

## Avoiding the Copyright War of 2013

By Caz McChrystal

For all the cultural cache and tabloid-mystique of the record industry, the business boils down to one task: management of assets. Sound recording masters are key, and yet the ownership of this vital asset will soon be challenged. Beginning in 2013, the Copyright Act will allow authors to regain ownership of copyrights transferred to others 35 years after those transfers took place. This means that regardless of what agreement a recording artist originally struck with his record label, after 35 years he could potentially regain ownership of his sound recordings - creating a windfall for artists and depriving record labels of the important revenue that catalogue recordings generate.

However, it is unclear whether this reclamation of ownership, known as the termination of transfer right, applies to sound recordings. Further complicating the matter is the issue over who may exercise that right. As a result, the industry could be expected to become proactive in finding a middle ground between labels and artists before litigation makes reasonable dispute resolution impossible.

Section 203 of the Copyright Act allows an author to terminate an exclusive or nonexclusive transfer of a copyright executed on or after January 1, 1978; however, this termination right does not apply to works made for hire. Therefore, transfers of sound recordings by artists to their record labels are subject to the termination right only if those recordings were not made for hire. Thus, the debate over the ability of artists to exercise their termination of transfer right centers on whether sound recordings are eligible for made-for-hire status.

The Copyright Act provides two categories of works made for hire: works created by an employee under the scope of employment [1], and specially commissioned works. Though the Copyright Act provides no definition of "em-

ployee," courts have routinely held that a lack of employee benefits combined with the failure to withhold income taxes are highly indicative of a lack of an employment relationship. Because recording artists lack employee benefits and do not have taxes withheld by their record labels, it is unlikely that artists have an employment relationship with labels. Therefore, sound recordings are only eligible for made-for-hire status if they fit into the second category of works made for hire.

The second category of works made for hire contains two requirements: (1) the parties must expressly agree in writing that the work is made for hire, and (2) the work must be prepared for

use in one of nine specially designated classes of works [2]. Sound recordings easily meet the first requirement; standard recording agreements used by major record labels uniformly state that all masters delivered under

the agreement are works made for hire. Under the second requirement, only two classes of works, compilations and contributions to a collective work, could possibly describe sound recordings [3].

It is unclear whether courts will label sound recordings as works made for hire by virtue of being specially commissioned compilations or contributions to collective works. However, most agree that neither classification is a perfect fit, and there may not necessarily be a one-size fits all determination that applies to every recording. Because the financial stakes are so high for both labels and artists, there is already vigorous debate over whether sound recordings are eligible for made-for-hire status and thus whether artists may exercise their termination of transfer rights. The debate remains academic until 2013, when litigation over this issue will



## MISSION STATEMENT

*The Music Business Journal (of the Berklee College of Music) is a student publication that serves as a forum for intellectual discussion and research into the various aspects of the music business. The goal is to inform and educate aspiring music professionals, connect them with the industry, and raise the academic level and interest inside and outside the Berklee Community.*

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# EDITOR'S NOTE

It is with great enthusiasm that I present to you the July 2009 edition of the Music Business Journal. In this issue, you will find writings on a wide range of current topics within the music industry, including social media marketing, intellectual property protection, cross-discipline branding, and more. You will find articles written not only by our excellent student staff, but also by contributing music business professionals from around the country. In our cover article, contributing author Caz McChrystal offers a glimpse into the future of music copyright ownership in the United States, detangling a complex legal issue destined to swell in importance over the next few years. In our business section, contributing author George Howard offers sage advice on enhancing promotional mixes through social media. We trust you will find in-depth, thought-provoking analysis in every section of this exceptionally substantive summer edition of the MBJ.

For millions of music fans worldwide, summer is concert-going season. With ticket prices spiraling ever higher, we'll take a look at recent proposals by Ticketmaster aimed at stanching the flow of tickets into the secondary market. In a similar vein, contributor Bryce McLaughlin will delve into legislative efforts to deter secondary file sharing in France. Conversely, I'll offer an analysis of Google's new DRM-free downloading regime in China and its dire implications for the future of intellectual property.

This edition of the Music Business Journal is especially exciting not only for what it contains, but also for what it is: Written and produced by a diverse team of students and professionals from across the US, and for the first time featuring an adjoining Podcast available to listeners around world, the July 2009 issue of the MBJ is an entity truly reflective of our modern global economy. It's been an absolute pleasure managing this effort as Editor-in-Chief of the Journal, and now, as I move forward, I wish my fellow writers, colleagues, and successors the best in their continued efforts to refine its quality and expand its reach. Once again, we at the Journal would like to thank Messrs. McChrystal and Howard for their outstanding contributions to our publication, and encourage you, the reader, to continue visiting our online site, [www.thembj.org](http://www.thembj.org), for more of the same kind of thoughtful coverage and analysis you'll find in this month's issue.

Sincerely,  
David K. Widaman

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### Avoiding the Copyright War of 2013 (cont'd.)

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likely begin [4]. That litigation could take several shapes; however, it will most likely take place as a series of copyright infringement lawsuits.

A termination takes place through a simple notification process in which an author sends a notice to the transferee stating the date that the termination will take place. That notice must be sent to the transferee at least two and no more than ten years before the termination is set to take place. In addition, a copy of the notice must be recorded with the United States Copyright Office. There is no hearing process or formal “changing of the guards” to ensure that a proper termination has taken place.

Once the date set for termination has passed, artists (assuming that sound recording are not works made for hire and are thus subject to the termination right) may sue their record label for copyright infringement should the label continue to distribute the sound recordings in question. Conversely, labels (assuming that sound recordings are works made for hire and are thus not subject to the termination right) may file cross-claims against artists alleging that any distribution by the artist or their assigns constitutes an infringement.

However, if cooler heads prevail, all sides may benefit from finding an alternative to litigation. While the idea of exercising the termination right may appear attractive to artists who wish to control their own sound recordings, terminations may create unintended consequences. For joint works (including most sound recordings), the termination right may be exercised by a majority of joint authors; but who are the joint authors of a sound recording? Certainly, the artist or band members who appear on the sound recording are joint authors. In addition, contributors like the producer, engineer, studio musicians, and graphic designers contributing to the album art could potentially claim joint authorship rights and a vote in whether a termination may take place. This could cause recording artists to wind up with less control over their recordings after a termination has taken place [6].

In addition, labels may find it in their best interest to avoid litigation over the termination of transfer right. For those artists whose recordings have maintained commercial value, the period between sending a notice of termination and the actual date that the termination will potentially become effective resembles an extended period of renegotiation. By providing either additional advance money or a higher royalty rate, labels may prevent artists from exercising their termination rights and thus maintain valuable and reliable distribution rights or those recordings.

It remains to be seen how labels will treat terminations for sound recordings of lesser commercial value. In the case of recordings with little commercial value, labels may decide to return ownership to the artist without acknowledging an effective termination. This would benefit both the artist, who would once again be able to exploit his work, and the label, which would be losing little from its bottom line and reaping the benefits of not having to acknowledge that a successful termination has taken place.

Inevitably, some litigation will occur; however, according to Daryl P. Friedman, Vice President of Advocacy and Government Relations at the National Academy of Recording Arts and Sciences, “it will be in the interest of all sides to begin developing an industry-wide solution of the

work-for-hire issue now to avoid contentious litigation or legislation as we approach 2013.” If both labels and artists rely solely on litigation to determine the issue, the business of bringing music to the listening public will likely suffer regardless of whether courts decide in favor of artists or labels. Therefore, it is in the interest of labels, artists, and all others associated with the production and distribution of sound recordings to seek compromise in determining how the ownership of sound recording masters is to be defined in the coming decades.

[1] *Aymes v. Bonelli*, 980 F.2d 857, 862 (2d Cir. 1992). In fact, the court in *Aymes* found these factors so probative as to “constitute virtual admissions” of the hired party’s status as an independent contractor. *Id.* For further discussion of agency law and copyright see, *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989).

[2] The enumerated classes of works are contributions to a collective work, motion pictures or other audiovisual works, translations, supplements, compilations, instructional texts, tests, answer materials for tests, and atlases. 17 U.S.C. § 101. The Copyright Act was amended in 1999 to include sound recordings as a class of works eligible for made-hire-status as specially commissioned works; however, that change was repealed less than one year later after withering criticism from artists’ rights groups.

[3] Efforts to describe albums as audiovisual works by virtue of their artwork and liner notes have uniformly failed. See, e.g., *Lulirama Ltd. v. Axxess Broadcast Services*, 128 F.3d 872 (5th Cir. 1997).

[4] January 1, 2013 is the first date on which transfers made on or after January 1, 1978 may be terminated.

[5] See, e.g., *Aalmuhammed v. Lee*, 202 F.3d 1227 (9th Cir. 2000).

[6] Absent an agreement to the contrary each joint author in a work may license the work nonexclusively to others without the permission of the other joint authors.

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## Google China and the Future of Intellectual Property

By David K. Widaman

The world stands at the precipice of a Chinese century. As has appeared increasingly obvious for several years, the United States, recently at the very pinnacle of its global power, is gradually ceding influence to younger, more dynamic developing economies. Of these rising nations, none stands in better position, or appears more poised to reap the benefits of a decline in US power than the People's Republic of China (PRC). More and more, all events political, social, economic, and legislative must be viewed in the context of China's prodigious ascent. As a vital engine of growth and investment for nearly every major player in the global economy, and an immense, rapidly gentrifying consumer market, China's domestic actions and international aspirations are increasingly shaping the evolution of industries across the globe. The United States' record industry is no exception. Long a leader of American cultural exportation, the industry is suddenly feeling the full brunt of this growing eastern influence. At a time of great weakness and uncertainty in the US record industry, a plethora of alternative business models and music monetization ideas have gained audience, at least in conceptual form. But with nothing even resembling a consensus yet reached on the 'new way forward', this still very 20th century industry appears rudderless and malleable in the hands of opportunistic 21st century business partners. An advertising revenue-based experiment recently launched by Google China in the PRC looks to harness and exploit the seemingly dire future of intellectual property, a pre-digital age concept nearly dead to the music industry. Can Google's new model be the significant precedent the world has been waiting for? Is it even a constructive development? While the prospect of penetrating the world's most populous consumer market makes most exporters giddy, this deal smacks of concession and defeat. I, for one, believe there is reasonable cause for such trepidation, and I will explore my concerns throughout the course of this article. I will argue that Google's Chinese experiment represents a subtle yet telling departure in Western capitalist ideology, and heralds an awkward union between two very separate conceptions of intellectual property protection.

Google announced the launch of its long-rumored, legal music downloading service on March 30th, 2009. The service, called Google Music Search, is available exclusively to mainland China, and allows internet users the freedom to search within and legally download from an online catalogue of over 1.1 million

copyright-protected files. Files located within the expansive database are DRM-free but watermarked to allow the measurement of gross volume figures. The files are transferred through a downloading portal administered by Top100.cn, a Chinese company headquartered in Beijing. Google doesn't charge users directly for the service, instead agreeing to split advertising revenue generated by the site with 140 participating music companies, including industry behemoths Universal Music, Sony BMG Music Entertainment, EMI Group, and Warner Music Group. Google, which has struggled mightily thus far in its effort to expand market share in China, acknowledged the deal to be an aggressive power play. China's dominant search engine, Baidu, continues to attract a significant majority of all search queries within the country, reportedly around 62%, while its biggest competitor, Google, still attracts a mere 28%. But rebirth as an online music provider is certainly not Google's ultimate aim, and the company readily admits its foray into the music industry is more of a means than an end. Google hopes its new role as China's first fully legal music downloading hub will give it a boost in its efforts to catch Baidu, which owes much of its current popularity to the facilitation of illegal downloading.

The time for aggressive posturing is now, the California search engine's executives reason, as no digital market will be as important, or as large, as China's over the next century. With just 22% (approximately 300 million) of its 1.3 billion citizens online, China's Internet market is already the world's largest, and by many accounts, its most larcenous. The International Federation of the Phonographic Industry (IFPI) estimates that nearly 99 percent of all music downloads in China are of illegal nature. Baidu has been widely accused of aiding and abetting this behavior by providing the use of unlicensed music files to its users, and by offering links to popular illegal downloading portals. The powerful Chinese search engine, which has so far declined comment on Google's recent moves, is already facing substantial legal action, including lawsuits filed by industry heavyweights IFPI, Music Copyright Society of China (MCSC), Universal Music, Sony BMG's



Hong Kong division, and Warner Music Hong Kong. Google's quest to become China's most powerful search engine would certainly be aided by a court ruling against Baidu's practices, but there exists little optimism that any punitive ruling could ever truly alter the country's entrenched culture of illegal file sharing.

Resigned to the sheer magnitude of online theft in China, record labels and publishers have grown increasingly skeptical of the profit potential offered by the immense market. Counterintuitively, it has appeared unlikely that the world's fastest-growing consumer nation will ever provide an opportunity to boost, even partially, the record industry's woefully sagging revenues. Thus, when over a year ago Google approached major music companies in the United States with the idea for a new, advertising-derived earnings model, the industry was eager to bite. The ad-based model, which at one time would have been considered an embarrassing concession, appears a sounder business strategy than stubbornly continuing to earn no money at all.

The basics of the deal are relatively easy to comprehend. Google, rather than its individual users, will compensate the owners of intellectual property downloaded on Top100.cn, presumably according to a pay scale determined through the watermarking data Google plans to collect. Beyond these basics, however, not much is known. The finer details of the financial relationship remain cloaked in opacity. Administration and payout responsibilities will belong to Google, but no information addressing the exact makeup or frequency of the payouts has surfaced, and none of the music companies involved in the deal have commented on what royalties artists and songwriters should expect to gain through the new model. The search engine and its partners have been remarkably disciplined in their public silence on financial

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aspects of the deal, merely insisting, when pressed, that projected revenue streams will be more than large enough to satisfy the desires of all parties concerned. One would hope so, but hard numbers and analysis would certainly be more convincing. The rarely discussed third party to the deal, Top100.cn, recently announced plans to pay for its position in the distribution chain by selling ad space on its site, as well, but substantive comments on its share of expenses and profits are nonexistent. From any angle, details of the agreement remain murky and closely held. This has not depressed morale, however, which appears fairly high among industry players. Chief Executive Officer of IFPI John Kennedy recently spoke enthusiastically of the deal, saying, "The launch of Google Music Search is fantastic news for artists, composers and producers as well as consumers across China." Even so, the deal doesn't lack detractors. Bob Garfield, host of National Public Radio's On The Media recently described the new model with the following analogy: "I get burglarized, right? They take my TV and my stereo and my jewelry, so I put on a deadbolt, and they strike again, and this time they take my furniture... And I install a burglar alarm and they come back again, and gone are the rugs and the paintings. So I decide to unlock all the doors and windows and just put up billboards for the burglars to see while they're stealing from me." Indeed, a rational mind does ponder the economic perversions inherent in the deal.

While record industry executives have been busy patting themselves on the back for securing the bold new revenue stream, they've also managed to effectively ignore several glaring red flags. The biggest problem for intellectual property owners in the digital age has unquestionably been the infinite, unregulated "secondary market" (and I use the term market more than loosely), wherein the majority of profligate theft of unlicensed music occurs. It is a problem that remains wholly unaddressed by Google's new business model. In fact, music companies have seemingly chosen to disregard the problem altogether, allowing Google to distribute completely DRM-free files to its downloaders, thereby squandering any chance once possessed of limiting potential value losses to the "secondary market". The implications, mathematically, are dire. Once a web surfer has registered a "hit" on Google's search page, he or she has 'paid' into the system via his or her exposure to the advertisements displayed on the page. Advertisers then owe and pay an advertising fee to Google, who divides fee income into respective shares and transfers agreed amounts into specified bank accounts around the world. Unfortunately, in

the same time it takes to execute this complex financial algorithm, the single web surfer who originally downloaded the track will have had the opportunity to send out the file to an infinite number of computers, without ever directing a single new "hit" to Google's search page. So, in theory, it is possible that if just one person visits Google's page and downloads a popular song, triggering just one exposure-derived advertising fee, it will then be possible to provide the song to every internet user in China for the price of just one advert viewing. This model-breaking hypothetical, which I admit is impractical and mostly illustrative, would entirely extinguish the life-giving mechanism of Google's new agreement: mass traffic streams. Without the immense advertising revenues generated by these mass traffic streams, music companies would be left with nothing to show for even their most dynamic successes, and Google would be left with only a split of a very weak trickle of advertising revenue, further hindering its own efforts to challenge Baidu. This unsettling risk has not been acknowledged or addressed publicly by any signatory of the deal. The record industry, through its marriage of convenience to Google, is endangering the scarcity and value of its own goods. I would urge executives of US record companies to carefully consider the longer-term consequences of Google's vision for the future of the music industry.

Google's new interpretation of the music market renders music a free and public good for one third of the world's Internet users. Furthermore, the size of the deal is not limited by a static, capped population, but by the rate of internet proliferation in mainland China, the world's most populous nation and fastest growing economy. While only 22% of Chinese citizens currently enjoy access to the Internet, that 22% minority consists of nearly 300 million citizens, representing the largest individual Internet market on Earth. Citing its 1.3 billion citizens, double-digit post-recessionary growth projections, and rapidly urbanizing rural population, China posits that its Internet market is ripe for further growth. The next closest internet market in sheer size, that of the United States, boasts a 72% rate of internet access, and still currently trails China by nearly 85 million internet users. The divide is stark. If China were to improve its Internet access to the same 72% rate enjoyed in the United States, its online market would comprise nearly 60% of the world's web users. Giving away intellectual property to 60% of the world, potentially for free, and without addressing the property's vulnerability to infinite reproduction, is irresponsible and disrespectful of basic capitalist principles. The record industry's blind faith in Google Music Search is rife

with inconsistencies, hypocrisy, and magical thinking.

The most potentially catastrophic risk of handing over free music to half of the world's Internet users, however, is not simple, intra-market sharing. It is transnational proliferation. Multiple-market file contagion would turn a hitherto exclusively Chinese experiment into an unintended global experiment in mere hours. Let's imagine that a student at Peking University downloads a file and sends it to 5 of his friends, including a cousin in Hong Kong. The cousin in Hong Kong shares it with 5 coworkers, including an old colleague in Singapore. From there, the file reappears in Sydney, Kuala Lumpur, Cape Town, London, and New York all within 24 hours. At each new location, the file is copied and distributed multiple times. By the end of the week, thousands of potential customers around the globe, divided by only a few degrees of separation, have been supplied with unlicensed, copyrighted material, causing demand for legitimate retail music to shrink. Physical and digital retailers, lacking projected revenue, begin to dry up, prompting further shifts into the illegal market. And since only in China is this "illegal market" legal, third-party downloading portals begin supplying customers with volumes of illegal free music once solely reserved for mainland China. Letting the free Chinese "market" (again, loosely) spill over into the other half of the world would be disastrous. Google asserts that its tech wizards have engineered around this risk by allowing the transfer of watermarked files only to computers with IP addresses inside of mainland China, but the rational money is, and always will be, on Chinese hackers. It's not difficult to envision the undesirable effects this experiment has the capacity to create. Although, one optimistically supposes, with every crisis comes opportunity.

Perhaps by letting watermarked files leave China proper, policy makers can gain a means of conducting more effective studies on the international 'shipping lanes' of digital piracy. Or perhaps, more mischievously, the so-called 'watermark', ostensibly a harmless tool used to measure transfer volumes, can be used to track, document, and indict a transnational 'crime ring' of illegal downloaders and file sharers. This idea is more problematic than promising, though. Using such sensitive data in a court of law would certainly test the ethical boundaries of intellectual property protection (just ask Sony BMG about the perils of data collection via watermark), and one remains skeptical that the record industry could garner even a modicum of public sympathy after agreeing to the new DRM-free deal with Google, which all but concedes the death of

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### Google China and the Future of Intellectual Property (cont'd)

intellectual property rights enforcement. The deal is likely to remain unpopular everywhere but China, where intellectual property rights and international law are frequently brushed aside in the name of state progress. It could be argued that the China-exclusive precondition of the deal disregards several 'most-favored-nation' clauses painstakingly negotiated by the World Trade Organization, and offends sensibilities reaching, potentially, as high as human rights. I offer this admittedly provocative viewpoint after reasoning the following: If Chinese citizens, and Chinese citizens alone, are entitled to engage in the copying and distribution of unlicensed intellectual property, then they possess a legal immunity unique to humans of their nationality. Copyright violations in China, rather than triggering proper legal consequences, have simply been legalized out of exasperation. And if merely ignoring international law is a valid method of altering international law, then what justice can logically be rendered against citizens of other WTO-member nations and Berne Convention signatories who attempt to procure intellectual property in identical ways, but are labeled criminals simply by virtue of their nationality, and often transitively, their ethnicity? While the 1.19 billion Han Chinese of the PRC constitute the world's largest ethnic group, they do not constitute a group somehow immune from conventions of international law. Size should not justify exceptionalism, and 99.5% of all countries on earth are now effectively being punished for not stealing as egregiously as China has. Additionally, in the opinion of this author, the 'right of copyright infringement' is certainly not the most important human right missing from modern Chinese society, a point heavily punctuated this summer by the 20th anniversary of the Tiananmen Square massacre and by July's appalling ethnic violence in the restive Xinjiang province. When considered in the context of China's abysmal human rights record, recent western concessions like the US record industry's Google-assisted kowtow appear even more damaging. Google Music Search is an innovative, laudable reconsideration of the monetization of music, but it sets bad precedent for the future of intellectual property. As a realist, this author can't help but wonder how many other liberal western traditions are likely to suffer similar, convenient erosions. If the West still believes in the rule of its law, then it is obliged to stand strong and support its proud legal edifice, even as more and more policymaking bodies around the world begin to groan and warp under the immense weight of the Chinese economy.

Certainly, all this is not to suggest that the Chinese are somehow incapable of respecting intellectual property – quite the contrary, in fact. With over 800,000 patent applications filed in 2008 alone, China actually leads the world in domestic patent filings. Since 2006, the country has witnessed the world's largest number of patent infringement lawsuits, and in the international arena, native Chinese firms have recently earned a spate of high-profile victories against foreign competitors. This would all seem to point to a strengthening capitalist tradition, and a growing respect for intellectual property, a concept not even recognized by the ruling Communist Party until 1985. It is occasionally argued that China's recent appetite for patent filing represents an important generational shift in thinking. That would certainly be nice. However, as is the case with so many of the country's positive economic indicators, these apparent shifts are not as much signs of a genuine cultural opening as they are byproducts of a brilliantly executed mercantilist policy. Predictably, China's sudden, voracious appetite for patents has been deliberately fueled from above by its government, which has for decades been obsessed with buying up foreign debt and building staggering trade surpluses. Its suddenly fierce defense of Chinese intellectual property is simply a plank in a monolithic, overarching, state-first protectionist policy. Free enterprise is rarely free in the PRC, where the allowance of private sector growth and middle class wealth has simply been a government tool in maintaining stability. The boardrooms of most, if not all, of China's largest firms are closely supervised by communist party officials. For the stewards of the PRC's mercantilist apparatus, defending Chinese intellectual property is not about fostering innovation or wealth among individuals, but about cultivating another positive net balance for the state. The concept of intellectual property in China has been manipulated into merely another state-controlled weapon of economic warfare.

In light of all this, it might seem foolish to tie the future prosperity of the United States, or the world for that matter, to one massive Asian economy. But doing so will soon become an absolute necessity. It should come as a relief, then, to find that China is not the United States' sole conceivable suitor. China may be the fastest-growing, most powerful prospective partner for the United States, but the two countries have already reached several impassable ideological chasms, and appear ill suited for true symbiosis. I posit that a far more congenial, natural ally lies just across China's southwestern border: India. A truly

entrepreneurial nation, boasting the world's second-fastest growing economy and the largest democratic system on earth, India mirrors the United States in ways China cannot. While its immense, cumbersome democratic process and detestable neglect of poverty often leave it in the shadow of better-disciplined China, its forthright embrace of individualism, entrepreneurialism, and human rights suggest it to be a much more compatible, long-term partner for the US. Furthermore, it is believed that while India's grassroots economic growth has been slower and less stable than China's state-run growth, India's eventual growth ceiling may in fact be higher. Ever since sweeping market liberalizations in the 1980s, Indian premiers and economists have spoken optimistically about establishing meaningful economic ties with the west, including the United States. The relationship would certainly be worth pursuing, once current political turmoil has cleared. At present, the largest diplomatic obstacle to a possible co-development strategy is the United States' close involvement with Pakistan, India's politically unstable neighbor and historical rival.

Rarely have intellectual property rights stood on such perilous ground. As the digital music revolution grows into its third decade, each day sweeping the globe, reinventing realities and smashing analogue conventions, long-held western conceptions of *droit d'auteur* are being challenged and reshaped in the name of economic convenience. While the blunt, overly restrictive DRM regimes of early digital media have failed miserably, their presence has maintained, at the very least, the appearance of societal respect for intellectual property. Doing away with DRM explicitly, as many popular music purveyors (now including Google) are, invites an even more regrettable, lawless paradigm. In a market absent of all scarcity, distribution cost, production cost, and therefore physical value, a viable business model cannot exist. In a market in which consumers effectively choose whether or not to pay for the services they receive, rational behavior ensures collapse. In a digital world where law is unenforceable, 'rights' are simply quaint relics of an ink-and-paper past. Yes, an industrial evolution is necessary and underway. But any evolution must take into account the fundamental cornerstones upon which our capitalist tradition was built. If future developments of the global economy follow precedent set by Google in China, the age of intellectual property rights is, as we know it, over.

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## Anti-Piracy's Avant-Garde

by Bryce McLaughlin

A recent law passed by the French Lower House brings the promise of controversy and the possibility of anti-piracy legislation throughout Europe and the United States. Popularly known as the 'Three Strikes' Piracy Law, the controversial legislation passed on May 14, 2009 permits a new government agency to interrupt the internet of persons caught pirating. Issuing an electronic warning after the first offense, the agency is further permitted to issue a second warning through the post and, finally, disconnect the user's internet for up to a year. [1]

Though welcomed by many and heralded as good legislation designed at protecting the rights of intellectual property creators, the 'Three Strikes' law has already met criticism and resistance. In fact, the May 14 bill is but a close relative of a similar April 9, 2009 bill that was rejected by the French National Assembly. [1], [4] In addition, the European Parliament recently issued a statement in anticipation of the May 14 legislation forbidding governments in the EU from disconnecting the

internet of individuals without first obtaining a court order.

Indeed, it is the legislation's bypassing of the court system that is most alarming. Seen by many as a direct assault on individual liberties, the bill fosters a new debate: whose rights should laws protect? Proponents of the bill believe the rights of content creators should first and foremost be protected. After all, pirates are but thieves and law-breakers. Yet do the ends justify the means? Certainly there exists the opportunity to silence dissenting individuals and groups through mere accusations of piracy. Such short term gains as the 'Three Strikes' Piracy Law might produce could well be for naught if the freedom to express oneself – either politically or creatively – is simultaneously curtailed.

And such concerns are not without merit. The executive in charge of web innovations at TF1, a French television broadcaster, was dismissed after a private e-mail to his representative in the National Assembly that shared his criticism of the then proposed 'Three-Strikes' Piracy Law was intercepted by his senior management.[2]

Yet this assault upon individual liberties has been slowed as the French Constitutional Council recently denied the new French government agency the ability to sever an individual's internet connection. In what can be seen as a direct response both to the aforementioned concerns and to the many favoring unrestricted internet access [3], the Constitutional Council has reaffirmed that freedom of expression and communication are fundamental rights irrevocable without court intervention [3].

Criticism and outrage aside, technology progresses at incredible rates and those determined and savvy enough to pirate will devise new methods of concealing their thievery. In addition, many are concerned for those mistakenly accused of piracy and the resulting disruption to business and personal lives. Indeed, another very serious concern is a potential side effect of the bill that could inhibit future internet development and growth in France.[2]

Yet for now, the law stands and begs an answer to the question: is this the avant garde of anti-piracy legislation in Europe? For Great Britain, the answer is no. The British government has instead opted to foster collaborative efforts between the British recording industry and British internet service providers. In fact, a new government agency has already been created to act as a mediator between the two seemingly uncooperative entities.[4]

But what of the enactment of such a law in the United States? Already the RIAA is

lobbying for legislation similar to France's 'Three Strikes' law [4]. At first, it would seem such a law would not withstand public outcry for the invasion of the individual's right to privacy is a contradiction to the principles upon which the nation was founded. Yet the encroachment of government into our personal lives that has been and is being fostered by both the past and present administrations allows for that possibility to remain a reality (perhaps the most recent example of legislation in the United States designed to dramatically enhance the tools available to government agencies combating piracy is the Prioritizing Resources and Organization for Intellectual Property Act [7]).

We cannot yet say with certainty if France's ambitious approach to combating piracy will yield the desired effect. Courts have yet to rule, results have yet to be produced, and time has yet to tell. We may, however, ask ourselves: as a global entertainment industry, are we willing to sacrifice liberties in the pursuit of profits? Are we prepared to embrace the ethics of piracy and defiantly trod upon the rights of others?

[1] Leigh, Philips. "France Passes 'Three Strikes' Piracy Law." *Business Week* 14 May 2009. 12 June 2009 <[http://www.businessweek.com/globalbiz/content/may2009/gb20090514\\_391445.htm](http://www.businessweek.com/globalbiz/content/may2009/gb20090514_391445.htm)>.

[2] Pfanner, Eric. "France Approves Crackdown on Internet Piracy." *The New York Times* 13 May 2009. 12 June 2009 <[http://www.nytimes.com/2009/05/13/technology/internet/13net.html?\\_r=2](http://www.nytimes.com/2009/05/13/technology/internet/13net.html?_r=2)>.

[3] Pichevin, Aymeric. "French 'Three-Strikes' Scheme Curtailed." *Billboard* 10 June 2009: 9-9. *Billboard.biz*. 10 June 2009. 17 June 2009 <[http://www.billboard.biz/bbbiz/content\\_display/industry/e31bc30ab7d8da37db8f8eeff19d8001ce4](http://www.billboard.biz/bbbiz/content_display/industry/e31bc30ab7d8da37db8f8eeff19d8001ce4)>.

[4] Boorstin, Julia. "France Seeks 'Three Strikes' Law vs. Web Piracy." *CNBC* 14 Apr. 2009. 08 June 2009 <<http://www.cnbc.com/id/30215096/>>.

[5] Wallace, Brenda. "France Passes 'Three Strikes' Anti-Piracy Law." *Weblog post. Coffee.geek.nz*. 13 May 2009. 13 June 2009 <<http://coffee.geek.nz/node/23000>>.

[6] Vilches, Jose. "France Votes Down Three Strikes Anti-Piracy Law." *TechSpot.com*. 9 Apr. 2009. 14 June 2009 <<http://www.techspot.com/news/34225-france-votes-down-three-strikes-anti-piracy-law.html>>.

[7] Butler, Tonya. "Legislative Update - Lobby This: RIAA! MPAA! MEIEA?" *MEIEA eZine Fall 2008. MEIEA*. 17 June 2009 <<http://www.meiea.org/Ezines/Vol6No1/butler.htm>>.

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## CURRENT EVENTS

### Untangling Michael Jackson's Finances

*MBJ Staff*

Shock and grief were expressed by many this June as the world lost one of its most influential pop-stars, Michael Jackson. Jackson transformed the world of popular music, establishing a new gold standard of global celebrity. However, along with his influence came an extremely garish spending habit. In the wake of his passing, it is important not only to discuss his musical legacy going forward, but also to sift through the financial mess he left behind.

In 1984, Jackson, known to be an intense negotiator and savvy investor, secured one of the biggest coups in music publishing history, acquiring the rights to The Beatles' entire catalogue for \$47.5 million dollars. Partially owned by Sony, today the investment is worth over \$1 billion. However, in more recent years, Jackson has been in financial trouble. Mounting personal debt, a result of Jackson's serial over-leveraging against his expansive asset sheet, had begun to loom over his estate. Secluded in his Neverland Ranch enclave, Jackson spent a majority of his final years paying off the high interest and costs associated with his eccentric and lavish lifestyle.

Yet Jackson's estate is still fundamentally sound. He may have had a cash-flow problem but the high net-worth of the estate is not in question. The future-value of his holdings, especially in publishing, may be hard to evaluate, but the debt will surely be sunk as revenue from recording sales and songwriting continues to rise.

Moreover, Michael's exorbitant living expenses are in check forever at a time when the estate is well positioned to regain ownership of his old recording masters, now in the care of Sony (see our cover article). Certainly, Jackson's estate would be able to extract maximum advantage from Sony, even if the masters did not completely revert to it. All of which suggests that Michael Jackson's family will gain much financially from Michael Jackson's passing.

For many fans that know Michael's intimate story, the shock of his death will be compounded by the observation that, perversely, his death may have undone the financial Gordian knot that tied him down lately. Even the most consummate and beloved music entertainer in the world, and one of its top business scions, could not in the end extricate himself in time from his worldly troubles.



### Universal and Virgin Launch New Subscription Model

*By: Michael Benson*

This June, Universal Music Group (UMG) announced it would be pairing with Virgin Media, the U.K. based telecommunications giant, to offer Virgin Broadband subscribers unrestricted access to UMG's entire catalogue for a monthly-added fee. While the exact amount of this fee has not been officially disclosed by either company, the BBC has quoted Virgin as saying this fee will likely be near the cost of buying a few albums [1], or according to the Wall Street Journal, around \$25 per month [2]. Pricing is also likely to be tiered, with at least one less expensive option for the more conservative of music downloaders.

In return, Virgin Broadband has said it agrees to discourage illegal file sharing among its subscribers by temporarily suspending service to those users discovered by record companies engaging in copyright infringement. A spokeswoman for Virgin suggested that the length of such a suspension could last "as little as five minutes, an hour, or a day [3]." She added that they would initially execute the penalties on a trial basis, and there is a possibility of no such penalty being enforced. The likelihood of penalties becoming more severe is quite small, given that U.K. broadband customers are charged on a per-usage basis.

Industry experts and U.K. government officials are praising the deal as the first of its kind brandishing a long-debated ISP-Publisher concurrence in terms. Earlier this year, Virgin Media decided to kill off its plans of a similar music download service when Sony and Universal demanded that Virgin agree to block file uploads and downloads from users' PCs. It seems in hope of re-monetizing their assets in a digital environment, UMG and other music publishers might be willing to slightly loosen their grip.

Indeed, this marks the first occasion of a deal struck between music publishers and Internet service providers that would give users this kind of access. Apparently, all tracks will be in the .mp3 format and fully DRM-free, streamable, and downloadable for use on users' portable music devices or burning CDs. It also hints that ISPs of the future may become more active in discouraging file sharing on their networks by penalizing users for copyright infringement.

However, it remains to be seen how Virgin Broadband customers will take to such an offer. Essentially, subscribers who have an established behavior of downloading or torrenting their favorite albums illegally will now be obligated to purchase the service to remove the threat of their connection being suspended. Alternatively, avid-downloaders will simply switch ISPs. If this happens, Virgin's competitors are unlikely to duplicate this new service model without further pressure from music publishers or from the government. Another obstacle looms: Virgin says it has been in talks with the other major labels for inclusion in their new yet-to-be-named digital music service and this comes as no surprise. Without the other big three, Virgin's new service will likely sink without a vast and inclusive library. Launch is scheduled before Christmas 2009.

The logo for VEVO, consisting of the letters 'VEVO' in a bold, sans-serif font. The 'V' is red, and the 'EVO' is black.

[1] Cellan-Jones, Rory. "Anti-Piracy Music Deal for Virgin." BBC News. 15 June 2009. 20 June 2009 <<http://news.bbc.co.uk/2/hi/technology/8100394.stm>>.

[2] Fanner, Eric P. "Universal Music and Virgin Reach and Download Deal." New York Times. 16 June 2009. 21 June 2009 <<http://tinyurl.com/nytdigital>>

[3] Meyer, David. "Virgin-Universal deal may hit 'persistent' file sharers | Digital Media - CNET News." Technology News - CNET News. 15 June 2009. 24 June 2009 <[http://news.cnet.com/8301-1023\\_3-10264472-93.html](http://news.cnet.com/8301-1023_3-10264472-93.html)>.

## BUSINESS ARTICLES

### Ticketmaster Fights the Secondary Market with Paperless Ticketing

By: *Christina Fabi*

In preparation for a highly anticipated fall 2009 tour, Ticketmaster introduced a paperless ticketing strategy for Miley Cyrus, making it the first exclusively ticket-less effort in live music history for a major artist. Since enacting this strategy, however, tickets have been reluctant to sell, unlike Cyrus' 2007 tour which sold out instantly. Since tickets went on sale June 13th, more than 40 of the 45 scheduled dates are yet to be sold out. As a result, Cyrus has become the center of a heated discussion revolving around past current ticketing models. While the primary market provider, Ticketmaster, in conjunction with Cyrus' management, Frontline, has articulated that its efforts are an attempt to create transparency and control within the business, voices in the secondary market have deemed the new model inefficient. This tension probes industry moguls and ticket-holders alike to question the benefits and consequences of this new model and to predict if we will see more implementation of it in the future.

In a digital world, going paperless seems logical. Every other aspect of the music industry is virtual, so why should the touring industry hang on to the antiquated idea of a physical ticket? Paperless does away with printing online receipts, eliminates the possibility of losing a ticket and only requires the fan to show up at the concert with the credit card used for the purchase along with a valid photo ID. It is said by Ticketmaster that these benefits will allow consumers to attend concerts with ease.

For Ticketmaster and Frontline, however, the new model has a much larger benefit. This new process is their effort to eradicate the secondary market and give concertgoers the chance to buy any seat in the house at face value. Prices are scaled from \$39.50 to \$79.50 with \$295 seats in the first 25 rows available through "I Love All Access", a VIP ticket site owned by Frontline management. Due to the fact that tickets are non-transferable, scalpers are disabled from buying a huge bulk of tickets in order to resell them at large mark-ups. Debra Rathwell, senior VP at AEG Live, the promoter of the Miley Cyrus tour, stated that the lack of sold-out shows is actually due to the absence of secondary market players. "This is what on-sales used to look like before brokers got into our business" Rathwell supports paperless ticketing because it gives the consumer the chance to take their time with each purchase without the fear of losing the opportunity to buy a good face-value ticket. She sees the recent sales numbers as highly satisfactory for Cyrus' tour.

In contrast, Don Vaccaro, CEO of TicketNetwork along with other secondary market representatives, has made his standpoint clear by pointing out that customers do not prefer paperless ticketing due to its restriction on transfer and possible resale. They believe that lower ticket sales are a result of this inconvenience and that people are resisting to fully committing to a certain show upon ticket purchase. Vaccaro confirms this in his statement saying "Consumers stayed away from paperless tickets in part because of convenience and logistic issues" Said Vaccaro. While the secondary market's reaction is no surprise, there are other factors that show paperless does not necessarily mean effortless.

The real problems might not come into play until people arrive at the venue. Paperless ticketing requires the fan to present their photo ID at the entrance and swipe their credit card. While this practice

is well known from air travel the arenas in question will have to accommodate masses in the multiple thousands. It seems difficult for the guards to be able to check each person's ID in order to make sure the credit cards are valid. Referring to the problems of the 2008 AC/DC tour which sold 3,000 tickets paperless per venue Chuck LaVallee, director of music relations for StubHub, comments that "If they didn't have time to check IDs on 3,000 tickets, they're not going to have time to check them on 18,000. I think the whole thing's a mess."

In the end, only on the days of the concerts will we know whether paperless makes the actual experience easier or turns it in to a logistical catastrophe.

Ticketmaster's main motivation is reported to be the elimination of the secondary market. For many years, however, the secondary market has become a more legitimate part of the touring business through online resale and auction sites. The primary ticket sellers have not come to terms with them due to the fact they cannot share in the profits that the resellers gain. The primary sellers believe it is unlawful for scalpers to share in a revenue they have not contributed to in any way and they resist the way the secondary market has driven up prices and redefined the actual value of tickets.

Scalpers have turned ticketing into a laissez-faire economy allowing for a dynamic pricing model that, until this new model, could not be controlled by primary sellers. Brokers point out that this development is proof of the fact that there is a strong demand for the service they are providing. In a competitive market, supply and demand dictate price and whether or not the secondary sellers are Ticketmaster's competition, bypassing them could not only mean an exclusion of resale but elimination of this main competition.

Critics of Ticketmaster have further disapproved of the company owning its own secondary market sites, Ticketsnow and Ticketexchange, which seem to contradict their general repugnance against resale. They have also pointed out that Cyrus, among many other artists has caught on to the increased prices, selling all access tickets at scalpers prices through alternate websites. Doing so, they again prevent fans that buy at face value, from buying seats within the first rows. After two presales via American Express and Cyrus' Fan club together with "I Love All Access", ordinary fans remain limited in their selection of top seats. Ticketmaster seemingly agrees with scalping as long as they share in the profits.

This leads us to ask whether the fan actually is a part of the paperless ticketing equation or simply serves as a convenient pretense- much like Miley Cyrus herself. With Ticketmaster being under investigation concerning a violation of antitrust laws, it is questionable at this point how paperless ticketing will affect the company.



## BUSINESS ARTICLES

# Social Media and the Marketing Mix

By George Howard

This article addresses the effective use of social media marketing. It presents best practices for leveraging the new technologies, and presents an argument against the use of traditional, top-down, marketing approaches.

In the groundbreaking book, *The Cluetrain* (which can – and should – be read online: <http://www.cluetrain.com/>)[1], the authors present the most cogent articulation of the Internet. Not the what of the Internet, but, more importantly, the why of the Internet. I certainly don't want to spoil the thrill you will have when you read the book, but I will let you in on one critical discovery the authors make with regards to the why of the Internet: Markets are conversations. Essentially, the industrial revolution — summarized by the notion that you could have any color Model T as long as it's black — created an artificial wall between the providers/makers of services and goods, and their customers. The rise of big advertising only further distended this divide (think *Mad Men*). Ultimately, we lost the conversation between those making the things and those who consumed the things. In so doing, a culture of mistrust emerged. To combat this mistrust companies spent countless dollars attempting to build brand equity; which is a long way of saying “trust.” Enter the Internet. As the authors of *The Cluetrain* correctly state, the Internet was never designed for commerce. Rather, the Internet was designed for communication (stories, conversations).

It took some time for those using the Internet to begin using it the way it had always been intended. At first, of course, the large companies and advertisers saw it simply as a gigantic one-way/top-down billboard. The recent ad collapse has borne out just how fallacious this concept was. What we call social media is a sign that the wisdoms of the Cluetrain have finally come to pass.

The tools are irrelevant. Be platform agnostic. Worry today about your Twitter, Facebook, and blog/site strategy (and, by all means, ignore MySpace et al.), but worry not about the “faddishness” of Twitter. Of course, social media is a bubble, but so too was there a bubble around the nascent Internet; it popped (as the social media bubble will too), and the world was forever changed. We can't go back. Wouldn't want to.

What is relevant are the practices involved with leveraging the tools of social media in the most impactful manner. There is an equation, it's a simple one: for every unit of online energy spent, spend a unit on offline energy. Marketing today is a straddle between the online world and the offline world. Only those who do the straddle right will survive. Err too far online, you fail. Too far offline, you fail.

To understand what I'm talking about, consider why Facebook is just crushing MySpace (random sample of the hundred or so students I teach: Q. How many use Myspace? A: None; Q. How many use Facebook? A: All). The reason is that Facebook helps us do the straddle (sounds like a dance), while MySpace is a closed online only experience.

Think about it: Facebook works because it allows you to enhance and augment your offline experiences. You post photos of things you do with your friends; you write on each others' walls regarding offline experiences.

MySpace is more of (and I use this word in the loosest possible manner) a portfolio, or, what I really believe it's become, for bands at least: an electronic demo. MySpace has nothing to do with your offline life; it's only related to your online life, and, thus, falls short.

Musicians and others too often feel that the new tech allows them to forgo what is really important: building real connections via playing live; i.e. they emphasize the online and forget about the offline. It makes sense. These online tools are so easy, and they give the illusion of progress and sometimes accomplishment. However, this indeed is illusory. Without leveraging what you've built online in order to grow your offline presence, and vice versa, you will fail.

This holds true across the board. Businesses, authors, whom-ever...all must do the straddle. If you're a real estate agent, why would you not be tweeting up a storm, Facebooking up a storm, blogging up a storm, so that when you have an open-house for one of your listings you can connect with your online constituency in an offline manner? If you're a restaurant that isn't tweeting out your specials, and even perhaps creating events/menus for your online peeps so that you can then have the offline experience with them, it seems to me you're missing something. You artists will have to come up with your own Twitter/Facebook/your blog/site strategies (or steal from others). I beg, plead, cajole you to step quickly away from the narrow thinking that has led us to this summer of musical discontent, and instead remember that markets are conversations, and that, really, all social media is word of mouth on steroids.

A few pieces of advice: Commit. You don't have to tweet out hundreds of times a day, but you do need to be consistent. If for several days you send out dozens of tweets, and for the past two days, zero... not good. Connect! There must be a connection between your Twitter presence and the rest of your social media efforts. Most importantly, your web site must be the central repository/point of dispensation for all things social media. Build an architecture of participation. If asked, your constituents will help. Ask. Use social media to make them feel like they are building things with you. After all, they are.

A Twitter presence is great, but it's not enough. It must be leveraged correctly by being more than a one-way push of information; it must be an invitation for the community to contribute to the identity (not brand), and there must be a place where the community can not only see their contributions, but also direct their Tribe (for more on this read Mark Earls' book *Herd*, and Seth Godin's book *Tribes*) to see what they've contributed. This allows for the community itself to attract others willing to join the Tribe. It's what Mark Earls means when he says (via his interview on the *Gaping Void* blog[2]):

Human beings are to independent action, what cats are to swimming. We can do it if we really have to, but mostly we don't... Instead, we do what we do because of what those around us are doing (Whatever our minds and our cultures tell us).

So if you want to change what I'm doing, don't try to persuade me - don't try to make me - do anything. Instead, enlist the help of my friends...

## BUSINESS ARTICLES

Why bother with all this social media junk, you ask? Well, here's my point: All top-down created communities will reach a plateau.

It's not a coincidence that bands get stuck drawing the same number of people to their shows, week after week, year after year. It's not a coincidence that a website or blog's traffic gets stuck at a certain level and doesn't ever really move more than a standard deviation one way or the other. It's not a coincidence that restaurants and bars reach a certain level of customers and rarely vary from this amount.

In all cases, what has happened is the same: a marketing strategy has been employed (typically some variant of a push/top-down approach) and has reached its maximum level of efficacy. Whatever effect it had, and whatever ambient WOM effect resulted from this initial push has reached its limit. It is now essentially a closed circuit. The same people will come to the bands' shows, visit the blog, and go to the restaurant (again, all within  $\pm\sigma$ ).

At this plateau point, those in charge of attracting and retaining new customers have two choices:

1. Ramp up the top-down/push marketing by purchasing more ads, etc., in the hopes that whomever they attract with these ads will engage in the offering and become part of the Tribe. This is not likely, and as we know - with modern analysis so clear in correlating traffic generated from a top-down/push marketing approach to bounce rate — simply doesn't work.

I'll use a website as an example: If you, for instance, run a campaign with StumbleUpon, or if you run some other form of ad (God forbid, a banner ad), you will often momentarily increase traffic by as much as  $+2\sigma$ . However, the goal is not just attraction, but also retention, and after the initial spike diminishes, the numbers are typically right back to their original traffic levels (read: no retention).

2. Give those in the Tribe the tools (social objects[3], etc.) to direct their peers to the show/site/restaurant of which they are already a Tribal member. The words of Mark Earls are worth repeating :

...If you want to change what I'm doing, don't try to persuade me - don't try to make me - do anything. Instead, enlist the help of my friends...

The latter is clearly the right choice. It requires a different strategy. It requires real diligence and perseverance. Your first several months of using social media can feel like you're talking to yourself.

But, if you're persistent, if you do "The Straddle", if you determine what social objects your Tribe can share and use to attract and retain their peers, you will trend up from the plateau. The benefit of this approach, beyond the fact that it's likely the only way it will work, is that the financial costs are de minimis. Although, at the same time, you must commit the time and human resources to this project or else it will fail. To sum it up, there are little to no out-of-pocket expenses to undertake, while there are very definitely opportunity costs.

At the end of the day, you have no choice: the conversation has begun, and the tools to facilitate that conversation are improving. You can avoid the conversation (at your peril), but the conversation will go on without you. Big companies are finally starting to understand this. The frustrating part is that many in the music business — those who have so much authentic conversation to share — seem to be resisting it. Part of this is the understandable, though nonetheless delusional, idea that many artists cling to: That the hand of God will come down and promote their work on their behalf so that they can simply focus on creating the work. Best of luck with that. Rather than allowing someone else to present your work to the marketplace (and axiomatically get it half-right or all wrong), you can now converse with your market directly and with an authentic voice. The Internet disdains and shines a bright light on mediocrity and inauthentic behavior. It rewards those who use it as a means to tell stories and create meaningful connections. That is what you must do.

[1] Jeff Jarvis, the author of the recent *What Would Google Do?* book correctly expresses his indebtedness to The Cluetrain. Unfortunately, he misses his mark. The book should have been called *What Would Facebook Do?*

[2] [www.gapingvoid.com](http://www.gapingvoid.com)

[3] For more on social objects see my blog: [www.9giantsteps.com](http://www.9giantsteps.com)

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## BUSINESS ARTICLES

# Strengthening Brand Identity Through Music

By Tiffany Peon

In a decade of declining record sales, only the most enterprising artists survive. Record sales can be an unreliable source of income, and although touring may be lucrative, it is an expensive investment for those without tour support. As a result, sponsorship is becoming a very important revenue source for musicians worldwide. While musicians endorsing products is not a new concept (Coca-Cola has been using big acts like Michael Jackson in their advertisements for years), artists are increasingly looking for creative ways to align themselves with brands. Major industry innovators, among them Pharrell Williams and Cornerstone Publicity, are not simply featuring music in advertisements, but using artists' identities to strengthen brand identity.

Let's pretend you sell toothpaste. While your brand is very popular, you've yet to tap a certain target demographic. You've tried to grab the group's attention, but traditional TV and print campaigns have brought only marginal returns. How do you utilize new forms of media without losing credibility or being labeled 'spam'?

Colgate in Latin America created an effective campaign in this exact scenario. Two years ago, the company signed a contract with Tito El Bambino, a Reggaeton artist who had achieved fame in his genre, but was not yet a household name. Bambino appeared on TV, Radio, and print ads, while also making personal appearances at stores and launching an interactive website. Instead of using his own songs, the artist performed Colgate's jingle, which was offered as a downloadable ringtone, redeemable with a code on the toothpaste boxes. By the end of the campaign, over 75,000 ringtones had been downloaded and Tito El Bambino was suddenly one of the most prominent artists in Latin America. Colgate's campaign earned Bambino valuable exposure outside his urban genre, supplemented his income, and built him a wide fan base of young and old alike.[1]

The reason campaigns like this are proving to be effective is because they target customers' interests instead of their wallets. Companies with no prior involvement in the music industry are partnering with artists who represent the essence of their brand. In February, Honda launched a campaign aimed at urban males aged 25-45. The ad spot featured an actual, undiscovered Brooklyn rapper, Mickey Factz: paralegal by day and rapper by night. The series was titled "Rhymes and Reasons" and aired on ESPN, TNT and BET. While Honda's core values do not necessarily fit with that of the hip-hop community's most prominent celebrities, Factz was chosen because his personal story matched Honda's target market: an aspiring, creative young professional more concerned with saving for his 401k than spending cash on an extravagant lifestyle. The campaign was so successful that it was recently extended through 2010. As for Mickey Factz, he couldn't be happier: "People know who I am now who wouldn't have ever known me before, and they're finding out about my music." [2]

These cutting-edge campaigns come from some of the most innovative ad executives and firms - companies like Cornerstone Promotions, a ninety-person company that considers itself a new model for record labels. Cornerstone, started by two ex-label executives, works with

several major firms, among them Proctor & Gamble, Nike, Mountain Dew, Levis, and Southern Comfort, as well as musicians of all levels of success. Founder Jon Cohen believes "[our] biggest strength is that we understand how the consumer thinks, and then we build a whole infrastructure to reach that consumer through the Internet, through the non-traditional methods, through radio, event marketing, field marketing, PR." Many of Cornerstone's campaigns connect companies to marketable music. For Nike, Cornerstone finds DJs to create soundtracks for running, using artists like LCD Soundsystem, A-Trak, Aesop Rock, and De La Soul. These mixes are hot sellers for Cornerstone, and generate profits that simultaneously benefit Nike, the DJs, and all featured musicians.[3]

Other artist agreements have resulted in works written solely for brands. Though shorter in duration, these affiliations have involved musicians from a wide range of genres. "Converse Connectivity", the most recent campaign of this nature, featured an original collaboration between Julian Casablancas of The Strokes, Santigold, and Pharrell Williams. The song was released for free on blogs and peer-to-peer (aka P2P) networks in an attempt to advertise virally and keep a low profile. The campaign engaged consumers by creating a work of genuine artistic interest, and then centered it on a brand. [4]

Musicians looking to jump-start their careers should be open to brands that interest them as consumers. Big-ticket artists like Keith Urban and Rascal Flatts are being co-sponsored by several companies that together create a 'lifestyle brand'. Urban is sponsored by Clorox, KC Masterpiece Sauces and Kindsford Charcol, the type of all-American brands that fit his image and appeal to his listeners. Touring sponsorships are set to increase by 3.8% this year, and on the whole, over \$1.08 billion will be spent sponsoring music venues, festivals and tours. These sponsorships, in concert with the continuing growth of live music sales, have given artists a new way to supplement flagging album sales.[5] As a result, popular conceptions of the 360-deal have broadened significantly, affording artists even more opportunities to thrive sans record label.

For songwriters and performers, the road to success was once paved, straight and narrow. In the wake of P2P, massive industry consolidation, and a deep recession, that road now lies in shambles. While today's cross-industry offshoots may look uncertain, artists creative and daring enough to adopt a new strategy may find sponsorships a great place to start.

[1] Ben-Yehuda, Ayala. "Title El Bambino: With Teeth." *Billboard* 06 Ju. 2009.

[2] Herrera, Monica. "Mickey Factz: Recession-Friendly Rhymes." *Billboard* 06 Ju. 2009.

[3] Harding, Courtney. "Cornerstone: Brand New Day." *Billboard* 06 Ju. 2009.

[4] "Cornerstone: Brand New Day."

[5] Waddell, Ray. "Brands on the Run." *Billboard* 06 Ju. 2009.

## BOOK REVIEWS

## The Record Industry: An Orrery of Errors

By: Michael Skauge

A review of Steve Knopper's *Appetite for Self-Destruction: The Spectacular Crash of the Record Industry in the Digital Age*

The record industry has fallen on hard times. No stranger to adversity, the industry has for many years been plagued with small issues that highlight a larger problem. The difficulty is mostly attributed to the inability of major record companies to see where trends are headed, where people want music to be, and what consumers want to hear. This is the underlying theme of Steve Knopper's fascinating book, *Appetite for Self-Destruction: The Spectacular Crash of the Record Industry in the Digital Age*, which highlights the industry's unwillingness to change its business model, and how its current behavior will lead to the same self-destructive path that got it here in the first place. By giving us a strong, detailed history of how the record industry has evolved from 1979 until the present, Knopper provides us with an understanding and better picture of why things happened the way they did.

The book is laid out logically. It presents a chronological list of events leading the reader up to the present, and then, at the end, provides some speculation about the future. However, the objective, detailed accounts of history take a back seat to the many horrendous mistakes these record companies made. Knopper's use of history throughout the book helps the reader gain a glimpse of the real inner workings of the industry so that she can understand why we are where we are today. The business strategies outlined in this book will occasionally make you laugh, but will more often leave you scratching your head.

The first of the 8 mistakes Knopper calls "Big Music's Big Mistakes" is the CD longbox. You may remember the long cardboard box with the CD in it. This was a plan by technology execs at Sony and Phillips to convince the labels to switch from LPs to CD's. The boxes fit perfectly 2 to 1 in place of the old LP racks, and because of its obnoxiously large size, it gave record companies a reason for large packaging deductions. However, the packaging was extremely wasteful. Many artists revolted. The battle finally ended when Jeff Gold, then-vice president of Warner Music, sat down and crunched the numbers, finding out how much longboxes cost in a given year. When he realized it cost \$25 million (Warner was taking in about \$90 million at the time), they stopped the longbox and gave half the savings to the record stores. It took nearly 13 years for longbox to finally disappear. Knopper's most profound comment on this mistake comes at the end of the section when he says, "The fact that it took so long was symbolic of the decentralized record industry's inability to do anything quickly. Anything, of course, except sign talent and sell CD's." p. 39

The next big problem was illegal activity, a scourge known to the record business quite intimately. Independent radio promotion is a practice with a long history of payola and bribery. Independent radio promoters, the middlemen, were paid millions of dollars to push radio directors to play the

songs of the label so that, in turn, more records would be sold. Complicating the issue further were alleged ties to the mafia. When ties between then independent promoter Fred DiSipio and the mob came to light, record execs played dumb, using DiSipio as a scapegoat to play down their own involvement in the illegal transactions. The silver lining however, was that DiSipio's misfortune gave the labels an opportunity to potentially draw down radio expenses. But predictably, the problem wasn't solved. Independent radio promoters such as Bill Scull were still drawing up to \$50,000 per week pushing songs. Knopper uses these statistics and repetition of the phrase "like a drug" to underscore not only industry addiction to this soon-to-be outdated model, but also the amount of money that was being spent to get a song out. In the early 2000s, record companies finally decided they had seen enough of the pay-to-play, mob-saturated corruption, and they cut off the promoters. Then, any path back to the illegal model was torched by Attorney General Eliot Spitzer, who outlawed play-to-play. Suddenly without promoters, labels had no means of getting their songs played.

If you were in the know about music technology in the 1980s, you may remember DAT, or Digital Audio Tape. It was a clunky disc released by Sony to combat the threat of rampant cassette piracy that emerged in the 80s. It was also to be released along side the CD with the idea of making everyone twice as rich. However, with DAT players initially costing over \$1,000, they weren't terribly popular, and labels wouldn't sign on to the DAT idea without some assurances. Hence, the birth of digital rights management. This early version was called the SCMS or Serial Copy Management System. It allowed you to copy the disk exactly once. The publishers, songwriters, and others who would lose royalties through this agreement sued Sony. They won, and Sony paid up. However, Knopper points out that Sony still didn't understand the argument of the other side of the table. The songwriters and publishers losing money through this new technology were not isolated victims – and the affliction would someday come back to haunt the labels. Greed reigned supreme and manifested itself throughout all the major decisions of the era. One example is the death of the single. The single died with the advent of the CD. Traditionally, a successful 12-song album might've yielded two singles. By selling the other 10 tracks coupled with the 2 singles for \$15 instead of \$.99 per song, more money could be made.

As much as independent music fans adore the Newbury Comics of the world, it is Wal Mart and Best Buy that dominate record sales. With their size comes the ability to negotiate low prices, often offering CDs as mere loss-leaders, drawing in consumers to



## Appetite for Self-Destruction

The Spectacular Crash of the Record Industry  
in the Digital Age

Steve Knopper

## BOOK REVIEWS

### The Record Industry: An Orrery of Errors (cont'd)

buy other, more profitable items such as vacuums, blenders, etc. This forced smaller stores to sell records at low-profit prices. The MAP, or Minimum Advertised Price was introduced to curb the practices of the larger chains. Many states sued the record companies for price-fixing. They settled and agreed to give \$20 to anyone that bought a CDs bought between 1998 and 2000, a stupendous fee amounting to \$75.5 million. In addition, they donated 5.5 million CDs to schools and libraries. The CDs they donated included, "Martha Stewart Living: Spooky Scary Sounds for Halloween, and Ricky Martin's Sound Loaded." This is yet another example of the record companies' inability to recognize the effects of their actions on their customer base. Perhaps not surprisingly, donating ridiculous, bogus CDs and jacking up the price of albums filled with terrible songs turned out to be a bad plan. It further displayed the callous and arrogant nature of the industry.

Knopper discusses in depth the history of Napster, a simple but revolutionary computer program that rocked the record industry in several ways. For one, it brought back the idea of the single, because downloaders could now bypass 'filler' tracks. Second, and most importantly, it necessitated a new business model. The record industry failed to see the dire position they were in, and formulated a stubborn policy against Napster. Who could blame them? People were stealing product. However, their inability to move beyond this bitter stubbornness and engage business realities as they truly existed doomed them.

Napster proved a dagger through the industry's heart, when ironically, it could have at one time been the industry's best friend. The industry fought hard to dismantle peer-to-peer sites, seemingly blind to the fact that others would always pop up in replacement.

When the RIAA was out of options regarding rampant piracy, they began suing consumers for participation in peer-to-peer networks. They did so for hundreds of thousands of dollars. Downloaders could not afford to battle it out in the courts for long and so were forced to settle. The suing switched to college campuses due to the high speed of the Internet connection on the campuses. Only recently has the litigation stopped, due mostly to its inefficacy in stopping piracy, but also possibly because of work being done at the Berkman Center at Harvard Law School in Boston, MA. The last of Knopper's list of "8 mistakes" is Sony/BMG's decision to secretly add extended copy protection, or XCP, to CDs that would expose consumers' computers to malicious programs and viruses. When news of this practice finally came to light, nobody was happy and Sony quickly removed it. One wonders why did they do it in the first place.

In the last section of the book, Knoper discusses the future. This section proves to be the most interesting of the entire book. He touches on the future of 360 deals, DRM, subscription services, independent promotion, and independent production. I offer one of the most poignant points Knopper makes in the book:

Everything has changed. Thriller won't save the record business this time. Thinking differently will. And unless Doug Morris and this col leagues stop fiercely protecting the old model of selling pieces of vinyl or plastic to as many consumers as possible and start hiring digital music executives trained to build the next Napster or the next iTunes or the next Long Trail service or the next music-equipped cell pod or whatever particular shape the future might stick, the labels will become an anachronism p. 250.

Thinking outside of the box and supporting people that buy your product is the best course of action. For too long the record companies have abused their customers. Now in a position never before seen, consumers are able to demand what they want and how they want it. While it is valid to look at these new emerging models, I wish that Knopper had introduced something more unique. The book is great, but it sometimes reads more like a history lecture.

Personally, I don't believe the downturn was entirely the fault of the labels. Knopper likes to rant and rave about the record industry's failings regarding technology. While it is true that the record industry failed to see a larger, more important picture, so did a lot of people, possibly even Knopper himself. Hindsight is 20/20. All in all, Knopper manages to masterfully blend a strong, focused, and detailed history of the record business with a forward-looking approach to new ideas. We, as professionals in the music industry, can gain a lot from Knopper's book. Hopefully, many of the industry's major players will read this book. I believe that studying the record industry's inglorious past will ultimately help us avoid repeating the same kind of catastrophic mistakes in the future.

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## UPCOMING TOPICS

Some of the topics we will tackle in next month's issue of the Music Business Journal:

- **The Dawn of the Smartest Phones**
  - **Tweeting Music**
  - **D.I.Y. in Music School**

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