

Music and Equity Crowdfunding

By Peter Alhadeff

Over the last fifteen years, since the advent of the worldwide web, there has been a revolution in the world of finance. More money is being raised online today than ever before from crowds of like-minded investors, consumers, and communities of fans, especially in the creative arts. The phenomenon is global and has all the hallmarks of a higher growth early stage industry, with newer sites making the difference in the last couple of years. Kickstarter and Indiegogo, for instance, have taken over much business from ArtistShare, the first ever music fan funded site started more than ten years ago.

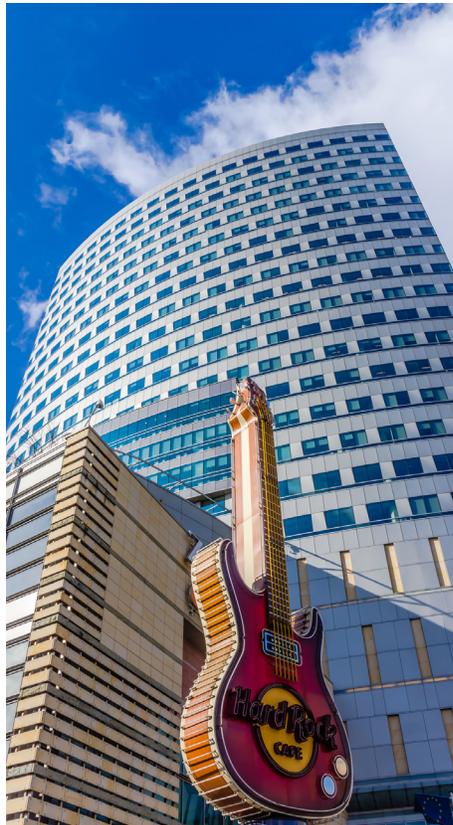
The Power of Crowdfunding

Global growth has been explosive. According to the first ever *Crowdfunding Industry Report* -- a free abridged version is available at www.crowdsourcing.org -- the market will reach \$3 billion early in 2013, up from half a billion in 2009. This is a new trade in the making, and top analysts and investors are bullish about its future. Fred Wilson, a well-known venture capitalist and blogger, has said that just in the United States, a one per cent shift in long-term investments could produce a \$300 billion market. If he is right, and one-twentieth of all crowdfunding monies were spent on music, the business would outdo overnight the glory days of old.

Crowdfunding platforms are broad-based and do much more than trade rewards against pledges, as musicians are accustomed to think. There are more than 450 sites worldwide, and they trade in equity and lending, as well as rewards and donations. U.S. legislation is expected to open up the doors soon for online equity deals when the JOBS Act, short for Jumpstart Our Business Startups, is given the go ahead by the Securities and Exchange Commission (SEC). As JOBS becomes the law of the land, financing in the industry is likely to unravel in new ways. For musicians and music entrepreneurs, JOBS will have long-term implications and here we speculate on what those might be.

The Juncture

In an exceptional show of bipartisanship by the Senate and the House of Represent-



tatives, the JOBS Act became law early in 2012. Implementation was slated by January 2013, but there has been a delay in the application of the law, especially its equity crowdfunding provisions. The SEC has to consider how to deal with both fraudulent fund-raisers and the passions of a new breed of possibly large and untrained unprofessional investors online. To minimize damage, maximum investments are being proposed per individual and crowdfunding project; in addition, investors will be limited to putting down a predetermined percentage of their income or net worth, to control potential losses (the top equity investment that will be accepted from a pool of online investors is \$1 million, and the caps on invested income online, or net worth, are the greater of \$2,000 or 5% for incomes, or net worth, less than \$100,000; for incomes, or net worth, over \$100,000, the figure is 10%).

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MISSION STATEMENT

The Music Business Journal, published at 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

In this issue we look deeply into some recent industry changes and contemplate their effects. The JOBS Act is expected to go into effect following an upcoming decision from the Securities and Exchange Commission and will expand possibilities for online equity deals – including within the music business. We speculate about what that means for crowdfunding platforms, music companies, musicians and the everyman investor.

The Billboard Hot 100 has recently made major changes to its hit-calculating formula and is an international leader when it comes to including new media in chart methodology. Eight years ago, the chart's formula was based only on radio airplay and physical sales. Those data sources have since been joined by digital sales and streaming, which, as of February, includes YouTube views.

The recent addition of YouTube to the Billboard charts reinforces how important the video streaming website has become within the music business. Furthermore, the service seems to be moving closer towards providing a direct revenue stream for music copyright owners. In just one week, the "Harlem Shake" by Baauer generated over \$200,000. Because of the viral videos, Baauer became the first unknown artist to debut at #1 in the Billboard Hot 100. Another YouTube sensation, the duo: Karmin, is featured as an in-depth case study.

Reversion rights go into effect in 2013, marking the first year that musicians can reclaim copyrights that were signed away on or after January 1st, 1978. As record labels and publishers try to find ways to retain their catalogs, many artists are requesting that the ownership of their songs be transferred back to them. So far, the majority of negotiations are taking place privately as precedents have yet to be set in court.

We report on some important changes regarding the implementation of the International Labour Organization's Maritime Labour Convention. The adoption of the convention will take place in August 2013 and will extend much needed rights and protections to those working aboard cruise ships, including musicians.

We also explore the implications of Creative Commons and free use, especially with respect to the rise of electronic dance music. We trace the Copyleft model back to the 1980s, where it began as a movement among certain computer software programmers to share code in the name of progress.

Finally, we study the meager state of artist royalties and break down the numbers to reveal just how little they can represent. More and more, revenue from recorded music continues to become an increasingly small slice of the overall income pie for artists. **MBJ**

From all of us at the MBJ, we hope you enjoy this issue.

Emilie Bogrand, Editor-in-Chief



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BUSINESS ARTICLES

Music and Equity Crowdfunding (cont.)

(FROM PAGE 1)

As these online investors will not be, as defined by the SEC, 'accredited' in any way, it propels the regulatory body into uncharted territory and makes it doubly cautious before it gives the thumbs up to Congress. A new SEC administration was installed two weeks ago, and incoming Chair Mary Joe White has made it clear that the JOBS Act is one of her priorities. The SEC crowdfunding safety guidelines are now anticipated by next year, and the U.S. should then take its place alongside a number of other countries in Europe already testing the waters, among them the UK, Italy, and France.

Moving Forward

Here are various possible scenarios for the music industry with equity crowdfunding.

First, a management or production company could solicit funds online and use the cash to sign up artists or maintain a roster of talent. It would bring more money into the business, but it could also make the production of music depend less on the manifestation of a creator's will, for production houses tend to be less about the artist themselves than the needs of music in the marketplace. The US record label system, for all its faults, allows an individuality of expression that the current crop of Japanese production houses, for example, do not.

Second, the above could further erode the tenuous hold of the record labels on the business. However, if the record labels themselves resorted to equity crowdfunding to defray the risk of signing artists (applying it to the second choice, say, of two artists vying for a recording contract), equity crowdfunding could be a boon for them. There are limitations to the amount that could be raised, but parceling talent into a holding company, as discussed by Miguel de Braganza in this issue of *The Music Business Journal*, may circumvent that limitation.

Third, the JOBS Act might help a publishing entrepreneur both advertise for an investment in a new catalog of songs and seek the exploitation and marketing of a lucrative collection of classic tunes; it could spurn a cottage industry of small publishers raising money and offering terms, on a selective basis, to the established houses. Or the larger publishing houses could, just like the record

labels above, use equity crowdfunding for their purposes too.

Fourth, and perhaps the most remarkable change of all, the JOBS Act could convert fans into shareholders in an artist's career. At present, such a Faustian exchange seems unlikely to be embraced by artists. They would, presumably, be loth to surrender what would seem like an unprecedented amount of control to their fans.

However, commercially oriented talent has been in the rise since the 1980s, when crisscrossing the world of commerce and music became less objectionable for artists. Megastars have embraced extra-musical sources of revenue to establish their brand,



and the trade on the whole has become much more dependent on non-recording sources of income. Commercial sponsorships are so common today that even a soda company like Coca-Cola is used to discover talent for use in its own label, Music Dealers; the artists that are willing to sign up for commercials, do so presumably, as a means to jettison their careers. Therefore, the current pragmatism of musical talent could conceivably morph into a piece of equity bought by a fan. Historically, music patrons have come in all forms and sizes, as Mozart and Beethoven knew. A question that may well be asked by financial experts is this: for artist stocks to trade and be made liquid at short notice, and so continue to encourage fan investment in the first place, will there be enough exchange to justify a

critically necessary secondary market?

Caveat Emptor!

Music is likely not even a partial concern for SEC regulators. After all, the JOBS act is meant to stimulate new startup businesses, whatever their focus, and create jobs. Yet it might definitely energize the creative arts sector and especially music, as fans are already engaged with, and thus informed about, the artists they support. JOBS would also grow the online economy, and boost the use of social media, a tool that is vital in today's music business.

For a technology-based economy, JOBS encourages a more agile supply of ordinary people's savings towards the trade. Major and indie-recording labels should, for instance, be able to accept many small contributions from investors without the stringent requirements associated with SEC regulations for investor numbers. This, as argued, is welcome.

Still, regulators will have their job cut out for them just by tracking investors' income or net worth for compliance with JOB's crowdfunding provisions. Moreover, as JOBS also relaxes terms in the market for IPOs (initial public offerings), and allows less stringent reporting requirements for companies selling under \$1 billion a year, such as Pandora, it introduces an element of moral hazard. This will be compounded when firms advertise freely for stocks that institutional investors will not touch. In the end, it must be remembered that the JOBS Act will encourage inexperienced individuals to risk their savings, so fans will have to use their head as well as their heart when supporting their favorite artists. *Caveat emptor!*

MBJ

BUSINESS ARTICLES

The Poverty of Artist Royalties

By Stephen Marcone



Introduction

With both dismal CD sales and the advent of 360 deals, many observers and artists consider money generated from the sale of recordings as ancillary revenue. This seems to be right. After all, the number one album of the year no longer sells close to ten million units as it did at the turn of the millennium. In 2011, *21* by Adele sold nearly six million units according to Nielsen *Soundscan*; when the album passed the ten million mark in 2012 there was word that it was the new *Thriller* of our times. In fact, only thirteen titles sold one million copies in 2011-- in 2001 there were more than one hundred such titles. Recorded music income must be a diminishing component of an artist's livelihood, and the unbundling of individual songs from albums is unlikely to have helped.

Moreover, as will be seen, the data suggests that the overwhelming majority of artists almost never receive a royalty check. Aaron Van Duyne III, a prominent CPA and business manager for several popular artists, maintains that before superstardom, the high cost of production and promotion, along with the 9.1 cents paid by the labels for the mechanical rate, makes it close to impossible for artists to collect any money on artist royalties.

Unsurprisingly, several artists have taken a different approach to earnings. In 2007, Radiohead experimented with an idea to release *In Rainbows* on a pay-what-you-like basis. Taking into consideration that fans would pay nothing for the album, and using the appetite of the fanatic fan to cough up big money

for the box set, the project did generate more revenue than their previous release in 2003. Prince too bypassed standard procedure. He released *Planet Earth* as a tool to promote his live shows by including a free add-on in 2.8 million copies of the *The Mail on Sunday*. The British newspaper newspaper paid Prince one million dollars for the product. In 2010, Prince made similar arrangements to release *20Ten* exclusively to European newspapers stating that it's "the best way to go; no charts, no internet piracy, and no stress".

Recently, a series of new business models have developed tailored to the artist's specific fanbase with hopes that revenue generated by all of the artist's activities will produce income in a timely manner. For the most part, these models ignore the sales from recorded music as a revenue stream. One of the most popular models was explained by Tom Silverman, CEO of Tommy Boy Records, at the *New Music Seminar* in the summer of 2009. For Silverman, becoming successful was no longer about selling recordings: the new business model was about converting potential fans to passive fans and then to active fans, hoping some of them would become fanatic fans; as the fans moved up this sequence, the number of fans decreased but the amount of money spent by each fan increased.

Artist Royalties and Label Recoupments

The cost of launching an artist's recording versus the artist's cut of the revenue to payback those costs has been documented throughout the industry in textbooks, articles, and blogs. Even when selling millions, the payment formula has always favored the recording companies. Recoupment of all expenses, i.e. deductions, must occur prior to the artist receiving any revenue. Consequently for most artists the live performance revenue has been the main source of income. For instance, when commenting on the business of the 1990's, even Keith Richards could state that "touring was the only way to survive; record royalties barely paid overheads".

As Anthony N. Luti states on Luti-law.com: "it is essential that [a band or artist] take into consideration all of their deductions when evaluating a royalty rate [as] on average, [they] can expect about \$1.00 in royalties

for each full-priced \$16.98 CD sold through normal retail channels." He continues: "approximately 80% of albums never reach [the breakeven] point; obviously, this means that most artists never receive any royalty checks."

In *All You Need to Know About The Music Business*, Don Passman shows that with a retail price of \$10 and a 10% artist royalty, after deductions, an artists receives only 75 cents; this is because a new artist signing to a major label can expect a recording advance of \$100k to \$250k with tour support ranging from \$50k to \$150k per tour --all of which is recoupable.

Jeffrey and Todd Brabec write that a new artist usually receives a royalty rate of 10% to 12% and a recording fund of \$200k; with deductions, the artist could realize half that rate.

David Baskerville's *Music Business Handbook* declares that "the royalty offer will be in the range of 10% to 15% of the retail price." Furthermore, "most recording deals are unrecouped--meaning the artist frequently sees no royalties beyond payment for the delivering the master to the label."

Stephen Marcone writes that, under the old system with a 12% royalty rate and after all allowances and deductions, the artist may net approximately \$1 per unit sold. Coupled with a debt of at least \$300,000 to record, manufacture, and promote a release, the artist must sell 300,000 units before generating any revenue.

The *HowStuffWorks* webpage notes that artists make between 8% and 25% royalty rate (based on the clout of the artist); however, expenses can reach \$800,000 by day of launch. In an article about a class action suit against Warner Music about shortchanging artists on digital downloads, *Justia.com* states the artist is paid: "at a ten-percent royalty rate under the 'sold' equation of the parties' original 1972 Agreement".

Finally, Paul Allen writes that after all is said and done, an artist will receive \$1.04 from the sale of a CD and \$.99 from *iTunes* for 10 downloads.

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BUSINESS ARTICLES

Artist Royalties (cont.)

(FROM PAGE 4)

TABLE I: Five Recorded Music Factoids in 2011

1.	Album Titles	Sales	Majors' Related	Indies' Related
	13	1,000,000 (plat.)	13	0
	34	500,000 (gold)	34	0
	125	200,000	120	5
	209	100,000	196	13
	8855	1000	6103	2752
	36463	100	17572	18891
2.	.01% of titles represented 80% of sales			
3.	46% of sales were from catalog product			
4.	Sales of 100 copies or less:			
	Different Titles:		Sales:	
	Majors: 194,000 (25%)		Majors: 5,600,000 (46%)	
	Indies: 596,000 (75%)		Indies: 6,600,000 (54%)	
	TOTAL: 790,000		TOTAL: 12,200,000	
5.	Other:			
	- The percentage of albums selling above 1,000 copies is negligible			
	- One out of every thousand albums sold 1,000 copies or more			
	- Four out of every hundred albums sold 100 copies or more			
	- About 800 titles represented 80% of the year's sales			
	- The majors' releases represented 85% of all sales & 15% of new releases			
	- Major titles only represented 25% of all sales of 100 copies or less			

The 360 Deals

With regard to the recording revenue clause in 360 deals, most companies give the artist a better royalty rate but not necessarily a better royalty base; which means that an overall bigger piece of the pie is in consideration.

Paul Allen states that after recoupment, "the label will give the artist 30% of the earnings from the album." Marcone offers an example of an artist's royalty rate of 20% with a 60%-40% split favoring the label, after recoupment. Van Duyne explains that pertaining to the advance specifically attached to recording royalties, the record company will ask for a return in the neighborhood of 20% of receipts after recoupment. If one takes into consideration the splits on rest of the deal, most artist do not fare any better. In addition, *The Digital Trends* website reports that "the amount of money most artists see is usually indistinguishable from \$0."

Interpretation and Conclusion

Nielsen *Soundscan* results for 2011 are shown in TABLE I, above.

The three top selling albums in 2011 were *21* by Adele, with 5.8 million units; *Christmas* by Michael Buble, with 2.5 million units; and *Born This Way* by Lady Gaga, with 2.1 million units. These artists most likely received artist royalty checks. However, only 125 titles or 0.014% of titles for sale, sold at least 200,000 copies or more. This dismal number suggests that only a few lucky artists cashed royalty checks. Less may be expected to make this sort of money in the future.

The data also appears to show that even with the smaller recording budgets, an indie artist still has only a slim chance to recoup (only five indie releases sold 200,000 copies or more).

In addition, if only four percent of the titles sell one hundred copies or more, A&R departments are arguably in trouble justifying signings when recording advances for new artists range, as is said by experts, between \$250,000 to \$1million. Finally, if approximately 800 titles represented 80% of 2011 sales, the much discussed long tail theory, where gains are made by lesser known records at the expense of the most popular, does not hold much water: the consumer is basically still primarily interested in purchasing the hits.

Overall, it appears that album sales were not a revenue stream for the majority of artists in 2011. The industry and consumer should perhaps stop judging the success of a musical artist by the number of records sold or the major labels behind them. As the Internet becomes the viable tool for exposure, recorded music revenue will be identified by the role it most likely has always played for most artists: that of a promotional tool. MBJ

BUSINESS ARTICLES

Harnessing the “Harlem Shake”

By Emilie Bogrand



Baauer’s “Harlem Shake” was the first single by an unknown artist to enter the *Billboard Hot 100* chart at number one. Here we examine how it happened and derive broader implications about the monetization of YouTube content based upon the context of the song’s success.

Shaking It Up

The “Harlem Shake” is a dance track written by young DJ/producer, Baauer. Following the song’s creation in May 2012, it was posted online where it began attracting interest from other DJs who used it in remixes, and promoted it on their websites. Eventually, Baauer landed deals with a management company, PR company, booking agency, and record label.

About one year after Baauer wrote “Harlem Shake”, an amateur comedian named Filthy Frank posted a video on YouTube using the song as the basis for a skit involving strange dancing, masks and outfits. During the first half of the video, Frank and his crew dance casually, a spectacle that is contrasted starkly with their ridiculous, brightly colored, one-piece body suits and masks. Once the beat drops, the scene transforms into an absurd dance party. Only a few days later, some of Filthy Frank’s fans had posted their own imitation videos.

Kevin Ashton is an MIT Engineering graduate who has been tracking “Harlem Shake’s” online activity. In his piece, “You Didn’t Make The Harlem Shake Go Viral – Corporations Did,” he proposes a theory explaining the “Harlem Shake’s” journey from comedian skit to viral sensation.

The Superbowl aired a few days after the Filthy Frank video. During the power outage, major brands used the incident to market their products via social media. “A few advertising agencies reacted quickly via Twitter, Facebook and YouTube: Walgreens pointed out it sells candles; Oreos reminded people they could still dunk their cookies in the dark; and

Tide said it could not get your blackout but it could get your stains out.”

The following day, Forbes ran an article describing the Superbowl situation as “real-time marketing” and many brands, therefore, began focusing on finding a viral meme. Some companies created their own “Harlem Shake” imitation videos filmed in their offices, in hopes of catching the next viral wave and increasing visibility.

The flurry of social media buzz surrounding those videos was picked up by television talk show hosts, who proceeded to broadcast their own versions of the “Harlem Shake” on TV. It was not much longer before the concept went viral, taking the song with it, as thousands of “Harlem Shake” videos began pouring into YouTube.

Monetizing the “Harlem Shake”

It is important to note that the *Billboard* charts have recently updated their formula to include YouTube activity. Without this amendment, “Harlem Shake” probably would not have made it very far on *Billboard* – the song is not played in heavy rotation on radio stations and has not generated major sales.

Not only did YouTube help Baauer debut at the summit of the *Billboard* charts, it has also become a direct source of revenue.

In the past, going viral on YouTube represented free advertising that would position artists to make money later. Today, it is becoming increasingly possible to monetize YouTube clicks and views. A CPM (cost per thousand viewer rate) is negotiable between YouTube and media content owners. Songs are tracked by YouTube’s automated software, ContentID, which notifies a song’s copyright owners, who then have the option to tell YouTube to either block, track or monetize it via advertisements.

Musicians are seeing profits from YouTube. The CPM for Psy’s “Gangnam Style” was high enough to ultimately net the artist \$2 million. There also seems to be an emerging middle class of musicians who use their YouTube presence for cash flow. U.K. artist, Alex Day, does not tour, is not signed to a label, and relies mainly on iTunes sales and YouTube for monthly revenue. “Typically I make around £3500 a month from YouTube (I’m on a network so they can sell the ad space higher) and at least £10,000 a month from music and merch sales,” says Day. Recently, he released an album in the U.K. on the same day as Justin Timberlake and charted higher than the megastar on iTunes.

Similar to Day, Baauer’s “Harlem

Shake” is also tied to a network – in his case, INDMusic. Before “Harlem Shake” exploded, a partnership was already in place between Baauer’s record label, Mad Decent, and INDMusic. Every time someone uploads a video of themselves dancing to “The Harlem Shake”, INDMusic works with YouTube’s ContentID to collect advertising revenue for Mad Decent.

In some ways, companies like INDMusic resemble Performing Rights Organizations like ASCAP or BMI. They track copyrighted material, take a percentage of the money they collect, and deliver the rest back to copyright owners. Despite INDMusic’s percentage cut, Jasper Goggins, the label manager of Mad Decent, claims to be making more money using INDMusic than when the label had a direct partnership with YouTube.

In just one week following the explosion of the “Harlem Shake”, over 3,000 videos featuring the song were posted per day, which resulted in 103 million YouTube views that could be monetized. Apparently, YouTube was able to charge an average of \$2 for every thousand viewers, for a total collection of \$206,000. INDMusic collected one-tenth of that and another 45%, or \$92,750, went to YouTube. Executives familiar with the terms of such YouTube channel deals told *Billboard* that 10% of the latter amount was paid to the person who uploaded the video; the remainder was distributed between the master rights owners and publisher, and Mad Decent was both. In short, 103 million views translated to roughly \$83,500 for Mad Decent.

Conclusion

Remarkably, it is the crowd, not the musician, generating the revenue in cases like this – Baauer’s “Harlem Shake” does not even have its own official video. The framework YouTube and its partners are putting into place is changing what was formerly considered copyright infringement into a viable business model. For example, INDMusic is currently working to promote purchase links to the copyrighted song on user-generated videos.

In today’s music industry, it is common belief that only the consumer wins. However, strategies like YouTube’s are capitalizing on the “Direct-to-Fan” movement and building structures through which everybody benefits.

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BUSINESS ARTICLES

Modernizing the Hot 100

By Eduardo Loret de Mola

In February of 2013, Billboard and Nielsen made another modification to the “Billboard Hot 100” chart, the official singles chart in the United States. The chart now includes data from YouTube video streaming – an unprecedented event that reflects the growing importance of YouTube on society and the music industry.

Recent History

This is the third time in almost eight years that Billboard has updated the chart formula. It is a positive sign that the iconic magazine is intent on staying abreast of industry changes.

In 2005, Billboard added digital sales data to physical sales and radio airplay. Two years later, in response to the increasing popularity of music streaming, Billboard began incorporating data from streaming media and on-demand services starting with figures provided by AOL Music and Yahoo! Music. In 2012, additional data from companies such as MOG, Rdio and Rhapsody, displayed before under the umbrella of Billboard’s “On-Demand Songs” chart, was incorporated into the Hot 100 (later, as online streaming became progressively more important, Billboard also established the “Streaming Songs” chart in January 2013, which ranked on-demand and online radio streams from services such as Spotify and MySpace).

The System

Currently, Billboard uses a point-based system incorporating data from physical and digital sales, radio airplay and streaming. “Streaming” includes on-demand streaming, online radio streaming, and YouTube views.

Billboard has never published the exact percentage weight attributed to each component in the methodology; hence there are no official percentages that can legitimize the final results. Nevertheless, there are ways to accurately predict the current weight of each component using information such as the total number of sales or YouTube views a song collects in one week.

Case Study

Let us examine the first week following the application of the new chart formula.

Billboard is on record for acknowledging that the #1 song that week on the Hot 100, Baauer’s “Harlem Shake,” had 3.5 times the overall chart points as the #2 song, Macklemore & Ryan Lewis’ “Thrift Shop.”

Let’s start by looking at the official numbers for the week:

“Harlem Shake”:
• Sales: 262,000

• Airplay: 2,000,000
• Online Streaming: 103,000,000

“Thrift Shop”:

• Sales: 412,000
• Airplay: 111,000,000
• Online Streaming: 10,100,000

Billboard uses conversion factors for each category: 1/12 for sales, 1/7,500 for airplay, and 1/450 for online streams. This is equivalent to scale where 1 sale equals 625 airplays or 37.5 online streams. By dividing each row by the appropriate conversion factor and adding points, the reader should confirm that “Harlem Shake” earned 3.5 times more points than “Thrift Shop”.

Balancing The Scale

With the recent formula update, Billboard has devalued online streaming in relation to sales. Before the change, the on-demand Songs’ chart conversion factor was 1/150 or 1 sale = 625 airplays = 12.5 online streams. More streams are now needed to match a sale in the Hot 100, a chart that historically placed more importance on buys and radio airplays.

This makes sense, because from an income point of view, watching videos on YouTube cannot be considered a comparable action to purchasing a song from iTunes: there is hardly a cost barrier to watch a YouTube video. Successful YouTube videos, moreover, draw a huge number of views, sometimes in the millions, so overloading the Top 100 with YouTube views would tip the scales.

International Charts

An international perspective is in order and it is perhaps curious that most other countries do not take online streaming into account in their national music charts.

In the United Kingdom, for example, the singles chart compiled by The Official Charts Company on behalf of the British record industry, only includes a combination of physical record sales and digital downloads. Managing Director, Martin Talbot has even gone on record saying that streaming data will not be included in the near future. Remarkably, and much unlike the Billboard Hot 100, the official UK singles chart has been entirely based on sales since its launch in 1952.

Similarly, Japan’s “Oricon Weekly Chart” ranks the highest selling singles of the country based only on physical sales. However, Japan has another chart that registers a song’s popularity: the “Japan Hot 100.” It is

a chart compiled by Billboard and Hanshin Contents Link since February 2008, and it has a somewhat similar structure as the U.S. Billboard Hot 100 chart: it includes physical sales and airplay data in its formula, but digital downloads are not tabulated despite the fact that Japan sells one of the highest amounts of digital downloads in the world.

Another example is the ARIA (Australian Recording Industry Association) singles chart, which has been the main singles chart in Australia since 1988. It too is based entirely on physical and digital sales and does not report online streaming.

Counting music streams should be in the air, though. Billboard is now developing charts for other countries, including the “Brazil Hot 100” and the “Canadian Hot 100”, the “Euro Digital Songs” chart, and the “Korea K-Pop Hot 100”. Old industry habits die hard, but progress may not be far off.

Conclusion

Online streaming, especially YouTube, is becoming increasingly relevant in today’s music industry. The impact of YouTube prompted Billboard to add YouTube views and make it more important than other on-demand streaming categories. Revisiting earlier math for the #1 song “Harlem Shake” shows that, after conversion, 91.2 % of the total points in its Hot 100 chart placement came from online streaming, with sales representing only 8.69% and airplay a paltry 0.11%.

Detractors of the new change to the Hot 100 say that YouTube views will determine the chart’s outcome. Many videos have songs that may be counted as an online stream even when a 30-second meme made by someone else, like the “Harlem Shake” series, is picked up instead of the official video. A musical chart thus could be weighted towards social interactions and be diverted from its intended purpose.

These issues, and the conversion factors for sales, airplay, and online streams, should be reviewed periodically to determine the accuracy of the chart. However, it is undeniable that YouTube is a crucial indicator of what songs are popular among the listener. Besides, to reduce the universe of online streaming and exclude YouTube seems narrow if most of the listening public interacts with the site on an hourly basis. Measuring winners in the music charts may be harder today than it ever was—but a snippet of a complicated reality is better than a misleading portrait. **MBJ**

BUSINESS ARTICLES

Record Labels and the JOBS Act

By Miguel de Braganca

**Investing in music**

The largest providers of capital in the music business, the major record labels, have been devastated over the last decade by the disruption of their core competency: selling recorded music and investing profits into the development of new talent. Global music sales have been contracting for over a decade, falling from \$27.8b in 2000 to \$16.5b in 2012.¹ It doesn't take an economist to explain the effect: there is less cash available to fund artists. Furthermore, talent development is a high-risk business. Traditionally, nine out of ten artists who are signed do not generate a positive return-on-investment, though some labels report the fail-rate has improved to eight out of ten.²

With the advent of the 360-deal, the labels are implying that their role in the new music economy is that of an investment bank. Basically, labels provide financing in exchange for active and/or passive rights in all the revenue streams an artist generates. However, unlike a true investment bank, the operations of a major label include product development, distribution, and marketing services for their clients—activities that artists can increasingly perform themselves with competent management and a good strategic plan, due to the technological disintermediation of those label functions. The variable costs of financing talent plus the fixed costs of maintaining diverse, heavily-staffed operations, pitted against a 80% chance of capital loss and decreasing returns on the 20% of investments in

the green, does not bode well. Especially given that, on average, spend per artist developed is \$700,000 to \$1.4 million.³

Given that their traditional model is ailing, labels might increase their profit margins by eliminating all operations except for financing talent—using a combination of analytics and golden-eared A&R to determine expected returns. Or, they could hold on to their current operations and defer a percentage of artist development risk to retail investors by taking advantage of the soon-to-be released crowdfunding provision in the JOBS Act. This second scenario would hopefully result in a higher volume of new artists being brought to market by a more efficient music company—focused on developing and selling talent. Let's examine this possibility by investigating the JOBS Act and how its integration into the music industry might play out.

JOBS

The US JOBS Act was created to help small businesses by changing several laws that govern financial reporting for emerging growth companies seeking to go public, and, more importantly for the purpose of this article, legalizing the sale of equity in privately held companies to non-accredited investors—providing, in both cases, they meet certain requirements. Some of the act is already in effect, however, the crowdfunding provision is being held up by the SEC, who is overdue in issuing required regulation.⁴

The crowdfunding provision will allow companies to sell up to \$1m of equity, per year, through online “funding portals”. In theory, crowdfunding portals will function like the famous crowd-sourced fundraising platform, Kickstarter, except offering equity ownership instead of product-based rewards. Ordinary Joes and Janes will be able to invest up to \$2,000, or, 5% of their annual income or net worth (10% for investors with annual income or net worth exceeding \$100,000).⁵

Small businesses are not the only ones benefitting from the JOBS Act. Ironically, The Atlantic reports that investment bank Goldman Sachs is taking its new emerging growth company, Goldman Sachs Liberty Harbor Capital LLC, public—the JOBS Act has defined an ‘emerging growth company’ as a firm with an annual revenue of under

\$1b. Liberty Harbor Capital is an investment fund, classified as a business-development company, that buys debt in mid-sized companies.⁶ Goldman will enjoy reduced reporting requirements, and, a five-year period of financial opacity, that many critics speculate will allow for risky investment behavior similar to the type that contributed to 2008's financial meltdown.⁷ If Goldman can leverage the JOBS Act for a potentially positive economic outcome, there is no reason that creative firms in the music industry shouldn't benefit by ethically employing the legislation.

Reducing the Label's Exposure to Risk

According to the IFPI's 2012 Investing In Music report, a major label spends an average of \$1,050,000 to break a new act. If a market develops for the asset class, equity-based crowdfunding could help labels hedge their bets on new artists. For example, if a label has identified two hot R&B singers it wants to sign, it may have to pick just one due to economic constraints—likely losing the other to a competing firm. But if the label were to finance one act with proprietary funds and micro-finance the other, they have effectively halved their risk for the price of one artist plus the cost of marketing the securities. By sharing development costs with an additional pool of investors the label will have more capital to develop a larger volume of talent. This will be possible through the crowdfunding provision of the JOBS Act, providing the SEC does not grossly alter their outline of proposed regulations.⁸

However, it gets complicated. Because of the Act's annual \$1m ceiling per firm, the label's corporate entity cannot fully micro-finance more than one act, which renders the instrument useless for risk management. What the label must do is create a holding company for each act being marketed to investors and transfer the ownership of the artist-label contract into the new entity. The public can then invest in a specific act through the holding company's presence on a funding portal. Of course, the label should maintain a large piece of ownership in the holding company. In theory, with this model, the label is free to crowd-fund, say, \$100m spread out equally over one hundred bands, per year.

Allowing investor participation in all aspects of a recording contract may not

(CONTINUED ON PAGE 9)

BUSINESS ARTICLES

Record Labels (cont.)

(FROM PAGE 8)

be desirable for the label. The label could limit this participation by assigning bundles of rights derived from a recording contract to the holding company, rather than the entire deal. There are two ways to approach this. The first is to bundle particular revenue streams. For example, the owners of the holding company could enjoy their rights to physical/digital sales, sync licensing masters, and touring. The label would maintain exclusive rights to their participation in interactive streaming/internet radio royalties, publishing, merchandising, and endorsement deals. Secondly, the label could limit investor participation by assigning a specific duration of the contract, and products created therein, to the holding company. An example of this scenario could be the holding company's enjoyment of all rights secured by the label for the initial term and one option. If the artist-label contract is for one term plus three options, the label alone participates in revenue streams created during the final two options. Using the label's robust quarry of empirical data, the exact formula for valuating artists, creating these rights bundles, and scheduling dividends/returning principal will have to be refined to create an equitable profit-maximizing balance between the label and the investors.

Investing in Label-Backed Artists is a Safer Bet

According to the Startup Genome Project, internet startup companies have an 8% chance of success.⁹ The success rate of label-backed artists is 20%. That means for investors interested in this asset class, backing a signed artist is 12% more likely to generate profits than financing a Silicon Valley internet entrepreneur.

Amanda Palmer's successful Kickstarter campaign has shone a spotlight on micro-finance's potential for funding music. She raised \$1.2m by offering her fans future creative rewards in return for their patronage—a pay-it-forward approach.¹⁰ There has been much debate in the industry about this approach, but the take away is that Ms. Palmer's success is evidence that people are willing to put money into artists to further their careers. Equity-backed crowdfunding could take it to the next level.

Despite a period of low investor confidence in the music industry,¹¹ Forrester Research predicts that 2014 is going to be a

turnaround year for the business.¹² The number of paid streaming subscribers is growing and emerging markets offer new prospects as their tech infrastructure expands and more people come online.¹³ Governments are increasing their compliance in the fight against piracy by prosecuting facilitators such as Pirate Bay,¹⁴ and, the trend for touring revenue is up. As the labels continue adapting to a digital world the value of the industry will increase.

In Closing

For this model to be sustainable it is important that the labels adhere to the highest ethical principles, which could prove to be difficult given the widely-reported contractual tricks label's use to pad their pockets.¹⁵ However, if used with integrity, the JOBS Act can benefit both label and consumer by creating a more dynamic and varied music market. It should help labels develop a larger number of acts and allow more people to enjoy a financial benefit from artists' success. The act could prove to be an instrument that helps mend consumer-label relations and improve transparency in a misunderstood industry. **MBJ**

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LAW SECTION

Working Conditions in Cruise Ships

By Ryan M. McCarthy



The International Labour Organization's ("ILO") Maritime Labour Convention ("MLC") is providing new rights and protection for more than 1.2 million seafarers working on vessels around the world.¹ The MLC will be implemented starting in August 20, 2013, after receiving ratification earlier this year by at least 30 member states with a share of one-third of the world's gross tonnage.² The new ruling "consolidates and updates more than 68 international labour standards related to the Maritime sector adopted over the last 80 years."³

The legislation impacts "seafarers", which are defined as "any person who is employed or engaged or works in any capacity on board a ship".⁴ Musicians and entertainment industry personnel employed pursuant to exclusive employment agreements with their respective cruise line are thus entitled to the new rights provided in the MLC. In light of the fact that the MLC presents the guidelines as generally applying to all seafarers, this paper will speak of musicians rather than seafarers.

Increasingly, the major cruise lines such as Carnival, Royal Caribbean, and Disney are incorporating innovative forms of entertainment and searching for cutting edge acts to distinguish one cruise line from the next. This is breeding jobs. Disney Cruise Lines' Entertainment Operations Team, for instance, recruits music acts, performers, and DJs among the more than fifty-five entertainment related positions it advertises.⁵

Musicians Aboard

The new protective mantle afforded by the ILO is a game changer: musicians signing contracts to perform on cruise ships after August 20, 2013 will be entering

into Seafarer's Employment Agreements ("SEA") under Regulation 2.1 of the MLC.

Under the regulation, musicians are now required to have an original copy of their employment agreement signed by themselves and the ship owner or the ship owner's representative; in the past, musicians would have unresolved questions regarding the terms of their contract.⁶ Furthermore, the musician's employment agreement must at a minimum contain specific information provided in Standard A2.1 of the MLC. In particular, "where a collective bargaining agreement forms all or part of the [musician's] employment agreement, the agreement must be on board the ship with relevant provisions in English (except on ships engaged only in domestic voyages)."⁷ A final note relates to notice periods for termination. Specifically, the cruise line must establish minimum notice periods for early termination of an SEA by either the musician or the cruise line: this is good given the uncertainties attached to a new form of employment unknown to most musicians.⁸

Secondly, pertinent to a career as a cruise ship musician, is Regulation 2.2 governing wages under the MLC. Cruise lines must pay musicians "at no greater than monthly intervals and in full for their work in accordance with their employment agreements and any applicable collective agreement."⁹ Moreover, musicians will be entitled to have better oversight of the cruise line's accounting practices related to wages and additional payments; the cruise line must also provide reasonable charges for remittances/allotment transmission services and exchange rates.¹⁰

Finally, the new legislation regulates the hours of work and hours of rest guaranteed to musicians by the MLC under Regulation 2.3. Specifically, the maximum amount of work that a musician could do in any 24-hour period is 14 hours or alternatively, 72 hours in any seven-day period. Additionally, the minimum hours of rest must be ten hours for every 24 hour period and 77 hours for every seven-day period.¹¹ All artists are aware of the time, dedication and persistence required to entertain a crowd. On cruise lines, entertainers often perform multiple times throughout the day and in different areas of the boat. These protections should ensure that musicians and entertainers are allowed to rest and so perform at an optimal level.

A Sea Change

There is very little scholarly work relating to the protections that musicians will receive as a result of the convention, and the backlash by cruise owners is yet to be properly documented. For instance, cruise line owners do not welcome the MLC. Joseph Cox, President & CEO of the Chamber of Shipping of America, says that "the broad definition of a seafarers as anyone who works in any capacity on board is going to be problematic."¹² Fortunately for them, luxurious and expensive music-based cruises, featuring premium guest artists hired for brief appearances, would not fall under the provisions of the MLC. This means that popular cruises like the "Legendary Rhythm and Blues Cruise," the "Smooth Jazz Cruise," the "Rock Legends Cruise," and Sixthman Productions, a cruise music production company recently acquired by the Norwegian Cruise Line, would not be impacted.¹³

But all of this would be only a small consolation for cruise ship owners, for the law will have a much bigger effect on all labor hiring costs (expenses for musicians are only a small fraction of the total). The new MLC regulations are, at the end, an attempt to help redress a long-standing imbalance of power between employers and employees at sea. Bosses should not be happy. But if law is the chaperone of trade, the new legislation could drive more musicians to seek performing opportunities in the high seas—which might be good for employers. **MBJ**

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LAW SECTION

The Copyleft Tradition

By Allen Kronenberger & Chelsea Ira

In past years, music has firmly established itself as a free good in the minds of many consumers, making it increasingly difficult to monetize and track licenses especially in the electronic music scene where sampling and remixing is commonplace. Aside from the music itself, the costs associated with music production have also decreased, making high-quality music creation accessible to amateurs. This accessibility has transformed music into an amiable art form—where styles are transitory and trends emerge and evolve daily. While there is value in copyright ownership and monetization, many of the copyleft and creative commons movements would argue that the free progression of art trumps any monetary benefit.

The EDM Culture

The nature of the electronic music culture lends itself to infringement, and yet some producers are still unwilling to make their work available for sampling and remixing. Ethically, one would assume that if a producer “borrows” another’s music it then would become acceptable for others to “borrow” his music. In a way, if this mentality were honored, electronic music could be considered inside the public domain.

However, not every producer shares this mindset—especially ones that stand to make a large profit from their music. Additionally, allowing others to create derivative works does not necessarily prevent those derivatives from being copyrighted as new pieces with no credit given to the original author. By giving up derivative rights outright, producers face the possibility of losing a good deal of money in the future. Furthermore, if a derivative surpasses its contemporary, the original producer will be overshadowed by the derivative’s success and forgotten in its wake. These monetary and egotistical factors act as barriers between our closed society and free musical progression.

History

The computer programming industry developed a solution to this problem back in the 1980’s—copyleft. Computer programming, like electronic music, can easily be managed by one person, is always morphing into new products as programmers modify each other’s work, and is subject to copyright law.

In 1984, a programmer by the name of Richard Stallman resigned from MIT to prevent the school from having any claim on his software. He believed intellectual property was an unhealthy concept for the computer programming industry, and that programmers should instead be allowed to share and develop software together. “It wasn’t worth continuing in the software field without being able to cooperate with people and to write and improve whatever program you want to improve. I decided that I would make a new software-sharing community even if I had to write all the software myself.” He went on to create the GNU Project, which developed free software that could be built upon and improved for the good of society.

The project allowed programmers to work together and share information. With this sharing principle, programs improve and develop quicker than they would if they had been restricted. Despite the talent employed by these large corporations, the united knowledge and creativity of the masses often lead to more advancement and innovation.

Sharing leads to the creation of a derivative work, which requires a license in copyright law. To achieve their vision, Stallman and the GNU Project could have placed their software into the public domain, but this approach would perhaps create more problems than it solved. Once a derivative work is created, parts of that work become copyrightable again, and the new copyright owner can prevent the software from being shared in the future, thus halting the innovation process. Also, despite Stallman’s pure intentions, programmers still need to be paid and earn a living. Stallman believed that programmers should still be paid for their services, just not the proprietary rights of their software.

Stallman created the copyleft license to ensure the continuation of the permission-free software movement and to ensure the programmers could make ends meet. Copyleft is a license that works inside modern copyright laws; instead of abandoning the rights to the public domain, the license creates stronger proprietary rights in the GNU Project’s works. The GNU copyleft license gives users permission to copy, modify, and distribute the software on the condition that all derivative works are licensed under the same terms. The user must also “agree (i) not to establish proprietary rights in the software; (ii) to provide the

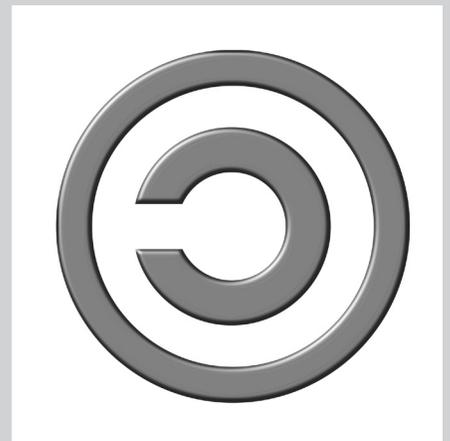
source code to anyone to whom they give the object code; (iii) to include in the software notice of the applicability of the GNU GPL; and (iv) to accept the software without warranties of any kind.” Many commonly used programs, such as Firefox, Open Office, and the Linux operating system were developed and continue to be improved upon through the copyleft principle.

In practice, a programmer creates and sells a piece of software, which can then be changed and developed. The resulting derivative work can also be sold, but must use the same license as the original programmer, allowing for the free creation of derivatives. Using this methodology, the programmer still profits from his services, but cannot limit the future development of that software.

Creative Commons and Music

The copyleft idea spread to creative industries in 2001 with Creative Commons. Much like copyleft, the Creative Commons’ purpose is to allow owners to easily grant licenses for their copyrighted works, allowing for monetization and the free progression of the arts. Creative Commons has several different licenses including: Attribution, No Derivative, Share Alike, and Noncommercial. These licenses can be combined to fit an artist’s needs, allowing a creative to control how their works are used without the bother of licensing each individual use.

In music, producers often build upon each other’s works to create something new and original. By employing an Attribution Share Alike license, music producers can effectively replicate the copyleft license from the software industry. The Attribution



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BUSINESS ARTICLES

Lessons from Karmin

By Stephanie Kellar

Karmin, formed in November 2009, is the platinum-selling pop/hip hop duo of Amy Heidemann and Nick Noonan, two students of Berklee College of Music. The Boston connection runs deep for Karmin, as their business team was formed within the institution: manager Nils Gums, assistant manager Matt Maltese, executive assistant Katy Eggleton, sound engineer Andrew Maltese, and Grammy-nominated hit songwriter and producer Claude Kelly.

Two years ago Karmin's cover of Chris Brown's "Look At Me Now" (LAMN) went viral on YouTube exceeding 3-million views in five days and propelled the band onto the global stage.¹ This viral event led to a performance on *The Ellen DeGeneres Show* and a barrage of offers from all four major record labels, many of their imprints, foremost music publishers, and world-class producers.

Karmin emerged from a whirlwind six weeks later as the first act signed by L.A. Reid in his new role as Chairman and CEO of Epic Records, a division of Sony Music Entertainment. They signed a publishing deal with Sony/ATV as well, an agency agreement with William Morris Endeavor (WME), and licensing deals with the National Basketball Association (NBA) and Jay Z's Roc-a-wear, all shortly thereafter.

They did not sign a 360 deal with any entity, thereby retaining all rights to their touring, merchandising, sponsorships, and other prospective revenue streams. The deliverables and financial terms of the recording and publishing agreements remain private. Gums generalizes their value at "over a million dollars each."²

Since then, Karmin's early career highlights are remarkable by any measure—from an American Music Award New Media Honor, two I Heart Radio/Jingle Ball tours, performing on Saturday Night Live, achieving platinum-selling status for the single "Brokenhearted", appearing on the cover of *Rolling Stone* by fan vote, ad campaigns for Steve Madden, Rue21, and GAP, earning "more than

the record deal"³ from luxury brand Coach for a holiday video of "Sleigh Ride", to ringing in 2013 with a performance at a private New Year's Eve party at the Viceroy resort in Anquilla with Paul McCartney seated in the front row.

While these extraordinary post-viral career highlights tell an exciting story, it is the eighteen-month pre-viral period encompassing Karmin's professional development and launch phases that holds value in analyses by musicians and their managers seeking to extract actionable marketing strategies and tactics to consider in developing their own strategic marketing plans.



This period from inception to going viral divides in two nine-month segments—a professional development phase from November 2009 to early August 2010, and a launch phase from late August 2010 to mid-April 2011 when they went viral.

Professional Development Phase: November 2009 – August 2010

Post graduation, Heidemann worked as a wedding singer and student advisor at Berkleemusic, the college's online school. Noonan worked the front desk at a boxing club. They pursued musical opportunities separately and grew increasingly frustrated with scheduling conflicts and creative differences in failed attempts to join up with other musicians. In November 2009, eighteen months after graduating from college, Heidemann and Noonan formed Karmin to pursue a professional music career together as a pop duo. Heidemann soon resigned from her job to dedicate full time to

the entrepreneurial endeavor. Noonan kept his job until the week after LAMN went viral nine months later.

Karmin's development phase was fully an exercise in self-development recognizing every artistic decision they made had a business counterpart, with Gums providing branding and marketing strategy on an informal basis. Karmin's management agreement with Gums was not formalized until late fall 2010, several months after their launch. The initial conceptual process they followed is common to all start-ups, requiring them to envision the look, feel, and voice of their offer with emphasis on singular differentiators that could resonate with a target market. Karmin's branding efforts reflected shared aspirations, goals, core values, and musical preferences; the look and feel encompassed visual and tactile elements including design, imagery, color, and typography. Word choices eschewed profanity.

Much learning was involved. In college, Heidemann was a voice principal and Noonan was a trombone principal. To become a pop music act, she learned how to play guitar and he learned how to play cajón and piano. They began writing songs together and staging their live show. They studied recording and editing audio and video, how to design, build, and maintain a website, and how to master the back end workings of social media networks, primarily YouTube, Facebook, and Twitter.

Gums' marketing strategy derived from the convergence of several personal observations—the production values on YouTube for independent artists were generally low, despite readily available, inexpensive video and audio technologies; the clutter factor on YouTube was extremely high; search engine optimization (SEO) techniques were poorly used if at all, and popular music in general was moving away from its organic roots toward heavy reliance on elaborate arrangements and recording studio techniques, especially the use of Auto-Tune.

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BUSINESS ARTICLES

Karmin (cont.)

(FROM PAGE 12)

Gums' counseled Karmin to cover currently charting popular songs to enable the use of titles, keywords, annotations, descriptions, and search engine optimization (SEO) techniques to land on the first page of a YouTube search for the original artist or song, and to do so in intimate, one-take, acoustic performances. From there, prospective fans could discover Karmin.

Launch Phase: August 2010 – April 2011

Karmin's hard launch came in late August 2010 with karminmusic.com coming out of beta, and Twitter, Facebook, and YouTube accounts in place. They began a daily practice of promoting their music by communicating with early fans. By analyzing the data available to them as account administrators, they learned the longer the introduction to a song, the higher the bounce rate. To remedy this occurrence, they developed a short, video introduction—"Hi I'm Amy. And I'm Nick. And we're Karmin. This is [name of tune]." Behind the scenes extra footage was added at the end of the videos like a gift for those who watched the whole video. They also incorporated a variety of sales promotions to engage fans from asking them to create captions to candid photos of the band, to covering their covers.

By the end of the year, they had uploaded 24 music videos—18 covers and six originals—a rate of nearly four videos per month for the five-month term. Their portfolio represented nearly one and one-half hours of proprietary music content in three and one-half minute songs. Some videos were one-take productions filmed in-studio, others were storylines requiring multi-location filming and longer production time. They had played 22 shows, eight of them busking in front of H&M or Best Buy in Boston's Back Bay, plus uploaded two lifestyle videos and a mock T-shirt ad.

In January 2011, taking stock that the results of their efforts to date were marginal, Gums and Karmin refined their branding and marketing strategy by adding a key differentiator—Heidemann's rapping skills. In addition, Gums recommended they open a new YouTube channel, Karmincovers, and focus on producing simplified, in-studio music videos that took less time to finish. He provided Karmin with a half dozen song suggestions he

forecast would be rising the following week on Top 40 radio and sales charts, and asked for an accelerated production schedule of two covers and one original per week.

The same month, with compulsory licenses in place, they began selling digital singles of the cover tunes using a promotional offer of a free download in exchange for an email address for the first two weeks, then converted the links to a 99-cent iTunes sale. With 30-cents going to iTunes, 9.1-cents going to the original artists, and 16-cents going to InGroove and management fees, Karmin began earning an estimated 45-cents per cover download.⁴

When LAMN went viral in mid-April 2011, Karmin had 44 music videos on YouTube—33 covers and 11 originals—representing nearly two and one-half hours of music content. Their Karmincovers channel had just over one million video views⁵ and nearly 850,000 subscribers.⁶ When they entered final negotiations with Epic and Sony/AVT the following month, they brought 80,000 email addresses and an estimated \$125,000 in retail sales of digital downloads with them.⁷

Conclusions

Beyond talent and hard work, Karmin's early career success rests on their awareness of story, design, and differentiation as the lead drivers of a marketing campaign. They were willing to create and execute a direct-to-fan (D2F) marketing plan on a low cost, high sweat, do-it-yourself (DIY) basis, and embraced social media always as a two-way communication tool with which to engage fans.

Beyond that, of course, there seems to be a locational advantage. Much of Karmin's quick progress was aided by connections and friendships made at Berklee, the largest college of contemporary music in the U.S. Legal and financial questions about covering other songwriters' materials, for instance, could be quickly dealt with, and acted upon, drawing on the expertise of resident business experts. Fundamentally, Karmin found the right startup team there. Without the advice and involvement of Nils Gums and Matt Maltese, as well as others, it is unlikely that Karmin would have been able to capitalize on their early success. No one would argue that a presence in Silicon Valley is neutral to the success

of a technology-based startup. Similarly, speaking of Karmin is, to an extent, speaking of the opportunities found at Berklee. **MBJ**

An extended version of the piece will be published in the Music Marketing Review under the title "Karmin: Marketing Music Using Social Media", June 2013.

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www.thembj.org

Keyword Search

LAW SECTION

An Update on Reversion Rights

By Dan Servantes

What do Tom Petty, Bryan Adams, Tom Waits, Kris Kristofferson, and Bob Dylan all have in common? They released iconic albums that generated millions of dollars and are now requesting copyright transfer termination from their labels and publishers. Thanks to the Copyright Act of 1976, artists have a chance to reclaim their song rights. Copyright transfer reversion is and will continue to be an issue in the music industry for years to come. There will be many examples in the coming years of how copyright reversion will ultimately play out as precedents unfold.

The Copyright Act of 1976 allows for copyrights transferred on or after January 1, 1978 to be reclaimed by their creators thirty-five years later. There is a five-year window to reclaim those rights. This year will mark the first rounds of copyright transfer termination requests.

So far, this is not a cut and dry arrangement. Publishers and labels are obviously not fond of losing all of their copyrights, especially the rights to successful legacy artists. For this reason, they are actively searching for a legal response to fight the termination notices.

The most prevalent response has been the “Work-for-Hire” argument. “Under the Copyright Act of 1976, any grant, license or assignment made on or after January 1, 1978 may be terminated by the author thirty-five years from the date of such transfer if the work was not originally created as a work-made-for-hire for an employer.”

Artists and authors will argue that their agreements do not fall under the Work-For-Hire category while some publishers and labels will claim the opposite. Work-For-Hire agreements are common in film scoring situations, where an artist is paid a fee to score a film and the resulting music and rights are granted to the film studio. Some copyrights are very important to the livelihood of the music companies and so, in some cases, these companies might try to misconstrue the nature of the advance given to songwriters and artists as a salary or fee.

There has already been one high publicity ruling made on copyright reversion. This copyright transfer termination request was made by Victor Willis (member of the Village People and co-author of such hits as “Y.M.C.A.”) in January 2011 to French mu-

sic publisher Scorpio Music S.A and their US administrator, Can’t Stop Productions, Inc. In return, Can’t Stop Productions filed suit challenging the validity of Willis’s terminations.

Scorpio first argued that Willis’s work should be classified as work-for-hire. However, the music publisher withdrew that claim for undisclosed reasons. Next, Scorpio argued that since Willis was only *one* author of the joint works, a termination would be required by all authors in order for it to be valid. The Southern Court of California disagreed. It decided that a joint author, who independently transfers his or her copyright ownership, could also independently terminate that transfer. Anything to the contrary would conflict with the purpose of the Copyright Act.

This ruling set some important precedents. The first being that joint authors may separately request transfer termination – any artist wishing to request termination does not need to do so in conjunction with co-writers or producers. Also, Victor Willis managed to successfully regain control of his copyright, representing a critical win for songwriters and setting a positive precedence for future cases.

There are many cases to come and depending on the situation, there are several different possible results. The most likely is settlement outside of court. A copyright reversion case will only go to court if there is enough money involved with the song or catalogue for the litigation fees to be worth the result.

Even in the cases regarding major artists, labels and publishers will be reluctant to go to court because of a lack of precedent. The first cases to go through court and be ruled upon will set those precedents. Labels and publishers are afraid to set a bad standard for future cases and potentially initiate disastrous consequences. This is most likely why Scorpio withdrew their work for hire argument in the Victor Willis case.

“Rather than taking the fight to court, it is far more likely that a copyright termination notice from an artist will serve as a jumping-off point for negotiations with the label on a new contract”, said Eric Custer, a music industry lawyer. Unless an artist is really at odds with their label or wants to move in their own artistic direction, the parties will most likely try to work together on a settlement and a new contract.

According to Ed Christman of Billboard, publishing companies are apparently being much more receptive to copyright transfer termination requests. There are less legal loopholes involved; so many publishing companies are cooperating. Additionally, many publishers are retaining copyrights but at a reduced profit rate, making the deals more favorable for the artists. Some labels, on the other hand, are being more difficult and ignoring the requests from artists.

Should an artist or songwriter be able to reclaim their rights, they will be in a powerful position. Song catalogs by legacy artists represent a large slice of the music industry pie. In 2012, catalog sales represented 49% of album sales and 55% of single sales.

With this type of leverage, legacy artists would have several options to exploit their songs. Artists that still command a strong audience today would have the clout to sign with a publishing company or label under much more beneficial terms, putting them in a position to earn substantially more money from songs that are already selling well. It is unlikely that artists would attempt to take on the time consuming task of exploiting their songs by themselves.

The reclaiming of these rights will modify the landscape of the industry as the music creators enter into a new balance of power, giving them leverage over labels and publishers as they decide upon the best way to profit from their music. As of right now, it appears that many artists are choosing to negotiate privately. Other artists are waiting, and opting to take action towards the end of their five-year window in hopes that, by then, a legal precedent will be set.

Many artists sign contracts that will continue to have consequences over the entirety of their careers. For those who transferred their ownership of song copyrights to a record label or music publishing company thirty-five years ago, 2013 will be an important year. **MBJ**



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license requires all derivatives or covers to credit the original author, and the Share Alike license requires all subsequent creations to use the same license as the original.

This principle need not be confined to the electronic music industry, though. Many artists, including Trent Reznor of Nine Inch Nails, have made their masters available free for remixes. By using the Noncommercial license, artists can allow amateurs to build upon their original while still maintaining income streams from professional uses. Additionally, the recent development allowing artists to more accurately track and monetize YouTube videos has made covers, remixes and derivatives profitable for the original artist.

While many consider this free progression of music to be beneficial to the industry as a whole, the Creative Commons movement has not yet reached a critical mass. It is not copyright law and it is not

mandatory – artists must choose to opt-in to this principle. Many musicians are not aware of Creative Commons and others simply fear change – giving up copyrights has historically been associated with negative connotations. Creative Commons is, however, extremely dependent on network effects. If only a small minority of musicians use this licensing system, it will provide little value to the industry as a whole.

Creative Commons presents an often misunderstood and misrepresented solution to amateur copyright infringement, sampling and the administrative nightmare of tracking uses. It stands, not in opposition to copyright law, but as an augmentation, healing the bonds between musicians and fans torn apart by copyright litigation. Copyright law was established to balance the good of the intellectual property owner with the good of society, and Creative Commons is certainly a step forward for both parties. **MBJ**

Harlem Shake (cont.)

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Perhaps more importantly, the entertainment industry can begin to make peace with its fears surrounding online piracy and see online services like YouTube as hotbeds of opportunities rather than enemies. Trust between copyright owners and consumers can also be rebuilt. It never seemed healthy for content owners to punish their fans for sharing music online without a license but, for a while, it seemed like the only resort. Now, fans are invited to participate in the process, leading to mutual gains. By working together, YouTube, music consumers, record labels, emerging artists and small startup companies like INDMusic can find ways to profit symbiotically from media file sharing. **MBJ**

Editor's Note: Some articles had end notes that could not be accommodated in the printed edition. The reader is encouraged to check the complete version online.