

## The Value of Tidal

By Erin Brick



Before celebrity hip-hop mogul and businessman Jay Z came along, WiMP and Tidal hardly made an impact on music streaming. The two services are now operating under the name Tidal after Jay Z bought their Norwegian parent company Aspiro for \$56.2 million. The new Tidal apparently offers a catalog of over twenty-five million songs, seventy-five thousand music videos, and an arsenal of editorials and interviews by established music journalists.

This is a subscription only ad-free service with a \$9.99 per month plan of Spotify type audio quality (320 kbps) and a \$19.99 per month premium tier of high-fidelity audio and video streaming (1,411 kbps). It is available in thirty-one countries across Europe, North America, and Southern Africa and in the coming months is expected to be available in Poland, Australia, Hong Kong, Qatar, U.A.E., and Germany. Whether or not the hi-fi option will make a difference to consumers is an open question, but the service has seen support from celebrity stakeholders Beyoncé, Madonna, Kanye West, Arcade Fire, Deadmau5, Jack White, and others: their music appeals to a broad base of fans and cover the majority of today's popular genres.

The launch of Tidal, on March 30th, was accompanied by a live feed video that featured the artist stakeholders themselves coming together in New York. #TIDALforALL trended on social media and the attending celebrities changed their avatars to a bright

cyan-blue in support (see the picture above). Thousands of fans logged in. Thus far, Tidal can claim nearly six hundred thousand paid subscribers, which, as a matter of fact, pales in comparison to Spotify's fifteen million and Deezer's six million.

### A new contender?

The acquisition, though, is intended to be more than just Jay Z's attempt to enter the streaming market. If the service becomes successful enough, it could very well push the music industry in a new direction. A rising tide lifts all boats—large-scale adoption of a subscription-only platform would likely increase per-stream royalties dramatically. This possibility has prompted artists to put exclusive material on the service to encourage consumers to join. Among these artists is Taylor Swift, whose entire catalog, which was famously pulled from Spotify last fall, is available on Tidal with the exception of her most recent release, 1989. Jay Z told *Billboard*, "People really feel like music is free, but will pay \$6 for water; you can drink water free out of the tap and it's good water, but they're okay paying for it—it's just the mindset right now." Tidal, Jay Z, and others are hoping to turn around the free ad-supported mindset among consumers of digital services.

Aside from the high quality, ad-free audio and videos, another feature of Tidal is a song recognition element similar to popu-

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## MISSION STATEMENT

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

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# EDITOR'S NOTE

In our final issue of the spring semester, our cover story focuses on the on-demand streaming service Tidal. Rapper Jay Z recently launched the company with great fanfare. The event included a team of celebrity shareholders that promised greater transparency and higher royalty payments. If the service manages to live up to its expectations, it could very well change the industry. Many, however, remain skeptical and critical.

The MBJ recently had the opportunity to travel to Austin, Texas, to attend South By Southwest. We explore what the festival is today, and document how it has grown to become an event that draws tens of thousands every year, including the introduction and development of the now massive SXSW Interactive. There, last year, tech startup Lightwave hosted a concert to demo a wristband that monitors audience biometrics and uses the data to create an immersive live experience. We cover that story too, for the new trend in so-called wearable technology will likely impact music performances in real-time.

Like ever, musicians struggle financially. And today, absent recorded music sales, it can be quite a challenge to fund albums and tours. Things could change due to new and generous parameters for equity crowdfunding recently made public by the Securities and Exchange Commission. We detail the SEC ruling that allows the full implementation of the Jumpstart Our Business Startups Act (JOBS). It may open up a tremendous amount of investment in music related projects. In a separate piece we also explore several interesting ways artists can use merchandise to help bring in extra money, with or without JOBS.

Finally, this issue features the first of two thorough articles on the current state of the right of public performance in the U.S. It comes to us from well-known attorney, professor, author, and former ASCAP executive, Todd Brabec. This is a must read on copyright. Also in our law section, we address court histories over a critical topic in the music-making frontier: unlicensed sampling.

Thank you as always for reading the MBJ. To all our graduating writers, we wish you the very best of luck!

Sincerely,



Griffin Davis  
Editor-In-Chief

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## BUSINESS ARTICLES

### The Value of Tidal (cont.)

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lar music discovery application Shazam, that allows users to identify a track being played near them, and then takes them directly to its stream. Tidal also offers song credits with tracks, allowing users to identify producers, writers, engineers and any other contributors in their favorite songs. Rather than journalists and other so-called industry taste makers, Tidal claims playlists are curated by music creators—a branding advantage (Apple made the same claim when they re-launched Beats streaming last fall, but this did not seem to help better market Beats). Lastly, as with many other subscription streaming services, Tidal gives users the ability to listen offline.

However, Tidal's premium subscription fee basically doubles the standard subscription rate and one wonders if there is enough there to justify its steep price. Spotify, for instance, has a well-developed social element to its platform that Tidal does not. In Tidal, users do not interact by 'following' each other, sharing playlists, and seeing what other people are listening to. Tidal is also lacking any sort of desktop app, and its music is available only on a mobile app and a web browser page.

#### The Hi-Fi Market

So just how well will Tidal perform as it targets consumers with a taste for loss-less audio quality? The success of Beats headphone showed just how much consumers are prepared to pay for supposedly high quality product: the reviews were mixed so, arguably, celebrity endorsement seem to have mattered more.

Tidal, moreover, is not the first streaming service to enter the hi-fi market. French streaming service Deezer recently launched its Elite tier, which offers hi-fi streaming, though only through the Sonos brand of speakers, which Tidal has also partnered with. The biggest competition for Tidal is likely to come from either Apple's Beats or the introduction of a high quality listening tier on Spotify. In the latter case, celebrity shareholders and a proprietary song identification engine would not be a sufficient competitive advantage for Tidal.

#### Music or Business

Perhaps the most significant and bold element of Tidal is its supposedly artist friendly approach. Fifteen different musicians own 3 percent stakes in the company and have

pledged to offer exclusive content on the platform. When you add Jay-Z in the mix, musicians would own the majority of Tidal's equity—a significant first in the streaming industry. Usher, one of the initial shareholders, has said that Tidal offers "control over artists careers."

This seems optimistic. Of course, it would be wonderful to see artists have more control over their careers, but the fact of the matter is that for most signed songwriters and any signed artist, their publisher or label owns their works, and controls all licensing and royalty distribution (public performance payments for songwriters excepted). So it is unlikely that Tidal will be able to offer music creators, particularly those who aren't in the very top tier, any sort of additional power over their careers.



Two promises that Tidal could very well follow through on are its promises of greater payment transparency and higher royalty rates. Digital technology makes a tremendous degree of transparency possible, though the industry has largely been hesitant to adopt any sort of transparency driving tools. If Tidal were to adopt such tools, and somehow get the labels and publishers on board, which would be no small task, they could help artists and songwriters gain greater clarity as to the size and source of their royalty payments. In terms of royalty rates, large scale adoption of Tidal, particularly of its hi-fi tier, would dramatically grow the amount of revenue brought in by streaming services, and, assuming this extra money made its way to artists, increased royalty payments would follow. That being said, until the value of hi-fi to consumers is proven, and while "freemium" services exist, it seems a stretch to assume that many of the same consumers who adopted Napster will feel compelled to pay for streaming because they

sympathize with underpaid artists.

Tidal is an exciting new service and the development of a viable digital music marketplace hinges, of course, on the willingness of both developers and music creators to try new platforms. On the other hand, Tidal is a business. Were it to fail, Jay-Z and his celebrity cohorts will likely still do well from a liquidation event with Apple or Google. Who knows, even Spotify might be a buyer. In short, the artists who are currently shareholders of Tidal seem to be thinking, above all, with their entrepreneurial hat. **MBJ**

#### Endnotes

1. Billboard Staff. "Jay Z's Tidal Fully Integrates WiMP Streaming Service." Billboard.com. March 23, 2015. Accessed March 25, 2015.
2. "How Good Is the Sound Quality on TIDAL?" TIDAL. Web. 13 Apr. 2015. <<https://tidalsupport.zendesk.com/hc/en-us/articles/201594722-How-good-is-the-sound-quality-on-TIDAL->>.
3. Billboard Staff. "Jay Z's Tidal Is on a Wave of Expansion." Billboard.com. March 25, 2015. Accessed March 25, 2015.
4. Flanagan, Andrew, and Hampp Andrew. "It's Official: Jay Z's Historic Tidal Launches With 16 Artist Stakeholders." Billboard. March 30, 2015. Accessed March 30, 2015.
5. Bajaj, Vikas. "The Risks of Jay Z's New Venture." The New York Times. March 31, 2015. Accessed March 31, 2015.
6. Gervino, Tony. "Jay Z Talks Tidal, Jimmy Iovine, Rewriting the Music Business Rulebook." Billboard. March 30, 2015. Accessed March 30, 2015.
7. Peoples, Glenn. "New Streaming Service Tidal Joins the Hi-def Trend." Billboard.com. October 28, 2014. Accessed March 25, 2015.
8. Hampp, Andrew, and Glenn Peoples. "Tidal Addresses the Backlash: 'There's So Much More to Do'" Billboard. April 1, 2015. Accessed April 1, 2015.
9. Hollywood Reporter. "Usher on Tidal: 'We're Only Getting Started'" Billboard. April 2, 2015. Accessed April 2, 2015.

## BUSINESS ARTICLES

# Talent, Fans, and Equity Stakes

By Griffin Davis



The Internet has been a catalyst for the democratization of creativity in art. The low-cost, high-reach communication tools it affords its users have allowed creators of all types to bring their works to a global audience, and to communicate directly with that audience. This is well known. But while the Internet's role in the dissemination of creative works cannot be understated, it is by no means the only way in which it has empowered talent. It has also delivered innovative financial practices that depend on micro rather than macro financing. Crowdfunding, for instance, is the gathering of piecemeal contributions by fans, along with the Internet community at large, to pay for creative and artistic projects.

There are three main models here. Each procures finance for a project through pledges or contributions from a mostly anonymous public that is online. But the way they go about it is different.

Rewards based crowdfunding is the most popular model, supported by sites like Kickstarter and Indiegogo. Fans that give money to a project receive in return a gift according to the level of their contribution. For musical campaigns, rewards often range from a CD or download for a contribution in the \$5-20 range, to a private concert by the artist for donations of many hundreds or even thousands of dollars.

Donation based crowdfunding works in much the same way, the main difference being that it does not provide any sort of gift to contributors. Donation based crowdfunding tends not to be used to fund artistic or technological projects, but rather charitable projects like covering someone's hospital bill, or helping to cover a student's college tuition.

The most exciting of the three platforms, however, is equity crowdfunding. In equity crowdfunding, rather than a gift, contributors receive an equity stake in either the project

or the company running the project, allowing the general public to get involved in business not unlike venture capitalists or Wall Street-ers. Equity crowdfunding has yet to realize its full potential in the United States and is awaiting regulatory issues.

### The New SEC Rulings

In the spring of 2012, the Jumpstart Our Business Startups (JOBS) Act, which was intended to increase investment in small businesses by both easing IPO requirements for some existing businesses and inviting equity crowdfunding for startups, was passed by Congress and subsequently signed into law by President Obama. The JOBS Act was meant to help set up the framework for equity crowdfunding. However, when it came time for the Securities and Exchange Commission (SEC) to draft regulations, things slowed down. The SEC was able to implement Title II of the JOBS Act fairly easily, allowing those looking for funding to advertise to accredited investors. It had problems when it came to dealing with non-accredited investors—the demographic that equity crowdfunding aims to tap into. Talks on how to regulate investment by these more vulnerable investors stalled for quite a while, but now it seems that we might be very close to the true launch of equity crowdfunding in the United States.

In March, the SEC announced its Title IV Regulation A+ rules, which directly address non-accredited investors. Under these regulations, companies will be able to draw investment from both accredited and non-accredited investors in one of two investment tiers. Tier 1 allows companies to raise a total of \$20,000,000, and Tier 2 allows for a cap of \$50,000,000. In addition to their fundraising caps, the main difference between the two tiers is that Tier 2 pre-empts some state laws, allowing companies easier access to investment from all across the country. However, while those who go with Tier 1 may face some difficulties reaching investors in certain states, they will not face the same auditing and financial reporting requirements as those who chose Tier 2.

When these rules go into effect in a few months, they will likely open the floodgates, bringing a wave of new investment to small companies all over the country and, by example, likely around the world. While there has been much talk of the massive

role that equity crowdfunding could play in driving growth and development in the tech sector, it could have a similar impact on arts funding, particularly on the way musical projects are financed.

### Equity in Music

While digital technologies have greatly reduced the costs a musical act faces in distributing and marketing an album, they have by no means eliminated them, nor have they eliminated all of the costs associated with producing musical content. While there are of course a number of big players in the electronic music scene whose only investment before fame was a few thousand for a computer and some software, they are still very much the exception. The majority of artists still need to pay for studio time, mixing and mastering, studio musicians if they aren't in a band, and that, which could total thousands of dollars, is just for the production of the music; they will still be faced with advertising costs, merchandise and CD costs, and can probably expect to lose money on at least their first couple tours. The amount of money it takes to make an artist truly competitive, coupled with the fact that many artists are wary of becoming indebted to a label because they cannot recoup their advance, has made crowdfunding, specifically rewards based crowdfunding, incredibly popular among musicians. That being said, in this day and age continued fan engagement is crucial to an artist's success, and, unfortunately, in a rewards based campaign fan engagement can begin and end with their donation. With an equity crowdfunding campaign, however, donors have a vested interest in the success of a project, and are therefore much more likely to remain actively involved in promoting it.

Though the United States is just beginning to bring equity crowdfunding to a wide audience, the funding model has been in existence for several years now in the music industry, though primarily in Europe, through crowdfunding startup Sellaband.

Sellaband functions in much the same way a site like Kickstarter does; the artist has an idea for a project, determines how much it will cost to make it a reality, then sets up promotional tools and markets the campaign to fans. Unlike Kickstarter, Sellaband allows the artist to choose either various tiers of rewards, or a fixed amount of equity in the project to give away to donors, who are called

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## BUSINESS ARTICLES

# Artist Merchandising Made Simple

By Dan Servantes

With recorded music sales in free fall and touring being a very expensive gamble to try to end up in the black, it has never been more crucial for up-and-coming artists to find non-traditional revenue streams to keep their art alive. There are many ways for musicians to make money - private lessons, doing session work, or even writing jingles. However, none of these are actively helping build an artist's career, and the time spent working on those endeavors will ultimately take time away from their own art.

As all artists know, it takes a while to become profitable. Many hours and dollars are spent recording, performing shows for little or no money, and perfecting their craft. Even when money does start flowing in, it can take some time to earn enough to live off of it. Savvy artists may come up with ways to earn extra money using the same tools they already have. Still, it is worth outlining a way forward for artists that are less experienced at monetizing their craft. A word of caution: the following strategies require having at least a small, dedicated fan base. If people are emotionally invested in an artist and their music, there are numerous ways to capitalize on that connection and make fans feel even more special.

### Marker Pens and Notebooks

One of the easiest strategies for an artist to earn additional revenue is to increase the value of items they already sell. Many artists sell CDs, vinyl, and posters. The simple efforts of signing (and personalizing) a handful of each offering can increase the value of the product by as much as 50%. This leads to a significant increase in marginal profit for the artist. Physical items are generally expensive to manufacture and ship. Permanent markers, however, are incredibly inexpensive. The additional revenue generated from signing merchandise can go a long way in covering manufacturing and shipping costs. Moreover, many times there are posters left over after tours or album releases. Once the tour or album release is over, these items become useless. They can no longer be hung in venue windows promoting shows. Signing these posters gives them new relevance as memorabilia items and can increase demand in the product.

Artists can also offer limited merchandise from items they've used in the studio or on stage. Fans have a way of romanticizing the idea of the recording studio or a band on the road. This sentimentality can bring up the value

of an order piece of gear substantially. For example, a notebook used to take notes on different takes, arrangement ideas, or other during the recording session would have a high monetary value to a super fan of the artist. Part of it is the one-of-a-kind exclusivity of the notebook. It is a complement that becomes uniquely tied in the mind of a fan to the recording of a favorite album. The artist may have only paid \$5 for the notebook pad, but to a super fan, it could be worth much, much, more.

For bands that are known as "live acts", something used live could have tremendous value to a fan. A set list that was used on stage, a drum stick used during the encore, and the laminate passes from old tours all have value to fans. These items are commonly discarded after a show or tour, yet represent the opportunity for fans to get an exclusive piece of memorabilia and for the artist to make additional income without spending any money.

### Old Recordings and Specials

Often neglected by artists, unreleased recordings, demos, and live bootlegs have long been considered a treasured find by fans. While these are rare recordings for fans, artists often find themselves with computers full of unrealized demos, iPhone voice memos, unreleased tracks, and live recordings from shows. Occasionally, these recordings find their way onto the Internet and get leaked. Artists can take advantage of these miscellaneous recordings by releasing them as a B-side album. Naturally, only the most dedicated fans will be enticed by this offer, but they will rally behind it and bring in a spike of revenue without the artist having to spend any money on additional recordings.

Offering fans other forms of special treatment is becoming popular. VIP tickets and passes are the most classic example of an experiential offering for fans that works well on many levels. VIP tickets give the fans better seats, the opportunity to meet the band, and perhaps even a chance to listen to a sound check. Except for brief interactions with fans, there is little additional expense and only marginal revenue loss for the aspiring artist.

Similar to VIP passes are studio visits. Just as a VIP pass lets a fan see what goes on behind-the-scenes in a music venue, a studio visit allows a fan to go behind-the-scenes in the studio. This is the most intimate

and vulnerable experience an artist can offer, and fans know this. That means that artists can offer these studio visits at a hefty price, well above the cost of a concert ticket. Studio visits are also a fantastic way to offset the costs of recording in a studio. If an artist has the ability to record in a home studio, income from studio visits is pure profit.

### Face-to-Face Streaming

The advent of streaming technology also brings with it a host of possibilities for artists to connect with their fans. Sites such as Ustream, Concert Window, and Livestream allow artists to stream performances to fans for free, or privately for a charge. Online experiences can also include one-on-one video chats with fans. Skype, Facetime, and Google Chat do that like never before. Now, a fan can pay to have their favorite artist perform a song over Skype, do a Q&A across the country, or get a music lesson covering their favorite songs. This costs the artist nothing other than free time, allows them to build a stronger relationship with their fan, and brings in an additional source of income.

The major concern when employing these strategies is fan fatigue. If a fan has access to this kind of merchandise and experiences consistently, it no longer becomes special. With many of these offerings, exclusivity is key. To avoid fan fatigue, there are a couple ways to release these offerings and make it special for both the artist and fan. The first is through a pre-sale interactive marketing campaign that revolves around a landmark event for the artist such as an album release. Sites such as PledgeMusic, Kickstarter, and Indiegogo are specifically used for pre-ordering and selling exclusive merchandise and experiences for a limited time.



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## TECH NEWS

### Your Heart on Your Sleeve

By William Kiendl

In recent years, the evolution of wearable technology has resulted in an explosion of opportunities in the digital space. Wearable devices such as Google Glass, Apple iWatch, Nike Fuelband, and various other consumer data tracking devices have quickly revealed themselves to be promising tools for the future of mobility and location-based marketing. Wearable technology is expected to have a major impact on society, similar to that of smartphones. According to Berg Insight, wearable smart device sales worldwide are predicted to reach 64m units by 2017.<sup>1</sup> In short, the battle to dominate the wearable technology market is ongoing.

As fans increasingly seek more immersive, interactive live experiences, the value of consumer data tracking and real-time targeting capabilities will play a key role in the development of wearable smart devices. Health and physical activity biometrics are a particular area of opportunity, with companies launching devices such as thermo bracelets that heat or cool your body, and devices that monitor users' physical activity and heart rate levels, allowing users to enhance their exercise experience or more closely monitor a health condition. An estimated 21m wearable devices were sold last year, according to IDC, a research firm; wrist-worn devices, including watches and bracelets, were the majority.<sup>2</sup>

There are also many opportunities for wearable technology in the live music space, though integrating this technology could prove to be a major challenge for the music industry in the next few years. Already a number of startups are working to develop useful wearable devices that can easily be implemented in a large audience situation, with hopes of tapping into the lucrative festival industry. If successful, these devices could spur the growth of industries based on both cultivating consumer data and providing new technological capabilities.

However, there are serious logistical and privacy related concerns that could hinder the growth of wearable technology. The trials and tribulations of Google Glass illustrate the failure of wearable technology's flagship product. Still, if the information can be collected anonymously from the source and there is value in the aggregation of many data points,

wearable technology will surely have its day.

#### History of Wearable Technology

Wearable technology now includes a diverse set of products, watches, wristbands, necklaces, and smart glasses. With the Internet, their success is predicated not just on the real-time information they garner for the users themselves. It is the marketing intelligence they supply sellers that makes them especially attractive to others.

In the pre-Internet era, the concept dates back to the late 1970's when the first calculator watch was released following production of the first hand held calculators by Hewlett-Packard (the slide ruler, possibly the best piece of wearable technology ever, had put men on the moon before that). Devel-



oped by Pulsar Watches, the calculator watch quickly became popular amongst mathematicians and scientists. It entered pop culture after it was worn by Sting on the front cover of the 1983 single, by The Police, "Wrapped Around Your Finger". Tom Hanks wore one in the 2000 film *Cast Away*. Devices with higher functionality like PDAs and smartphones later replaced it.

During the late 2000s, wearable technology experienced growth as Chinese companies introduced the first wristwatches containing mobile phone capabilities, known today as i5 and i6 devices. In 2010, wearable electronics began to incorporate the latest industry standards including the Internet Standards set by the Internet Engineering Task Force, as well as Bluetooth technology. These developments lead to technological advances including the ability for wearable devices to

interface with the wireless personal area network (WPAN) and wireless body network (WBAN)<sup>3</sup>.

Despite such events, it wasn't until Google exhibited the first prototype of Google Glass in 2012 that wearable computing gained notoriety. Originally developed from military research on head-mounted displays, the technology wasn't made available until 2013, and was only offered to a select group of developers deemed "Glass Explorers". Acclaimed producer and audio engineer Young Guru was selected to be one of these explorers, and his input on the device ultimately led to the development of specialized ear buds for Google Glass. Google's streaming service, Google Play All Access, was integrated into the device. In May of 2014, Google released a limited quantity of product to the general public starting at \$1,500. Despite relatively successful sales, it has been discontinued for the time being due to both criticism of the device's functionality and concerns about privacy stemming from its ability to inconspicuously record video. Still, the technology is making an impact on personal and business computing, fitness tracking, and healthcare monitoring where music, of course, is a complement.

#### Wearable Tech Live

In 2012, music producer, iPad DJ, and entrepreneur Rana June launched a startup called Lightwave with the hope of capitalizing on the opportunities wearable technology presents in nightlife and live performance. Lightwave produces a wristband that collects data by measuring audience member biometrics including movement, temperature, and audio levels, and provides real time analytics on the data it collects.

The goal of the Lightwave wristband is to use the data to allow performers and even venues to use audience interest and engagement to alter or improve their offerings, as well as to enable a more interactive, customizable experience for the audience. Lightwave launched its device during South by Southwest Interactive in 2014 as part of a "Bioreactive Concert" that was sponsored by Pepsi. Attendees were given a Lightwave wristband that transmitted users' biometrics wirelessly to their production team. The system then displayed the information on large

## TECH NEWS

### DIY Merch (cont.)

screens and Lightwave iPads for users to interact with and even share via social networks. The team is then able to use these metrics to create elements of the show that drive audience engagement.

For example, they could set up a game in which the audience's average temperature is displayed on screens and the audience is then encouraged to become more active: once it reaches a certain temperature threshold, beverage rewards follow. Similarly they could use the motion sensing capabilities to set up a dance contest in which the most active audience member or group of audience members are acknowledged on screen or rewarded in some way. Rana June, Lightwave's CEO, sees this technology being integrated far beyond interactive parties and cool sponsorships. "Before the experience of performing live, I didn't understand the lack of real-time data available to artists and performers and how static much of the current live performance technologies [were]," she explains. "The underlying goal is to provide deeper, more meaningful insights about what's happening beyond someone with a clicker saying 1,000 people walked in."<sup>4</sup> Being able to provide the event organizer, featured performer, and audience members with all of this information create a vast amount of opportunities in live entertainment space.

Despite the exciting opportunities presented by Lightwave, technologies like this face quite a few obstacles. The first is scalability. While it is easy enough for them to hand out a relatively small number of wristbands at their event, bringing the Lightwave wristband to a large space like an arena would pose issues both in terms of affordability and the ease with which these devices can be distributed and collected. The device also seems to be limited in its genre application. The wristband obviously meshes well with the audience at an EDM show, but the interactive element of Lightwave would seem somewhat out of place in many rock and folk shows, where the audience is looking for a more observational experience. Finally, many concertgoers will likely oppose the idea of having their movement and bodily function tracked for a couple hours. Of course recording the data anonymously can largely assuage these fears, but doing so would limit the scope of Lightwave's interactive elements.

#### Future Implications

Lightwave is not the first company to introduce wearable devices in the live performance industry. In recent years, major music festivals have invested millions in creating new forms of mobile payment and ticketing services for large crowds. Last year, Lollapalooza began offering attendees wristbands that were linked to users credit and debit card information weeks prior to the event. This new form of wearable payment allows concertgoers to purchase food, drinks, and merchandise without the need to carry cash or plastic cards. The wristband also can double as ticketing device, allowing fans easy entrance at crowded festivals. Production company C3 Presents, as well as various concerts and festivals including Governor's Ball and Electronic Daisy Carnival have all begun to implement the use of wearable technology and digital interaction, and have high hopes that soon this will become the standard for other major festivals.<sup>5</sup>

Apple is planning to debut its highly anticipated iWatch in the coming months, and others, including Sony and Samsung have been exploring the market. It seems likely that the technology will develop quickly. Privacy concerns, though, will continue to be a hurdle. The Internet has changed our lifestyle and opened it up ever more to public scrutiny, sometimes without our consent. In the long-term, therefore, the success of wearable technology must depend on a measure of public trust. Its utility will also be key. We justify trade-offs in privacy when we use a smartphone and surrender locational data because the device is so useful – not so yet with wearable technology. **MBJ**

#### Endnotes

1. <http://www.wired.com/2014/05/wearable-tech-smartphones-smart-living/>
2. <http://www.economist.com/news/business/21646225-smartwatches-and-other-wearable-devices-become-mainstream-products-will-take-more>
3. [http://www.redorbit.com/education/reference\\_library/general-2/history-of/1113176835/the-history-of-wearable-technology/](http://www.redorbit.com/education/reference_library/general-2/history-of/1113176835/the-history-of-wearable-technology/)
4. <http://www.fastcodesign.com/3031268/infographic-of-the-day/using-science-and-skrillex-to-throw-a-killer-party>
5. [http://www.psfk.com/2014/07/wearable-concert-tech.html?utm\\_content=buffer98d0&utm\\_medium=social&utm\\_source=twitter.com&utm\\_campaign=buffer#!950n8](http://www.psfk.com/2014/07/wearable-concert-tech.html?utm_content=buffer98d0&utm_medium=social&utm_source=twitter.com&utm_campaign=buffer#!950n8)

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#### Flash Sales

Another option is a flash sale. Unannounced and only available for a brief amount of time, flash sales are a great way to push unique and discounted products to fans and keep them on their toes, waiting for the next one. Direct-to-fan web stores such as Bandcamp and Bandpage are ideal for these events, because they allow the artist to work completely autonomously, with no set time, and no targeted sale amount or restrictions.

There are significant differences in how artists connect with fans during interactive pre-sales and flash sales. Interactive pre-sales allow fans to feel like they are a part of whatever career stage the artist is in. It deepens the connection between artist and fan and allows the fan to become more emotionally invested in the artist's success. The flash sale comes across as more of a favor to the fan. With unique items and special deals, the flash sale is a way to keep fans regularly checking in for updates. What both of these strategies accomplish is conversation. Fans will get excited. They will tell their friends. By doing something out of the ordinary, artists are inspiring their fans, and standing out in a saturated market place.

\* \* \*

Each artist is different and, indeed, the marketplace relates to talent individually. This has not changed and goes back to the dominant era of the record labels: at end of the day, the majors managed a multiproduct roster business. So the way artists will employ some of the methods suggested above today depends on their personality, their own sense of their brand, the point at which they are in their career, and last but by no means least, their connection to their public. It has never been more important for artists to think out of the box and find ways to both earn additional income and make a deeper connection with fans for, alas, reliance on the record labels of old is a thing of the past. **MBJ**

## BUSINESS ARTICLES

SXS<sup>W</sup>'s Anatomy

By Griffin Davis and William Kiendl



Founded in 1987, the South by Southwest Music Conference initially was introduced as a series of events highlighting both the unique location and year-round music scene of Austin, Texas. Austin claims more nightclubs per capita than any other city in the world, and SXS<sup>W</sup> has mirrored Austin's economic growth in the last forty years. Today, businesses of all kinds thrive alongside an emerging finance and technology sector, and this has contributed immensely to the festival's international success.

Austin musicians were disconnected from the rest of the entertainment world, and the original idea of SXS<sup>W</sup> was to create a platform for a wide range of artists and industry intermediaries to collaborate and further develop their careers. Back in 1987 the festival's planners expected to draw around 150 people. They ended up bringing together over 700 and, according to founder Louis Black, "[SXS<sup>W</sup> became] national almost immediately."<sup>1</sup> Now, SXS<sup>W</sup> has gone a step further, with people from all over the world coming to network and share ideas with rising artists, trendsetters, and industry leaders.

Today, receiving an invitation to perform at SXS<sup>W</sup> is the equivalent of winning a Willy Wonka golden ticket. SXS<sup>W</sup> built a reputation of being the premier event for music discovery, and the list of artists whose careers skyrocketed after SXS<sup>W</sup> performance is long: Hanson, The Strokes, Janelle Monae, John Mayer, and Katy Perry, who performed at SXS<sup>W</sup> shortly before the release of her breakout single "I Kissed A Girl."<sup>2</sup> Discovery at SXS<sup>W</sup> Music has not been limited to musi-

cians either. Saturday Night Live alumnus Fred Armisen made his comedy debut at SXS<sup>W</sup> Music in 1998 with the film Fred Armisen's Guide to Music and SXS<sup>W</sup>, in which he posed as a journalist at the festival.<sup>3</sup>

#### SXS<sup>W</sup> Music today

SXS<sup>W</sup> Music is a far cry from what it was in 1987. Attendance has grown to 28,000 in 2014. The 2014 festival also saw performances from 2,371 different artists from more than 50 countries. All of these performances took place across 111 stages located all around the city, though most, including all the major ones, are located within a roughly one mile radius of the Austin Convention Center.<sup>4</sup> A few of the stages are located within the convention center, which serves as the epicenter of SXS<sup>W</sup> and hosts the entirety of the conference portion of SXS<sup>W</sup> Music. The conference is comprised of several hundred events, including panels, networking meet-ups, and one-on-one mentor sessions, that cover music industry issues ranging from data collection and usage to copyright law. The events at the conference feature presenters and panelists from a wide variety of backgrounds, including BandPage founder and CEO J Sider, Nobel Prize winning economist Paul Krugman, and rapper and keynote speaker Snoop Dogg.

While the plethora of available activities makes SXS<sup>W</sup> Music an attractive event, it can also make it quite a daunting one to attend. Official SXS<sup>W</sup> events run from 9 am to around 2 am every day, with the ending time extending to 4 am or 5 am if you include the many unofficial events that take place. There are almost always at least four or five events at any given time,

and often times the number of overlapping events can reach a couple dozen. When it comes to performances, particularly those of some of the more popular acts, attendance generally well exceeds the venue's capacity, resulting in lines that more than fill the rope mazes outside the venue and move at a one out one in rate.

Press passes are usually of little help with these lines, and even the available express passes, called SXXpress, aren't guaranteed to get the owner into a crowded venue. All of this isn't meant to dissuade someone from attending SXS<sup>W</sup> Music, but rather to suggest that any attendee should approach each day with a plan, and, if they want to realize the full value of their badge, which can cost up to \$1,745, they should plan on getting very little sleep. Perhaps the best advice for an attendee when it comes to performances at night is to plan around a venue rather than just choosing all the artists to see, as hopping from venue to venue over the course of the night will be nearly impossible.

Among the most significant features of SXS<sup>W</sup>, and one that has garnered quite a bit of attention in recent years, is the prevalence of branding. In what is by all accounts a major change from the early days of the festival, and even a departure from what it was during the first decade of the millennium, most, if not all of the performances at SXS<sup>W</sup> Music are sponsored by one or more brands. The branding of these showcases works in a few different ways. In some cases, such as with the Berklee



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showcase, the brand rents out either a venue or temporary SXSW stage for the duration of their events, with another brand moving into the same space later that day or the next day. Others, like Spotify, Pandora, and YouTube rent out a venue for the entire week, hosting showcases and parties every day of the week. The pinnacle of branding at SXSW comes in the form of the small village built by The Fader and Converse, appropriately called the Fader Fort. In addition to being full of advertising for Converse and The Fader, the fort, which holds one of the festival's largest stages, features Jack Daniels sponsored bars, Vitaminwater sponsorship for soft drinks, several food sponsors, and even Kia cars.

Branding at SXSW goes far beyond what is inside the venues. Representatives from companies fill the streets surrounding the convention center handing out everything from energy drinks and headphones to smoking paraphernalia and cigarettes. Charmin toilet paper, a sponsor, used the hashtag #tweetfromtheseat to get the attention of your correspondents. While some perks of brand sponsorships, such as free food and drink, are appreciated, the level of branding at SXSW can be quite overwhelming and easily distract from actual performances.

### SXSW Interactive

Introduced in 1994, SXSW Interactive Festival has grown to become one of the most important technology conferences in the world. The event, which originated as a spinoff of the music conference, includes networking sessions, keynote speakers, trade exhibitions, pitch competitions, and a highly competitive startup accelerator program. This year marked the 22nd annual Interactive conference - bringing together in total over 33,000 participants across a diverse range of new media industries. While daytime programming continues to focus on exploring innovation, inspiration, and creativity through hardware demonstrations and new product launches, sponsored evening showcases have become increasingly more popular for those seeking interactive, immersive live experiences.

Historically, the Interactive conference has been widely recognized for its ability to ideate, create, and launch influential technology companies. Over the past two decades, the conference has been instrumental in writing the history of our current digi-

tal culture, as well as in adapting and debating the ideas of the future. SXSW Interactive was the first conference ever to connect some of the earliest web denizens and hackers in a common place. The 2007 Interactive conference helped to grow the then fledgling social media startup Twitter, ultimately helping reshape the way we see social media today. Startups started paying attention, and in 2009, local search and discovery application FourSquare launched as part of a new product series.

In addition to notable product launches, SXSW Interactive is famous for bringing together the world's brightest minds to deliver historic keynotes, some of which have been widely criticized due to their controversial topics and audience interactions. Facebook founder and CEO Mark Zuckerberg's 2008 keynote interview with journalist Sarah Lacy was arguably one of the most notorious. Audience members described the interview as "a train wreck" due to Zuckerberg's failure to address Facebook's privacy concerns and data portability questions.<sup>5</sup> Subsequent years have featured keynotes from major tech figures including Twitter founder Evan Williams, Microsoft senior researcher Danah Boyd, and Spotify founder and CEO Daniel Ek. This year, transhumanist Marine Rothblat, who gained notoriety as the inventor of Sirius XM radio, delivered an impassioned keynote on the future of artificial intelligence and the ability to transfer human consciousness to machines.

SXSW Interactive week introduced a variety of new themes this year, including fashion and wearable technology, health & MedTech systems, global impact of and policy surrounding technology, and Art, Science, and Inspiration exhibitions. When not attending a panel or live event, registered participants can mingle in the Startup Village, explore the robotic petting zoo, or attend mentorship sessions around the city. Despite some of the heated controversies, the unparalleled wealth of knowledge introduced and inventive ideas discussed at the SXSW Interactive Festival are what keep the conference on the forefront of digital creativity and make it an international destination for innovation.

### Discovery at SXSW

Traditionally, SXSW has been categorized as an entertainment attraction for a broad group of creatives to collaborate, share ideas, and build companies and artists. In recent years, the festival has become saturated by the professionalization of big brands and large companies

with major spending budgets. "Increasingly, on the front end of the event, it has more and more facets of a traditional business conference," says Hugh Forrest, director of South by Southwest Interactive. "Business is getting done. Startups are meeting VCs or angels or investors and brand people are talking to brand people"<sup>6</sup>

Today, technology is where much of the interest in SXSW lies, resulting in SXSW Interactive becoming a major hub for investors and startups to connect. The expansion of the festival into a more business-oriented conference this year has predominantly benefited the startup and entrepreneurship community. The organizers of SXSW have nearly doubled the infrastructure available for early stage companies, and even introduced a SXSW Accelerator program aimed at giving startups an opportunity to pitch their ideas to major venture capital firms. Since the program launched in 2009, featured companies have received over \$600M in funding.<sup>7</sup>

However, as SXSW has become a major destination for startup growth and investment, the festival's role in music discovery, which was its initial purpose, has changed dramatically. There has been much discussion in recent days about the value of a SXSW showcase for small bands and artists. Though most performers receive some sort of compensation for playing at SXSW, for small acts from outside the Austin area it is nowhere near enough money to cover the expenses they incur due to travel, accommodations, and food, meaning the value for them is, and has pretty much always been in the amount of exposure they can gain. Unfortunately for these small acts, gaining the attention of fans and industry insiders is incredibly difficult given that they are competing with several thousand other acts, at least five or six of whom are playing at the exact same time as them. Additionally, most SXSW attendees are not deciding which new band they want to check out, but rather are waiting in line to see one of the many major acts, including Tove Lo, The Weeknd, and Chance the Rapper, who all perform on the festival's biggest stages. With all of this in mind, it is probably best for small acts that are looking for the most cost efficient way to build their fan base to forgo a SXSW appearance in favor of a regional tour, or a performance at a

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## LAW SECTION

## The Performance Right Juncture: I

By Todd Brabec



Todd Brabec is author with Jeff Brabec of the bestseller *Music, Money, and Success* (New York, 7th Edn.). The piece was originally published in *Entertainment and Sports Lawyer*, a publication of the American Bar Association, Vol.31, No.4, Winter 2015, pp.1 and pp. 37-42. We will publish the second part of this article, which deals with the sound recording copyright, in the next edition of the MBJ.

Two exclusive rights of copyright are at the heart of the worldwide business of music. They involve musical compositions and sound recordings, the rights of copyright owners and limitations on those rights, and how creators and copyright owners are compensated.

Section 106 of the Copyright Act, in fact, reads as follows:

“Subject to sections 107 through 122, the owner of a copyright under this title has the exclusive right to do and to authorize any of the following:

- (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; [and]
- (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.”<sup>1</sup>

In the world of traditional media—radio and television primarily—music licensing has evolved into a fairly straightforward process. For musical compositions, songwriters,

composers, and music publishers join or affiliate with ASCAP, BMI, or SESAC (performing rights organizations or PROs), which negotiate license agreements for the use of music, collect the fees, and distribute them back to writers and publishers who have performances in specific media. If the PRO and a user cannot come to an agreement as to license fees, courts intervene and determine “reasonable fees” for music use.

In the area of sound recordings, performances on traditional over-the-air radio are exempt from royalties and considered as “promotional” tools to drive sales. A record company’s main source of income, other than record sales, comes from the licensing of master recordings to television series, feature films, and advertising commercials, among other uses.

However, with the onset of the online/digital world the business has become much more complex.

#### Musical Compositions and the PROs

In the United States, there are three primary organizations that represent songwriters, composers, and music publishers on a non-exclusive basis in the negotiation, collection, and distribution of music performance license fees. The organizations are the American Society of Composers, Authors and Publishers (ASCAP, 1914); Broadcast Music, Inc. (BMI, 1939); and SESAC (1930). They are referred to as performing rights organizations

(PROs). The primary sources of license fees are traditional radio, broadcast and cable television, and general licensing (live performance, music in bars and restaurants, etc.).

New media license fees, which include online and digital music services, currently represent a relatively small portion of U.S. domestic music license fees, approximately \$100 million of a total annual U.S. domestic PRO collection of \$1.4 billion. Royalty distributions are made 50 percent to writers and 50 percent to music publishers after operating costs are taken into account, about 12-13 percent in the case of ASCAP foreign and BMI. There is a PRO in practically every country of the world where, via reciprocal agreements with ASCAP, BMI, and SESAC, U.S. writers’ and publishers’ works are represented and paid for when performances occur in foreign territories.

ASCAP and BMI both entered into consent decrees with the government in 1941. Amendments to those decrees were signed with ASCAP in 1950, 1960, and 2001 and in 1966 and 1994 with BMI. One aspect of these decrees that has had a significant effect on the determination of license fees is the existence of a separate “rate court” for ASCAP and for BMI. This comes into play when the PRO and a music user cannot come to a negotiated agreement as to what “reasonable” license fees should be in any given area. The decree allows any party to apply to the U.S. District Court for the Southern District of New York for a determination of interim and final fees. These rate courts have been in existence with ASCAP since 1950 and with BMI since 1994, and have determined fees and license terms for the major traditional media areas of radio and broadcast and cable television, as well as, in recent years, the online music community. It is in these latter “new media” decisions and settlements where most of today’s complex issues have arisen.

SESAC, the smallest of the U.S. PROs, operates on a for-profit basis as opposed to the nonprofit operations of ASCAP and BMI, is not governed by a consent decree with the government, and does not have a “rate court” procedure for license fee adjudications and disputes. Nevertheless, under a recent October 2014 settlement with the Television Music License Committee (TMLC) regarding a class action anti-

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trust suit involving local television stations, SESAC has agreed to a binding arbitration for any future licensing fee disputes with the settlement class that cannot be resolved by negotiation. It was further agreed that SESAC could not interfere with the ability of any affiliate to issue a public performance rights license directly to a settlement class member. A final settlement approval hearing is set for March 2015 in the U.S. District Court for the Southern District of New York.<sup>2</sup>

In the online world of music licensing, the ASCAP rate court has been instrumental in deciding not only what “reasonable” license fees should be but also what is actually licensable by the U.S. PROs. Interim fee and final fee decisions have involved many of the biggest players in the “new media/technology” world and have resulted in license fees significantly below what the PROs and copyright owners were requesting.

To put the online fees into perspective, ASCAP, BMI, and SESAC collected approximately \$1.4 billion in domestic U.S. license fees from radio, broadcast and cable television, and venues where live music is played. Of this amount, approximately only \$100 million was generated from all online/digital uses. An additional \$700 million is received each year by the U.S. PROs from foreign collection societies like PRS, GEMA, SACEM, SIAE, SGAE, SOCAN, APRA, IMRO for performances of U.S. writers’ works performed in foreign countries. A small portion of that money is attributable to online uses. Most publishers, incidentally, collect their foreign country performance royalties directly from those societies as direct members or through sub-publishers.

Commencing with the 2007 AOL/RealNetworks/Yahoo case, rate court filings, hearings, and decisions have involved YouTube, MobiTV, AT&T Mobility, Verizon Wireless, Spotify, Ericsson, and Netflix, among others.<sup>3</sup> A brief summary of some of the most important points of these cases should help in understanding the current status of online performance licensing:

The AOL/RealNetworks/Yahoo rate court case had major worldwide significance, as there was a summary judgment ruling that the downloading of a music file did not constitute a public performance under the Copyright Act—a ruling totally contrary to the laws of most other countries with the exception of Canada.<sup>4</sup> This decision was af-

firmed by the Second Circuit Court of Appeals,<sup>5</sup> with certification denied by the U.S. Supreme Court.<sup>6</sup> The Second Circuit also remanded the fee formula back to the district court for further proceedings.

The 2009 Verizon Wireless rate court case reaffirmed the AOL “no performance in a download” decision in a ruling that stated that the transmission of a ringtone to a cellular telephone customer did not constitute a performance, and that the mechanical ringtone rate of \$0.24 per download was the only appropriate right and compensation involved.<sup>7</sup> The primary issue of the 2009 AT&T case was whether previews of ringtones were to be considered “fair use” rather than licensable performances.<sup>8</sup> The court ruled in favor of ASCAP, and a customer’s previewing of ringtones was therefore licensable by the PROs. An interim 2009 decision regarding YouTube was a good example of the size of court-set “reasonable” music license fees, with an order of \$70,000 a month.<sup>9</sup>

The 2010 MobiTV case involved what a reasonable license fee should be for the delivering of television programming to mobile telephones and audio channels. In this case, the court returned to the early 1990s ASCAP performance licenses with Turner Broadcasting that set a three-tiered license based on the music intensity of the program. The music intensive fee was 0.9 percent of defined revenue, with 0.375 percent for general entertainment and 0.1375 percent for news and sports programming.<sup>10</sup> The Second Circuit affirmed the lower court decision.<sup>11</sup>

All of the aforementioned cases were eventually settled, with additional settlements and agreements entered into with Apple, Rdio, Spotify, Netflix, Hulu, and others. Practically all settlements in this area are confidential.

Two additional rate court cases, DMX and Pandora, involved not only the determination of reasonable license fees but also the role that direct licensing plays in the PRO licensing picture. Under the ASCAP and BMI consent decrees, the agreements that writers and music publishers sign with ASCAP and BMI are nonexclusive—members and affiliates are allowed to directly license their works to a music user and bypass the PRO structures entirely.

DMX is a leading background and foreground music service provider that pro-

vides preprogrammed music for business establishments via direct broadcast satellites or on-premises delivery mechanisms. DMX hired a company to assist and design a direct licensing program with copyright owners that eventually resulted in direct licenses representing over 7,000 catalogs, including one major music publisher, Sony. DMX was requesting from ASCAP and BMI a “through-to-the-audience” blanket license that reflected the DMX direct licenses already obtained as well as those to be negotiated in the future.

In July 2010, the BMI rate court entered a final rate for the blanket license subject to adjustment of DMX’s BMI performances directly licensed.<sup>12</sup> In a separate decision, the ASCAP rate court ruled that ASCAP is required to issue to DMX a blanket license with “carve-outs” for the direct licensing program.<sup>13</sup> Both decisions were appealed to the Second Circuit, which in June 2012 affirmed the district court decisions.<sup>14</sup> The resulting rates significantly reduced the license fees that DMX was paying to ASCAP and BMI.

Pandora is the leading Internet customized radio service and is considered a non-interactive service as opposed to an ondemand/interactive service where the user chooses what he or she wants to hear. Pandora entered into license agreements with both ASCAP and BMI in 2005 and terminated those licenses at the end of 2010 and 2012, respectively. In the case of ASCAP, Pandora applied to the court for a through-to-the-audience blanket license for the period 2011 through 2015. In the case of BMI, Pandora filed an application for a five-year license commencing January 1, 2013.

Based primarily on the small license fees that were awarded by the ASCAP and BMI rate court judges commencing with the AOL/RealNetworks/Yahoo case in 2007, the major music publishers, starting with EMI, later acquired by Sony, notified ASCAP and BMI that they were withdrawing their catalogs for online licensing purposes. The majors felt strongly that they could negotiate more financially acceptable online value deals than the arrangements that had been set by prior rate court decisions and the subsequent settlements emanating from those decisions.

These online media withdrawals

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were accomplished by specific changes in the rules, regulations, and practices of ASCAP and BMI. Upon withdrawing their works, a number of the publishers entered into direct licensing deals with Pandora, in effect creating a system whereby Pandora had licenses with ASCAP, BMI, and SESAC, as well as short-term negotiated direct performance licenses with the major publishers. Discussions were also held between ASCAP, BMI, and the major publishers with a view toward ASCAP and BMI handling the administration of the online licenses negotiated by the publishers.

In response to a motion for summary judgment in September 2013, Judge Cote ruled that a selective withdrawal of new media rights by publisher members could not be implemented without violating the consent decree, and further that the ASCAP repertory subject to that license is all works in ASCAP at the time Pandora applied for a license (January 1, 2011)—not when the final license is arrived at.<sup>15</sup>

In short, an application for a license is treated as a license in effect and in this case no works could be removed by any ASCAP member during the period 2011 through 2015. And when a publisher finally removes works, those works have to be removed for all licensing purposes, not just for online licensing. Any users with license agreements still in effect at the time of the withdrawal could continue to use the withdrawn works up until their specific license agreement expires.

In a similar motion for summary judgment in the BMI case, Judge Stanton allowed the removal of works that occurred prior to January 1, 2013, but ruled that those works could not be licensed by BMI to any others after any existing license agreements expired.<sup>16</sup> If BMI cannot offer those compositions to new media applicants, their availability does not meet the standards of the BMI decree and they cannot be held in the BMI repertory. The BMI-Pandora rate court trial is set for 2015.

To put both judges' "all in or all out" summary judgment decisions in perspective, if one were to remove works from the current \$100 million PRO annual license fee area of the online world, one would be forced eventually to remove those works from the other \$1.3 billion in PRO domestic license fees being generated by traditional media, i.e. radio,

broadcast and cable television, and live music venues. Not to mention the two-year effect that such withdrawals would have on the reciprocal "flow through of money" agreements between foreign collection societies and the U.S. PROs. As a point of reference, it is important to note that practically all new PRO licensing deals with traditional media, like radio and television, include streaming, website music uses, mobile apps, digital and primary broadcasts, mobile and wireless platforms, webcasts, and multicasts.

On March 14, 2014, Judge Cote issued her "determination of reasonable license fees" 136-page decision in the ASCAP-Pandora rate court case.<sup>17</sup> The judge ruled that the appropriate fee for the years 2011-2015 was 1.85 percent of revenue less certain de-



ductions. ASCAP had requested a rate of 1.85 percent for 2011 and 2012, 2.5 percent for 2013, and 3 percent for 2014 and 2015. Pandora had requested a rate between the current 1.7 percent traditional radio rate (Pandora had acquired a small radio station in an attempt to qualify for this rate) and 1.85 percent (the ASCAP form rate in effect for Pandora since 2005).

#### Musical Compositions and Performance Collections

An important issue in the Pandora rate court proceedings, as shown, involved the concept of the divisibility of copyrights, which allows a publisher/copyright owner to make deals with various classes of users for their catalog. Another is the disparity in payments between artists and record companies and songwriters and music publishers for the same type of performance. We turn to this next.

The AOL/ RealNetworks/ Yahoo 2007 court case provided evidence of over

\$30 million paid by these services to the major record companies. Their fees to the PROs were, in comparison, very small. As to Pandora, the company expended in 2013 approximately \$315 million of its total revenue of \$600 million on content acquisition. Of that amount, close to \$290 million went to SoundExchange for artists and record companies, with all three PROs collecting a total of less than \$25 million for songwriters and publishers. As a point of additional reference, total 2013 limited performance right statutory royalties to SoundExchange were \$650 million in addition to significant record company interactive streaming license fees and payments negotiated with the services, whereas combined ASCAP, BMI, and SESAC revenue for all new media uses from all licenses and services was less than \$100 million.

In July 2014, ASCAP, along with Universal Music Publishing, Sony/ATV Music, and EMI Music as intervenors filed an appeal from the two district court opinions with the Second Circuit.<sup>18</sup> The basis of the appeal was that the district court erred in ruling that the amended final judgment of 2001 prohibited ASCAP from accepting partial grants of public performance rights, and that the district court in setting a final license fee ignored recent arms-length relevant benchmark agreements.

As to the "partial grants" prohibition, ASCAP's position was that the consent decree long ago removed any prohibition on the right of members to reserve for themselves the right grant exclusive licensing rights to music users. Further, such a prohibition is in direct conflict with the exclusive rights provided by the copyright law to copyright owners.

As to the issue of ignoring benchmark agreements in the setting of final reasonable license fees, ASCAP pointed out that the Universal Music, Sony/ATV Music, and EMI Music Pandora direct license deals were all in excess of the 1.85 percent court-set fee, as was the 2013 negotiated ASCAP Apple iTunes radio license—all "arms-length willing buyer and willing seller agreements." Further, the Second Circuit, in its 2010 RealNetworks/Yahoo decision, confirmed that a 2.5 percent rate was a valid benchmark even though it vacated the district court's across-the-board application of that rate to all of RealNetworks' and Yahoo's services.<sup>19</sup>

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Accordingly, the current district court erred in ignoring the Second Circuit's guidance in *RealNetworks/Yahoo*, which established that a rate of 2.5 percent revenue (or higher) is reasonable for all-audio, music-intensive digital music services similar to Pandora's.

### Decentralization

The ability of a copyright owner to directly license a work to a music user and bypass the PROs was a major issue in the ASCAP and BMI DMX rate court decisions as well as the current Pandora litigation. Language in both the ASCAP and BMI consent decrees guarantees the right of any member or affiliate to directly license their works to a user. SESAC, as it is not under a consent decree with the government, incorporates language in its writer and publisher affiliation agreements that insures the right to directly license—"publisher retains the right to issue nonexclusive licenses directly to any third person for the public performance in the United States, its territories and possessions, of any work subject to this Agreement."

When songwriters, composers, and music publishers join or affiliate with ASCAP, BMI, or SESAC, they sign representation agreements granting to the PRO the nonexclusive right to license the non-dramatic public performances of their works. Though each PRO contract and governing documents are different as to their terms, length of contract, withdrawal of works and resignation/termination provisions, dispute resolution procedures, payment schedules, distribution rules, and benefits, they all are non-exclusive agreements whereby the writer or publisher can license a work directly. The PROs cannot interfere in any way with this right or the ability to exercise this right.

Language as to the ability to directly license as well as the effect of a direct license has been standard in many types of industry license agreements, including work-for-hire/employee for-hire contracts, for many decades. A sample clause might read:

The performing rights in the composition, to the extent permitted by law, shall be assigned to and licensed by the applicable performing rights organization with said organization authorized to collect and receive all monies earned from the public performance of the composition and to pay the writers and publishers directly. If to the extent it is unlawful for the PRO, or any of its affiliates, to issue

blanket small performing rights licenses or the applicable performing rights society does not from time to time, for any reason whatsoever maintain a regular system of collecting performance fees and/or a third-party licensee (i.e., a television network, independent television station, digital music service, etc.) requires direct licensing of such rights, company and publisher shall have the right to directly license their respective shares of the public performance rights in the composition to such third parties. If the company or publishing designee receives a distribution of earned public performance fees from any source that does not make a separate distribution directly or indirectly to publisher and to composer, then publisher shall be entitled to receive its portion of such fees and composer shall be entitled to receive the writer's share of such fees.

Additional variations of a direct license clause are as follows:

Licensee desires to obtain from publisher a blanket license for all necessary performance, reproduction, and distribution rights implicated by the delivery of programming embodying publisher's catalog, and publisher is willing to grant such right to license on a nonexclusive basis.

The right to publicly perform and to authorize others to perform the composition by means of a media entity not licensed by ASCAP, BMI, or SESAC is subject to clearance of the performing right either from Licensor or from any other duly authorized licensor acting for or on behalf of Licensor subject to good faith negotiations in accordance with established industry customs and practices.

An issue in many agreements is what happens to the writer share when a copyright owner, usually the music publisher, directly licenses a work to a user. Clauses range from "payments to be made based upon the prevailing PRO rates for the specific use," "compensation to be negotiated in good faith," "reasonable fee," "fee subject to arbitration," "a complete buyout with no further compensation or continuing royalties," or "50 per cent of any license fee received."

A further unresolved issue as to an allowable and effective direct license under court or consent decree interpretation involves the situation where a music user (traditional broadcaster, online music service, etc.) contacts a copyright owner directly with the request versus the situation where the

ASCAP or BMI copyright owner approaches the user to negotiate a direct license—a fine distinction but an important one in current litigation and consent decree interpretation.

### Arbitration

In part because of the Pandora decisions, a major development occurred in June 2014 when the Department of Justice (DOJ) announced that it would review both the ASCAP and BMI consent decrees "to account for changes in how music is delivered to and experienced by listeners [and to determine] what modifications would be appropriate."<sup>20</sup> The DOJ allowed a 60-day period for comments from any interested party (music publishers, songwriters and composers, PROs, online service companies, music users of any nature, and the general public). A cross-section of some of the views was illustrative of the issues as well as the diametrically opposed positions of many of the parties.

On the music user side, the National Association of Broadcasters (NAB), the Digital Media Association (DiMA), Netflix, Fox News, the Radio Music License Committee (RMLC), the National Restaurant Association, and the Consumer Electronics Association, among others, submitted comments. The creator/copyright representative side included comments from the PROs ASCAP, BMI, PRS for Music (U.K.), SOCAN (Canada), JASRAC (Japan), and SIAE (Italy), as well as the Society of Composers and Lyricists (SCL), the Nashville Songwriters Association International (NSAI), the National Music Publishers' Association (NMPA), and the Screen Actors Guild-American Federation of Television and Radio Artists (SAG-AFTRA), among others.

ASCAP, in its comments, requested that the rate court be replaced with a faster and cheaper dispute resolution procedure, that ASCAP be allowed to bundle and license multiple rights (the current decree prohibits ASCAP from licensing any right other than performance) and allow partial grants of rights from its members.<sup>21</sup> The arguments centered on the fact that new media users need multiple rights in their business, that publishers need flexibility to manage rights and negotiate contracts terms, and that property rights are divisible, assignable, and licensable either in whole or in part. BMI, which is not prevented from bundling or licensing multiple rights, requested that publishers be allowed to withdraw digital rights and that a binding arbitration model

(CONTINUED ON PAGE 14)

## LAW SECTION

## The Performance Right Juncture: I (cont.)

(FROM PAGE 13)

replace the consent decree mandate.<sup>22</sup>

The Society of Composers and Lyricists (SCL), an interest group for film and television composers and songwriters, was in favor of consent decree changes and expressed concerns that if the major music publishers withdrew completely from ASCAP and BMI, the transparency and accountability of the PRO collective licensing model would be affected, and further that in a bundled rights situation it would be difficult to ascertain the value of the performance right in bundled transactions.<sup>23</sup> Most writers in this field sign “work-for-hire” contracts where the backend performance royalties represent a substantial portion of their income. The 165,000 member organization SAG-AFTRA, the largest labor union representing working media artists, commented that the scales have tipped too far in favor of licensees’ interests over those of artists and that the rate setting process set forth by the consent decrees is inefficient, expensive, and burdensome on the PROs, and if not modified will significantly devalue a writer’s works.<sup>24</sup>

Sony/ATV Music supported amending the consent decrees to allow copy-right owners the ability to limit the scope of the rights they grant to ASCAP and BMI in their musical compositions and to require the PROs to accept those grants; supported an expedited an arbitration process for resolving rate disputes; and recommended that the reviews of the decrees occur periodically to take into account new technology changes and conditions. Sony/ATV was not in favor of allowing the PROs to handle rights other than performing rights, as it was their position that these markets already functioned well and that the introduction of such regulated entities into the market for these other rights would be costly and disruptive.<sup>25</sup>

As to the foreign PROs that submitted comments, widespread concern centered on the belief that the current consent decrees were outdated in today’s world and that changes were essential if music was to be appropriately licensed and compensated. Partial grants of rights and the bundling of multiple rights are commonplace in the foreign marketplace, and dispute resolution procedures are less cumbersome than the U.S. rate court. PRS for Music in the United Kingdom, which receives over \$100 million a year in U.S. performance royalties for its members from ASCAP and BMI, expressed

concerns over the present decrees and stated that it would consider licensing the British repertory directly in the United States rather than through intermediaries if it proved more efficient.<sup>26</sup>

DiMA, a trade organization whose members include Apple, Amazon, Microsoft, and YouTube, stated that the decrees have not harmed ASCAP or BMI financially in terms of the music industry generally, and that the PROs must be subject to oversight as their anticompetitive behavior continues to this day. Further, if the DOJ does allow all the PROs to bundle rights as well as permit partial withdrawals, then substantial oversight must be put in place; songwriters should be allowed to keep their rights with their PRO if that’s what they wanted, regardless of whether the publisher removed the works.<sup>27</sup>

The Radio Music Licensing Committee strongly felt that the decrees were necessary to keep the market power of ASCAP and BMI in check.<sup>28</sup> If publishers were allowed to withdraw from the PROs, they could leverage their outsized market share to extract exorbitant license fees from licensees. Both the National Association of Broadcasters<sup>29</sup> and Television Music License Committee also shared these views. As to Netflix, its position was that the decrees were in place to constrain the PROs market power.<sup>30</sup> It was against allowing partial publisher withdrawals, but if the DOJ allowed them, then conditions would have to be imposed to mitigate any adverse consequences. Finally, the rate court must stay in place though it does need to be streamlined. (Editor’s Note: There has not yet been any resolution on the consent decree issue yet, but it has been widely reported that the DOJ will announce significant changes some time soon.)

**MBJ**

*Will be continued.*

## Endnotes

- 17 U.S.C. § 106.
- See *Meredith Corp. v. SESAC, LLC*, No. 1:09-cv-09177-PAE
- See Todd Brabec & Jeff Brabec, *Online Music Licensing: From PROs, AOL, and AT&T, and the CRB, ENT.& Sports Law.*, Oct. 2011.
- See *United States v. ASCAP*, 485 F. Supp. 2d 438 (S.D.N.Y. 2007)
- United States v. ASCAP*, 627 F.Jd 64 (2d Cir. 2010).
- ASCAP v. United States*, 132 S. Ct.366 (2011).
- See *Cellico P’ship*, 663 F. Supp. 2d 363 (S.D.N.Y. 2009).
- United States v. ASCAP*, 599 F. Supp. 2d 415 (S.D.N.Y. 2009)
- United States v. ASCAP*, 616 F. Supp. 2d 447 (S.D.N.Y.

2009).

10. *re MobiTV, Inc.*, 712 F. Supp. 2d 206 (S.D.N.Y. 2010).
11. *ASCAP v. MobiTV, Inc.*, 681 F.Jd 76 (2d Cir. 2012).
12. *Broad. Music, Inc. v. DMX, Inc.*, 726 F. Su pp. 2d 355 (S.D.N.Y. 2010)
13. *In re THP Capstar Acquisition Corp.*, 756 F. Supp. 2d 516 (S.D.N.Y. 2010).
14. *Broad. Music, Inc. v. DMX Inc.*, 683 F.Jd 32 (2d Cir. 2012).
15. *In re Pandora Media, Inc.*, Nos. 12 Civ.8035,41 Civ. 1395, 2013 WL5211927 (S.D.N.Y. Sept. 17, 2013).
16. *Broad. Music, Inc. v. Pandora Media, Inc.*, Nos. 13 Civ. 4037,64 Civ.3787,2013 WL 6697788(S.D.N. Y. Dec. 19, 2013).
17. *In re Pandora Media, Inc.*, 6 F. Su pp.3d 317 (S.D.N.Y. 201 4).
18. *Pandora Media, Inc. v. ASCAP*, No. 14-1158 (2d Cir. Aug. 4, 2014)
19. See *United States v. ASCAP*, 627 F.Jd 64 (2d Cir. 2010).
20. *Antitrust Consent Decree Review*, U.S. DEP’T OF JUSTICE (June 2014).
21. *Public Comments of the American Society of Composers, Authors and Publishers Regarding Review of the ASCAP and BMI Consent Decrees* (Aug. 6, 2014), <http://www.justice.gov/atr/cases/ascapbmi/comments/307803.pdf>.
22. *Public Comments of Broadcast Music, Inc.* (Aug. 6, 2014), <http://www.justice.gov/atr/cases/ascapbmi/comments/307859.pdf>.
23. *Comments of the Society of Composer & Lyricists* (Aug.6, 2014), <http://www.justice.gov/atr/cases/ascapbmi/comments/307971.pdf>.
24. *Comments of Screen Actors Guild-American Federation of Television and Radio Artists* (Aug.6, 2014), <http://www.justice.gov/atr/cases/ascapbmi/comments/307818.pdf>.
25. *Sony/ATV Music Publishing LLC Comments Submitted to the Department of Justice in Connection with Its Review of the ASCAP and BMI Consent Decrees* (Aug. 6, 2014), <http://www.justice.gov/atr/cases/ascapbmi/comments/307983.pdf>.
26. *Antitrust Division Review of American Society of Composers, Authors and Publishers (“ASCAP”) and Broadcast Music, Inc. (“BMI”) Consent Decrees (“Review”)* (Aug. 5, 2014), <http://www.justice.gov/atr/cases/ascapbmi/comments/307652.pdf>.
27. *Comments of Digital Media Association (“DiMA”)* (2014), <http://www.justice.gov/atr/cases/ascapbmi/comments/307972.pdf>.
28. *Comments of the Radio Music License Committee, Inc. and the Television Music License Committee, LLC* (Aug. 6, 2014), <http://www.justice.gov/atr/cases/ascapbmi/comments/307977.pdf>.
29. *Comments of National Association of Broadcasters* (Aug. 6, 2014), <http://www.justice.gov/atr/cases/ascapbmi/comments/307974.pdf>.
30. *Comments of Netflix, Inc.* (Aug. 6, 2014), <http://www.justice.gov/atr/cases/ascapbmi/comments/307908.pdf>.



## LAW SECTION

## Sampling Without A License

By Chelsea Lockhart



Sampling has been controversial from the very start.<sup>1</sup> Supporters of the practice argue that artists sample songs they love and build on them to create their own sound. It is taking little pieces from a few different sources and making something new out of it.<sup>2</sup> Those opposed to sampling, while possessing mixed opinions about its value as an art form, cite the frequency of unlicensed sampling as a major issue. “Get a license or do not sample” is a famous quote from the ruling in *Bridgeport Music, Inc., v. Dimension Films*, a major case dealing with sampling,<sup>3</sup> and though it is not considered a bright-line rule, this ruling has been used as a precedent in cases dealing with copyright infringement. In the case, the court determined that whether or not the sample was substantially similar or *de minimis*, the part taken has some amount of value.<sup>4</sup> Though the majority of sampling cases have ruled similarly, the issue of *de minimis* and substantial copying, as well as the issue of fair use are still being defined by the courts.

According to Section 501(a) of the Copyright Act, anyone who, without permission, exercises any of the exclusive rights of the copyright owner as provided by §106 through §118, or who imports copies into the United States (in violation of section 602), is infringing on the owner’s copyright.<sup>5</sup> In order to successfully bring an infringement claim, the plaintiff must prove two things: ownership of a valid copyright, and unlicensed copying of the copyrighted work.<sup>6</sup> The former is generally easy to prove by providing a valid copyright registration. The latter can be a bit trickier, and often requires the use of circumstantial evidence, as direct evidence of copying is usually unavailable. Using circumstantial evidence, the plaintiff must prove that the defendant had access to the copyrighted work, and that the new work is substantially similar to the one it samples.<sup>7</sup> In *Selle v. Gibb*, the court held that the Bee Gees’ “How Deep Is Your Love” did not infringe Selle’s “Let it End” because Selle

did not offer sufficient proof that the Bee Gees had access to his song, or that they had been nearby during his few performances.<sup>8</sup>

Conversely, there are many potential defenses to a claim that a sample is infringing, the most notable being fair use. Under the Copyright Act, fair use of a copyrighted work, which includes uses such as criticism, news reporting, education, and research, is not an infringement of copyright.<sup>9</sup> There are four main factors used to determine whether a use falls under fair use: the purpose and character of the use, including whether the use is of a commercial nature; the nature of the copyrighted work; the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and the effect of the use on the potential market for the work and the value of its copyright.<sup>10</sup>

Determination of the third factor, also compared with *de minimis* use, has caused the most issues in modern sampling related cases. If the new work is highly transformative, meaning the sample is unrecognizable by an ordinary audience, it may escape the onus of copyright infringement even though it is an unlicensed, and potentially commercial use.<sup>11</sup> In *Tufamerica, Inc. v. WB Music Corp. et al*, the plaintiff alleged that Jay Z infringed on his copyright by using a sample of the word “oh” on the song “Run This Town,” and that “Run This Town” was substantially similar to the original song.<sup>12</sup> The court held that “oh” was too common a word to warrant copyright protection. The court also held that the samples appear faintly in the background of “Run This Town” and are only barely perceptible to the average listener.<sup>13</sup> The court reasoned that the amount of time a sample appeared in a song is considered when analyzing substantial similarity. Unlike the *Bridgeport Music* court, the judge stated that not every unlicensed copying of a part of a copyrighted work is infringement, and that the plaintiff improperly conflates factual copying and actionable copying.<sup>14</sup> This was the first significant case that disagreed with the ruling in *Bridgeport*.

In contrast, in *Bridgeport Music, Inc. v. UMG Recordings, Inc.*, Bridgeport claimed that UMG’s song “D.O.G. in Me” infringed the copyright to the George Clinton song “Atomic Dog” by copying the phrase “Bow wow wow, yippie yo, yippie yea.”<sup>15</sup> and the court agreed, finding that there was substantial similarity. UMG claimed that the use was intended to be

a tribute to George Clinton,<sup>16</sup> however the court held that there was no evidence backing that claim, such as an acknowledgement in the liner notes of the album.<sup>17</sup>

Both of these cases illustrate the continued discrepancy in rulings in sampling-based infringement cases. The requirements for bringing an infringement claim and the factors analyzed in those claims have proven to be relatively universal, but the viability of various defenses is far less defined, and is evaluated case-by-case. Additionally, the line between *de minimis* copying and a true use is still very much blurred. While it is always nice to have clear-cut rules, we live in a world in which music and the technology used to create it is changing, and loose guidelines with room for interpretation may in fact be optimal for the development of music. MBJ

## Endnotes

1. TED Radio Hour: Why Would More Than 500 Artists Sample the Same Song?, National Public Radio (June 27, 2014), <http://www.npr.org/2014/06/27/322721353/why-would-more-than-500-artists-sample-the-same-song>.
2. All Things Considered: Sampling as a ‘Collage Of Mistakes’, National Public Radio (Nov. 17, 2012), <http://www.npr.org/2012/11/17/165145271/dj-shadow-on-sampling-as-a-collage-of-mistakes>.
3. *Bridgeport Music, Inc. v. Dimension Films*, 383 F.3d 390 398 (6th Cir. 2004).
4. *Id.* at 399.
5. 17 U.S.C. § 501(a).
6. David J. Moser & Cheryl L. Slay, *Music Copyright Law* 183.
7. John S. Pelletier, Note, *Sampling the Circuits: The Case for a New Comprehensive Scheme for Determining Copyright Infringement as a Result of Music Sampling*, 89 *Wash. U. L. Rev.* 1161, 1175 (2012).
8. *Selle v. Gibb*, 567 F. Supp. 1173 (1983).
9. 17 U.S.C. § 107 (2006).
10. *Id.*
11. M. William Krasilovsky & Sydney Shemel, *This Business of Music* 209 (John Gross & Joanthan Feinstein eds., 19th ed. 2007).
12. *Tufamerica, Inc. v. WB Music Corp. et al*, No. 1:13-cv-07874 (S.D.N.Y. Nov. 05, 2013).
13. *Id.*
14. *Id.*
15. *Bridgeport Music, Inc. v. UMG Recordings, Inc.*, 585 F.3d 267 (6th Cir. 2009).
16. *Id.* at 278.
17. *Id.*

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## UPCOMING TOPICS

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## Music Shares (cont.)

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“believers” on the site, based on the size of their contribution. The concept was met with tremendous praise from the likes of Public Enemy’s Chuck D, and Greg Scholl, former CEO of The Orchard. However, though the site has had some major campaigns, including one for Public Enemy, it has mostly failed to live up to expectations, with the largest of its current campaigns having, at the time of writing, only raised €870 (US \$943). While its failure in the rewards based market can likely be chalked up to the dominance of Kickstarter and Indiegogo, its failure in the equity realm is likely due more to the risk involved with investing in musicians.

Despite this challenge, crowdfunding platforms are still looking for a way to make equity crowdfunding a larger player in the music industry. Among them is MIT-based startup TapTape, which has come up with a way to manage risk. The company has teamed up with several prominent indie labels that essentially serve as curators, identifying up and

coming artists that they would like to sign and help develop. They then bring the artist to TapTape and launch a campaign that allows fans to join them in funding the artist’s project, thereby greatly increasing the capital available to the artist. In return, investors get both “The Basics”, a guaranteed reward, such as a CD or shirt, if the campaign reaches its goal, and “The Upside”, a percentage of the profit earned by the project.

Though the label-curated system is likely going to exclude smaller artists, this move is probably for the best, as Sellaband has proven that there is little interest in making an equity investment in an unproven, unsigned artist. Though the service has yet to officially launch, they are already offering “TapPoints”, which can be used as a currency to invest in artists, to 500 of their early users. Better than the points is the possibility of getting involved early with a funding model that could very well change how musical projects and business endeavors of all sorts are financed. <sup>MBJ</sup>

## SXSW (cont.)

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smaller, discovery oriented festival like CMJ Music Marathon. <sup>MBJ</sup>

### Endnotes

- 1.“SXSW History.” SXSW.com. Web. 6 Apr. 2015. <http://sxsw.com/about/sxsw-history>.
- 2.Perkins, Tavon. “15 Artists You Didn’t Know Got Discovered At SXSW.” RantHollywood. 6 Mar. 2015. Web. 5 Apr. 2015. <http://www.ranthollywood.com/2015/03/06/15-artists-you-didnt-know-got-discovered-at-sxsw/>.
- 3.“Fred Armisen – Co-creator, Co-writer, Co-star.” Www.ife.com. Web. 5 Apr. 2015. <http://www.ife.com/shows/portlandia/cast-and-crew/fred-armisen-co-creator-co-writer-co-star>.
- 4.“SXSW Demographics.” SXSW.com. 1 Jan. 2014. Web. 6 Apr. 2015. <http://sxsw.com/sites/default/files/attachments/SXSW-Demographics.pdf>.
- 5.Wallace, Lewis. “SXSW: Zuckerberg Keynote Descends Into Chaos as Audience Takes Over.”Wired.com. Conde Nast Digital, 9 Mar. 2008. Web. 6 Apr. 2015. <http://www.wired.com/2008/03/sxsw-mark-zucke/>.
- 6.Morris, Chris. “SXSW Is Becoming More like a Traditional Business conference.” Fortune. Time Inc., 12 Mar. 2015. Web. 6 Apr. 2015. <http://fortune.com/2015/03/12/sxsw-interactive-2015/>.
- 7.Ibid.