

An Introduction to the Berne Convention

By Alissa Musto



The United States and Canada are two of the 174 member countries in the Berne Convention for the Protection of Literary and Artistic Arts. This international, long-standing copyright policy mandates several minimum protections and rights for copyright owners in an attempt to balance the moral and financial rights of authors with the benefit of the public good. These include the rights of copyright owners to control, authorize or prohibit reproduction, distribution, rental, importation, public performance, broadcasting, communication to the public, making available to the public, translation and adaptation of their work.¹ However, the Convention 1 does not define a universal period of time where owners may exercise these rights, creating a vast discrepancy in American and Canadian copyright law and having serious implications in today's music business.

While Article 1, section 7 of the Berne Convention states that "the term of protection granted by this Convention shall be the life of the author and fifty years after his death," establishing a minimum standard, section 6 confirms that "the countries of the Union may grant a term of protection in excess of those provided by the preceding paragraphs."² The "lifetime plus

fifty years" term was already in practice when the United States joined the Berne Convention in 1988, initially implemented by the Copyright Act of 1976;³ however, the Copyright Term Extension Act of 1998, heavily lobbied by Disney and other lucrative companies risking substantial profit loss from their material entering the public domain, stretched the fifty year period to seventy years.⁴ While benefiting a very small group of the most successful creators, this twenty year extension hindered the American public's access to a rich source of their historical and cultural heritage and did little, if anything, to benefit the ultimate goal of copyright law: promoting the creation of new artistic works.

Copyright Legislation in the United States

While Canada first adopted the Berne Convention in 1886, the United States' reluctance triggered a saga of complex and confusing copyright legislation.⁵ The conditions of pre-Berne laws are still applicable to works created during those eras, despite current policies. Because of a former copyright notice

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MISSION STATEMENT

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

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EDITOR'S NOTE

Welcome to the Fall 2017 issue of The Music Business Journal. Our leading story this issue is on the Berne Convention and how it functions to connect the American and Canadian music industries, as well as the rest of the world. We look to China and the recent developments in online music streaming and the technology giants that rule in that part of the Chinese market.

We explore the uncertain future of SoundCloud and also contemplate the situation regarding the PROs and consent decrees. Turning to the live music sector, we have the first half of a two-part article on the effect of radius clauses on local venues, particularly with the growth of large music festivals as of late. Look for the second half in our next issue.

We continue our research into branding and music with an article on trademark law in music and how pop music stars like Taylor Swift are taking extra steps to protect their own brands as artists. Eminem also gets a mention as we explore the recent move to sell off a part of his royalties, and take a look further into the industry of investing in music.

We close with a reflection on the life and contribution of Tom Petty to the music industry and the work he did on behalf of both music creators and music lovers.

Thank you for reading!



Sincerely,
Alexander Stewart
Editor-In-Chief

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requirement, works published between 1923 and 1977 without the proper copyright notice are subject to the public domain (despite the removal of this requirement when the United States joined the Berne Convention on March 1st, 1989).⁶ Works published between 1978 and March 1st, 1989 that lack copyright notice also fall into the public domain if the work was not subsequently registered within five years; however, works published during this seven period would be entitled to seventy years of protection after the author's death if registration was completed within five years, regardless of whether proper notice was originally published or not.

It is estimated that the required proper copyright notice only accompanied 10% of works, instantly leaving the remaining 90% in the public domain.⁷ In accordance with the Copyright Act of 1909, works created between 1923 and 1963 would be in the public domain if the copyright was not renewed, even if proper notice was given. If a work created during that period was renewed within twenty-eight years of publication, protection was extended to 95 years after the original publication date.⁸ Additionally, United States copyright law differentiates works made for hire or "corporate authorship" from traditional works. Section 101 of the Copyright Act of 1976 defines a work made for hire as "a work prepared by an employee within the scope of his or her employment."⁹ The resulting creation is owned by the employer, not the employee; the commissioner of that work is considered the legal author. Works made for hire in the United States are entitled to the sooner of 95 years of copyright protection from the date of publication, or 120 years from the date of creation.¹⁰

In Canada, works made for hire are not legally recognized and receive the same term of copyright protection regardless of whether the work was created for employment.¹¹ While the employer may own the work and reap the financial benefits of copyright ownership, authorship is still credited to the employee.

Copyright Discrepancies Between the United States and Canada

Canada's fifty year copyright term following an author's death would mean that all works created by authors who died in 1967 will soon be entering the public domain. Under current US copyright law, these works would receive an additional 20 years of copyright protection; however, most works created during this period are still regulated by the Copyright Act of 1909. Assuming proper renewal and notice was pursued, these works would enter the public domain ninety-five years after publication.¹²

While Canada's copyright term results in all of an author's works entering the public domain at the same time, the expiration date would vary in the United States for each individual piece. For example, Otis Redding, wrote and recorded popular hit, "Sittin On The Dock of the Bay" only a few months before his tragic death in 1967.¹³ Two years earlier in 1965, Redding wrote and originally released, "Respect," which would later become Aretha Franklin's iconic performance.¹⁴ Both works created by Redding would enter the public domain in Canada in 2017. However, "Respect" will receive US copyright protection until 2060, and "Sittin On The Dock of the Bay" will not expire until 2062.

While the overwhelming result is an influx of American songs entering the Canadian public domain while still under US copyright protection, this also creates a small loophole of songs in the US public domain that are still protected in Canada. As a result of obstacles mandated by the Copyright Act of 1909, 85% of works created before the Copyright Act of 1976 became part of the public domain.¹⁵ Technical oversights meant even famous works such as "Rockin Robin," a hit song that topped charts with Bobby Day's performance in 1958, entered the public domain.¹⁶ Because the author, Leon Rene, did not die until 1982, "Rockin Robin" would have been protected until 2032, if Rene was Canadian; however, because "Rockin Robin" is in the public domain in the United States, the country of origin, it

is also part of Canada's public domain.¹⁷

Modern Use of Public Domain Material

According to the Berne Convention, when a work enters the public domain, any individual can exercise the exclusive rights previously reserved for the copyright owner. While a particular arrangement or recording of the work may still be protected, the work itself is available.¹⁸

"Take the A Train," the famous jazz standard, was written by Billy Strayhorn in 1939.¹⁹ In addition to being Duke Ellington's signature tune, "A Train" has been covered by dozens of artists over the decades including Oscar Peterson, Ella Fitzgerald, Chaka Khan, Mel Torme, and Chicago.²⁰ Under the ninety-five year protection term, the copyright for "A Train" in the US is due to expire in 2034; however, because Billy Strayhorn died in 1967, it recently entered the public domain in Canada.

Nikki Yanofsky, an accomplished Canadian jazz-pop artist, successfully released her own cover of "A Train" on her 2010 album, *Nikki*.²¹ Because the original work was still protected under Canadian copyright law in 2010, Yanofsky had to obtain permission to initially record, release, and sell her version of this song. Alas, once the underlying work entered the public domain, Yanofsky became the sole author and copyright owner of her own rendition; she can now pitch her arrangement for any commercial performances and ventures in Canada without navigating additional licenses, permissions or fees.²² Per contra, because the US copyright for "A Train" is still in effect, Yanofsky does not have the same liberty to freely solicit or serve as the sole rights holder regarding commercial opportunities in the United States. For example, if an American television series wanted to use her performance or arrangement, permission would still need to be obtained for the underlying work.

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BUSINESS ARTICLES

Trademark: The Importance of Brand-Artist Protection

By Will Lenart and Alexander Stewart

In an industry dominated by corporate sponsorship, discussion regarding music-brand relationships has been a pressing topic of interest. Lately there has been an increase in consumer brands utilizing music and musicians for marketing and promotional efforts, as well as musicians using branding strategies to forward their careers. As this increasingly becomes an essential part of a musician's career, efforts to protect brand identity have become vital.

Taylor Swift has been an industry leader in artist brand-building and has done a successful job of making her brand a widespread icon. Although musicians have been trademarking their band and artist names for years, earlier this month, Swift began further efforts in brand protection by trademarking key phrases from her music. Notably, "this sick beat" from her song "Shake It Off," "nice to meet you, where you been?" from "Blank Space," and "party like it's 1989" have all been trademarked. Additionally, the title of her new album *Reputation*, her latest single "Look What You Made Me Do," and lyrics "the old Taylor can't come to the phone right now" have all been trademarked as well. This is arguably less about monetary revenue and more about protection against callously opportunistic third parties trying to make profit from Swift's brand without the involvement or permission of her entity.

Trademark Law and Music

Going beyond the industry norm of plainly copyrighting a work, and filing for lyric trademark, is additional protection against any kind of theft or infringement. While not completely resistant to direct transgression, the main idea is to scare off anyone even thinking about stealing intellectual property from Swift's brand.

The timing of Swift's trademark filings is significant as it occurred just days prior to Rihanna winning her long-term court case in the U.K. against the popular clothing store, Topshop, for selling unauthorized T-shirts with her face on the front. This case emphasized the idea of "passing off," which specifically exploits an unreg-



istered trademark (in this case, Rihanna's image). Artists are naturally concerned that an image used in this way could be read by the public as an implicit endorsement of their product, and as recorded music sales fall, musicians are strictly managing their licensing rights in order to receive maximum possible revenue from all brand exploitations.

While it appears this move by Swift and her lawyers was to obstruct unlicensed third parties from flooding the market with unauthorized products, if the application is successful, it could open the doors for her to start selling her own exclusive This Sick Beat-themed products, for example.

Although making headline news, Swift is not alone in the move to trademark lyrics. Beyoncé, Britney Spears, and Madonna have all filed trademark applications in the past for their lyrics, but were less successful and eventually abandoned those applications. This often happens because of a lack of uniqueness and brand association in the phrase being trademarked. Song titles, on the other hand, have had more luck with trademark application. For example, David Bowie once trademarked "Ziggy Stardust," which was successful mainly because of its distinctiveness. Madonna, on the other hand, applied to have the title of one of her songs "Material Girl" trademarked, but it was denied due to generality.

Trademarking lyrics can also lead to controversial situations within an artists' fan base because fans are the ones who are most likely to misuse trademarked property. For example, online store Etsy, who manufactures unique and customizable handmade or vintage items, gives fans the ability to sell homemade merchandise of products with lyrics from popular songs, thus giving fans the ability to illegally profit from an artist's brand. Most likely, fans are not intentionally trying to infringe upon

an artists' property, but it is up to the artists to decide how strictly they enforce their trademark. Artists could technically go as far as filing lawsuits against their own fans, but that would be unhealthy for the artist's entity.

In order to keep the proposed trademarks valid, Swift will need to continually prove use of the trademark, whether this be through music, merchandise, or other methods. With new albums to come in the future, it will be of significance to see how Swift and other artists design and distribute products that utilize trademarks from previous work. Even if the product is not selling, artists may still continue to manufacture products with the mark just to uphold the validity. This is a difficult area to navigate in the recorded music industry, even for Swift. After having filed her trademarks for lyrics from her album 1989, the trademark applications were abandoned in January 2017 due to lack of a statement of use.

The possibility that more people follow in Taylor Swift's footsteps is becoming more apparent as more artists want increased protection for their brands. There is recognition throughout the industry that branding is now extremely important for artists today, and with that, more artists seem to be trending towards aggressive branding tactics such as trademarking lyrics. Artists in the modern music industry are constantly focused on shaping their public image the same way businesses do, and with that comes increased protection of intellectual rights. Artists are in fact their own entities, and they must protect their own brands.

America, Mar 04 2015 Business Radio Podcasts North. "Taylor Swift, Trademarks and Music's New Branding Model." Knowledge@Wharton,

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Works For Hire

Because Canadian copyright law does not recognize works made for hire as a special circumstance like the United States does, these works are granted the standard term of fifty years following the author's death. Rodger Penzabene, a songwriter employed by Motown Records, wrote and co-authored several songs in the 1960s for artists like Gladys Knight & the Pips and Marvin Gaye.²³ His most notable songwriting contribution is a series of hits performed by The Temptations: "You're My Everything", "I Wish It Would Rain", and "I Could Never Love Another."²⁴

Because Penzabene created these works as an employee of the record label, each song assumed ninety years of copyright protection from the point of publication, expiring from Motown Records in, respectively, 2062, 2062, and 2063.²⁵ Conversely, in Canada, authorship of these works would still be associated with Penzabene, despite his status as an employee.²⁶ Therefore, because Penzabene died in 1967, very shortly after completing his emotional trilogy, his works will enter the Canadian public domain by the end of 2017.

Practical Music Industry Issues From Differences in Copyright Term

The twenty-year discrepancy in copyright term inevitably creates a rift between the American and Canadian music industries, where the popularity of certain styles, artists, and songs typically run parallel. In the age of the Internet and social media, where music can be shared instantly and virally with anyone in the world at any time, varying copyright terms are neither practical nor enforceable once a work enters the public domain in a different country.

The work of any author deceased prior to 1967 is now in the public domain in Canada. A Canadian website may upload the sheet music to these applicable works and share with the public, and consequentially a Facebook user may upload videos of himself singing one of these works without the threat of account suspension. Simultaneously, a Canadian

fashion company could print T-shirts featuring lyrics from the work, without acquiring permission.

However, what prevents a musician in America from logging onto that Canadian website and printing out free sheet music? What prevents a Facebook user in America from watching their Canadian friend's performance online? What prevents an American consumer from ordering one of these T-shirts and having it shipped to their home in the United States? Despite Canadian public domain, these works are still protected under US copyright law, and their creators are entitled to an additional twenty years of financial benefit.

Conclusion

Protected by the first amendment's commitment to freedom of speech and expression, the United States cannot simply censor the Internet from Canadian webpages. While American anti-piracy legislation can harp down on websites and applications enabling copyright infringement, all of the examples previously discussed adhere to their respective, federal laws.

It is not the responsibility of foreign governments to monitor whether or not online user-generated content complies with US code, in addition to their own. Therefore, international copyright duration should be harmonized to the Berne Convention minimum: the lifetime of the author plus an additional fifty years. The twenty-year extension subject in the United States, along with varying extensions in additional countries, offers minimal incentives for authors to create new works and ultimately does more harm than help in maintaining the goal of copyright legislation. By limiting user access to twenty years worth of cultural and historical progress, the creation of new works inspired and influenced by these prior contributions, is greatly hindered.

Footnotes

¹ "Understanding Copyright and Related Rights." *World Intellectual Property Organization* 2 (2016). http://www.wipo.int/edocs/pubdocs/en/wipo_pub_909_2016.pdf.

² The Berne Convention for the Protection of Literary and Artistic Arts (1971).

³ Moser, David J., and Cheryl Slay. "The History of Copyright." *In Music Copyright Law*. Boston: Course Technology / Cengage Learning, 2014.

⁴ Ibid.

⁵ Ibid.

⁶ Hirtle, Peter B. "Copyright Term and the Public Domain in the United States." Chart. *In Cornell Copyright Information Center*. 2014.

⁷ "The Incredible Shrinking Public Domain." Duke University's Center for the Study of the Public Domain. 2017. <https://law.duke.edu/cspd/publicdomainday/2017/shrinking/>.

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¹¹ Abramovitch, Susan H. "Canada and the United States: Differences in Copyright Law." *Gowling WLG*. July 1, 2013. <https://gowlingwlg.com/en/canada/insights-resources/canada-and-the-united-states-differences-in-copyright-law>.

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¹⁴ Ibid.

¹⁵ "The Incredible Shrinking Public Domain." Duke University's Center for the Study of the Public Domain

¹⁶ Nichols, Tom. *They Never Renewed*. New York, NY: BZ/Rights Stuff, 2010.

¹⁷ Moser, David J., and Cheryl Slay. "Duration of Copyright." *In Music Copyright Law*.

¹⁸ Ibid.

¹⁹ "Take the "A" Train." Smithsonian National Museum of American History. April 4, 2009. http://americanhistory.si.edu/documentsgallery/exhibitions/ellington_strayhorn_6.html.

²⁰ Ibid.

²¹ Chisling, Matthew. "Nikki Yanofsky Biography & History." *AllMusic*. Accessed October 13, 2017. <https://www.allmusic.com/artist/nikki-yanofsky-mn0001964472/biography>.

²² Moser, David J., and Cheryl Slay. "The Derivative and Distribution Rights" *In Music*

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BUSINESS ARTICLES

Consent Decrees and the PROs

By Jessica Starkey and Ashley Cook

The voluntary Consent Decrees that ASCAP and BMI entered into in 1941 were originally made to protect composers, licensees and music consumers while encouraging competition between the two companies. In 2001, ASCAP's consent decrees were revisited by the Department of Justice (DOJ) for modification and amendment. One of the most important additions in the consent decree was in the event ASCAP and a licensee were not able to agree on a rate, then the court would set a reasonable rate for them. ASCAP and BMI both insist that the consent decree, which allows the courts to set a "reasonable rate", is flawed. In the DOJ's 2014 review of the consent decree, ASCAP claimed the term "reasonable" was unclear. Further, ASCAP argued that since it does not have the ability to say 'no' in the market, the use of past agreements between ASCAP and licensees does not reflect a free market price. Moreover, if the court were to allow a partial withdrawal, then the market would more clearly represent what the price of licenses should be.

Sony vs. Pandora

In contrast, Sony and Pandora's public performance license agreement is between a willing buyer and a willing seller, while ASCAP and Pandora public performance licenses are between a willing buyer and court obligated seller. ASCAP argued that it would prefer the set court rate be eradicated from the consent decree, but if that was not possible, defining the term "reasonable" as a public performance license agreement between two parties free to say "yes" or "no," would be acceptable.

In the same DOJ review of 2014, Pandora responded that a partial withdrawal would be an illegal form of price fixing. Pandora explained that when the publishers were allowed to partially withdraw from ASCAP they used copyright infringement as a threat towards Pandora. Complicating the situation was Sony's refusal to give ASCAP permission to give Pandora a song list of Sony's songs. This placed Pandora in a position of agreeing to Sony's prices or being sued in court for copyright infringement. It seems unfair to have an agreement between a threatened buyer and a willing seller.

The pressure that the various parties put on each other suggests the current system is not working as it should. It has been stated that Universal Music and Sony threatened ASCAP during negotiations between ASCAP and Pandora causing ASCAP to reject negotiations. Furthermore, Sony may have breached the confidentiality agreement in the public performance license between Sony and Pandora if they told Universal key points of that agreement. At the same time, ASCAP was expected to know everything about the confidential licenses to negotiate licenses in the future.

The use of either the Pandora and ASCAP public performance license or Pandora and Sony public performance license contradicts a free market. In both licenses, there is a disadvantage to one party. At the same time, making partial withdrawal illegal is taking away the rights of copyright owners. One of the six rights to a copyright is public performance and, in a free market, a copyright owner should be allowed to decide the price of that license or the organization that will decide the price for them.

The Database Solution

Pandora's argument against partial withdrawal seems to be a situation of illegal price-fixing, not caused by the partial withdrawal, but by the control of knowledge. To look at partial withdrawal and call it the enemy is to ignore the underlying problem within the industry. The industry needs a universal database within the U.S. that is free for any individual to use. The music industry, as a whole, has been trying to establish a comprehensive database for the last couple of years. In 2014, the Global Repertoire Database failed because many PROs around the world pulled their songs out of the database, some claiming it was too expensive, while others said it would affect their business model too much.

This year, ASCAP and BMI announced they will work together to make a database of the songs in their catalogs. With major publishers like Sony, UMPG, and others pulling out their entire catalogs from ASCAP and BMI because of the court

ruling on partial withdrawal, there will be a major group of songs missing from this database. Many were surprised to learn that after ASCAP's and BMI's announcement that the Recording Industry Association of America (RIAA) and the National Music Publishers Association (NMPA) were also working on a song database that purposely excluded ASCAP and BMI. RIAA and NMPA insisted that the PROs had proven themselves untrustworthy in developing a song database.

Closing Thoughts

During the last review of ASCAP's consent decree, ASCAP asked for modification on the decree that limits licensing to only public performance. This means ASCAP is not allowed to authorize sync or mechanical licenses. BMI does not have this limitation in its consent decree nor does any other PRO; this leaves ASCAP at a major disadvantage. Interactive internet broadcast radio services must have a license to perform in public, as well as a mechanical license to function. When an interactive internet broadcast service asks BMI for a license, they receive both required licenses. This limits ASCAP's ability to compete at the same level as other PROs around the world. ASCAP has offered to represent different business entities in other countries to negotiate licenses but has been consistently turned down because businesses only want to pay for one packaged license through other PRO's that have this ability.

Although consent decrees may have successfully governed in an older industry, there are two questions that must be asked in today's music society:

- 1) Are consent decrees encouraging or hindering competition between all PROs? and;
- 2) Are they still protecting the interests they set out to protect originally? The answers may vary depending on which decree you are examining, but

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BUSINESS ARTICLES

Soundcloud's Uncertainty

By Alexander Stewart

Berlin-based streaming service SoundCloud has enabled its users to upload, record, promote, and share their original content online since it was founded by Alexander Ljung and Eric Wahlforss in 2007. With a valuation that at one point was expected to surpass \$1 billion, SoundCloud was an inimitable start-up with great potential. As the ingenious combination of an audio streaming service and social network, it provided an online space for creators to upload, share, and discuss nearly any kind of sound. It hosted bootleg remixes, spontaneously recorded Drake tracks, and transmitted podcasts; not to mention the millions of independent music creators sharing their musical voice with the online community. It provided a vast library of content for users with interests outside of the standardized catalogues of streaming giants like Spotify and Apple Music. In February of this year, the company proudly expressed a total of 150 million tracks on the platform, about five times the amount on Spotify or Apple Music.

Now SoundCloud's future is uncertain. In 2014, Twitter expressed public interest in a potential acquisition of the streaming platform, as did Sony the following year and Spotify too, soon after. All found various issues with the state of SoundCloud at the time and decided against the acquisition. Sony was quoted stating the reason being "a lack of monetization opportunities." The company's valuation has sunk immensely and is still sinking. On July 6th, it announced it had laid off 173 employees, which is 40% of its workforce, and shut down its London and San Francisco offices.

Difficulties

Many of SoundCloud's problems began in 2012 with the introduction of reposts, along with the service's surging popularity, began to attract bad actors who flooded the site with what amounted to undisclosed advertising. SoundCloud finally instituted reposting limits in 2015, suspending or even banning users who abused the feature, but it was arguably too late. Years of unchecked abuse had flooded users' SoundCloud feeds with mediocre music pushed through by artists, labels, and blog accounts, much of it paid for.

Furthermore, a very major issue for SoundCloud presented itself in 2012. The launch of Spotify in Europe in 2008 and the United States in 2011 quickly started a race within the music streaming market. Spotify emerged offering new users a six-month free trial of unlimited major label music. For millions of SoundCloud users, Spotify proved irresistible. It also offered record labels the business model that they would come

to insist on everywhere else, this being fully licensed tracks in exchange for guaranteed royalties. And while Spotify has had its own combats with labels, the basic structure of its deals with the labels set a template that SoundCloud was pressured to follow going into their negotiations with the majors.

It took until 2014 for SoundCloud to finally complete its first label deal with Warner. In August of that year, British licensing company Performing Rights Society For Music (PRS) sued SoundCloud for unpaid royalties. This then became a major concern for the company as so much of their content was either a derivative work or uploaded without the rights holder's permission. That December, the Wall Street Journal reported that the company was looking to raise \$150 million with a valuation of \$1.2 billion; however, the round never closed.

During 2014, SoundCloud introduced On SoundCloud and later On SoundCloud Premier, programs similar to YouTube's partner program. On SoundCloud Premier offers members a way to make money from their music directly. SoundCloud never specifically provided the public with details about how these programs work, but it seems to be concerned content-related ads, as well as working with brands to create sponsorship packages, which are then offered to On SoundCloud Premier artists. These programs are still in operation but very little has been shared about their success.

In January 2016, SoundCloud was able to raise \$35 million in financing. Along with a round of layoffs later in the year, this transaction pushed the company a little further away from bankruptcy. It also wasn't until 2016 that all the label deals were finally secured, which gave the company the opportunity to introduce SoundCloud Go and Go Plus, a paid monthly subscription that grants users access to all 150 million tracks in the library, essentially designed to compete directly with the music streaming giants.

SoundCloud Go includes the derivative works like remixes and original songs containing samples of popular songs that labels and PROs were finding troublesome, but it was still only about half of the major label content found on Spotify. Many of the big names in popular music including Katy Perry, Rihanna, The Beatles, and Radiohead were not present on the service. Although many of these were later added, to many users, this new Go service was a failure, with many criticizing its confusing interface as a major issue. Furthermore, SoundCloud was



a latecomer to this ferociously competitive streaming music space and with a selection of services that offered no real differentiation from that of Spotify and Apple Music.

The SoundCloud Go subscription went on to shift the primary focus of the company away from what really made them successful in the first place. SoundCloud's embrace of the major labels had the side effect of dispiriting the remix culture that had originally helped the site grow and thrive. Though a content identification system had technically been in place since 2011, SoundCloud began to enforce it much more severely once deals were in place with labels. Suddenly, long-time accounts were being suspended, tracks were being removed, and copyright infringement "strikes" were being issued. Artists that were issued strikes had little recourse and were often directed to take their problem up with the original rights holders.

There are still possibilities for acquisition or further funding that could save the company. Ljung wrote in a blog post earlier in the year that the company raised \$70 million in debt this past March to stay in operation while it pursued a reported \$100 million in additional investment. It has yet to secure that investment and is once again rumored to be looking for a buyer. There has even been talk of an IPO for SoundCloud in the future; however, this seems very unlikely at this point in time.

Closing Thoughts

In a music era dominated by steaming giants such as Spotify and Apple Music, SoundCloud has been a start-up in stagnation. Though the company found substance with the major labels and was able to launch a subscription as an attempt to compete in the

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BUSINESS ARTICLES

Investing in Individuality

By Ashley Cook

New investment opportunities are arising in the contemporary marketplace for music fans and investors. Enabled by the positive market turnaround streaming has brought upon the industry, artists are selling shares in their own businesses via royalties. As streaming revenue in 2016 grew a positive 60.4% and digital income now constitutes roughly 50% of global music revenue,¹ artist royalty guarantees appear to be the most stable they have been since the Napster-era, and are growing rapidly. While such an augmentation provides new venture opportunities for individuals seeking to capitalize on future artist earnings,² the state of the music industry might not be as optimistic as it sounds when examined more closely.

Start-up Royalty Flow Inc. is endeavoring to exploit royalty opportunities by providing a marketplace where individuals can buy shares in artists, or more specifically, invest in future artist royalties. Royalty Flow recently purchased a portion of American rapper Eminem's future royalty stream to offer as shares through their site. The company, incorporated in May 2017, made their initial IPO in September via Regulation A+, a title under the Obama-era JumpStart Our Business Start-up (JOBS) Act. Investors can buy shares at \$7.50 each with a 300 per share minimum, a \$2,250 dollar investment.³ The company issued 6,666,666 shares in full, bringing their total offering to \$50,000,000.⁴ Once the company hits their equity goal of \$11 million, they will list on NASDAQ to be publicly traded, and dependent on this crowdsourced funding will purchase either 15% or 25% of Eminem's catalog.

Eminem

Eminem is the first commercial artist the company will offer, though they are seeking to purchase more brand name catalogs. The Bass Brothers, the producers who first signed Eminem and sold Royalty Flow the rapper's royalties, made \$5.1 million dollars last year alone from their controlled Eminem copyrights,⁵ making the rapper's catalog a robust asset as the company enters into the market. The brothers sold their future earnings in Eminem's rights to Royalty Flow for \$18.75 million.⁶

Eminem attracts 18 million listeners a month on Spotify, and his career catalog has sold 172 million copies worldwide. The monies sold to Royalty Flow are derived from the rapper's side projects as well as studio albums released between 1999 and 2013. This includes songs from top-selling records such as *The Marshall Mathers LP* and *The Eminem Show*.⁷

However, according the rapper's label, Interscope Records, Eminem was not consulted in the selling of his royalties and has no connection to Royalty Flow; the Bass Brothers are the sole instigators of such negotiations, as they hold the rights to his early sound recordings.

Publishing Revenue

With music sales on the rise and streaming dominating music consumption, global music revenue is predicted to rise to \$41 billion by 2030, a large increase from \$16 billion in 2016.⁸ Music publishing catalogs are thus accumulating mass amounts of capital. Not only are songwriter shares being assessed at seven to twelve times their royalty gross, but also brand name catalogs are being sold at colossal prices.

Round Hill Music is in the midst of purchasing Carlin Music, which holds the rights to music from artists like Elvis, David Bowie, and others. Additionally, Pink Floyd's publisher, Imagen, was sold earlier this year for \$600 million.⁹

Though investment in prosperous music royalties may appear to be a novel idea, David Bowie pioneered such a practice back in the late 1990s, when the artist issued the first ever celebrity bonds, called "Bowie Bonds." These, valued at \$55 million and backed by Bowie's future royalty income, were bought by Prudential Insurance.¹⁰ The bonds paid a 7.9% interest rate over 10 years; a high investment-grade rating when first issued, considering the U.S. Treasury bond returned 6.4% at that time.

Innovative Investments

Though innovative, the bond tanked to junk status as Internet piracy wreaked havoc on the music industry and

revenues in the early 2000s. Now, facing its first positive economic recovery since illegal downloads, the music business is multiplying with new investment endeavors, but it is not the first industry to invest in celebrities.

Fantex, Inc., an athlete stock exchange platform founded in 2012, works in a similar way. Fantex pays their signed athletes an upfront sum of money in return for a percentage of their future earnings in perpetuity.¹¹ When an athlete is signed, the company must fund the upfront money through their IPO, and if the requirement is not met, then the offer is void. To evade risk, the company has stake in multiple athlete's earnings, and when an investor buys a share, they are actually purchasing stock in Fantex themselves, instead of one individual athlete.

Having stake in multiple individuals dilutes the risk of calamity for both the purchaser and the company, especially when venturing on high-stress activities such as professional athletics. For example, Fantex's debut athlete was supposed to be Arian Foster, the former running back for the Houston Texans; however, he was injured right before his IPO, and the company backed out of the offer.¹² This shows the unpredictable, high-risk business of investing in individuals and demonstrates why it is safer to invest in a company representing multiple entities.

Individuality

Similar to athletes, artists face the same unpredictability due to subjectivity. Due to political or social issues, many artists have lost substantial followings as a result of publicity incidents. For example, in 2003, Grammy award-winning band the Dixie Chicks spoke out against former republican president George W. Bush at a concert, and their fan base sanctioned their career.¹³ Due to this incident, the band lost countless record sales, had a diminishing album tour, and was even boycotted from country radio stations. Had the band issued shares on their future royalty earnings, the stock would have tanked all due to one incident, again showing the delicacy and high risk involved in capitalizing on individuals.

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Investing (cont.)

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While Fantex offered multiple celebrities to invest in, Royalty Flow on the other hand, has yet to provide another artist to balance out the risky investment. Though Eminem has had a lucrative career, today's technology is constantly changing, and recent court cases leave the music industry on the cusp of change.

Spotify's recent lawsuit concerning the distribution of mechanical royalties poses an imperative challenge to songwriters and the issue of today's technology in regards to composition data.

Current Industry

In March 2016, the National Music Publishers Association (NMPA) sued Spotify for failing to pay mechanical royalty fees.¹⁴ This resulted in a \$30 million settlement for the NMPA and its members, but other songwriters sought further impartiality.

Individuals seeking to launch a class action lawsuit sued Spotify individually for the same transgression: Spotify contracted Harry Fox Agency to locate and match streamed sound recordings to their affiliated composition copyrights, and Harry Fox failed to do so, resulting in no compensation for songwriters or publishers. By law, if the affiliated composition owner cannot be located, a Notice of Intent must be filed. Harry Fox also failed to warrant such notices.¹⁵

Spotify settled for approximately

\$43 million to be paid out to composition rights holders, but this case provokes the question: is today's music technology accurately structured to administer high influxes of data? And if not, is the industry ready for new investment ventures? Given this instance, the technology appears to be lacking.

There is no transparent way to link a sound recording to its allied composition owner, and with today's monumental streaming activity, is it even possible to regulate such information? Without a proper system setup to synchronize copyright data, and with the largest streaming service patently infringing upon the rights of composition owners, the status of the music industry is dictated by the very technology setup to exploit it.

Closing Thoughts

Although streaming is today's main thoroughfare for music consumption, without the sovereignty of substantial technology, there is no certainty for accurate compensation for artists. Prima facie the music industry is rejuvenating, but when examined more closely, it is far from transparent. In such a business, royalty investment is precarious, especially when it is highly subjective.

As new music investment opportunities surface, it is imperative to be cognizant of the technology guiding artists' success. There are many musicians whose careers have been stable and lucrative, but individuality combined with a paradoxical industry could lead to risky investment.

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BUSINESS ARTICLES

The Significance of Radius Clauses

By Jeff Apruzzese

As physical record sales have declined and streaming has become more popular than ever before, we are seeing a big spike in the live music industry. More specifically, we have seen a large increase in the amount of music festivals in the United States. Music festivals often contain radius clauses which limit where an artist can play outside of that given market. With the growing popularity of major music festivals, the impact large radius clauses are having on local promoters in major cities should be reviewed.

Ever since Woodstock, festivals have changed the way in which music is experienced. More recently, festivals have become something that is part of the American culture, as well as a phenomenon that has dominated the music industry. In 2014, there were more than 60 festivals in the United States alone. One of the many reasons that new music festivals are arising is due to the great potential for concert promoters to make large profits.

Research by Rian Bosse points out that while streaming sites like Spotify and illegal downloads have deflated album sales, they have helped drive the reemergence of festivals. Coachella, arguably the most profitable festival in the United States, is part of a rapid buildup in stationary music festivals across the country, which is reflective of the growth of the live music scene since the millennium. As Chris Parker reports in *The Economics of Music*

Festivals: Who's Getting Rich, Who's Going Broke, from 1999 – 2009, album sales have dropped 50%, while concert sales have filled up 40% of that gap. In that same time period, live music revenues went from \$1.5 billion to 4.6 billion. In 2015, the total revenue for live music and concerts was \$4.3 billion compared to \$7 billion in total music revenues, with more than half being digital. As album sales have dropped, festivals have become one of the most profitable areas of the music business (Bain 2017).

Radius Clauses

With so much money potentially at stake for these giant music festivals, promoters are looking for ways to insure their investment with the artists that they are booking. Bain notes that a common component of major festival contracts is radius clauses. The radius clause puts restrictions on how long the artist must wait before returning to the same market and how many miles outside of that marketing they must go in order to play another show within that time frame. Some festivals are more extreme than others, saying artists are not even allowed to announce another shows until the festival is sold out. Tom Windish is quoted saying, “festivals want to be as exclusive as possible,” which is why Coachella puts a limited time ban on artists performing in Southern California (Walters 2012). Walters argues that as songs and albums become more freely available on the Internet, bands rely more heavily on money from touring.

However, the concept of the radius clause is not new. Knopper (2014) points out that since some of the major festivals like Lollapalooza stay on top of their radius clauses, agencies such as William Morris Endeavor have had to create an entirely new department devoted to making bands' deals with festivals and managing their touring routes. Gwee (2016) addressed the fact that the radius clause for Lollapalooza for example, prohibits artists from performing 300 miles around Chicago, 6 months before the festival and 3 months after. These limitations can negatively impact smaller bands who are not getting paid as much and cannot afford to drive past the radius clause in order to perform. Despite this, many bands will not complain for fear of not being booked at major festivals.

These radius clauses are not set in stone as the language in contracts is often negotiable and can often be worked out; however, the larger the artist, the more restraining the clause may be. The proximity and the size of the show as well as the perceived effect that it will have on the festival's overall outcome will ultimately determine if the radius clause can be broken or not.

Local Promoters

In reviewing the literature, there are numerous articles that discuss the potential effects of what these major music festivals could additionally have on local promoters. As Parker (2013) points out, this can turn into a real ‘David and Goliath’ situation. Independent promoters are going to have a hard time competing with festivals that are run by AEG and Live Nation, who can use their other festivals and club gigs as leverage. Similarly, Bain (2017) addresses the fact that the politics of radius clauses have evolved with the consolidation of music festivals, as Live Nation and AEG have purchased several of the small local promoters. She argues that these consolidations make it feasible to offer artists multiple festivals over the course of the touring season and make it impossible for other promoters to book them.

Enough local promoters have voiced their opinion on this potential artist monopoly, and in 2010, the attorney



Photo Credit: Ananta Arora (@aroraography)

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Radius (cont.)*(FROM PAGE 10)*

general's office investigated Lollapalooza on antitrust grounds. R. Scott Hillers looks at how local music venues are affected by exclusive contracts. He argues that music venues face two possible competitive outcomes from the emergence of these festivals: firstly, the presence of music festivals will diminish the ability of smaller music firms to attract enough popular bands to fill their schedule, leading to closure or entry deterrence. Secondly, he argues that festivals create local demand for the bands and various genres of music involved, leading to a wider base of artists and genres that could be hired.

The appeal and impact of music festivals cannot be denied. Information from Nielsen Music reveals that 32 million people go to at least one music festival every year. In a case study that took place from June 17-28, 2016, by MusicWatch, Inc. on behalf of Eventbrite, it was found that nearly 40% of festival attendees said they went to more music festivals in 2016 compared to 2015, and over half plan to attend even more festivals in 2017. This case study also brings forth some very interesting statistics, including that one out of every five festival attendees spends more on music festival tickets in a year than the other four attendees combined.

These studies show that the demand for music festivals is healthy and flourishing. In order to meet the growing demand, there are even more festivals than ever before, which in turn makes them competitive with their radius clauses. Alas, as Danton (2016) points out, we may have reached our peak in the festival trend. He argues that music festivals no longer have distinct identities, and sites that were once genre specific now blur many, if not all of the genres together. Furthermore, he adds that we have already seen signs of the tipping point as numerous festivals have cancelled.

Closing Thoughts

Do major music festivals with extensive radius clauses have negative effects on local promoters in major cities? In this question, there are two variables: the measured affects upon local concert promoters and the radius clause put in place by major festivals. In Part Two of this Article, which will be in the next edition of the Music Business Journal, the impact expanded ra-

dius clauses have on local concert promoters will be examined. Are local venues closing and promoters being put out of business, or are they able to survive? What strategies or new practices are being put into place in order to maintain a competitive edge for both local concert promoters and festival promoters? What would be the effects if the radius clause was removed entirely? We will delve deeper into answering these questions in the next issue.

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BUSINESS ARTICLES

China and the Monopoly of Music Streaming

By Lesley Evita Lin, Alexander Stewart and Ashley Cook

Despite the immense size of China's music streaming market, Chinese recorded music revenues are minimal. The country made the Top 20 in the IFPI's ranking for global recorded music revenue for the first time in 2014, just below Switzerland. These low incomes are due to many factors including the low fees paid to rights holders, a low adoption rate of subscription models and, perhaps most importantly, the historically weak copyright environment in China's modern era. All of these aspects aid the widespread dilemma of music piracy in China and are intensified by the disparity between the law and actual enforcement.

China's lenient copyright system has reduced the obstacles for non-music affiliated companies to enter the digital music sector. The Chinese search engine, Baidu, obtained its enormous audience partially by offering search returns with links to unlicensed mp3 files, legal due to unprincipled legislation. Other technology companies use the ambiguous copyright laws to create large audiences in non-music affiliated industries. For example, Internet company Tencent began to offer music as a way to entice customers to stay within their social messaging and gaming platform. As the competition for market share intensifies, music becomes a vital player to these businesses as well as other large tech companies competing for capital.

Since the dawn of digital music and streaming, there has been a large increase in efforts by both the Chinese government and various stakeholders in China's music industry to establish and enforce stricter legislation and to increase collection of digital royalties. Organizations like The Music Copyright Society of China and The China Audio Visual Copyright Association have been created to collect and distribute royalties.

Tencent

China is now beginning to establish a music market where people are willing to pay for music. Over the past five years, digital music revenues for the re-

corded industry have nearly quadrupled, amassing to roughly \$195m. Primarily derived from online music streaming, this sum still only represents a small segment of the global total around \$7.8 billion. Even so, streaming has accrued a momentous impact alone, driving positive revenue for the Chinese marketplace.

Streaming's new sovereignty is due to multiple factors, the most prominent being smartphones, which have made it easier than ever to access and subscribe to streaming services. According to the IFPI 2017 Global Music Report, 86% of China's Internet users listen to music via smartphone; however, the streaming market is dominated by one single corporation. Tencent, the most prevalent of China's Internet giants and also creator of popular messaging service, WeChat, owns the top two Chinese music streaming brands, QQ and Kugou Music, each with hundreds of millions of users.

Kugou music has over 450 million active users and is China's largest online music service. QQ Music, named after Tencent's QQ messaging service, is the second largest, accumulating roughly 211 million monthly users. Finally, Kuwo Music, China's third largest platform, has over 100 million active monthly listeners and was acquired by Tencent in 2016. These three companies combined represent over 70% of the music streaming market in China, showing Tencent's explicit monopoly.

Their domination results from many acquisitions executed over the last few years; most importantly, it purchased three international record label catalogues from Warner Music Group, Sony Music, and Universal Music Group. This large purchase enabled Tencent the exclusive right to stream major label music in China. This means that Tencent has the power to choose which songs competitors are allowed to play.

Tencent claims that such exclusivity is required for them to ensure the le-

gitimacy of online music streaming services in China and also to help reduce piracy, but such a monopoly is concerning. Competitor service Xiami, owned by Alibaba, has been rather unsuccessful in incorporating music streaming into their platform mostly because it has failed to strike a deal with Tencent. Nevertheless, with China's booming market, it is possible the major labels will reconsider their deals with Tencent when time for renewal approaches.

Artists

Tencent's market monopoly may also be concerning for artists. Many of these services established their businesses on pirated music before they began to license it. Still to this day, unlicensed "indie" music is prevalent. Independent labels and artists generally get paid little in royalties, if anything at all, because of their weak leverage in negotiations with these giant streaming services.

Compared to Western music services, monthly fees for Chinese streaming platforms are quite low. QQ's Green Diamond service is roughly ten yuan per month, which converts to approximately \$1.47 per month. Other services have similar rates and typically offer packages with features such as free downloads, high quality streaming, and artist engagement opportunities. These low monthly fees yield very small royalty revenues and per-stream rate payouts to recording owners are extremely low; however, these rates may rise if and when copyright laws give increased leverage to rights holders.

Closing Thoughts

There is still a great distance to go toward building an affluent music industry in China. Revenues are comparatively low for such a large market. Copyright laws regarding online music are out-dated and effectively enforcing them is currently ambivalent. Collecting digital royalties is problematic as well, but there still remains potential for greater copyright enforcement and further growth. Although illegal down-



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loads still dominate music consumption in China, streaming service subscriptions are growing vastly with abundant mobile consumption. Given this, the music streaming landscape in China holds potential for the global music industry.

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MUSIC AND SOCIETY

Tom Petty—Standing Ground
1950-2017

By Todd D. Gardner



One of Rock's legends, Tom Petty, is no longer with us, having passed October 2, 2017. We all know him as the frontman for the band, Tom Petty and the Heartbreakers, with such hits as "Free Fallin'," "Runnin' Down a Dream," "American Girl," "Don't Come Around Here No More," "Don't Do Me Like That," and many more. Throughout his career, he collaborated with such notables as Johnny Cash, George Harrison and Nobel Laureate, Bob Dylan. In 2002, his band, Tom Petty and the Heartbreakers, was inducted into the Rock and Roll Hall of Fame. In his career, he sold more than 80 million records worldwide, making him one of the best-selling music artists of all time. Although Petty is rightfully remembered for his passion in music, he is also remembered for his passion in protecting the rights of artists and his concern for fans.

Petty came from humble beginnings in Gainesville, Florida, had blue-collar work ethic and learned to be resolute when he felt he was being taken advantage of. When his first label Shelter Records was sold to MCA, he was confronted with unfavorable contract terms which left him financially strapped. Although this was the norm for artists in the 70s to live off advances given by the labels, this system of advances left many artists in financial difficulty. Petty complained that when his contract was transferred to MCA, he had not wanted to be "bought and sold like a piece of meat." When his new label attempted to enforce the terms of the one-sided contract, Petty did what he had to do to survive. Petty financed the re-

cord himself and refused to release it. When MCA would not relent, Petty filed for Chapter 11 Bankruptcy. This made the MCA contract void and put Petty in a position to renegotiate a more favorable agreement with the label. Petty was a pioneer in taking on the labels and, in subsequent years, other groups would follow suit using Petty's move as a template to stand up for their rights as artists.

In 1981, Petty again stood his ground with his new label MCA when it attempted to raise the price of his new album, *Hard Promises*, from \$8.98 to \$9.98. Petty was not interested in the label making an extra buck at the expense of his loyal fans. Petty told MCA that he refused to release the album and if he was forced to he would name it *Eight Ninety Eight* until the label agreed to take the then standard rate of \$8.98. MCA finally relented. Petty proved that an artist who had a solid fan base was capable of leveling the playing field with the big labels. "Sometimes there's a communications breakdown and, when that happens, you just have to stand up for yourself," Petty told *The New York Times* in 1981.

When it came to live music performance in the late 1990s and early 2000s, Petty did not like that tickets were beginning to become too expensive for his fans who he cared for deeply. Petty moved to cap his concert ticket prices at fifty dollars. "I've had business people come to me several times and tell me, 'your peers are charging much more and you should too,'" Petty told the *Chicago Tribune*

in a 1999 interview. "And I just think it's not a good idea. We ought to try to keep this music affordable. . . . I know when I was a teenager I could not have remotely afforded these prices. I just don't think it's worth that much, for one thing, and we don't need the money that badly. We're making a nice wage."

Although Tom Petty will be greatly missed, his music will continue on to be celebrated as a Rock and Roll gold standard. Equally true is that his legacy will stand for a man that was never afraid to take on excess power and to be a protector of the fan.

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Soundcloud (cont.)

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market, this came at the cost of a huge opportunity by losing sight of what made it unique in the first place; serving as a listening platform for non-label controlled content. Many very successful artists today owe their success to SoundCloud. Artists like Lorde, Post Malone, Don Monique, as well as a large percentage of the hip-hop scene today all started their musical endeavours on the streaming platform. Once with the aspiration to become the YouTube of sound, the Berlin-based company has fought to remain viable, challenged by an unproductive business strategy, management problems, and a tenacious music industry.

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