

## Gender Inequality in the Music Industry

By Natasha Patel



Gender inequality is a big issue in the music industry. At first glance, it may not seem so. Names like Aretha Franklin, Taylor Swift, and Beyonce have become synonymous with success. Billboard's profile of the fifty most successful women in music impresses. Jody Gerson, soon to be first in command at Universal Music Publishing Group, was a former co-president and head of the West Coast office at Sony/ATV. Julie Greenwald is chairman and C.O.O. at Atlantic Records. Michele Anthony is executive vice president at Universal Music Group. Many more make the industry proud.

Women are also becoming organized. Women in Music (WIM), an interest group, wish to "advance the awareness, equality, diversity, heritage, opportunities, and cultural aspects of women in the musical arts through education, support, empowerment, and recognition."<sup>1</sup> Its President, Neeta Ragoowansi, runs a music law office and heads the organisation alongside vice-president Jennifer Newman Sharpe, another prominent lawyer. Some of their past events include a Pro-Bono Legal Clinic at NYU's Clive Davis Institute of Recorded Music, and meet-ups hosted at the B.M.I. offices in New York City. WIM takes an active role in cultivating the next generation of female leaders. For Julie Greenwald, at Atlantic, this means mentoring one-on-one in company time: "it is important

to [me] that they understand how hard it is to juggle it all."<sup>2</sup>

Yet all is not well. In the U.K, for example, facts speak for themselves. Women working in the business are more inclined to have a superior qualification as compared to their male colleagues but nearly 50% of them earn less than £10,000 (\$15,000).<sup>3</sup> Moreover, even though there are more women in the population than men in working age, 61% of music professionals in the U.K. are male. In sectors such as promotion, management and live music, that number rises to 70%.<sup>4</sup> Except for the salaries, the United States is unlikely to be that different.

The uneven distribution of the genders is partly to blame on long work hours that force women to make a choice between work and family life. Nowhere is this more evident, it seems than in the field of music production and engineering. In Nashville, Tennessee, fewer than 5% of all professional producers and engineers are women<sup>5</sup> and, overall, only six females have ever been nominated for best producer at the Brits and Grammys combined; none have won the prize.<sup>6</sup>

Entrenched attitudes don't help. Lari White, co-producer of Toby Keith's *White Trash With Money*, bore witness to this fact

(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

A Hide and Seek Business  
Page 4

Prince, YouTube, and Fair Use  
Page 6

Radio and Sound Recordings  
Page 10

Apple Music and Its Rivals  
Page 12

Music Hackathons  
Page 14

## EDITOR'S NOTE

Gender inequality in the music industry is on our radar in this issue. The disparities in pay and employment numbers between men and women are well known. Less talked about are some egregious examples of inappropriate behavior in the music workplace towards women. Another disturbing fact is the apparent misogyny of some iconic artists, both in public and in private. Women in the industry, fortunately, are organizing.

Last July, Berklee's Institute of Creative Entrepreneurship (Berklee ICE) released a much-read report—a manifesto that exposes the lack of transparency in the transactions of many music intermediaries that end up hurting the artist. We break it down and take a critical look too.

Universal Music Publishing Group (representing famed artist, Prince) recently lost a copyright infringement case against Stephanie Lenz, over a 29 second video that featured her children dancing to Prince's "Let's Go Crazy". The fair use defense came under scrutiny and in so doing illuminated its reach. The lack of sound recording performance right collections from terrestrial radio is also the subject of a lengthy piece that examines a case of American exceptionalism. On the other hand, the collection of sound recording performance rights for webcasters and Internet radio services proceeds well. In particular, featured artists, vocalists, and sidemen, even if they do not own the copyright of a composition, can, as we explain, collect from SoundExchange.

Apple Music faces numerous challenges moving ahead, as its free trial period ends and Spotify continues to innovate and gain clout. A new Nielsen's 360 report discusses the right price for subscription services, which is relevant to both. "Hackathons" are becoming popular and are a viable means through which to innovate, train, develop, and pitch creative ideas, and present a unique set of opportunities to educators, entrepreneurs, businesses, and investors. We pay attention to the form. Finally, we interview Cyber PR expert Ariel Hyatt, who specializes in independent musicians.

This issue marks my first as Editor-in-Chief of the Music Business Journal, and I am humbled to have the opportunity to be involved with this fine publication. I would like to thank our team for their outstanding work, and our readers for their support.

Sincerely,



Spencer Ritchie  
Editor-In-Chief

## TABLE OF CONTENTS

### Music and Society

Women and the Music Business.....1

### Business Articles

Business Transparency.....3

Nielsen and the Price of Streaming.....5

Understanding SoundExchange.....11

The State of Streaming.....12

### Law Section

An Important Fair Use Lawsuit.....5

Congress and Sound Recordings.....10

### Interview

Ariel Hyatt, Cyber PR .....8

### Tech News

A New Type of Business Conference .....14

### MBJ Editorial

Mission Statement.....1

Editor's Note.....2

### Sponsorship

Berklee Media

## Management

Editor-In-Chief..... Spencer Ritchie

Content Editor..... John Lahr

Webmaster..... Corliss Lee, Itay Shaha Rahat

Faculty Advisor and Finance..... Dr. Peter Alhadeff

Layout Editor..... Corliss Lee

## Contributors

Editor's Note..... Spencer Ritchie

Business Articles..... Shereen Cheong, John Lahr, Eduardo Loret de Mola, Spencer Ritchie

Interview..... Corliss Lee, Spencer Ritchie

Law Section..... Serona Elton, Lydia George

Music and Society..... Natasha Patel

Tech News..... Natalie Cotton, Klementina Milosic

Staff..... Felipe Gonzalez, Haley Haerr-Hartmann, Anastaeisha Kennedy, Zoe Mitchell, Sanchitha Wickremesooriya

## MUSIC AND SOCIETY

## Gender Inequality (cont.)

(FROM PAGE 1)



when she completed her own R&B album, *Green Eyed Soul*. It was her first completely solo production, and she was involved in everything, from choosing songs to hiring players and overseeing all recording sessions. She and her husband, Chuck Cannon, also a songwriter and musician, brought the album to a very successful producer friend, not to pitch or promote it, but just to let him hear. The producer then turned to Lari's husband and said, "Yeah, man, that sounds great!" White says there is not much to do but laugh off such an instance, because it was not intentional.<sup>7</sup>

A man dismissing a woman as not being equal is indeed common in the business. And it often goes well beyond that. Inappropriate behaviour in corporate settings abound. A recent story, reported by Jessica Hopper, Pitchfork Magazine's Senior Editor, is telling. She asked the following over Twitter: "Gals/ Other marginalized folks: what was your first brush with the idea that you didn't count?"<sup>8</sup> The responses that followed ranged from cases of male peers simply being dismissive towards their female co-workers, to examples of outright sexual abuse and harassment in the workplace. A woman even said that a famous producer/DJ grabbed her private parts during a meeting but her label asked her "to shut up".<sup>9</sup>

It is difficult to imagine this happening as easily in another industry. Added is the fact that, often, the private lives of many men

in the business are far from exemplary.

Chris Brown has been afforded pardon after pardon despite serious physical assault charges on his then girlfriend, singer Rihanna. The recent lawsuit that Kesha has filed against Dr. Luke is special. Kesha alleges that Dr. Luke raped and abused her but also accuses Sony of knowingly concealing his actions. If true, the industry should examine how far it can go tapering over the allegedly egregious behaviour of its cash cows. The same applies to Dr. Dre's recent biopic of the famous rap collective, N.W.A., released by the Aftermath-Interscope label of the Universal Music Group. There is no allusion to Dr. Dre's earlier violence towards his girlfriends, (and the female cast of the film consists largely of groupies and dancers).

Women could be excused for saying that money matters more than they do. And this statement ignores a culture within the industry that perpetuates misogyny. In Dr. Dre's case it goes back to more than a decade ago. And it is not just the record label that is condoning a wrong. The technology sector, especially Apple Music where Dr. Dre holds sway, is equally to blame. Ultimately, both the record labels and Apple would say that it is the consumers that abet these stars by buying their music. This would be disingenuous, for their role in the marketplace is pivotal too.

Change in this regard has come out-

side of the United States. The activist group GetUp, for example, endorsed the banning of Chris Brown from performing in Australia this September, a message that is unequivocal in its condemnation of domestic violence, especially because the instance of violence took place six years ago.<sup>10</sup> In order to perform shows that have already been scheduled, Brown will now be forced to appeal to the Commonwealth government.

Meanwhile, there is much work to be done in the U.S. in order to bring a better gender balance to the workplace. Some issues transcend the music business. Failure by Congress to pass the Paycheck Fairness Act does not help, and legislators should redouble efforts to get the bill approved.<sup>11</sup> Other considerations are easier to implement and more germane to the music industry: to get the RIAA or the Recording Academy to promote the recognition of women's work in recordings by asking member to make sure that credit is given where credit is due.

Overall, it is the behaviour of individuals that will change things for the better and any initiative or interest group that can get this across, such as the Women in Music organization, deserves the support of the entire music community. Men could learn by listening to women's concerns, as women do with men. This seems obvious, but it is often forgotten. **MBJ**

## Endnotes

1. Women In Music. Web. <<http://womeninmusic.org/web/about-us/>>.
2. "Julie Greenwald: Women In Music 2014." Billboard. Web. 05 Oct. 2015.
3. "Supporting the UK's Independent Music Companies." Women in Music. Web. 05 Oct. 2015.
4. "Supporting the UK's Independent Music Companies." Women in Music. Web. 05 Oct. 2015.
5. Haruch, Steve. "Women Account for Less than 5 Percent of Producers and Engineers — but Maybe Not for Long." Nashville Scene. Web. 05 Oct. 2015.
6. Grein, Paul. "The Producer Of The Year Category Turns 40." The GRAMMYS. N.p., n.d. Web. 07 Oct. 2015.
7. Savage, Mark. "Why Are Female Record Producers so Rare? - BBC News." BBC News. Web. 05 Oct. 2015.
8. Haruch, Steve. "Women Account for Less than 5 Percent of Producers and Engineers — but Maybe Not for Long." Nashville Scene. Web. 05 Oct. 2015.
9. Pittman, Taylor. "This Is The Kind Of Bullsh\*t You Face As A Woman In The Music Industry." The Huffington Post. Web.
10. Ibid.
11. Croffey, Amy. "No Entry! Chris Brown Banned from Australia Ahead of Concerts..." Mail Online. Associated Newspapers, 26 Sept. 2015. Web. 10 Oct. 2015.
11. Ness, Debra L. "Why the Failed Paycheck Fairness Act Vote Matters." The Huffington Post. TheHuffingtonPost.com Web. 05 Oct. 2015.

## BUSINESS ARTICLES

# Lifting the Veil: A Fair Music Report

By John Lahr

The logistics of correctly attributing the money earned from the sale and performance of recorded music has always been a daunting task. This is a global commodity that comes bundled with intellectual property rights that can differ slightly from nation to nation, and that is typically very affordable and accessible. Every year, there are billions of small transactions that add up to billions of dollars. Tracking is often complicated and copyright ownership ever harder to pin down, as more songwriters divide chores over time. Permission to trade in recorded music gets harder if the multiple copyrights of a song cannot find proper attribution, and yet publishers and labels have long made the argument that tracking rights is not always possible or feasible and that that is part of the cost of doing business.

But does it need to be this way? What if the music business became more productive and transparent both for buyers and sellers in the music supply chain? Could it ultimately reward better artists for the work they were entitled to by law? The Fair Music Project, part of the Rethink Music initiative at Berklee's Institute of Creative Entrepreneurship (ICE), asked such questions. Its report, *Fair Music: Transparency and Payment Flows In The Music Industry*, was released in July and a follow up workshop met in Boston in October.

### Rethinking Music

The report paints a picture of an industry gnarled in complexity by both nature and design. The variety of consumption methods "include at least a dozen major online streaming services, iTunes, Google Play, Amazon, and other download stores"<sup>1</sup> and a variety of physical distributors that range from brick and mortar stores to online retailers. Such outlets also generate revenue in multiple ways, including ownership of physical or digital copies, paid interactive or on demand models, paid non-interactive models, and advertising supported models.

Although consumption is increasingly shifting to digital, techniques accounting for the revenue so generated are falling woefully behind. The report details stacks of paper royalty reports with disparate data that are rarely useful. This is often due to publishers both having relatively little data to begin with and receiving it slowly over time. Issues like this, it is argued, could easily be solved with technology

already implemented in the banking industry. It would provide real time accounting, analytics, and in-depth royalty information.

In particular, the report makes a strong case for greater implementation of a system used by Kobalt Music Publishing—a disclosed underwriter of the report. Kobalt's technology "allows songwriters, and now artists and their managers who use Kobalt Label Services, to see real-time information about the uses of their music on a worldwide basis" (p.15). Kobalt offers their Label Services to other labels, and is currently involved in service integration with over 500 independent labels.



The second problem examined by the report is the unbalanced nature of the relationship between artists, labels, and online digital service providers. The Non-Disclosure Agreements required by online digital service providers are especially targeted. Non-disclosure contractual clauses prevent adequate auditing from artists. Such confidentiality provisions, for instance, could imply that "Spotify could be paying the labels appropriately, but the artist has no idea of the underlying license or per-stream rate and can never be sure if sales are recorded correctly" (p.16).

There is, indeed, a big divide that separates the business of music creators from that of their intermediaries. Artist David Byrne picked up on this a few weeks after the Fair Music report was published. In an op-ed for the New York Times, Byrne wrote that he

asked YouTube how ad revenue from videos that contained his music was shared; exact numbers, he was told, were not shared, but the service's cut was "less than half". YouTube, it seems, really keeps 50 percent of the ad revenue, the owner of the master recording gets 35 percent, and the remaining 15 percent are paid to the publisher. Ordinary musicians, naturally, would be excused for not knowing this—even if it hurt them. Moreover, payments on a per stream basis offer little sustenance if any to independent artists and even well known musicians are becoming mistrustful of the apparent lack of concern for accountability among the top digital service providers. Here again, David Byrne approached Apple Music, only to be told that "you can't see the deal, but you could have your lawyer call our lawyer and we might answer some questions." There should be no need for this complication.

Another problem is that royalties may not be attributed to an artist or label because their works are not classified under an ISRC (International Standard Recording Code) or an ISWC (International Standard Music Work Code). When services and performing rights societies are unable to identify the rights holders of a composition or recording due to a lack of an ISRC or ISWC, the royalties go into escrow, and are then distributed to labels and publishers by market share. These monies are often not passed on to artists, as they cannot be attributed to any specific name.

There is more to the report, including a discussion of issues with the formality of copyright registration and earlier attempts at creating a multinational database of songs, such as the European Union's its Global Repertoire Database.

### Criticism

While the Fair Music report has received praise for shining a light on the issues of transparency surrounding the industry, it has also received harsh criticism from numerous sources. The IFPI claims that the report "...contains too much inaccurate information, unsubstantiated assertions, and consequently unfair criticisms of record companies. In particular, the report omits certain key points, which means that it gives an incomplete picture of what is happening in the industry."<sup>3</sup>

## BUSINESS ARTICLES

Fair Music (cont.)

Pointedly, the IFPI argues that label payments of artists' royalties have declined less than industry revenues overall. Independently verified data from a strong sample of 18 markets data suggest only a 6 percent drop in the last five years-- much less than the drop in the sale of recorded music at 17 percent. The IFPI writes too that upfront record company investment in A&R and marketing has not significantly diminished: the proportion of record companies' income invested there slipped marginally from 28 to 27 per cent between 2008 and 2013 (the IFPI instead shifts the blame to large digital services that claim to be exempt from copyright laws, and therefore do not pay fair market value for the music they exploit).<sup>4</sup>

Part of the artist community would have also liked the Fair Music report to go further. Thetrichordist.com, a community blog, has said that there is too much focus on "downstream royalties--what the services pay to rights owners--not upstream royalties, the revenues earned by services that those downstream royalties are based on."<sup>5</sup> If there are advances from the digital services to the labels for the use of streams, and the labels get to keep part of the advance in perpetuity, then those monies should be shared with the artist.

Fundamentally, the Berklee report has been criticized for not discussing YouTube--a conflict of interest given that Kobalt Music, the underwriter, raised \$60 million for its music rights platform in February 2015 led by Google Ventures<sup>6</sup>. Google, of course, owns YouTube.

**The Way Forward**

Inaction is costly, and Fair Music has a point. The report lays out five solutions to improve transparency and increase efficiency in the digital marketplace: a creator's bill of rights, the use of standard identifiers and a certifications of transparency, a rights database, an industry gradual conversion to crypto currencies and block chain technology, and a broader education initiative to empower creators.

It is, after all a manifesto and therefore preys on what should be rather than what is. There is nothing wrong with this, but the reader is left wondering how any trade, much less the music trade, could get there. Not all business intermediaries, moreover, will share the same empathy for the music creator, and this presumably is a precondition for positive change. For the labels, in particular, the relationship with the

music creator is one of work for hire. For the technology companies, music has been a means to an end that is far removed from just music sales. This is certainly true of Apple, but even Spotify's Daniel Ek must know that music is but one of the secret sauces to grow the company.

Self-interest could bring players to the table, and it did for a while. A system of unique global identifiers for both compositions and sound recordings would in theory generate more global business for everyone and pay artists fair royalties. However, multiple attempts were made and didn't prosper: the Global Repertoire Database (GRD) and WIPO's International Music Registry (IMR), notable among them. Both were unsuccessful due to wavering support from intermediaries and collection societies, as well as less advanced technology in some European markets.

The report also recommends the investigation of blockchain technology and cryptocurrencies, such as Bitcoin, to manage and track online payments through the value chain, directly from fans to music creators. Certainly, advances in blockchain technology could accelerate transparency in the music trade--and serve well the aspirations of the Berklee report. On the other hand, a currency has to become a medium of exchange that is accepted widely, and it may be easier to discuss how to simplify business transactions rather than to impose the requirement of a completely new way of doing business: the dollar does well and is not the cause of the travails of the business. The same people that are encouraged to migrate to Bitcoin are also responsible for where the industry is.

MBJ

## Endnotes

1. FAIR MUSIC: TRANSPARENCY AND PAYMENT FLOWS IN THE MUSIC INDUSTRY. [www.rethink-music.com](http://www.rethink-music.com). Berklee Institute of Creative Entrepreneurship, 14 July 2015. Web.

2. Byrne, David. "Open the Music Industry's Black Box." *The New York Times*. The New York Times, 01 Aug. 2015. Web.

3. "News." IFPI Response to the Berklee College Report. IFPI, 17 July 2015. Web.

4. "News." IFPI Response to the Berklee College Report. IFPI, 17 July 2015. Web.

5. "Even More Transparent: 5 Omissions From Berklee College/Rethink Music's Report." *The Trichordist*. N.p., 22 July 2015. Web.

6. "Kobalt Tunes Into \$60M Led By Google Ventures For Its Music Rights Collection Platform." *TechCrunch*. N.p., n.d. Web.

A Nielsen Report

By Spencer Ritchie

Nielsen recently published its annual Music 360 Report, detailing consumer spending in music, especially subscription services. According to Nielsen, the appetite for music in the United States is high. Apparently, 91% of the US population is listening up to 24 hours of music a week, a much larger number than reported for similar surveys in the 1990s.

This could bode well for streaming sites, and yet demand for recorded music continues to fall--which suggests that demand for free streaming is strong. Almost four-fifths of Americans surveyed claimed that they were 'unlikely' to join a paid subscription service within the next six months. And only one-tenth of those surveyed indicated that they were 'somewhat' or 'very likely' inclined to join a streaming service. If so there would be tepid subscriber growth.

After streaming a collective 164 billion tracks over the course of 2014, the first half of 2015 alone has seen the flow of 135 billion streams. This is good, but few pay. Nielsen finds a mere 3% rise in subscriptions and concludes that the central factor that is inhibiting mass adoption of paid subscription services--and, therefore, the abandonment of freemium and unpaid streaming--is price.

Ease of use and strong song libraries impact people's choice of services to begin with, but the specter of cost puts them off and they elect not to continue through with payment. The problem is that free streaming, which accounts for the lion's share of overall streaming users, doesn't generate much revenue through advertisements. That is why Nielsen's suggests a more nuanced tiered pricing system. This may be possible now that Apple has endorsed paid streams only and Spotify seems to be moving in that direction too: a market without free streams helps their case.

At \$71 billion, Americans spend more money on the lottery per year than they do on both live and recorded music. The same could be said of weddings, and for about the same amount. Live and recorded music, ticket sales, and digital and physical recordings, including streaming, are worth instead a total of only \$6.8 billion. Nielsen puts the average per capita consumer spending on music in 2014 at \$104, and this includes live performance and festival spending. This figure seems to be much exaggerated. For a population of 350 million, it would mean a total music spend-

(CONTINUED ON PAGE 7)

## LAW SECTION

## The Fair Use Check

By Serona Elton



Unless you have been following the case of *Lenz v. Universal Music Publishing Group*<sup>1</sup>, you would probably never imagine using the words “dancing baby” and “Prince” in the same sentence. Not unless you were perhaps commenting on some home videos of Great Britain’s Prince George. The case, which could just have easily involved a cat video that used a Madonna recording, is actually about fair use and its relation to a provision of the Digital Millennium Copyright Act (DMCA) regarding takedown notices. On September 14, 2015, the Ninth Circuit Court of Appeals rendered its decision in the case.

### The Potentially Infringing Event

In February of 2007, Stephanie Lenz uploaded a 29 second video to YouTube, which featured her young children dancing to an audio recording of Prince’s “Let’s Go Crazy.” The “Let’s Go Crazy” audio recording embodied a musical work by the same title, which was written by Prince, and administered by Universal Music Publishing, neither of whom granted Lenz a license to use the work.

### The Detection and Evaluation

Around the same time, an assistant in the legal department at Universal Music Publishing Group (UMPG) was diligently

searching YouTube, on the lookout for potentially infringing uses of musical works administered or owned by UMPG, within the site’s user generated content. He found Lenz’s video, which was presumably not that difficult since she titled it “‘Let’s Go Crazy’ #1.” What happened after the assistant identified the video is what this case is all about. Despite popular belief among non-lawyers, this case is not about whether the use was actually an infringement or not. It is not about whether or not Prince has the right to prevent people from using his music in user generated content. Rather, it is about the process that unfolds after a potentially infringing use on a digital service platform has been identified.

After identifying the video on YouTube, the legal assistant evaluated the use, considering several factors. Those factors were whether or not there was a significant use of the musical work, specifically, if it was recognizable, as opposed to being distorted, and if it was in a significant portion of the video, or was the center of focus in the video, as opposed to only being heard for a second or two, or playing in the background behind lots of other noise. After performing the evaluation, the assistant determined that indeed the musical work was significantly used in the video.<sup>2</sup>

### The Takedown and Put Back

Based on the evaluation, UMPG sent YouTube a takedown notification regarding the Lenz video. The takedown notification also listed more than 200 other videos that they believed were infringing on Prince’s musical works.<sup>3</sup> Such takedown notices are par for the course for copyright owners who seek to protect their works in the online world. Takedown notices and procedures are a key part of the safe harbor from copyright infringement liability that the DMCA established for digital service providers, like YouTube.<sup>4</sup> While a copyright owner can always decide to sue a party who directly infringes on their copyright, such as Lenz, the DMCA process is what many copyright owners follow initially when seeking to have what they consider infringing uses of their work taken down from a service. The activity of sending takedown notices is unfortunately, yet accurately, often analogized to the carnival game Whack-A-Mole in that as soon as one infringing use is taken down, another one pops up.

The DMCA process, which can be

found in section 512 of the US copyright law (formally cited as 17 U.S.C. §512), has very specific requirements. One requirement is that takedown notices include six specific pieces of information, including “a statement that the complaining party has a good faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law.”<sup>5</sup> The UMPG takedown notice contained such a statement.<sup>6</sup>

Once YouTube received the takedown notice from UMPG, they removed the video from the service and notified Lenz, in accordance with §512(c)(1)(C), and §512(g)(2)(B). Lenz then exercised her right under §512(g)(3) to file a counter notice, claiming that her video did not infringe on UMPG’s rights because it constituted fair use, and demanding the video be re-posted. YouTube then reposted the video back onto its service, in accordance with the DMCA put-back procedures described in §512(g)(2)(C).<sup>7</sup>

### The Lawsuit

About a month later, in July 2007, Lenz brought suit against UMPG. She made three claims in her lawsuit at the outset. One of the claims was a request for the court to decide (called a declaratory judgement) if her use of “Let’s Go Crazy” in her video was a fair use or not. The court declined to make a declaratory judgement because UMPG had not brought a copyright infringement suit against Lenz and expressed that it had no intention of suing her for direct copyright infringement.<sup>8</sup> Another claim was that UMPG intentionally interfered with her contractual use of YouTube’s hosting service, although Lenz later chose to abandon this claim. The only claim of the initial three that remained as the claim in the case was that UMPG misused the DMCA takedown process by knowingly misrepresenting that Lenz’s use of the musical work “Let’s Go Crazy” was infringing, which is prohibited under section 512(f), and therefore, is liable for damages incurred by Lenz as a result of the misrepresentation.<sup>9</sup>

As typically happens in a case like this, both parties ask the trial court to dismiss the case, arguing that, even if the court assumed every fact the other party alleges is true, once the law is applied to the facts, the other party does not have a case to pursue (called a cause of action). The trial court denied both parties motions to dismiss, and the court’s decision

## LAW SECTION

was appealed to the Ninth Circuit Court of Appeals.<sup>10</sup>

### The Appellate Court Ruling

The Ninth Circuit Court judges decided several questions. The main question was whether a party can have good faith belief, as stated in a takedown notice pursuant to §512(c)(3)(A)(v), that the use of their material is not authorized by the copyright owner, its agent, or the law, if they have not considered whether or not the use may be a fair use. The court said no, based on how it decided to view fair use, which is a key part of the decision. UMPG argued, unsuccessfully, that fair use is not a use authorized by law, but rather a defense to an unauthorized use. The court disagreed and found that fair use is a use authorized by the law, even if, procedurally in an infringement lawsuit, it must be proven by the alleged infringer. It is to be regarded as a use authorized by law, in much the same way that a compulsory license would be regarded. Therefore, in order to have a good faith belief that a use of material is not authorized by law, fair use must be considered.<sup>11</sup> The court said that whether or not the specific evaluation that UMPG undertook was a consideration of fair use, even if not labeled as such, was a question of fact that should be left to a jury to determine.<sup>12</sup> The court also acknowledged that computer algorithms are often used today to detect potentially infringing use due to the volume of content to be analyzed, and made clear that a copyright owner need not have a human evaluate each use, nor perform an extensive legal evaluation of each use to determine with a high degree of certainty if it is a fair use.<sup>13</sup> However, in order to avoid violating §512(f) by misrepresenting that it has a good faith belief that a use is not authorized by law, a copyright owner must consider fair use in its analysis.<sup>14</sup>

The court also addressed whether or not a concept called willful blindness, which is where a party subjectively believes that there is a high likelihood that a fact exists, and then takes deliberate actions to avoid learning about the fact, could be applied when determining if UMPG violated §512(f). The court said no because there was no evidence that UMPG believed there was a high likelihood that the video was a fair use, even though Lenz argued that her video was “self-evident” fair use.<sup>15</sup> While of far less interest to the non-lawyer music business professional, the court also addressed what sort of damages a plaintiff can

seek for a violation of §512(f), and confirmed that a plaintiff need not have incurred actual monetary loss, but can seek nominal damages due to an “unquantifiable harm.”<sup>16</sup>

### The Takeaway

The court in this case determined that fair use must be considered before a copyright owner can make a good faith representation, in a takedown notice, that a use he is claiming is infringing on his work is not authorized by law. Further, it confirmed that fair use is a use authorized by law, rather than merely a defense to an unauthorized use, even if the burden to prove fair use falls on a defendant in a case. It does not decide whether or not the use of Prince’s musical work “Let’s Go Crazy” in Lenz’s video is a fair use, or whether or not the specific procedures followed by UMPG in evaluating Lenz’s use of the musical work amounted to a fair use analysis, even if not labeled as such. Therefore, while this case does not give creators of user generated content free reign to use copyrighted works under the guise of fair use, this case is important to those who champion fair use, those who toil away at protecting their copyrights in the online world, and perhaps to Prince fanatics everywhere, including your writer. **MBJ**

*Professor Serona Elton is Director of the Music Business and Entertainment Industries Program at the University of Miami, and a MEIEA Past President.*

#### Endnotes

1. Lenz v. Universal Music Corp, Nos. 13-16106, 13-16107, 2015 WL 5315388 (9th Cir. 2015).
2. Lenz, 2015 WL 5315388, at \*2.
3. Id.
4. The Digital Millennium Copyright Act safe harbor provision is codified in section 17 U.S. Code §512 - Limitations on liability relating to material online.
5. 17 U.S.C. § 512(c)(3)(A)(v).
6. Lenz, 2015 WL 5315388, at \*2.
7. Id.
8. Lenz v. Universal Music Corp, No. 5:07-cv-03783-JF, docket entry, Order Granting Defendant’s Motion to Dismiss With Leave to Amend As to Claims 1 and 2 and Without Leave to Amend As to Claim 3; Denying Special Motion to Strike Without Prejudice, at 8 (N.D. Cal. April 8, 2008).
9. Lenz v. Universal Music Corp, No. 5:07-cv-03783-JF, 2010 WL 702466, at \*1 (N.D. Cal. February 25, 2010).
10. Lenz v. Universal Music Corp, 572 F.Supp.2d 1150 (N.D. Cal. August 20, 2008).
11. Lenz, 2015 WL 5315388, at \*2.
12. Id. at \*7.
13. Id. at \*8.
14. Id. at \*7.
15. Id. at \*9.
16. Id. at \*10.

## Nielsen (cont.)

(FROM PAGE 5)

ing in the US of nearly \$35 billion, making festivals and, perhaps, artist performance income much more significant than ticket sales or recordings.

It is worth noting that were subscriptions in Spotify and Apple to pick up, regular payments of less than \$10 a month would boost the average spend in music a lot (payment of the staggering \$240 a year membership to TIDAL would certainly help!). Moreover, streaming services have incentives to grow their paid subscriber base by selling cheaper services. Paid streaming in the industry accounts for 73% of all streaming revenue. Spotify currently receives up to 90% of its receipts from its over twenty million paid subscribers and only 10% from its 55 million unpaid users. Moreover, the 3% increase in the total population of streaming subscribers last year was worth an overall increase of 25% in subscription revenue to the industry. In short, any paid subscriber, as Spotify knows, is better than a free rider.

Streaming services may be also using the wrong keys to turn on subscribers. Price point considerations (83%) trumped ease of use (82%) and song variety (73%), as mentioned above. Apple, Spotify, and Tidal should take notice. Spotify rolls out new features that have little to do with price, such as Discover Weekly. Apple invests heavily into Beats One radio. Tidal purports to feature the highest quality of audio streaming. In the meantime, YouTube is seeing higher user growth than all other interactive streaming websites combined. There is no curated or exclusive content there, but much functionality at no cost.

The problem with YouTube, of course, is that it doesn’t own the music that the public loves the most, as Spotify, Apple Music, and Tidal do. A paid user is far more valuable than a freemium user, but freemium users could be enticed to become paid subscribers with the right incentives. This is perhaps the most significant finding of the Nielsen Report.

**MBJ**

## INTERVIEW

## Cyber PR For Musicians with Ariel Hyatt

By Corliss Lee and Spencer Ritchie



Ariel Hyatt specializes in digital public relations. She has caught the attention of CNN, Wired, Billboard, Hypebot, and the Washington Post with her unique brand of advice about the uses and misuses of social media. She is in demand at SXSW, the Future of Music Coalition, Grammy Camp, and ASCAP's I Create Music, among others. Hyatt has also made important contributions to music business studies in the US through her collaborations, for example, with The Clive Davis Institute of Recorded Music at NYU, Belmont, MTSU, and Berklee. Her self-published book, written with Richard Meitin (Minnesota State University, Mankato) and Charlie DaHan (Shanachie Records), *Cyber PR for Musicians: Teacher's Guide*, (New York, Huntercat Press, 2013), is now indispensable reading in many college courses on music marketing and promotion.

**MBJ: How does your company, Cyber PR, go about its business?**

AH: Traditional PR won't work on its own for independent artists, and that is my clientele. A publicist will get the band a review, an interview, or a media placement. The Cyber PR process is really about something different. It's about creating a tangible fan-oriented result, attracting as many people as possible to sign up for an email list, to open a newsletter, and to follow-through joining the greater fan tribe. That's what's actually going to make an artist career take off. At Cyber PR we understand traditional marketing but we obviously adapt it to today's environment.

**MBJ: How did you come to focus almost exclusively on independent artists?**

AH: When I started my business in the 90's I was living in Boulder, Colorado. It was not exactly a hotbed of major label artists. We had our few breakout artists that did get signed to major labels, like Big Head Todd and the Monsters and The Samples and a few others. But the world that

I was immersed in was the world of independent artists, who made their money touring. The paradigm was to stay on the road for 6 to 10 months a year, like The Grateful Dead or Phish. You could also make a lot of money on the road doing what we now call direct-to-fan merchandising.

I was also working at a theatre and we had live music almost every night of the week, and a lot of the artists that were coming through were signed to majors. But the ones that I had access to, and the ones that were calling me, were the independent artists on the touring circuit. I didn't live in New York or LA. Remember too that in the 90's record labels had much larger PR departments. Even if they did hire out a PR firm, it was one of the blue chip PR firms that they knew. It was a very insular system.

**MBJ: What do you find are some of the most common mistakes that independent artists make with their online presence?**

AH: The first mistake is not to have a strategy, and respond with a random collection of effort that is not thought through.

The second mistake is the general urgency to do quick follow-ups without the content to back it up. This happens where there is a tendency to self-promote. We should be at a stage in the arc of social media where people understand that you're not supposed to be overly self-promotional on social media. I think that what happens is you book the show and the fear kicks in: "oh my god, we need to fill seats." Or you spend a lot of time and money and effort creating something, so you start tweeting, "buy my stuff, check me out".

The third mistake relates to consistency of placement. One day you might get inspired and be like, "yay we're starting a Tumblr", or "we're gonna really start using Snapchat", or "we'll Tweet away". But keep it alive; don't let your tweets die after a few months. Same with blogs: artists start them, feel they are wonderful, cool, and fun, but then, after two years they let them die. So if you're going to open up the can of social media, consistency is absolutely key especially on platforms that people access a lot. I can't tell you how many times we see clients underplay Facebook results only to find that they haven't posted for months. Fans notice that and lose interest.

## INTERVIEW

**MBJ: in addition to what you've just mentioned, how would you help an unknown musician build her own brand?**

AH: It depends on what the musician has going on in the first place. Continuing to build a brand is based on the fact that there's something happening already. The cornerstone of a brand is the brand story, aside from the music, and what the music sounds like. It starts with the band's music genre and the band's location. For us, we're talking about starting with a band that's maybe two to five years down the road, not a band that's already hit mainstream and had a massive success. Be original and don't copy other bands or look to poach fans of Led Zeppelin or Paul McCartney.

So we start with "what's the story of the band?" and "what bands are 2 to 5 years ahead of them?" "What did those bands do?" and "how did they find their success?" We reverse engineer. We find out what's going on online, and then can we dip our toes into the same waters. But there is generally no cookie cutter answer. We always have to ask "what is interesting about this artist?" and "what stands out so far?" Are they making videos? Are they really good at Instagram? Are they able to write weird blog posts that we could turn into a series? We have to look at what the band does well.

**MBJ: Can you tell me a bit about the literature you authored for independent musicians?**

AH: Just a couple of years into my career, my phones were ringing off the hook, with artists asking, "Oh, hey, what's PR? And what's publicity?" I had a booking agency then and could not find the time to answer everyone. So I wrote my first article at twenty-five titled "How To Be Your Own Publicist". This was before you could just Google "What is music publicity?" I used to use the "The Billboard Guide to Music Publicity" as my bible. Then, as I started building my business, I learned a lot about marketing, mp3s, and file sharing. I really wanted to help, because I also was keenly aware that most of the artists that I worked with, or that were calling, could not afford to pay the thousands of dollars a month that we were charging as an agency. Fast-forward to the advent of social media, and the prevalence of outdated marketing texts, and I wrote the book *Cyber PR for Musicians* to help artist entrepreneurs and anyone who wants to be in the music space. It was the missing piece in the marketing and self-promotion puzzle.

**MBJ: You launched your own crowdfunding-**

**ing campaign called "Fuel Your Fans and Launch Your Career" with RocketHub. As a PR professional and educator, what did you learn?**

AH: A lot--it was one of the most learning intensive experiences of my career. I was shooting for \$50,000 and ended up with \$62,000, which was incredible. But crowdfunding is so hard. It looks so simple: you just make a page, then you create some tiers of rewards, you say how much it's going to be, you choose a date, and then there is the launch. I learned that you have to keep the pedal to the metal for all 30 days. I learned that social media is not where you get most of the people that are going to give you money. Neither is posting stuff on Facebook or tweeting into the ether. Most of the people who are going to give you money are your friends, your family, and people on your mailing list.

**MBJ: Excluding Amanda Palmer's campaign, the Top 10 music projects on Kickstarter in 2014 collected between \$200-600K. Is this the way of the future, where a label advance is replaced by a crowdfunding campaign?**

AH: It is difficult to say, but there is truth in the statement. And by the way, it does not strike me as fair. Can you imagine telling the independent creator "oh, guess what, you're not going to make any money unless you go out, find fans, put the money down, communicate constantly, and knock yourself out all the time?" Still, there is no magical Santa Claus in the sky who is going to come and give you everything. In this day an age you're going to have to make your tribe, you're going to have to communicate with them, and you're going to have to work this and that end of the business.

Now more than ever your band has to be a team, both for the crowdfunding campaign and beyond it. What we see at the agency 90% of the time is that one band member does all the business, hires the publicist, works with the radio, works with the promoter, does the booking, and everybody else just kind of shows up and plays. That is a recipe for a disaster. I think when you choose your bandmates you should choose not just people that are great players but you should ask yourself, "does this person know how to use Photoshop, make a decent video, or even know how to drive?" Make a list of everything the band needs to succeed, and make sure that your bandmates are helping you along. Otherwise, you are going to find yourself burned out, exhausted, and overwhelmed.

**MBJ: In 2008, Kevin Kelly, founding executive editor of Wired Magazine, blogged that to make a living an artist needed only a thousand true fans. How true is that today?**

AH: I created an entire series based on Kevin Kelly's groundbreaking article called "In Defense of 1,000 True Fans". And I interviewed about eleven or twelve artists that were creating their livelihoods off that model. And I actually got them to count how many fans they were supported by. And what I realized was, many of them didn't even have a thousand true fans. They had 500 fans, or 600 fans, or 200 fans. My crowdfunding campaign was oversubscribed at \$62,000 with less than 300 people. This is very exciting, and Kevin could not have anticipated this in 2008.

**MBJ: Indeed, what new examples of apps or social media do you think are proving especially helpful to indie artists?**

AH: Anytime you see a platform that has a generous amount of people on it, you better start looking at it, and find out how you can use it to get your message out. There will always be new kids on the block. We had Snapchat, Instagram, Facebook, Twitter, and Pinterest. I don't know that there's going to be one silver bullet, but everything iterates pretty brilliantly into the next update. And look at how far Soundcloud, Bandcamp, and Bandsintown have come. These were all apps that were designed exclusively for musicians. At Cyber PR we work all of them.

**MBJ: Finally, if you had an ideal client, what mindset would you like her to have?**

AH: It's just as important to understand how to market and promote yourself, as it is to play your instrument and to be talented. And that's not what everybody wants to hear. I think most of my clients don't create music because they really have a big desire to tweet. But tweeting is here to stay, so if you are struggling with it or are uninterested, you may want to rethink that. You work out to live a healthier life. Hate it as you might as an artist, you have to figure out the best way to use social media because your overall soundness in today's marketplace depends on it. That is how I feel about marketing, social media, and promotion.

Besides, I think we need to lose the fantasy that there was ever an artist that became famous just by sticking to her music. There is a myth about some iconic stars in the 70s that laid around on Martha's Vineyard playing guitar. James Taylor and Carly Simon worked the business end too, and world tours are no picnics. A lot of it is brutally hard work. The self-promotion piece is a newer conversation, but I've yet to meet a famous artist that doesn't work hard at getting his art out there.

**MBJ**

## LAW SECTION

## Fair Play and American Exceptionalism

By Lydia George



On December 24th, 1906, Reginald Fessenden, his wife, and a few helping hands began performing live music and readings of bible passages over the airwaves, representing the first time that radio was used as a music based entertainment medium rather than exclusively a public service announcement platform. Similar stations followed suit, leading to the model becoming more popular, and necessitating the creation of the “American Society of Composers, Authors, and Publishers” (ASCAP) in 1915, for the purpose of collecting royalties on behalf of songwriters whose compositions were being performed publicly both over the airwaves and elsewhere. ASCAP provided a way for composers to collect royalties from public performances of the individuals who bought their printed music and enabled songwriters to be compensated financially even if they weren’t performing the piece themselves, such as live performances over the radio. However, performing musicians without songwriting credits were yet to be compensated for the public performance of their sound recordings, and would not be for some time. The issue of compensation for sound recordings remains a point at contention between the recorded music industry and the American broadcast industry to this day.

The music-radio relationship in the United States remained fairly consistent for at least half of the 20th century. Once phonograph recordings hit the radio scene, musicians saw radio airplay as a prerequisite for selling large sums of records in addition to selling tickets for performances. Local radio stations benefited from popular recorded music because they were able to grow a larger listenership, which allowed them to gener-

ate more advertising revenue. This relationship was seen as relatively symbiotic until the very definition of the word “radio” began to expand around the 21st century with a series of technological advances in the platforms through which people listen to music.

When Digital and interactive radio services were being developed in the mid to late 90s, they instigated a string of amendments to The Copyright Act of 1976. These included the “Digital Performance Right in Sound Recordings Act of 1995” (DPR), which recognized the absence of digital performance rights on satellite services, digital cable audio services, interactive services, and commercial online music providers. Internet radio’s unprecedented ability to track the exact quantity of listeners they had at a given period in time was a compelling point in distinguishing how to fairly charge internet radio providers, making this amendment more justified. As a result, royalty fees were assigned to individual online platforms based on their listenership not only for compositions but also sound recordings (often called “neighboring rights”) which allowed for both performers and songwriters to be compensated for online public performances of their work.

Since 1995, Internet radio platforms have been expected to pay royalties for both the composition and sound recording of a song, yet it remains that terrestrial radio is still responsible only for paying songwriters public performance royalties on their compositions. This apparent discrepancy can be traced to the initial launch of new technology means of listening to music. Digital music services, especially those with interactive technology, were feared as outlets that could potentially

cannibalize recorded music sales, resulting in courts recognizing digital and terrestrial radio to be of two different markets, requiring one to face neighboring rights fees, but not the other. However it remains that performing artists are providing an invaluable service to terrestrial radio stations, so there an apparent paradox as to why being of different markets necessitates that one merits payment and not the other, given that the two are both of immense importance.

The United States is one of four countries (including North Korea, China, and Iran), to deny their performing artists, as well as international performers the neighboring rights royalties that they earn on terrestrial radio. As a result, when a song performed by an American artist is played on international airwaves, the revenue generated from that public performance sits in a “black box”, serving as a lost and found for unclaimed royalties due to strict collection limitations on American Performance Rights Organizations (PROs) effectively prohibiting neighboring rights collection. The money will then stay idle for a designated period of time until it is absorbed and dispersed among the foreign PROs that initially collected it. The global recorded music industry is currently worth \$15 billion dollars, of which the United States contributes more than a third. Our inability to make a change to this legislation (which has been stagnant since the ‘90s) is forcing our nation to leave millions of dollars drifting in international airwaves.

It is not for lack of trying. The first attempt to amend neighboring rights royalty circumstances for terrestrial radio occurred in 2009. This amendment attempted to establish smaller annual flat fees instead of neighboring rights royalty payments for “certain religious, minority, female, small, rural, noncommercial, public, educational, and community terrestrial broadcast stations that have revenues falling within corresponding separate specified changes (H.R. 848).” But the courts ruled in favor of free airplay for local radio stations in fear of upsetting the “mutually beneficial” relationship between the recording industry and local radio, wherein neighboring rights royalties are exchanged for promotion. They also considered, that broadcasters “provide tens of thousands of hours of essential local news and weather information during times of national emergencies and natural disasters, and...

## LAW SECTION

(sic) hundreds of millions of dollars of time for public service announcements and local fund raising efforts for worthy charitable causes, all of which are jeopardized if local radio stations are forced to divert revenues to pay for a new performance fee (H.R. 848)."

This amendment made a second appearance last April in the "Fair Play, Fair Pay Act of 2015" (FPFP), in which more specific fees were established for designated major radio stations while ensuring more affordable rates to smaller and local radio stations, "[capping] royalties for stations with less than \$1 million in an annual revenue at \$500 per year (and at \$100 a year for non-commercial stations), while protecting religious and incidental uses of music from having to pay any royalties at all (Nadler)." This tiered system is in response to the assertion of large radio conglomerates that neighboring rights pose a potential threat to smaller stations. FPFP also proposed to solidify the appropriate statutory rate for any sound recording pre-1972, protect current songwriter and publisher royalties, keep a more orderly practice in allocating royalty payments to music producers, and unlock the millions of dollars in the international 'black box' of undistributed money.

Radio stations stand strongly opposed to the "Fair Play, Fair Pay Act". They claim that the local radio-artist relationship is a truly unique form of music promotion, unlike any other platform. Broadcasters suggest that the value of terrestrial radio's promotional use, in addition to the financial perks that come from it, will be harmed. They also contend that the inevitable clout and monopolistic power of Sound Exchange, which collects and distributes this neighboring right for record labels, featured performers, vocalists and sidemen, also causes local stations to be hesitant to get involved in sound recording performance fees. If fees are found to be excessive, they say, local stations will be forced to cut employees and stop expanding, ultimately providing less exposure for both new and popular artists. (Editor's Note: we feature a full article on SoundExchange elsewhere in this issue.)

Yet U.S. terrestrial radio is a \$17.5 billion industry, with a proven business model that has survived the proliferation of its more 'techy' competitors. Paying neighboring rights is unlikely to be the death knell of U.S. radio. Payments would probably amount to much less than one in every twenty dollars made in advertisements. Moreover, the rest of the world has done it and moved on. In

fact, language is a natural broadcasting barrier to many smaller European nations, and its broadcasting industry is much smaller than its powerful coast-to-coast U.S. cousin. If many in radio feel that artists' rights legislation is a money grab by both artists and labels to compensate for declining record sales, they are being silent too about the exceptional treatment they have been afforded for years.

**MBJ**

Sources:

- "Bill Text111th Congress (2009-2010)H.CON.RES.49.IH." Bill Text. N.p., 12 Feb. 2009. Web. 30 Sept. 2015. <<http://thomas.loc.gov/cgi-bin/query/z?c111%3AH.CON.RES.49%3A>>.

- Christman, Ed. "'Fair Play, Fair Pay Act' Introduced, Seeks Cash from Radio Stations." Billboard. N.p., 13 Apr. 2015. Web. 30 Sept. 2015. <<http://www.billboard.com/articles/business/6531693/fair-play-fair-pay-act-performance-royalty-radio>>.

- "FCC - Telecommunications Act of 1996." FCC - Telecommunications Act of 1996. N.p., n.d. Web. 07 Oct. 2015. <<https://transition.fcc.gov/telecom.html>>.

- Flattum, Jerry. "Convergence And The Entertainment Society." N.p., Feb. 2011. Web. 30 Sept. 2015. <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.473.4391&rep=rep1&type=pdf>.

- "Future of Music Coalition." Public Performance Right for Sound Recordings. N.p., 5 Nov. 2013. Web. 30 Sept. 2015. <<https://www.futureofmusic.org/article/fact-sheet/public-performance-right-sound-recordings>>.

- "H.R.848 - Performance Rights Act111th Congress (2009-2010)." H.R.848. N.p., 14 Dec. 2010. Web. 30 Sept. 2015. <<https://www.congress.gov/bill/111th-congress/house-bill/848>>.

- O'Brien, Kyle. "Here We Go Again: The Latest Round In The Fight For Music Royalties." Advertising Week Social Club. N.p., 06 June 2015. Web. 30 Sept. 2015. <<http://www.theawsc.com/2015/06/06/here-we-go-again-the-latest-round-in-the-fight-for-music-royalties/#fjCZgzaGLqKH34L.Lc.99>>.

- "Premier Muzik International - Royalty Recovery and Neighboring Rights Administration." Premier Muzik International - Royalty Recovery and Neighboring Rights Administration. N.p., n.d. Web. 07 Oct. 2015. <<http://www.premiermuzik.com/faq.php>>.

- "Reps. Nadler and Blackburn Introduce the Fair Play Fair Pay Act of 2015." Congressman Jerrold Nadler. N.p., 13 Apr. 2015. Web. 30 Sept. 2015. <<https://nadler.house.gov/press-release/reps-nadler-and-blackburn-introduce-fair-play-fair-pay-act-2015>>.

- "Topic: Music Industry." Www.statista.com. N.p., Oct. 2014. Web. 30 Sept. 2015. <<http://www.statista.com/topics/1639/music/>>.

- <http://www.allthingsstrings.com/News/News/Violin-Solo-Was-the-First-Music-Played-Live-on-the-Radio>

## SoundExchange Explained

By Eduardo Loret de Mola

SoundExchange is an independent nonprofit organization that is dedicated to collect and distribute royalties resulting from digital performance rights of sound recordings. When it was created in 2000, this organization was a division of the RIAA but in 2003 it became an independent organization, currently representing the interests of more than 110,000 artists and copyright owners. As reported by SoundExchange, they have already successfully paid nearly \$3 billion since they first started doing business.

### Early Beginnings

Before the enactment of the Digital Performance in Sound Recordings Act of 1995 ("DRPA"), artists and sound recording copyright owners in the US couldn't collect any royalties from digital performances because legally those rights didn't exist in any medium, unlike other countries in the world. The DRPA attempted to resolve this situation by creating a statutory license for subscription-based non-interactive digital audio transmissions, but it wasn't enough since music technology was developing much faster than what the law was encompassing. That's why another law, that would replace the former, was enacted in 1998: The Digital Millennium Copyright Act ("DMCA"). With this new law, statutory licenses were expanded to include non-subscription non-interactive digital audio transmissions. This resulted in digital radio services being obliged by law to pay copyright owners for the digital performance of the content they were using.

Royalties resulting from digital performance rights are fees that digital music providers are required to pay copyright owners by law. The manner in which these payments are able to reach its corresponding beneficiaries is through an intermediary, in this case, SoundExchange. Currently, this organization is the "sole entity entrusted by the Copyright Roy-



(CONTINUED ON PAGE 13)

## BUSINESS ARTICLES

# Dawn of the Streaming Giants

By Shereen Cheong



In response to the transition from digital music downloads to the rise of music streaming, Apple Music was launched on June 30th. Its debut has undeniably left more questions than answers in the music industry, adding up to the uncertainty about the future of the music industry. According to a recent report on Digital Music News, despite the fact that Apple Music is most likely to have 15 million non-paying users, only a portion of them will remain as paying subscribers after its three-month trial phase expires. On the other hand, determined to retain its position as the leading music streaming service in the music industry, Apple Music's largest rival, Spotify, is aggressively gathering more users for its streaming platform and could hit close to 100 million users by end of this year. Apart from Apple Music and Spotify, there are also other streaming platforms like Deezer and Google Play Music, concurrently trying hard and finding new ways to thrive in the music subscription space.

### Apple Music and Spotify

Most Apple users would have begun the three-month trial phase from June 30th onwards, and hence would have ended the trial period by the end of September this year. A portion of Apple Music users would probably have forgotten to disable their automatic credit card payments setting and so would unintentionally commit to the subscription plan; the other portion, of course would have chosen Apple Music. Therefore, Apple Music might well lose a few million users by November, making a dent in its starting base of 15 million users. However, it may well still reach approximately one-third of Spotify's 7.5 million paying subscribers.

Apple is commonly known for

Apple Music sparked excitement and curiosity amongst Apple's loyal users, the momentum has not been sustained. In particular, the digital revolution has undoubtedly impacted peoples' never-ending desires for good social networking platforms and, while there is no doubt that Apple Music is strong on design, it is unfortunately weak on its social networking capability. For this user, and as others have noted, Apple may have focused too much on trying to integrate multiple features onto the system at the expense of neglecting the importance of a good user experience to its customers on Connect (see "Apple Music's Debut", MBJ, August 2015).

The main weakness of Apple Music's Connect is that it lacks social interaction between the artists and their fans. It seems more like a broadcasting platform rather than a social networking one. For instance, according to Brian Chen of the New York Times, the artists that he follows mainly post pictures and updates about their latest activities without ever socializing with their fans. Added to that is the fact that Connect does not allow its users to connect and share their playlists with one another, defeating the purpose of a social networking platform in the first place. On the contrary, Spotify engages its customers well by enabling them to share their playlists with one another, regardless of wherever they may be worldwide. Both Apple Music and Spotify have curated playlists and other complex features. Apple Music generally offers a more organized and friendly platform for its user to browse music than Spotify, which oftentimes causes confusion amongst its users because of its options like "Search" and "Browse".

Unquestionably, Apple Music will

promising a better user experience than its competitors' to customers. Apple Music has definitely proven to be friendlier to users than most streaming services, making the process of choosing a song easier and more efficient. Nevertheless, this may not be the case for Apple Music's Connect, a platform for musicians to connect and interact with their fans. Although work better on Apple devices as compared to Spotify. Unlike Apple Music, Spotify is unable to take advantage of the Siri feature to choose a song on its platform. Further, in terms of subscription fee, Apple Music offers a cheaper subscription fee than Spotify. Most of Apple's customers who are registered iTunes users can immediately sign up for a three-month free trial with just a single tap and pay a monthly subscription of \$10 thereafter. In contrast, Spotify requires its users to pay \$1 for the first three months and \$10 a month thereafter if they sign up through the website. Otherwise, "[Spotify] charges its users a monthly fee of \$13 inside Apple's in-app payments service to make up for the 30 percent cut it gives up to Apple".

### Deezer and Google

In the meantime, French streaming service Deezer will likely file for an initial public offering (IPO) to stay viable in the race with Spotify and Apple Music. Deezer is seeking funds from investors to expand its market share through partnerships. Deezer was founded in 2007 and its revenues surged 53 percent in 2014 to hit 142 million euros (\$158.5 million). Although Deezer counted 6.3 million users by the end of June, it still falls well behind the music-streaming giant Spotify. Deezer's strategy is to focus on expansion in Europe before moving on to the U.S. market. In Europe, the company has teamed up with telecom companies to sell its premium subscriptions with mobile-phone packages; it launched in the U.S. about a year ago. Deezer's sales surged 41 percent in the first half of 2015, narrowing the company's loss to 8.97 million euros from 12.8 million euros a year earlier.

Deezer's plan to file an IPO could make sense. However, it appears that nearly half of Deezer's 'subscribers' remain entirely inactive as they are, in actual fact, bundled into various mobile plans. Also, some of these users are unaware of the music streaming service in their mobile devices or plans. As many as 3 out of 6 million classify as 'monthly inactive bundle users', and as of June 30th only 1.5 million were paying the full subscription fee. Deezer may be creating the perception of value, but it will still have a way to go before investors are convinced. (Even Spotify delayed a potential IPO; it has continued working, successfully, for venture rounds in the private equity market—an option that is still open to Deezer; unlike Deezer, however,

(CONTINUED ON PAGE 16)

## BUSINESS ARTICLES

### SoundExchange Explained (cont.)

(FROM PAGE 11)

alty Board (which is appointed by the U.S. Library of Congress) with administering statutory license fees paid by non-interactive digital radio services.” Formerly, there was a two-tier structure, in which the roles were divided between receiving and designated agents. Back then, when SoundExchange was part of the RIAA, the latter and the webcasters negotiated a payment structure where all of the royalties were going to be paid to a single receiving agent: SoundExchange. By federal regulations, the receiving agent had to distribute the payments to the designated agents, which in this case was also SoundExchange and another company, Royalty Logic. In 2002, the Library of Congress found that system inefficient because it “added expense and administrative burdens to a process meant for prompt, efficient and fair payments to copyright owners and performers with a minimum of expense.” They kept the two-tier structure but they stopped recognizing Royalty Logic as a designated agent, so SoundExchange became the sole receiving/designated agent. The CRB reviewed this situation and in 2007, when the royalty rates were published, and finally decided that there wasn’t going to be a two-tiered agent system anymore but a single collective, an organization that would have the responsibility of both collecting and distributing royalties under the law. As a result, they declared SoundExchange as the sole designated agent.

#### Collection and Distribution

SoundExchange charges digital music providers a statutory license (determined by the Copyright Royalty Board), which allows them to stream content while paying a fixed rate for each play. Subsequently, the organization collects the royalties and distributes them to the featured artist and the copyright holders for the use of their music and other content broadcasted on a non-interactive digital source, such as Internet radio, cable TV music channels, satellite radio and other digital services that stream sound recordings. They do not, however, collect public performance royalties from publishing, which are already covered by PROs or royalties resulting from digital downloads. For this service, SoundExchange charges its clients an administrative fee of 4.6%, which, the organization claims, is the lowest fee of its kind among the major collective management organizations in the world. Along with the payments, digital music services also provide SoundExchange with playlists of

all their recordings. When SoundExchange receives said payments, they allocate them between the different recipients.

SoundExchange distributes royalties among its beneficiaries as follows: 45% are paid directly to the “featured artist” on the recording (by “featured artist”, SoundExchange is referring to the individual or group that is featured the most on the record). 5% goes to a fund for non-featured artists, which typically consists of session musicians and background singers. Finally, the remaining 50% is paid to the copyright owner of the sound recording, the owner of the “master”, which is mainly the record label or the artist who owns its own masters.

#### SoundExchange and Sound Recording Rights

SoundExchange has always claimed to be an organization that wants to fight for a music industry that is fair to its musicians. Consequently, it has a clear stand regarding the lack of regulation towards public performance rights of sound recordings, also known as the AM/FM Radio Royalty Loop-hole. Currently, terrestrial radio doesn’t pay royalties to the labels and artists when their records are played on the air. In other words, radio doesn’t pay royalties for the sound recording, only for the composition, which is protected by the Copyright Law. Even though digital radio can be accessed in a similar way as AM/FM radio (meaning that both of them can be played in cars, for example, and consequently can reach similar audiences), only digital radio is obliged by law to pay sound recording royalties for the music they broadcast. Instead, terrestrial radio gets to keep an estimated \$17 billion of advertising revenue a year in blissful ignorance of the sound recordings that drive audiences to it in the first place.

This is not the only problem SoundExchange has identified in relation to the protection of sound recording rights. Sound recordings made before February 15, 1972, have a different legal treatment: they are not protected by federal law. Instead said rights are currently under the scope of various state laws until 2067, “at which time all state protection will be preempted by federal law.” Even though state law protects “pre-72” sound recordings, some digital music services are currently using those recordings without paying any royalties or simply without any permission at all. SoundExchange estimated

that the amount of money lost by copyright owners due to this situation amounted to \$60 million in 2014. This number is supposedly going to increase to more than \$70 million by the end of this year. In order to try to fix this problem, SoundExchange launched the Project72 initiative in May of 2014. The purpose of this campaign was to ensure that artists who recorded before 1972 could be rightfully paid. One of the things the organization did was introduce the RESPECT Act in the House of Representatives during the 113th Congress. With this Act, digital music services providers would be required to pay royalties for all the content they broadcast, regardless of the year they were recorded.

Most recently, the Copyright Royalty Board approved a settlement between SoundExchange and the public radio networks. This settlement will compel public radio stations such as, NPR, Public Radio International, Public Radio Exchange American Public Media and all others named by the Corporation for Public Broadcasting to pay \$2.8 million annually, divided into 5 installments, through 2019. That rate is up from the \$2.4 million in annual payments made during the previous term. Also, as part of the settlement, all public stations have to pay a minimum of \$500 in royalties a year and 5% of all payments will serve as compensation for ephemeral rights, “which allow for storage of the reproductions of recordings that are broadcast on the stations’ servers. According to the determination, the payments cover 285,132,065 aggregate tuning hours, or the total hours of programming.” All of these payments are going to be made to SoundExchange, so the latter can distribute them between the artists and copyright owners. Even though this part of the settlement has already been approved by the CRB, the board hasn’t approved the section of the settlement in which they designate the public radio sector as a collective entity. This decision is going to be approved when the CRB sets statutory rates for all webcasters, not only for the public sector. Afterwards, said determination has to be reviewed by the Register of the US Copyright Office to see if the settlement is in accordance with the law. <sup>[MIB]</sup>

## TECH NEWS

### Hackathon Time

By Natalie Cotton and Klementina Milosic

A new way of doing things in the startup world is being copied in academia and beyond. The “hackathon” is a method for making an innovative idea tangible in a short amount of time, starting from inception to creation and involving as many stakeholders together as possible in one place.

Hackathons may have been popularized by the Oscar-winning film *The Social Network*, which narrates the story of Facebook’s Mark Zuckerberg. In a memorable scene in his Harvard dorm room, Zuckenberg pulls a sleepless all-nighter, continuously coding with his friends, all abetted by energy drinks and snacking. The result was Facebook’s shell. This scene has become the metaphor for a new working paradigm in technology circles, and now corporations and colleges with business departments endorse that paradigm too.

The thinking behind hackathons is twofold: that they will bring out the best from the brightest and most engaged stakeholders, and that creation thrives under pressure. Recent hackathons are credited with producing Facebook’s Like button and its Timeline feature, as well as more chat and video capabilities in other social media platforms. High-speed industries that depend on technology, including the music trade, are the likeliest candidates for success.

Recently, companies have been encouraging employees to create and build ideas through their own internal events. The hackathon exercise is meant to boost productivity, but it also allows employees to interact with management and create a prototype product or service. Public hackathons, instead, have been used to launch platforms for established companies. In that case, the sponsors look to scout, recruit, and hire new talent. Shutterstock, the successful global stock photography provider, was created at a hackathon and now conducts its own similar event annually. Attendees are given 24-48 hours to imagine, design, and implement any idea that they think could be of value to the company. In an effort to attract more participants and accelerate the synergy of ideas, hackathons have been held in unlikely places such as yachts, planes, and even luxury buses. Prizes for successful ‘hacks’ come with prestige, but it is the quick integration into personal computing devices, including smartphones, that makes the challenge of a hack immediately worthwhile for participants.

At college, it can be difficult for students, who can contribute much to technological innovation, to interact with executives, venture

capitalists, and headhunters. Enter Hacking Arts, a MIT Media Lab project. The Media Lab is a key venue for exploring the intersection of art, entertainment, technology, and entrepreneurship. This yearly event brings students together from MIT, Harvard, and Berklee College of Music to produce technology based projects related to art and entertainment, explore demos from early stage music start-ups, experience tech-enabled live performances, and hear from entrepreneurial thinkers in all the creative industries. Engineers from companies such as Sonos, Google, Pandora, and some CEOs were available for two-hour mentorship sessions to help refine concepts and prepare hackers for the pitch. The pitch was given to a panel of judges composed of innovators from Time Warner Inc., ArtScience Labs, Artsy, MIT, Berklee, IDEO, and Sonos.

Hackathons are by nature geared towards large-scale industry problem solving. The entrepreneurial spirit necessary to develop fresh thinking around technology and implement change from the ground up is useful for trades caught in the middle of the digital revolution. For instance, Rethink Music, an initiative of the Berklee Institute for Creative Entrepreneurship (Berklee ICE), held an all-day conference and workshop early in October to tackle transparency and fair payments for music. Public forums such as these may become more common in the future as different industries explore new ways of doing business with their technology partners.

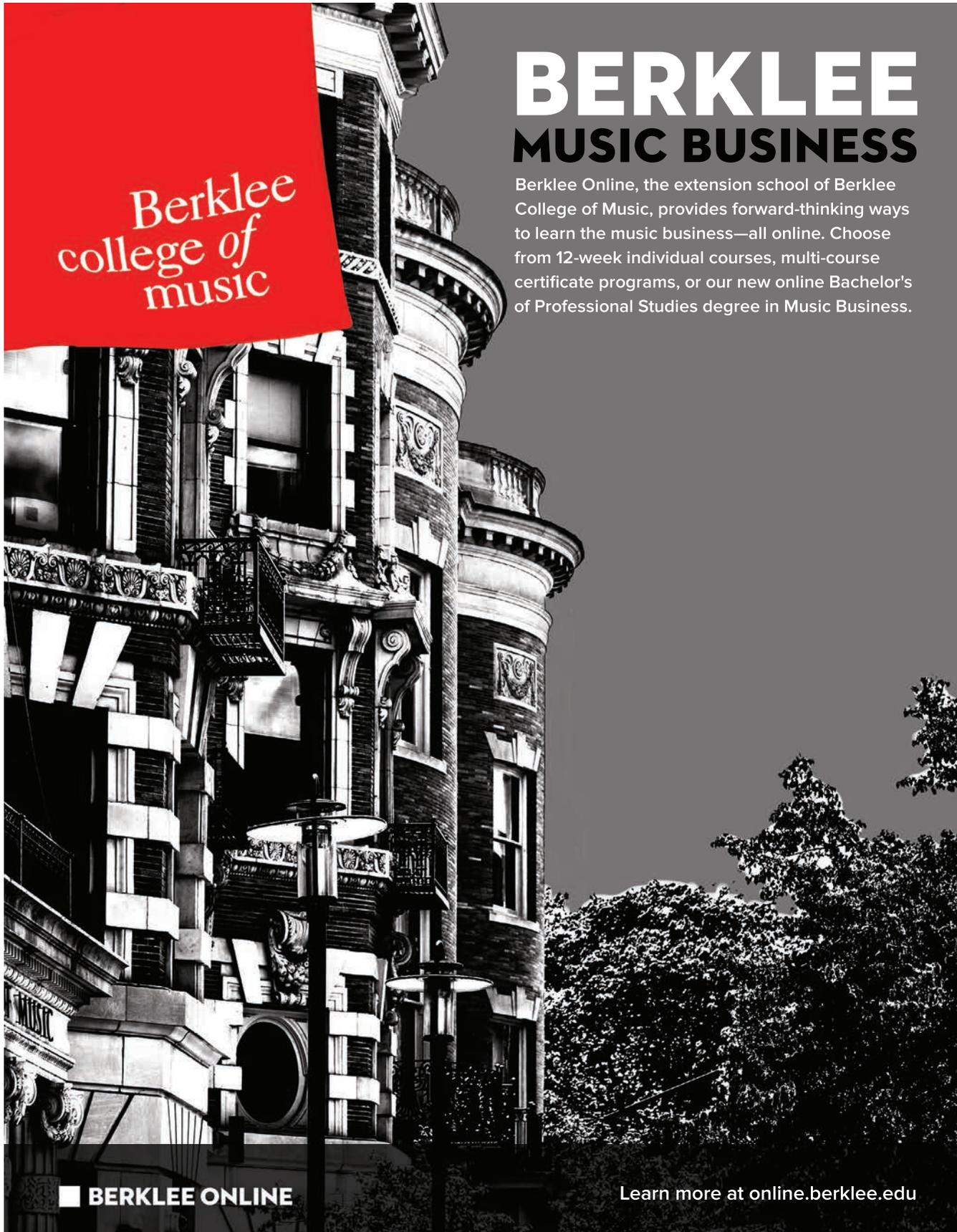
Lady Gaga has been a pioneer in the technology field. South by Southwest (SXSW) takes place annually in Austin, Texas, and the conference blends music and emerging technologies for creative problem solving. In 2012, Lady Gaga decided to organize the first music hackathon at SXSW ever to be live streamed. Gaga’s start-up Backplane held the hackathon in order to encourage designers to develop new apps, platforms, and technologies to advance the future of digital music distribution. Backplane secured fundraising from several Silicon Valley venture capitalists with LittleMonsters.com, a parallel one-stop shop for people who share a particular passion for everything Gaga. Ten thousand fans were chosen, from a million applicants, to use the platform that enabled users to download her music, buy tickets for shows, and chat with each other through translation software, despite language barriers. It also featured social ticketing, which allowed fans to find concert seats near their friends and even start conversations beforehand with strangers they would be sitting with. Most importantly, the data generated by the site was valuable and identified

key influencers along with their insights.

And there is more evidence to pick on. The MIDEM Hack Day in Cannes, France, offers competitions to pitch and meet potential partners and investors on an international scale. For the last five years MIDEM has brought together approximately 20-30 developers from around the world to build music apps on site. These hackers are vetted beforehand for their ability. Non-participants are able to pitch their own ideas into the mix, and the final award is delivered with much fanfare and incorporated into MIDEM’s promo kit. Still, some argue that the biggest and most impressive music hackathon is the Music HackDay Boston. Its sponsors include SoundCloud, MailChimp, Spotify, and Free Music Archive. The Echo Nest, which is owned by Spotify, organizes the event. This hackathon awards prizes for the best contributions to Echo Nest’s API, one of the most ubiquitous data gathering back-end apps in the business (Echo Nest is also active in a Monthly Music Hackathon in New York City).

Another instance is Pandora. In 2013, the non-interactive music streaming service held a hackathon in its hometown of Oakland, California. The goal was to create new tools and apps for users to discover and listen to music, and most importantly, to make their music experience even more enjoyable. Currently, Pandora also runs an internal hackathon twice a year and requires full participation for most of its labor force. This is a 72-hour event and winners are rewarded for Best Demo, Most Creative Idea, Best Improvement to Pandora, and Best Project Not Related to Pandora.

Overall, hackathons are a sign of the times. As technology evolves, software developers have to cooperate to provide better business-oriented solutions. Clearly, there is much demand across the business spectrum. The music trade, of course, is perhaps one the most impacted by the digital revolution and not surprisingly music intermediaries wish to stay the course by understanding the game that is played. That game is defined by rules that lie outside of their control and have to do with the independent evolution of online tools for mobile and desktop devices. Better to know what is at stake. And if there are investors that value music for its societal reach, all the better. **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 11, Issue 4

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

October 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)

Alibaba and  
Chinese Streaming

Deezer's IPO

Music and Blockchain



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

## Streaming Giants (cont.)

(FROM PAGE 12)

Spotify first obtained the master licenses to use the recordings of the majors in the U.S, which brought in big venture money from Coca Cola and Goldman Sachs, among others).

Another potential big player is Google, although its attempts to build a music streaming service seem to be lackadaisical and so far have gone under the radar. Owing YouTube, the largest universal free streaming platform in the planet, must make Google Play Music the poor cousin in the family. And yet there is some effort there, even if the service is hardly promoted. Subscribers can have unlimited access to songs from its All Access streaming service by paying a monthly subscription fee of \$9.99. Non-paying Google Play Music users can also store up to 50,000 tracks in a cloud locker for no additional cost. To compete with Apple Music for value, Google Play Music will be launching a family plan later this year. It is applicable to a family of up to six members and costs \$14.99 a month, which is equivalent to the value of Apple Music's family plan. (Spotify's family plan is more expensive than what Google Play Music and Apple Music have to offer: a family of up to five people can use a

single account to stream music there for \$30 a month, but thereafter additions of family members can lower per capita costs substantially).

### Closing Remarks

Music streaming services might eventually put a halt to the decline in physical recorded sales and digital downloads. Ultimately, Apple's position as the world's largest music retailer will be at stake. Apple may not be troubled much by the numbers: last year its revenue was \$180 billion against iTunes receipts that would not have exceeded \$4 billion. But the identity of the company could take a hit for the worse if Apple Music does not do well. Music defined Apple in 2003 and helped it usher in an era of unprecedented growth and affection worldwide. Apple's iPods and iPhones defined the times. It would be a pity if the poor margins made on music were to stop Apple's efforts at delivering a cutting edge service.

Earlier in the summer, after the release of Apple Music, Ian Rogers, one of its top promoters and directors, and a music industry celebrity, left Apple Music to become the chief

digital officer at LVMH, whose brands include Marc Jacob, Fendi, Louis Vuitton and Dior. Rogers enjoyed perhaps the most distinguished career in the digital music space since the advent of the World Wide Web, and though there must have been personal gain for him in moving on, his departure from the largest and best known company in the world was disquieting. For many, the perception was that Rogers's parting reflected the possible declining fortunes of Apple Music after the free subscription period expired September.

But Apple Music will likely adapt. The company is cash rich and there are many avenues to explore. Fitness tracking with music is a growth area and the company is a player with the iWatch and the iPhone 6. Its payment interface is second to none. Spotify's clout, though, will continue to be daunting, as investors know. In June, Spotify got another \$115 million in investment from Swedish telecom operator TeliaSonera, for a market cap of \$8.2 billion. Spotify's recommendations and discovery features are just as good as Apple's, if not better. And, right now, Spotify is the more open platform. **MBJ**