here."

Text Write In Response Rate

1546 Total Write In Responses

1,025	Total write in responses for "Needs and Gaps"
449	Total write in responses for "Ideas and Proposals"
72	Total write in responses for "Venues"

Musician Write In Responses

707	Musician write in responses "Needs and Gaps"
296	Musician write in responses "Ideas and Proposals"

Music Industry Business Write In Responses

318	Music Industry Business write in responses "Needs and Gaps"
153	Music Industry Business write in response "Ideas and Proposals"

Venues Write In Responses

72	Venue write in responses

Write In Thematic Content

There were common themes among many of the text write in comments across all types of respondents. This classification of comments into 19 Thematic Categories demonstrate how many times a particular issue or idea was mentioned throughout the write in responses. "Times Mentioned" reflects the number of times the Thematic Category was mentioned amongst all write in comments.

Times mentioned	Thematic Category
343	Musicians unable to make a living wage/Low pay for musicians
205	Parking concerns
188	Opposition to the Sound Ordinance
118	Affordable housing needed
95	Increased professional skills development
81	Lack of professional infrastructure
72	Zoning and development control
66	Public transportation improvements
61	Promotion of local music and events to the public
52	City incentives for musicians and music business industry
51	Centralized industry resources would be beneficial
49	Encouragement for promoters to book local acts
46	Affordable commercial space for rent needed
34	Better marketing to and assistance for minorities
27	Export of live music and music business from Austin
27	Increased safety
22	More collaboration with other art disciplines
22	Creation of Entertainment Districts
22	Permitting and code compliance improvements

Theme Category Definitions

Here we have provided a more detailed explanation of each of the 19 Thematic Categories, and what they mean relative to the free form responses.

Musicians unable to make a living wage/Low pay for musicians – Refers to comments about venues paying musicians low wages, musicians playing only for tips, decreases in cover charges over the past 10-20 years, the culture of free or reduced price music in Austin for patrons, live music not supported financially by locals, and the general idea that musicians cannot make a living in Austin.

Parking concerns – Refers to comments about the lack of availability of parking downtown for musicians and patrons, prices for parking, and street closures which reduce parking.

Opposition to the Sound Ordinance – Refers to comments about the current levels and enforcement of the sound ordinance, sound ordinance restrictions on venues that prohibit sustainable operations, revision of current sound ordinances, methods used to ensure compliance, complaint driven enforcement of sound ordinance, and no uniformity in enforcement of sound ordinance.

Affordable housing needed – Refers to comments about the availability and increase in price of housing for rent or purchase.

Increased professional skills development – Refers to comments about training for musicians and small businesses on business related content such as management, marketing, bookkeeping, taxes, legal, fund development, and also in regard to peer to peer networking and mentoring.

Lack of professional infrastructure – Refers to comments about lack of music industry associated businesses such as managers, booking agents, marketing and PR professionals, publishers, labels, licensing assistance, performing rights organizations, distributors, music supervisors, and artist development. Also includes comments about the lack of support services located in Austin forcing artists to move or look to other areas for assistance.

Zoning and development control – Refers to comments about zoning for residential and hotel purposes near venues, venues being effected by condo and hotel development, preservation of venues and buildings, and requirements of builders to consider landmarks and legacy businesses when developing new properties.

Public transportation improvements – Refers to comments about improving and expanding public transportation, including new lines and extended hours.

Promotion of local music and events to the public – Refers to comments about city wide campaigns to increase knowledge of Austin music and events. Includes ideas of more free public shows, tipping campaigns, advertising locally about Austin talent, and general awareness of the importance of music to the City.

City incentives for musicians and music business industry – Refers to comments about offering incentives for music industry businesses to open or relocate in Austin, incentives for venues that book local live music, incentives for venues that offer fair pay for musicians, incentives to open live music venues outside of the downtown center, and incentives to use locally based artists in advertising, film, TV placements.

Centralized industry resources would be beneficial – Refers to comments about a central hub for musicians and businesses to find resources and information through both physical space and online presence, centralized resources on grants and funding opportunities, access to directories and lists of professionals, shared office space at a reduced price, access to business services, centralized resource for job openings, and centralized list of educational activities for musicians and business owners.

Encouragement for promoters to book local acts – Refers to comments about encouraging or incentivizing local promoters to use more Austin artists on festivals and touring shows.

Affordable commercial space for rent needed – Refers to comments about the need for affordable space for rent for venues and music industry businesses

Better marketing to and assistance for minorities – Refers to comments about targeted communication to the minority populations, better relations between police and minorities, more support for venues that book minority and cultural artists, and more support for women artists.

Export of live music and music business from Austin – Refers to comments about exporting the brand of Austin music nationally and globally, campaigns to export talent to other cities, music exchanges and alliances with other cities, and awareness campaigns about industry resources in Austin.

Increased safety- Refers to comments that indicate concern about the need for musician and public safety, especially in the Central Business District.

More collaboration with other art disciplines – Refers to comments about collaboration and relationship building with other art forms including visual art, film and TV, theater, and gaming.

Creation of Entertainment Districts – Refers to comments about maintaining and creating designated Entertainment Districts which could regulate and protect music industry needs.

Permitting and code compliance improvements – Refers to comments about the City permitting requirements and process and current city codes that apply to venues and musicians.

Other Recurring Themes

Other topics that were mentioned with some frequency (but were not counted in an official Thematic Category) are given below.

1. A change to allow for busking would have a positive impact on musicians.
2. There is too much emphasis on the downtown core. More events and venues are needed outside of the downtown area.
3. HAAM should serve music business industry workers.
4. Lack of quality venues with professional staff and PA. Many venues need better upkeep.
5. Venues should do their part to promote. Venues expect artists to do all marketing. Promotion should be a shared effort.
6. Radio and print media do not cover all genres of music and frequently cover the same artists.
7. Bands should not play for exposure. Musicians need to act collectively and not play for free.
8. Dislike of DJ's taking gigs away from musicians.
9. Less festivals. More year round focus on music needed.
10. Clubs should provide backline.
11. Affordable rehearsal space needed.
12. Need a better relationship with the police.
13. More listening rooms, less bar type venues.
14. More family oriented venues and shows are needed.

Most Common Themes

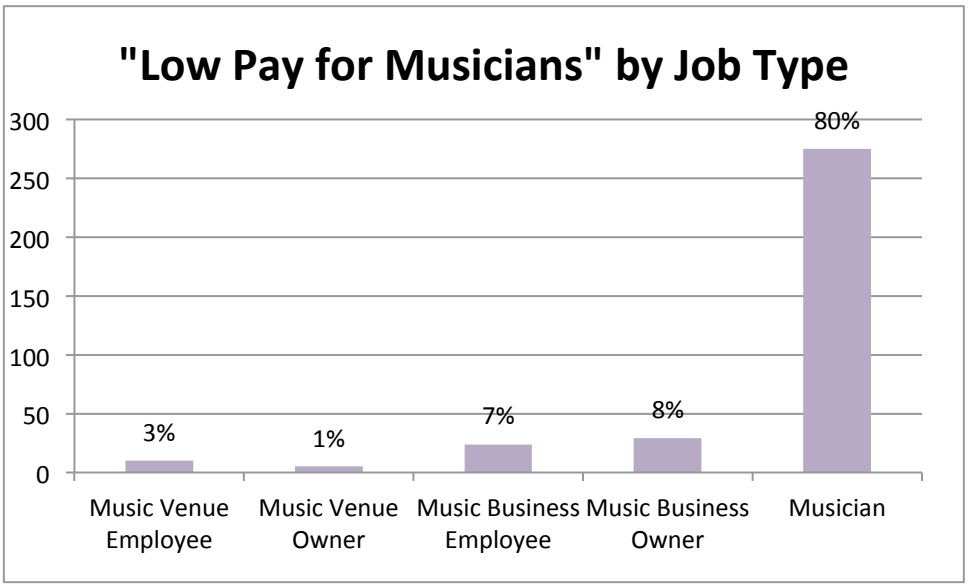
Write in comments weighed heavily toward indicating that low pay and the inability to make a living wage was the top issue for many of the respondents. 22% of survey write-in comments specifically mentioned low pay for musicians as an important and persistent issue.

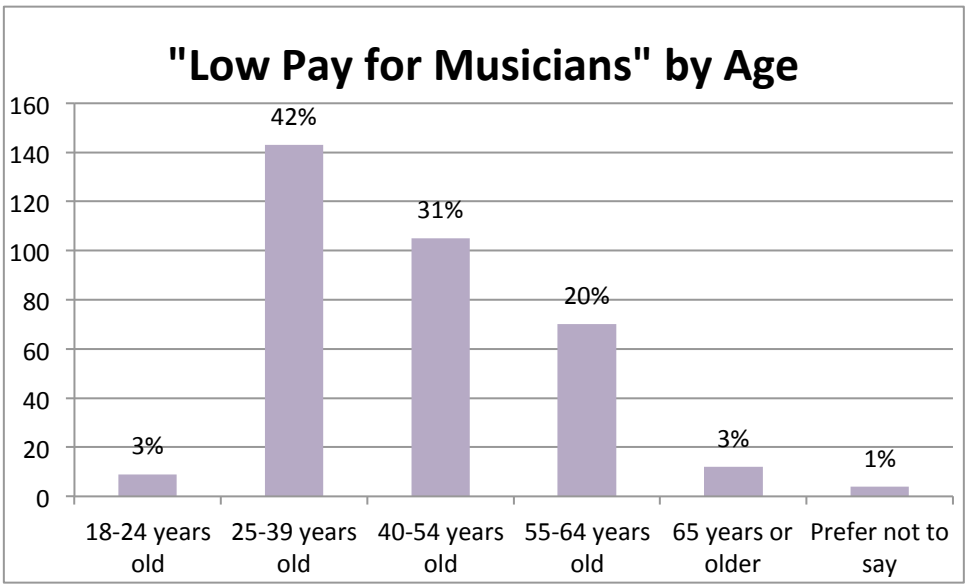
Affordable housing was also one of the more popular write in text subjects. 45% of write in survey participants that indicated affordable housing was needed had been living in Austin for over 20 years. 68% of write in survey respondents that indicated affordable housing was needed had been living in Austin for more than 10 years.

Write in comments show the same concerns as the multiple choice and graduated survey questions in the affordability and low pay areas. Data shows that these are problematic, high impact issues for both long term and newer residents.

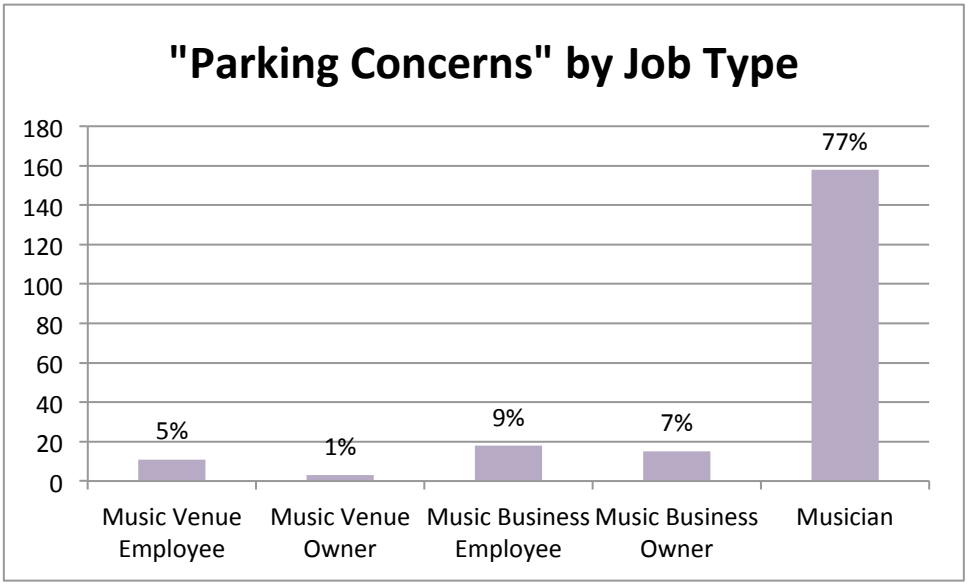
The following charts provide additional insight about those who provided free form comments. The five most common Thematic Categories ("Low Pay for Musicians", "Parking Concerns", "Opposition to Sound Ordinance", "Lack of Affordable Housing" and "Professional Skills Development") are segmented here by respondent Job Type and respondent Age. These charts do not represent the entire survey population – they are limited to those who provided write-in responses. Please refer to the Appendices IV, V, VI, and VII for quantitative data encompassing the entire survey population.

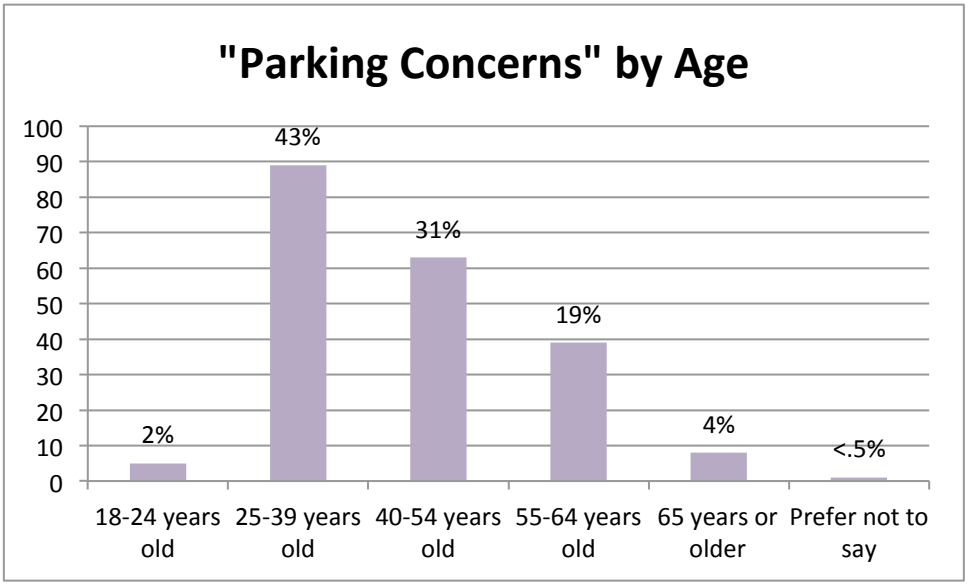
Musicians unable to make a living wage/Low pay for musicians – Refers to comments about venues paying musicians low wages, musicians playing only for tips, decreases in cover charges over the past 10-20 years, the culture of free or reduced price music in Austin for patrons, live music not supported financially by locals, and the general idea that musicians cannot make a living in Austin.



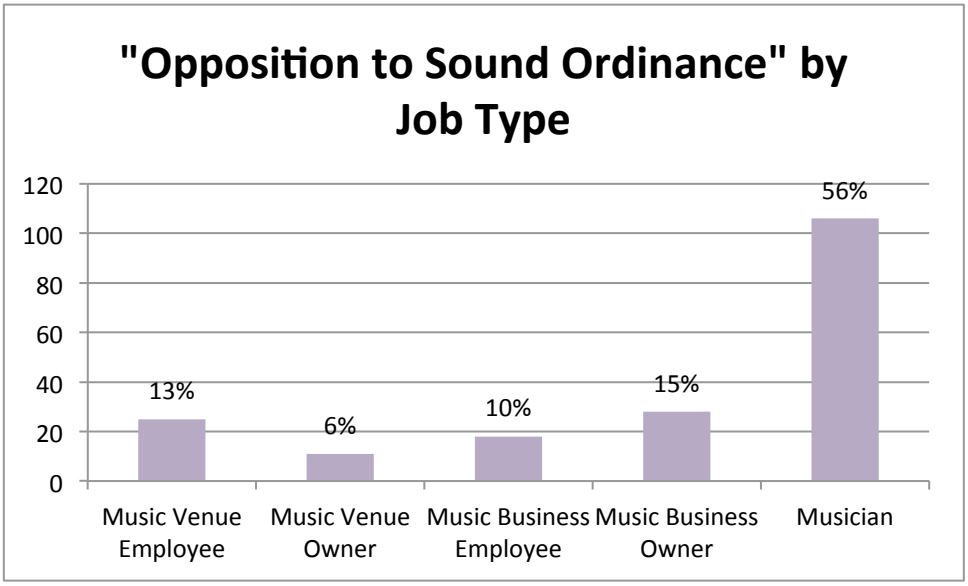


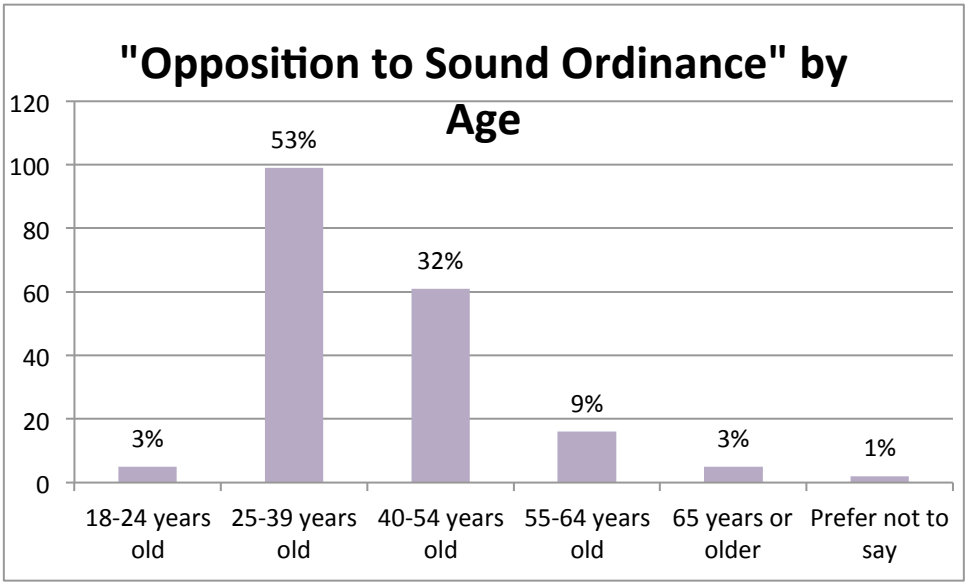
Parking concerns – Refers to comments about the lack of availability of parking downtown for musicians and patrons, prices for parking, and street closures, which reduce parking.



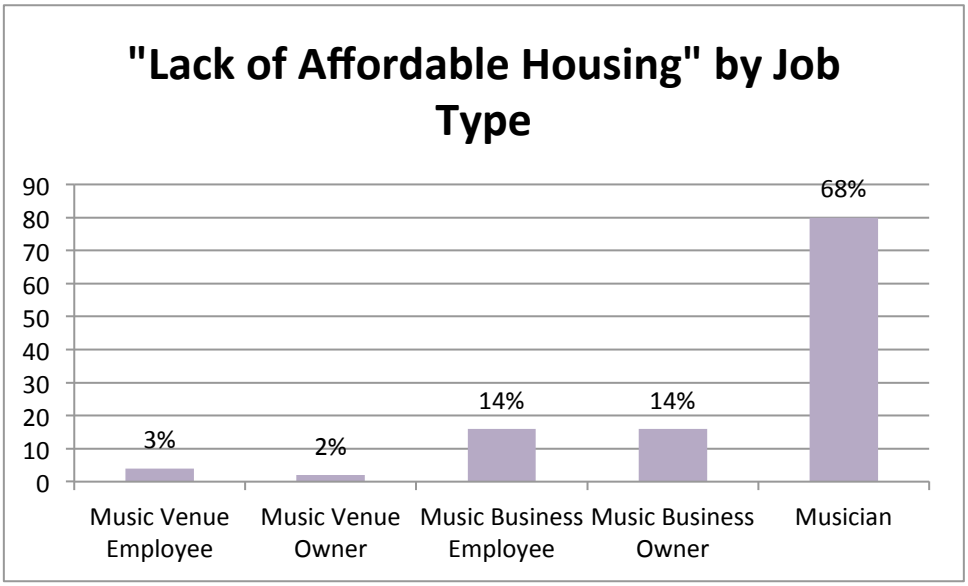


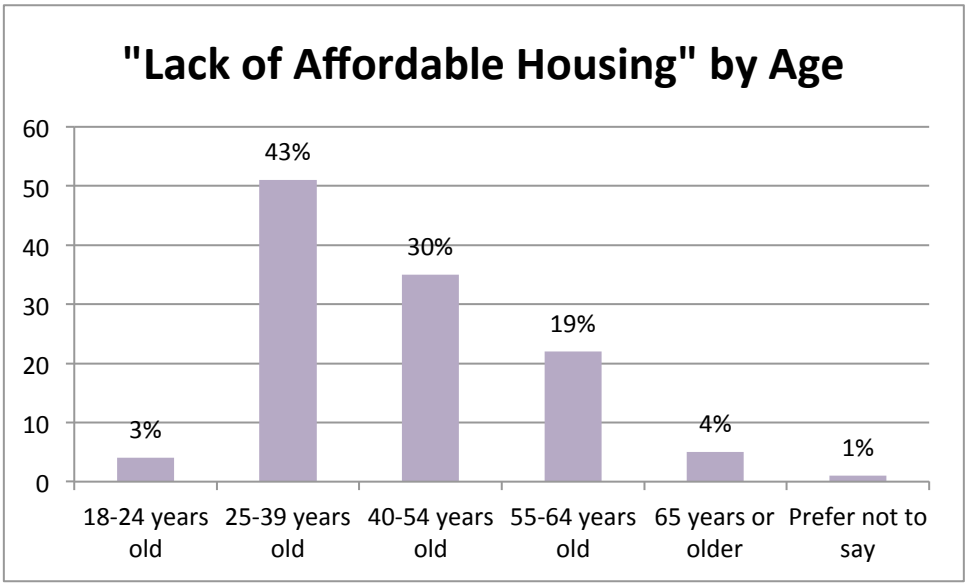
Opposition to the Sound Ordinance – Refers to comments about the current levels and enforcement of the sound ordinance, sound ordinance restrictions on venues that prohibit sustainable operations, revision of current sound ordinances, methods used to ensure compliance, complaint driven enforcement of sound ordinance, and no uniformity in enforcement of sound ordinance.



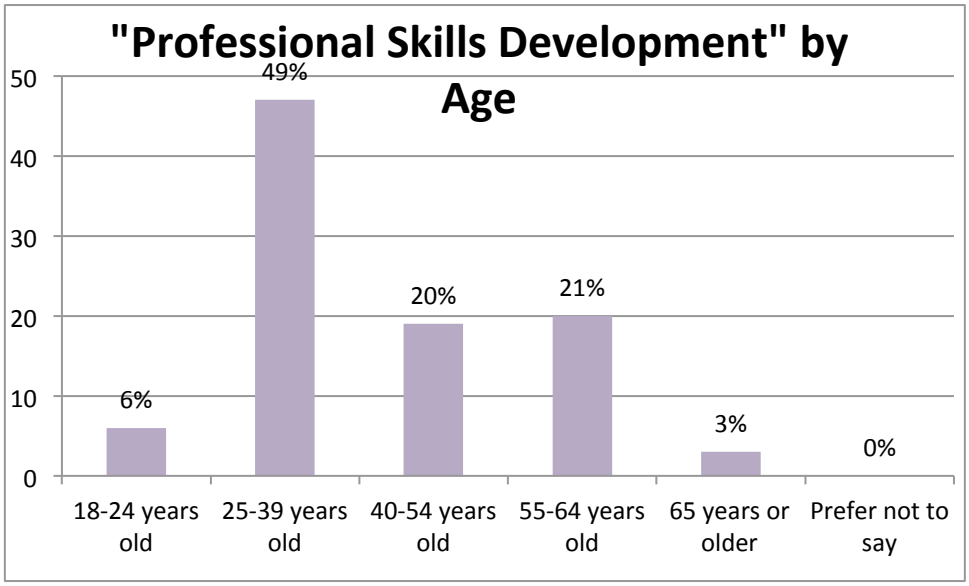


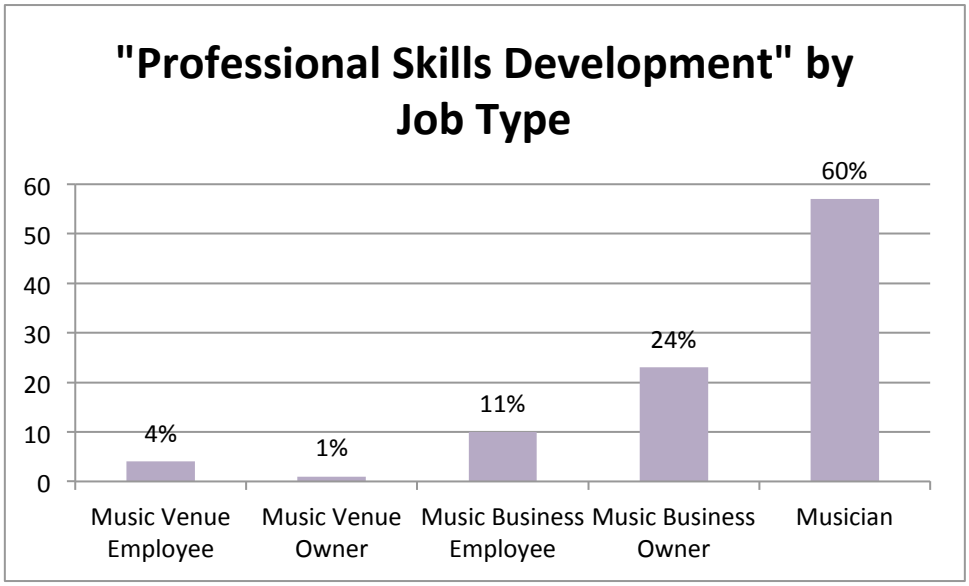
Affordable housing needed – Refers to comments about the availability and increase in price of housing for rent or purchase.





Increased professional skills development – Refers to comments about training for musicians and small businesses on business related content such as management, marketing, bookkeeping, taxes, legal, fund development, and also in regard to peer-to-peer networking and mentoring.





Appendix XIV
A Selection of Sample Write Ins from Survey Respondents

***Note: This Appendix contains a few selected responses from the pool of 1,500 write-in responses received. There were three separate questions in which opportunities were given for write-in ideas, suggestions, or issues. Those questions are provided below along with some selected responses we received. These are provided verbatim as received, with no changes to spelling, grammar, or other issues. Each line break represents a new respondent.*

"Needs and Gaps: Anything Else?"
"Did we miss a need in Austin's music industry that is important to you? Tell us about it here."

"There are too many sound ordinances in place downtown. As a local musician that has played here for the last several years, I feel like the city is pushing out its music culture to make room for hotels and condos. I think there is a way these two things can live in harmony and would love to see the city do something about it"

"A huge impact on venues is the growing regulations forcing bars/venues/etc to turn off their music at 10:30pm, 11pm, etc. hours before closing due to local neighborhood sound complaints. Having outdoor patios/bars/music venues is not a new concept for Austin, aka the Live Music Capitol of the WORLD, however people moving to town and complaining about the sound IS new. These people want to move to Austin because it is a vibrant city known for its live music scene, and the very thing that brings them to town, is what is being systematically shut down. Housing scarcity within the city forces the building of housing developments by famous venues, and then they complain about the sound when there are shows. This alone is putting a huge dent in the music industry in Austin and directly affecting everyone working in that industry. The city should support the industries that are bringing in revenue and for what Austin is known for, otherwise everything will suffer. "

"A lack of industry is a major contributing factor to the stagnation in the music industry here. Nashville, LA, and New York all have managers, labels, publicists, and all the resources a band needs to take it to the next level. Austin has the most diverse live music scene, but that only gets you so far. I consider Austin a petrie dish for live music. You can collaborate with anyone and do some really cool, out of the box stuff, but in order to take your career to the next level, you have to be where the industry is; which is not Austin. The rising costs of rent are putting a strain on venues and on housing for artists. As rents increase, it's going to force the creative people out, which is a struggle for a lot of artists. With so many bands in this town and all the talent here, you'd expect a few more to make a national impact, rather than a small handful. I think a big part of that is the lack of local support. While we have SXSW, ACL, C3, KUTX, etc, the majority of the focus there is on national acts rather than growing local support and fostering bands in their hometown. "

"Artist management needs more support from Austin. There are a number of multitalented managers in this town who should all office under one roof and share relationships the way they do in LA and NYC. It's beyond me that Austin doesn't have more opportunities like this. It's the only way for our Austin musicians to break out of the local bubble, by having management that is connected in a wide-scale. "

"Artists need to be paid for performing their music. Always. It has to be "the live music capital" for the musicians as well as the fans. This should not be a government mandated program (as seen in Portland) but should be something created out of recognition of the role of music in our city and the role it has played in creating economic success for others (restaurants, hotels, club owners, etc). "

"As a side musician, I am often frustrated working for talented bandleaders of worthwhile artistic and entertainment merit that have no business training or resources to successfully lead their bands. Sometimes there are fantastic projects could foster all kinds of income, but due to lack of financial support just disappear. I would be great if our city, which prides itself on its music scene, could develop a support system for artists and set them up with tools needed to survive and thrive. Courses and financial resources to create and develop campaigns, tours and concertizing. Also publishing a set a standards for venues, artists, industry workers to use would go a long way. Something like a code of conduct - some kind of ethical standard to elevate the scene from the sloppy, abusive, haphazard free for all that it is. "

"Austin is a great city to be in a musician in IF you are only here to write, record and play out. It is indeed a live music capital of the world. The issue though, is that music is a business and Austin does not have much business. Mood Media, C3, Transmission, FrontGate tickets, and a handful of mom & pop record labels isn't enough to grow a music business city. Maybe that's not what this city is about though. It is hard to create a viable place for musicians to grow long-term without the business being around. That's not to say it's impossible, but having publishing/licensing companies in town that are a part of the scene and have a good reputation, or having pro-level managers increases the value of the city for everyone. I love this city, and I'm very glad I moved here. I fought against the move to Austin when my band wanted to relocate. I was working at a indie label in NYC and didn't want to give up the business aspect of it; however, upon moving here the quality of life and headspace the city affords has allowed me to grow tremendously as a writer. Now, where do I go from there is the next question. If I'm having to seek the next step out of state, coupled with rising rents & increased traffic it's going to push me and others out to the bigger music business hubs. We need to get some good business in here and show these companies that Austin is the against the grain music city. "

"Austin is about local musicians, not bringing in big over rated celebrity acts. Keep it humble and keep it local. We made this city weird, let's keep it that way. "

"Austin is an amazing place! It is one of few cities that is actively trying to make better for musicians and music industry people. The only thing I have noticed since I moved here is that it can be very difficult to get paid for what I do. Lots of venues will try to tell me that they can't pay me but it's good "exposure" for my band. Which I appreciate but eventually I need to get paid or else all this "exposure" won't matter because I can't afford to pay for the gas to my next show. I've also experienced this in other areas. I was signing a deal to write music for some short films in Austin and they said they can't pay me for my work but they will advertise and promote us... Which like I said is good but how am I going to pay for the studio time, travel, food, accommodations, producer, mixing/mastering, etc... for the songs. Other than that I LOVE AUSTIN! "

"Austin is saturated with incredible music. It's everywhere. Austin has made it effortless and very inexpensive to experience live music. This makes it very difficult for local musicians to stay afloat financially. I have a full-time job. Almost every musician I know has a full-time or multiple part-time jobs to make it in Austin. I don't think the wealth of music talent is a bad thing. I think it's wonderful. But we have bred a culture of people that expect great music to be easily accessible and very cheap. When I am planning a gig and considering how much to charge for tickets, I have to keep in mind that people will not come to the show if the door is too expensive. Often times, I charge a modest amount to catch a larger audience. The audience is enthusiastic and appreciative but the tip jar rarely reflects that. After the venue takes a percentage, I pay my band and tip the sound crew. Sometimes I walk away with fifty bucks. Sometimes I pay my band out of my own pocket. I would really appreciate more venues that are committed to helping local musicians sustain

their trade. Strange Brew is a great example of a venue that respects Austin musicians and compensates them fairly for the entertainment they provide. I don't know how to change the culture of listeners in Austin. I wish people felt more inclined to pay for the music they hear. Unfortunately, I feel like that is pretty far out-of-reach right now. ”

”Austin needs to focus on maintaining its vibrant downtown club and restaurant scene and not pander to real estate developers via draconian new noise ordinances. If people want to live downtown in the Live Music Capitol of The World, they should understand this. ”

”Austin seems to have a circle of its "favorites" and those favorites seem to always be getting all the attention, but there are SO MANY amazingly talented musicians who do not get the same recognition and press/promotion. It's not that those folks don't deserve or haven't worked hard for that recognition, but it seems almost impossible for new (or even long-time Austin musicians) to break through. I don't know how that would be addressed, but it is a common source of frustration for many of the musicians with whom I talk, and even non-musicians who are tired of the same names all the time and want to hear from others.... ”

”Austin's new sound ordinance proposals and cops showing up to shows with decibel mtrs in order to "protect" residents of new downtown condo is going to eventually suck the life out of what made this town so great in the first place. If people want peace and quiet - they never should have moved to the city that is regarded as "the live music Capitol of the world" and we need to stop making policy that will endanger that reputation our amazing city has. There is plenty of land outside of our cities cultural districts for everyone to be happy. ”

”Being a classical musician in Austin is like living in a small town. We all know each other and support one another's efforts. I have heard from many of my friends that our community often feels excluded from the table when Austin talks about caring for the music community. We do understand that we are vastly different from the mainstream music culture/industry of the city. We will always have to function as non profit organizations and rely heavily on patronage. We will always cater to a very different crowd than local clubs or festivals. But we are innovative, diverse, and growing. One of the things that could benefit our community would be more readily available grants and resources for new performing ensembles. Maybe there are such things, but perhaps they need more visibility. Patronage can be supplemented by such resources and that would result in individual musicians receiving more performance opportunities, local venues receiving more bookings, and everyone being paid just a tiny bit more than the basic honorariums most classical musicians receive outside of the larger organizations. Our community can become more fully integrated in to the life of the city beyond the few big name ensembles. Encouraging smaller groups will result in wonderful things. There's a wealth of gifted classical musicians in Austin. I don't think there is a limit to what they might accomplish. But you may need to find them and tell them how the city can help. Thanks! ”

”Biggest issues: - Lack of booking agents - Low pay for established, proven musicians due to surplus of part-time musicians willing to accept little to no pay - Competition is so fierce that most musicians and talent managers only support one another if it benefits their social status in the community. The rest of the time, they're pretty harsh. Austin claims to be the City of Live Music and a city that reveres our musicians and yet they receive so little respect. They are paid poorly and receive little to no support from venues, the industry, or the city. But the truth is, none of this would happen without the artists. This is a city for entry level musicians and retired pros. Not the established musicians in the middle. ”

”Connection to the industry on the world stage is missing. Legit managers, attorneys, booking, etc. Austin music tends to stay in Austin. We need to export it. ”

"Consistent and fair wages. AFFORDABLE HOUSING IN THE CITY Diverse and late night Public Transportation MUSICIAN PARKING "

"Cost of living increases while wages have remained stagnant have created a difficult career environment for full time professional performing musicians. Lack of reliable and affordable late night public transportation desperately needs to be addressed in Austin. "

"Everything mentioned was right on the money. I would add that Austin does not have enough of a connection with other cities. We should be able to build a circuit so that musicians aren't forced to try and get all of their income from Austin, a town saturated with music. It would be good if we could encourage the exchange of music and musicians with Houston, Dallas, San Antonio, El Paso, Corpus Christi, NOLA, and the rest of the country and the world. "

"Extremely important are the need for more late-night public transportation, and more affordable housing. Thanks! "

"HAAM offers benefits to musicians only. I'm in the music business. I contribute to their well-being and yet no such benefits are available to me. I do just as much for Austin as musicians do. "

"High rents downtown driving the clubs out. Poor pay, if any, in the clubs. I made more in clubs 35 years ago than I do now. Clubs unwilling to allow bands to build following in residency programs. Parking. Limited physical promotion opportunities- we can't put our posters ANYWHERE anymore. "

"I am a music publicist doing national, professional PR campaigns. I have been searching for office space to accommodate myself and one other desk for freelancers who help me. I desperately need a professional, small office space. "

"I can't emphasize enough the importance of providing affordable housing for people in the music industry. The inability to afford rent or a mortgage in Austin is forcing folks who are vital to the Austin music scene to move further and further away. If the appeal of Austin to those who want to move here is the 'live music capitol' then we need to do something to help keep the industry here. "

"I consider what I do to be my work. It is my passion. But I do it essentially for free and have to supplement my work, my passion, with other jobs just to pay the bills. I came to Austin to do this because I believed it was a town that supported an artist's lifestyle. The artist I work with barely makes enough to pay his band. That of course trickles down to me. If rents continue to go up here, people like me who want to give back to, and support, the arts will have to leave this town. The artists will follow suit. That would be a tragedy. "

"I could see great use for a MUSICIANS RESOURCE CENTER - a shared office space where, for a nominal yearly fee, musicians could access office supplies (copy machines, fax machines, etc) and writing rooms, maybe even rent space to give lessons. "

"I don't think the general public knows how little world-class professional musicians living here earn playing music for a living -- that would be a good result to share with the public and hopefully open some eyes. I also don't understand why so many Austinites are unwilling to pay as much as the price of a movie ticket to see live music here. "

"I feel that we need more economic development and incentives to bring in professional industry to help sustain growth and offer more resources. I have a difficult time understanding why people move to the "Live

Music Capitol", purposely move next to live music venues then complain. The sound ordinances are ridiculous! I would also like to see some continuity with what venues pay musicians. ”

”I would like to see additional local support and assistance for music industry professionals such as self-employed artist managers, agents, venue owners, sound engineers, etc. in the areas of healthcare, counseling, financial services, and career development. HAAM and SIMS do an amazing job of providing affordable healthcare and substance abuse counseling for musicians, but local music industry professionals who are an integral part of Austin's creative community and economy are not eligible for those services. Like musicians, they must work two or more jobs to make a sustainable living, and there is little financial stability as their income is largely dependent upon the opportunities that are available to them. Austin Music Foundation, with support from the City of Austin Music Division, provides free business education for both musicians and music industry professionals through their programs. I believe other local music-based nonprofits and organizations can and should be inclusive as well of professionals who are not musicians but provide support for musicians. Thank you for conducting this study! I look forward to gaining insight on what we as a community can do to strengthen Austin's music industry. ”

”If a musician plays at a venue they should get paid. If they play well, they should get paid well. ”

”If a non musical person knowingly elects to buy, rent or lease a home next to or near enough to a venue with live music, the city should not take the side of the buyer if there are complaints about the noise. If you buy a house next to active train tracks don't complain about the noise the train makes. ”

”Many of the downtown transportation/parking policies have made it difficult to perform in the area. It's as though the city has made it as difficult as possible. The officers working downtown all seem to have different information. One will let you do this, one says you can't. The loading zones are far from the venues. The parking meter times require that we stop in the middle of shows to feed the meter. Remember that many of us have to be jn the area for 6 hours at a time to do our jobs. All the while hassled by disorganized officers. It's just a big mess at times and I am discouraged from playing downtown on weekends for the most part. ”

”Public Transportation please! It's embarrassing to tell out of town guest that we have NO good options. ”

”Stop playing for free. ”

”Subsidized or free parking for musicians/sound engineers working downtown. ”

”The musicians we deal with are extremely underfunded and undereducated on investing in their own careers. Any resources that give them guidance on what is available to them and assistance with funding professional support will be a huge help to them and companies like ours that work to keep our services within reach. ”

”The older venues are vanishing. ”

”The synergy between managers, agents, promoters, publicists and other entertainment industry locals does not exist. A space for all to work and collaborate is needed. ”

”There is a lack of communication between the music community and the city of Austin. It's an us against them mentality I believe on both sides. There is also a lack information readily available to musicians about grants and other services the city/national government provides to musicians to continue their art. Music is a very important part of the city and it is up to the city to make more information available but also for the musicians to educate themselves by getting involved in civic activities in order for all of us to become more informed about what each other's agenda really is. There should be a shared vision to grow responsibly as a

city and as a culture in Austin. The opportunities available for both parties need to be known and discussed so that artistic people can continue to stay and work here. ”

”There needs to be, at least an effort, more parking for loading and unloading gear close to venues. ”

”There should be a Tip the musician space on every bill where live music is played. Just like for a server. It should be available to patrons for that option. More music business related access ie publishing companies and music business advice. It is very difficult to make it as a musician financially in Austin. ”

”TOO MANY BANDS WILLING TO PLAY FOR FREE”

”Venues feel that it is an artist's job to promote the shows while in reality it should be a group effort. ”

”We have a talent pool here in Austin that rivals anywhere else in the country. However, we are not considered a "Hub" city in the industry. We lack an organizational force that could build the music industry in Austin instead of maintaining what many refer to as a "black hole". Austin is laid back, which I like, but sometimes it's horizontal! ”

”We need incentives for the music industry to locate here or do business here.”

”We need more unique performance spaces for interesting, creative musicians. We also need fewer huge festivals.”

”We need to organize services and information. ”

”Would like to see greater integration into television and film. ”

“Ideas and Proposals: Anything Else?”
"Did we miss an idea or initiative proposal that is important to you? Tell us about it here:”

”Creation of incentives for promoters to use more local acts on bills with touring artists" That would help a ton. ”

”All the City and government efforts are good, but what most young artists need is a cheap place to live.”

”Designated loading zones for musicians downtown and/or a parking pass or spots for musicians. ”

”I'd like to see a more diversified bill for the bigger festivals when booking locals. There is a weird sort of clickish vibe here that I haven't felt in other bigger cities involving music. ”

”Promote a program among local merchants to include a "Tip the Talent" line on all credit card receipts, with accompanying marketing campaign to promote. ”

”Reduce noise ordinance restrictions - base them upon science instead of perception. ”

”Traffic and transportation to and from downtown needs to be fixed; the city is too big for its infrastructure which lessens the appeal of the city for tourists and artists. Also parking is a huge obstacle. So many people

don't go downtown because finding parking is such a hassle and there are no alternatives. More free parking. Less worry about towing. More viable mass transit options. As it stands, these issues are preventing people from north and south Austin and the surrounding suburbs from going downtown and partaking in the culture. ”

”Incentives for major/corporate labels and publishers to re-locate or open offices in Austin. ”

”Late-night transportation to and between music venues, entertainment districts, and the airport. ”

”Incentives/resources for small business owners like myself to be able to hire full-time employees. ”

”Tax incentives for apartment owners and business owners to house musicians and lease to music related businesses. ”

” ‘IT'S HIP TO TIP’ a large portion of our income is tips, we need to encourage the public to hire bands for events AND tip the ones they see in venues. ”

”A music business 'shopping mall' with offices, studio and media resources, music supplies, repair shops, small-stage showcase clubs. Couple of local restaurants, coffeeshops... During the large City-wide festivals if could be one of the venues. Target time frame for everyday traffic is 12-7pm, a place musicians and friends can meet to do things they need to get done in one place. I'm sure some of your ideas listed here would culminate in something like this idea. ”

”An incentive that is a TABC tax rebate for venues that have live music at least 3 nights a week. ”

”Fixing the transportation (trains, buses, shuttles) and making more performer-designated parking in the city center would really help keep a lot of the music actually present downtown. Preserving some of our old buildings and venues as music venues instead of knocking them down for high-rises and more high-cost living would encourage musicians not to leave Austin (as many of them are finally doing). Legalizing and creating busking districts would provide another viable income for musicians and encourage tourism. ”

”I don't think that intensifying development or offering businesses incentives is the right answer. We are drawing more people here- musicians and others- than the city can realistically support. ”

”I think there are some great ideas here. Incentives for promoters to use local bands on national tours would be a HUGE help. ”

”I'd like to suggest some type of tour support/subsidy for Austin acts carrying Austin's "brand" on their marketing materials who are gigging outside the city or state. If bands are providing jobs and/or revenue that meets a set threshold, they can apply to a program to be certified as "Made In Austin". A city-approved logo could then be attached to their stage banners or marketing materials and they would function as brand ambassadors when touring. Some type of tax break, underwriting or subsidy would then be available to help financially support or subsidize the act's touring activities. ”

”I'm not a fan of government welfare (i.e. incentives) for anything. I do support establishing "live music districts," as it were, to neuter the whiners who would call in noise complaints after moving downtown. ”

”PLEASE don't call the marketing campaign "Austin Etiquette." Please limit money spent on incentives. That's a slippery slope. ”

"Sound Ordinances need to be appropriate in parts of the city where live music existed long before the condos went up. "

"Tax breaks or other incentives for local venues who establish themselves as live music venues that pay musicians a respectable wage for performing at their club. How are club owners supposed to pay musicians what their worth if they can't afford to pay their rent/taxes? "

"The enforcement of the noise ordinance makes it difficult for music venues to operate. It's also true that some music venues aren't following the rules by having music go on later than the ordinance allows or not obtaining a live music permit in the first place. Perhaps there is a balance to be struck here between potentially extending those hours, streamlining the permit process, and having a more lenient enforcement strategy. There is also an issue of new residents moving to areas of Austin that are known to have live music, then complaining about noise. This is within their right when a venue is violating the ordinance, but it is also true that these folks have made a decision to live in an area known for live music & nightlife. I'm not sure what the solution is here. Perhaps more information given to new/potential residents of housing in these neighborhoods would help. Bar owners/managers should also be flexible in this and both sides might want to figure out some way of having friendly dialogue. The city might be able to foster an improved relationship among all of those involved.
YES to local venues having an incentive to put local acts on bills with touring artists. That would be incredible. It certainly happens already, especially with bands that are savvier about networking and gaining exposure through working with acts while on the road, and then repaying the favor when each visits the others' city...but to have venues assist in facilitating this more would be excellent. "

"Venues: Anything Else?"
"Did we miss an issue relevant to Austin's music venues and establishments that is important to you? Tell us about it here:"

"Yes. Whatever permits, ordinances, rules and regulations are put into place should be applied to ALL venues equally. "

"85 decibel limit measured right next to a speaker at the premises boundary is, silly. The person calling in a noise complaint should have their privacy protected, but a few individuals should not be able to shut down live music, especially when the music venue preexisted their dwelling. Without live music and our adored outdoor venues, downtown would not have the vibrant night life that attracts so many people to our city. "

"Creating neighborhoods that are sustainable and creative requires affordable housing and a mix of uses within entertainment zones and corridors. City needs to find ways to use live music venues during daytime as cafes or commercial kitchens . The neighborhoods will welcome new venues outside downtown if they offer the community a value and consider neighbors needs for mixed uses . Live music venues as galleries and lunch spots. During the day. "

"I don't know how to fix it. But the lack of interest in live music on 6th street is disturbing. 6th has become just another strip in a college town. Just dj's and dance clubs. Sometimes..... a cover band. If a venue does put on a local artist, they're empty. "

"I think that we really should look at what the costs of operating a venue in Austin really are. With skyrocketing rent and utility prices there is no margin for making a living doing it. I have moved outside of Austin and sold my home in Austin just to help afford to keep my venue open. Something has got to give or more and more venues will be either closing down or leaving Austin altogether. With no profit margin to

speak of it makes it difficult just to stay open, much less pay the musicians what they are worth, because that is a whole other issue that needs to be addressed as well. ”

”Less restrictive sound ordinance. We are supposed to be the live music capital of the world right? Let us flourish! ”

”New residential homes/condos/apt should not have authority over pre existing venues. Developers and potential buyers need a discloser about sound prior to moving in. ”

”Newly issued sound ordinances makes it difficult for musicians to find gigs and decrease viable income. They also hurt the income of local venues around the area. Since the new sound ordinances were enacted and enforced, the income of outdoor music venues in the downtown area has severely decreased. Incoming residents are moving to the downtown area for the atmosphere of living downtown, but the strict sound ordinances are ruining the Austin atmosphere of the Live Music Capital. How can we support live music while enforcing such stringent restrictions on sound levels and timing? Our Rooftop Deck brings in the most income for our venue, and at 12am, when all outdoor music has to be turned off, we lose the majority of our crowd. ”

”Parking is the most important issue for venues and bands right now, Austin's short-sighted demand for growth has forced out parking for everyone. Parking needs to be a priority. ”

”The sound ordinance will be the death of live music in austin..... wait and see. ”

”Want to emphasize the impact of neighborhood associations targeting live music venues and setting unreasonably strict regulations that significantly impact the ability of the venues to make money. All for being a good neighbor- but let’s find common ground and allow established venues to operate as intended. ”

Appendix XV
City of Austin Cultural Contract 2015 Allocations

Note: *While City allocation processes typically create only one category for "Music", we have created a more detailed examination here of what is included in that category, and how a more refined view can create insight on issues discussed in the Austin Music Census regarding economic development initiatives to grow the commercial music industry. We have segmented the traditional "Music" category into three classifications of funding: 1) Commercial Music Development & Performance, 2) Children's Music & Education, and 3) Fine Arts Music. Fine Arts Music includes things like the Opera, Symphony, Chamber Ensembles, Chorus, etc. A full breakdown of how we created allocations is available in the following pages of this Appendix. Lastly, in some cases, such as the Long Center, Paramount Theater, One World Theater and others, Cultural Contract Funding supports both Commercial Music Development/Performance AND Fine Arts Music programming. In such cases, we have looked at available information on these venues' programming as well as their requests for specific sponsored projects, and divided the funds recieved into correlating line items below. Again, these allocations are fully disclosed in the following pages of this Appendix. It is possible that there may be minor adjustments to these "split" allocations that could be made if more information was publicly available, but on the whole, we do believe these numbers to be essentially correct and representative of the distribution of funds.*

PROGRAM SUMMARIES

Program Type	Total Amount	Number of Organizations	Percentage of Funds Allocated
Commercial Music Development∞	$526,672.80	13	6.9%
Children's Music & Educational Programs	$347,427.00	12	4.6%
Fine Arts Music	$1,006,685.20	21	13.2%
Performance Art, Theatre, and Dance	$2,458,156.00	42	32.3%
Film	$583,248.00	7	7.7%
Visual Arts	$888,709.00	18	11.7%
Cultural Promotion / Education	$538,444.00	10	7.1%
Other	$1,254,385.00	21	16.5%
TOTAL	$7,603,727.00	144	100.0%

∞ In our research of the Commercial Music Development category, we were able to *definitively* link approximately $125,000 that is clearly for local artist performance support or developmnet. The remaining $400,000 appears to be tied to activities and fees related to touring acts, based on available information.

PROGRAM DETAIL

Program Name	Funds Awarded
Commercial Music Development	**$526,672.8**
Austin Federation of Musicians Union	$23,950.0
Austin Music Foundation	$42,991.0
Golden Hornet Project Inc.	$6,696.0
Line Upon Line Percussion	$1,225.0
Women in Jazz Association	$23,950.0
Austin Theatre Alliance (*40% of total award*)	$76,160.0
Greater Austin Performing Rights Center Inc. *AKA* The Long Center (*25% of total award*)	$48,800.0
Austin Creative Alliance (*total award of $456,515 split between "Other" and "Commercial Music Development"*)	$60,000.0
Capitol View Arts	$9,200.0
Texas Accountants and Lawyers for the Arts (*total award of $4,200)*	$2,000.0
Capital of Texas Public Telecommunications Council AKA KLRU-TX	$24,400.0
Texas Education Broadcasting Co-operative Inc AKA KOOP Radio	$24,100.0
One World (*60% of total award of $258,668)*	$155,200.8
Texas Folklife Resources (*total award of $115,450)*	$28,000.0
Children's Music & Educational Programs	**$347,427.0**
Anthropos Arts	$45,384.0
Austin Latino Music Association	$6,100.0
Girls Rock Austin	$18,006.0
Groundwork Music Project	$22,900.0
Hispanic Alliance for the Performing Arts	$4,000.0
School of Indian Percussion and Music	$10,100.0
Texas Early Music Project	$41,132.0
Austin Children's Choir	$20,065.0
Austin Jazz Workshop	$43,765.0
Austin Chamber Music Center	$91,200.0
Austin Community Steelband	$22,900.0
Musical Connections	$21,875.0

Fine Arts Music	**$1,006,685.2**
Austin Chamber Ensemble	$10,347.0
Austin Civic Orchestra Society	$26,551.0
Austin Civic Wind Ensemble (ACWE)	$4,572.0
Austin Classical Guitar	$146,515.0
Austin Lyric Opera	$190,400.0
Austin New Music Co-op	$8,000.0
Austin Symphonic Band	$16,596.0
Austin Symphony Orchestra	$190,400.0
Austin Wind Symphony DBA Cinematic Symphony	$1,750.0
Capital City Men's Chorus	$17,600.0
Chorus Austin *AKA* Austin Civic Chorus Inc.	$51,463.0
Classical Guitar Alive	$27,861.0
Ensemble VIII	$16,335.0
Indian Classical Music Circle of Austin	$16,550.0
River City Pops	$15,549.0
Salon Concerts Inc.	$23,950.0
Tapestry Singers *AKA* Austin Women's Chorus	$5,700.0
Texas Choral Consort	$43,650.0
Austin Celtic Association	$64,429.0
Capitol Broadcasting Association Inc. *AKA* Classically Austin 89.5	$25,000.0
One World (*40% of total award of $258,668*)	$103,467.2
Performance Art, Theatre Programs, and Organizations	**$2,458,156.0**
Academia (AZTLAN) de Danza y Folklore	$11,018.0
Academy of Tango-Texas Corresondiente de la Academia AKA Academy of Tango-Texas	$5,546.0
Allison Orr Dance Inc	$45,810.0
Ariel Dance Theatre	$14,634.0
Austin Playhouse	$120,796.0
Austin Scottish Rite Community & Children's Theatre Inc.	$84,600.0
Austin Shakespeare Festival Co. Inc. *AKA* Austin Shakespeare	$86,800.0
Austin Summer Musical for Children	$11,700.0
Austin Theatre Alliance (*60% of total award of $190,400*)	$114,240.0
Ballet Austin	$195,200.0
Ballet East Dance Co.	$73,136.0

Blue Lapis Light	$71,200.0
Center Stage Texas	$45,679.0
Conspire Theatre	$2,913.0
Different Stages	$23,555.0
Gilbert & Sullivan Society of Austin Texas Inc.	$21,500.0
Greater Austin Performing Rights Center Inc. *AKA* The Long Center (*75% of total award of $195,200*)	$146,400.0
Hyde Park Theatre Frontera	$100,500.0
La Fenice	$6,397.0
Out of Bounds Comedy	$20,072.0
Penfold Theatre Company	$17,900.0
Physical Plant Theater	$1,000.0
Pollyanna Theatre Company	$46,153.0
Rude Mechanicals	$97,800.0
Salvage Vanguard Theater	$95,622.0
Teatro Vivo	$24,567.0
The Hidden Room Theatre	$2,000.0
Theatre Action Project *AKA* Creative Action	$190,400.0
Vortex Repertory Co.	$147,470.0
Zachary Scott Theatre Center	$200,000.0
Zilker Theatre Productions	$89,000.0
Folklore y Ritmos de Panama	$6,915.0
Esquina Tango Cultural Society of Austin	$4,250.0
Dance International	$21,875.0
Conservatory Dance Theatre *AKA* The Austin City Ballet	$24,300.0
Chaddick Dance Company *AKA* Chaddick Dance Theater	$7,600.0
Kathy Dunn Hamrick Dance Company Inc.	$23,849.0
Lannaya *AKA* Lannaya West African Drum and Dance Ensemble	$10,882.0
LEAP of JOY	$1,000.0
Puerto Rican Folkloric Dance Inc	$36,377.0
Roy Lozano's Ballet Folklorico de Tejas	$44,000.0
Visions in Rhythm *AKA* Tapestry Dance Co.	$163,500.0
Film	**$583,248.0**
Austin Film Festival Inc.	$190,000.0
Austin Film Society	$235,712.0

Austin Scriptworks	$25,250.0
Cine las Americas	$34,504.0
Motion Media Arts Center aka The Austin School of Film	$64,600.0
Moving Image Arts & Education	$19,050.0
Texas Nafas	$14,132.0
Visual Arts	**$888,709.0**
Austin Area Art from the Streets	$40,898.0
Austin Fine Arts Alliance, Inc. *AKA* Art Alliance Austin	$93,400.0
Austin Museum of Digital Art	$7,400.0
Austin Visual Arts Association	$66,350.0
Big Medium	$112,546.0
Cherrywood Urban Landscape and Arts League *AKA* CHULA League	$20,650.0
Co-Lab Projects	$10,014.0
Fluent~Collaborative	$5,000.0
The Contemporary Austin Museum Inc.	$192,800.0
Generous Art, LLC	$2,600.0
Imagine Art	$69,900.0
La Pena	$35,246.0
Latinas Unidas Por El Arte (LUPE Arte)	$21,976.0
Serie Project Inc.	$22,360.0
Shady Tree Studios	$55,382.0
Travis Heights Art Trail	$3,400.0
Umlauf Sculpture Garden & Museum	$9,250.0
VSA arts of Texas	$119,537.0
Cultural Arts / Cultural Education	**$538,444.0**
Asian American Resource Center *AKA* AARC	$4,400.0
Austin Latino/a Lesbian & Gay Organization *AKA* allgo	$54,598.0
Austin Polish Society	$9,100.0
Celtic Cultural Center	$23,300.0
Great Promise for American Indians	$89,831.0
India Fine Arts Inc.	$46,834.0
Mexic-Arte Museum	$186,372.0
Red Salmon Arts	$25,559.0
Russian Speakers Society of Austin	$11,000.0

Texas Folklife Resources (*total award of $115,450*)	$87,450.0
Other	**$1,254,385.0**
Amala Foundation	$3,400.0
Arc of the Capital Area	$24,400.0
Austin Children's Museum DBA Thinkery	$185,600.0
Austin Creative Alliance (*total award of $456,515*)	$396,515.0
Austin Poets International Inc.	$14,971.0
Austin Tango Society	$4,400.0
Borderlands Texas Poetry *AKA* Borderlands Texas Poetry Review	$5,700.0
Capitol View Arts (*total award of $12,245*)	$3,045.0
Easter Seals-Central Texas Inc.	$4,000.0
Fuse Box Austin *AKA* Fusebox Festival (*total award of $117,450*)	$97,450.0
Knowbility Inc.	$24,700.0
Latinitas Inc.	$53,000.0
MASS Gallery, Inc.	$10,000.0
Mobile Art Program	$9,400.0
Public Access Community Television Inc. *AKA* Channel Austin	$20,800.0
South Austin Museum of Popular Culture	$20,000.0
Texas Accountants and Lawyers for the Arts (*total award of $4,200*)	$2,200.0
Texas Democracy Foundation *AKA* The Texas Observer	$18,800.0
The Chautauqua Foundation Inc.	$14,450.0
Women & Their Work (Center For)	$274,754.0
Writer's League of Texas	$66,800.0
TOTAL	**$7,603,727.0**

Appendix XVI
City of Austin Hotel/Motel Occupancy Tax and Mixed Beverage Tax Revenues

HOTEL/MOTEL OCCUPANCY TAX FUND FY2015 ALLOCATIONS

City of Austin 2014-2015 Approved Budget: *Total Transfers Out of the Fund* - $68,666,068 [1] The City of Austin collects 9 cents per dollar of hotel/motel room occupancy fees. The following chart created from information in the City of Austin Fiscal Year 2014-2015 Approved Budget illustrates the funds to which those fees are distributed.

FY2015 HOT Fund Distributions	Amount of Fund	Percent of Total HOT Collections	Penny Rate
Convention Center Tax Fund [2]	$34,333,034	50%	4.5 cents
Convention Center Venue Fund [3]	$15,259,126	22.2%	2 cents
Tourism & Promotion Fund [4]	$11,062,867	16.1%	1.45 cents
Cultural Arts Contracts Fund [5]	$8,011,041	11.7%	1.05 cents
TOTAL	**$68,666,068**	**100.0%**	**9.00 cents**

The City of Austin FY 2014/15 Approved Budget provides a brief description of the purpose for each of these funds, excerpted here:

> *The distribution is as follows: 4.50 cents to the Convention Center Tax Fund to pay debt service requirements related to the Austin Convention Center, 2.00 cents to the Venue Project Fund to pay debt service for bonds issued for the expansion of the Austin Convention Center and the Waller Creek Tunnel*

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1. *City of Austin Approved Budget, 2014-15; "Hotel/Motel Occupancy Tax Fund," Vol. 1, p.618.*
2. *Id., "Convention Center Tax Fund," Vol. 1, p.604.*
3. *Id., "Convention Center Venue Project Fund," Vol. 1, 606.*
4. *Id., "Tourism and Promotion Fund," Vol. 1, 647.*
5. *Id., "Cultural Arts Fund," Vol. 1, 607*

Project, 1.45 cents to the Tourism and Promotion Fund for contract payments to the Austin Convention and Visitors Bureau (ACVB) to promote conventions and tourism for Austin, and 1.05 cents to the Cultural Arts Fund to grant contracts to artists and cultural agencies as a way to encourage, promote, and improve the arts in Austin. Cultural Arts contracts are allocated through a predetermined process involving review and recommendation by the Arts Commission and approval by the City Council. As hotel/motel occupancy collections increase, so do the disbursements to these funds. Disbursements in FY 2014T15 are expected to be $68.7 million, which is 14.6% higher than the FY 2013T14 budget and 4.0% higher than the FY 2013T14 estimate.[6]

The Austin Convention and Visitor's Bureau (ACVB) has two employees that specifically promote music and film. Those two positions are not funded from the Tourism and Promotion Fund, but from a transfer to ACVB from the Convention Center Fund.[7]

MIXED BEVERAGE TAX THREE-YEAR REVENUE EARNINGS AND PROJECTIONS[8]

FY 2014 Revenues: $8,959,417
FY 2015 Estimated Revenues: $9,087,000
FY 2016 Forecasted Revenues: $9,734,000

6. *City of Austin Approved Budget, 2014-15*; "Hotel/Motel Occupancy Tax Fund, Factors Affecting Requirements," Vol. 2, p.248.
7. *City of Austin Approved Budget, 2014-15*; "Tourism and Promotion Fund, Factors Affecting Requirements," Vol. 2, p.261.
8. *City of Austin Budget Office*, as presented to Austin City Council.

Appendix XVII
Commercial Music Hubs in Other Cities

NASHVILLE InDo Nashville
InDo Nashville is a creative hub for the entertainment industry. It will provide co-working spaces, songwriting rooms, cafe area, open workspace, dedicated office suites and conference rooms. Various levels of membership will be available, while the top floor will feature private suites. (Opens this spring).

DETROIT Musicians Community Center
The Musicians Community Center provides promotional assistance, seminars and clinics, audio recording, video production, and rehearsal space for musicians in Detroit.

CHICAGO Fort Knox Studios/ 2112
Fort Knox Studios is a venue where bands can practice and managers, entertainment lawyers and others can work, all in the same environment. It includes 92 rehearsal suites and office spaces for booking agents and others. In June, the location will launch an incubator, providing office space, access to mentors and programs such as an artist residency program, to nurture music, film, and creative technology startups.

NEW ORLEANS Habitat for Humanity - Musicians Village
This residential development was intended for musicians who were relocating back to New Orleans after Hurricane Katrina, but anyone can live there. The development is situated around a performance hall that has practice rooms and classrooms, meeting rooms, offices, classrooms and a community Internet room.

MEMPHIS Memphis Music Resource Center
The Memphis Music Resource Center is the core program of the Memphis Music Foundation. It serves as a business solutions workspace and information center for musicians in the Memphis area.

Appendix XVIII
The Titan Music Group Team

PROJECT ARCHITECT, LEAD AUTHOR – NIKKI ROWLING is the founder and CEO of Titan Music Group, LLC. Titan provides music industry-related economic development and public policy consulting to a variety of government, trade associations, and private sector companies. Under Nikki's direction, Titan Music Group has provided commercial music industry solutions for its clients since 2007. These solutions include large-scale music industry economic development studies, analytics-based and data-driven strategic models and implementation plans, quantitative and qualitative market research projects as well as best practices recommendations. Nikki was a principle architect of the Austin-Toronto Commercial Music Trade Alliance, launched in 2014 as a public-private partnership between the two cities. Currently she serves on the Steering Committee for the first-ever Music Cities Convention, a global gathering of thought leaders working to create better regionally focused music industry development strategy.

Before founding Titan, Nikki had over 15 years experience in various roles in the music industry. She co-founded Austin Music Foundation (AMF), where she served as Executive Director from 2003-2006, and has served at the board level in other community organizations, including the Central Texas Angel Network, Advisory Council of Texas Venture Labs, and Executive Committee member of Austin Music People.

Her previous work experience also includes several years in early-stage software companies that provided business-to-business neural network data optimization and data mining solutions. In 2011 Nikki was the recipient of the State Bar of Texas' Cindi Lazarri Artist Advocate Award, and a 2010 Honoree of ACTIVATE's "Rising Star of Texas Elite 100" for her work in growing entrepreneurship in Central Texas. Nikki holds a B.A. from The University of Texas at Austin's Plan II Honors Program.

CONTRIBUTING AUTHOR – ALISSA MCCAIN currently serves as the Executive Director of Texas Accountants and Lawyers for the Arts. She has been an active member of the Austin arts nonprofit community since 2002. Her previous positions include Director of Operations at Austin Creative Alliance and Director of Programs and Operations at Austin Music Foundation.

Alissa has extensive experience building professional education programming to assist the creative sector achieve economic growth and hone entrepreneurial skills. In the past 10 years, she has produced over 175 professional development events related to the creative industries that have served over 9,500 participants.

Other professional experience includes project, budget, and grant management at the Texas Department of Public Safety and large-scale event planning at South by Southwest Conferences and Festivals. Alissa holds a B.A. in Political Science from the University of Texas at Arlington and a J.D. from Texas Tech University. She is a member of the Texas Bar. She also serves as a board member of Capitol View Arts.

STATISTICAL METHODOLOGY & ANALYTICS – DR. GREG HIXON serves on the faculty at the University of Texas at Austin, where he teaches four Ph.D.-level classes per year in applied statistics and computational analytics at one of the world's leading research universities.

Dr. Greg Hixon specializes in the use of use of modern, computationally intensive non-linear/non-parametric statistical techniques and custom-designed simulation models. He has extensive professional and teaching experience in experimental design and advanced applied statistics, including non-linear regression, robust analysis, mixed-model regression, PCA/factor analysis, non-parametric regression, resampling and permutation techniques, time series analysis, and structural equations modeling.

Dr. Hixon has more than 25 years of experience in the application of advanced statistical techniques and mathematical models. In addition to his university duties, he serves as a expert consultant to a variety of governmental and private sector entities.

STATISTICAL METHODOLOGY & GEOGRAPHICAL INFORMATION SYSTEMS – MATT HARRIS is currently the Director of Analytic Consulting at FICO. Matt has over 20 years experience creating analytical data models and data-driven solutions to address a wide variety of business problems, with greatest concentration in CRM, risk, e-commerce and payments. Matt was also the Principal at Geotrends for over 10 years, a consulting company that applies a mix of Geographical Information Systems analytics utilizing spatial relations, population density, and other location-based data inputs along with traditional statistical methods to develop simulation models for accurately predicting real estate and land values, assist in site selection and appraisals and other location-based business decisions.

CONTRIBUTOR AND RESEARCH ASSOCIATE – BROOKS RICE is a life-long Austinite, a lover of Austin's music scene and was a performing musician for more than ten years. Brooks received his undergraduate education from the University of Texas at Austin and now practices law locally, focusing exclusively on entertainment law and small business transactions. Brooks continues to be actively involved in music-related issues and currently serves as a volunteer board member for Texas Accountants and Lawyers for the Arts, and on the council of the Texas Entertainment and Sports Law Association of the Texas State Bar.

MARKETING AND COMMUNITY OUTREACH – LISA HICKEY is a Partner at GFG Partners, a boutique marketing consultancy, with more than 15 years of experience marketing large scale festivals and events. Hickey previously held the position of Marketing Director with C3 Presents, the third largest concert promoter in the United States, and the producer of Lollapalooza and Austin City Limits Music Festival.

"Building Music Communities: Public Policy, Non-Profits and Music Businesses in Partnership"

Music is big business in today's information technology economy. In the city of Austin, Texas, music related economic activity contributes more than $2 billion dollars a year to the economy, while also giving Austin a "Cool Vibe" that has made it one of the fastest growing cities in the country in terms of population growth and economic growth. At the same time, that same growth is crowding out musicians and music venues with higher rents and cost of living. How does a city and its community hold on to what makes it special – music – while also providing opportunity to all its citizens?

At the same time, other cities have been shaken by changes in the economy that threaten to leave its citizens behind. After the oil economy downturn a decade ago, the people of Lafayette, Louisiana, another much smaller city rich in culture including a vibrant musical community, worked together to promote 21st century economic development through its "CREATE" initiative. Lessons learned in Lafayette are equally relevant in building, maintaining and sustaining a musical community that contributes significantly, not just culturally, but financially to a city's prosperity.

Our Panel of experts, including some of the primary architects of these two cities' efforts to build their economies through music and culture, will share their insight on what attorneys, non-profits, music business people, and our governments can do to promote Public/Private partnerships to build maintain and sustain the important business of music and culture in our communities. Our distinguished panel includes:

Hon. Joel Robideaux: Mayor of Lafayette, Louisiana

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Stephen J. Easley: Attorney/Counsel, The Buddy Holly Educational Foundation/ Former Counsel, Mosaic Sound Collective Foundation in Austin, Texas

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   - **a.** Stephen Easley to introduce panel
   - **b.** Brief overview of the topic

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   - **a.** Live Music Capital of the World – Economic Impact
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   - **c.** Austin's Response – Cities building Music Communities
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     - iv. TOG Music Publishing, LLC
   - **e.** Non-Profits building Music Communities
     - i. Black Fret
     - ii. HAMM and SIMMS
     - iii. Mosaic Sound Collective
     - iv. Austin Music Foundation
     - v. The Buddy Holly Educational Foundation

3. **Building Music Communities at a State Level – Government Partner (Brendon Anthony)**
   - **a.** Economic Impact of Music in the State of Texas
     - i. Discuss Economic Impact Report
       1. Combined, music business and music education directly account for just under 97,000 permanent jobs, $4.1 billion in annual earnings, and just over $9.6 billion in annual economic activity, up from almost 95,000 jobs and about $8.5 billion in annual activity during 2017.
       2. The ripple effects associated with the direct injection related to music business and music education bring the total impact (including the direct effects) to over 209,000 permanent jobs, $6.5 billion in earnings, and $23.4 billion in annual economic activity. The State of Texas also realizes approximately $390 million in tax revenue from these impacts.
     - ii. Growth between 2015 and 2019
   - **b.** Texas Music Office in the Office of the Governor
     - i. Music Friendly Communities
       1. Host a Texas Music Office sponsored Music Friendly Community workshop.
       2. Establish a Music Office/Liaison within a division of city government (city office, economic development corporation, CVB).

3. Register with the Texas Music Office's Texas Music Industry Directory. The liaison's organization also signs a mutually agreed upon Memorandum of Understanding (MOU) that creates a working arrangement for the sharing of Music Directory data, and establishes protocols for keeping the directory information up to date.
4. Demonstration of partnerships with the community's music-related 501c3 nonprofits in order to foster community development.
5. Collaboration with music education programs, including area college or university music schools.

ii. New Business Development
1. Create
2. Expand
3. Relocate
4. State Incentives & Programs
    a. Texas Enterprise Fund
    b. Historically Underutilized Business Cerification Program ("HUB")
    c. State Tax Exemption for Production of Masters
    d. Events Trust Fund
5. Resources
    a. **Governor's Small Business Forums**: Each year, the Texas Governor's Office, in partnership with the Texas Workforce Commission and local partners, host around twenty small business forums throughout the state. Each forum is custom tailored to provide education and training that is relevant to the small business needs of each community. This includes networking and procurement opportunities. For more information, as well as a calendar of events, please visit the Governor's Small Business Forums Calendar.
    b. **SCORE**: SCORE stands for Service Corps. of Retired Executives and is a nonprofit association dedicated to helping small businesses get off the ground, grow, and achieve their goals through education and mentorship. SCORE has a variety of resources available to small businesses.
    c. **Small Business Administration**: The US Small Business Administration(SBA) can provide a plethora of information on available

loans and grants, small business workshops, advocacy efforts and much more. Visit the Federal SBA's Website to learn more about what the can do for your small business.

d. **Small Business Development Centers "SBDCs"**: SBDCs provide assistance to small businesses and aspiring entrepreneurs throughout the United States. SBDCs help entrepreneurs realize the dream of business ownership and help existing businesses remain competitive in a complex, ever-changing global marketplace. SBDCs are hosted by leading universities and state economic development agencies, and funded in part through a partnership with SBA. SBDC advisors provide aspiring and current small business owners a variety of free business consulting and low-cost training services including: business plan development, manufacturing assistance, financial packaging and lending assistance, exporting and importing support, disaster recovery assistance, procurement and contracting aid, market research help, program support, and healthcare guidance. For more information on SBDCs as well as to find out where the closest SBDC is to you, please visit the websites for SBDC and Texas Local Resources.

e. **Skills for Small Business Program**: Skills for Small Business Programfinances tuition and fees for community and technical college courses for current and newly hired employees of small businesses (fewer than 100 employees) in Texas, successfully merging small business needs and local training opportunities into a winning formula for putting people to work in Texas.

iii. Music Industry Resources

1. Texas Music Industry Directory
    a. Businesses
    b. Musicians
    c. Radio
2. Business Guides
    a. Getting Started in Music Business Guide
    b. Notes for Songwriters
    c. Notes for Young Aritists

d. Booking Concerts an Tours
e. Starting a Record Label
f. Creating a Press Kit
g. Publicing a Music Event
h. Guide to Music Related Insurance
i. TABC Regulations and Laws for Venues
j. TABC Regulations and Laws for Special Events
k. City/State/Federal Regulations for Venues
l. What Every Restaurant/Venue Owner should know before Playing Music in their Establishment

iv. Music Education and Community Grant Program
1. The Texas Music Office's Music Education & Community Grant Program (aka the License Plate Grant) seeks to provide opportunities for the next generation of Texas musicians and to provide support for music programming in under-served and under-resourced communities.
2. $22 from the $30 fee from the purchase of every Texas music specialty license plate goes directly toward providing music instruments and lessons to Texas school children in need around the state.
3. In addition, this fund is able to partner with non-profit organizations to create experiences featuring Texas music in under-served communities statewide.

4. **Building Music Communities in a Small City – Government Partner (Hon. Joel Robideaux)**

a. The Cultural Heritage of Lafayette and Southwest Louisiana
i. Artist Examples
ii. Business Examples – Dockside Studio by the River
iii. Festivals
1. Festival International de Louisiane
2. Festival Acadiens et Creole
3. SOLO Songwriters Workshop & Festival

b. Importance of Culture as an Economic Driver in Lafayette

c. CREAT Initiative
i. CREATE VISION 2025: In 2025, Lafayette has attracted and provided substantial investment by encouraging sustainable growth for existing efforts and nurturing new creative and cultural industries. This growth has improved access, awareness and participation to culture and recreation for residents and visitors, while developing related industries and supporting wider PlanLafayette initiatives
ii. CREATE STRATEGIC MISSION: The CREATE Strategic Plan for Arts, Culture and Recreation will support this vision

by catalyzing creative assets to improve quality of life, drive our creative economy, and stimulate investment in our community

iii. CREATE IS A BLUEPRINT FOR:
    1. Strengthening Lafayette's cultural identity;
    2. Catalyzing new and existing creative assets;
    3. Driving strategic investment in new cultural infrastructure and revitalization efforts through matches and measurable outcomes; and
    4. Attracting more regional, national, and international workers, visitors, and businesses to Lafayette
    5. With a transparent, actionable strategic plan based on community input, CREATE will strengthen Lafayette's creative and cultural industries, continuously tracking performance indicators to inform ongoing investment and ensure the sustainability of the sector
    6.

IV. GOALS:
    1. Provide high-quality cultural and recreational experiences for residents and visitors.
    2. Develop state-of-the-art creative infrastructure to support the public realm and drive culture and parks participation
    3. Educate and inspire the next generation of creative thinkers to build our workforce and retain talent
    4. Promote and strengthen Lafayette’s creative assets at home and for visitors
    5. Ensure robust support systems are in place to drive sector growth, capture return on investment and ensure sustainability

V. KEY STRATEGIES TO MEET GOALS: Provide high-quality cultural and recreational experiences for residents and visitors
    1. Provide resources and venues to secure local, national and international talent to perform in Lafayette
    2. Enhance access in creative production and participation by underrepresented populations.
    3. Establish an annual public input event to discuss success of efforts or provide opportunity to refocus.
    4. Develop state-of-the-art creative infrastructure to support the public realm and drive culture and parks participation.
    5. Establish an accessible multi-use creative industry performance and rehearsal complex between 300 – 1,500 seats.

6. Identify infrastructure assets with potential to revitalize / re-use for arts & cultural needs (artist studios, live/work spaces, galleries, performance venues, markets).
7. Establish and nurture cultural and historic districts.
8. Better connect public parks and community assets.
9. Pursue public-private partnerships to fund infrastructure / multiply public investment.
10. Encourage creative clustering with intentional placement.
11. Educate and inspire the next generation of creative thinkers to build our workforce and retain talent.
12. Develop an educational program for annual mini business plans and reports for select disciplines.
13. Nurture arts and health education for K-12 students.
14. Ensure local higher educational institutions have the curriculum, certification and teaching resources to cover innovation, entrepreneurship, leadership and management in relative industries.
15. Build the best educational programs in the world to learn about our culture and language.
16. Develop a cultural leadership or fellows program.
17. Promote and strengthen Lafayette's creative assets at home and for visitors.
18. Work with Louisiana Office of Cultural Development.
19. Develop and further engage digital media to showcase assets.
20. Incorporate cross-departmental, parish-wide brand and marketing campaign.
21. Increase public awareness of assets by developing and maintaining a thorough and updated asset inventory.
22. Pursue strategic international partnerships and collaborations.
23. Ensure robust support systems are in place to drive sector growth, capture return on investment and ensure sustainability.
24. Establish creative economy division or commission.
25. Assist in developing creative new ventures or projects.
26. Maintain a program to assist existing organizations in increasing sustainability.
27. Utilize industry knowledge and assets to interface across industries.
28. Streamline policies and regulatory support to creative and community assets.

29. Improve sustainability of parks and recreation.
30. Work with UL and LEDA to develop related industry measurement and data collection tools.
31. Continuously collect and review financial data of related industry organizations.
32. Better incorporate French and other languages into daily life.

5. Building Music Communities in a Small City – Business Partner (Mark Falgout)

a. Blue Moon Saloon & Guest House
b. Working with the City/State to Build the Blue Moon
c. Expansion to Warehouse 535
d. Partnering with the City/State on Expansion to Warehouse 545
e. Partnering with the City/State on Festival International
f. Partnering with the City/State on Festival Acadiens & Creole
g. Partnering with the City at SXSW
h. Partnering with City and The Buddy Holly Educational Foundation to Create SOLO Songwriters Workshop and Festival

6. **Conclusion – Stephen Easley & Panel**

7. **Questions - Audience**

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       1. Host a Texas Music Office sponsored Music Friendly Community workshop.
       2. Establish a Music Office/Liaison within a division of city government (city office, economic development corporation, CVB).

3. Register with the Texas Music Office's Texas Music Industry Directory. The liaison's organization also signs a mutually agreed upon Memorandum of Understanding (MOU) that creates a working arrangement for the sharing of Music Directory data, and establishes protocols for keeping the directory information up to date.
4. Demonstration of partnerships with the community's music-related 501c3 nonprofits in order to foster community development.
5. Collaboration with music education programs, including area college or university music schools.

ii. New Business Development
1. Create
2. Expand
3. Relocate
4. State Incentives & Programs
    a. Texas Enterprise Fund
    b. Historically Underutilized Business Cerification Program ("HUB")
    c. State Tax Exemption for Production of Masters
    d. Events Trust Fund
5. Resources
    a. **Governor's Small Business Forums**: Each year, the Texas Governor's Office, in partnership with the Texas Workforce Commission and local partners, host around twenty small business forums throughout the state. Each forum is custom tailored to provide education and training that is relevant to the small business needs of each community. This includes networking and procurement opportunities. For more information, as well as a calendar of events, please visit the Governor's Small Business Forums Calendar.
    b. **SCORE**: SCORE stands for Service Corps. of Retired Executives and is a nonprofit association dedicated to helping small businesses get off the ground, grow, and achieve their goals through education and mentorship. SCORE has a variety of resources available to small businesses.
    c. **Small Business Administration**: The US Small Business Administration(SBA) can provide a plethora of information on available

loans and grants, small business workshops, advocacy efforts and much more. Visit the Federal SBA's Website to learn more about what the can do for your small business.

d. **Small Business Development Centers "SBDCs"**: SBDCs provide assistance to small businesses and aspiring entrepreneurs throughout the United States. SBDCs help entrepreneurs realize the dream of business ownership and help existing businesses remain competitive in a complex, ever-changing global marketplace. SBDCs are hosted by leading universities and state economic development agencies, and funded in part through a partnership with SBA. SBDC advisors provide aspiring and current small business owners a variety of free business consulting and low-cost training services including: business plan development, manufacturing assistance, financial packaging and lending assistance, exporting and importing support, disaster recovery assistance, procurement and contracting aid, market research help, program support, and healthcare guidance. For more information on SBDCs as well as to find out where the closest SBDC is to you, please visit the websites for SBDC and Texas Local Resources.

e. **Skills for Small Business Program**: Skills for Small Business Programfinances tuition and fees for community and technical college courses for current and newly hired employees of small businesses (fewer than 100 employees) in Texas, successfully merging small business needs and local training opportunities into a winning formula for putting people to work in Texas.

iii. Music Industry Resources

1. Texas Music Industry Directory
    a. Businesses
    b. Musicians
    c. Radio
2. Business Guides
    a. Getting Started in Music Business Guide
    b. Notes for Songwriters
    c. Notes for Young Aritists

d. Booking Concerts an Tours
e. Starting a Record Label
f. Creating a Press Kit
g. Publicing a Music Event
h. Guide to Music Related Insurance
i. TABC Regulations and Laws for Venues
j. TABC Regulations and Laws for Special Events
k. City/State/Federal Regulations for Venues
l. What Every Restaurant/Venue Owner should know before Playing Music in their Establishment

iv. Music Education and Community Grant Program
1. The Texas Music Office's Music Education & Community Grant Program (aka the License Plate Grant) seeks to provide opportunities for the next generation of Texas musicians and to provide support for music programming in under-served and under-resourced communities.
2. $22 from the $30 fee from the purchase of every Texas music specialty license plate goes directly toward providing music instruments and lessons to Texas school children in need around the state.
3. In addition, this fund is able to partner with non-profit organizations to create experiences featuring Texas music in under-served communities statewide.

4. **Building Music Communities in a Small City – Government Partner (Hon. Joel Robideaux)**

a. The Cultural Heritage of Lafayette and Southwest Louisiana
i. Artist Examples
ii. Business Examples – Dockside Studio by the River
iii. Festivals
1. Festival International de Louisiane
2. Festival Acadiens et Creole
3. SOLO Songwriters Workshop & Festival

b. Importance of Culture as an Economic Driver in Lafayette

c. CREAT Initiative
i. CREATE VISION 2025: In 2025, Lafayette has attracted and provided substantial investment by encouraging sustainable growth for existing efforts and nurturing new creative and cultural industries. This growth has improved access, awareness and participation to culture and recreation for residents and visitors, while developing related industries and supporting wider PlanLafayette initiatives
ii. CREATE STRATEGIC MISSION: The CREATE Strategic Plan for Arts, Culture and Recreation will support this vision

by catalyzing creative assets to improve quality of life, drive our creative economy, and stimulate investment in our community

iii. CREATE IS A BLUEPRINT FOR:
    1. Strengthening Lafayette's cultural identity;
    2. Catalyzing new and existing creative assets;
    3. Driving strategic investment in new cultural infrastructure and revitalization efforts through matches and measurable outcomes; and
    4. Attracting more regional, national, and international workers, visitors, and businesses to Lafayette
    5. With a transparent, actionable strategic plan based on community input, CREATE will strengthen Lafayette's creative and cultural industries, continuously tracking performance indicators to inform ongoing investment and ensure the sustainability of the sector
    6.

IV. GOALS:
    1. Provide high-quality cultural and recreational experiences for residents and visitors.
    2. Develop state-of-the-art creative infrastructure to support the public realm and drive culture and parks participation
    3. Educate and inspire the next generation of creative thinkers to build our workforce and retain talent
    4. Promote and strengthen Lafayette’s creative assets at home and for visitors
    5. Ensure robust support systems are in place to drive sector growth, capture return on investment and ensure sustainability

V. KEY STRATEGIES TO MEET GOALS: Provide high-quality cultural and recreational experiences for residents and visitors
    1. Provide resources and venues to secure local, national and international talent to perform in Lafayette
    2. Enhance access in creative production and participation by underrepresented populations.
    3. Establish an annual public input event to discuss success of efforts or provide opportunity to refocus.
    4. Develop state-of-the-art creative infrastructure to support the public realm and drive culture and parks participation.
    5. Establish an accessible multi-use creative industry performance and rehearsal complex between 300 – 1,500 seats.

6. Identify infrastructure assets with potential to revitalize / re-use for arts & cultural needs (artist studios, live/work spaces, galleries, performance venues, markets).
7. Establish and nurture cultural and historic districts.
8. Better connect public parks and community assets.
9. Pursue public-private partnerships to fund infrastructure / multiply public investment.
10. Encourage creative clustering with intentional placement.
11. Educate and inspire the next generation of creative thinkers to build our workforce and retain talent.
12. Develop an educational program for annual mini business plans and reports for select disciplines.
13. Nurture arts and health education for K-12 students.
14. Ensure local higher educational institutions have the curriculum, certification and teaching resources to cover innovation, entrepreneurship, leadership and management in relative industries.
15. Build the best educational programs in the world to learn about our culture and language.
16. Develop a cultural leadership or fellows program.
17. Promote and strengthen Lafayette's creative assets at home and for visitors.
18. Work with Louisiana Office of Cultural Development.
19. Develop and further engage digital media to showcase assets.
20. Incorporate cross-departmental, parish-wide brand and marketing campaign.
21. Increase public awareness of assets by developing and maintaining a thorough and updated asset inventory.
22. Pursue strategic international partnerships and collaborations.
23. Ensure robust support systems are in place to drive sector growth, capture return on investment and ensure sustainability.
24. Establish creative economy division or commission.
25. Assist in developing creative new ventures or projects.
26. Maintain a program to assist existing organizations in increasing sustainability.
27. Utilize industry knowledge and assets to interface across industries.
28. Streamline policies and regulatory support to creative and community assets.

29. Improve sustainability of parks and recreation.
30. Work with UL and LEDA to develop related industry measurement and data collection tools.
31. Continuously collect and review financial data of related industry organizations.
32. Better incorporate French and other languages into daily life.

5. Building Music Communities in a Small City – Business Partner (Mark Falgout)

a. Blue Moon Saloon & Guest House
b. Working with the City/State to Build the Blue Moon
c. Expansion to Warehouse 535
d. Partnering with the City/State on Expansion to Warehouse 545
e. Partnering with the City/State on Festival International
f. Partnering with the City/State on Festival Acadiens & Creole
g. Partnering with the City at SXSW
h. Partnering with City and The Buddy Holly Educational Foundation to Create SOLO Songwriters Workshop and Festival

6. **Conclusion – Stephen Easley & Panel**

7. **Questions - Audience**

2018 Report

CREATE Lafayette

CULTURE • RECREATION • ENTERTAINMENT • ARTS • TOURISM • ECONOMY

SOLO Songwriters Festival & Workshop

INVENTORY

The CREATE Initiative is focused on understanding what rich culture and recreation assets we have here in Lafayette Parish.

RETURN ON INVESTMENT

Knowing what we have, allows us to invest in meaningful efforts measured by return on investment.

OPPORTUNITY

Lafayette has an incredible opportunity to strategically grow our cultural economy by strenghtening jobs and reinvesting in Lafayette Parish.

Volume 1, Issue 1

CREATE Lafayette

YEAR ONE

Opportunities for Lafayette that would not have existed without CREATE in 2018 include a focus on music, the first US international songwriter's workshop with the Buddy Holly Educational Foundation, the International Music Cities Convention, French-speaking high school students helping to make Lafayette as French as we say we are, a burgeoning film industry including an international film-making lab and a comprehensive inventory of culture and recreation assets in Lafayette Parish.

Music Cities Convention

In 2018, the CREATE Initiative focused on its organizational structure and participating in meaningful partnerships and opportunities that would have an immediate impact in supporting our cultural economy. Taking into consideration over 400 individual meetings, hundreds of emails, social media comments, phone calls and research, the CREATE Initiative honed in on the organizational structure to provide the backbone for an innovative and strategic approach to support and grow the cultural economy in Lafayette Parish. With a broad mission including all culture and recreation efforts in the parish, deciding where to focus resources remains a daunting task. But with the help of the Lafayette Economic Development Authority (LEDA), an organizational structure emerged that looks to equitable investment, measuring impact and return on investment. These efforts position CREATE to provide a multiplier effect in attracting matching, outside revenue into Lafayette Parish while bringing attention and awareness to our greatest assets. This organizational structure includes CREATE's vision, mission and key strategies, a comprehensive inventory of all culture and recreation assets, a meaningful investment strategy, developing a return on investment calculator and continued public involvement.

KINOMADA

CODOFIL

In January, CREATE and LEDA began working to establish this organizational structure that continues into 2019. In February, CREATE helped to host an informational meeting for film industry workers to take advantage of a new member initiation fee waiver and lowered experience hours to join IATSE, the International Alliance for Theatrical and Stage Employees Union. This is in preparation for a new Louisiana state film incentive package that went into effect in 2018. In March, the CREATE Initiative adopted an artist compensation policy, making a commitment to never ask an artist to work for free. In April, CREATE hosted a French-speaking intern from Quebéc through the international LOJIQ program to help launch le Programme de la Francophonie, placing French Immersion High School Students with local organizations to incorporate more daily French. In May, CREATE partnered with the Buddy Holly Educational Foundation to host the first US songwriting workshop, SOLO Songwriters Festival & Workshop over Memorial Day Weekend. In June, the film industry was booming with three film production companies moving to Lafayette and in production for films that started premiering in 2018. In July, CREATE successfully helped to establish the McComb-Veazey Cultural District gaining support and incentives through the Louisiana Cultural District Program. In August, CREATE and LEDA released a Small Film Economic Impact Analysis to measure impact of the film industry in Lafayette and developed a Film Production Permit and Package to aid film production in the parish. In September, CREATE worked with UNIV100 students at UL Lafayette to survey all parks to build a list of prioritized improvements. In October, Lafayette hosted the Music Cities Convention with Lafayette Travel to host over 300 music policy makers from around the world convening to aid Lafayette in being more supportive to its music community. In November, CREATE partnered with the Opportunity Machine Innovation Convention to connect our culture and innovation with entrepreneurs and exhibit how our culture and recreation impacts our business community. In December, CREATE focused on gathering information on all culture and recreation assets in Lafayette Parish in preparation to launch the asset portal in 2019 along with continued and new partnerships aimed at improving quality of life through access and sustainable investment to our cultural economy.

The ability of the communities in the whole parish to work together and with other parishes in order to make progress as a city is a proud accomplishment. It helps make life better where you are and it is comforting knowing that there are a lot of hard-working people trying to make this place a better place.

- Keisha Jones, Resident

Measuring Impact

BY THE NUMBERS

Measuring the return on investment for culture and recreation can be perceived as quantifying the unquantifiable. In an effort to be responsible in its efforts, the CREATE Initiative is testing methods of tracking return on investment for all expenses and projects through existing data sets, economic impact studies and new measurements. Starting with existing measurements, we work with our partners at Lafayette Travel and LEDA to identify known data sets.

2,890,000 Annual Visitors

2nd LOWEST SPEND in the state ($399 vs. $618)

LAFAYETTE VISITOR PROFILE:

Average age: **49**

$93,000 INCOME vs. $75,200

72% Married

52% live in Louisiana

55% employed

21% retired

63% leisure visitor

21% business visitor

56% of trips planned within 2 weeks of visit

44% visit known residents

32% visit for entertainment

21% visit for shopping

From Lafayette Travel, we learned that Lafayette shows great success and room for growth in the tourism sector.

A: LCVC Visitor Report, 2014

Cultural Economy Impact in Lafayette MSA

33,655 JOBS

= 15% OF ALL JOBS

$1.02 BILLION in Earnings

8.1% of all household earnings

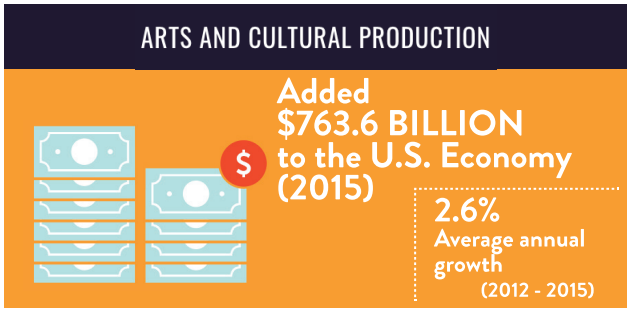
$1.50 BILLION GDP

5.7% of all economic output

JOBS INCLUDE: FOOD, AGRICULTURE, DATA, PUBLISHING, FILM, RECORDING, DIGITAL MEDIA, ARTS, SPORTS, MUSEUMS, AMUSEMENTS, ACCOMMODATION AND NIGHTLIFE

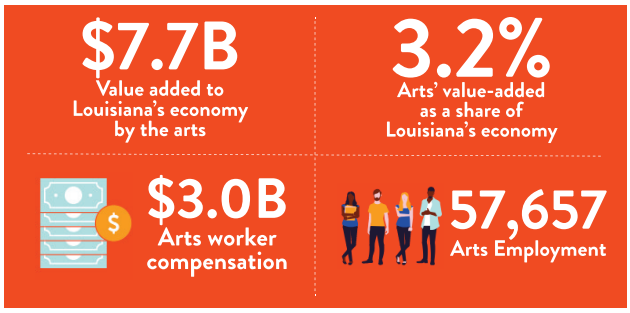
Through LEDA and economic impact studies, we learned that our cultural economy is our second largest economy.

B: LEDA Cultural Economy Impact Analysis, 2017



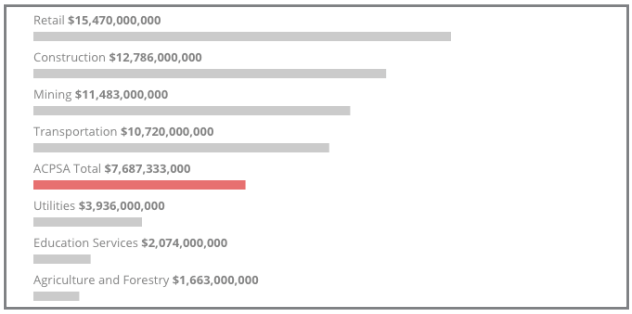
NATIONAL IMPACT

The U.S. Arts and Cultural Production Satellite Account, produced jointly by the National Endowment of the Art's Office of Research & Analysis and the Bureau of Economic Analysis, U.S. Commerce Department, March 2018.



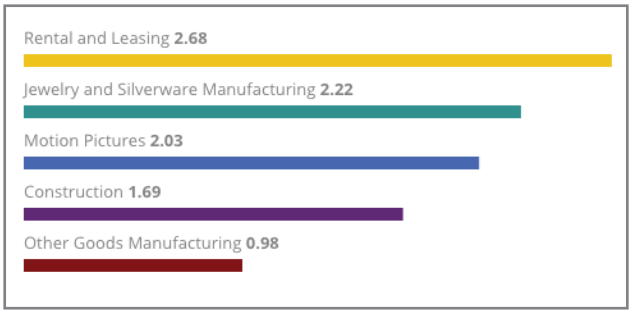
STATE IMPACT

The U.S. Bureau of Economic Analysis reports that arts and cultural production accounts for $7,687,333,000 and 3.2% of the Louisiana economy, contributing 57,657 jobs.



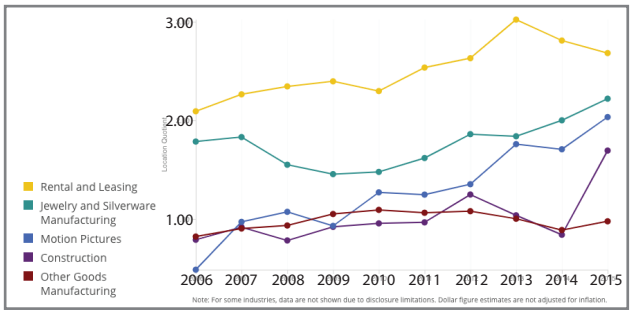
ARTS & CULTURE VS. OTHER SECTORS

Arts and cultural Value Added in Louisiana ranked 5th among the comparison sectors. ACPSA Comparison industries are selected industry categories using the North American Industry Classification System (NAICS) drawn from BEA's 2015 state level data for employment (full-time and part-time workers), compensation and value added by industry.



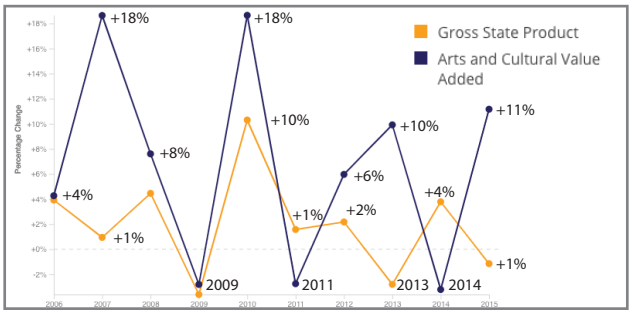
ARTS & CULTURE INDUSTRIES

The ACPSA contains detailed data on 36 key industries within the arts and cultural economy. These industries range from core arts and cultural production to industries supporting arts and cultural activities. The bar chart here shows the top five arts and cultural industries in 2015 by Value Added using Location Quotient in Louisiana.



ARTS & CULTURAL INDUSTRY TRENDS

This line chart displays 10-year trends for the top five ACPSA industries in Louisiana. In 2015, the top five industries by Value Added using Location Quotient in Louisiana are represented here.

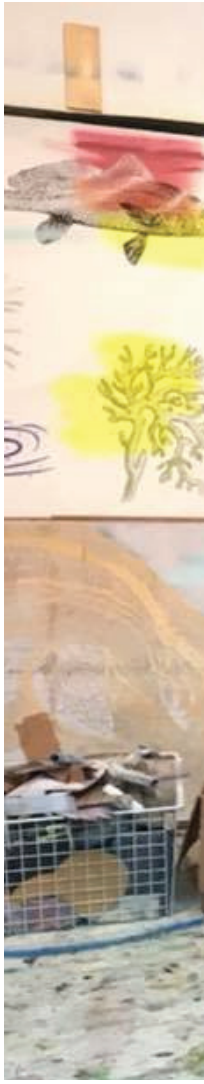


ARTS & CULTURAL TRENDS

ACPSA industries as a whole displayed the following year-over-year changes by percentage when compared to all industries. Louisiana Value Added changed by 11.16% between 2014 and 2015. This trend comparison provides insights into how arts and cultural industries fared relative to the Louisiana economy over time.

Cajun BMX Park

Music Cities Convention



COMMUNITY

Recognizing that culture is how our community comes together and our parks are where our community come together, the CREATE Initiative is working to support these assets to continue to build community.

IMPACT

In addition to quantitative data, CREATE is also gatehring qualatative data to measure the impact of the CREATE Initative in Lafayette Parish at a personal, individual level.

Looking forward

CREATE OPPORTUNITY

For the first time, CREATE provides a sustained focus on building community wealth by strengthening and supporting the culture and recreation opporutunities in Lafayette Parish through financial matches and strategy to move the needle forward like never before.

Francis Pavy

Lafayette Has the Best Stories

Through the CREATE Initiative, Lafayette now has the ability to match outside revenue coming to Lafayette to introduce new opportunities.

Efforts such as the SOLO Songwriters Festival & Workshop provide an opportunity for CREATE to match an equal contribution with the Buddy Holly Educational Foundation to welcome the first US edition of their famous songwriters workshop to Lafayette in 2018 and continuing in 2019.

"When conversations with the Buddy Holly Foundation got started, they were already doing some incredible workshops in Europe and wanted to bring it here to the United States. They could have picked a lot of music cities to start, but the fact that they were interested in Lafayette, recognized the amount of talent we have here, and to me it made perfect sense to introduce a much larger audience to some of the talent we have here," said Mayor-President Joel Robideaux.

Just in the first year, SOLO has generated endless stories for each participant since the event.

"SOLO has been the spark to get this moving for so many great songwriters in Acadiana," said Roddie Romero, local musician and SOLO participant.

In growing their songwriting ability, local musicians are building multi-generational wealth through intellectual property and copyrights that improve earning power beyond live performances and album sales.

"I could talk for an hour just about my experience at SOLO. It was absolutely incredible and nothing short of life changing and I'm not exaggerating in any sense of the word. I can't tell you where I would be without SOLO because right now I feel like I'm on the cusp of making a really nice platform for myself as a songwriter and as an artist and that is 100% because of SOLO," said local participant and scholarship recipient, Sara Douga.

SOLO Songwriters Festival & Workshop

While these incredible stories are a direct result of the incredible talent and drive of each songwriter, because of the CREATE Initiative, these songwriters found a platform and training to grow in their craft.

From beginners like Sara Douga now collaborating on songs around the globe to veterans like Marc Broussard, individual success for these musicians is growing from the SOLO stage.

"I have hit spots in my career where I've gone into writing mode and gone to work and gotten quite a bit of writing done in short order. But I would describe SOLO Fest as by far and away the most prolific week of writing of my career," said Marc Broussard, local musician and SOLO participant.

For Lafayette as a music destination and cradle of original music that moves musicians and listeners, success for Lafayette's music community is even greater.

The first workshop and showcase generated over 65 original songs in year one and will continue when SOLO returns to Lafayette, May 21-29, 2019. Find a video about the event and information about 2019 at www.SOLOSongwriters.com.

> **"I would describe SOLO Fest as by far and away the most prolific week of writing of my career,"**
>
> **- Marc Broussard,**
> **Local Songwriter and SOLO Participant**

Lafayette is a Music City

In some cases, CREATE can participate in other ways than funding to bring new opportunities to Lafayette, such as partnering with Lafayette Travel and Sound Diplomacy for the Music Cities Convention

In addition to helping with promotion, advising on speakers and content to help Lafayette, CREATE partnered to provide an opportunity to educate attendees about our music history in Lafayette. CREATE partnered with local musicians, Anya Burgess and Chris Segura to exhibit locally sourced musical instruments for the atrium gallery spaces of the Acadiana Center for the Arts, where the event was held. To connect the instruments with the historical narrative of how our local music started and has evolved, CREATE partnered with local filmmakers and Lafayette Travel to produce an educational video about the history of music in Lafayette.

The Music Cities Convention came to Lafayette after only appearing domestically in Washington D.C. and Memphis. The international music policy convention brought music industry thought-leaders from around the globe here for panel discussions, round-tables, performances, music showcases and to experience Festivals Acadiens et Créoles. Highlights included Al Bell, who helped create Stax Records in Memphis, giving us Otis Redding, Isaac Hayes and countless other music legends.

“Please appreciate and understand the asset value of this rare music art, right here in your own backyard, is priceless and invaluable,” said Bell. “It’s like gold. Globally popularize your Creole zydeco music in Louisiana and watch your tourism dollars increase the growth of other businesses with new dollars being cycled through the city’s economy."

“Your tax base increasing, additional employment opportunities arriving, your social and color environment improving — all of this resulting in an overall improvement in the quality of life for all of your citizens,” Bell said.

Bell’s comments directly echoed the theme of the convention, “Diversity, Music and Improving Our Cities and Communities” that carried over into round-table discussions with local musicians and members of the Lafayette music community to create a list of initiatives to address. From sound permitting, recording capabilities to education, Lafayette is now more informed for how to move our music community to the next level.

Another highlight of the event was a local music showcase featuring The Lyrical Legacy of Caesar Vincent played by over 30 local musicians in an unofficial kick-off for Festivals Acadiens et Créoles. The Caesar Vincent project is another way that CREATE partnered to help showcase the depth of the musical talent of our area. With Festivals Acadiens et Créoles and the Center for Louisiana Studies, CREATE helped to produce the CD project featuring over 65 local musicians recording 20 ballads written by Caesar Vincent, ensuring that these songs and songwriter were not forgotten and reintroduced to a new generation of musicians, continuing to tell our musical story.

During the Friday Bach Lunch, attendees and the public were treated to an original music-themed painted LAFAYETTE sign at Parc Sans Souci by local artist Ashley McNamara. The painting was another way CREATE helped to showcase our community for the conference and locals alike.

See the videos and more at www.CREATELafayette.LA.

Ashley McNamara, Music Cities Convention

Music Cities Convention

Supporting What Supports Us

In the 1980's, as much as 70% of Lafayette's economy was dependent on the energy sector. By 2017, it was 32%. Of the lessons Lafayette learned in the oil bust of the 1980's, our most successful lesson was that we needed to diversify our economy. When we consider what Lafayette did to diversify, the CREATE Initiative is only standing on the shoulders of work done previously to rely on our most renewable natural resource - our culture. These efforts included CODOFIL in 1968, Festivals Acadiens et Créoles in 1974, Downtown Development and Downtown Alive! in 1983, Acadiana Symphony Orchestra in 1984, Festival International in 1986 and many others. In 2007, we layered our culture with our proven culture of innovation to implement LUS Fiber in 2007, building on the trailblazing of LUS in 1896. Throughout our history, during the times when it mattered most, the citizens of Lafayette come together to support and celebrate the elements of our community that are sometimes intangible such as culture, quality of life and experiences. Our community continues to benefit from this vision decades later.

By 2017, when the price of oil caused Lafayette to lead the country in job losses in 2015 and 2016, we were hit with another disaster, the 2016 flood. Once again, when faced with adversity, Lafayette citizens rose to the occasion.
In 2017, Lafayette Parish voters approved a re-dedication of an existing property tax to fund drainage to address an immediate need and CREATE, to strategically invest in building our community wealth with long-term vision. This vision, if successful, is the opportunity for this generation of leadership to implement long-term investment in moving our community forward for the next generation. These efforts not only support what's always been our golden goose, but also reinvests in what makes us who we are.

rts competitive compensation for the work of

of the artwork or service provided.

l support of artists as working professionals

the rates set forth by the artist.

ayette, CREATE aims to be a positive example

vate; to encourage fair compensation for all

t Lafayette Parish.

- CREATE Artist Compensation Policy

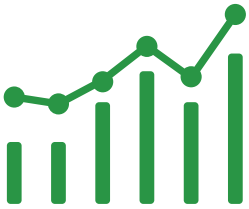
Parking Day

Support

Efforts like CREATE's Artist Compensation Policy make a committment like never before to support those who make up our 2nd largest economy, the Cultural Economy. Lafayette has always relied on our culture, now our culture can rely on Lafayette to be even more successful in moving our community forward.

Tools

The CREATE Initiative seeks to identify gaps by launching the asset inventory portal and to quantify impact of culture and recreation by developing tools such as the ROI calculator. These tools together give a strategy that will track success to help Lafayette make wiser infrastructure investments.



Impact

By connecting Culture & Business, such as through the Opportunity Machine Innovation Conference, the CREATE Initiative is showing the connection between our culture and our ability to attract and retain talent, residents and businesses. This diversification makes our economy more resilient and sustainable.

CREATE

NEW OPPORTUNITIES

FILM PACKAGE

With a new state film incentive package, the CREATE Initiative is helping Lafayette compete by offering personal help film productions with offices, locations, crews, parking, police, fire and other requests through the Film Package and Permit. The permit, package and location lookbook was developed with filmmakers and can be found at CREATELafayette.LA/film.

The Acadiana Advocate

Cajun BMX

PARK IMPROVEMENTS

Looking for ways to improve parks for citizens and attract visitors to Lafayette, CREATE laid the groundwork in 2018 for new opportunities such as the Cajun BMX Park at Picard Park and the Futbol Club Barcelona Soccer Youth Camp at the Youngsville Sports Complex. In addition to these events, CREATE worked with UL Students to conduct visual surveys of improvements or opportunities in all of the parks in Lafayette Parish, to be addressed in 2019. Fill out your own Park assessment or suggest improvements at CREATELafayette.LA

PROGRAMME DE LA FRANCOPHONIE

In an effort to be as French as we say we are in Lafayette, and to provide value for French Immersion students in their own community, the CREATE Initiative partnered with Lafayette High School and LPSS to provide opportunities for advanced French students to do required coursework in partner organizations and businesses in French and help these organizations be more French-friendly. Apply at CREATELafayette.LA.

CODOFIL

KINOMADA

FILMMAKER PROFESSIONAL DEVELOPMENT

The International filmmaking lab and festival, Kinomada make its US debut and brought together filmmakers of varying experience together. The lab included local filmmmakers and visiting filmmakers developing the films in Lafayette by starting with screenwriting, location services, design and costume, photography, lighting, sound, editing and a bilingual premiere during the Southern Screen Festival. The event was made possible by a partnership with CREATE, La Fondation Louisiane, Le Centre International, CODOFIL, Lafayette Travel and Lt. Governor Billy Nunguesser's Office of Cultural Development.

LAFAYETTE TRAVEL

COMMUNITY CALENDAR

The CREATE Initiative is working with Lafayette Travel to develop a comprehensive Community Calendar to promote a single place to promote and appear on partner websites around Acadiana. The calendar will be searchable and filterable to the type of event, date, location or list of dates.

Small Film Economic Analysis

5 FILMS IN 2018: WILL SPEND **$4.7** million in Louisiana

Have a TOTAL ECONOMIC IMPACT: **$19 Million in Louisiana**

GENENERATE: **$3.2 Million** in NEW INCOME for ACADIANA in 2018

For every **$1** an extra **$0.33** is put back into **Acadiana**

78 JOBS CREATED IN ACADIANA

2,795 HOTEL NIGHTS / FILM
FIVE FILMS:
$1 MILLION IN REVENUES
$43,000
HOTEL/MOTEL TAX REVENUES

SMALL FILM ECONOMIC IMPACT ANALYSIS, LEDA - 2018

Filling the Gaps

WORKING TOGETHER

Together with Lafayette Travel and Lafayette Economic Development Authority, the CREATE Initiative is filling a gap that existed for improving the quality of life of Lafayette Parish citizens who were already invested here.

Ben Berthelot

PRESIDENT & CEO
LAFAYETTE TRAVEL

Lafayette is one of the world's most recognized tourism destinations because of our culture and recreation opportunities. Because of the CREATE Initiative, we are able to support and grow these opportunities to grow the visitor experience in Lafayette. These efforts create more jobs and revenue for Lafayette Parish while improving the quality of experiences for locals and sharing a deeper understanding of Lafayette's culture worldwide.

Joel Robideaux

MAYOR-PRESIDENT
LAFAYETTE CONSOLIDATED GOVERNMENT

Over the years, Lafayette Travel and the Lafayette Economic Development Authority have gone above and beyond their missions to improve the quality of life for Lafayette citizens. They have met this need because they know it is essential in attracting and retaining talent, businesses, and visitors. Now, the CREATE Initiative will provide a dedicated focus to strengthening efforts of making Lafayette better for those who are already invested here.

Gregg Gothreaux

PRESIDENT & CEO
LAFAYETTE ECONOMIC DEVELOPMENT AUTHORITY

When prospects consider Lafayette, they are drawn here because of our culture. But without a strategy to provide support and grow, we have seen companies leaving Lafayette. Because of the CREATE Initiative, we now have a daily focus on keeping companies and workforce here through infrastructure investment, education and workforce development that support long-term sustainability and ensure economic health of our cultural economy.

Long-term Vision:

In 2025, Lafayette has attracted and provided substantial investment by encouraging sustainable growth for existing efforts and nurturing new creative and cultural industries. This growth has improved access, awareness and participation to culture and recreation for residents and visitors, while developing related industries and supporting wider PlanLafayette initiatives.

Strategic Mission:

The CREATE Strategic Plan for Arts, Culture and Recreation will support this vision by catalyzing creative assets to improve quality of life, drive our creative economy, and stimulate investment in our community.

What will CREATE do?

1. Strengthen Lafayette's cultural identity;
2. Catalyze new and existing creative assets;
3. Drive strategic investment in new cultural infrastructure and revitalization efforts through matches and measurable outcomes; and
4. Attract more regional, national, and international workers, visitors, and businesses to Lafayette.

With a transparent, actionable strategic plan based on community input, CREATE will strengthen Lafayette's creative and cultural industries, continuously tracking performance indicators to inform ongoing investment and ensure the sustainability of the sector.

Goals:

1. Provide high-quality cultural and recreational experiences for residents and visitors.

2. Develop state-of-the-art creative infrastructure to support the public realm and drive culture and parks participation.

3. Educate and inspire the next generation of creative thinkers to build our workforce and retain talent.

4. Promote and strengthen Lafayette's creative assets at home and for visitors.

5. Ensure robust support systems are in place to drive sector growth, capture return on investment and ensure sustainability.

Key Strategies:

1. Provide high-quality cultural and recreational experiences for residents and visitors.

a. Provide resources and venues to secure local, national and international talent to perform in Lafayette.

b. Enhance access in creative production and participation by underrepresented populations.

c. Establish an annual public input event to discuss success of efforts or provide opportunity to refocus.

2. Develop state-of-the-art creative infrastructure to support the public realm and drive culture and parks participation.

a. Establish an accessible multi-use creative industry performance and rehearsal complex between 300 – 1,500 seats.

b. Identify infrastructure assets with potential to revitalize / re-use for arts & cultural needs (artist studios, live/work spaces, galleries, performance venues, markets).

c. Establish and nurture cultural and historic districts.

d. Better connect public parks and community assets.

e. Pursue public-private partnerships to fund infrastructure / multiply public investment.

f. Encourage creative clustering with intentional placement.

3. Educate and inspire the next generation of creative thinkers to build our workforce and retain talent.

a. Develop an educational program for annual mini business plans and reports for select disciplines.

b. Nurture arts and health education for K-12 students.

c. Ensure local higher educational institutions have the curriculum, certification and teaching resources to cover innovation, entrepreneurship, leadership and management in relative industries.

d. Build the best educational programs in the world to learn about our culture and language.

e. Develop a cultural leadership or fellows program.

KELLIE SMITH, DOWNTOWN LAFAYETTE

4. Promote and strengthen Lafayette's creative assets at home and for visitors.

a. Work with Louisiana Office of Cultural Development.

b. Develop and further engage digital media to showcase assets.

c. Incorporate cross-departmental, parish-wide brand and marketing campaign.

d. Increase public awareness of assets by developing and maintaining a thorough and updated asset inventory.

e. Pursue strategic international partnerships and collaborations.

5. Ensure robust support systems are in place to drive sector growth, capture return on investment and ensure sustainability.

a. Establish creative economy division or commission.

b. Assist in developing creative new ventures or projects.

c. Maintain a program to assist existing organizations in increasing sustainability.

d. Utilize industry knowledge and assets to interface across industries.

e. Streamline policies and regulatory support to creative and community assets.

f. Improve sustainability of parks and recreation.

g. Work with UL and LEDA to develop related industry measurement and data collection tools.

h. Continuously collect and review financial data of related industry organizations.

i. Better incorporate French and other languages into daily life.

> "Whenever you have government focusing on the development of our creative economy, that's exciting." - Johnathan Williams, Love of People

Lt. Governor's Office of Cultural Development

SEAFOOD KING

In addition to winning Louisiana Seafood King in Lafayette, local chef Ryan Trahan of Blue Dog Cafe went on to win American Seafood King in 2018.

GRAMMYS

Since 2008, Lafayette is home to 162 GRAMMY nominations and 39 GRAMMY wins. That compares with 166 GRAMMY nominations and 52 GRAMMY wins in New Orleans.

CEDRIC WATSON, LAFAYETTE TRAVEL

BASIN ARTS

LAFAYETTE TRAVEL

To the Citizens of Lafayette Parish:

I would like to express my sincerest gratitude to your commitment, passion and assistance in 2018 with the CREATE Initiative. Without your individual contributions of attending meetings, hosting dynamic cultural and recreational events, engaging on social media and reaching out to our staff directly, the CREATE Initiative would not have been able to accomplish what we have done so far. The CREATE Initiative is one of long-term vision. While there is immediate gratification in some of the events and programs we've been a part of in 2018, the real impact of CREATE will take several years. Because of your robust input over meetings, emails, calls, surveys and letters, this initiative aims to be what the people of Lafayette Parish deserve in mindfully celebrating and supporting equitable investment in Lafayette's culture and recreation assets.

In addition to the public and partners, a special thank you goes to our Departments at LCG, the Council, Ben Berthelot and staff at Lafayette Travel and Gregg Gothreaux and staff at the Lafayette Economic Development Authority.

Thank you also to those in our creative and recreational programs and organizations who have long carried the responsibility of supporting our cultural economy without the help of CREATE for so many years. Because of what you've built, CREATE can not only exist but help to make Lafayette better in the years to come.

Thank you,

Mayor-President

Making Headlines

NEWS IN REVIEW

LAFAYETTE TRADES OIL FOR CAJUN SONGCRAFT TO DRIVE ECONOMY
Next City

"This all-star cast of Acadian musicians, who keep the flame alive for Louisiana French, was also noteworthy for the evening's source material: a treasure trove of lost recordings by Caesar Vincent, a humble farmer who roamed rural Louisiana his entire life by horse or on foot — he never owned a car, or for that matter a television — and had an encyclopedic memory of folk songs spanning old-world France to new-world Acadiana, the French-speaking cultural region of Louisiana also known as Cajun country."

NEXTCITY.ORG/DAILY/ENTRY/LAFAYETTE-TRADES-OIL-FOR-CAJUN-SONGCRAFT-TO-DRIVE-ECONOMY

EXPLORE PARTS UNKNOWN: SOUTH LOUISIANA
CNN

"There are parts of America that are special, unique, unlike anywhere else. Cultures all their own, kept close, much loved but largely misunderstood. The vast patchwork of saltwater marshes, bayous, and prairie land that make up Cajun country is one of those places."
Anthony Bourdain

EXPLOREPARTSUNKNOWN.COM/DESTINATION/SOUTHERN-LOUISIANA/

WHAT ARE THE PEOPLE AND PLACES YOU'RE EXCITED TO INTRODUCE US TO DURING PLACES TO LOVE'S NEW SEASON?
Forbes Travel Guide

"I've been helping to edit the Lafayette, Louisiana, show. Every time I go to Louisiana, I go to New Orleans. I love New Orleans but come on! Lafayette is home to both Creole and Cajun cultures. So, not only do you have this amazing zydeco music and Cajun music, You have a group of people living there that literally live by the motto that no one is ever a stranger. If you're there, you are part of the family."

STORIES.FORBESTRAVELGUIDE.COM/ALL-AROUND-THE-WORLD-WITH-TRAVEL-EXPERT-SAMANTHA-BROWN

For links to videos, additional information or to contact us, please visit:

CREATELafayette.LA

Follow Us

CREATE Lafayette

Instagram

Experience the culture and recreation assets of Lafayette Parish through the lens of Lafayette artists, athletes and citizens who contribute to our cultural economy.

@CREATELAFAYETTE

Facebook

Keep up with events, photos and the many partners and assets that contribute to our cultural economy in Lafayette Parish.

@CREATELFT

Twitter

Engage with us and follow CREATE Lafayette to keep up with information across platforms and partners.

@CREATELAFAYETTE

FOR MORE WAYS TO ENGAGE, VISIT:

CREATELAFAYETTE.LA

mosaic sound collective

Presentation for Austin Music Commission

msc

Update on our Progress

We're open for business!

While we are waiting for our Zoning Case to be considered we are open under our current zoning. We are asking for rezoning from GO to CS-1 MU to accommodate additional services for musicians, artists and the community.

We are repurposing a 25,000 sq ft building, which was a convalescent home, a juvenile detention facility, and most recently a church.

msc

Current Tenants & Services:

- Stuart Sullivan and Wire Recording Studios
- Charles Godfrey of Sonic Ranch Studios (A famous El Paso Studio)
- Capital Radio Backline (formerly Transmission Entertainment)
- TipCow (Our 1st tenant under our Music Tech Incubator Program)
- Education Classes (Paul Minor Sound Engineering, Jonas Wilson Songwriting)
- Art Studio (Peelander Z)
- Many more that we hope to announce soon…

Future Tenants & Services:

- Community Outreach & Launch of Membership Drive
- Expanded Education Programs
- Youth Engagement Programs
- Performance Venue for Music, Arts & Community Programming
- Affordable Co-working Space for Music
- Music Tech Incubator Program
- Rehearsal Studios
- Mastering Suite
- Streaming Video Company
- Screen Printing Facilities
- Vinyl Manufacturing
- Food & Beverage Facilities

msc

Goals & Objectives

- Sustainability Model: For-Profit Services that support our Non-Profit Mission
- Affordable Space for Musicians & Artists, forever dedicated to them, by owning the facility & land
- Education: Trade Skills for a “Working Musician” (Budget & Schedule)
- Job Creation: Creating new and better paying opportunities, and a ‘Hire an Artist’ program
- Provide low-cost and no-cost services to musicians and the artistic community through our music industry and non-profit tenants
- Youth Engagement: Supporting the next generation of Musicians & Artists, and supplementing instrument lessons with Production, Video, Job Training and services
- Community Outreach: Supporting not just Music Nonprofits, but other Arts groups, including theater and the visual arts, as well as other important Non-profits and Community Needs
- Diversity of Membership, Programming & Community Outreach: Our goal is to build programs and programming that serve as a cultural, educational and creative resource to the neighborhood and Nonprofit community
- Music Tech Incubator Program to support developers of music tech (apps, hardware, software, programming)
- Affordable Housing for Musicians & Artists
- Promoting cultural and ethnic diversity though the arts and economic development, by creating a Mosaic Diversity Committee to address equitable access to the arts and economic development

Affordable Housing

Adjacent to our 3-acre property there is a 7-acre tract that has been rezoned to MF-2, for 179 high-density affordable units with some mixed use retail space. We are looking for a Developer to take on this project, in hopes that Austin will soon recognize affordable housing for the Creative Sector, as is recognized in cities like New Orleans, Denver, Portland, and Seattle.

Economic Development

Our facility will be an engine of economic development on the East side, bringing dozens of new businesses and over a hundred new jobs to an area that deserves more attention. This development is creative, low-impact, and sustainable.

msc

Our Ask

We request the Music Commission's support of the following action items:

- Recommendation to Council for Approval of our Zoning Change from GO to CS-1 MU
- Recommendations to Mayor Adler, Council, and Economic Development for support with our Affordable Housing Development for Musicians & Artists
- Nominees from Music Commissioners for a Mosaic Committee on Diversity & Programming
- Recommendations to Mayor Adler, Council, and Economic Development that the City work with Mosaic for economic development, including securing federal HUD, Commerce Department, Economic Development Administration, and Labor Department support

mosaic sound collective

dan redman / founder & ceo
713.398.2604
dan@mosaicsoundcollective.com

mosaicsoundcollective.com
6400 FM 949 / austin, tx / 78724

Working Document - Music and Creative Ecosystem Stabilization and Promotion Action Plan

Outline

Key Focus Area (1): Address affordability issues resulting in displacement of musicians, creatives, and associated places of business

Strategies	Actions	Responsibility	Existing Programs or New Resources	T
1.1 Preserving and enhancing /creating/ Strategy associated with affordable space	1.1.1 Facilitate/promote/encourage of multiple Music and Creative industry HUBs through public/private partnership to boost local industry capabilities *(gap analysis space needs, programming, technology, resources, co-working spaces, targeted geographic locations) *proposed long range plan $5 mill (city lead)*	Don/Meghan	$- New program	I
	1.1.2 Commission a space GAP analysis for small business and music and creatives *(Square footage needs, programming space, small business, warehouse space, etc.) *proposed long range plan cultural facility analysis*	Nicole/Donald		
	1.1.3 Hire a consultant to coordinate a program to activate nontraditional spaces to support a variety of for profit and nonprofit creative uses. *(Partners for Sacred Places also include Develop impromptu and non-traditional venue for art exhibits, installations and performances – Detroit model; "pink" code – less "red" tape)*			
	1.1.4 Include use of appropriate affordable space for creatives in all interlocal agreements. *(AISD, UT, St. Edwards, ACC. i.e. Kealing Middle School Recording Studio gift from Spotify)*	Sylnovia		
	1.1.5 Evaluate the creation of a technology platform to match available space with community creative and music needs. *(Space Finder, open source/CTM, Now playing Austin, ACA)*long range- Mapping Austin's cultural resources)*			
	1.1.6 Coordinate with Convention Center to ensure creative space is incorporated within the Convention Center expansion			
	1.1.7 MEXIC-ARTE Funding	Sylnovia		
	1.1.8 Develop a consistent framework for identification and cultivation of cultural districts, including internal & external stakeholder participation & appropriate incentives for community partnerships. *(Real estate, housing, focus on health, creative space, existing districts, leverage city assets, geographic specific, etc.) long range *cultural cluster district*	Christine		
	1.1.9 Encourage the private sector to create a strike fund that can assist in facilitating affordable housing and creative space *(mayor)*	Christine		
1.2 Preserving/enhancing, creating/ Strategy associated with affordable housing	1.2.1 – Encourage and collaborate with NHCD to explore affordable housing options for creatives and musicians *(missing middle)*	Redevelopment		

Key Focus Area (2): Develop and promote a continuum of health and education resources for Austin musicians and creatives

Strategies	Actions		Existing Programs or New Resources	T
2.1 Strategy for educational resources	2.1.1 Market existing workforce development training opportunities		$- New program	$ -
	2.1.2 Facilitating partnership with targeted industry training in cooperation with Austin Community College. *(i.e., Fashion Incubator)*	Sylnovia		
2.2 Strategy for creative learning for youth	2.2.1 Expand existing Music for Kids program to include Spanish concerts for Spanish speaking children	Music	New Program	$ -
	2.1.2 Expand Creative Learning Initiative to ISD that touch City of Austin	CAD		
	2.2.2 Creation of an Industry Internship Program for youth in Austin to learn about the various sectors of the music and creative industry through internships with non-profit and for-profit organizations *(Seattle)*	Music / CAD	$- New Program	I -
	2.2.3 Promote youth leadership through music collaboration by way of cultural exchanges *(eventually be incorporated in 3-1-1 Music On Hold playlist, define one village music project)*	Music	Existing	$ -
	2.2.4 Connect schools and families with nearby PARD and other cultural centers to provide after-school arts programming through Creative Learning Initiative	Meghan		
	2.2.5 Provide source of funding to local arts and music organizations and/or individuals to serve students through Creative Learning Initiative	Meghan		
	2.2.6 Expand funding to MindPOP for implementation of future phases of Creative Learning Initiative and to explore expansion of partner sector partnerships with COA *(modeled after SXSW partnership, Spotify gift to keeling middle school)*	Sylnovia/Meghan		
	2.2.7 Expand SXSW High School Badge Program as part of the Quality of Life Initiatives, via the Co-Sponsorship	Sylnovia/Meghan		
	2.2.8 Create a Creative Learning Initiative liaison in COA to coordinate arts programming and linkages to the community	Meghan		
	2.2.9 Promote marching band events			
	2.2.10 Promote events that education area youth on careers in creative industries			
2.3 Promote access to existing safety net social service resources	2.3.1 Increase awareness of Health and Human Resources for musicians by the creation of a PSA campaign through a partnership with HAAM and SIMS *(one sheeter – describe HAAM and SIMS)*		$- New Program	$ -
	2.3.2 – Create a Health Services Coordinator in HHSD (i.e.Homeless/LGBT)			
	2.3.3 – Promote 211			
	2.3.4 – ACA partner with St. David for gap contributions to offset Medicaid funding. Expand HAAM/SIMS role to include all creatives			

Key Focus Area (3): Promote the individual professional development of artists and musicians, along with the music and creative industries

Strategies	Actions	Existing Programs or New Resources	Timeline*
3.1 Increase revenues generated by artists, musicians, and related businesses	3.1.1 Creation of an education campaign regarding local music patron etiquette, including tipping of musicians and the importance of cover charges *(featuring local music talent, as well as, the creation of a comprehensive list of tipping apps, and a universal tip jar)*	$- New Program	Short Term
	3.1.2 Creation of a Live Music Venue Best Practice guide (through research of various best practices to raise the standards of how music venues are operated and music are treated)	New Program	Short Term
	3.1.3 Creation of revenue development curriculum for musicians and creative		
3.2 Professional development?	3.2.1 Develop Austin-centric curriculum continuum with Austin Community College focused on creative business development (promote artists that complete programs – Artists Inc.)	$- New Program	Short Term
	3.2.2 – Develop discipline-specific training via Getting Connected (Tier 1) and a Creative Expo		
3.3 Audience development?	3.3.1 Creation of the ATXPort Program for Austin musicians that is closely aligned with exporting music services, musicians and licensing opportunities (Formation of a Legacy Tour/Roadshow of Austin's greatest local performers; expand to all?)	$ - New program	Short-term
	3.3.2 Creation of Music Foundation through a public/private partnership to support the ATXPort program (singular focus)	$- New Program	Long Term
	3.3.3 Establish a program to promote the licensing of Austin music for commercial uses		
	3.3.4 Establish an online radio station of only Austin music (Music on hold, promote Austin artists)	$- New Program	Long Term
	3.3.5 Establish of an Austin Music Walk of Fame in place of the Austin Music Memorial	$- New Program	Long Term
	3.3.6 Create a cultural exchange program with creatives via Sister City/ISPA relationship. i.e. Hackney Partnership with ACC Fashion		
	3.3.7 Explore implementation of the Cultural Tourism Plan recommendations		
	3.3.8 Develop an education campaign to promote patronage of local musicians and creatives		
3.4 Industry promotion	3.4.1 Implement a structure to include of Tourism and Marketing Plan in Partnership with the Austin CVB		
	3.4.2 Partnership with the Texas Music Office regarding the update of the Austin Music Industry Database	New Program	Short Term
	3.4.10 Identify the unique needs of specific genres, and execute strategies focused on underserved genres	$- New Program	Short Term
	2.4.1 – Develop an exchange program with other Cultural Programs across the county. Explore expansion of the Smithsonian Relationship.		

	2.4.3 – Partner with _____ on match making (S?)		
	.4.4 – Include creative develop as a component of the MECA Chamber contracts		
	2.4.5 – Evaluate web tools for promotion and networking of local creatives		
	2.4.6 – Expand the Concierge System, linking to ACVB		
	2.4.7 – Explore city-wide arts award, i.e. similar to Small Business Award		
	2.4.8 – Encourage Recruitment of National Creative Conference (i.e. to include opportunities for local creatives		
	4.2.1 – Include BizRight video training as part of the pre-contracting process		
	Develop vehicle to encourage philanthropy (nonprofit)		

Key Focus Area (4): Identify and align City of Austin regulations, operations, and incentives to promote the music and creative ecosystems

Strategies	Actions	Modify or Continue Existing Programs or New Resources	Timeline*
4.1 Ensure planning and land use regulations protect and promote the music and creative ecosystems	4.1.1 Promote compatibility between performance venues and residential by employing the Agent of Change Principle *(the existing uses have the ability in reviewing the site plan for a venue that seeks to locate in a more homogeneous non-venue area. The surrounding property owner review of the site plan would prevent the new venue user from being sued) + Existing user having greater rights hand gets a prior deference as surrounding uses change*	New Program	Short Term
	4.1.2 Reduce regulatory, zoning, & administrative barriers to the development of live/work spaces		
	4.1.3 Develop and implement a density bonus program for preservation or new development of live music venues and creative spaces in vertical mixed-use (VMU) and transit-oriented development (TOD) zones, and other master zoned areas.		
	4.1.4 Position appropriate surplus City-owned property for redevelopment into creative space through Public/Private partnerships		
	4.1.5 Work with CapMetro to expand services to creative and entertainment districts		
	4.1.6 Align City infrastructure improvements associated with mobility to promote access and connectivity to creative activities *(Reference particular sources)*		
	4.1.7 Allow for more creative uses by-right in Imagine Austin Activity Centers, Activity Corridors, and Transition Zones through CodeNEXT or a prior development code amendment.		
	4.1.9 Allow compatible, public-facing creative use & music spaces to satisfy the ground-floor retail requirement in vertical mixed-use (VMU) through a code amendment.		
	4.1.10 Evaluate creative spaces and live music venues within planned unit development		

	(PUD) consideration *(specific tiers referenced)*		
4.2 Align licensing and permitting processes to better serve music and creative businesses	4.2.1 Development of an entertainment license to organize and consolidate permits associated with business operation (Creation of official "Live Music Venue" designation/branding for quality live music venues)	New Program	Short Term
	4.2.2 Consider revisions to building codes to encourage the development of new and preservation of existing creative use spaces and live music venues. ("pink" code)	Christine	
	4.2.3 Propose a busking ordinance to support public performance of multiple types	New Program	Short Term
4.3 Ensure Economic Development Department and other City resources are organized to best promote the creative and music ecosystems	4.3.1 Review the permitting and regulatory processes associated with creative commercial activity, to determine appropriateness… (should Music be conducting SIP and CAD tour registry; film)	Existing Program	Long Term
	4.3.2 Continuation of the North American Music Cities Best Practice Summit as a method by which to gather research on new and innovative solutions	Existing Program	Short Term
	4.3.3 Establish and implement processes and structures that facilitate collaboration between all department divisions to address needs of the creative ecosystem	New Program	Long Term
	4.3.4 Expand the current Business Retention & Enhancement Program (BRE) to include the Red River Cultural District		
	4.3.5 Develop a loan program to serve multiple purposes identified by creative businesses and individuals, including those potentially displaced by new development. (to remain on their site or in their immediate corridor or district)		
	4.3.6 Create an economic development corporation (EDC) that facilitates public private partnerships to deliver real estate projects that advance the creative ecosystem. *(nonprofit, target industry) *economic development corporation, land acquisitions –long range)*		
	4.3.7 – Work with the appropriate City departments to incorporate arts, creative, cultural and historic assets into existing and future wayfinding systems (Tejano Heritage Trail)		
	4.3.8 Develop Branding Campaign for creatives		
	4.3.9 Modify the Music Venue Assistance Loan Program to expand beyond sound mitigation.		

	4.3.10 Use property and sales tax abatements, Chapter 380 agreements, development fee waivers, TIFs, & other policy tools allowed under state statute to incentivize creative and music sector businesses and organizations, both for retention & new development		
	4.3.11 Define & integrate creative space preservation, music, and art into small area plans, including neighborhood plans, corridor plans, & Soul-y Austin commercial area plans.		
	4.3.12 Provide ombudsman services for creative businesses		
	4.3.13 Coordinate and maximize the use of City-owned spaces for creative use		

The State of Music in Austin

As our city booms, are musicians and venues being left behind? We put together a roundtable of seven industry leaders to get their insight.

MODERATED BY SARAH THURMOND | PHOTOGRAPHED BY JONATHAN ZIZZO | LOCATION ARLYN STUDIOS

It's been 25 years since Austin adopted the official title of Live Music Capital of the World, and a lot has changed. There's the good, such as the addition of premier venues and festivals to attract more big-name touring acts and a number of our homegrown talents breaking through internationally. But there's also the bad, including beloved clubs closing due to skyrocketing rents and multimillion-dollar developments encroaching on popular music corridors. For an industry that brings in $1.6 billion annually to the city, what does it all mean? We gathered together a group of industry leaders to talk about these and other pressing matters affecting the music scene today.

An abbreviated version of this roundtable ran in the March issue.

Sarah Thurmond: Don, I'd like to start with the music census, put together by your office. Was there anything you found surprising?

Don Pitts: Well, one of the surprising things was that so few people read it. Actually, there's a lot of people that read stories about the census, but I guess a lot of people didn't read it. So we would get calls to our office, they would say one thing or the other, and they obviously didn't read the census. Another surprising thing was more of a workforce-development issue. Industry-wide we have a workforce-development issue, from musicians, to venue owners, to venue managers, to venue workers, to event producers. We have a large supply of those in Austin. The other surprising thing is it wasn't all bad. There was an increase in the small businesses, the two- or three-person shops that are music businesses. We saw significant growth of those in the last two or three years.

Thurmond: Did anyone take the survey at this table? [*There are some yeses*.] Of the results, did you look through them, and did you see anything that stood out to you that maybe that maybe the media didn't really go into? What surprised you about the results?

Elizabeth McQueen: The thing that *didn't* surprise me was something that a lot of people talked about: "Oh my gosh, musicians make so little money in this town!" I was like, yeah, the kind of musician who would move to this town is often not motivated by fame or money or success on a grand scale. So, I was surprised that people were surprised. I was also surprised by how many small businesses and small nonprofits there were, many of which are working out of homes and not connected in any way. It showed us this opportunity to acknowledge that kind of creative class and the service that that class offers to this city. They don't make a lot of money but they make this city what it is. They give the city the vibe that it has, and it's the reason why you want to come to Austin because people live a great quality of life that's based around creating and not monetizing necessarily. And also it gives us an opportunity to say, "Oh, look at all these people who are doing things in the music industry. Maybe we could

connect them all. Maybe we could create music business hubs. They could all work side by side in a co-working space. And maybe that would just lift everybody's ships." That was what I got out of it.

Andy Langer: I think to some degree, while those numbers aren't surprising, people would be surprised to know that musicians are often walking away from the bandstand with less than $30 a man. That is the same money they were making 10 years ago, the same money they were making 10 years before that, and the same money they were making at the height of the Armadillo [World Headquarters]. So I don't know that that hasn't changed as a problem because everything else has changed in terms of rent and whatnot, but I think the raw numbers of what it is to load your stuff into the car, take it down to a club, play for a couple hours, and unless you're in this little tiny percentage of folks that make more than that, you're splitting up a couple hundred bucks at the end of the night between however many people, and that's a problem on a bunch of levels when a city gets more and more expensive to live in.

McQueen: When I moved here in 2000, I made nothing and I lived on nothing. And it was highly possible to live like a kind of a nice—you could have a really nice quality of life and play those kinds of gigs. And now it's just not possible, and there's nowhere for the creative class to go except out, like away.

Britt Daniel: Right, I don't think anybody was ever supporting themselves on those $30 a night, but the fact is it was a cheap place to live and you could make your money some other way. Having a minimum-wage job was enough to keep you in Austin. Now it's not.

Terrany Johnson: It's not. I used to play Hip-Hop Hump Day at the Mercury, which is now the Parish, and we had a Wednesday night. We'd get a piece of the bar and the door. So a 10-piece band, everybody would walk out of there with probably $200 or $300 apiece. There's no way that you can do that now.

Daniel: You're going to see people moving away, so that they can get somewhere where they can do their art at a rate that they can afford.

Langer: [*To Daniel*] As somebody who's out there sort of as an ambassador, because people are going to ask you questions about Austin everywhere you go and always have, are they asking different questions about Austin now, and if you're talking to a musician, are they less interested in picking up and moving here? Has the conversation changed out there?

Daniel: I don't think the conversation has changed too much. I just think that what Austin's known for might be changing a bit. Obviously, there is still a music scene here, but there's so much money being poured into here that the culture's changing, and I think people realize that. People think of Austin as the place where Austin City Limits and South by Southwest and Fun Fun Fun Fest happen. That's what I end up talking to a lot of people from out of town about. I like that those things happen, but it's not the whole picture, and those things don't help musicians. In fact, it's maybe the opposite. They don't help local musicians do their thing.

Thurmond: When you were starting out back in the early '90s, was there a cover charge at every venue you played? That was one of the study's results: cover charges disappearing at venues.

Daniel: I guess there was a cover charge. I do remember when Emo's started in '92 it had no cover, and that was a big deal. Even the Cannibal Club, which was the first venue I would go to regularly, it was $3 or $5 a night, and I remember thinking that $5 a night was hefty. I would still go, but I wouldn't go every time there was a $5 cover.

James Moody: That was an interesting thing when I got here. I was working in New York when I came here and fell in love and immediately started bouncing around these clubs. I was shocked going to high school in LA and then growing up in New Orleans and coming here and seeing so many single-digit covers when the rest of the world hadn't left that world behind, and a lot of it was driven by the fan base. The fan base was expected, because we had so much supply, so they held that economy down in terms of what was available for the clubs and the artists a little bit. So I remember at the Mohawk, it was a big deal—if you got past $10, you better have a good story to tell who was coming.

Daniel: I'm still very conscious of how much my band charges for shows, and when I see that it's going to cost $40, something goes off in my head. And then my manager and booking agent will say, "That's less than what everybody else is charging going into this room in New York." Still, it sticks with me.

McQueen: Now we have these big national rooms, like ACL Live. All of a sudden, we have a venue where big national touring acts can come through. I know that you were talking about this in 1995, but it's even more now. Go out to the 360 Amphitheater and pay like $150 to go see Van Halen. Or you're going to pay $100 to see someone at ACL Live. But still, if you're a native Austinite, you're not going to pay $15 to see a local band at a local club. The disconnect is becoming even more, like, crazy about what people will spend their time and their money on. And it used to be that you didn't get a lot of those touring acts coming through Austin, so people would just opt to go local, but now the competition is fierce.

Moody: It was definitely the supply-and-demand thing. We had so much supply of talent and so many options. It's really risky to push your ticket price for the band or for the venue.

Daniel: It was a lot of local options. Now the bigger Austin gets, the more there are national options coming in.

Langer: And you're not just competing against other clubs. You're competing against Netflix, video games, all the different ways you can spend money and your time outside of the inconvenience, in many cases, of trying to find a parking spot downtown when some hotel has bagged all the spots for six blocks around those venues.

McQueen: Uber has been a godsend in this town.

Langer: Yeah, so all of those things are distracting people from spending the money they have left after they've bought the tickets to go to the Austin360 or go to ACL Live or wherever. And then you look at what's left, what's trickling down and how many people are fighting for what's trickling down because there are still a lot of clubs. I mean, that's good. But there's a lot of people looking for that same piece of the pie.

McQueen: The thing is, in Austin our idea of how artists can get revenue is based around performance. Live performance is just not a great way to make money, especially if you're playing in town all the time.

Johnson: If you're doing hip-hop in Austin and you're trying to rely on being a performer, it's going to be a rough ride. A lot of venues, they don't have areas for DJs or for hip-hop bands, so to speak. It's all live bands. So artists have to find other ways to create that revenue. And one thing that I've been doing with artists is getting their mindset off of just being onstage, as far as owning your publishing, licensing, placements—other revenue that you can generate for yourself while you still play those $30 gigs.

McQueen: I personally think that all this revenue that's coming in from all these hotels that are getting booked from all these people who are visiting Austin all the time—we'll talk about different ways—that money should be going back to artists. I personally think directly back into the hands of artists so that they can create whatever they want to create and it not infringe on their personal bank accounts.

Daniel: Doesn't seem like too radical an idea, if that's why these hotels want to come to Austin and that's why the people want to come to Austin.

McQueen: I think that people are desperate for a taste of authentic anything, and they come to Austin and they see a bunch of people living authentic lives and they just—

RC: Gravitate toward that.

Langer: Yeah, but are they coming for that and then experiencing it? Or are they coming here because some company that came here or grew out of here brought them here, and then it's not in their DNA? I think this is the fundamental issue, above and beyond everything, or that impacts everything we're talking about, is that fundamentally people that have moved here—and this is not an Old Austin versus New Austin, it-was-so-much-better-however-long-ago gripe—it's that perhaps we haven't done a good job of educating the people that are coming here that part of the DNA of this city is traditionally been arts and culture, and that arts and culture doesn't exist in a vacuum unless you're feeding arts and culture. And that what's missing it appears from a lot of people moving here, that element of "OK, I'm going to go out and see band X, Y or Z however many nights a week." I mean the way that—

Moody: You're going to say [former Austin mayor] Will Wynn? [*Everyone laughs*]

Langer: Yeah, it's that old Will Wynn thing: This is our sports team. We don't have a sports franchise. Music is our sports franchise in the same way somebody who lives in Atlanta has a major league baseball, basketball and football team to choose from and goes and supports those things. I don't know that we have that now.

Reenie Collins: I actually agree with that. What I tell people is if you don't care about music personally, but you're here doing business and have business here, you should care about it because it makes a difference to us economically. You should care about it because it's what makes our city our city. And I do believe that we should be encouraging and teaching people, especially our newcomers, how to go out, where to go, what to see. We ought to make it easy. We ought to make it interesting. But for people who aren't used to doing that it can be very intimidating, or it can be, "I don't really have time. I don't have a place to park." Those are all excuses. We've got Uber. Now, old people like me can go to an early show. [*Everybody laughs*] You can go to an early show and be home and be in bed. There's all kinds of options.

Thurmond: Don, one of your office's goals is trying to figure out ways to generate revenue sources for musicians, correct?

Pitts: Yes, there's a lot of stuff happening now. Our office lives in two separate worlds: the permitting, regulatory world and the economic development world. This last budget cycle, [city] council gave us two new staff members to focus more on professional development and industry development. That's our desire and what we should be doing. But, also the census said we needed a music tourism plan. I don't think Austin does tourism very well. We do conventions and meetings and, fortunately, festivals well. So I think what we've been hearing a lot of conversation from the commission and a lot of the dialogue that's on the dais from council members, that they're wanting to see a music tourism plan. Right now, the people that do our tourism is the Austin Convention and Visitors Bureau. They did a presentation not too long ago with the Economic Opportunity Committee. But according to ACVB's testimony in front of that council, 60 percent of the people they interviewed and surveyed, the visitors coming in, 60 percent said they come to Austin for music. So my question would be: Are we reinvesting? How much of the funds are we reinvesting back into music programs that could respond to tourism? You go to cities like Nashville, Chicago, Seattle, New Orleans, they got the music tourism thing down. I think for us it's an uphill battle. It's almost like the tagline is a detriment for us. The Live Music Capital of the World is a double-edged sword. Our other kinfolk in the arts world are frustrated with music getting all the credit. But the music folks are all frustrated because all of the resources and revenue are going to others. So I think we have to address that.

McQueen: We're all in the same boat now. It doesn't matter if you're a musician or an artist or a theater person. It's the same kind of person who moves to Austin no matter what they're medium is.

Moody: There's been a very divide-and-conquer mentality, though, about establishing what the music and the creative economy is. And so when we do reports, we'll say South by Southwest brings this much in. Or ACL Fest brings in that much. But the census is only the appetizer of actually starting to try to put the actual music economy together, and if you did, that number would be enormous. It would be everything, honestly. It would be so much of who we are and what drives our little micro economy here. But it hasn't been *ever* properly put together to represent a story. We've always, I think—when I got here, I was frustrated that all the music stories were about a show that we missed at a venue that closed a long time ago. It was never an economic story. It was never just about jobs. And it was never just about tourism. And the things that I think policy makers really need to be able to get behind, and we don't have good policy for that. Don's office should be four times as big as it is, relative to that economy, and it's not. And so should his budget. Not because he's [*sitting*] here. It's just because you would think if you were to ask people about the Live Music Capital of the World, you'd assume that office would be enormous, right? Because it's an enormous responsibility. And then the hotels and such around the venues, they can contribute with the hot tax and the way that those things work. I'm very pro-growth. I like the hotels coming to Red River because it'll bring new customers to non-venue hours and venue hours. But, as you guys said, if they bag up all the parking spots around the venue and then the parking revenue goes to the general fund and not back to the district, then we're not supporting the thing that's getting the hotel to make the decision.

Langer: To back track for a minute on the tourism thing, what does it say if you show up in Austin, Texas, go to a hotel downtown, talk to the concierge—and they send you to Dirty Sixth? They're going to send you to a place that's filled with shot bars and vomit. What we've allowed Sixth Street to turn into is probably the biggest problem reputation-wise and tourism-wise for the city. And what you used to have on Sixth Street, and again, I don't want to sound like Old Man Austin here—

McQueen: You sound like a classic Austinite.

Johnson: Here it comes.

Langer: —what you used to have on Sixth Street was a *bar* bar, next to a live music venue, next to a coffee shop, next to an art gallery. I could take you from Babe's to Black Cat to Mercado Caribe to Steamboat. You could go to Lovejoy's for a second and avoid music for a minute. Then you had Emo's at the other end and Flamingo Cantina. You had a mixed experience there that allowed both things to happen at the same time. Now it's none of that essentially. So now you have to go to Red River.

Daniel: But there's a difference between Sixth Street now and Red River now, and my concern is that all of the places that original live music is able to do business in are going to become Dirty Sixth because it's the only thing that can survive.

Moody: The numbers are better. I spoke with Britt about this before. We went to the state and we said: If we can classify live music venues and give them some sort of tax benefit, that's wise because of the extraordinary overhead that it takes to manage sound equipment, sound engineers, security, staff, all the extra money it takes to run a live music venue (see sidebar, page 81). The bar guys, they just get the bar money. They don't have all that extra money it takes to provide the office space for musicians to do their job. And if your rent changes, that's why you see people freak out. "I had it all planned out. I could barely make my margins. You move that rent number, and I'm gone."

Pitts: To James' point, we've been looking at what role the city has. In Austin, one thing I've learned from being here since 2003, coming from Nashville, is that everyone has a different perception of what the city should be doing—and the city should be doing everything. But with the rent hikes, say on Red River, we've been looking at ways to extend [venues'] hours three hours a week. In just the preliminary numbers that we're getting back, it could add 20, 25 percent to their bottom line every year, which could then kind of compensate for some of that high rent. The other thing is, going to the entertainment license that the Music Commission had recommended last summer to the mayor and council, of getting it more of a business license instead of kind of a sound permit now—it's in this no-man's land if it's treated like a land development code permit, with a lot of heavy duty notification and a lot of administration stuff. But if we went to an entertainment license, it could provide an opportunity and the framework for the city to incentivize live music for venues that really want to be an incubator and provide truly live music. That's when the city could say, "We're going to extend your hours." I'd like to see some kind of energy rebates as well. But at least just extending your hours on Red River three to fours hours a week could add significant income.

Moody: It would, just because most of those businesses were based off [of] paying rent 24 hours a day and they're monetizing that four or five hours a day. If they did happy hour business or private event business, if they were able to extend, that would totally help not only with the rent stuff, but people need to remember that the door business is usually separate from the bar business. The more freedom you get, the more you can contribute to artists and the more you can contribute to better gear, because we don't have a lot of great-sounding rooms in this town. We never have. But we could and we should, so that kind of stuff helps.

Daniel: Well, forgive my ignorance, what kind of venue or business is not allowed to be open for more than four or five hours?

Moody: It's not about "allowed." For example, if you think about 710—we used to go there—that club didn't even get moving until 10 o'clock at night and afterwards, and it had to close at 2. It was never cool to go to happy hour on Red River.

Thurmond: It's still not cool.

Daniel: So how is the city going to help by adding hours?

Moody: Well, a lot of it has to do with the sound. If you have sound times change, you can play at different times, keep the crowd in there. I've noticed like with the hotels, like when they come in, and you'll see, Cheer Up Charlies has started to grow their non-live music business, as an example of what all those clubs should do to be more sustainable down there. The Mohawk's been investing in that, too. So it's more about saleable hours. It's not necessarily about live music.

Collins: What I'm thinking about more organically is what we're all talking about: Everybody should be taking advantage of the live music that we have to offer. It is such a part of our culture. If you are living in Austin and you are not, shame on you, because you are missing out on some awesome things. There are a lot of Austinites who really do like live music, and they're just not doing anything. *Why* aren't they? What are those things? How can we break down those barriers? As a not-for-profit, I'm always looking at ways to help our musicians, not only through what I do but to get money in their pockets overall. We have this whole base of people—not just tourists, but Austinites who live here—who just aren't taking advantage of it. An example that came to mind is [when] we had a bunch of people over [to our house], and we had a HAAM event. It was at the White Horse. And I said, "I've got to go. I've got to show up." Not anybody in my house had been to the White Horse and they were like, "Well, we'll go with you." They had the best time. It was a great show. They were like, "We didn't know this was here." And they were all Austinites, maybe old like me. And the thing is they've got the money to spend, they like music. Once they were down there, they were like, "We're coming back." And that's the case: We've got so many people that we're gearing toward tourists and some of these other things. We're not thinking about how do we…

Moody: The local economy.

Music Makers' Reality

Thurmond: I'd like to switch the conversation a little bit to the struggles artists are facing. For the musicians here, what were some of the struggles you faced when you started out in Austin, and do you think that they've changed?

Johnson: I'm one of the few who have been here forever, born and raised here. And doing hip-hop and urban, we have always been separate from the music scene in Austin—a part of us is still separate—where we've always managed to book our own shows, find unconventional venues to throw our shows. When the census and other things come up, the urban part isn't so much tied down to those results. We can still put on events and bring out 500 people. And it'll be off the radar. The *Chronicle* won't write about it, or other publications won't write about it, which is why I'm happy I'm here with you guys today. And, so, as far as getting paid for booking, that issue only really comes into play when we go outside of the normal urban circuit, to venues on Sixth Street or Fifth Street, because then it's a whole negotiating thing. You have to understand their overhead, and you really can't get a piece of the bar anymore. So it's all about thinking outside of the box now, more than just, "Let's play downtown." A lot of venues, they don't have areas for DJs, they don't really have areas for hip-hop bands, so to speak. It's all live bands, and a lot of clubs took their stages down for a while. We went through that whole DJ phase, where a lot of clubs took their stages down and just made DJ booths. So now they went back putting in stages so the DJ booths are gone. So it's an ever-changing thing.

McQueen: I just moved to Austin, like, "Heeey, I want to be playing music." And that was like my whole plan when I moved here. I think I had a typical Austin musician experience. I moved here when I was 23, and I totally felt like I found my place. And all I wanted to do was play music and I'd work other jobs. I didn't really care about getting paid. I just wanted to play as much as I could. I'd play anywhere with electricity. Luckily, Austin was set up so that I could do that. Like, I worked part-time at the university for a long time and would play at night for years and years. And all my friends did that. We had the Austin Musician Money Recycling Program, where you get money from your friends who came and saw you and then you'd give it back to them when you went and saw them. I just feel really lucky that I moved to Austin when I did because I can't imagine being 23 now and just wanting to play music and have a part-time job and that being possible. I have a lot of friends who are musicians who are having their rental houses sold out from under them because the people who own them can't possibly not make a profit. There's not really great public transportation in the city, so if you have to move really far out, how do you get back in? I know there are kids still doing it, like those Raw Paw kids are still making awesome art and music and not really caring about the money.

Johnson: [*laughs*] That's true.

McQueen: I mean, I'm glad that they're doing it, you know? And I hope that that kind of musician still feels like they can move to Austin in 10 years because that's what makes Austin beautiful. Because when I moved here, I didn't know what I was doing, but I moved to a place where I literally just said, "I want to form a country band and play music." And I met some people at a club and they were like, "Well, I play guitar. Let me show you." It was so open. And when you hear stories about other industry towns, you don't hear that a lot of times. I'm hoping that, in my heart of hearts, everyone's going to bond together and be like, "We love our musicians and our creatives! Here's some money and some housing. Come!" [*Everyone laughs*] I don't know. I talked to a tech guy the other day, because we have a big tech culture here, and he had that weird tech mindset. "Well, if the market can't bear it and if you can't…"

Moody: Oh, that's the worst.

McQueen: "If you can't afford it, get the f*ck out." I just think that's a really unfortunate attitude to have.

Langer: But sometimes you got to look at it that way.

Thurmond: Why is that, Andy? Why do you need to look at it that way sometimes?

Langer: One of the problems with this town traditionally has been that we've been trying to run businesses like it's still 1974. And so you've got a lot of badly run businesses that aren't keeping up with modern-day business practice, because they've got these hippie-dippy ideas that you just shared. And what ends up happening is they have to fall by the wayside because that's how our economy works.

McQueen: Yeah, but the economy is just a bunch of individual decisions made on the part of a community. So literally everyone in Austin could *decide* that they wanted this to be a thing and support it.

Daniel: How many incentives are given to companies like Dell? Incentives happen. Why can't they happen for music venues and musicians?

Moody: That argument is a little frustrating when they say the market is going to do what the market is going to do and everybody has to deal with it. I think the city does have a vote on what it wants to be, but you have to create policy around that. As an example, there are developers telling me Red River is going to [be redeveloped], because it's obvious. The market will eventually get it. But we have a thing called Capitol View Corridors, where legally you can't build a building a certain height, otherwise you can't see the Capitol. That was a policy put in place. That's a law. So you can put policy in place that benefits the Capitol just like you can put policy in place that benefits your cultural economy, or whatever our gold is, and we haven't done a good job of that. In fact, if you want to place a big hotel—right now, there's no one you have to check with.

McQueen: That's crazy.

Moody: No one. And so if you want to drop a Hyatt on top of some live music venues, the music venues have to deal with the repercussions. The Hyatt doesn't have to check with someone that's in charge of a cultural office that says, "Hey, maybe you should do this, that and this, because we have musician loading zones and we have things that you're going to affect, sanitation, whatever." None of that exists. So right now, it's the Wild, Wild West. If you have the most money, and you have an OK drawing—don't get me started about architecture, because, holy shit, it's not going that well—you can get the permit.

Pitts: With a lawyer or a permit consultant.

Moody: Exactly. You can just get it. And the next thing you know, we're finding out later, when you see the trucks, and you're like, "What's happening?" No one's been notified, because they had the most money, and they moved the process quickly because they had someone. If there was someone to be able to police that stuff, not say, "Don't do it. This is how you do it." Because we're actually very pro-growth but managed.

Collins: Don't you think New Orleans probably has a lot of that—

Moody: They do a much better job.

Collins: —and we should probably go and figure that out.

Moody: New Orleans, you can physically look at it and tell that they care about that.

Collins: Yeah, I know.

Pitts: San Francisco passed legislation that will address that. And I think the mayor is putting together a team of folks that will be introducing policy the first of March to address that. I will also say, going back to affordability, I think this is a perfect example of other city policy impacts. When the council was talking about the granny flats, which was basically allowing these homeowners of a certain lot size to have an apartment house or something like that. I think there was an effort to try and engage the music community, because one of the things that they were selling—I know a lot of people that rent to musicians purposely for $500 a month because they like that, this is their thing—there was a time that the music community could have risen up and actually helped push that legislation through to allow that. We've learned from the census that there are state provisions that are preventing the city to spend city dollars on providing affordable housing for a specific group.

Collins: Well, you know what? Shame on our musicians a little bit, because if our music community came together, we would have a bigger coalition and have more power than teachers, than firefighters. We would have a big coalition of people. We just can't seem to—

McQueen: We're not the most organized group in the world.

Moody: That's why when he says "music community," I'm like, Who are you talking about? Who do you call? I've lived in Bouldin Creek for 15 years, and it's pretty weird that the most feared organization in Austin, Texas, is the Bouldin Creek Neighborhood Association. [*Everyone laughs*] We can't even get together a music community. We have these sub-communities. We have these bubbles. But we have not found a way to put the bubbles together into one bubble. And so the divide a conquer strategy works.

Collins: You're exactly right, because, you know—and this is a little bit off—but doing all the HAAM open enrollment stuff, I can't even get people to come in or motivated to get them moving for something that's free and good for them. Because we can't get the communication out there and you can't get people moving. That, to me, is something that as leaders we should be trying to figure out how we do that. There's a lot of power here. There's a lot of power sitting at this table.

Langer: Look at Nashville and its music commission. Joe Galante is at the head of it. He's the most powerful person outside of [Scott] Borchetta in country music. And then you go down that list of who's on that committee, and it's literally every major label and publishing head and the people who are doing the business of music in Nashville. And it's not their No. 2 or 3. . It's the guy at the top of the pyramid. And they go to these music committee meetings. I'm assuming that they're going to these meetings because their name is on the thing. And, I mean—

Moody: We don't do that.

Langer: We don't do that. And so, you know… I can count on one hand the number of times that I've seen Moody, [C3 Presents co-founders Charles] Attal, [Charlie] Jones, [Charlie] Walker, [SXSW Managing Director Roland] Swenson and—I don't know who I'm missing there—in one place. It was the announcement of AMP [Austin Music People]. How many years ago was that?

Moody: Five.

Langer: That might be the only time they've ever all been in the same room to my knowledge. And that's crazy. Because they all have competing agendas—I'm mean, I'm sorry, they all have—

Moody: Shared interests.

Langer: Shared interests, and they act like they have competing agendas. And I think that what you have are, in a lot of these commissions and committees and the people that are willing to step forward no matter how well intentioned and whatnot they are, they don't have the power base to go and move people in the same direction, and everything is splintered.

Collins: It's true.

Moody: I recognize the same thing. Being from New Orleans, it's one of the reasons AMP exists. Because we had to create it. We didn't have this central advocacy group, and it didn't become what we hoped it would become, but it became something of value and so we had to take a small victory over what we hoped would be a larger one. I think we have shifted, though, in that we're not as competitive of a music culture as we were when I got here. I'm collaborative with all the guys that you listed off now, but I wasn't and was just learning about the environment. But we're still just as disconnected than we should be.

PITTS: Yeah, I'd agree with that. There are a lot of people that are disenfranchised. They're just—

Moody: Off on their own.

Langer: I'm not advocating for a smoky room where the same six people make all of the decisions. Don't get me wrong.

Moody: Neither am I.

Collins: Not unless I'm in there. [*laughs*]

Moody: No, it should be a big room of 50 people that represent 5,000 people.

Johnson: Right, active participants.

Langer: Exactly.

McQueen: Well, I think, just speaking for a musician perspective, it's not until very recently that I think any of us felt, like, loved or cared about. For me, the music census was like, oh sh*t, people are paying attention to us.

Thurmond: But, I'm wondering though, do other cities have HAAM and SIMS and these types of organizations that really are for the musicians to help with their medical needs?

McQueen: Well, maybe I should have said I felt loved but not listened to.

Thurmond: That feels very unique to Austin, but I might be wrong about that.

Pitts: It is.

Moody: Those come from the heart, but those weren't developed by any government effort.

Collins: Those were individuals. To my knowledge, like for a HAAM or a SIMS or anything that does with health-care issues, really there aren't very many. New Orleans has their musicians' clinic, which is connected to the teaching medical center, so they have that. I know that Nashville actually called HAAM and Ray Benson to get advice on what they were going to do. We are working with Ian Moore in Seattle to do something that they want to call SMASH, and we're actually trying to co-sponsor with them. But, no, Austin is really unique in that. But I don't think HAAM would have started if you didn't have someone like a Robin Shivers who had that kind of influence, who had that kind of power, who had that kind of wealth and all of those things together. And her legacy, we've been able to build on it, but that's a hard thing to do. Now when people call me and ask me how can we do that in our city? I give them a lot of information. There are a lot of pieces there, but the city has to care about it. And Robin pushed that through.

Moody: And by the city, you mean the people of the city. I mean, one of the reasons I moved here to Austin was because, when I came here, I was like, They have a *what* for *who*? They have mental health services for musicians? Well, OK. Great.

Collins: By the city, I mean the people, but I also mean health-care partners and even the city officials themselves. Everybody's *got* to care. And it goes back to, you know—I tell people all the time, again, if you don't care about music you should because it's your economic engine driver. And so you can get there one way or the other. I don't care which way you get there, I just care that we get there.

Protecting our Artists & Venues

Thurmond: I want to make sure we talk about the aging musician population. When you're a struggling artist and young, struggle is part of the deal. If you decide to be in the creative class, struggle is part of it. Reenie, older artists made this the Live Music Capital of the World, so what are some of the concerns that HAAM is facing now with aging musicians?

Collins: Well, I think we're learning. One of the things I'm seeing is we have a lot of musicians who are aging off of HAAM and onto Medicare. And what we're realizing is that we weren't thinking that far. So, there's a whole thing happening in health care in our country. On paper, it feels like people are taken care of. Oh, we've got the Affordable Health Care Act or we've got Obamacare. Oh, we've got Medicare. On paper, it looks like people are taken care of. But when you really get down to it, there are still a lot of gaps, and in particular in Texas, since we didn't do certain things. So what we're finding is where the aging musicians are, yes, they're moving on to Medicare, but they might not know how to use it. They might not be very well educated in it. There are a lot of tricks to anything in how you sign up and what you pick and what are the other agencies that we can get resources from. And one of HAAM's big things has really always been to be collaborative and to look at what else exists and see if we can be collaborative and make things work. And so for the aging musician piece, really this year, it's become one of my focuses to say, "We need to look at this and see how HAAM can expand services or what we need to be doing." And we will be. I wish I could tell you I have a lot of answers, but I don't. But I will say I think it's a need. I will also say that there's a need for housing. It's a need for a lot of areas with our aging musicians, because especially if they can't play a lot anymore, they really don't have any income and you know that they don't have their 401K or their pension in place. I know Marcia Ball and Nancy Coplin and some folks have come together to create HOME [Housing Opportunities for Musicians and Entertainers], which is supposed to address some of our aging musician needs. But these are all small pieces. I kept seeing the mayor's emails that went out about helping the homeless vets, which I think is awesome. I do, I think it's incredible. But I'd love to see that help a musician.

Thurmond: James, you represent venues here. In the past year, we've had some closings due to rent getting too high. What are you facing as a venue owner?

Moody: It's a little bit harder. There's some optimism because the city's growing. So you have to assume that a lot of the people are moving here because of the music. You have to *hope* that part of their plan is to get their condo and see a show. [*Everyone laughs*] I personally am not a pessimist about new developments if they mean new residents because I actually think you can be a convert. I think you can actually fall in love with some of what we do and totally change where you hang out and how you dress because the city will do that to you. It definitely did that to me. And so I have some optimism about the growth of the city. But the economics of running a live music venue relative to increasing rental rates, that is a very real threat. And I think we all know that a lot of these clubs don't have the best accounting in the world and the best advisors and the best mathematical approach anyway. And so you move one thing to the left or right and it's over. It's literally clubs that are planning on being here during South By know that they have to close within 30 days. It's hard right now. I mean, there are some good things happening. Like, I love what Will Bridges just did with Antone's, and it's a signal that we're not going to give up. And I think it's a great anchor to what's happening on Red River and we're doing our best, too. But our venue has been under threat two or three times [in 2015].

Thurmond: You turn 10 this year?

Moody: We turn 10 this year. Well, if we make it to August. And I give Britt credit, because Britt from a distance, while making music and traveling around the world, he was like, "What's going on down there because I hear that things are in trouble." And that is important that everyone asks, What does the trouble mean? How do we define it? How do we help? Which is what Don's office is trying to help, too. Because at this point, for me, I just want to keep it open and alive. It's not a career endeavor for me. It's just now it's so important to the community to make sure that my club stays open relative to those other clubs. Contiguous music streets, there's only one or two of them in the United States left where you can go see three shows in one night off of one parking spot. But if the city takes parking spots or charges for them and puts it into the general fund… One of the reasons we used to do so well down there is because we had free parking. Red River was [free]. And so if you notice, the free parking on East Sixth Street has shifted all the show-goers down there for a while. And it's just become more difficult. I don't know how better to answer it, because it's kind of a complex problem, but it is *very* slender margins. The stuff that Don is suggesting I think should be seriously considered just because those margins, generally if you do well, they get shared.

Langer: Let me throw one thing out there that's probably too complex for a format like this. So the city has this culturally based aesthetic, artisans and whatnot, and inconsistent with that would be tooting your own horn, sort of marketing and presenting who you are and what you've accomplished. I think for a long time that was kind of frowned upon here. And probably still is aesthetically. You've got people moving here who live music isn't part of their DNA, right? And then, you know, somebody sends up a trial balloon: Mohawk's in trouble; there's dumpsters that need to be moved next door at Cheer Up Charlies; there's a hotel encroaching on the wall. You look at the comments on that story in the *Statesman* on a Facebook page and it's, "Well, I don't care about that. There's traffic. Traffic is nuts. And we weren't meant to have traffic like this in the city." Etcetera. What I think everyone has done a bad job of, a really poor job of, is readjusting to the new world of marketing and social media and whatnot and saying, "This is who we are. This is what we accomplish." You look at C3 [*producers of ACL Music Fest*] and the money—significant money—they give to the park, the park that people play in and raise their children in and whatnot the rest of the year. Yet those neighborhoods complain that they lose access to those parks for two weeks. Well, look at what C3 is leaving financially behind. But C3 doesn't say that. They'll mention it in passing, but they're not taking the kind of credit they should be for the money they're giving to the park. And South by Southwest,

same story only with tourism dollars, etcetera. And I think you've got these three big organizations doing a relatively poor job of expressing what they've brought to the table. And I think that feeds on itself when one of these things happen and everyone says, "Oh, well, we've got all these other problems in the city and are willing to let music sort of slide by."

Daniel: So what's the venue for touting themselves in that way?

Langer: I don't know. [*Everyone laughs*] Well, I think that what they end up doing is commissioning an economic impact study. Whoever pays for an economic impact study gets the study they're looking for. That's how those work. And it's a document that gets one day's worth of press and then nobody reads, much like this survey. The survey came out, generated more than one day of press. It generated a week's worth of press. But it didn't drive people to go read the survey, and I think these economic impact studies are the same. I don't know how you politely toot your own horn.

Daniel: Maybe the city is supposed to be doing it.

Moody: I agree. Because those organizations talk about this stuff individually, and they don't talk about that stuff collectively of what the industry does very well. We don't talk about [merchandise], for example, being a part of the economy. You're talking about is a huge part of our creative music culture. You roll all that stuff up and you talk about the money that moves through sound equipment, merchandise, staff, you're talking serious economic impact. We've never once done that properly.

And the last thing I would say to answer your venue question is that it is an all-day process. For a big show, everything has to start being organized at 2 in the afternoon. And that's not a bar, that's a live music venue. And those things are completely different animals. It takes some real work to put on a Spoon show.

McQueen: Everyone's just in their own camps regardless. There's the venue people over here, and then you have all these individual musicians just with their heads down trying to do their next thing or play their next gig.

Johnson: Everybody's trying to survive.

Moody: But we can't do it without them; they can't do it without us.

McQueen: Exactly.

Moody: So there's not enough collaboration that I thought would naturally be here.

Pitts: No, our approach in reading the census—my sports analogy is coming back and focusing on the fundamentals: blocking, tackling, special teams. If you look at the national championship last night, it was special teams, blocking and tackling that won the game. But we've lost our way—the city has lost focus on the basic fundamentals. For us, it's streamlining the process; make the permitting process more friendly, less arduous; providing more opportunities for the venue; more opportunities for the musicians and for the music business. And what does that look like? It's different from each sector.

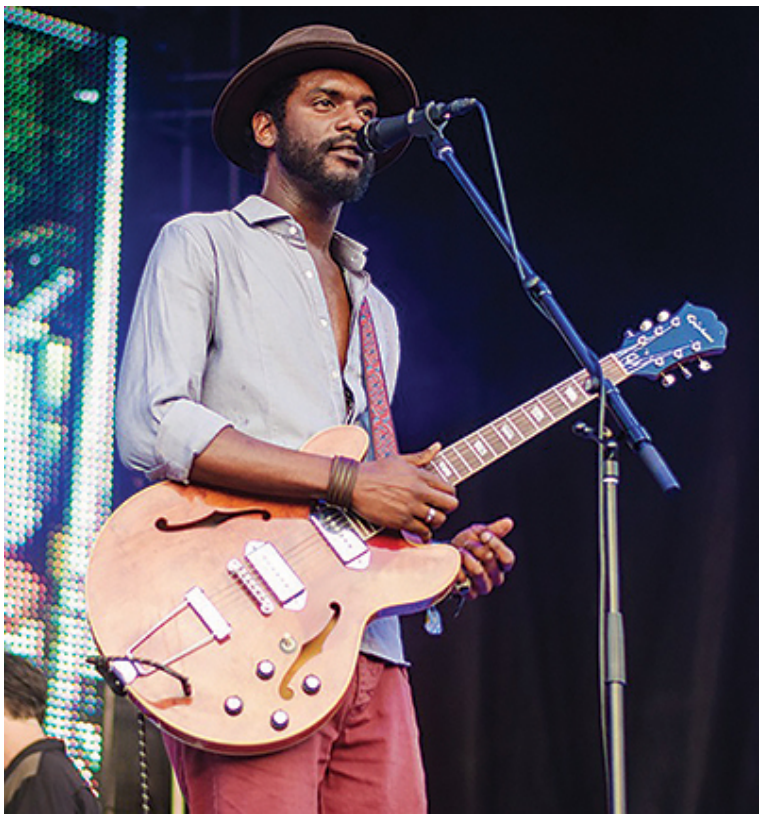
Moody: And the last thing I would say to answer your venue question, just so readers know, is that it is an all-day process. For a big show you start when the sun is out. And people don't realize how much planning for one show, and how much staffing and how much investment it takes to properly have a good-sounding, well-lit, secure, well-done show with the lines managed, and the bar lines, and everything has to start being organized at 2 in the afternoon. And that's not a bar; that's a live music venue. And those things are completely different animals. Holy sh*t, it takes some real work to put on a Spoon show. Like, you're starting in the morning with your text messages going.

Langer: But then during those four hours that you get to sell alcohol, the TABC takes 17 percent of that right off the top.

Moody: Absolutely. It's 14, but that was one of the conversations we were having, if you have to make all those investments in sound equipment and staff, and you wanted to look good and sound good and deliver on the Live Music Capital of the World idea, which is a great show, if you spent all that money and did all that work, could you qualify as a live music venue and then get a tax benefit? Maybe it's 2 percent or 3 percent, and put that back into your infrastructure, put that back into your musicians, put those savings back into the music economy. That's what we were asking the state of Texas to do. We've got some language; we're going to keep asking.

Pitts: I think we can resurrect that, from the meeting we had with the governor late last year.

Moody: I still think it's a good idea.



THE GOOD STUFF

Thurmond: Let's talk about the positive, like our hip-hop scene. There are lots of bands coming out of Austin's, but I don't know if it rivals Houston yet.

Johnson: It's completely different from Houston. The thing with Houston, what they got figured out that we really haven't is the support of the whole town and not just pockets. Just like in the rock scene or any other genre, you have certain hip-hop groups that just do their own thing. All are successful in their own right, but if we were to come together, as a bigger pool, then we could start really having a voice. But, you know, guys are doing a lot of music. They're becoming businessmen, which is what I really push, as far as owning their music, becoming their own label. So we're moving in that direction, as far as ownership of our art now. Usually we just put it out there and hope somebody books us or writes about us, "Please notice us." But now we're stepping up ourselves, saying we're going to do our own thing regardless. Because hip-hop has been in Austin for many, many years, before I even got into it. It's going to be here for a while, and it's only going to get better. So it's always a positive with that.

McQueen: I agree with what James was saying, the influx of people presents a real opportunity. Like if what Andy was saying, if you say to everyone that's moving here, "Hey, you're living in Austin. Why not, like, *live* in Austin?" You know what I mean? And if they did, it could be a huge boon to musicians. There's a lot more non-industry here, so musicians who can't make a living say just from performing, there are more jobs available, which is potentially really great. And also, I think that Austin is kind of growing up, and everyone is upset about it. They're always upset about it because we all move here in our 20s and fall in love with it and then get really pissed off when it changes and our favorite club closes. Now we have the potential to maybe get a lot of disparate groups together. I think one thing that came out of the census was that a lot of groups stepped up and said, "Hey, you missed us."

Johnson: Totally.

McQueen: Like you totally missed our voices, so I think that's a real concern too now, integrating genres and not just rock and country into the conversation in Austin. And now we know we have all these businesses. Maybe they can start to connect, maybe the city's going to start investing in the music industry more. I have high hopes because Austinites are typically pretty cool and they like the arts and, you know, maybe someone will read this article and decide to take some action.

Daniel: I would love to know from Don how uphill of a battle it is. You're with the city, but you're on our side. [*everyone laughs*] How much struggle is it to get some of these ideas that we're talking about here? They're all ideas, but we need to push them through in some way, right?

Pitts: Absolutely. First of all, I'm optimistic that there's finally legislation coming. I've always looked at myself as the local that jumped across the castle wall and said, "Come on, come on. Let's go." My frustration is that I'm telling the people that are communicating with our office or the music commission, "It's here, here, here." I'm telling you where the passageway is and for whatever reason, everyone is just looking. So finally, after about a year and a half of touting the entertainment license, the mayor is putting together a list of numerous resolutions to bring forward the first of March. But to answer your question, if we all got on the same song sheet, it wouldn't be an uphill battle.

Daniel: When you say "we," you mean?

Pitts: We, the music community. The music community in general, the whole rising tide lifts all boats. It's like we all know that, but we don't do it. With me, every day is like herding cats. Fortunately, I think my focus—from my bosses to the executive team of the Economic Development, from the census to council members, the policymakers are saying, "What are you doing in permitting?" If 100 percent of our focus was really on industry development, I think we could accomplish a whole lot more. I spend about 70 percent of my time plugging the holes up in a permitting process or making things happen that aren't necessarily supposed to happen happen. But if I could focus solely on industry development, I think I could do a better job of herding cats, coordinating the different aspects of our community to say, "Hey, here's the song sheet." I mean, I could be the chorus director.

Daniel: Do you need more staff so you don't have to be messing with the permit side?

Pitts: It's more staff. It's also a commitment, a focus. When the office was created, it was kind of an agreement.

Moody: It was casual.

Pitts: It was like, "We've got this problem with venues and sound complaints. We'll start this office if you can help us fix this first." I think for the most part, it's as thick as it's going to be until the whole thing just needs to be imploded and start anew.

Moody: And then we have to do the community part better. There has to be one, like with representation and agreement, which we don't quite have.

Pitts: Right. And what I'm learning now, so instead of waiting on that, we're starting to kind of map out how my office plays that role more of engaging every aspect of the community. The frustrating thing about the census, though, is we did find out that 26 genres were represented in the census. It was disheartening to me, because we went out and hired canvassers to go to hip-hop shows, to Latin shows, to all kinds of shows just to get musicians and music people to participate for 15 minutes without getting car insurance but—[*laughs*]

Moody: All I'll say to answer your question about positive things is this: Beerland is still alive and well. [*everyone laughs*] And that is always a signal for me if we can make it. So Beerland is still alive and well, while ACL Live is still growing and introducing a whole new market to us. We had no idea that those artists and those ticket prices could be sustained by our community. And it's folks that weren't going to shows as much that you [*to Reenie*] were talking about, and so the two ends of the spectrum are pretty interesting to me. Bringing Antone's back, which was a very risky thing to do after its tenure, I think is an awesome signal.

Langer: Bringing it back as a tightly programmed club, very genre specific. It's a real experiment and real smart.

Let me throw one more positive thing out: music, despite a dismal music business, appears to be of the consistent quality that the town has always produced. I can go to Bonnaroo and see Spoon, Shakey Graves, Gary Clark Jr., Wind and the Wave and Grupo Fantasma all in one place, representing us at arguably the second or third biggest festival in the country. And then, I can go see Carson McHone at White Horse or I could go see Sweet Spirit, and the consistency is what it's always been.

Moody: It's also not show based, where you're not going to Antone's necessarily for who's playing. You're going to Antone's for what it feels like regardless of who's playing. You know it's going to be a good show. Those are the right stewards, and I like that team. Those signals I would characterize as very positive signals. Even the Red River guys, the Red 7 guys split up and opened two new clubs. So Red 7 went away, and then they opened Sidewinder and Barracuda, which, you know, they're bringing back that vibe, which is really kind of interesting for Red River. So there are some positive things. I just don't want anyone to read this thing and think it's OK because it's not OK. [*laughs*]

Langer: Let me throw one more positive thing out and refocus this for a moment: Music despite a dismal music business, appears to be of the consistent quality that the town has always produced. In other words, I can go to a Bonnaroo and see Spoon, Shakey Graves, Gary Clark Jr., Wind and the Wave and Grupo Fantasma last year. I mean, all in one place, representing us at arguably the second or third biggest festival in the country. And then, I can go see Carson McHone at White Horse, or I could go see Sweet Spirit and the consistency is what's it's always been. Despite the dismal music business picture, somehow the music seems consistently—

Moody: The shows are great.

McQueen: And also, I would be remiss in not pointing out that now we have a population that can support organizations like Black Fret, which is a music patronage organization. Just like SIMS and HAAM, it's something that could only have been born in Austin. I personally received $10,000 from people so that I could make a record and make a giant art installation. It's a crazy concept, but I don't think in the past Austin had the population to maybe support it. But now you can say to people like, "Pay $1,500 a year and support musicians." That's huge.

Collins: But even on just the most basic, organic level, what I was going to say the positive is that there is still really good music in this town. And there's really good people in this town. As a not-for-profit, I am constantly amazed at the number of people who come in with their generosity, small or big, to support music. HAAM couldn't exist in another town probably. So there's a lot of good going on.

Thurmond: Britt, do you have any good stuff to add?

Daniel: Not more than what's just been mentioned. I mean, I still love Austin. I still think Austin is a great place. It's a different place than when I first moved here, but it's equally great.

Moody: So give him credit. The one thing that he does that's really nice and that I would say for all musicians to think about is no matter how successful his band gets, he will find new clubs that are opening, and he will go play small shows in new clubs still to this day. And he knows this, but we were struggling when he came and said, "I have to play the Mohawk against advice." And we could barely put it together because we didn't

have all the equipment and it was great. But he's been doing that consistently over the years and if other people took example from that—

Langer: Well, they do to some degree. And that's great, because this is what it is to be a successful Austin musician. Shakey Graves has spread that around to a bunch of different clubs that might not have been there at the beginning for him. Gary Clark Jr. does that. You're about to see White Denim do that at four different clubs for a month-long period.

Moody: I just think it should be celebrated and noticed because not everyone knows. If he plays a show at Hotel Vegas, not everyone knows. But it's important. We have a lot of successful musicians. And the more they can come back and do that—thank God for Willie, he can play any room he wants to in the world and he still comes back and plays.

Langer: Thirty years ago, Willie taught Austin musicians that the way they can give back, because they might not have money, is to play shows for nonprofits to raise money and that's something that consistently Austin's done better than anywhere else. When something happens, whether it's a natural disaster or an accident or whatever, you don't have to ask Austin musicians twice to do that.

The 2019 Economic Impact of Music in Texas

Texas Music Office

Office of the Governor, Greg Abbott

Overview

The return on investment associated with economic development is normally a longer-term payback, as external events tend to drive the fortunes of a regional economy in the near term, per the boom and bust cycle of sectors such as energy and real estate. However, the State can have a more significant influence on its economic fortunes over the longer run. Much of Texas' future will depend on a highly capable workforce, innovation and entrepreneurship, clusters in knowledge industries, the presence of world-class research universities and other institutions of higher learning, and public policy that supports growth and development. Embedded in all of the above is the interrelationship between creativity, innovation, and quality of life. This brief analysis updates the impact of music done twice previously, using the same methodology and sources of data, as well as discussing broad areas of additional influence on the state's economy.

Inputs and Methodology Used in the Modeling Process

Inputs

Any effort to measure the role of music in a local economy will by definition involve classification decisions by the analyst, since music does not map directly to standard industrial classification patterns. For this study, there are two broad categories of activity that comprise the music sector:

1) Music business (which includes commercial music, music-related media, music production, distribution and sales, music industry, tour, and recording services, performers, and music-related manufacturing, transportation, and retail activity (including venues)); and
2) Music education (both primary and secondary)

This analysis uses the most current edition of the Texas Music Directory produced by the Governor's Music Office as the data source for job estimates. This information is then combined with wage data from the Quarterly Survey of Employment and Wages (QCEW) maintained by the Texas Workforce Commission to estimate annual wages for each segment within the broad categories. These annual earnings estimates are then crossed against data from the 2012 Economic Census to derive estimates of annual revenue by sector, allowing an overall assessment of the direct "footprint" of music business and music education in Texas. See Table 1 below for the results.

Table 1: Texas Music Industry 2018 Direct "Footprint" ($Billions)

	Jobs	Earnings	Revenue/Sales
Music-Related Business	81,493	$3.280	$9.631
Music-Related Education	15,530	$0.847	N.A
Total Annual	**96,923**	**$4.127**	**$9.631**

Source: TXP, Inc.

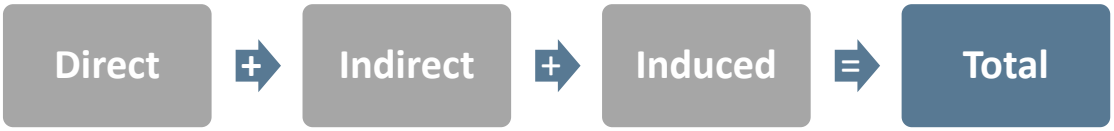
Economic Impact Methodology

In an input-output analysis of new economic activity, it is useful to distinguish three types of expenditure effects: direct, indirect, and induced. Direct effects are production changes associated with the immediate effects or final demand changes. The payment made by an out-of-town visitor to a hotel operator is an example of a direct effect, as would be the taxi fare that visitor paid to be transported into town from the airport.

Indirect effects are production changes in backward-linked industries caused by the changing input needs of directly affected industries – typically, additional purchases to produce additional output. Satisfying the demand for an overnight stay will require the hotel operator to purchase additional cleaning supplies and services, for example, and the taxi driver will have to replace the gasoline consumed during the trip from the airport. These downstream purchases affect the economic status of other local merchants and workers.

Induced effects are the changes in regional household spending patterns caused by changes in household income generated from the direct and indirect effects. Both the hotel operator and taxi driver experience increased income from the visitor's stay, for example, as do the cleaning supplies outlet and the gas station proprietor. Induced effects capture the way in which this increased income is in turn spent in the local economy.

Figure 1: The Flow of Economic Impacts



Once the ripple effects have been calculated, the results can be expressed in a number of ways. Three of the most common are "Output," equivalent to sales; "Earnings," which represents the compensation to employees and proprietors; and "Employment," which refers to permanent, full-time jobs that have been created in the local economy. The

interdependence between different sectors of the economy is reflected in the concept of a "multiplier." An output multiplier, for example, divides the total (direct, indirect and induced) effects of an initial spending injection by the value of that injection – i.e., the direct effect. The higher the multiplier, the greater the interdependence among different sectors of the economy.

Results

Combined, music business and music education directly account for just under 97,000 permanent jobs, $4.1 billion in annual earnings, and just over $9.6 billion in annual economic activity, up from almost 95,000 jobs and about $8.5 billion in annual activity during 2017. The ripple effects associated with the direct injection related to music business and music education bring the total impact (including the direct effects) to over 209,000 permanent jobs, $6.5 billion in earnings, and $23.4 billion in annual economic activity. The State of Texas also realizes approximately $390 million in tax revenue from these impacts.

Table 2: Summary of Texas Music Industry 2018 Total Economic Impact ($Billions)

	Jobs	Earnings	Revenue/Sales	TX Tax Rev.
Music-Related Business	184,260	$5.930	$20.017	$0.311
Music-Related Education	25,628	$1.598	$3.367	$0.079
Total Annual	**209,888**	**$6.528**	**$23.384**	**$0.390**

Source: TXP, Inc.

Conclusion

The figures outlined above at least partially document the substantial role that music plays in Texas' economy, and the fact that is has grown steadily from the initial findings done in 2015. However, there is more to the story. Much energy and effort have gone into analyzing the reasons that drive economic growth in Texas, with an exceptional range of activity and opportunity in music and the creative space clearly a major factor. Texas is a place that appreciates creativity and culture in a variety of evolving forms, and the incredible diversity of the local scene undoubtedly serves to both attract and retain talented people. This in turn has a significant impact on business recruitment, retention, and expansion, as well as local entrepreneurship. Moreover, music is a crucial element of "Brand Texas" that draws visitors from across the globe. As Texas looks to its economic development future, creativity is a fundamental comparative advantage – the goal remains to identify the key investments, policies, and regulatory changes that can support the infrastructure necessary for sustainability and growth.

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The Economic Impact of Music

2016 UPDATE

TXP, Inc.
1310 South 1st Street; Suite 105
Austin, Texas 78704
www.txp.com

Overview

Music and its prospects are a subject of much conversation in Austin these days, as a range of factors that largely boil down to increasing costs and uncertain revenue streams have put pressure on local musicians and those who support them. The connection between culture, creativity, and economic activity has been a foundation of local economic development thinking since the turn of the century, and was a strategic economic development focus for the City as Austin experienced explosive growth over that time. TXP has addressed this relationship locally as it pertains to music, beginning with an initial study in 2001, followed by updates in 2007 and 2012. This paper provides an additional update to the measurements done previously, using 2014 data as the basis of analysis.

Definitions and Assumptions Used in the Modeling Process

Definitions

Any effort to measure the role of music in a local economy will by definition involve classification decisions by the analyst, since music does not map directly to standard industrial classification patterns. In this case, TXP has defined music as comprising the following:

1) Primary Music (which includes production, music video, industry, tour, and recording services, performers, and commercial music);
2) Music-related tourism (tourism influenced by music).

These categorizations are by no means definitive, but represent TXP's best effort to capture the range and scope of Austin's music activity in a manner that is both reasonably comprehensive and consistent with our previous local work in this area.

Assumptions

Since this analysis is an update of previous work by TXP, data on the direct impact of music was either obtained from the original sources or projected forward from the recently available baseline information from public sources. Information from the Austin Music Census was incorporated, while estimates of the role of music in Austin's tourism industry relied on several studies commissioned by The Austin Convention & Visitors Bureau. These studies examined, among other things, the relative appeal of attractions that brought visitors to Austin. Once the scores were normalized, questions concerning the variety of attractions in general, the range of art and cultural offerings available, and music and nightlife were used (in combination with data on tourism in the Austin area from Dean Runyan maintained by the Governor's Office of Economic Development) to calculate the role of music in attracting tourists to Austin.

Economic Impact Methodology

In an input-output analysis of new economic activity, it is useful to distinguish three types of expenditure effects: direct, indirect, and induced. Direct effects are production changes associated with the immediate effects or final demand changes. The payment made by an out-of-town visitor to a hotel operator is an example of a direct effect, as would be the taxi fare that visitor paid to be transported into town from the airport.

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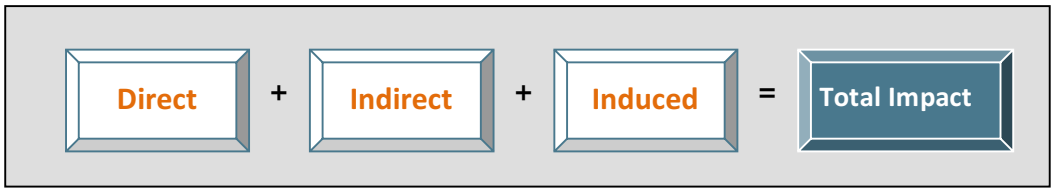
Figure 1: The Flow of Economic Impacts



Once the ripple effects have been calculated, the results can be expressed in a number of ways. Four of the most common are "Output," equivalent to sales; "Value-Added," which describes the difference between a firm's top-line revenue and its cost of goods sold (exclusive of labor-related costs); "Earnings," which represents the compensation to employees and proprietors; and "Employment," which refers to permanent, full-time jobs that have been created in the local economy. The interdependence between different sectors of the economy is reflected in the concept of a "multiplier." An output multiplier, for example, divides the total (direct, indirect and induced) effects of an initial spending injection by the value of that injection – i.e., the direct effect. The higher the multiplier, the greater the interdependence among different sectors of the economy.

Summary Results

In 2010, the collective impact of music and music-related tourism accounted for just over $1.6 billion in annual economic activity (output) in the local economy, supporting over 18,000 jobs and producing almost $40 million in City of Austin tax revenue. At that point, while the economic activity skewed slightly toward music as being the creative sector of Austin's economy, other indicators suggested that music-related tourism had moved past the music itself in terms of local economic impact. This gap has widened considerably in the past four years. While the collective impact of music and music-related tourism now exceeds $1.8 billion annually, over two-thirds of the jobs are now associated with the tourist side of the equation, compared to 56 percent in 2010. Put another way, the impact of music-related tourism accounted for 3,780 more jobs in 2014 than four years previously, a gain of 37 percent. By contrast, music and its secondary effects saw jobs fall 1,205 over the same period, a 15 percent decline. The following summarizes the analysis. See Appendix 1 for detailed results.

Table 1: Total Music Sector Economic Impacts in 2010 and 2014 ($millions)

2010	Output	Value-Added	Earnings	Jobs	City Tax Rev.
Primary Music	$856.10	$478.58	$230.04	7,957	$9.66
Tourism/Music	$806.25	$485.19	$244.65	10,191	$28.40
Total Annual	**$1,662.3**	**$810.82**	**$401.17**	**18,148**	**$38.06**

2014	Output	Value-Added	Earnings	Jobs	City Tax Rev.
Primary Music	$726.46	$406.13	$195.20	6,752	$8.20
Tourism/Music	$1,105.32	$665.19	$335.41	13,971	$38.93
Total Annual	**$1,831.7**	**$1,071.31**	**$530.61**	**20,723**	**$47.13**

Conclusion

The data bears out the conversation alluded to above, as it is clear that the local primary music industry is experiencing a range of challenges that add up to a smaller footprint than four years ago. Meanwhile, the tourism side of the equation is thriving, a dichotomy that logically can't continue indefinitely. Beyond the festivals and concerts that are destination events, primary music helped create an environment in Austin that appeals broadly to visitors of all stripes; to the extent that it is no longer healthy and viable, both sides of the equation inevitably will suffer.

APPENDIX

A1. Detailed Total Music Economic Impacts (2014)

	Output	Value-Added	Earnings	Jobs
Agriculture, etc.	$651,933	$233,769	$92,829	6
Mining	$3,566,036	$1,812,045	$753,464	5
Utilities	$28,278,169	$17,213,020	$5,599,560	54
Construction	$9,389,054	$4,667,513	$3,436,390	88
Manufacturing	$50,078,144	$18,823,537	$10,753,540	207
Wholesale Trade	$39,001,084	$26,312,107	$12,178,235	187
Retail Trade	$108,055,478	$70,788,637	$36,799,481	1,508
Transport & Warehousing	$24,037,732	$13,157,689	$9,127,626	232
Information	$300,705,920	$124,338,972	$64,177,585	1,169
Finance & Insurance	$94,000,153	$54,620,551	$26,021,452	471
Real Estate	$149,000,352	$110,519,318	$11,255,395	495
Professional Services	$85,664,418	$58,204,323	$40,066,913	659
Management of Firms	$8,901,731	$5,502,339	$3,670,494	48
Administrative Services	$46,509,609	$31,211,677	$20,771,182	959
Educational Services	$9,731,035	$5,522,762	$3,962,422	162
Health care	$59,057,115	$36,567,009	$27,730,583	744
Arts/Entertain/Recreation	$330,469,765	$215,151,619	$105,090,722	5,661
Accommodation	$196,535,752	$126,498,083	$57,612,075	2,251
Food Services	$248,120,857	$129,100,163	$78,653,507	5,259
Other Services	$40,026,774	$20,312,169	$12,136,495	483
Households	N.A.	$718,718	$718,723	72
Total Annual	$1,831,781,11	$1,071,276,02	$530,608,675	20,723

A2. Detailed Primary Music Economic Impacts (2014)

	Output	Value-Added	Earnings	Jobs
Agriculture, etc.	$177,025	$70,810	$35,401	2
Mining	$902,829	$460,266	$194,707	1
Utilities	$6,780,069	$4,354,823	$1,345,247	13
Construction	$2,513,759	$1,239,177	$920,432	23
Manufacturing	$20,959,797	$8,001,544	$4,832,268	87
Wholesale Trade	$11,665,968	$7,877,626	$3,646,327	56
Retail Trade	$22,305,189	$14,622,291	$7,593,564	311
Transport &	$8,815,861	$4,921,304	$3,363,117	88
Information	$258,262,227	$101,240,776	$53,756,767	998
Finance & Insurance	$34,095,075	$19,950,753	$9,469,829	172
Real Estate	$49,106,821	$36,573,429	$3,752,530	162
Professional Services	$40,715,822	$28,147,025	$19,028,161	322
Management of Firms	$2,513,759	$1,540,120	$1,044,336	13
Administrative	$17,808,746	$12,232,449	$8,301,588	408
Educational Services	$3,487,399	$1,982,683	$1,398,349	56
Health care	$21,721,006	$13,436,221	$10,177,853	260
Arts/Entertain/Recreati	$195,312,026	$133,601,003	$57,119,884	3,304
Accommodation	$4,620,361	$2,974,025	$1,345,247	53
Food Services	$11,117,190	$5,788,728	$3,522,422	235
Other Services	$13,577,841	$6,833,177	$4,088,842	159
Households	N.A.	$265,538	$265,509	27
Total Annual	$726,458,771	$406,113,767	$195,202,379	6,752

A3. Detailed Music-Influenced Tourism Impacts (2014)

	Output	Value-Added	Earnings	Jobs
Agriculture, etc.	$474,907	$162,958	$57,428	4
Mining	$2,663,207	$1,351,779	$558,757	4
Utilities	$21,498,100	$12,858,198	$4,254,314	42
Construction	$6,875,295	$3,428,335	$2,515,959	64
Manufacturing	$29,118,347	$10,821,993	$5,921,272	120
Wholesale Trade	$27,335,116	$18,434,481	$8,531,909	131
Retail Trade	$85,750,289	$56,166,346	$29,205,917	1,197
Transport & Warehousing	$15,221,871	$8,236,386	$5,764,510	144
Information	$42,443,692	$23,098,196	$10,420,818	170
Finance & Insurance	$59,905,078	$34,669,798	$16,551,624	300
Real Estate	$99,893,530	$73,945,889	$7,502,865	333
Professional Services	$44,948,597	$30,057,298	$21,038,753	337
Management of Firms	$6,387,971	$3,962,218	$2,626,158	34
Administrative Services	$28,700,863	$18,979,228	$12,469,593	551
Educational Services	$6,243,637	$3,540,078	$2,564,074	106
Health care	$37,336,109	$23,130,788	$17,552,730	484
Arts/Entertain/Recreation	$135,157,738	$81,550,616	$47,970,839	2,358
Accommodation	$191,915,392	$123,524,058	$56,266,828	2,198
Food Services	$237,003,667	$123,311,436	$75,131,085	5,024
Other Services	$26,448,933	$13,478,992	$8,047,653	324
Households	N.A.	$453,180	$453,214	46
Total Annual	$1,105,322,34	$665,162,252	$335,406,296	13,971

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