Copyright law is based on property law. It evolved over time and recognized more and more economic rights, such as those of music creators to collect on sound recordings and public performances. But original copyrighted material may arguably possess certain inalienable personal rights that supersede any economic right. In many European countries, for instance, a droit moral is in play when a wholly original work is fixed in a tangible form. This moral right makes the work inseparable from its creator, for the work is seen as embodying that person’s personality or “creative soul”. In effect, this standard allows a higher degree of artistic protection and exists independently of economic copyright. It also gives European creators much more veto control in the distribution of their work than is allowed in the U.S.

An author of an original work in a country where moral rights are recognized will always be protected, even in cases of works for hire or transfers of copyright share. And there are four basic considerations associated with droit moral: first, there is the right of disclosure, i.e. determining when a work is ready for release, if ever; second, there is the right of retraction, i.e. removing a work from public circulation; third, there is the right of attribution, i.e. the paternity of the work; and, finally, there is the right of integrity.

The integrity right merits its own discussion. It allows the creator of a work “to prevent presentation of a work in a derogatory manner contrary to the intentions of the creator.” This has many applications today. One example is a composer objecting to the usage of a sample in a hip-hop recording, such as Newton vs. the Beastie Boys for Pass the Mic. Another is a songwriter protesting usage of their work at a political rally for a cause that they disagree with, as happened with Neil Young’s recent objection to Donald Trump for playing his Rockin’ in the Free World.

While droit moral has flourished abroad, it has not made a dent in the United States, where domestic protection for creators of original work does not extend for the most part beyond the six exclusive economic rights embodied in 17 U.S.C § 106 (1) through (6). (CONTINUED ON PAGE 3)
The 2016 presidential campaign as well as a recent lawsuit involving Jay-Z and Timbaland’s usage of a sample for their 1999 hit, Big Pimpin; have exposed the dearth of moral rights implementation in the United States. Despite being a signatory member of multiple international treaties embodying moral rights, U.S. legislators do not provide musicians the same degree of protection afforded to them abroad. Also on the legal front, the ownership Happy Birthday to You, one of the most iconic compositions of all time, has been successfully challenged in court. Music publisher Warner/Chappell is now at the losing end of a class action lawsuit that hinged on property rights over the lyrics of the song.

David Bowie, of course, is much in our minds after his passing, and we pay homage to his pioneering experiment with Wall Street. After all, the ‘Bowie Bonds’ paved the way for the recognition that intellectual property could function as a bond collateral.

We also revisit the Jumpstart Our Business Startups Act (JOBS). The Securities and Exchange Commission has now passed Title III, whose rules include allowances for both non-accredited investors and businesses to raise money via equity crowdfunding. These provisions can serve to bridge the gap between artists, entrepreneurs, fans, and, not least, all manner of music companies looking to fund music. In the meantime, Adele shattered sales records without any streaming. As this story is looking more familiar by the day, we explore its implications. Moreover, festivals are experiencing a renaissance and becoming cash cows for the two corporate giants in concert promotion, Live Nation and the Anschutz Entertainment Group (AEG). We explore a cutthroat competition over this turf.

Two non-traditional sources of revenue continue to merit our attention. Music intermediaries are embracing brand sponsorships as a means of connecting musicians with commerce and broaden their audience. However, we note too that living with a brand has its perils. Video games, on the other hand, present a unique opportunity for artists to reach new fans, generate quite a decent income, and revive moribund music catalogs. Finally, Gaye Estate’s successful lawsuit against Robin Thicke and Pharrell Williams in the recent Blurred Lines case yielded an unorthodox interpretation of copyright law by calling into question the traditional understanding of copyright infringement. Juries, it turns out, may not understand the subtleties of the law the way lawyers do.

Thank you for reading, and a Happy 2016!

Sincerely,

Spencer Ritchie
Editor-In-Chief

Editor’s Note: Some articles have been printed without footnotes for production reasons.

Please log onto www.thembj.org to find them.
Moral Rights (cont.)

(From Page 1)

Therefore, despite being able to receive financial compensation and exercise partial control for derivative works, synchronizations, public display, public performances, reproductions and distributions of their content, creators of original works are only minimally able to control the context in which these uses occur.

Given that the United States was a signatory of the Berne Convention that granted creators of original work specific moral rights, this is odd. Initially, when the U.S. became a member party of Berne in 1988, it was determined by congress that precedents in current legal code and common law were sufficient to adhere to Berne, guaranteeing the rights of both attribution and integrity to an author of an original work.

As for Berne, the period of time to which these rights applied was not specifically laid out in the convention, but it was suggested that they last for either the length of time afforded to economic copyright, or at least as long as the work’s original creator lived. The Berne convention also lacked a universal set of application standards and allowed member countries to enforce the law as they saw fit.

The World Intellectual Property Organization Performances and Phonographs Treaty of 1996 (WPPT), to which the U.S. was also a signatory member, explicitly included musicians, songwriters, performers, and producers as parties that had moral rights to compositions and sound recordings. Again, the United States has been reluctant in its application of WPPT, and has only loosely, if ever, enforced it. This has resulted in some American musicians being unable to claim moral rights against misuses of their work domestically, seeking redress in international court.

Moreover, international artists in the United States are not receiving the same rights afforded to them in their home countries. Due to the increasingly instant and globalized nature of information sharing, the issue has become pressing. American copyrighted content is shared abroad instantly, and international content is digitally imported constantly, each being subject to different rights.

Despite many examples abroad, including Canada, New Zealand, France, and, more recently, a buy in by the United Kingdom, moral rights are extended only towards works of visual art in U.S. legal code. 17 U.S.C. § 106 (A) or, the Visual Artists’ Rights Act of 1990 enables a creator of a work of visual art to control attribution and prevent misappropriations of their work, which may be harmful to the artist and/or their body of work. But that is where it stays, and the law does not generalize to other means of creative expression.

As such, artists like Neil Young, Aerosmith, and R.E.M. all criticized usage of their work by certain political figures and have been largely unable to intervene with the courts. When questioned about Trump’s usage of Young’s Rockin’ in the Free World, a representative of Trump’s campaign rightly claimed that they had received the necessary licenses to publicly perform the work legally.

Indeed, so long as the public figure in question only publicly performs and or broadcasts a song in venues and through stations that are in possession of the relevant public performance blanket licenses, they cannot be legally stopped based on the composers’ political or personal opposition to their views.

As such there have been rampant miscommunications and public relations gaffes in the current election cycle, due to the lack of integral protection afforded to musicians under copyright law. This creates a double standard wherein a visual artist may prevent a political figure from appropriating their works of art for the purpose of their campaign based on principle alone, but a musician may not.

Digging deeper, we see that, according to ASCAP’s Using Music in Political Campaigns, a campaign needs to contact a song’s publisher, as well as the master recording owner in order to obtain the relevant licenses for usage of songs in a campaign video. Not so for campaign events held only through licensed values and channels, where a blanket public performance license for the campaign is what is needed.

As the right to public performance is a compulsory one, musicians and composers can do little more than denounce politicians or else make loose claims at defamation when they are in disapproval with public performances of their work.

In this case, like others, a lack of moral rights protection in the United States is reflective of the nature of US intellectual property law, which is meant to promote diffusion and serve the strongest economic interests at play, at the expense of the actual creators of content. The failure of terrestrial radio to recognize public performance rights in sound recordings is yet another example: neighboring rights prevalent in Europe and in most of the developed world are held hostage in the United States by the lobbying power of broadcasters. Intellectual property law in the United States, in short, is at best outdated and limited in its scope; at worst, and this is current practice, it ignores the right of artists not to be manipulated for a cause they disagree with as well as shortchanging their collections on public performances.

Examples of artists that successfully argued for a violation of their moral rights are easy to find abroad. When French center-right political party UMP (Union For a Popular Movement) publically performed “Kidd”, a 2009 rock song by American band MGMT at a campaign event, they faced immediate legal action. Upon establishment that the UMP had not obtained permission to use the song, the party was made to pay a €30,000 ($32,644) settlement for unauthorized usage based on the integrity rights of its creators.

US artists have benefitted too, it must be said, from the lack of moral rights enforcement. Jay-Z and Timbaland recently faced charges of copyright infringement for their usage of “Khosara Khosara”, an Egyptian film music excerpt from the 1960’s used in their 1999 hit Big Pimpin’. Jay-Z and Timbaland had obtained the proper licenses from EMI for $100,000 but Osama Ahmed Fahmy, the creator of the song, was not paid. Fahmy asserted that he did not approve of a usage of his uncle’s work in a song celebrating promiscuity and as Hamdi’s heir, he should have been consulted before the sample was used. This case, hinging on the legitimacy of moral rights, was quickly dismissed in the Los Angeles courtroom, with the judge citing that the plaintiff had signed away economic rights to the work, and that he could not claim moral rights violations outside of Egypt.

In rap and hip-hop, where sampling can create an entirely different context for a song, the actual enforcement of moral rights could therefore create problems for sellers if the Berne Convention and the WPPT Treaty had more bite in US Courts. If the Roy Orbison Estate exercised its moral rights in the case of 2 Live Crew’s sampling of Oh,
The Toppling of Happy Birthday

By Luiz Augusto Buff

Happy Birthday To You, referred to as Happy Birthday in the remainder of this article, is arguably the best-known song in the world. It is a staple of life and has been for over a century. And this is true both in English-speaking countries and the rest of the world, where the lyrics of Happy Birthday are translated and adapted to suit local mores. For most of us, and wherever we live, the song has become part of our collective DNA — a patrimony we share as modern humans. Indeed, we tend to think of Happy Birthday as a public good and not an object with property rights. As a public good there can be no attendant economic transaction in consideration of the song’s ownership rights.

Yet this has not been the case. Happy Birthday has been known to generate as much as seven-figure receipts in the U.S. in annual greeting card companies, restaurants chains, film producers, advertising agencies, and any business that uses the tune commercially. The song, in short, has been the private property of someone, and the courts have validated the argument used was that Happy Birthday rightfully belonged in the public domain.

Happy Birthday’s history, recently challenged the law. In 2013, Rupa Marya and Robert Siegel refused to pay a $1,500 synchronization license fee to Warner/Chappell Music, a major music publisher who claims ownership of the song. Siegel and Marya brought a class action lawsuit against Warner/Chappell seeking to free the song from its control. The result used was that Happy Birthday rightfully belonged in the public domain.

Historically, the origins of the song go back to the XIXth century when sisters and kindergarten teachers Mildred and Patty Hill, composed the song Good Morning. The Hill sisters assigned their rights to the manuscript that contained Good Morning (and other songs) to Clayton Summy in 1893. Summy filed for copyright registration that same year and published a songbook titled Song Stories for Kindergarten, containing Happy Birthday. At that time, copyright was valid for two consecutive 28-year terms, so the copyright on Song Stories for Kindergarten, in which the original melody of Happy Birthday was published, expired in 1949.

However, the lyrics to Happy Birthday, which borrowed the melody from Good Morning, do not have a clear origin. The first publication occurred in 1911 but it did not credit any author. The song was widely popularized after being used by teachers in kindergartens, theater plays, and movies in the early 1930s. Warner/Chappell claims that its copyright on Happy Birthday is based on a 1935 registration, which Warner/Chappell acquired in 1988, when it purchased the Birch Tree Group, the successor of Clayton F. Summy Co. This registration arguably contained the lyrics to Happy Birthday and would only expire in 2030, ninety-five years after registration.

At stake in the class action suit was the issue of whether the 1935 registration effectively included the lyrics to Happy Birthday. Every song has at least two copyrightable elements: the music and the lyrics. Both are independently protected against infringement. The two parties in the case agreed that the music on Happy Birthday was borrowed from the song Good Morning and entered the public domain a long time ago. Therefore, the only copyrightable element that would hold rights to Warner/Chappell would be the lyrics to Happy Birthday.

If the court agreed that Happy Birthday had to be put in the public domain, the plaintiffs wanted Warner/Chappell to return all monies collected as royalties and license fees related to the exploitation of Happy Birthday — a figure estimated at $2 million per year by George Washington University Professor Robert Brauneis, a consultant to the plaintiffs.

After examining a multitude of documents, agreements, court cases, registration filings, and (rotted) songbooks, judge George King ruled in September 2015 that the 1935 registration did not include the lyrics to Happy Birthday. Clayton Summy had never acquired rights to the words of Happy Birthday but only to the original melody and specific piano arrangements of the music. Therefore, Warner/Chappell did not own a valid copyright of Happy Birthday.

And while Warner/Chappell sought to have the judge’s judgment reconsidered or an opportunity to appeal, the Association for Childhood Education, a charity organization co-founded by Patty Hill, tried to intervene in the case alleging that it could be the real copyright holder for Happy Birthday. In December 2015 the parties involved in the case arrived at a settlement, and even though the terms have not been disclosed yet, it seems that, finally and beyond dispute, the song Happy Birthday will be at last in the public domain.

This is indeed a happy outcome for many. Artists will be free to create their own versions of the song without having to pay for mechanical licenses. Public performances and broadcasts of the tune will not collect funds for anyone, encouraging its diffusion and free play by radio and TV. TV and film producers can use the song without worrying about any sync fees. And greeting card manufactures, and others, could get more creative in the marketplace and save costs.

However, caution must be exercised since the song may still be protected under copyright legislation in other countries. The case of Brazil will illustrate what considerations may be playing abroad.

In Brazil, the song became popular in 1942, when the famous radio presenter Almirante, Henrique Fóreis Domingues, ran a contest to choose the official Portuguese lyr-
Adele’s Choice

By Natasha Patel

Adele is officially the top selling artist of 2015. 25 sold more than the next three ranked albums combined in the U.S. and broke all records in the first week of its release — 3.5 million units v. ‘NSync’s 2.9 million fifteen years ago. Since 2001, only four top-ranking records have been able to sell over a million copies in the first week, while in the U.K., 25 surpassed EA’s FIFA 16 game to become the entertainment product of the year.

Adele is among a handful of artists that can surpass the million-unit mark in the first week of a release while withholding music from streaming services to maximize revenue on album collections. Indeed, she defies the sales paradigm of the industry when recorded music buying is increasingly migrating towards streaming. But for her it makes sense: it has been argued, for instance, that 25 alone would have needed over 16 billion paid plays to match the income that the album generated – an impossibly high standard.

The download-to-streaming exodus in 2014 defined the year in numbers. For the first time, global digital sales and physical product brought equal amount of revenue for the labels. Both comprised 46% of total sales, with performance income collected on neighbouring rights and synchronization monies accounting for the remainder: 6% and 2%, respectively. Marquis digital services such as Spotify, Apple Music, Pandora, and Deezer are household names worldwide (although Pandora’s international presence is limited to just a few countries). Pandora has $1 million active listeners, Spotify over 75 million, Apple Music, with a short launch window, about 10 million, and Deezer about 3 million. With the exception of Apple, which is self-financed, all of these streaming services have welcomed new big money investments. Most notably, Spotify, the market leader of interactive streams, was valued at over $8 billion dollars in 2015.

Adele’s sales strategy is not unique. Coldplay is soon to set release its new album A Head Full of Dreams, and is not planning to make it available on streaming services; their fifth album, Mylo Xyloto, was released in 2011 and held from streaming services for over three months: an audio-only version of Paradise was uploaded on YouTube and used, with success, to seed the album. Tom Wait’s Bad as Me was also held from streaming to boost sales: metal rock label Century Media removed its entire catalogue from Spotify, returning it nine months after reaping the benefit of strong non-streaming sales. Taylor Swift’s 1989, of course, set the tone in 2014, when she withdrew that record and her entire catalogue from Spotify U.S. — a move that seems to have drawn buyers to the album in droves.

While acts like Coldplay, Adele and Taylor Swift can rely on their fans to spend money on the albums of their music, most other musicians are not afforded the same luxury. Smaller artists find it much harder to sell full records, and must therefore rely on alternate sources of revenue. For them, generally, streaming seeds the album. A good example is the U.K.’s Ed Sheeran. Sheeran is apparently the most-streamed artist in the history of Spotify, with over 3 billion plays. At the same he has the second highest selling U.K. album of 2014. Clearly, unbundling the album for streaming has not hurt Sheeran.

For independent artists, touring money, endorsements, and merchandise sales are important sources of revenue, none of which solely depends on recorded music. Moreover, regardless on who is doing the math, mechanicals on streams are worth pennies, with one study estimating that about a million streams are worth just $1,200. So for independent artists to place music in Spotify is arguably a testimony to the power of that medium to promote their live music and ancillary sources of revenue. They might not make money from recorded music, but they will drive traffic to their concerts and keep themselves in the public’s eye.

That logic does not play well with the major acts discussed above. Their fan base is strong, there is a pent up demand for their recorded work. If the album is perceived as a hit, there is little need to seed it with streams. Better cash in with album downloads or physical sales.

Here is where we find The Beatles, who had probably maximized already...
Crowdfunding Gives Fans Shares

By John Lahr

More than three and a half years after the JOBS Act’s passage, the Securities and Exchange Commission has released its rules for the critical Title III. The regulations won’t be fully into effect for more than a year, but its impact on the way small businesses, content creators, and new products can raise money cannot be overstated. More specifically, the equity crowdfunding provisions, and allowance for non-accredited investors to invest in private companies detailed within the JOBS Act have the ability to fundamentally change the way artists and entrepreneurs are able to interact with their fans and customers.

What is the JOBS Act?

The Jumpstart Our Business Startups (JOBS) Act was passed in 2012 with the aim of encouraging startup and small business funding. These kinds of companies are described in the law as “emerging growth companies”, and are able to take advantage of the JOBS act if they have less than $1 Billion in gross annual revenue. The SEC did this through three main provisions. The first is allowing non-accredited investors to invest in private companies, which before had only been available to Accredited Investors (people earning over $200,000 annually, or with a net worth of over $1,000,000). By allowing average people to invest in private companies regardless of their income, small companies and content creators have access to a much larger pool of investors and capital. This greatly increases the likelihood of companies reaching their fundraising targets, as well as allows anyone to take a financial stake in a company or product they believe in. Non-accredited investors who bring in less than $100,000 per year can invest in a crowd-funded campaign to the tune of $2,000 or five percent of their net worth, whichever amount is higher). Anyone making more than $100,000 a year can invest up to 10% of his or her annual income into crowd-funded campaigns.

The second provision gives the ability to private companies looking to raise money to publicly announce and advertise their round of funding before, and during its progress. Prior to this change “SEC registration provided that the offering [was] not publicly advertised.” This is a seemingly small, but critical change. Crowdfunding is entirely dependent on the ability of the project to mobilize a community and convince them to contribute. This would be impossible if the SEC prohibited any public awareness campaigns. However, should a project decide to generally solicit funds, they are subject to increased regulation by the SEC. The business must “file an advance Form D at least 15 days before any general solicitation (instead of the current requirement, 15 days after the first sale), submit general solicitation materials to the SEC, and include specific mandated legends on the materials.” Doing any promotion via social media, announcements via website, or any other general solicitation before meeting the above requirements would put the project in danger of violating securities law, so companies looking to use equity crowd-funding should be familiar with all the regulations before launching a campaign.

The third key provision is the ability to actually raise money through crowdfunding, but in exchange for equity instead of rewards. Unlike rewards based crowdfunding, equity-based crowdfunding requires issuing securities. This comes with a high degree of regulatory oversight to protect the non-accredited investors (685 pages of regulation for Title III alone). Therefore, it is incredibly important that anyone wishing to participate in equity based crowdfunding familiarizes themselves with the regulations and consults a lawyer if necessary. It is also important to note that artists will not be able to fund one off projects such as albums, or tours through equity crowdfunding. This type of funding is only available for activities that will generate equity, debt, or derivatives. The amount companies are allowed to raise through equity crowdfunding has also been capped at $1 Million in any twelve-month period.

A large part of the regulation requires being transparent with investors. VentureBeat advises “that you disclose anything about your business that would have a material impact on an investor’s decision to back it: disclosures could include everything from the fact that you’ve taken on substantial debt to the fact that your mother-in-law owns 70 percent of the business or that your business could fail if coconut water (your business model) goes out of vogue or that one customer makes up 80 percent of your business.” After all the relevant information has been filed, the issuer has two choices of how to issue the equity. It can either be issued by a broker/dealer, or through an SEC approved funding portal.

The new artist fan relationship

The ability for the general public to invest in the business of an artist or creative enterprise will fundamentally change the nature of the relationship between creators and their fans. These new rules “open the door for fans to become business partners with a financial interest in a label’s success, for example, providing another way to support artists without the charitable concept of current crowdfunding.” This could greatly change how we think about the concept of music ownership. It could no longer be used to describe owning a recording of music, but include ownership of a piece of the intellectual property as well.

By making the shift from stakeholder to shareholder, the fan will also potentially have increased visibility into the business or decision making of the artist. It remains to be seen what fiduciary duty the artist might have to the equity holding crowd, or how fans might be represented, if (Continued on Page 7)
at all, in the board of directors. Complicating the matter is the fact that the shares of the company will be illiquid (unable to be traded on public markets), and therefore will not be able to be converted into cash at short notice. In a typical startup, owners’ shares can only be made liquid by an IPO, a merger, or an acquisition. This is unlikely to apply to artists unless the buyer becomes a record label, a production house, or a publishing company chasing very successful talent. So the risks to fans are enormous, and any shares owned would only have theoretical value. The best bet then is to hope for dividends (similar to artist earnings on royalties).

How then, are investors supposed to see a return on their investment other than dividends? Luckily, many fans that invest in artists will do so because they support the art, and want to feel a true sense of community and ownership. These shareholders will not be concerned just with liquidity. The rest however, will at some time desire to cash out. This could potentially be done in a number of ways.

Firstly, the artist may offer to buy-back the shares of those looking for liquidity at some point in the future. This would be good for both artist and fan because the artist will regain more ownership, and the fan will have cash in their pocket. Secondly, the record label may also offer to buy the shares of fans looking for liquidity. Allowing fans to sell to another entity invested in the success of the artist keeps the shares within the artist’s existing stakeholder base. If the label is publicly traded, such as Warner or Universal, the shares of the artist might be able to be exchanged for label shares, which are liquid. Alternatively, marketplaces may pop up where shares can be sold to existing shareholders, or anyone looking to acquire stock in an artist not currently issuing.

**Bridging the gap**

The new rules do not take effect until January 29th, 2016. Until then the closest platform to true equity crowdfunding is TapTape, a startup from M.I.T. Sloan launched at Hacking Arts.

TapTape offers its users the ability to invest money in artists on its platform in exchange for bonuses, but also has provisions for investors to receive profits on successful projects. Those profits are currently paid in TapCoins, which can be used to purchase concert tickets or artist merchandise through TapTape’s site. It seems this is the happy middle, providing fans a way to financially back artists while still having the ability to enjoy an upside on successful projects. TapTape can also be used for one-off projects for which true equity crowdfunding is not practical.

While these new platforms and investment vehicles give fans a unique opportunity to take a stake in their favorite artist work, it also presents unique challenges for artist and fan alike. Both parties would do well to remember that ultimately they are dealing with the sale of securities.

For artists this means a degree of oversight they are not used to dealing with, and the information they might be required to disclose may be disconcerting. This oversight is also complex, and any misrepresentations could result in heavy fines, or potentially criminal charges. They will also have increased legal responsibility to their fans, which may influence or even dictate what business or artistic direction they wish to pursue.

For fans this means they are sharing in the risk of an already highly risky business in a medium that will not likely be completely liquid—at least until a trade in secondary artist stocks develops informally. Labels were prepared to loose money on most artists against the expectation of doing well with a few. So a fan should also hedge his bets among other artists if the expectation is one of monetary reward. Otherwise, there can be comfort in the idea of jumping-starting a favorite’s artist career, where return on investment can be traded for more proximity, perhaps, but surely more perks.

**Endnotes**


**Sources**


**February 2016**

www.thembj.org
Background

Before the World Wide Web, well before the advent of Internet piracy and the single song format after Apple iTunes, both of which hurt album sales and sound recording royalties. By 2004, Moody’s had cut Bowie’s bond rating to BAA3, only one level above junk. Nonetheless, the original 10-year Bowie bond was paid off in full at maturity in 2007, when Bowie resumed sole ownership of his music and royalties.

Changing Circumstances

The markets, though, did not predict the rise of Internet piracy and the single song format. In fact, at issue, the Bowie Bonds earned a triple-A bond rating from Moody’s, the highest. The economy was in overdrive, as was the music industry, and this kind of financial instrument at the time appealed to investors, many of which were apparently seeking to diversify their holdings. Other musicians would rush in after Bowie: James Brown, Ashford and Simpson, and Iron Maiden, among them, but for much smaller amounts.

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Back in the mid 1990s, when the

Bowie’s bonds were issued, about the only way artists could seek financing for their musical endeavors was to get a recording deal with a major label and have the label supply all finance. Simply put, the labels advanced the money for recording costs and sundries for an album, and the artist kept on paying back the loan from both the album and single sales until the label recouped in full the advance and sundries, as well as the marketing and publicity costs of ‘establishing’ the artist. Only after the loan was sunk, could an artist earn royalties on the sound recording that originated the advance. The Bowie Bonds put a crack on that structure.

Debt Financing

To understand the mechanism of Bowie’s transaction some perspective is needed. Stocks and bonds are the financial pillars of a modern economy. When a company issues stock, it sells ownership shares to raise money. No fixed schedule of payment on principal or interest is expected, but this so-called equity investment depends on good profit returns for the buyer of stock. Of course, not every business wants to sell a controlling stake. In that case, debt financing is the alternative. Debt financing can be done in two ways, either by taking a loan from a bank or by issuing bonds.

Bank loans tend to be expensive and the amount of financing involved is limited. Not so bonds, which help raise cash for municipalities and cities, corporations, and the federal government (the largest borrower of all). In general, a bond is just a promissory note of payment paid to bondholders in a stipulated period of time, with periodical fixed interest rate payments and a guarantee that the full amount of the principal is going to be returned at maturity.

Individuals can exceptionally become bond issuers if they have an attractive enough pool of assets they can securitize to back up the bonds. This was the case of Bowie. Moreover, one of the reasons bonds are so attractive as a financial instrument is that they can be liquidated at any time after purchase: unless the issuer defaults, which is rare, institutions or retail investors can always recover their loan if they themselves need cash at short notice. (If the fixed interest rate of the bond is higher than the prevailing money market rates at the time of the sale, the bondholder takes a loss: conversely, he gets a premium; if the money market rates are the same as the bond rate, the bondholder recovers the exact amount of the loan).

In 1997, David Bowie met with Bill Pullman, a renowned Wall Street investment banker, to consider some form of debt financing. Bowie was then considered the U.K.’s wealthiest rock artist, with Rolling Stone magazine estimating his net worth at $917 million (an individual’s net worth is the difference between his assets and liabilities; Bowie, however, had a cash-flow problem). A large part of Bowie’s wealth came from his lucrative publishing catalog.

The Paper

Pullman came up with an innovative financial mechanism, the ‘celebrity bond’. This new instrument consisted in Bowie issuing paper backed up by his future royalty earnings from his pre-1990 catalog. Bowie was to forfeit his music rights from twenty-five of his albums for a period of ten years, i.e. for the maturity of the bond. The future royalties of the songs could serve as collateral for the bonds, which were issued at close to 8%, so the forfeited catalog had to raise about $5 million a year — a safe bet at the time.

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Luckily for Bowie, this was right before the financial crash of 2008, which pretty much ended the celebrity bond market. James Brown, for instance, fared badly with his own bond. Finding the payment of interest hard, he asked to convert his old bonds into new ones.

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To understand the mechanism of Bowie’s transaction some perspective is needed. Stocks and bonds are the financial pillars of a modern economy. When a company issues stock, it sells ownership shares to raise money. No fixed schedule of payment on principal or interest is expected, but this so-called equity investment depends on good profit returns for the buyer of stock. Of course, not every business wants to sell a controlling stake. In that case, debt financing is the alternative. Debt financing can be done in two ways, either by taking a loan from a bank or by issuing bonds.

Bank loans tend to be expensive and the amount of financing involved is limited. Not so bonds, which help raise cash for municipalities and cities, corporations, and the federal government (the largest borrower of all). In general, a bond is just a promissory note of payment paid to bondholders in a stipulated period of time, with periodical fixed interest rate payments and a guarantee that the full amount of the principal is going to be returned at maturity.

Individuals can exceptionally become bond issuers if they have an attractive enough pool of assets they can securitize to back up the bonds. This was the case of Bowie. Moreover, one of the reasons bonds are so attractive as a financial instrument is that they can be liquidated at any time after purchase: unless the issuer defaults, which is rare, institutions or retail investors can always recover their loan if they themselves need cash at short notice. (If the fixed interest rate of the bond is higher than the prevailing money market rates at the time of the sale, the bondholder takes a loss: conversely, he gets a premium; if the money market rates are the same as the bond rate, the bondholder recovers the exact amount of the loan).

In 1997, David Bowie met with Bill Pullman, a renowned Wall Street investment banker, to consider some form of debt financing. Bowie was then considered the U.K.’s wealthiest rock artist, with Rolling Stone magazine estimating his net worth at $917 million (an individual’s net worth is the difference between his assets and liabilities; Bowie, however, had a cash-flow problem). A large part of Bowie’s wealth came from his lucrative publishing catalog.

The Paper

Pullman came up with an innovative financial mechanism, the ‘celebrity bond’. This new instrument consisted in Bowie issuing paper backed up by his future royalty earnings from his pre-1990 catalog. Bowie was to forfeit his music rights from twenty-five of his albums for a period of ten years, i.e. for the maturity of the bond. The future royalties of the songs could serve as collateral for the bonds, which were issued at close to 8%, so the forfeited catalog had to raise about $5 million a year — a safe bet at the time.

In fact, at issue, the Bowie Bonds earned a triple-A bond rating from Moody’s, the highest. The economy was in overdrive, as was the music industry, and this kind of financial instrument at the time appealed to investors, many of which were apparently seeking to diversify their holdings. Other musicians would rush in after Bowie: James Brown, Ashford and Simpson, and Iron Maiden, among them, but for much smaller amounts.

Changing Circumstances

The markets, though, did not predict the rise of Internet piracy and the single song format after Apple iTunes, both of which hurt album sales and sound recording royalties. By 2004, Moody’s had cut Bowie’s bond rating to BAA3, only one level above junk. Nonetheless, the original 10-year Bowie bond was paid off in full at maturity in 2007, when Bowie resumed sole ownership of his music and royalties.

Luckily for Bowie, this was right before the financial crash of 2008, which pretty much ended the celebrity bond market. James Brown, for instance, fared badly with his own bond. Finding the payment of interest hard, he asked to convert his old bonds into new ones.
at a lower rate with no avail. Pullman, who had brokered the bonds for Brown, rejected the idea because the bonds were relatively new, the market interest rate did not support such a transaction, and also because it had to be done with the consent of the bondholders which was unlikely.

Reflections

David Bowie, together with Bill Pullman, first put on the table the idea of royalty-backed securitization and made an intangible asset pool of intellectual property ultimately the equivalent of a firm loan collateral, such as a house in a mortgage or a car in a car loan. This could have implications for the future of music and other forms of intellectual property.

Miramax, the film studio, has securitized $250 million of 3.34% notes due 2026 against the future cash flows of its library of films. Also, Bloomberg recently indicated that according to data from Barclays, bonds that are backed up with intangible assets comprised 21% of all U.S asset-backed securitization in 2015 and that segment of the market grew faster than other more traditional sectors.

Bowie’s bonds, in short, have come a long way. But very few artists today would seem to offer the guarantees that would attract outside investors, such as Bowie did. And even if the loan collateral were expanded from publishing and recording revenue to a share in live music receipts, a bet on a celebrity artist would still be risky in a world were the value of that intangible pool of royalties is less clear when technology changes.

Finally, it is good to remember that Bowie was willing to surrender and transfer the rights of the assets that were pertinent to the deal to a separate legal entity not under his control; only under this arrangement, did lenders control the risk, for if Bowie went bankrupt, the securitized asset pool was at least under their control.

In many ways, therefore, it can be said that no artist has tested his name in the markets as amply and successfully as Bowie did – and with such courage.

Festival Turf Wars

By Brooke Adams

The album is no longer the golden child of the industry. In 2014, recorded music dropped in overall sale value by 11%, deepening its decade old downward trend. Moreover, only two albums went platinum that year: Disney’s Frozen and Taylor Swift’s 1989. Adele notwithstanding, the picture does not paint well either for 2015, although the final numbers will not be released by the Recording Industry Association of America for a few months.

Instead, the $6 billion North American concert industry continues to be a bastion of strength, duplicating ticket sales in value since the mid 1990’s (before adjusting for inflation). Live music provides more revenue for artists than ever — and the labels that sign those artists to 360º contracts profit too.

In particular, Live Nation and AEG (Anschutz Entertainment Group), the two giant concert promoters, are doing battle over the latest cash cow: live music festivals. Jim Glancey, head of the Bowery Presents, reports that music festivals have become significantly more profitable than traditional concerts for promoters. Established festivals produce promoter profits of up to $5 to $10 million, with tickets ranging from $375 for general admission to $899 for VIPs. For Glancey, a single artist might instead return, typically, $45,000.

On top of such higher grosses, corporations will pay top money to promote their brand at festivals. Compared to a single event, festivals return good value. This is because there are larger audiences there, more music acts and tastes to cater to, and the message lingers over days, not hours. According to the latest statistics, sponsorship money for festivals, music venues, and tours exceeded $1.5 billion in North America in 2014.

This has to do too with historical changes in the production and consumption of music festivals. The majority of festivals are no longer run by independent producers seeking to make a name by pulling together well-known or new acts, like they did during the first days of Woodstock and the Newport Folk Festival in the 1960s. Festivals are now produced and organized almost institutionally, because the technical and business challenges have increased dramatically. For their part, consumers perceive festivals as a three-day break with a special value proposition: an economic way to sample a roster of about on hundred artists while partying, drinking, and sharing the full experience with like minded fans.

The largest music festival by ticket sales is Coachella, which in 2015 year grossed $84 million from sales of 198K tickets. This is an average price per ticket of $424, an all time record. Coachella is owned by AEG. Live Nation, instead, owns one of the oldest and most popular festivals, Lollapalooza. The brand’s main event is in Chicago, but it also runs in Berlin, Brazil, Chile, and Argentina. Lollapalooza grossed $66 million in 2014, and its average take is probably around $300.

The resurgence of music festivals has led to a corporate buying frenzy. In April, Live Nation cornered the market by purchasing a controlling stake in the Bonnaroo Festival. With the acquisition, Live Nation now owns four of America’s top five festivals as measured by attendance. It must be realized that Live Nation owned no festivals at all as late as 2012. For its part, AEG has added at least twelve major U.S. festivals to its portfolio since 2010 through acquisitions, partnerships, and launches. The company reports that in 2010 only one in ten dollars of its bottom line came from festivals; now it is more like one in three.

AEG and Live Nation are also attracting more talent to their festival shows. The steady flow of attendant fans, year in and year out, guarantees a dependable source of income for artists; individual album releases no longer do that and are, in any case, far more unreliable. But earning the loyalty of the customer, i.e. the attendant music fan, is key to Live Nation and AEG. This makes it an all around win-win partnership with the artist.

There is, for sure, much intra corporate competition, especially to secure new locations. Here is where the concert promot-

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Synch Money and Video Games

By Michael Kostaras

In 2011 the $26 billion videogame industry doubled the film industry and almost tripled the recorded music industry sales of $6.9 billion. Videogames are going places, which is great news for music. As games have become increasingly complex and cinematic in their storytelling, so too have their soundtracks. Borrowing from the playbooks of directors like Quentin Tarantino and the Coen Brothers, more and more games are adding a new atmospheric element to their visuals by using popular songs, all of which require the purchase of a synchronization license. By examining game franchises such as Guitar Hero and Grand Theft Auto, one can understand the varied and innovative ways in which modern gaming is implementing popular music and how it may create more attention and revenue for the music industry.

The world was very different in 2007. The very first iPhone had just been released, Barack Obama had just announced his intention to run for President, and P2P file sharing programs such as Limewire, Frostwire, and Kazaa were at their peak. In the videogame world, a new pop culture phenomenon was ready to emerge exploitation.

The Guitar Hero series successfully created a new market for the song catalogues of rock/metal artists in the 1960’s to the 1990’s. For famed stadium rock band Aerosmith, Guitar Hero was a particularly profitable venture. The franchise, which went so far as to create a tie-in game almost entirely dedicated to the band, “generated far more in revenues than any Aerosmith album ever has,” according to Bobby Kotick, Activision’s and Guitar Hero CEO. “[Aerosmith’s] merchandising, concert sales, and new recording contracts [were much] influenced by their participation in Guitar Hero.”

Dragonforce, whose song “Through the Fire and Flames” is considered the hardest of any game, also saw increased sales. Countless YouTube videos show gamers proving their mettle by demonstrating flawless virtual performances of the tune. This rite of passage for top gamers ensured that the song got much more attention than expected. In a 2008 interview with USA Today, Herman Li, one of the group’s guitarists stated “our CD sales have gone up, and we are high up the charts on digital downloads; as we don’t play commercial music, it took everyone by surprise.” According to the same article, digital sales of the song rose from fewer than 2K sales weekly to 38K by the end of December 2007.

Initially, and as revenues expanded, music videogames like Guitar Hero and Rock Band appeared to milk well the synchronization licenses they used. But synch licenses became an ever growing and important factor in total production costs (though not the only one: the expenses incurred to produce the plastic guitar controller packaged with the games also weighed heavily.) When the market became saturated and sales slowed down, profits fell and costs were reappraised. For instance, Vivendi, the owner of Universal Music Group, made a bid for a controlling stake at Activision, it was accepted partly because it promised to cut synch costs on all UMG catalog.

The record labels have since found additional new avenues for synch income—and no less from the best selling game franchise Grand Theft Auto. Although the majority of the attention surrounding the controversial series focuses on its violence, it is often forgotten that Grand Theft Auto is a pop culture satire at heart. To achieve its aim, the game features a virtual radio as its most effective tool to lampoon media and consumerism in the current age. Synch licenses are needed for this, of course.

In-game radio uses actual popular music to connect with players. With multiple stations in each game, comes the ability to appeal to different genres of music and different listener demographics. For example, Grand Theft Auto: San Andreas takes place in Los Angeles in a satirical version of the early 90’s. It rather fittingly includes a west coast hip hop station named Radio Los Santos. This station plays out a greatest hits mix of popular 90’s West Coast gangster rap tracks, including early hits from N.W.A, Dr. Dre, Snoop Dogg, and others which helped make the soundtrack popular with fans. The radio stations further appeal to listeners by featuring celebrity DJ’s. For example, GTA V’s radio includes a 70’s g-funk station, with Bootsy Collins starring as himself. GTA V also took a new step forward and went so far as to give respected artist Flying Lotus his very own tie-in station that features many of his songs, as well as others that have influenced him.

Due to the private character of the synth negotiations with video gamers, it is difficult to know exactly how much revenue the music industry has made from the GTA series. Nevertheless, buyout fees usually correlate with the production budget, which for GTA V’s stood at $266 million. It was the

(Continued on Page 16)
ing giants turn the heat on against smaller independent festival promoters. Partnerships are aggressively pursued, and when denied, retaliation follows—which in not good for independent festival organizers or, in some instances, the offer of talent.

The story of New York’s independent Governors Ball Music Festival illustrates this. Failing an agreement between AEG and the promoters of Governors Ball, AEG now plans to hold a parallel event at Queens’ Flushing Meadows, Corona Park, in June this year. It is calling it the Panorama Music Festival. The Panorama Festival would take place two weeks after Governors Ball in Randall’s Island.

The problem for the organizers of Governors Ball is twofold: a potential loss of ticket sales as well as more tepid commitments from attending artists. This is because bands that are booked to a music festival are usually prohibited from performing other shows in the area weeks or months around the date of the event, and talent hoping to make Governors Ball will likely reappraise whether it is in their best interest to attend or switch instead to the Panorama Music Festival. Says Jordan Wolowitz, co-founder of Governor’s Ball: “[AEG] is trying to run us out of town. There are plenty of other times to do a big festival in New York. We’re not suggesting that they not do a festival; we’re suggesting they don’t do it two weeks after us.” Wolowitz points out that other major cities such as Los Angeles and Chicago hold several festivals a year, “but none of them are two weeks on top of each other; you’re competing for the exact same ticket buyers. It doesn’t make business sense, frankly for either company. [They’ll] have a diluted lineup, we’ll have a diluted lineup, and the fans lose.”

Technology also seems to bias the market in favor of big money and away from independent promoters. Its presence is found everywhere. Wearable tech wristbands, as used at ID&T’s Tomorrowland Festival, serve as more than entry tickets. They provide the festival with a ‘cashless’ environment, where all transactions for food, drinks, and merchandise are uploaded on the wristband. Moreover, fans are able to link up with one another through UHF radio frequencies that connect when users simultaneously press the bracelet’s heart-shaped button.

Other instances of tech applications in the music festival industry are not hard to find. Both AEG and Live Nation have developed apps for smartphones that allow features like wristband activation, friend finder, shuttle tracker, and meal planners. These apps have replaced paper maps by including things such as a 360-virtual reality experience allowing festival attendees to use the app to roam festival grounds, watch live footage, or relive the experience using Google cardboard. AEG has partnered with ‘hearables’ company Doppler Labs in an exclusive deal for the first use of DUBS Earplugs. The earplugs are specially designed for concerts and were handed out in welcome boxes at this year’s Coachella festival. (Interestingly, VIP’s earplugs had an added feature that simulated what a concert might sound like to them in the future if users did not protect their ears now.)

Finally, the importance of streaming and new media conversations is critical to this growing market. Patrick Dentler, director of marketing at the concert promotion company C3, the largest independent promoter in the U.S., says, “music festivals must live-stream now if they want to be seen as credible and extend the reach of their events”. At present, Coachella is the longest-running live-streamed festival on YouTube, and Live Nation is playing catch up to AEG, but this may not last. Independent promoters are even more behind. Today, fans must get a personal sense of the festival’s atmosphere ahead of time if they are to choose it next year. The homogenized and gated experiences of the late 1960s are, in effect, history.
Living Up To A Brand

By Zoe Mitchell

Artists have always struggled to make ends meet, and more so since the drop in sales of physical product, i.e. CDs, cassettes, vinyl, and VHS music videos. A survey of the Future of Music Coalition claims musicians make, on average, $34K a year. Even if true, this figure does not take into account touring and recording expenses. And the business is not made up of the likes of Rihanna or Kenny Chesney who easily make more than $10M a year.

Still, artists across the board are getting smarter at tapping new sources of revenue. Beyoncé, Adele, and Taylor Swift aren’t making their big earnings just from album sales. For them, like the rest of the industry, albums are becoming as much of a promotional tool as the music video for “Hollaback Girl” was released in March 2005, and by May she was signing with Hewlett-Packard, who at the time was designing a custom-made camera for exclusive sale on its HP’s website. The television commercial for HP was created in the image of the music video for “Hollaback Girl” and even used the same actors and director. This partnership, therefore, may beg questions about the origins of the music itself. In other cases, it does not. In 2011, the Foo Fighters teamed up with Blackberry, a cell phone company, to perform in fans’ garages in eight major cities across the U.S. The so-called Garage Tour was filmed and soon became a documentaty in support of their latest album, Wasting Light, which premiered at SXSW that year.

Current brand partnerships are also based more heavily on the timing of a release, album or otherwise. They link new music with a product being sold. Gwen Stefani’s “Hollaback Girl” was released in March of 2005, and by May she was signing with Hewlett-Packard, who at the time was designing a custom-made camera for exclusive sale on its HP’s website. The television commercial for HP was created in the image of the music video for “Hollaback Girl” and even used the same actors and director. This partnership, therefore, may beg questions about the origins of the music itself. In other cases, it does not. In 2011, the Foo Fighters teamed up with Blackberry, a cell phone company, to perform in fans’ garages in eight major cities across the U.S. The so-called Garage Tour was filmed and soon became a documentaty in support of their latest album, Wasting Light, which premiered at SXSW that year.

Brand partnerships are not exclusive to artists, of course. Chevrolet, Citi®, and Samsung sponsored the 2014 Billboard Music Awards. Both the Foo Fighters’ and the Billboard Music Awards’ partnerships were created by MAC Presents, a well known New York based company whose purpose is to create sponsorship programs between top artists, fashion labels, and brands. The Universal Music Group & Brands company, part of the music recording and distributing giant, serves pretty much the same purpose, and so does Big Synch, a London based company, geared toward making these types of partnerships happen. None of these companies can be more than ten years old.

Others have taken it a step further and started their own record label, getting inside the heartland of music production. Red Bull and Mountain Dew have their own Red Bull Records and Green Label, respectively. Artists signed under them likely surrender more rights than under a simple partnership deal. In this context, The Red Bull Music Academy, founded in 1998, can be seen as protecting the brand’s image by fostering creativity with workshops, lectures, and the offer of free studio time. It is a sign of the times that music fans may not distinguish between music produced by a consumer brand and other, freer-made, music.

Shoe companies have also become new stakeholders in the industry. Rubber Tracks is Converse’s recording studio with locations across the U.S. and additional studio connections in Argentina, Brazil, Italy, and France. Rubber Tracks allows local musicians to record in Converse’s professional studios for free. On the other hand, since 1995 Vans has been sponsoring the longest running traveling tour in the U.S., the Vans Warped Tour (out of which Vans also pays a full scholarship to a student at Berklee College of Music).

Some brand partnerships do not involve an exchange of cash. Paul McCartney, Bruno Mars, Madonna, and Beyoncé played for free at the halftime show of the Super Bowl. There, the consideration given was the 100 million-strong audiences that almost guaranteed a boost in album sales or song streams. For instance, Bruno Mars’ album sales picked up 66,000 units within a week of his performance.

Other partnerships turn out to be disastrous. Beyoncé teamed up with Michelle Obama on the Let’s Move Campaign back in 2010. The campaign was geared towards ending child obesity, but about a year and a half later Beyoncé signed a $50 million deal with Pepsi: as soda is heavily linked to obesity, the Huffington Post was perhaps justified in calling this an example of “blatant hypocrisy”. And Alicia Keys should have not tweeted her partnership with Blackberry on an iPhone; even if we can excuse her, Blackberry dropped her unceremoniously.
A Pan European Licensing Initiative

By Edward Panek

The newly appointed CEO of the ICE Licensing and ICE Services is PRS’s Robert Ashcroft. As he states, “the DNA of this hub has been forged from the same qualities of [our earlier] copyright database, which was in itself born of collaboration and a strong will to solve big problems in the market place. ICE is a truly mass-market proposition that will appeal to the widest cross section of rights holders and digital service providers operating across Europe. ICE builds out the brand with a truly flexible suite of options. It is set to deliver security, speed and reliability very cost effectively to all customers.” Ashcroft shall keep his duties as CEO of PRS in conjunction with this newfound responsibility at ICE. Joining Ashcroft as Commercial Director of ICE Licensing will be Ben McEwen, also of PRS.

As of early 2016, ICE will be performing three major roles in the industry: (i) services, (ii) licensing, and (iii) general operations. ICE Licensing is the amalgamation of the pre-existing licensing services provided by PRS, STIM and GEMA, between whom the rights of 235,000 registered member artists and songwriters are represented. ICE Services offers crucial support to this in the form of intermediary assistance, which covers invoicing, legal support and the provision of business expertise to all of ICE’s licensing clients. ICE Operations will provide online matching and processing services.

At present, Digital Service Providers (DSPs) can choose whether they want to join ICE or not. This will, of course, depend on the particular needs and wants of the DSPs. For instance, if a particular firm is large enough to the extent that they have their own in-house legal and business accounting department, they may opt for not including ICE Services as part of their package.

But why should ICE succeed as a successful ‘pan-European licensing hub’? In particular, what is to stop any of the three co-founding organisations, PRS For Music, STIM or GEMA, from getting the same cold feet GRD members did?

With ICE, there is likely going to be fewer conflicts of interest because there are fewer parties involved, — just three nation states in a part of the globe that shares long standing trade, political, and cultural ties. Security can be more easily trusted for the same reason: no publisher wants to devolve collection of worldwide performing rights to a new multinational body without the right assurances about possible breaches in the basic data, the administration of fulfilment rights, and, fundamentally, the control that is given up in collection operations. Size matters here, and co-operation between the UK, Germany, and Sweden is far more manageable and easier to trust than a wider European Union of stakeholders with North American participation (ASCAP, for example, may have lost confidence in Europe’s ability to handle proper collection of performance rights because many European societies double up on mechanicals).

If ICE succeeds, artists and songwriters will benefit from the speed at which they can get their works licensed to DSPs and then paid royalties. France, Italy, and Spain are not part of ICE so far, but, given the prominence of the founding countries, ICE’s impact in Europe, where there are twenty-eight collection societies, could be a game changer and precipitate new country alliances. From the point of view of the DSPs and other entertainment mediums that need to acquire licenses for songs, film and television studios, a single licensing body will be a godsend.
The Lesson of Blurred Lines

By Peter Alhadeff and Shereen Cheong

In November, Robin Thicke and Pharrell Williams were ordered to pay $5.3 million to the Marvin Gaye estate for infringing Gaye’s Got To Give It Up in their 2013 Blurred Lines single. Thicke and Williams will also have to pay at least half of the song’s future publishing income.

This case is interesting because legal experts have argued that the ruling puts a different spin on copyright law. The court effectively lowered the standard of infringement for musical compositions, making the ‘groove’ of a composition — i.e. the interaction between, say, a bass and a drum in a particular rhythmic pattern — important to its decision-making. The ruling has created anxiety in the songwriting community, which often draws inspiration on grooves. Of course, this more lenient interpretation of copyright infringement brings on the possibility of added lawsuits against songwriters.

The Gaye estate produced an audio mash-up of Blurred Lines and Got To Give It Up to show “concrete musical illustrations of the substantial similarities” between the songs. Further, Gaye’s estate attorney, Richard Busch, invited two musicologists who testified to the effect that there was a similar and identifiable signature phrase in both, that there were examples of common repeating three or four-note melodic patterns, as well as similar hooks, lyrics, and instrumentation. Both experts argued that such similarities ultimately gave a similar kind of feel or vibe to the two songs.

A similar feel or vibe, though, had not so far been interpreted as a violation of copyright law, which maintains that there can be no copyright infringement of an idea, only of the exact expression of that idea. The standard is thus high, for in theory there must be a perfect match up between melody and rhythm, even down to the same notes (a transposition of a phrase note by note into a different key would still be copyright infringement).

Therefore, the verdict in this case was puzzling to the music industry. Similarity leading to an identifiable vibe is not an offense in copyright law. But the case was tried in front of a jury, and the Gaye estate had, above all, to convince the jury. Michael Harrington, a much sought-after figure in such cases, says “as an expert witness, my job is to give extrinsic testimonies, which are important in this case; however, intrinsic testimonies are usually more important for evidence as they come directly from [the jury] who have not acquired any kind of special skills on a particular matter… [The views of the jury] constitute a steady balance for extrinsic testimonies.”

Indeed. And Thicke and Williams may not have impressed the jury well either, another factor in the decision. When asked a simple question about chord structures, Pharrel Williams seemed uneasy. In particular, Robin Thicke was perceived as being less than candid, inconsistent in his statements, and altogether unprofessional. A separation from his wife added to an erratic demeanor in court and he appeared drunk and high on Vicodin in press interviews about the song.

In fact, the jury first awarded the higher sum of $7.3 million to the Gaye estate. When United States District Judge John A. Kronstadt officially rendered judgment, he amended the sum to $5.3 million, but included punitive damages on future publishing monies as well. The final judgment appears to have been more in line with Thicke and Williams’s current and future publishing earnings on Blurred Lines.

By its actions, the jury has arguably called into question the integrity of copyright law as it applies to musical compositions. A musical source of inspiration, leading to the creation of a commonplace feel, is after all, a desirable trait that musicians emulate all the time. Arrangers, especially, should be able to communicate too with their players to produce given results without fear of their employers being sued, and this is especially true in film and TV.

Moreover, if the sound recording of an old composition is going to be privileged now over the actual composition of a tune, the ruling seems to be changing the traditional view of copyright infringement on its head. Hitherto, it was the composition of a song itself that decided infringement cases, not another sound recording whose musical vibe was found to be part of the new composition. “If you’re not influenced by Marvin Gaye, there must be something wrong with you; we hardly realize it anymore”, says Harrington again. He could just as well be talking about James Brown, Chuck Berry, the Beatles, or Michael Jackson—all of them a product of their own influences.

Copyright law should make musical creativity flourish, not stifle. This ruling suggests that unless the causal listener, i.e. the jury in the dock, can separate a well-known musical vibe from the actual composition of a song, copyright law will not work well enough. Defendants, and their attorneys, will have to work harder in court to explain this.

Endnotes
2. Interviewed by Shereen Cheong and Lydia George.

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Moral Rights (cont.)

(From Page 3)

Pretty Woman, their song use could have been stopped. Instead, the case went to the Supreme Court, came down to an issue of fair use, and the ruling was in favor of 2 Live Crew based just on economic rights. Legislators, actually, seem concerned that moral rights can create a critical mass of copyright suits within the court system.

Nevertheless, overall it seems right that the law should protect creators when reproducing or broadcasting music performances. Individuals are at the core of a modern market economy, and sellers, including music creators, cannot be forced to march to market against their will.

Moreover, the principle of a people’s self-determination is at the core of international law and dispute resolution. It is therefore strange that, in the United States, moral rights are such a side story in the intellectual property trade. Freedom of speech and uncensored lyrics are all very good, but without moral rights on the table the rights of musicians are being compromised. MB

Synch Money and Video Games (cont.)

(From Page 10)

most expensive video game ever made, with 241 songs licensed. Music publishers, for sure, made much money too. In the Jan. 2012 edition of Music Week, for example, EMI’s VP of music resources says “over the years, the Grand Theft Auto series has provided EMI Music Publishing with a unique opportunity to get sync placements for some hidden gems in our catalogue that otherwise may not have landed in the world of video games.”

Indeed, as of August 2015, two years after its release, GTA V sold 54 million copies. That means at least 54 million pairs of ears listened to its selection of tracks. The game also sold $800 million dollars in its first 24 hours on the market alone, and grossed $1 billion within its first three days. This makes it the fastest entertainment property in all of history to cross the $1 billion threshold. Album sales for the entire music industry totaled to $15 billion in 2013, averaging about to $1 billion a month. Thus, within four days of its release, Grand Theft Auto V outsold the monthly global recorded music sales.

The success of the Grand Theft Auto and Guitar Hero franchises remind us that the level of interactivity they offer provides users with a deeper connection to the accompanying music. This invariably creates interest and encourages gamers to go research new artists and genres on their own. The music repertoire expands and in turn draws in more attention from gamers.

Recently, the International Federation of the Phonographic Industry, in its Digital Music Report, put the annual increase in worldwide synchronization revenues for 2013-14 at 8%. In a couple of years there could be as much as half a billion dollars from synch money worldwide, just for the record labels. No other sector except streaming seems to be showing such potential—not live music, not music products, and not general music publishing. The thoughtful exploitation of music in video games is therefore adding significant resources to the bottom line of the industry’s key players, especially record labels and music publishers. It is also driving large number of new listeners firmly into the camp of paid-for recorded music, which promotes both live music and sales of instrument gear.