

## Copyright in Public Places: A Contribution

By Brian A. Oliver



“All the world’s a stage,” wrote Shakespeare in *As You Like It*, and he said as much in other plays.<sup>1</sup> The public performance of creative works, including the work of songwriters, has to be seen in that context today. The advent of the Internet and digital technologies has blurred the lines of demarcation between public and private places, placing an undue burden on those experiencing or performing copyrighted works as to when a particular performance of a work necessitates obtaining a public performance license from the copyright holder.

Under the current Copyright Act,<sup>2</sup> a copyright owner has the exclusive right to control the manner in which members of the public listen, view, or otherwise apprehend musical works and other categories of creative works performed at places “open to the public.”<sup>3</sup> But just when are places “open to the public?”

This article seeks to answer this question, and provide a judicially administrable framework for courts, musicians, mu-

sic enthusiasts, and practitioners to use when navigating through the so-called “unsettled condition of the law”<sup>4</sup> surrounding public performance.<sup>5</sup>

### Copyright and Public Performance

United States copyright law is derived from the constitutional purpose of “promot[ing] the Progress of Science and useful Arts,” by granting authors a limited monopoly on their creative works.<sup>6</sup> When it comes to music, each song you listen to has two distinct copyrightable elements: the underlying musical work,<sup>7</sup> and the sound recording embodying that musical work.<sup>8</sup> Importantly, the Section 106(4) public performance right regulates the public performance of musical works, and the Section 106(6) public performance right governs the public performance of sound recordings. In this essay, we will focus on the Section 106(4) public performance right.

With respect to Section 106(4), in order for an activity to be deemed a public performance, the activity must fall within the

(CONTINUED ON PAGE 3)

### 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.*

### INSIDE THIS ISSUE

The Business of Song Catalogs  
Page 8

SoundCloud  
Page 7

Marketing Misses  
Page 4

Paid ‘Likes’  
Page 6

K-Pop’s Imperialism  
Page 12

# EDITOR'S NOTE

With the rise of music streaming services, income in the music industry has become increasingly reliant on a copyright owner's right to publically perform their work. While streams on Pandora or a similar service are clear examples of public performances, determining what constitutes a public performance isn't always so well defined. In this issue's cover story, we explore how courts currently evaluate whether a space constitutes a public place, and provide a suggestion for how this process might be improved.

As pop culture has become increasingly digitized, artists have been given access to a wealth of data about their fan bases, and it seems that those who study this data and utilize it creatively stand the best chance of success. At the same time, online data points, such as YouTube views and Facebook likes, can be easily manipulated to overstate an artist's popularity, leading us to question the validity of internet metrics.

While live performance has not yet proven itself to be a profitable endeavor for all artists, it is certainly amongst the most exciting areas in the music industry. New developments in live music will give artists a better sense of the audience, will allow audiences to completely immerse themselves in sound, and will, so to speak, bring back to life some of the world's most beloved pop stars. We show that representations of deceased performers are not always met with overwhelming support from their heirs, but much of the time the families and friends of these stars can do little to avail themselves of legal remedies.

Today, pop stars looking to sustain their careers must provide much more than music to their fans, they must create an image. Key to this image is a well-defined fashion sense, and some musicians, including Pharrell Williams and Lady Gaga, have taken the relationship between music and fashion a step further, turning it into a massively lucrative business. Image-based pop stars are perhaps most prevalent in South Korea's K-Pop culture, and could serve as a booster for the genre as it looks to become a global force.

Finally, we explore the growth and future potential of audio-based social network SoundCloud, and explore the significance of recent acquisitions of publishing catalogs.

Thank you for reading. Happy Holidays and a Happy New Year! 

Sincerely,



Griffin Davis  
Editor-In-Chief

## TABLE OF CONTENTS

### Business Articles

The Value of Data.....4  
 The Power of a 'Like' .....6  
 Publishing's Financials.....8  
 Clouds over SoundCloud.....7  
 Clothes Maketh the Star.....14

### Law Section

Music in Public Places.....1  
 Minding Dead Talent.....10

### Music and Society

Korea's K-Pop Culture.....12

### Tech News

The Future of Concerts.....11

### MBJ Editorial

Mission Statement.....1  
 Editor's Note.....2

### Sponsorship

Berklee Media..... 15

## Management

Editor-In-Chief..... Griffin Davis  
 Content Editor..... William Kiendl  
 Webmaster..... Corliss Lee, Itay Shahar Rahat  
 Faculty Advisor and Finance..... Dr. Peter Alhadeff  
 Layout Editor..... Corliss Lee

## Contributors

Editor's Note..... Griffin Davis  
 Business Articles..... Luiz Augusto Buff, Natalie Cotton, Chris D'Amico, Griffin Davis, Dan Servantes  
 Law Section..... Brian A. Oliver, Daniella Peterson  
 Music and Society..... Corliss Lee, Melissa Sutikto  
 Tech News..... Alex Cohen  
 Staff..... Anahita Bahri, Jim Campbell, Anastaeisha Kennedy, John Lahr, Gigi Tsakiris

## LAW SECTION

## Copyright in Public Places (cont.)

(FROM PAGE 1)

Copyright Act's statutory definitions of both "public" and "performance."<sup>9</sup> In effect, courts treat these terms as two distinct concepts.<sup>10</sup> Section 101 defines the public boundaries of the performance right, providing that, among other ways,<sup>11</sup> a work is performed publicly, within the purview of Section 106(4), when it is "perform[ed] . . . at a place open to the public . . ."<sup>12</sup> Accordingly, the focus of the inquiry in determining whether a copyrighted work was publicly performed centers on the location where the performance occurred.

**Public Places**

The circumstances surrounding advances in new technology and the public performance of musical works parallel those the film industry faced in the 1980's with respect to the public performance of audiovisual works. The creation of the Internet and digital technologies has enabled the general public to turn their backyards into a concert hall. In the 1980s, a group of major motion picture studios<sup>13</sup> shared concerns about the definition of the word "public," as applied to the public performance right. At the time, consumers were beginning to experience works in private that traditionally were only publicly performed. The film industry began to initiate a series of test cases to determine the scope of the word "public" as used in Section 106(4), and these cases remain the standard in public place analysis.

The major motion studios' first victim was a small chain of video rental stores, Maxwell's Video Showcase (Maxwell's), in Red Horne, Inc. v. Columbia Motion Pictures. Maxwell's exhibited copyrighted motion pictures for a fee in private viewing booths located on the store's premises. The in-store viewing booths seated only four patrons at any one time, and the actual performance of the videos were handled by Maxwell's employees. Ultimately, the Third Circuit decided that the video rental store's showcasing operation did indeed constitute a public performance. The courts felt that the video establishments were places open to the public and thus the motion pictures were publicly performed, emphasizing that the services and accommodations provided at the private viewing booths were no different from those offered at a conventional movie theater, as they afforded any member of the public the opportunity to avail themselves of a motion picture on the stores' premises, and the fact that the video stores

provided popcorn and beverages to customers.<sup>14</sup>

With the Red Horne decision settled into Third Circuit precedent, the studios decided to file another test case in the same jurisdiction. This time they sued another business, Aveco Inc., for engaging in activities similar to the video rental store chain in Red Horne. Analogous to Maxwell's, Aveco Inc.'s business centered around exhibiting videos to the public in in-store video booths. The Court again found that this sort of activity constituted a public performance. In addition to examining the "nature of the place" factor in making its determination that the video showcase enterprise at issue was a place open to the public, the Aveco court added an additional wrinkle to public place analysis by examining the extent to which the individuals experiencing the work controlled the performance.<sup>15</sup> Writing for the majority of the Third Circuit Court of Appeals, Judge Stapleton dedicated a considerable amount of his opinion to analyzing the amount of control the video rental store's customers had over the performance of the audiovisual work, namely for deciding whether the video store was subject to contributory liability<sup>16</sup> for copyright infringement through the actions of its customers.<sup>17</sup>

Finally, the film studios decided to test the scope of the word "publicly" in an entirely different circuit, the Ninth Circuit, and in a situation arising from a radically different set of facts. In *Professional Real Estate Investors, Inc.*, the studios claimed that a hotel was violating its public performance right by providing in-room videodiscs players and renting video discs to its guests.<sup>18</sup> In examining the "nature" of the location where the performances occurred, a hotel room, the court distinguished the nature of the video stores in Red Horne and Aveco from the hotel at issue in *Professional Real Estate Investors, Inc.* by explaining that the performances of the motion pictures in a guest's hotel room were merely incidental to the primary purpose of the entire hotel, "the provision of living accommodations and general hotel services . . ."<sup>19</sup> Ultimately, the Professional Real Estate Investors, Inc. court, unlike the Red Horne and Aveco courts, focused on the relationship between the performances at issue and the primary purpose of the place in which the performances occurred. Another factor bearing on the court's judgment was whether the location in which the performance occurred affords its

occupants a reasonable expectation of privacy.<sup>20</sup> The court decided that that because hotel rooms are constitutionally protected areas under Fourth Amendment jurisprudence, the room is not a place open to the public.<sup>21</sup>

**Critique**

In the wake of Red Horne Inc. and its progeny, two frameworks have been proposed to govern public place analysis, both of which utilize the three factors dispositive in the above-referenced cases: (1) the nature of the place; (2) the amount of control exerted over a performance; and (3) the reasonable expectation of privacy of those experiencing the performance.<sup>22</sup> However, as a threshold matter, two of these factors are inappropriate in public place analysis.

First, the Aveco decision's reliance on the "control" factor in making its public place determination is unfounded. A careful reading of the dispositive decision suggests that in Aveco, the Third Circuit primarily looked at the control factor in deciding only whether the video store should be subject to contributory infringement through the actions of its customers; in other words, this factor served no purpose for deciding whether the audiovisual works at issue were publicly performed, or the narrower question of whether the video store was a place open to the public.

Second, it is peculiar that the Ninth Circuit in *Professional Real Estate Investors, Inc.* relied on whether the place in question is a constitutionally protected area in deciding whether a place is open to the public.<sup>23</sup> As an initial matter, the court in *Professional Real Estate Investors, Inc.* examined whether the hotel room's occupants were afforded a reasonable expectation of privacy from the individuals' perspective. In a sense this is correct, but courts often look at other objective factors in deciding whether an individual has a reasonable expectation of privacy. Notwithstanding the court's error in applying the purported law, criminal principles should not be applied within the copyright context. For one thing, courts have not looked to criminal principles to interpret a specific term or phrase of the Copyright Act outside the 'open to the public' clause.<sup>24</sup>

Additionally, if courts were to apply the reasonable expectation of privacy to

(CONTINUED ON PAGE 5)

## BUSINESS ARTICLES

### Game Changing Data

By Dan Servantes



Knowledge is power. Francis Bacon knew this 400 years ago. In business-to-consumer businesses, where knowledge of the customer base is a key asset, his dictum seems as prescient as ever.

Social media networks such as Facebook, Twitter, YouTube, and Instagram move massive amounts of data. Facebook alone has 1.35 billions monthly active users, and is a goldmine for information on nearly any demographic in any corner of the developed world: user interests, activities, and listening and viewing habits are all mined in real time and leveraged for advertising sales.

Yet using and turning data into monetary gain may still be an underdeveloped craft in the music industry. Only a handful of players in the industry have figured out how to do this successfully and efficiently. Any understanding of the problem, naturally, has to begin with the data providers themselves.

#### Facebook and Twitter

Facebook, the largest player in social media, provides data in at least two important ways. On the one hand, it has the broadest view of general trends and interests. For example, it knows who is the most talked about artist in Miami or what current events are being followed in Cape Town, South Africa. But the devil is in the details, and it is the metrics on users' engagement levels by age, gender, geographic location, and time of day that are really invaluable for advertisers. Such metrics point to who exactly is interacting with a Facebook embedded web page and in what manner. It is this particularity of Facebook's data that allows a band to target different people with the same campaign and discover who is the better get: the 18-25 year old females in Philadelphia who have a higher

engagement rate than any other demographic or the 25-35 year old females in the suburbs surrounding Philadelphia that may really purchase the music. For artists, this is bankable knowledge.

Twitter, of course, is the other social media platform with an invaluable data feed. It has recently announced, for example, a partnership with IBM: the blue chip company will mine Twitter using a new multi-variable pattern-dependent data model that addresses qualitative questions such as what is it that customers like best about an advertiser's product and why is it that Brazil is its new trending market. Previously, this could only be guessed or inferred from sales data. Now, Twitter's chatter can provide a rich tapestry of new information. And because people like to talk much more about music than, say, stovetop cleaning solutions, there will be better intelligence about where to tour, the best pairing of supporting talent, the right branding partnerships, and the geography of possible fan reactions to a band's release. This is good for the music business and, by implication, for artists.

#### Spotify

When looking for data on music and listening trends, labels and artists should go straight to the platform that consumers are using to listen to music. While iTunes and Amazon will never reveal customer analytics to labels, Spotify, which is partly owned by the labels, is much more obliging. Recently, Spotify teamed up with Next Big Sound to provide listener analytics for artists and their managers. Through Next Big Sound, artists can see their most popular songs, the age, gender, and location of their listeners, and how this correlates with data from other sources. If an artist can discover what kind of listeners are repeat listeners and not just casual fans, it narrows the target group for purposes of monetization.

Indeed, on a broader scale Spotify is a needed resource to understand and take advantage of daily trends in the industry. Two examples of possible lost opportunities, one by Aerosmith and the other by Spice Girls, should suffice to make the point.

Aerosmith's song "I Don't Want to Miss a Thing" spiked exceptionally in Spotify on November 13. This was at the same time that the robotic lander Phiale touched down on Comet 67P. It may have been a coincidence,

but the storyline of the disaster movie Armageddon, where Aerosmith's song was featured prominently, involved another comet hitting Earth. It is likely that Aerosmith fans and film audiences remembered the song in the movie. But a silence in the band's social media assets suggests that no attention was given to this phenomena and that, ultimately, there was lost opportunity for the group to promote itself. In fact, Spotify data shows that every time a comet-related event happens, roughly twice a year in previous years, Aerosmith listening increases.

As for Spice Girls, listening peaks in Spotify every Thursday. This, in all likelihood, is because the group is the most popular Throwback Thursday artist in the US. If listeners are more nostalgic about Spice Girls on Thursday than any other weekday, the group should know. There seems to be little evidence that traffic is higher at their website on that date, again suggesting a missed marketing opportunity.

In the above context, Taylor Swift's recent action with Spotify may seem puzzling. Swift removed all her music from the streaming service because Spotify refused to make an exception of releasing her music worldwide but not in the US. Swift, a megastar, was bartering with the fact that streams in the US would have cannibalized album sales there. In effect, she traded listener data, and stream sales, for album sales (abroad, Swift is not as popular, which is why she had fewer misgivings about releasing streams). In the event, Swift became the top-selling US artist in 2014. The cost to Swift, though, is measurable. She was able to get nearly 1.3 million units in album sales in the first week, but she distanced herself from her fanbase in Spotify, including the 19 million customer playlists she commanded there and the analytics they provided. As the service allows artists to post tour schedules and merchandise on its artist page, arguably 19 million people were one click away from spending as much as \$100 each on concert tickets; Taylor instead went for 1.3 million people spending \$10 each on her album.

Taylor Swift does well anyway, but for younger bands understanding data is much more important. As an independent artist, there is often not a big enough budget to market to a mass audience, and

(CONTINUED ON PAGE 16)



## LAW SECTION

## Copyright in Public Places (cont.)

(FROM PAGE 3)

other copyright cases it would lead to absurd results. For example, under Fourth Amendment jurisprudence, an individual does not have a reasonable expectation of privacy in activities that anybody in the public can view.<sup>25</sup> While using reasonable expectation of privacy principles may be an easy way for courts and academics to conceptualize the public/private distinction in the public performance right, in application, this may have disastrous outcomes for copyright law. For instance, consider this hypothetical: if someone is watching movie on a television in their backyard, and members of the public could view the television while riding in an airplane traveling in a publicly navigable airspace, the individuals would not have a reasonable expectation of privacy there, and thus, under Fourth Amendment jurisprudence, the exhibitions of the movie would constitute a public performance.<sup>26</sup> Congress surely could not have intended for the public performance right to be construed so broadly.

**Solution**

In stark contrast to the recently proposed three-factor frameworks, a better approach to public place analysis is to apply a two-factor balancing test that encompasses the modified “nature of the place” factor articulated in *Professional Real Estate Investors, Inc.* coupled with a new factor, that of access. In effect, a court applying this test would first look to the relationship between the performances at issue and the primary purpose of the entire place in which the performances occurred. Then, in applying the second part of the test, a court would analyze whether anyone from the public could avail themselves to the performances at issue, and, particularly, whether anyone from the public could access the immediate space in which the performance occurred. Because the first factor is closely related to the economic rationale of copyright law, that of encouraging creativity, the first factor should weigh more on the analysis than the second factor.

Utilizing this article’s proposed framework would also further the fundamental purpose of copyright law, as it would help ensure that the author of the copyrighted work is receiving adequate compensation from the fruits of his labor. By focusing on the relationship between the performance and the primary purpose of the place in which the performance occurred, it would

place less of a burden on those experiencing works in a non-commercial and non-systematic manner that would promote the overall purpose of copyright law. **MBJ**

**Endnotes**

1. William Shakespeare, *As You Like It*, Act II, Scene VII (1623) (“All the world’s a stage, And all the men and women merely players; They have their exits and their entrances, And one man in his time plays many parts . . .”).
2. Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (1976) (codified as amended at 17 U.S.C. §§ 101-805 (2012)).
3. See 17 U.S.C. § 101 (2012).
4. *Prof’l Real Estate Investors, Inc., v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 64-65 (1993).
5. Regrettably, the United States Supreme Court had the opportunity to provide some guidance on the open to the public clause in *Professional Real Estate Investors*, but the Court sidestepped the public performance issue altogether and decided the case on other grounds. See generally *id.*
6. CONST. art. I, § 8, cl. 8.
7. See Section 102(a) (providing that “[m]usical works, including work, any accompanying words” are categories of “original works of authorship”).
8. See Section 101 (explaining sound recordings “are works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied.”)
9. See 17 U.S.C. § 101 (2012) (providing “[t]o ‘perform’ a work means to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible.” One can perform
10. See e.g., *American Broadcasting Companies, Inc. v. Aereo, Inc.*, S.Ct. 2507-2511 (*Columbia Pictures Indus., Inc. v. Prof’l Real Estate Investors, Inc.*, 866 F.2d 278, 279-80 (9th Cir. 1989)).
11. Aside from being performed at a place “open to the public,” as provided for in Section 101, an audiovisual work or motion picture can also be publicly performed in two other ways: (1) “to perform or display it at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or (2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.” See *id.* These two clauses are commonly referred to as the “substantial number of persons clause” and the “transmit” clause, respectively, but are outside the scope of this article.
12. *Id.* (“[T]o perform or display it at a place open to the public.”)
13. Specifically, *Embassy Pictures, Paramount Pictures Corporation, Twentieth Century-Fox Film Corporation, Universal City Studios, Inc., Walt Disney Productions and Warner Bros., Inc.*
14. *Redd Horne, Inc.*, 749 F.2d at 159 (finding that because, *inter alia*, the business was organized primarily for the enjoyment of performances, “[t]he services provided by

Maxwell’s are essentially the same as a movie theater.”); *Aveco, Inc.*, 800 F.2d at 63.

15. See, e.g., Kheit, *supra* note 5; Adam Barrett Townshend, *Crashing by Design: Toward A Uniform Standard for Public Place Analysis Under Federal Copyright Law*, 79 NOTRE DAME L. REV. 2045 (2004).

16. *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 243 F. Supp. 2d 1073, 1089 (C.D. Cal. 2003) (quoting *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 264 (9th Cir. 1996)) (“Contributory infringement originated in tort and ‘stems from the notion that one who directly contributes to another’s infringement should be held accountable.”)

17. *Aveco*, 800 F.2d at 61.

18. See *Prof’l Real Estate Investors, Inc.*, 866 F.2d at 279-80.

19. Remember, in *Aveco* and *Redd Horne*, the exhibition of motion pictures was the primary purpose behind the establishment.

20. See *Prof’l Real Estate Investors, Inc.*, 866 F.2d at 281.

21. *Prof’l Real Estate Investors, Inc.*, 866 F.2d at 281.

22. See, e.g., John Kheit, *Public Performance Copyrights: A Guide to Public Place Analysis*, 26 RUTGERS COMPUTER & TECH. L.J. 1 (1999); Adam Barrett Townshend, *Crashing by Design: Toward A Uniform Standard for Public Place Analysis Under Federal Copyright Law*, 79 NOTRE DAME L. REV. 2045 (2004).

23. See *Prof’l Real Estate Investors, Inc.*, 866 F.2d at 281.

24. There is good reason for prohibiting criminal principles in copyright law, as our criminal rights are much broader than our civil rights.

25. See *California v. Ciraolo*, 476 U.S. 207, 213-14 (1986) (finding no reasonable of expectation of privacy in the activities conducted within one’s backyard when the public can see into the backyard from a legal vantage point).

26. *Id.* at 214 (determining that the public could easily see into the defendant’s backyard when flying in a plane within public navigable airspace).



## BUSINESS ARTICLES

## The Power of False Pretense

By Christopher D'Amico

They say that money can't buy happiness, but it can buy likes, views, shares, or followers. From the beginning of social media, users have sought to expand their networks for professional clout, financial gain, or even bragging rights amongst friends. Social media companies have used this engagement to enhance their value. The rise of social networking has fuelled a global race to gobble up as many endorsements as possible. The appetite to increase tallies on sites such as Facebook and Twitter has spawned a new industry as brokers attempt to capitalize on the phenomenon by hawking likes and followers, which social media companies struggle to police. Schemes include click farms, where low-paid workers are paid to repeatedly click the "like" button, view videos or retweet links, while support can also be given by fake profiles or genuine accounts hijacked by hackers and used to endorse profiles without their owners' knowledge. Celebrities, businesses, and even the US State Department have bought bogus Facebook likes, Twitter followers, and YouTube views to inflate a social media presence.

### Bots

Italian security researchers and bloggers Andrea Stroppa and Carla De Micheli estimated in 2013 that sales of fake Twitter followers have the potential to bring in \$40 million to \$360 million to date, and that fake Facebook activities bring in \$200 million a year. As a result, many firms, whose values are based on credibility, have entire teams persistently pursuing the buyers and brokers of fake clicks. Many of these programs created by brokers of click farms are bot-generated. The process involves millions of fake profiles and accounts automated to like or follow the buyer. Social media companies have created means of monitoring bot-generated clicks, but for every click farm that is dissolved another more creative scheme emerges.

Unique IT World is a Dhaka-based social media promotion firm. Its CEO, Shaiful Islam, pays workers to manually click on clients' social media pages, making it harder for Facebook, Google and others to catch them; Shaiful Islam ruefully says that "the accounts...[are] genuine". Indeed, a current check on Facebook puts Dhaka as the city where most likes and followers are created. Facebook estimated as many as 14.1 million of its 1.18 billion active users are fraudulent accounts, and has an uphill battle identifying real users. For LinkedIn spokesman Doug Madey buying con-

nections dilutes the member experience, violates user agreements, and prompts account closures. And even if it were true, as Twitter's Jim Prosser argues, that there is no upside for infringers (as in the end they run out of money and lose followers) their actions, while they last, are manipulative and certainly not business-neutral.

### Culprits

YouTube wiped out millions of music videos in Dec. 2012 after auditors found views had been grossly exaggerated. After an internal audit, there was speculation of foul play all over, spilling into Sony Music, Universal Music, and Google—all joint-venture owners of VEVO. In effect, on Jan. 2013, Lady Gaga was stripped of 156 million YouTube views from her VEVO



Channel and the removal appeared to be part of a broad clean up of bot generated views at YouTube. After the purge, a former YouTube employee who used the alias 'Spk' was allegedly connected to VEVO. Spk claimed to have an empire of bots that inflated views on various video games such as Diablo 3 and social media sites including Twitter and Reddit; he said his views bot was so successful that Google asked him to use it for VEVO back when the music conglomerate first started putting content on YouTube. "I had to sit there and bot videos with millions and millions [of views]...[for]more than 20,000 videos." In 2009, Spk started his own botting business ("I am doing nothing different, just working for myself"). He currently employs 15 people, and his most notable hire is botting reseller Tapangoldy.

YouTube has refused to comment on Spk's history at VEVO. It will only say that it paid Spk handsomely for addressing an internal security issue, and in fact Spk is listed in Google's Hall of Fame Security Site. In the meantime, new

evidence of the boosting of artificial likes is making headlines. Kanye West's video "Heartless", for example, gained 33 million views in one day which Spk, again, claimed he botted per YouTube's request. By comparison, "Gangnam Style", the most popular video in YouTube history, never saw more than 3 million views a day. Further, all of Britney Spears's music videos that aired before the creation of VEVO were likely botted. The artist's 2005 hit, "Toxic" received more than 30 million views in a 24-hour period—again making it suspicious. View data for The Backstreet Boys and N'SYNC music videos point to a similar story. Lady Gaga's first hit "Just Dance", which was uploaded to VEVO after the song had already made the rounds on radio, television, and the pop charts, was surely inflated because views there were later purged.

Google's minority stake in VEVO could partly explain VEVO's actions. The VEVO channels charge the highest rates of any advertisers in YouTube, and a large volume of views rakes in more money. Videos with more views also are ranked higher in search engines, therefore, raising the ranking of VEVO content and facilitating the channels as a music video powerhouse. Both factors helped Sony and Universal Music too. Now, bad publicity is slowing the practice and not least because Spk's disclosures raise advertisers' wrath about payments made on false pretenses.

### Indie Musicians

The buyers of fake likes or pretend followers are common folk too, not just musicians or celebrities. But the impact of this trade is impacting independent musicians more than anyone else in the business. After all, indie artists are told that their web presence and projection is key to their initial marketing efforts. Earlier this year, Facebook made changes to their algorithm limiting the reach of liked pages for certain sites. If a musician with 1,000 likes were to post content 'organically', the post would only reach up to about half of their followers. This troublesome change was made to entice page administrators to pay Facebook to promote their page and "boost" posts. Many indie brands, and musicians, were affected and have refused to pay more for advertising. Moreover, according to a report in The Guardian, as of 2015 Facebook will be re-

(CONTINUED ON PAGE 16)

## BUSINESS ARTICLES

# A Report on SoundCloud

By Griffin Davis



In the years since the rise and subsequent fall of Napster, the distribution of recorded music has, for better or worse, become primarily about maximizing exposure. Many of today's artists look to have their music on as many listening platforms as possible—a difficult task in and of itself given the seemingly constant stream of new music industry startups. Some come to these platforms looking to somehow make a living off their per-play pittance, but many view them as merely one piece of the puzzle; a tool for acquiring career-sustaining super-fans, for connecting them with the perfect producer or tour mate, and most often for helping them catch the attention of the label, publisher, or brand that they feel will allow them to build the career of their dreams.

In the seven years since its inception, SoundCloud has worked to build the ideal platform for maximizing exposure and connections for musicians, and, in doing so, has dramatically changed the music industry.

### History

The company was founded in late 2006 by Alexander Ljung and Eric Wahlforss in their native Sweden, however it wasn't until the duo moved to Berlin in 2007 that SoundCloud began in earnest. Both Ljung and Wahlforss had worked with audio all their lives, and felt frustrated by what they viewed as a lack of adequate tools for sharing sounds on the Internet. They looked at the success of photo sharing site Flickr and decided to build a platform that would create the same community around audio that Flickr created for

photography—an idea that ultimately gave birth to SoundCloud. Prior to the official launch of SoundCloud, Ljung and Wahlforss gave free accounts to several prominent producers and DJs, most of whom created EDM, in the hopes that they would upload some of their tracks, and bring with them a large group of colleagues who shared the ideals that had led to the creation of SoundCloud. The move paid off, as SoundCloud grew rapidly, and today has a monthly listener base of roughly 175 million.<sup>1</sup>

During its meteoric rise, SoundCloud grew from a community of producers into one for all creators of music, from bedroom DJs and songwriters to some of the biggest producers and bands in the world, where they could share their music with colleagues and fans alike. Perhaps the most significant element in their development as a social network for music was their inclusion of a comments feature. This feature allows listeners to pinpoint a section of a track and provide praise or feedback for the artist. SoundCloud's wealth of undiscovered talent has made it a significant tool for those on the business side of the industry, with A&R employees at record labels sometimes spending hours searching for potential new artists.

### Legal Issues

SoundCloud, much like YouTube, is a platform made up of user-generated content, and like other UGC sites it requires users to certify that they have obtained all rights necessary to upload their content. Many users, however, have not done so, and are uploading

content that infringes on the copyrights of others. This is a particularly big problem for a platform like SoundCloud, which is known for its abundance of remixes and sample-heavy songs, many of which are unlicensed.

To add to the problem, in the beginning, SoundCloud took a fairly relaxed approach toward infringing material, resulting in quite a bit of criticism as well as threatened lawsuits. It is important to note that under the terms of the Digital Millennium Copyright Act, SoundCloud is not required to monitor user-generated content for infringing material, but must respond quickly to takedown notices, and must terminate the accounts of repeat offenders. To save themselves from an onslaught of lawsuits that likely would have spelled their end, SoundCloud opted to become more compliant with DMCA requirements, and in 2011 introduced a content identification system similar to the one used by YouTube.

SoundCloud's identification system, which was intended to be more accessible to independent artists than many of its counterparts, was a big step forward for infringement monitoring, but it has not been without its shortcomings. SoundCloud has faced a lot of criticism for the apparent lack of transparency in their trusted sender program with Universal Music Group. Trusted sender programs allow groups like Universal to issue takedowns directly and in bulk. While this system creates great efficiency, it is necessary that it be highly transparent to ensure accountability on all sides. This lack of transparency was revealed this past summer when a series of emails between a DJ named Mr. Brainz, whose SoundCloud account had been deactivated after multiple takedowns notices by Universal, and a SoundCloud representative was published. It is revealed in the exchange that the Universal takedown notices only stated that unlicensed Universal material had been used, but not exactly what the infringing material was. This left the DJ unable to fix the problem by either obtaining a license or replacing the infringing sample.<sup>2</sup>

While this is certainly unsettling, critics of the program have blown it a bit out of proportion. Some have claimed that SoundCloud is allowing Universal to issue takedowns indiscriminately, and while there may be some abuse on the part of Univer-

(CONTINUED ON PAGE 9)



## BUSINESS ARTICLES

## Music Publishing's Dynamic Finances

By Luiz Augusto Buff



After the music industry was shocked in the early 2000s by the growth of piracy and file sharing, many investors were skeptical about the future of music publishing assets, worried that the value of songs would decrease significantly due to consumer's free access to music. However, the rise of legal alternatives for music consumption offered listeners a way to access music conveniently and affordably, while at the same time compensating publishers and songwriters for the use of their work. Throughout the past decade, the publishing side of the music business ended up suffering a significantly smaller hit than the record labels.

### Prospects

Indeed, royalty revenue in music publishing remained notably stable over the past 15 to 20 years, attracting savvy investors to the field. The music publishing industry generates around \$6 billion a year globally. Approximately 40% of that revenue comes from the public performance of compositions, when music is performed publicly through broadcast on television, radio, cable and satellite, live performance at a concert or other performance venues, but songwriters and publishing companies benefit greatly from a multitude of revenue streams. Important sources of income include synchronization licenses of existing works for use in movie, documentary, TV, video games, internet, or commercials; mechanical royalties from the sale of physical and digital products, as well as from streaming services; sheet music sales and lyric display; as well as other streams such as ringtone licensing, commissions for original work, grants and awards, and litigation settlements.

In 2012 Sony/ATV alongside David Geffen, GSO Capital Partners and Michael

Jackson's estate purchased EMI Music Publishing with a catalog of over 1 million songs for \$2.2 billion, and even during the recession back in 2009, a Dutch pension fund backed the acquisition of the Rodgers & Hammerstein catalog for Imagem Music Group. This is possible because royalty returns are largely uncorrelated to the performance of the public and private equity markets. Royalty income is basically predictable, and distributed on a semi annual basis generating an annuity-like cash flow for investors.

In addition, there are currently positive factors influencing the dynamics within the music publishing industry that have the potential to generate incremental revenue for music catalogs, thus attracting the interest for investments in music publishing catalog acquisitions. The termination of transfers and licenses provision in the Copyright Act effectively gives authors and writers the chance to reclaim the rights they assigned after 35 years from the execution of the agreement. Songwriters of popular songs written in the late 1970s may now regain rights to their songs and renegotiate their catalogs with interested companies and investors. Furthermore, emerging markets around the globe are adapting their copyright framework, enabling innovative services to access the enormous potential of those markets. With the explosive growth of digital media platforms such as Deezer, Spotify, and YouTube's Music Key, it is expected that royalty earnings will increase in the years ahead.

### NPS Multiples & Acquisitions

Music publishing catalogs are usually traded for a multiple over Net Publisher's Share (NPS). NPS is defined as the amount of royalties received by a music publisher less the amount of the royalties that have to be paid to writers, performers and others who participate in a share of the royalties earned. Some catalog valuations are based on an average of the NPS over a 3 to 5 year period, while others prefer to base the asking price on the "last twelve month" (LTM) period. Recent acquisition transactions were closed with a multiple of 5x to 15x the NPS. Established classic catalogs tend to trade between 10x to 15x NPS, while newer and lesser-known catalogs are selling between 5x and 10x NPS. In determining the multiple applied to the transaction the parties have to access a number of factors that include the number of past hits or potential future singles in the catalog, the remaining life of

protection, current songwriter deals in place, and other determinant factors when acquiring a company. For instance, the acquisition of the Rodgers and Hammerstein catalog previously mentioned had a price tag of \$225 million. The NPS at closing was \$19 million, returning a multiple of 11.8x NPS.

There are a number of companies that are currently interested in the acquisition of music publishing catalogs. Ole, a Toronto-based music publishing company recently acquired the catalog of the band Rush for an undisclosed amount. The company has recently concluded over \$300 million in acquisitions and controls a catalog of over 45,000 songs. In 2011, Josh Gruss, a former hedge fund manager, founded Round Hill Music, a private equity firm exclusively dedicated to investments in revenue generating music copyright assets. Round Hill Music closed on a fund with multiple investors for a total of \$201.6 million earlier in July, and has made several acquisitions since. The company now administers a catalog of over 20,000 songs, including songs from The Beatles, Rolling Stones, Frank Sinatra, Billie Holiday, Ella Fitzgerald, Miles Davis, James Brown, Bruno Mars, Aerosmith, Katy Perry, Bon Jovi and Celine Dion. Their most recent acquisition was the catalog of Big Loud Shirt Industries, including #1 hits performed by Rascal Flatts, LeAnn Rimes, George Strait, Faith Hill, Carrie Underwood, Kenny Chesney, Jason Aldean, Blake Shelton, and Toby Keith. The investment strategy of the company is to acquire time tested, iconic copyrights, add value to the portfolio to increase cash flow and later sell its assets to a strategic or financial buyer.

### New Developments

Music publishing royalties have also been the target of new and innovative ways of exploitation, such as crowdfunding. Royalty Exchange, a startup founded in 2011 created a marketplace where royalty revenue streams are auctioned to accredited investors. Artists and songwriters may use the platform to sell part of the royalty income from their writer's share to raise capital for specific projects. Songwriter and producer Preston Glass who worked with artists such as Natalie Cole, Aretha Franklin and Whitney Houston, recently auctioned 15 of his songs through the Royalty Exchange platform, raising \$158,000 from an investor that now receives a cut

(CONTINUED ON PAGE 9)



## BUSINESS ARTICLES

## SoundCloud (cont.)

(FROM PAGE 7)

whenever one of the songs is played on the radio or streamed online. The transaction does not involve transfer of copyright ownership, only encompassing participation on the royalty stream derived from the public performance of the songs. The company takes a 2.5 percent fee from the buyer and anywhere from 5 percent to 12.5 percent from the seller, depending on the size of the deal. It also takes 2.5 percent of future earnings from the buyer, as an administration charge. Royalty Exchange has now sold more than \$2 million in royalties on more than 2,000 songs. The company is expecting to expand significantly once the SEC passes final regulations on the JOBS Act's new general solicitation rules, making it possible for companies like Royalty Exchange to advertise shares of an asset to the general public, not only for accredited investors, as well as creating a form of royalty crowdfunding.

Moreover, one of the most renowned names in the music industry, Irving Azoff, ex-Chairman of Live Nation and a longtime manager and recording industry dealmaker, is now colonizing the publishing space. Last year, alongside former Performing Rights Organization (PRO) executives Randy Grimmer and Sean O'Malley, Azoff founded a company called Global Music Rights (GMR) as part of Azoff MSG Entertainment, a new joint venture with the Madison Square Garden Company. GMR offers licensing, distribution and collection services for the exclusive rights granted to a small number of artists. GMR is not a traditional music publishing company, but rather a new PRO competing with ASCAP, BMI and SESAC. GMR plans to limit their representation to 40-60 writers, including Pharrell Williams, the estates of John Lennon and Ira Gershwin, and One Republic front man Ryan Tedder, who in 2013 had an income of \$2.5 million for seven songs that he wrote for One Republic, Beyonce, Ellie Goulding, Maroon 5, Demi Lovato, and The Fray. GMR and SESAC are not bound by the consent decrees with the U.S. Department of Justice that regulate how ASCAP and BMI do business. For that reason, Azoff has promised to negotiate higher royalty rates for its writers with traditional broadcasters and new digital services. In fact, at the end of November, as YouTube announced its upcoming Music Key subscription service, GMR sent a letter requesting removal of its songs for lack of proper licensing clearance. YouTube refused to do so arguing that it had all the necessary rights in its catalog already and that the safe harbor provisions of the DMCA protected it. The dispute is still in its early stages and might be settled before becoming a lawsuit. In the meantime, it allows Azoff to put pressure on new digital services and negotiate better deals for his roster of artists. **MBJ**

sal, it is unlikely that the issue is more than just a lack of communication between the label and SoundCloud users. Others have stated that SoundCloud's enforcement policies go against their artist-centric image. However, it seems foolish to suggest that monitoring copyright infringement goes against the best interests of artists.

**The Future of SoundCloud**

As SoundCloud works to solve its legal issues, it faces an even harder challenge: how to make money. SoundCloud has traditionally been a free service, which has contributed in part to its massive growth. Users could upload a fairly large amount of content for free, and all listeners could enjoy the free content without any advertisements. The only reason this was at all possible was SoundCloud's terms of use. Users, i.e. uploaders, agreed to forgo royalty payments. A relatively small number of high volume users did pay for unlimited uploads, and that, combined with investments from a variety of venture capital firms, including Union Square Ventures, allowed SoundCloud to cover operating expenses and stay afloat.<sup>3</sup> Now, however, investors, along with the major labels, have become impatient. SoundCloud needs to strive for a payoff and that involves working with the labels. Warner Music Group recently made a deal with SoundCloud, accepting a 5% distribution from SoundCloud's revenue and royalty payments for its artists.<sup>4</sup>

To accommodate the demand for profits and the new promise of royalty payments, SoundCloud has had to restructure their set-up considerably. For users, there will now be four tiers of subscription. The free tier, called a "Partner" account, gives access to 3 hours of uploads, basic metrics, and customer support. A "Pro" account costs \$55 a year and gives the user 6 hours of uploads, access to listener demographics, comment free posting in "quiet mode", and the ability to choose which tracks appear at the top of their page. The "Pro Unlimited" account, which costs \$135 per year, provides the same features as "Pro", but with unlimited upload time.

The hallmark of the new SoundCloud will be SoundCloud Premier, an entirely new level of membership that will function essentially as an artist development program. The invite-only program will give artists access to all of the features of the Pro Unlimited account, in addition to in depth metrics, a highly customizable

"visual profile", promotion of their tracks and profile, a share of SoundCloud's revenue, and the ability to place advertisements on their content—a first for SoundCloud.<sup>5</sup>

This is a radical shift for a company that made its name on no cost, ad free music sharing, and is likely to turn it into a platform that more closely resembles other interactive streaming services like Spotify and Beats. In effect, SoundCloud's user base will be segregated into those who get paid and those that have no opportunity for profit.

It could be argued, of course, that the company's hands were tied. SoundCloud could not continue to hemorrhage money, and a sudden shift to a fully advertised setup, which would have been necessary if they had wanted to pay royalties to all users, would almost certainly have resulted in a decreased user base.<sup>6</sup> But it is unlikely that the turnaround will surprise SoundCloud's founders and investors too much. For them, SoundCloud's current predicament is probably part and parcel of the big money stakes that pioneering music companies eventually find themselves in. **MBJ**

## Endnotes

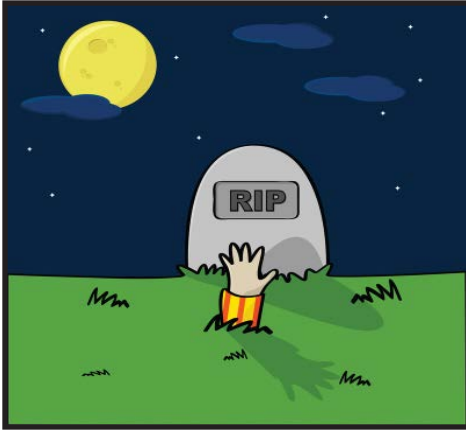
1. Sisario, Ben. "Popular and Free, SoundCloud Is Now Ready for Ads." The New York Times. The New York Times, 20 Aug. 2014. Web. 24 Nov. 2014.
2. "Soundcloud Boldly Releases New App, Allows Universal to Flag Your Account, and Quietly Announces Data Mining, All in One Month." Do Androids Dance? 27 June 2014. Web. 24 Nov. 2014.
3. "SoundCloud." CrunchBase. Web. 24 Nov. 2014.
4. Sisario, Ben. "SoundCloud Signs Licensing Deal With Warner Music." The New York Times. The New York Times, 4 Nov. 2014. Web. 23 Nov. 2014.
5. "On SoundCloud-Overview." SoundCloud. Web. 24 Nov. 2014.
6. Resnikoff, Paul. "SoundCloud Is a Financial Sinkhole..." Digital Music News. 13 Oct. 2014. Web. 26 Nov. 2014.



## LAW SECTION

## Protecting the Living Dead

By Daniella Peterson



There are many stars who left the stage far too soon, among them John Lennon, Aaliyah, Whitney Houston, and Kurt Cobain. In the aftermath of these tragic deaths, fans are often hungry to connect with the best of their idol's legacy, and to ponder the reasons for their demise. Audiences want to see movies, read books, and hear music dedicated to, inspired by, and centered on these lost stars. But who should be allowed to create such works? Who should have a say in how the deceased performer is represented? Should the departed individual's family or management be allowed to pull the plug on a production?

### Court of Public Opinion

Before works honoring deceased performers ever make it to production or publication, they are often weighed in the court of public opinion. Fans want to know if the family was involved, how big the producer's name is, who was cast in the starring role, and how many of the performer's works will make it into the new production.

The initial reaction to these choices can often determine if the project continues as planned, is reworked to the wishes of family and fans, or is scrapped altogether. For example, Lifetime's biopic of R&B singer Aaliyah Haughton, known simply as Aaliyah, was doomed from the beginning after the late singer's family expressed disgust that a big movie studio was not spearheading the project. Without the approval of Aaliyah's family, Disney actress Zendaya Coleman was cast to play the lead role. As news spread of the casting decision, and later of the Haughton family's refusal to grant music rights, members of the public took to Twitter and other social media sites to voice their disapproval. The backlash was so intense that Coleman decided to back out of

the project. Ironically, the public disapprobation caused viewers to tune in—if for no other reason than to see just how bad the movie was—and Nielsen ended up ranking Aaliyah: The R&B Princess number one in Twitter TV ratings.

Twitter commentary echoed the thoughts of the Haughton family. Fans complained that Aaliyah was too big for Lifetime, and that her legacy could not be done justice by a made-for-TV-production on a network with a poor track record of biopics—Lifetime's films on the lives of Anna Nicole Smith and Brittany Murphy were called “a sad mess” and “trashy,” respectively. There were three fatal flaws in all these films. First, they failed to acquire the blessing of the deceased's estate or family. Second, they opted for low-budget casting and costuming. Finally, they chose not to employ a well-known writer who would have lent the script some credibility. All of these errors lead viewers to ask themselves, “Why couldn't they have done better?” Or, perhaps more importantly, “Why couldn't they have been stopped?”

### Court of Law

Legally, there isn't much that can be done to stop an “unauthorized” biopic or posthumous album from coming to market. Novelists, filmmakers, and songwriters have free reign to discuss or depict famous people in whatever way they wish—so long as their works are truthful, or as close an approximation of the truth as to not be noticeably untruthful, and do not invade the subject's privacy (a factor that is hard to prove when the subject is no longer with us). This is why the family members often take to the media to voice their displeasure—they have no real power to “authorize” any work about their famous loved one.

The two legal claims that may be brought by disgruntled family members are that there is invasion of privacy because the work misappropriates the artist's likeness, and that it is a violation of their right of publicity. The first claim is not available to famous people or their representatives because the courts in many states have ruled that famous people have, by virtue of their fame, no privacy interest in their likeness or image. The second claim is related to the right of a person to make money from the commercial use of his name or likeness. This second claim would logically seem to be available to people like the Haugh-

tons, but, sadly, this is not the case. Rather, this claim can only be asserted when a commercial entity has falsely claimed that the celebrity at issue has endorsed a product. This is why claiming a work is “unauthorized” really doesn't add much to any legal challenge.

On the topic of privacy, it is important to mention that one simply cannot invade the privacy of a dead person. Most courts have held that the deceased have no privacy to be invaded, and so claims of a violation cannot be brought in a court of law. Generally, a plaintiff claiming a violation of the use of his likeness must prove three things: (1) that there was a use of a protected attribute; (2) that the use was exploitative—usually, this means that the use was for the purpose making money; (3) that there was no consent. The hardest thing for the families and management of deceased celebrities to do is to prove that a “protected attribute” exists.

The family of slain Florida teen Trayvon Martin, however, were successful in their attempt to stop the unauthorized use of the youth's image—Trayvon's infamous, haunting “hoodie” picture—because they argued that the picture, a selfie snapped by the boy with his own camera, was property of their son, an unwilling celebrity, which had passed to the family posthumously. As such, they asserted that their property deserved protection and that others could not use their son's image on t-shirts, artwork, or any other commercial (exploitative) uses without their consent. The family sent out hundreds of cease and desist letters and donated the money from the uses they licensed to a charity established in their son's name.

### What can be done?

The best thing for families of deceased celebrities to do is present their feelings about the unauthorized production to the public. If the family feels the portrayal is offensive, belittling, or insulting, it should say so in no uncertain terms to anyone that will listen. This move is likely to induce some fans, possibly even a critical mass, to speak out against the project. It also may convince the big names who wanted to work on the project to decide to leave. No celebrity wants backlash or controversy to surround their projects, which is part of the reason why so many biopics end

(CONTINUED ON PAGE 13)

## TECH NEWS

## New Frontiers in Live Performance

By Alex Cohen

Although Technology may have destroyed the recorded music market, it has played a significant role in enhancing live performances. Recent developments need to be heeded by both artists and concert producers.

#### 4D Sound

4D Sound is an installation in Amsterdam where the sound system surrounds the audience unlike anything seen before. The system is set up with 16 pillars of speakers around the room, and more in the walls and floors. Sound immersion is the least of it. The stage setup is complemented with software that gives the performer complete control in the placement of sounds. It allows the artist to present new auditory arrangement performances beyond the control of just volume and timbre. With 4DSOUND, listeners have reported that “sounds [fly] past their heads and [rain] from the sky” and “guitar riffs [come up] from their feet”<sup>1</sup>. When performers can manipulate the sonic spectrum at will, and pinpoint parts of that spectrum selectively to audiences, live concerts will have changed forever.

#### Holograms

Club promoters and music industry executives like cutting costs. Top musical acts downsize their orchestra, and single DJs who can sell out arenas are cheaper than rock bands. Technologists have recently taken it a step further.

Holographic performances take out the human element altogether. The artist is virtual: designed graphically, filmed, if necessary, with an actor in his or her place, and merged with film tape of the original artist; the right postproduction effects make the concertgoer’s experience believable. The first time this technology went mainstream was at Coachella 2012. During the set of Snoop Dogg and Dr. Dre, deceased rapper Tupac Shakur ‘made an appearance’ as a hologram and performed along side his living colleagues. The digital Tupac looked bizarrely realistic and even interacted with the crowd and other performers.

Since then there have been more such performances. At the 2014 Billboard Music Awards, Michael Jackson, in hologram form, performed “Slave to the

Rhythm” accompanied by real back up dancers and musicians. Many of the attendees were dear friends of Jackson’s and appeared to have found the performance unsettling (the estate of the deceased performance, of course, should have a say in the use of a dead artist’s likeness).

Holographic performances have not been restricted to resurrecting the dead. Hatsune Miku is the world’s first holographic pop star. She is not the recreation of a former artist, and her voice is digitally synthesized by an application created by Crypton Future Media. Although she is most well known in Japan, and is marketed to target Japanese youth, she has found global acclaim. On October 8th, 2014, Hatsune Miku made her debut on the Late Show with David Letterman. The virtual artist performed her J-pop song “Sharing the World” with a touring band of humans. Although these holographic performances were not without its critics, the amount of attention they have received so far suggests that the market for virtual artists will likely grow.

#### Ableton Live

Music production platforms have started to incorporate performance aspects into their software. Ableton Live did this most successfully and became one of the most used DAW’s on the market. Unlike other music production software, such as Logic or ProTools, its sound engine is programmed to continue playback without overloading and crashing a computer’s central processing unit. Ableton integrates other performance products in a user friendly way. With Akai, they have created a number of hardware controllers that work with the software. Ableton allows mapping virtually any of the parameters in the program and changing them at will with a MIDI controller. A user can personalize the controllers, and the hardware setup. Other companies, like TouchAble and Lemur, have created apps to further enhance Ableton’s software.

#### iPads & iPhones, Gloves & Bracelets

Today, many artists perform on stage using iPads and, in some cases, even iPhones. Both allow real time control of instruments and effects in a live setting--so a performer can replicate, or modify at will, their songs on stage. Past restrictions are dis-

appearing fast, for instance, with new controllers. Imogen Heap waves gloves to play melodies and change timbres in concert. She is happy that she no longer needs to react with faders, knobs, or keyboards, and that a wave of her hand or a particular bend of a finger gives her the desired effect.<sup>2</sup>

Companies are taking notice of such developments. Lightwave is pioneering wearable technology to read movement, audio levels, and body temperatures. A Lightwave bracelet created by Rana June, one of the first iPad DJs, is focused on reading concert goers’ physical responses and converting them into emotional metrics. Lightwave partnered with Pepsi, Fast Company, and Fools Gold artist A-Trak at SXSW 2014. A-Trak made adjustments to crowd analytics on the fly --and so did the light crew, the fog machine operator, and the confetti blasters. The song set was even revised to suit Lightwave’s data. Moreover, a leaderboard showing the most engaged fan in the audience was projected on a screen behind A-Trak. Finally, a “boys vs. girls” dance-off unlocked refreshments when a performer reached a given body temperature.<sup>3</sup> **MBJ**

#### Endnotes

1. “Max Cooper on the 4D Sound system” October 24th, 2013 <http://www.djtechttools.com/2013/10/24/the-4d-soundsystem-max-cooper-interview/>
2. Dezeen “The gloves that will ‘change the way we make music’, with Imogen Heap” March 31st, 2014 <http://www.dezeen.com/2014/03/31/imogen-heap-gloves-mini-frontiers-movie/>
3. Lightwave “Pepsi Bioreactive Concert @ SXSW 2014” <http://vimeo.com/lightwave>





## MUSIC AND SOCIETY

### The Ambitions of K-Pop

By Corliss Lee and Melissa Sutikto

Ever since Psy went viral on YouTube and ‘Gangnam Style’ made it into the pop culture lexicon in America and the rest of the world, South Korean pop artists have resolved to crossover with renewed vigor. This essay examines Korean pop (K-Pop), the practices of the entertainment agencies that sustain the genre, and the culture that nourishes it. In part, it concludes that there are limitations for a repeat occurrence of a Psy type phenomenon.

The juncture is, nevertheless, promising. Lee Chae-rin, known as CL, the leader of K-pop girl group 2NE1, recently teamed up with US talent manager and businessman Scooter Braun to launch a solo debut effort in America next year. CL’s entertainment agency is YG Entertainment, which was responsible, no less, for Psy’s earlier success. The effort, moreover, will come after CL’s collaboration with Skrillex on the EDM producer’s song “Dirty Vibe” (another Korean rapper, G-Dragon, of the boy group BigBang, was involved as well). Like Psy, it is worth noting that CL is multilingual, and will add French to Psy’s English.

#### Business and Culture

Context is everything, and to understand K-Pop’s projection, and possible crossover limitations, some reflections are in order. In Korean culture, the songs, the image of the artist, the concept for the music video, and the connection built between stars and fans all follow a very different dynamic than found in the West. Overall, there is a carefully crafted, in-house-production approach that is commercially tweaked over time. These are not compositions written by artists that express individual and personal experiences for the benefit of fans. Instead, either generic songwriters or the artists themselves write K-Pop songs to fit the concept assigned to talent by the entertainment agency. New artists, in fact, are more often than not vehicles for creativity rather than the drivers of it, and may not even be involved in the creative process.

In South Korean culture, in fact, it is widely understood that image is the basis on which the agencies and the artists’ careers are built upon. The actions and the words spoken by the artists are tightly controlled, a practice common among many idol groups. A slip of the tongue, it is felt, can have a detrimental effect on careers and, therefore, spills over to the entertainment agency that hires the talent.

Such tensions have been well documented. Joy, from the girl group Rania, told TV station Al Jazeera that before the debut track “Dr. Feel Good” was released in 2011, the group was not allowed cell phones and could not call or see friends, nor (sic), “of course”, boyfriends. More recently, boy band B.A.P. filed a lawsuit against their agency describing their 7-year agreement as a “slave contract”.



These are not isolated episodes, but they are to some extent undercut by the remarkable success of K-Pop, which is based on an incubator type mentality. The entertainment agencies recruit prospective artists as early as their teens, and send them through a specially designed and very competitive training program to prepare them for careers as global pop exports.

Lee Soo-Man, the founder of SM Entertainment, the biggest entertainment agency in Korea, explains that the creation of a K-Pop group starts off with a search for potential artists, often through global auditions, in, for example, Japan, Thailand, or Malaysia. After applicants are screened, a software simulation operated by the company is used to show how the voice and the appearance of the trainees would change in three to seven years.

If everything checks out, the future stars start their training program, which consists of singing, acting, foreign language classes, song composition, and rap and dance choreography. The artists have to be relatively skilled in each of these areas before they are deemed ready for a local debut.

This vision of the music and pop market is at the very least odd for American or European sensibilities. In 2011, lecturing at Stanford University, Lee Soo-Man explained that exporting Korean culture involved an ongoing collaboration with companies and artists in different Asian countries with the goal of creating joint ventures “to share the enormous added value [so] created.” Korea’s national border, it seems, is not the limit by any means.

YG and JYP, the other ‘big two’ agencies, are equally bullish about success in Asia. Together, combined sales of the big three, inside and outside South Korea, totaled \$106 million in the first quarter of 2014. But platinum status is given for only ten thousand units sold (in the US it is one million), so arguably it is the small market size of South Korea that prompts the more international business strategy.

#### Expanding in Asia

Part of it as well is the fickle nature of debut records in South Korea. Upcoming or established artists tend to be dethroned by newer releases. To maximize earnings, entertainment agencies turn abroad for sales and touring receipts. Japan, the second largest music market in the world, is a top destination for K-Pop, and there appears to be a growing market for the genre in China.

BoA, hailed as the Queen of Korean Pop, is the first star to break into Japan. At age 28, her career spans fifteen years and lists sixteen albums. She has travelled often to the island, mastered the language, and her management company has signed contracts with a local company to coordinate releases. K-Pop group TVXQ toured Japan for two months in 2008, putting up seventeen shows in front of 150K fans.

K-Pop boy band Super Junior crossed over China and to other Mandarin-speaking countries, such as Taiwan. The mal-

(CONTINUED ON PAGE 13)

## MUSIC AND SOCIETY

### Living Dead (cont.)

leability of talent is noteworthy here, for SM Entertainment put together a subgroup in 2008 with Chinese and Koreans nationals, or descendants of either country, and called it the Super Junior-M. Their debut album “Me” topped charts in China, Taiwan and Thailand. Their popularity has not waned, and this year, at the Top Chinese Music Awards, they collected the “Most Popular Group Award” and the “Best Music Video Award”.

Rain, the singer-songwriter, actor, and music producer (his real name is Jung Ji-Hoon), is yet another example of Seoul’s outreach. The Best Show Asia Tour has played to packed audiences in China, Thailand, Taiwan, Singapore, and Macau. K-Pop, therefore, has a global dimension that transcends Psy and Gangnam, and produces a crop of local and regional superstars.

#### Crossover Into America

So far, Psy is the exception to K-Pop’s full recognition in America. The K-Pop wave may be known as ‘Hallyu’ in Asia, but ‘Gangnam Style’ seems to be identified only with Psy—and it is not for lack of effort from the Korean entertainment conglomerates.

Wonder Girls, a popular K-Pop act in Asia, performed two concerts in California and one in New York in March 2009, as Jonas Brothers’ opening act. They released an English version of the song ‘Nobody’ which debuted at No. 76 on the Billboard Hot 100 four months later, marking the first time a Korean group entered the US charts. Wonder Girls video, released later 2012, featuring Akon is currently has 10 million views, but it is difficult to know how many of these were from US viewers as they did not return to the Billboard charts. Earlier, Rain had garnered some fame from his dance-off with Stephen Colbert on The Colbert Report. At about that time in 2009, BoA’s collaboration with Flo Rida did not sustain momentum, and BoA’s US debut moved only 8K units.

Psy’s YouTube video and TV appearance on The Ellen DeGeneres Show early in 2013 broke the mold for K-Pop. But little seems to have changed since. While the US looks for artists to have personality and an ability to connect with fans, K-Pop talent usually has to project a desirable but unattainable quality. Psy, a Berklee student familiar with Boston, may have been an exception. He did not have to conform.

Canadian musician (Claire) Grimes says, accurately, that Psy “is not hiding behind a group name or label...and that is why [he has] managed to cross over.”

#### Limitations

There is a real dilemma here, for K-Pop artists that succeed in the West could lose their home base if they are perceived as a product of an alien culture. For Korea, music is more than just entertainment, as is the case for most non-English speaking countries. Psy, and possibly others like G-Dragon of BIGBANG have to tread carefully as they attempt the crossover.

So will their entertainment companies. Too high a pedestal for the artist distances them from America fans, and a secondary role in collaborations doesn’t help either. Psy and Snoop Dogg’s “Hangover” barely resembled the work of Psy, except for Psy’s catchy hooks. “Hangover”, released this year, lasted only a week and peaked at No. 26 on the Billboard Hot 100 chart and has had 161 million views on YouTube to date-- a big drop from Psy’s “Gentleman” released 2 years earlier, which lasted 15 weeks and peaked at No. 5 on the chart, with 761 million YouTube views to boot.

Still, multinational collaborations are currently making the top of the Billboard charts, as is shown by Jessie J, Ariana Grande, and Nicki Minaj’s “Bang Bang”. It is inevitable too that large cities will develop a more international sound imprint over time, and K-Pop, with its choreographed dance moves and exciting visuals, could be a fun fit for our sprawling neighborhoods (South Korean cuisine has exploded in the last five years in coastal cities like Los Angeles, and we are more familiar than ever with Korean culture and their products, particularly cars).

Yet a K-pop break in America seems elusive. Language and culture will always be a barrier. But K-Pop may be testing the limits of our terms of engagement with Pop, for it suggests that the quality of an entertainment package, if fun oriented, may not need to rely on aural elements exclusively. A good projection of the music or the lyrics draws attention to the quality of the song, but a standout visual performance built around a few simple musical hooks can be as alluring.

**MBJ**

(FROM PAGE 10)

up starring C or D-list actors with no skill or credentials. America has a consumer-based culture, and many people do not understand why they should not be allowed to buy a t-shirt or music track, or watch a movie that depicts someone they admire. An emotional plea by an affected family member is often enough to persuade the general public to consider another viewpoint.

Next, those opposing the use should get in touch with a lawyer. As explained above, an argument will need to be made as to what attribute(s) are worthy of protection. This is not possible in every case, but a good lawyer, familiar with intellectual property and trademark rights, will be able to pull out pertinent facts to make a case for stopping the project. **MBJ**

#### Sources

Bacle, Ariana. “Twitter Was Not Happy with Lifetime’s Aaliyah Biopic.” Entertainment Weekly. N.p., 16 Nov. 2014. Web. 22 Nov. 2014.

Grow, Kory. “Where Lifetime Went Wrong With the Aaliyah Movie (and What It Could Learn Going Forward).” Vulture. N.p., 8 Jan. 2014. Web. 24 Nov. 2014.

Liptak, Adam. “When It May Not Pay to Be Famous.” The New York Times. The New York Times, 01 June 2013. Web. 24 Nov. 2014.

O’Neal, Sean. “Everything about Lifetime’s Brittany Murphy Movie Is Already Trashy and Awful.” News-wire · The A.V. Club. N.p., 3 Sept. 2014. Web. 22 Nov. 2014.

“Using the Name or Likeness of Another.” Digital Media Law. Berkman Center for Internet & Society, n.d. Web. 24 Nov. 2014.

Weber, Lindsey. “Where Lifetime Went Wrong With the Aaliyah Movie (and What It Could Learn Going Forward).” Vulture. N.p., 17 Nov. 2014. Web. 24 Nov. 2014.

## BUSINESS ARTICLES

## Haute Couture for the Red Carpet Star

By Natalie Cotton

Beyoncé in Versace; Taylor Swift in KaufmanFranco; Pharrell Williams wearing Vivienne Westwood. Musicians and fashion labels are linked far beyond the beats played on runways, and when paired together correctly they can become a force to be reckoned with in pop culture. Throughout history, musicians have, often times unintentionally, started fashion trends that helped build and define fashion brands. Today, fashion houses recognize that artists have the followers, media dominance, and creative authority necessary to advertise their products.

The world's most famous runway could very well be a red strip of carpet. With roots dating back to antiquity, the red carpet has become an exclusive, far-away place where stars can be seen via mass communication outlets such as TV and Social Media. According to the late comedian and fashion commentator, Joan Rivers, the red carpet is "one big P.R. party and the goal is to get noticed." For Rivers, artists either win the awards or they win the red carpet. The best do both. For fashion houses, dressing a star on the red carpet is an opportunity to formally present their current style to millions of viewers.

The oversized brown hat Pharrell Williams used on the red carpet currently has its own twitter account with more than 19 thousand followers. Jennifer Lopez continues to remind us of the famous green Versace gown she wore to the Grammy's 14 years ago, most recently in one of her music videos. Modern music fans have the opportunity to purchase much more than music—not that many are doing that; today, the personality and style of celebrities is for sale. Online platforms such as WhoWhatWear.com allow fans to see and shop for Taylor Swift's favorite outfits, while Vogue, which recently featured Ms. Swift on its cover, assures the best looks from her new album will work in your closet this fall. Further, Swift's constant use of red lipstick forms part of an image she takes every place including her lyrics.

Pharrell Williams, who has been involved with fashion more than almost any other musician, currently has two established clothing lines, Billionaire Boys Club and Ice Cream. During the development of his own clothing brands, he decided to partner with Jay-Z and founded the clothing line, Rocawear. He has collaborated with French design house Louis Vuitton to make a jewelry collection called Blason, has a fragrance with Comme des Garçons, a line of sunglasses for Moncler,

and a streetwear line with Uniqlo. He has also added an element of social responsibility to his image through his work as curator and co-designer of RAW for the Oceans, a collaborative project that takes plastic from the world's oceans and transforms it into innovative denim and apparel. Whether it be through donning his trademark buffalo hat or his work as a brand ambassador, Williams seems to constantly find ways to use fashion to keep his name in the mix and elevate his music career.

Stefani Germanotta, better known as Lady Gaga, has tied the fashion world with performance art through her own creative production team - Haus of Gaga. Her everyday clothes, hairstyles and stage costume, made by her atelier, are able to influence an audience by using strong, consistent imagery with a



story. At the 2014 South by Southwest music festival, Gaga partnered with Doritos to share "boldness". Fans digitally competed to obtain one of the 2,200 available slots to attend her performance. By sharing a picture or a video that expressed individuality, fans were invited to engage with Gaga's bold personality. It is necessary for artists who partner with a brand to follow Gaga's example and use the brand in conjunction with their personal brand to increase dialogue with fans. While the "traditional" record business continues to disappear, artists like Gaga serve as evidence of the growing power of brand association.

Burberry's creative director, Christopher Bailey, believes "music is like the weather, it affects the spirit of everything." Burberry now has a full-time music team that develops projects like Burberry Acoustic, which shoots music videos for emerging artists who have

been dressed in the latest Burberry collection. Through these videos, viewers are able to enjoy music while simultaneously being exposed to the Burberry brand. German luxury brand Hugo Boss partnered with music in a slightly different way, opting to live-stream Fashion Week on Spotify. The Spotify playlists by designers Rebecca Minkoff, Bergdorf Goodman and Christian Louboutin allow the audience to form a more complete picture of the brand's identity, often leading to an enhanced connection with the brand.

Through retweets, hashtags, and the rest of its sharing arsenal, social media allows consumers to be a more dominant force in the pop culture conversation than ever before. Anyone looking to build a brand these days, whether in fashion, music, or otherwise must be able to utilize the power of social media. It used to be that photography was prohibited at designer's fashion shows, and the invitations were strictly for the wealthy elite. Today, the prime seats are dominated by artists and bloggers who share a continuous stream of pictures with Instagram's 200 million active users. By allowing trendsetters to provide play-by-play coverage of their shows, designers allow all of their fans to have a front row seat.

In the 1960s, the Beatles had everyone in mop-top haircuts. In the 70s, leather jackets and spikes identified devotees of the Ramones, Blondie, the Misfits, and the Sex Pistols. In the 80s, Madonna's music videos established necklace layering protocol, and established oversized hair bows and lace gloves. Today, however, it is not only the top pop stars who inspire fashion, anyone with enough social media followers can be a trendsetter, and any artist can enhance their career through their fashion choices. Lady Gaga is, without a doubt, a talented musician, but her massive success was due to much more than her music prowess. Gaga used outlandish, but carefully chosen fashion to generate PR, and build a culture around her brand, ultimately creating the devoted fanbase necessary to sustain a musical career.

Given the current state of the music industry, it is necessary for most artists to build their image beyond what is conveyed through their music. By broadcasting their own personal style, and by partnering with fashion brands, artists can very easily create that necessary extra dimension. The adage a picture is worth a thousand words certainly rings true today, but now it can also be worth thousands of dollars.

MBJ





*Berklee  
college of  
music*

# BERKLEE MUSIC BUSINESS

Berklee Online, the extension school of Berklee College of Music, provides forward-thinking ways to learn the music business—all online. Choose from 12-week individual courses, multi-course certificate programs, or our new online Bachelor's of Professional Studies degree in Music Business.

■ BERKLEE ONLINE

Learn more at [online.berklee.edu](http://online.berklee.edu)

Berklee College of Music

# MUSIC BUSINESS JOURNAL

Volume 10, Issue 5

[www.thembj.org](http://www.thembj.org)

January 2015

## UPCOMING TOPICS

Visit the MBJ online!  
[www.thembj.org](http://www.thembj.org)

Please write to us at:  
[office@thembj.org](mailto:office@thembj.org)

Taylor Swift  
YouTube's Music Key  
2014 in Review



The Music Business Journal is produced a minimum of five times a year.

Visit the MBJ Online!

[www.thembj.org](http://www.thembj.org)

Free Archives

Keyword Search

## Game Changing Data (cont.)

(FROM PAGE 4)

even if there were there would be a risk of the music falling on deaf ears. For emerging talent, identifying their first audience type is invaluable. It certainly helps touring. If a band from Nashville sees that they have several repeat listeners in Milwaukee, they could plan a tour stop there. Previously, such bands never would have known about fans outside their immediate circle of influence: the equivalent analytics back then came from Soundscan and Broadcast Data Systems, which were purchased mostly by the major labels to serve their distinguished talent rosters, not unsigned performers (indie label generally felt that such data systems were too expensive for them).

### Google Analytics and Smart URLs

Besides social media and Spotify, there are other ways for artists to understand their customers today. Google Analytics provides copious data for free on web traffic. Artists can track time spent by fans on individual pages, their point of geographi-

cal origin, possible buyer conversion rates (people who are close to purchasing music but don't commit), and bounce rates away from a page. Google Analytics is made to measure for a band selling their music and merchandise on their own e-commerce enabled website. Smart URLs can also be used to discover exactly who is clicking on links that an artist puts out and how fans are accessing these links. Smarturl.it provides information on geographic location, referring domains, and devices used as part of its free service.

\* \* \*

In the end, data is knowledge. And if knowledge is power, a claim that Francis Bacon could already make centuries ago, modern songwriting and performing musicians should be glad with the tools they have today. After all, fans of the same feather flock together, so identifying a neighborhood of supporters is surely more rewarding than blank-targeting an anonymous mass. <sup>MBJ</sup>

## Likes (cont.)

(FROM PAGE 6)

ducing the amount of 'overly promotional' posts in users' news feeds; posts that aren't paid ads will become less visible. In the future, it seems an artist wishing to promote a new album or creating an ingenious buzz for a tour may no longer be able to do so free of charge.

This suggests that access to social media is being commoditized more and more. Further, pollution in social media is a special concern for it means that the odds are ultimately being stacked against stand-alone musicians who believe in the premise that new media and technology can level the playing field. By and large, and except for Spotify, investors today are not taking much risk with recorded music. Nor are they building markets for talent as they once did. If the innocence of a like is suspect, it will be harder for aspiring musicians and all emerging artists to de-risk themselves and trade their wares in front of potential investors. <sup>MBJ</sup>