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KANYE WEST'S "LIFE OF PABLO" EXPERIENCE SHOULD SOUND THE DEATH KNEEL FOR ALBUM EXCLUSIVES ON STREAMING SERVICES

The exclusive availability of a good or service through a certain distribution point is a tried and true marketing technique in certain industry sectors. In the entertainment industry, television has always been an industry based on exclusive distribution arrangements. Think Olympics, *Stranger Things*, and *Game of Thrones*. But exclusive retail distribution arrangements have been less prevalent and more difficult to pull off in the music business. Consumer demand to own music and listen to it on demand has forced artists and record labels to make music more accessible to the consumer. Prior to the internet, records were sold predominantly through non-exclusive retail outlets, like Sam Goody, Tower, or your local independent record store. In the post-internet era, the fungible nature of the digital music file has made it more difficult to limit the distribution of recorded music. The laws of supply and demand have thus placed extreme downward pressure on the price of recorded music.

Despite these pressures, recording artists and streaming services have experimented (and failed) with the exclusive album releases. Spotify, Apple, and UMG have all announced they are abandoning the practice, concluding that it hurts artists and consumers. Studies showed that streaming album exclusives caused piracy to spike for those releases. If these economic lessons were not enough, Tidal's botched release of Kanye West's *Life of Pablo* should be further warning to the industry about the perils of exclusive album streaming releases.

Tidal is a music streaming site similar to Spotify or Apple music where for a monthly fee, users gain access to a wide library of music. Tidal was launched by Aspiro in 2014 and was acquired by Sean Carter, known to many as JAY-Z. Tidal was marketed

as the first “artist-owned” streaming service, and artists such as Kanye West were offered stakes in the company in exchange for creating exclusive content for Tidal.

In 2015, Tidal admitted they had insufficient funds to last for another year unless they massively grew their subscriber base. Kanye West, also plagued by debt, announced that his highly anticipated album, “The Life of Pablo” would be released exclusively on Tidal. West even marketed the album’s exclusivity on his Twitter account, saying “my album will never never never be on Apple. And it will never be for sale ... You can only get it on Tidal.” In order to ensure that he could hear West’s, Tidal exclusive album, fan, Justin Baker-Rhett purchased a Tidal subscription for \$9.99, despite having a subscription to another streaming service.

In the 10 days following West’s album release, Tidal’s subscription numbers tripled from one to three million. Just over one month later the album was released to competitive streaming services and was made available for purchase. Baker-Rhett felt that he had been fraudulently induced into buying a subscription to access exclusive material that was now made available to everyone. Moreover, Baker-Rhett claimed that he never would have bought a Tidal subscription had he known that it would have been available on his other streaming service, so he sued Aspiro and West to get back his \$9.99.

To prove fraudulent inducement Baker-Rhett had to show that West made a material false representation, intended to defraud Baker-Rhett, that Baker-Rhett relied on the representation, and that Baker-Rhett suffered damage.

West and Aspiro’s effort to dismiss the fraudulent inducement action was recently rejected by a New York court. The court found that West’s tweet stated a strong enough claim to survive dismissal. West and Aspiro argued that West’s Twitter statements were true because the album that was released to the other streaming services was “remastered” and was therefore not the “same” album. The court did not agree and stated that whether or not West’s statements were true or false was an issue for the jury.

For now, Tidal and West can’t dodge this lawsuit. And West and Aspiro now must worry about whether the case will become a class action. West has wisely announced he is done with the practice of album exclusives. Tidal appears not to have yet learned what Apple, Spotify, UMG, and now Kanye West have – album exclusives are bad for the artists and bad for consumers. Earlier this summer, Beyonce and Jay-Z

released their new album *Everything is Love* as a Tidal exclusive, an exclusive that lasted for only two days. Given West's experience in promising consumers exclusivity, and not necessarily delivering it, Tidal may want to reconsider the wisdom of continuing its exclusive album release strategy.