

To Form a More Perfect Union: Reconstituting the Business of Record Labels

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Abstract

The Constitution of the United States is one of the most significant documents ever written in world history. Since 1787, it has served as the cornerstone of American democracy and as an aspirational model for democracies around the globe. Although the technical and logistical aspects are delineated in the seven articles and twenty-seven amendments, the guiding principles of the Constitution are contained in the short preamble.

It reads:

We the people of the United States, in order to form a more perfect union, establish justice, ensure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.

Much like the thirteen former colonies that would go on to form the United States, today's music business is emerging from a transformative revolution (albeit technical, not violent). And modern record labels are faced with the daunting task of reconstituting themselves for survival. Their survival is threatened from without by constantly evolving technical and social disruptions. But record label survival will soon be threatened from within as artists increasingly explore and embrace independent methods of fan engagement and monetary participation. Fortunately, the preamble to the Constitution can be applied not only to help labels survive, but to thrive.

To form a more perfect union (with artists), modern record labels should establish justice by abolishing the practice of deeming master recordings as works made for hire. Record labels should offer contracts based on just and transparent

royalty computations. Labels should restrict recording contracts to terms no longer than seven years. Additionally, labels should keep any re-record restrictions to reasonable limits.

To form a more perfect union, modern record labels should ensure domestic tranquility (with artists) by drafting plain language contracts. Contracts should be based on fair dealing, aimed at creating equitable partnerships. Any so-called 360 deals should require active participation on the part of the artist.

To form a more perfect union, modern record labels should provide for the common defense by protecting artists' rights when negotiating streaming (and other third party) deals. Labels should lobby, generally, for initiatives that benefit artists as well, such as the American Music Fairness Act.

To form a more perfect union, modern record labels should promote the general welfare by supporting artists' physical and mental health. Labels should also cease exploitative practices tied to race, gender, and power imbalance.

To form a more perfect union, modern record labels should secure the blessings for liberty (for labels and artists) by supporting artistic freedom, micropublishing, and emerging technologies such as non-fungible tokens.

These are broad principles record labels should employ to rethink, rebalance, and reconstitute today's music business. Otherwise, as the growing populace of recording artists continues to arm itself with technological advances, the revolution will be democratized.

Keywords: record industry, record labels, recording contracts, music business

Background

The Constitution of the United States is one of the most significant documents ever written in world history. Since 1787, it has served as the cornerstone of American democracy and as an aspirational model for democracies around the globe. Ratification of the Constitution was critical to

the survival of a newly formed democracy that could have easily fractured due to regional, cultural, and demographic differences. Drafted in the years following a violently transformative revolution, the Constitution laid out a general framework of covenants between a corporate federal entity and its member states, the people. Some provisions were included to foster trust. Other provisions were included as checks when trust may be absent. Corporate powers are specifically enumerated with all other powers being reserved by the people. Although the technical and logistical aspects are delineated in the seven articles and twenty-seven amendments, the guiding principles of the Constitution are contained in the short preamble.

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Much like the thirteen former colonies that would go on to form the United States, today's music business is emerging from a transformative revolution (albeit technical, not violent). And modern record labels are faced with the daunting task of reconstituting themselves for survival. Their survival is threatened from without by constantly evolving technical and social disruptions. But record label survival will soon be threatened from within as artists increasingly explore and embrace independent methods of fan engagement and monetary participation.

It's no secret that the U.S. music business can be treacherously disappointing to many aspiring artists and creatives. It only takes a cursory glance at headlines from newspapers and trade press to find stories of artists suing their labels over conflicts concerning ownership of sound recordings, term limits, creative freedom, and underpayment of royalties. For decades, the domestic music business has been a tightly controlled marketplace where entry, promotion, and, ultimately, success have been determined by a handful of (now just three) major media corporations. These record labels have employed onerous contract clauses to keep recording artists locked into long-term agreements that are often tilted heavily in favor of the companies. Such burdensome covenants have caused the breakdown of many promising music careers. Journalist Hunter S. Thompson is quoted as saying, in part, "The music business is a cruel and shallow money trench...where...good men die like dogs."

In many cases, artist "failure" can be traced to faulty contract provisions that stifle artistic expression and innovation

or fail to adequately motivate artists to consistently perform due to financially opaque terms. And in some cases, even where a contract may seem fair when taken at face value, the relationship may nonetheless fail due to more subjective omissions. The diamond industry uses the four C's (cut, color, clarity, and carat weight) as a somewhat objective gauge to determine a gem's inherent quality (and the subsequent fifth C, cost). However, no matter how impressive the rating of the four C's, the diamond alone won't predict whether the relationship will be mutually beneficially or whether it will last. Similarly, favorable contract terms aren't the best predictor of a happy relationship between artist and label. As with any marriage, the ultimate barometer of long-term bliss is commitment, the ultimate C.

Because of persistent pressure for corporate labels to achieve returns on investments, commitment on their part isn't guaranteed and often only directed toward artists who garner immediate success after an album's release. And once initial success is realized, many artists face burdensome contract requirements designed to keep them in place, constantly producing new works in the pursuit of profits. However, control may be slowly shifting away from centralized corporate labels towards a decentralized landscape where artists have direct supervision over ownership, rights, monetization, and fan engagement.

Developing production technologies, emerging distribution platforms, crowd and alternative funding sources, and unfiltered fan curation channels offer modern recording artists unprecedented control over their careers. This perfect storm, of sorts, provides an excellent opportunity for record labels to reassess their business models and adapt in anticipation of a revolution that will usher in an artist-favored future. Fortunately, the preamble to the Constitution can be applied not only to help labels survive, but to thrive.

Establish Justice

To form a more perfect union (with artists), modern record labels should establish justice by abolishing the practice of deeming master recordings as works made for hire. Copyright law provides, in certain circumstances, that copyrightable works can be owned by parties that didn't create the work, such as employers or those who specially commission a work with the written understanding that the work is to be considered a work made for hire. In such cases, the hiring company owns all rights in and to the work and the artist/creator is typically paid a fee in exchange for their services.

Record labels have historically and routinely claimed that sound recordings are considered works made for hire under artist recording agreements. As such, artists aren't considered the rightful owners. However, the Copyright Act only lists nine categories of works that could be eligible for work

for hire status: a contribution to a collective work, part of a motion picture or other audiovisual work, a translation, a supplementary work, a compilation, an instructional text, a test, answer material for a test, or an atlas (U.S. Copyright Act of 1976). Although Congress could have explicitly included sound recordings, it did not. Record labels have used the theory that sound recordings are contributions to a collective work as the basis for considering them works made for hire. However, this logic is flawed.

The Copyright Act defines collective works as encyclopedias, periodicals, and anthologies. These are typically works compiled from the efforts of several disparate authors into a related theme. This outlines a very different concept than most music albums that are generally a singular expression of a sole artist's vision. Further, the term collective work wouldn't apply in cases of single releases that aren't contributions to an EP or album.

The Copyright Act specifically lists parts of a motion picture as a category of works eligible for work made for hire status. In the legislative history, Congress is noted as justifying this inclusion because motion pictures are generally exorbitantly expensive to produce and there are typically tens of parties who could potentially claim an ownership interest including the production company, film producer, director, actors, editors, and the screenwriters. Since a list of potential claimants could be difficult to ascertain while the entire burden of costs would likely rest with the production company, Congress determined work made for hire status would be appropriate for parts contributed to motion pictures.

This rationale doesn't apply appropriately in cases of sound recordings. Unlike movie productions, albums are typically produced by a limited number of participants including the record label, artist, music producer, and recording engineer. The list of potential claimants is much more discernible. Although music albums can be expensive to produce, their costs are typically fractions of movie budgets. Lastly, an overwhelming percentage of recording contracts provide that all monies spent on an artist's behalf are fully recoupable (50% in some expenditure categories) from any future artist royalties which may come due during the contract term. Nearly every recording artist ends up being responsible for paying the full cost of their sound recordings before they receive any monies from the record label beyond the initial signing advance. In fact, the more successful an artist's unit sales are, the more times over they end up paying for sound recordings they may never own.

The Copyright Act of 1976 established a termination mechanism that would allow authors the opportunity to recapture rights in works they had previously alienated through the operation of a grant between 35 and 40 years after the date of the grant. The right of termination applies

to all post-1978 copyrightable works except works made for hire since, in those cases, there is no "grant" of ownership between creator and commissioner. Since 2013, the earliest year that previously transferred works could be recaptured, multiple legacy artists have served their former labels with notices intending to effect termination of earlier copyright grants. In most cases artists, such as Prince, have avoided expensive and uncertain lawsuits by negotiating settlements for the transfer of sound recording ownership or more equitable royalty payments (Gardner 2019).

However, over the last three years artists have filed three lawsuits against major labels seeking to regain ownership of their sound recordings. Plaintiffs in *Waite v. UMG Recordings, Inc.*, *Johansen v. Sony Music, Inc.*, and *Yoakam v. Warner Music Group Corp.* have all alleged that the labels ignored their legitimate notices to terminate the copyright grants and continued to exploit plaintiff's sound recordings illegally. In each case, the defendant record labels asked the courts for declaratory judgment stating that since the sound recordings were considered works made for hire within the meaning of U.S. copyright law, termination of the grants was not legally available or proper. In each case, the applicable court declined to grant declaratory relief deeming sound recordings as eligible for works made for hire status. With the dismissal of a few issues, the cases have been allowed to proceed.

Singer Dwight Yoakam settled with Warner Music Group in February 2022, but *Waite* and *Johansen* are still pending. Should the courts decide against plaintiffs and determine that sound recordings are eligible for work for hire status, recording artists would lose all ability to automatically recapture rights in their sound recordings, barring any successful appeals. Should courts decide for the plaintiffs the immediate repercussion for labels would be the potential loss of sound recordings made between 1978-1987 with a new class of potential terminations each subsequent year. Under the current termination provisions in copyright law, labels would still enjoy 35 to 40 years of exclusive rights in sound recordings.

An equitable solution would be to grant record labels consensual liens in the sound recordings that artists create and own. In cases where artists recoup the recording costs of their sound recordings, the liens would be removed after a period (e.g., ten years) and/or after a specified ROI is realized by the label. In cases where artists do not recoup the recording costs, the label would be entitled to a lien until the statutory 35- to 40-year termination window has lapsed, assuming the artist serves proper a termination notice between two and ten years prior.

In the absence of an adverse court decision or act of Congress that classifies sound recordings as ineligible for work for hire status, it may appear that record labels have little in-

centive to adopt the consensual lien approach. However, if artists increasingly follow Taylor Swift's re-record actions after the expiration of their record deals, labels could find themselves in possession of sound recordings with much less value and market potential. Taylor Swift will not likely be an anomaly. Although Ms. Swift's tremendous success and resources have undoubtedly enabled her to impressively re-record several of her earlier albums with impeccable precision, technological developments and affordability provide artists with shallower pockets similar opportunities to re-record their albums with satisfyingly convincing results. If artists aren't given the opportunity to own their original sound recordings, many will simply opt to re-record them after the initial deal has lapsed and the re-record restrictions expire.

Over the years, many artists have challenged the legitimacy of record deal term durations. Most recently, recording artist Gabriella Sarmiento Wilson, professionally known as H.E.R., sued her record label, MBK Entertainment, arguing that the company is in violation of California Labor Code §2855 which generally prohibits personal services contracts from running longer than seven years (Draughorne 2022). However, §2855 was amended in 1987 to specifically exclude recording contracts. The Free Artists from Industry Restrictions (FAIR) Act was introduced into the California legislature to repeal the §2855 amendment, but it failed to pass the California State Senate's Judiciary committee on June 28 (Newman 2022).

Presently, most recording contracts specify that artists recoup expense at the net artist royalty after numerous deductions. Since current royalty calculations pay a lion's share of record royalties to the label, a significant ROI for the company is already embedded into the contract terms. An equitable relationship should require record labels to offer contracts based on transparent royalty computations. Though the percentage would still likely favor the companies, transparency would help to foster deeper trust between artists and partner labels.

In the spirit of developing trust, labels should also eliminate antiquated terms and provisions to the extent they may still be present in contracts. Outdated provisions for packaging deductions, new technologies reductions, breakage, and free goods do not make sense in a largely digital landscape. Additionally, in the age of real-time metrics and reporting, reserve and liquidation clauses should be considered excessive. In cases of 360 deals or when artists have concurrent deals with a label and its affiliated music publisher, mechanical royalty reductions and controlled composition caps aren't justifiable under the current rationale that publishers should accept the reductions to contribute to the financial success of an album.

Ensure Domestic Tranquility

To form a more perfect union, modern record labels should ensure domestic tranquility (with artists) by drafting plain language contracts. Use of archaic terms and legalese not only makes contracts more difficult for the lay person to understand, it also increases mistrust between artists and labels. It's understandable many artists may feel that lawyers draft contracts in convoluted fashion to ensure their job security while simultaneously ensnaring unsuspecting artists. But a well-placed heretofore, hereinbelow, or notwithstanding isn't necessarily about job security or trickery.

Most legalese has developed out of a business necessity to make contract language as specific as possible. The language may be convoluted, but it is precise when drafted well. One repeated saying about legal communication is, "In everyday communication, we can assume people will try to understand what we are saying. But in legal communication, we can assume the other party will try to misunderstand what we are saying." Accordingly, much legalese has developed as an attempt to avoid ambiguity, at least among those trained to decipher it.

Ideally, both parties entering into a contract should be able to read it for themselves and understand all its provisions. However, entertainment contracts, especially recording agreements, tend to be intricate patchworks of interdependent conditions that are difficult to follow without years of experience. Even plain language contracts won't eliminate the need for artists to retain independent legal representation to review, explain, and negotiate the terms contained within them. But they will provide the basis for greater trust between the parties which is necessary to lay transparent foundations for more equitable, broad-based partnerships.

Due to the current state of sagging physical and download sales, record labels are likely to continue structuring new artist agreements as so-called 360 deals for the foreseeable future. However, any such contracts should establish comprehensive partnerships between artists and labels that require option-based investment and active participation on the part of the label. Labels should acquire rights beyond traditional record royalties (i.e., publishing, touring, and merchandise) only after paying additional advances as consideration for the newly optioned right. Record labels should take active roles in exploiting and managing the various facets of 360 deals as opposed to simply siphoning passive income. To the extent that any third parties such as music publishers or merchandise companies should become involved, the record label's participation share should be prorated so as not to put the artist in a worse position than if they were dealing directly with the third-party company.

Provide for the Common Defense

To form a more perfect union, modern record labels should provide for the common defense by protecting artists' rights when negotiating streaming (and other third party) deals. Record labels have routinely left artists out of front end advances they receive for catalog licensing deals. Similarly, artists were largely left out of the revenue shares labels negotiated with streaming giants such as Spotify. Although labels eventually agreed to share proceeds from the sales of their streaming shares with artists, it took considerable amounts of pressure from superstars such as Taylor Swift to bring labels to compromise (Sweney 2018). When labels strike a catalog deal with, or an ownership stake in, a streaming company, if artists aren't allowed to share in the advances or sales of revenue shares, equity should require that artists receive larger royalty percentages on streams of their songs subject to any such deals.

Labels should eagerly support initiatives that benefit artists and themselves such as the American Music Fairness Act (H.R. 4130). Aimed at inducing American broadcasters to pay royalties for the public performance of sound recordings, this bipartisan legislation would benefit the interests of artists and their partner labels. The measure also seeks to close a loophole that allows foreign broadcasters to forego paying the royalty since there is no reciprocal requirement in the United States.

Promote the General Welfare

To form a more perfect union, modern record labels should promote the general welfare by supporting artists' physical and mental health. It has been widely reported that mental health issues leading to illness, hospitalizations, and death have experienced a sharp increase over the past two years of the COVID-19 pandemic (Lang 2022). Uncertainty and isolation have taken heavy tolls on the psychological well-being of millions of people the world over. Uncertainty has plagued the music business and its recording artists well before the global pandemic surged in 2020. However, once the live music sector was shut down completely, significant revenues and livelihoods were certain losses.

Industry publication *Pollstar* reported that the live music sector was expected to lose approximately \$30 billion in revenue in 2020 due to coronavirus closures (Gensler 2020). It was also reported that Live Nation alone lost \$319.2 million in revenue that same year (Shaw 2021). Although performers' revenue slumped, songwriters and artists who write songs apparently fared better in 2020 as the National Music Publishers Association reported a 9.6% growth in publishing revenues, topping \$4 billion (Cristman 2021). Overall however, musicians still face precarious futures. To protect their investments in artists, labels should take an aggressive

approach towards supporting mental health initiatives in the music business.

Sony Music Entertainment appears to be taking the lead in this regard with the 2021 launch of Artists Forward. The global initiative is comprised of three programs aimed at supporting legacy artists with fresh starts, supporting new artists with access to information, and supporting all artists with access to mental health professionals (Artists Forward: Sony Music Entertainment 2021). Artist Assistance is one of the three programs and it is designed to give Sony artists access to free, confidential counseling services to help with issues such as anxiety, grief, and depression. Sony Music Publishing has duplicated the Artists Forward program as Songwriters Forward for its signed writers.

Labels should also actively partner with independent organizations that provide mental health and wellness assistance to musicians. Sony Music is a participating partner with Silence the Shame. Founded by industry veteran Shanti Das, the nonprofit seeks to educate communities about mental health resources by eliminating the stigma surrounding seeking help (Silence the Shame 2022).

MusiCares is a long-standing charity of The Recording Academy that raises money to provide relief funds to musicians, industry professionals, and their families in times of need. Grantees receive funds to help with various financial, medical, and personal emergencies (MusiCares 2022). Other notable organizations working to give musicians access to mental health care include We Rise LA, Backline, Nuçi's Space, Phantogram and the American Foundation for Suicide Prevention, and Music Minds Matter (Output.com 2022).

The Recording Academy has also recently launched initiatives aimed at addressing gender inequities within the organization, with the coveted Grammy Awards which it hosts, and in the industry at large. In the wake of the rapid expansion of the #MeToo and #TimesUp movements, The Recording Academy has enhanced its diversity, equity, and inclusion programs to better examine and address women's issues (Recording Academy 2022).

Record labels should cease exploitative practices tied to race and gender. They should also proactively introduce measures to eliminate power imbalances, which are cited as the root of sexual harassment and sexual assault (MacKinnon 1979). A recent study by the USC Annenberg Inclusion Initiative highlighted the lack of progress for women, underrepresented, and Black executives (Smith, et al. 2021). The study notes that across 101 music companies only 19.8% of executives were from underrepresented populations, 7.5% were Black, and 35.3% were women. By comparison, the researchers found that over the preceding nine years leading up to the study, almost half (47.8%) of the songs on the

Billboard Hot 100 Year-End Charts were from underrepresented populations.

A second study by the USC Annenberg Inclusion Initiative found that over the ten-year period leading up to 2022, women were credited as songwriters on only 12.7% of top releases (Hernandez, et al. 2022). Over the same decade, women garnered only 2.8% of the 1,522 production credits on top releases. The dearth of representation of women, Blacks, and underrepresented populations in the board room and studio control room serves to perpetuate endemic problems within the music business that ultimately have negative impacts on society.

Lack of board room representation can lead to ill-informed decisions on which projects to green light and the size of correlating budgets. This can lead to an emphasis and overreliance on culturally generic (or inaccurately tone deaf) projects that miss the mark with consumers. One study suggests that the movie industry may lose up to \$10 billion each year due to lack of diversity among studio executives and creatives (McKinsey & Company 2021). The researchers recommend that to address inequities in the film business, movie studios should take steps including setting specific hiring targets for underrepresented populations, recruiting outside New York and Los Angeles, recruiting from historically Black colleges and universities, and providing greater transparency in reporting DEI and employment data from their organizations. Record labels should follow similar recommendations to enhance their products' connections with consumers and to maximize profits.

Lack of creative representation implies that most songs that reach top chart potential are crafted by a few select individuals or teams that are more than likely white men. This lopsided makeup can lead to misrepresented or inauthentic images of women and underrepresented populations in songs and music productions. This may have broader social implications as well. Studies suggest that lack of representation can lead to psychological stresses in populations who experience underrepresentation or negative portrayals in media. One study found that when young children were exposed to television programming, Black girls and boys and white girls demonstrated lower levels of self-esteem whereas white boys demonstrated higher levels of self-esteem (Martins and Harrison 2012). A plausible explanation for the disparity may be that children who witness negative portrayals of themselves, or no portrayal at all, may be made to feel invisible or insignificant in the broader cultural narrative (Levinson 2020). Record labels should examine the content of their releases and plot more equitable and ethical representation in songs and visuals.

Secure the Blessing for Liberty...

To form a more perfect union, modern record labels should secure the blessings for liberty (for labels and artists) by supporting artistic freedom, micropublishing, and emerging technologies such as non-fungible tokens. Due to the speed and efficiency of internet communication, today's fans have unprecedented access to their favorite recording artists. Much of this access is unfiltered and unfettered. Arguably, the music business ecosystem has reached a point where fans across social media channels such as TikTok and Instagram expect to have candid access to artists' lives and often expect to have some input into artists' career decisions.

Fanbases such as Beliebers, KatyCats, the A.R.M.Y, and the Navy have the collective power to register big sales and streaming numbers. The Swifties have the collective will to send re-recordings of nine-year-old projects back onto the charts (Caulfield 2021) and the BeyHive has the collective influence to move over 800,000 first-week copies of a "secret" album release that received no premarketing (AP via Denver Post 2013). Certainly, these are the fanbases of the industry's biggest superstars. But the principle works for smaller major label artists and indies as well. Vested fans make the difference.

Empowering artists with more artistic freedom will permit them to present their authentic selves rather than considering profitability first. Artists should be encouraged to create and deliver art that is responsive to fans' desires and not subject to labels' release windows, or worse, tech companies' insatiable appetite for daily content to feed advertising algorithms. Yes, it will take rethinking marketing cycles. No, not everything will be certified gold or platinum by the RIAA. But that should be a desired difference between art and content. Repositioning music releases as art instead of content should lead to deeper, long-term connections with fans where they feel a shared responsibility to the success of artists they support.

Rap artist Nas recently partnered with Royal to allow fans to invest in his work by purchasing microshares of his song publishing. Fans receive a limited digital asset similar to a non-fungible token (NFT) that is trackable with each stream of the song on the internet. Other notable artists such as Big Boi from the duo Outkast, The Chainsmokers, Diplo, and 3LAU are also offering shares of their published works direct to fans. According to Royal, since offering fans the chance to purchase limited digital assets of 3LAU's song "Worst Case," the song has attained an implied value close to \$12 million with fans owning roughly half of that amount (Stassen 2022).

Although the general frenzy surrounding NFTs may be tapering off (Milmo 2022), owning microshares of songs should prove to be viable into the future as a crowdsourced music publishing model. Labels should examine the use

of the microshares model as a method of subsidizing the making of records by allowing fans to shoulder potential burdens of costs and losses in exchange for profits and the chance to own a small piece of their favorite art.

Conclusion

Developing production technologies, emerging distribution platforms, crowd and alternative funding sources, and unfiltered fan curation channels offer modern recording artists unprecedented control over their careers. Should record labels continue to practice outdated methods to control artists and siphon profits for themselves, artists will increasingly find ways to resist. By applying the altruistic principles found in the preamble to the U.S. Constitution, record labels can reconstitute themselves into true partners with artists, enjoying lasting and mutually beneficial relationships. These are broad principles record labels should employ to rethink, rebalance, and reconstitute today's music business. The time is right for record labels to reassess their business models and adapt in anticipation of a revolution that will usher in an artist-favored future. Otherwise, as the growing populace of recording artists continues to arm itself with technological advances, the revolution will be democratized.

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Marcus Thomas serves as Associate Professor, Chair of Music Industry at the Hartt School, University of Hartford. He previously served as Associate Director of The Los Angeles Film School's Entertainment Business program, where he was an instructor and faculty training developer for five-and-a-half years. Thomas also served five years as Assistant Professor and Coordinator of Georgia State University's Music Management program.

Professor Thomas is an educator and entertainment attorney who is also trained as a screenwriter and publicist. During his twenty-five-year career, he has maintained a boutique entertainment law practice and held several in-house positions with entertainment companies including a major record label, major-affiliated music publisher, and the nation's largest education music print publisher.

Thomas coauthored "The Commercial Music Industry in Atlanta and the State of Georgia – An Economic Impact Study." His study served as support for passing the Georgia Entertainment Industry Act of 2005. Thomas holds a Juris Doctor from Georgia State University, a Master of Fine Arts from Full Sail University, and a Master of Mass Communication from the University of Georgia.



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