Pay for Play

PAY FOR PLAY

How the Music Industry Works, Where the Money Goes, and Why

LARRY WAYTE

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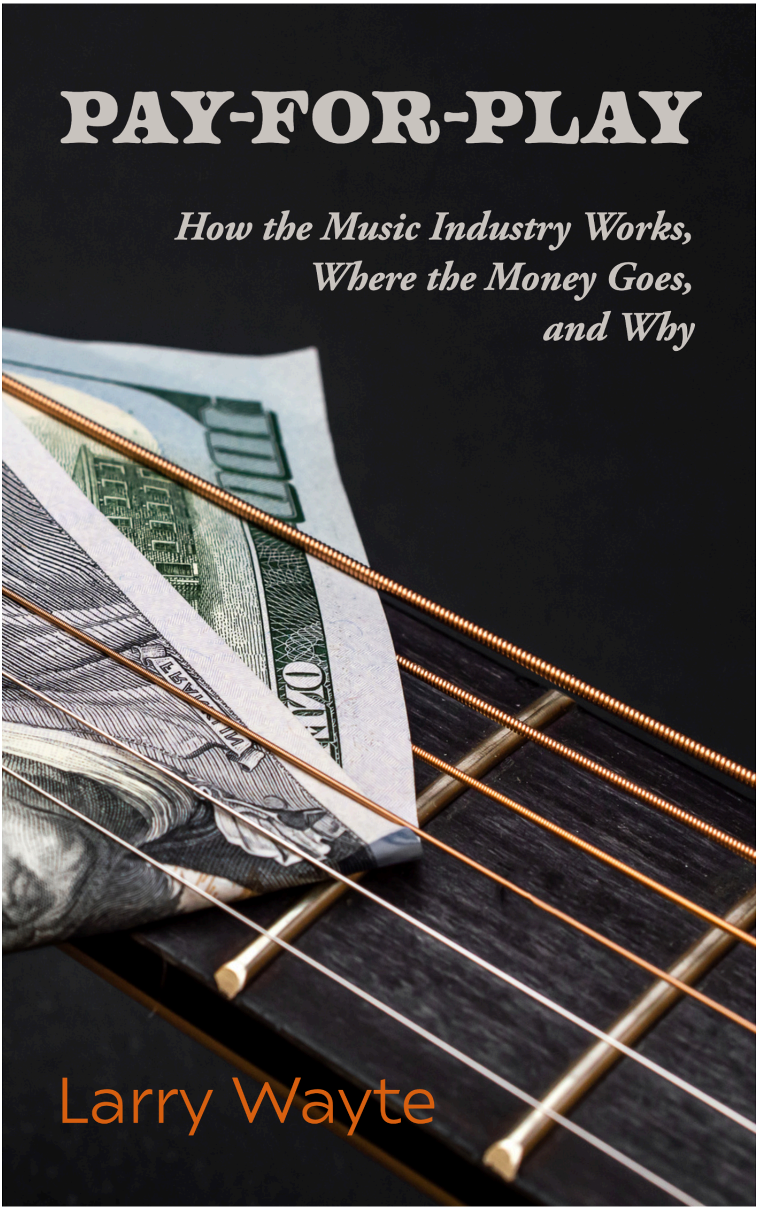
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INTRODUCTION AND ACKNOWLEDGEMENTS

In the spring of 2017, I taught for the first time a class I had recently designed: "Music, Money, and the Law." Several factors contributed to my creating that class: 1) There was no class in the University of Oregon's curriculum focused on the workings of the music industry; 2) in my popular music history classes, I had increasingly incorporated material about the functioning of the music industry and the effect on the sound and reception of popular music; and 3) my musicology colleague Lori Kruckenberg had been urging me to create such a class to fill the gap in the curriculum and take advantage of my unusual background as a lawyer.

My career path has certainly been unusual: I was a practicing lawyer for nearly ten years, after which I obtained a Ph.D. in musicology and began teaching college courses in popular music history. However, I had never made any connection in my legal career with my lifelong interest in music. My legal specialization was commercial real estate finance. When I left my career as a lawyer, I fully expected that I was leaving that part of my life behind forever. Over the following 20 years or so, however, I came to appreciate how my legal training and mindset gave me both an interest in and facility for understanding the highly complex legal aspects of the music industry. So, nearly 20 years after the end of my legal career, I became increasingly intrigued with the prospect of integrating my former legal training into my passion for teaching popular music history.

When I first taught Music, Money & the Law class in 2017, I searched in vain for an up-to-date textbook to help me present the material. I found several good texts that I could use parts of, but I ran into a recurring problem: the music industry has been changing so rapidly over the past two decades that texts written only ten years ago are now hopelessly outdated. The economics of music streaming and social media, in particular, have utterly transformed the music industry and the industry continues to react to these changes in technology at a remarkable pace.

After teaching my class for a few years with a combination of out-dated texts and more recent articles from music trade journals (such as *Billboard*), it became clear to me that the best solution was to write my own text. After teaching the class several times, I had developed the course to a point where I knew which material I wanted to cover and how the most recent trends in the music industry could be integrated into the more historical material. So, in the summer of 2019 I began laying the groundwork for this book. By 2021, I was using early drafts of some chapters in my course, and by the spring of 2022 I had a full draft manuscript that I successfully used in teaching the course.

The problem of constant and substantial change in the music industry remains an obstacle to putting the finishing touches on this book. You will see several chapters here that include references to new developments from the past year, and some from just a few weeks prior. Given this, I intend to frequently update this text as new developments occur, at least while I still teach my course.

I have organized this book in four parts, each of which is divided into multiple chapters. The first part concerns the history and structure of the music industry. I consider myself an historian above all other titles (musicologist, musician, music theorist, etc.). Understanding the music industry as it exists today requires an understanding of how it developed over time. Today's music industry would most certainly not be the one anybody would design from scratch. It has many inefficiencies and quirks that reflect the economic pressures and musical concerns of bygone ages. Understanding today's music industry requires an understanding of those historical developments.

The second part of the book provides an overview of copyright law and the ways it interacts with music. Some may feel that copyright law is merely one isolated aspect of the music industry, but that would be a misleading perspective. The more compelling view is that nearly every aspect of the music industry is thoroughly infused with the reward structure governed by copyright law. Nearly every dollar that flows from consumer to artist in the music industry is parsed out, divided, and contested in accordance with the system of rights and obligations the flow from copyright protections. One could even make a convincing argument that the very form of popular music (length of songs, cyclical structures, prevalence of cover songs, etc.) is highly influenced by the reward structure imposed by copyright law.

The third and fourth parts of the book deal with the issues surrounding infringement of copyrights. One of the fundamental and least understood aspects of music copyright is that there are two separate music copyrights: one involving the musical work (or "song") and one that involving a recording of that musical work (often called the "master right").

Each of these distinct copyrights needs to be dealt with separately because the laws and economics concerning them differ, even when both copyrights are held by the same person or corporation.

There are many several of the music industry that are not covered in depth in this book, and that is by design. The breadth and depth of this book is governed primarily by the purpose it is intended to serve — as a textbook for a 10-week undergraduate course. Additional breadth or depth would introduce material that I do not believe could be reasonably included in the course as I currently teach it. In my experience, there simply is not enough time to cover more material in that time than is in this text.

Acknowledgements:

I would first like to acknowledge the encouragement shown to me by my musicology colleague at the University of Oregon, **Lori Kruckenberg**. It was Lori's encouragement that got the ball rolling on the design of my Music, Money, and the Law class. And were it not for my design of that class, I would not have felt the need to write this text. I would also like to acknowledge the work and encouragement of **Rayne Vieger** of the University of Oregon Knight Library, who connected me with significant University of Oregon grant funding to support this open source text.

PART I
HISTORY AND STRUCTURE OF THE MUSIC INDUSTRY

1.

CHURCH AND COURT PATRONAGE

How do musicians make money? Today, that usually involves playing live concerts, selling recordings through music streaming sites such as Spotify, or creating music for movies or other video media. However, before roughly the year 1900 in the case of recordings, and roughly the year 1800 in the case of ticketed concerts, both of those sources of income were largely unavailable to musicians. So, what did musicians do for money before 1800? To answer that question, we must ask a couple more fundamental questions that rarely get considered today: What were the social purposes of music before the era of ticketed live concerts and recordings? Where would one hear music and how did musicians get paid for creating that music?

We tend to think today of music as a *commodity*, something that has an exchange value (a song is worth a certain amount of money) and that can be purchased in a marketplace (such as online). But music as a commodity is a relatively recent idea. Before the rise of the modern publishing and recording industries, music was thought of more as a social activity, something one *did* rather than something one consumed or purchased. *Accordingly, before the modern era, money was earned by musicians largely for their labor in providing music for social occasions, rather than for producing a musical commodity that could be consumed in a public marketplace.*

Consider all the various social functions that would have existed in the year 1500 where people would have heard music: weddings, funerals, social dances, in a pub, street fairs and markets, private parties, military battles, church services, etc. No doubt musicians have been paid for their labor in providing musical accompaniment and entertainment in these and other social occasions for longer than we have written histories of human culture. But the same would have been true then as now: some musicians made more money than others, and some much more. What were the sources of income for musicians prior to the commodification of music, and which jobs were the most prestigious and offered the greatest income security?

In the several centuries leading up to about 1800, composers and the musicians who played their compositions were frequently tied economically to a church, which, in Europe, meant the Catholic or later Protestant churches. Another common economic tie that musicians nurtured was to the noble and aristocratic courts who increasingly governed the economic and military affairs of a region to the extent the church did not. In Medieval Europe, up until about 1450, the Catholic Church controlled not only the local economies, but also the arts, including music. This control extended beyond economics and into the style of music that was considered appropriate for certain occasions. For example, the music one heard in church would have been very different from the music one heard at a peasant harvest festival — a distinct stylistic difference had already developed between an elite, literate culture and the illiterate culture of the masses.

There were musicians and musical styles that were outside the control of the church ("secular" or "vernacular" as opposed to "sacred" music), and most peasants and other people outside the elite classes likely only heard such vernacular music. However, those vernacular musical styles (what we would call "popular music" today) did not exist within an economy by which musicians or songwriters could earn a decent living, or even a living at all. Certainly, some vernacular musicians of the Medieval era could make money on the side as street musicians or providing entertainment at peasant weddings, funerals, or other occasions, but the level of such economic activity paled in comparison to the economy controlled by the Church.

The best known, and no doubt best paid, composers of the Medieval period earned their keep (often including room and board) from the Church, writing music for use in church services and assembling and directing those performances. (It is worth noting that in the Medieval era, the vast majority of people could not read music, and most could not even read at all. To be able to read and write music was then, even more than it is now, a sign of belonging to the elite ruling class.) In cities with the largest and most influential cathedrals, and associated clergy, the first universities were also established during the Medieval era as an extension of the church's administrative power. The cathedral of Notre Dame in Paris, for example, gave rise to the neighboring University of Paris in about 1170. Within these church-controlled universities, a new class of musicians and music scholars arose, still devoted to and employed by the Catholic church. Musicians in these universities perfected their techniques and theoretical treatises on the sacred musical style that one would only hear in association with a church service. It is interesting to reflect that even today it is within our modern universities that we still find composers of "serious" musical styles employed to carry on this tradition of elite musical style, where popularity with the masses is still generally not the measure economic musical value.

By about roughly 1450, the Church had begun to lose exclusive control over the administrative state, the economy, and the arts. City-states and other administrative regions controlled by aristocratic families in the regions of Europe once controlled as part of the Roman Empire (Italy, France, Spain, England, and increasingly Austria-Germany) developed economies built on expanding international trade and associated support services, such as banking and shipping. With the wealth accumulating within the courts of these elite families and their administrations, music and the other arts became part of the economy of prestige these courts used to bolster their competitive standing. Thus, during the Renaissance era (1450-1600), composers and musicians developed a new source of income apart from the church — court patronage.

Court patronage, however, was not exclusive of church employment — this was not an either/or choice. Many of the best known composers from the Renaissance Era earned income from both the church and the local courts, writing music to be used both inside and outside the church. But we must also not assume that just because composers were writing and performing music to be used outside the church that they were therefore entertaining the uneducated "masses." The aristocratic families of the courts existed in a very elite world, far removed from the peasants and other illiterates that made up the vast majority of the population. The music the court musicians wrote and performed was written music that only the most learned and civilized of the population could hope to perform, understand, or even bother to enjoy. The members of elite families took pride in their musical abilities, a sign of their cultured and elite status, and they paid professional musicians to give them lessons and write music they could use to impress their friends and family. Again, note that this tradition continues today, with more educated and wealthier families paying for expensive piano or other music lessons for their children, often in the comfort of their own homes. This continues to be a significant source of income for formally-educated musicians.

The composers who earned commissions and other employment from the courts were thus expected to deliver not only entertainment, but prestige. Courts prided themselves on not only the quality of the music they produced, but on the development of new expressive musical devices and performance practices. Whereas music written for church became stylistically conservative as appropriate for a social setting steeped in tradition and formality, the music of the courts became more experimental and expressive. Money began to flow to musicians who were more creative or ingenious than others, rewarding risk-taking and creativity rather than conformity. This linkage of musical economy with musical creativity and expressions of individual artistic "genius" continued to mark the Western musical economy through the coming centuries.

The system of court patronage increased in importance throughout the 16th century as the wealth and influence of the Catholic church continued to wane. That was due in large part to the success of Protestant Reformation, instigated by Martin Luther in Germany in 1517, followed by the King Henry VIII's decision to form a separate Church of England in 1534 after the Catholic Church (based in Rome) refused to allow him to annul his marriage (divorce) his first wife, Catherine of Aragon, after she failed to provide him with an heir.

Protestant churches in Germany and those of the Church of England still employed many well known composers and musicians, but the potential wealth and prestige of those positions was more local in scope and significantly diminished from that of the Catholic church. The best-known example of a Protestant church composer was Johann Sebastian Bach, who after a 6-year stint as a court composer in Köthen, Germany, seized an opportunity to become the music director of the Lutheran church in Leipzig, Germany, where he worked for 27 years, until his death in 1750. During his time as a church composer, organist, and music director in Leipzig, Bach wrote an enormous amount of music, much of it for the weekly church services and church holidays.

By the late 18th century, during the Age of Enlightenment, the system of court patronage for the most powerful of Europe's aristocratic families had become a source of great prestige, security, and wealth for those composers and musicians who could land such jobs. Each court connected to the monarchies of the leading centers of power in Europe, employed their own composers, orchestras, and choirs to entertain and provide a source of cultural prestige. The financial security these positions afforded musicians who held these positions continued to give them the freedom to find novel and creative means of musical expression, which served to increase their own individual fame and the prestige of the court to which they were employed. The late 18th century marked the height of this court patronage system, shortly before the revolutionary spirit of the time increased the demands for democratic reforms (e.g., the French Revolution of 1789).

Composer Joseph Haydn best represents the heights of international fame, wealth, and creative freedom that a musician could achieve in the court patronage system of the 18th century. Haydn was born in poverty, but through a tireless honing of his natural musical talents and self-promotion, he managed to earn a position as court composer to a prince of the Esterhazy family of the Austrian Empire at the height of its power. The Esterhazy court also happened to have a palace in Vienna, the single most important musical city of 18th and 19th-century Europe. During his employment by the Esterhazy Court, Haydn composed hundreds of pieces of music in several genres, including 104 symphonies, that earned him fame and admiration throughout Europe as the greatest composer of his day. Haydn's style became the basis of what is known as the "Classical" style and contributed greatly to the styles of both Mozart and Beethoven, who also both lived in Vienna and admired the elder Haydn. The system of court patronage would diminish with the democratic revolutions underway in the late 18th century, but it served to support the professionalization of literate music for over 400 years.

2.

PUBLIC CONCERTS AND CELEBRITY

The turn from patronage to ticketed public concerts marks one of the great shifts in the development of music as a self-sustaining industry. This change was not wholesale and complete, however. Remnants of the patronage system still remain an important part of the music industry today, particularly in classical music, where wealthy patrons often provide a significant source of financial support for orchestras and chamber music groups. A 2016 report by the American League of Orchestras found that only about 40% of the income of the average American orchestra came from ticket sales, with the remaining 60% coming mostly from donations from wealthy patrons and government grants. Nor did the shift from patronage to public concerts take place suddenly. Rather, the shift occurred during a period of over 200 years, from roughly 1650 to 1850.

In England, for example, one of the first regular series of advertised public concerts in Europe emerged in 1672. Other similar series followed in its wake. These concerts were typically held in taverns, pubs, and coffee houses catering to a largely middle-class audience, providing an alternative to the church and state-sponsored performances then common throughout Europe. Over the next 50 years, the tavern concert culture was copied by the aristocratic classes throughout Europe and the public concert emerged as a competitive site of advanced music-making to rival that of the church and court.

We cannot understand the shift from patronage to public concerts without also placing that shift in the context of broader social and political changes. During the so-called Age of Enlightenment (or Age of Reason), roughly 1700 to 1800, European philosophers such as Kant, Locke, and Rousseau argued for a political and social system based on man's ability to reason, rather than on what these philosophers considered to be outdated and irrational passions and prejudices of the past, including institutional religions. The clearest losers in that philosophic and political shift were the church and the aristocracy, both seen as embodying outdated traditions rather than enlightened reason.

The elevation of the enlightened and sovereign individual over the church and the aristocracy in the Age of Reason, particularly those who were educated to participate in a new professional class of elite taste and wealth (the so-called *bourgeoisie*), provided the conditions by which composers and musicians freed themselves from the yoke of patronage. This new social and political environment was fertile ground for the development of a new musical economy based on the taste and ticket-buying ability of the new secular upper middle-class culture.

Historian Michael Chanan identifies three types of concerts that developed in the 19th century out of this new economic model: The most common was the "benefit" concert, which was not the charity benefit we know today but rather a concert put on by a composer or musician for his *own* benefit and featuring his own compositions or works chosen to highlight his musical skills. The second type was the concert organized by standing musical organizations, such as symphony orchestras or opera companies. The third type was geared to a lower-class of consumer and featured amateur musicians without pretense of catering to an elite artistic taste. These three different concert models corresponded to an increasingly stratified public taste, reflecting political divisions as much as aesthetic differences.

The large public concert also gave rise to a backlash against musical democracy among the most elite music consumers — so-called *salon* culture, particularly in Paris. For those with the highest regard for their sophisticated musical taste, and with a correspondingly elevated wealth, public concerts meant acceding to the tastes of the vulgar masses. The solution was to bring the elite concert experience into one's own home (the equivalent of today's "house concert"). Wealthy music lovers could afford to hire celebrity musicians and composers of the

19th century (such as Chopin or Beethoven) to perform in one's own home (in the *salon*, the French word for "living room") to entertain a small group of friends in an intimate evening of elite culture. Just as with the earlier patronage system, salon culture enabled the bourgeois elite to exchange their wealth for social and cultural prestige with the currency of music. Music thus continued to be a commodity of social status, even as the transition to public concerts created an alternative market of exchange and taste.

These changes in the musical economy brought about corresponding changes in musical style that continue to play out today. With public concerts replacing patronage, composers now had to compete with each other for the public attention. No longer was it sufficient to please the musical palettes of a few highly-placed tastemakers in the aristocracy, composers now had to stand out among their peers by appealing to the fickle and broader tastes of a mass audience. The predictable result of this competition for financial security was the logic of musical originality and novelty. Composers could no longer simply create music that followed the conventions of the time, they now had to create music that would become known for breaking the mold. Composers created personal musical styles, indicative of their unique musical personality. In the jargon of our time, composers now had to create a personal "brand" in order to attract a paying audience who would be eager to pay to see their favorite musical celebrities. As we have seen, this emphasis on originality was already a part of the patronage system, but only so far as originality or creativity would accrue to the prestige and personal desires of the patron. With the ticket-buying public now in the role of the patron, the stakes were raised as composers needed to create an exciting product if they were to be paid at all (or even not lose money on the expenses required to put on a public concert). This new economic dynamic goes a long way to explaining the explosion of musical novelty and "rule-breaking" during the late 19th century among Romantic Era composers such as Franz Liszt, Richard Strauss, and Claude Debussy.

This emphasis on originality extended beyond just musical novelty into the realm of charismatic personality. Just as an original, novel musical style could attract a new audience, so could an outsized personality. Composers and performers in the 19th century began to draw on their celebrity status as much as their musical reputations. The flamboyant virtuosos of the 19th century, such as pianist Franz Liszt and violinist Niccolo Paganini, are just two examples of this new breed of musician pedaling a beguiling mix of novelty, charisma, and celebrity. They were the Jimi Hendrix's of their time, creating awe in their audience with unprecedented musical skill.

The competitive pressure towards novelty that we hear in the 19th century corresponds logically with the flourishing and maturation of the music print industry during that same period. As the capitalist industrial model filtered down to all levels of society in the Industrial Age, the music print industry was no exception.

3.

MUSIC PRINTING

Ottaviano Petrucci (1466-1539) was the first music printer in Europe. Living in Venice, Italy during the Renaissance era, Petrucci applied for and was granted in 1498 an exclusive right to print music in Venice for the following 20 years. In 1501, he published his first book of music, a collection of polyphonic *secular* songs by various composers. Petrucci printed his book using the new technology of movable type, using a music font he developed. (The printing press using movable type was invented by Johannes Gutenberg around 1440 in Germany.) In the several years that followed, Petrucci printed multiple revised editions of this first book of what we might now call pop songs, an indication of how immediately popular the book quickly became.

Petrucci's idea to print collections of music using moveable type and to sell them through Europe gave rise to the concept of *music as a commodity* with exchange value beyond the mere labor of the performing musician or composer. Music could now be purchased in a tangible form, creating a marketplace for songwriters to spread their names and styles across Europe and beyond as trade, exploration, and colonization spread European culture throughout the globe.

Music printing not only spread the reputations of songwriters and their styles throughout Europe, it also created an industry based not merely on providing musical labor but on creating a tangible, portable and reproducible musical product. This product, printed music, now existed in its own economy in which money could be made through the manufacture and distribution of a good that was independent of musical performance. *Music now circulated in a market, increasingly independent of either the church, the court, or the state*.

A printer specializing in music manuscripts did not have to compose, play an instrument or sing to be a part of this new economy. Music was now *mediated* by a middle layer between the performer and the listener. As we will see throughout this book, this middle layer of economic mediation in the music industry has grown markedly in the past 150 years, to the extent that it now accounts for the vast majority of money flowing through the modern music industry. Today, only about 12% of all revenue collected from music consumers ends up in the hands of the musicians. The other 88% goes to support a vast network of distributors, lawyers, accountants, marketers, publishers, and other non-music employment standing between the consumer and the musician.

The new economy of music printing had another profound effect on music in Europe — it privileged *written or notated* music over music that was transmitted *orally*. The vast majority of all musical works throughout the world and throughout human history have been transmitted orally (without written notation). Many musical styles today (including most American popular music) still rely primarily on oral transmission rather than written notation. However, the development of the printed music economy in Europe meant that, in order to participate in that economy, the music had to be notated in order to be printed.

European classical music is and has always been entirely dependent on written notation. Every classical musician learns notated music and most do not know how to learn or play music any other way than through reading it on a page. However, as we will see later in this book, the printed music industry also had a significant impact on American popular music. The system of financial exchange that developed around printed music after Petrucci's initial efforts in Venice provided a model for American songwriters in the 19th century when they sought to earn a living from their songwriting efforts.

However, popular styles in Europe during the Renaissance and later periods (such as the French *Chanson*) were also frequently notated. While we might suppose that the early music printing industry was supported largely by trade in what we now refer to as classical music, the opposite was actually the case: *the music printing industry flourished primarily through the sale of books of popular songs rather then sacred or other more serious styles*. This is an important historical fact, because it gives context to the rise of the American music print industry in the late 19th century, which also gained traction primarily through sales of printed popular songs in the so-called Tin Pan Alley style.

4.

TIN PAN ALLEY AND MUSIC PUBLISHING

Unlike Europe, America did not have a 500-year history of notated music and a system of church and court patronage supporting. The music economy in the U.S. before 1900 was geared largely to providing for amateur performances in the homes of the growing middle class. We must constantly remind ourselves that before the spread of recording technology in the early 20th century, if someone wanted to enjoy music they would have to either make it themselves or convince somebody else to make if for them (often by paying them). So, the music industry catered primarily to those who wanted to learn to make music for their own entertainment, as that was typically the best or only option given the largely rural character of the country at that time. Some of that economy was devoted to providing amateur musicians with instruments on which to accompany their singing, primarily the guitar and the piano. But once one owns a guitar or piano, that instrument lasts for close to a lifetime, so the growth of the musical instrument industry was limited by the durability of its product. However, providing those musicians with the means to play an expanding repertoire of songs in a variety of styles through selling printed music was an industry with *nearly limitless growth potential*.

Another unique aspect of musical life in America was that the growing middle class began to demand its own culture, one not tied to the educated elite who exuded the pomposity of European taste from which the American middle class had always chosen to distance itself. Thus, the music publishing industry in America found its sweet spot of success in helping middle class Americans find their own culture, one that reflected the American spirit of commercial populism and freedom from European tradition. We must be careful, however, to also acknowledge that for many Americans, the European musical tradition, what we now call "classical music" was an alluring connection to the riches of European culture. Many Americans did and continue to embrace the European musical tradition despite the growth of American popular music.

The new art of American popular songwriting eventually found its first "founding father" in the form of Stephen Foster (1826-1864), who wrote over 200 songs, several of which have become so identified with early American song that many assume them to be "folk" songs without authorship. Among Foster's best-known songs are "Jeanie with the Light Brown Hair," "Oh! Susanna," and "Camptown Races." Unfortunately, and rather tellingly, Foster died an impoverished and destitute man in New York City. Tellingly because Foster's lack of wealth is largely owing to the relatively unformed state of copyright law and the publishing industry when Foster was writing his songs (as we will learn later in this book), as well as his inconsistent and unsophisticated attempts to capitalize on his success. Had Foster lived just 50 years later, he likely would have earned a nice financial nest-egg for himself and his heirs through the copyrights to his songs, which were performed and recorded by a multitude of artist over the decades. But even if Foster didn't make as much money as he should have, Foster is still a symbol of the emerging American commercial popular song industry. That industry has grown to become one of the most lucrative industries in the world for those who have the talent and persistence to find a seat at the table.

New York City was the financial and media capital of the U.S.A. in the 19th century, so it should come as no surprise that the U.S. publishing industry would find its home there. The particular area of the City in which the publishing companies began to congregate around 1885 was an area that has famously become known as "Tin Pan Alley," a short stretch of West 28th Street between Sixth Avenue and Broadway. The origins of the term Tin Pan Alley are disputed, but it certainly is connected with the unusual method by which these publishing firms would advertise their latest songs (or "plug" them, in the jargon of the day). We again must remember that we are talking about a time without records and without radio. The only way people would hear the latest songs would be to hear somebody perform them live, so the publishing companies did everything possible to increase the likelihood of that happening. One method was to place upright pianos in front of their offices and hire pianists ("song pluggers") to play the latest songs for pedestrians walking past the building. Those inexpensive and likely poorly-tuned pianos apparently made a noise reminiscent of a tin pan. (This may have also been partly on purpose in an era when tacks were sometimes pushed into a piano's hammers to increase the treble and volume of a piano in a crowded, loud room, such as a bar — thus the term "tack piano".) Another possible source for the name is that the pianists hired to play these tunes put tin pans on their pianos to collect tips, which would also make a noise when passersby dropped coins in the pans. In any case, the term Tin Pan Alley stuck and is now recognized as not only the home site of the U.S. publishing industry in the late 19th century, but also the style of popular music that developed in conjunction with the industry.

The publishing companies that populated Tin Pan Alley were different from the other publishing companies in existence at the time, many of which had been publishing for over 100 years. These new companies published exclusively popular music (as opposed to classical or religious music), with songs written specifically to appeal to a mass audience of amateur music-makers who would sing and play the songs at home. This new breed of music publisher depended for their success on a new musical style, one that would be instantly appealing to a mass audience and easy enough to be sung and played by people with a limited level of musical training. The style that coalesced around these demands would become known as a "Tin Pan Alley" song, typically featuring an introductory "verse" followed by a "chorus" in AABA form (sometimes also referred to a 32-bar form due to each section of the chorus being 8 bars long).

The Tin Pan Alley business model and corresponding musical style became the dominant form of mainstream urban pop music in the United States from about 1885 lasting up until the emergence of rock and roll in the 1950s. A whole style of singing and musical performance developed around the Tin Pan Alley form, giving rise to the some of the most successful music careers of the 20th century, including those of Bing Crosby, Frank Sinatra, and Judy Garland.

One of the more important aspects of the Tin Pan Alley popular song publishing business model that is important to keep in mind is the importance of the songwriter relative to the performer. In the Tin Pan Alley era, songwriters were as well known, if not often better known, than the singers who performed and recorded their songs. The songs and their composers were the real stars, and the performers just the vehicles for delivering those songs. It wasn't until after recordings and radio performances became widely available in the 1920s that performers began to acquire celebrity status rivaling that of the best known songwriters. But the songwriters of the Tin Pan Alley era would always maintain their status as having contributed to what we now refer to as "The Great American Songbook." (Note that there is not any actual book known as the Great American Songbook; that is only a phrase meant to refer to the hypothetical collection of all the most successful songs that were part of the Tin Pan Alley tradition.) Among the songwriters who gained and retain celebrity status from that era include George Gershwin, George Cohan, Irving Berlin, Jerome Kern, and Cole Porter.

One of the most important dynamics in popular music of the 20th century was the change from the Tin Pan Alley paradigm to rock and roll in the 1950s. That process took over 30 years and involved the ascendance of non-mainstream musical genres from the rural southern states, particularly blues and country, to a position where they could challenge the lock on popular music held by the Tin Pan Alley songwriters and publishers. There were many players in that shift, but one of the most important was a record company executive and publisher by the name of Ralph Peer (1892-1960).

Peer started as a record producer and A&R man (artists and repertoire) for the small record company Okeh Records. Peer was instrumental in producing the very first vocal blues recording by a black singer in 1920, Mamie Smith's "Crazy Blues," which proved that there was a commercial potential for such records that defied the New York-centric Tin Pan Alley model. He was also personally responsible for the very first recordings of southern white musicians performing what we now call "country" music (at the time, it was called Old Time, folk, or hillbilly music). Those two genres, blues and country, would develop as alternative styles to Tin Pan Alley over the next three decades until they were combined into the hybrid of rock and roll in the 1950s. Peer's persistence in promoting and commercializing southern, rural and non-white alternatives to Tin Pan Alley makes him a pivotal figure in the development of the modern popular music industry.

One of the important aspects to Peer's career is his success in producing commercially successful recordings of newly-composed songs, rather than treating southern music as part of an antiquated "folk" style. Peer wanted his records to sell and to compete in the marketplace with Tin Pan Alley. He was a businessman, not a musician. One of the important aspects of Peer's formula was recording songs that could be copyrighted so as to earn future royalties for his company and his performers, taking advantage of the same business and legal structures that supported Tin Pan Alley. Peer started his own publishing company, Southern Music Publishing, which became one of the most successful non-Tin Pan Alley publishing companies of the 20th century. In the chapters that follow, we will see how the nature of the publishing business and copyright law gave Peer the tools to compete with and eventually be part of the overthrow of the Tin Pan Alley dynasty.

5.

HOW DOES THE PUBLISHING INDUSTRY WORK?

The music publishing industry is something most casual music fans (a group which includes nearly every person on the planet) know very little about and probably have never had reason to even think about. But that is not because it is a small or unimportant industry. In the United States alone, the music publishing industry is currently worth close to $7 billion. Globally, that number is about $10 billion. But where is that money coming from? For many, the first thought that comes to mind is that this must represent the sale of sheet music. While that is, indeed, the most tangible and obvious product of the publishing industry, sheet music sales actually make up only a very small part of the business, about $230 million in the United States (or only about 3% of total publishing revenue!).

So, where does the other 95% plus of the revenue in the music publishing business come from? In a word, copyrights. We will learn in the following chapters that royalties from song copyrights have been a major source of revenue in the music industry for over 100 years and were the foundation for the Tin Pan Alley business model described above. So, much of what music publishers do is try to attract talented songwriters to publish their songs with them. When a song is published, that means that the songwriter and the publisher have entered into an agreement whereby the copyright royalties from that song will be split (typically 50/50) between the publisher and the songwriter. Of course, the amount of the royalties will be determined by the popularity of the song, so publishers try to attract the most successful songwriters to join them in that partnership.

How do publishers sell themselves to a songwriter? Why would a songwriter choose one publisher over another? The "value added" by a publisher is their connections to the music industry, to record companies, to performers, and to the media. A song is only as valuable as its performances and recordings, so part of a publisher's job is to connect potentially successful songs to performers who are looking for new material.

Ever since the "singer-songwriter" genre emerged in the 1960s and '70s, there has been a mythology that performers generally sing songs that they themselves have written. That may be true for some iconic artists who also happen to be songwriters, but many great singers have little songwriting ability and thus are dependent on often unknown songwriters for their material. Some of the best-known pop singers in history, such as Elvis Presley, Frank Sinatra, Mariah Carey, Aretha Franklin, and Whitney Houston, for example, *never wrote a single song*. And many of the best-known pop songs were written by songwriters that most people have never heard of. For example, one of the most successful songwriters of recent decades is Max Martin, who has written chart-topping hits for the Backstreet Boys, Britney Spears, Pink, Usher, Taylor Swift, and Katy Perry, among others. But Martin is not a performer. He writes songs only for others to performer, and he has made a large fortune doing so. His income comes from copyright royalties rather than from live performances or making recordings. We will learn how this works in the chapters that follow.

So, much of what publishers do is in the realm of what used to be known as "song plugging," which is simply selling songs to performers, hoping they will record the song and it will become a hit. Why don't songwriters self-publish so they don't have to split the copyright royalties with publishers? The answer is that songwriters don't have the time, skills, or connections to successfully "plug" their own songs. Publishers have connections with record companies, record producers, and performers that enable them to expose a potential hit song to a performer who can turn it into a hit.

Music publishers also have an infrastructure of accountants and lawyers who can make sure that whatever royalties a song earns are correctly counted and distributed to the songwriter. Most songwriters do not want to spend their time reading through royalty reports to make sure they are correct, or chasing down record companies or streaming services that haven't paid the royalties in the proper amounts or at the proper time.

The valuable connections between the publishing industry and the recording industry has led more recently to the largest record companies having their own in-house publishing companies so that they can reap the publishing royalties from their artists as well as the recording royalties. Thus, Warner Brother Records has an affiliated publishing company, Warner/Chappell Music; Sony Records has its Sony/ATV Music Publishing company; and Universal Music Group has its Universal Music Publishing Group. These are the three largest publishing companies in the world due to the success of the recording artists affiliated with their parent companies, the three largest record companies in the world.

For a recent example, when Billie Eilish signed with Universal Music Group in 2018 to release her self-produced debut EP, "Don't Smile at Me," part of that deal was that Eilish would also publish her songs with Universal Music Publishing Group. If Universal had not convinced Eilish to publish her songs with their own publishing unit, then the valuable copyrights to those songs would have gone to some other publisher and a great deal of royalty income from those songs would have ended up in somebody else's pockets. Given the tremendous commercial success of Eilish's songs since that signing, we can easily see how valuable that publishing right is, regardless of how many copies of the sheet music to those songs are ever sold.

6.

THE FIRST FORMAT WAR: CYLINDER VS. DISK

Thomas Edison invented his famous wax cylinder recording device in 1877. However, twenty years earlier, in 1857, the French Academy of Sciences issued a patent for a device known as the *phonautograph* to Edouard-Leon Scott de Martinville that was based on a similar principle of etching sound waves onto a medium that can then reverse the process and replay those etchings. Martinville never produced a working prototype of his *phonautograph,* but in 1874 a young Scottish immigrant to America, Alexander Graham Bell, built a prototype of the device from Martinville's patent descriptions, thus giving the world the first audio recording device, *three year's before Edison's*. Bell did not focus on recording technology, as he became distracted by the promise of his work inventing the telephone, which incorporated Bell's new invention, the electric audio transmitter, or microphone. (The microphone, of course, would later become essential to audio recording, but not until about 50 years later.) Bell's telephone had more obvious practical applications than a recording device, so it understandably received much more commercial attention. Thus, Bell became famous for the telephone rather than recording, even though he had made a working recording device before Edison. And Edison became famous for recording, even though his device was not technically first, because he devoted time to marketing it.

Bell's interest in Martinville's first recording device patent would later resurface when Bell made improvements to Edison's "talking machine" (including a floating, rather than fixed, stylus; wax recording media rather than foil; and in-ear stethoscope audio playback for increased audio fidelity). Bell's patents for what he called the *Graphophone* would later be purchased by Edward Easton who used them to produce a line of records he sold under the name of *the first dedicated record company* — Columbia Records. By 1890, Columbia had a 10-page catalog of musical recordings for sale. Columbia's biggest hit from this period was a novelty song, "The Whistling Coon," recorded by a former slave, George Johnson (you can listen to it on YouTube). This gives an early indication of the importance African-American musical style and performance would have on the recording industry throughout the 20th century, and how those black performers also had to overcome racial stereotypes as they became increasingly involved in the industry.

Edison started the Edison Phonograph Company in 1887 to manufacture and market his cylinder-based "Edison Home Phonograph." The device sold well, but because of the low audio quality, its usefulness for music reproduction was not obvious and it was regarded as mostly a novelty. So, in 1888, Edison sold the company, including his patents for the device, and the company changed its name to the American Graphophone Company.

Edison's cylinder design was eventually upstaged by German immigrant Emile Berliner's competing "gramophone" *disc* recording technology, which Berliner patented in 1887. The primary advantage of the gramophone was that the technology incorporated a method of easy duplication: chemically etched metal disks were used to stamp duplicate copies. These master stamping discs were found to work best when made of gold, so the famous "gold records" awarded to records selling 100,000 copies are based on the actual historical origins of that technology. Edison's cylinders, by contrast, could only be duplicated by recording multiple original copies or copied laboriously using a pantograph. Berliner's flat discs were also more easily stored and could be recorded on each side. Berliner's discs also used horizontally-cut grooves rather than the vertical grooves of Edison's cylinders. Berliner expanded internationally as well, starting Deutsche Grammophon in Germany and the Gramophone Company in England.

Advertisement for Edison New Standard Phonograph 1898 (Public domain)

After Berliner's and Bell's success in improving the audio quality of recording devices, Edison in 1896 succeeded in legally regaining the rights to his early patents, which enabled him to resume manufacturing players and cylinder under the name National Phonograph Company. His release of recorded cylinders offered competition to Columbia, which quickly resulted in lower prices for both recorded cylinders and players, drastically expanding the market and accessibility. By 1898, the price of a cylinder player had decreased from $150 (in 1891) down to only $20 for the standard model and $7.50 for the least expensive model (the Gem)!

In a series of complicated legal challenges that would come to define the recording industry to this day, Emile Berliner lost control over his patents and his company in 1900, effectively shutting him out of the American recording industry his invention had helped launch. As a result of these legal battles, the newly-formed Consolidated Talking Machine Company began manufacturing discs under the name *Victor Talking Machine Company* in Camden, New Jersey. In 1901, Victor launched its line of gramophone players and 10-inch discs rotating at 78 revolutions per minute, the format that quickly became standardized across the industry. Victor was known for its trademark image of Nipper, the fox terrier, listening with cocked ears to the horn of a gramophone.

Victor Junior Gramophone Advertisement (1902) (Public Domain)

Columbia, now realizing the cylinder was becoming antiquated, began distributing its own line of 10-inch discs to keep up with Victor. By 1903, Columbia and Victor had pooled their patents with a cross-licensing agreement to create an effective monopoly on laterally-cut discs. This was the first of many industry consolidations that continue to define the recording industry today. As we will see later when discussing the details of recording contracts, music recording is a risky venture that requires significant investment of up-front capital with statistically low returns on that investment for the vast majority of recordings. The capital requirements and high risk of record production favor pooling of resources and corporate consolidation. By 1907, Victor had a catalog of over 7,000 titles and had sold over 500,000 of its cutting-edge "Victrola" disc players which featured an "internal horn" rather than the iconic external horn of earlier designs. *By 1921, Victor was selling over 50 million discs per year.*

Until the mid-1920s, recordings were made using an "acoustic" or mechanical process (that is, non-electric). Musicians and singers would array themselves in the recording studio around a large horn (or sometimes multiple horns) that funneled the sound into a recording diaphragm that vibrated a cutting needle, which in turn etched a groove onto the surface of a wax disc. That disc then became the mold for creating a metal master disc, from which duplicate discs were pressed. The sound quality of these acoustic recordings was far inferior to the electrical recording process that would become the norm by 1927.

The mechanical recording process favored louder instruments and voices in the "tenor" range, and was particularly unfriendly to low bass frequencies. Accordingly, some musical styles were better suited to this new technology than others. Italian opera star Enrico Caruso made the first record to sell one million copies in 1904 on the Victor label, his strong tenor voice being perfectly suited to the limitations of early recordings. Victor's success came primarily through sales of "serious" music, such as Caruso's many opera aria recordings.

Victor's musically conservative approach, however, would lead to opportunities for other companies to fill the void in recording popular styles. The story of the recording industry would be dominated throughout the rest of the 20th century and into the 21st with this repeating trope of major record companies being challenged by smaller "independent" companies that could take musical risks with new genres.

In 1911, the recording industry witnessed what might have been the first international recording pop sensation when four different recordings of Irving Berlin's dance hit, "Alexander's Ragtime Band," each managed to chart in the top-five. Two of those recordings were made by the vocal duo of Arthur Collins (baritone) and Byron Harlan (tenor), one on Victor and one on Columbia, indicating the now highly unusual aspect of early recording contracts which did not demand *exclusive rights* (more on this when we discuss recording contracts). The phenomenal success of this and other early syncopated dance hits gives an indication of where the industry was headed.

By 1914, the first "blues" recording (W.C. Handy's "Memphis Blues") had been released by both Victor and Columbia, followed five years later by the first "jazz" recording, "Livery Stable Blues" (Victor, 1917). These early releases of blues and jazz were an indication of America's embrace of African-American musical styles in the 1920s and a corresponding expansion in the recording industry. Given Victor and Columbia's focus on proven Tin Pan Alley composers and hesitation to record black artists, the stage was set for new companies to seize opportunities to expand both the styles of music recorded and break down color barriers in the industry. A handful of new "alternative" or "independent" record labels rushed to fill these voids in the major labels' catalogs: Okeh, Brunswick, Aeolian-Vocalion, Paramount, Gennett, and Black Swan are among the best known. Of these, Black Swan stands out not only for its recordings of black artists, but for the fact that it was the only black-owned record company of the time.

Mamie Smith Okeh Records Advertisement, 1920 (Public Domain)

In 1920, Okeh records started the ball rolling with the dramatic success of its recording of black blues singer Mamie Smith, singing "Crazy Blues," a song written by black songwriter Perry Bradford. Although this was not the first commercial recording of a black singer, it was the first commercially successful vocal *blues* recording by a black singer. This recording was remarkably successful, selling over one million copies within a year! "Crazy Blues" ranks as one of the most iconic successes of the music industry in the 20th century, proving there was an untapped market for recordings by black performers among a underserved demographic of black (as well as white) consumers who wanted to hear the latest styles, not just opera or novelty songs. "Crazy Blues" immediately opened the floodgates for other record companies to find their own black blues singers to attempt to duplicate that success.

Columbia Race Records Advertisement (c. 1935)(Fair Use)

By 1923, Columbia records had found its own star, Bessie Smith, who would go on to become the most celebrated of the black "blues queens" of the 1920s. Her 1923 recording of W. C. Handy's "St. Louis Blues" on Columbia is considered one of the most iconic recordings from the era. Other labels found their own blues queens, and the '20s became known for the glamorous and simultaneously gritty sexual realism of the blues queens. Ironically, by the 1960s the blues queens would largely be forgotten and the blues became synonymous with the rural sound of the black male blues singers of Mississippi in the

1930s, such as Robert Johnson. Those early *rural* blues recordings failed to sell in any significant numbers when they were made in the 1930s, but would later become an object of intense fascination for young white rock musicians looking for a new mode of musical to expression.

Despite the real progress of record companies selling recordings of black performers singing blues songs written by black songwriters (sometimes even on black-owned labels), the record industry in the 1920s still reflected the racially-segregated reality of the time. Records of black performers in the ‘20s were uniformly marketed as “race records” so the buying public would know the skin color of the performer. Record companies marketed race records to black audiences and assumed white audiences were not interested. Further, records were never made of performers of different races performing together (or at least not openly), as record companies were not willing to cross that barrier until the 1930s. Of course, many white record buyers wanted to hear these new black artists, so the record-buying public was, as would always be the case, one step ahead of the industry.

One striking example of the firm color line in the record industry in the 1920s is a series of 1929 recordings issued by Okeh records of a guitar duo of black guitarist Lonnie Johnson performing with “Blind Willie Dunn.” However, there was in reality no such guitarist named Blind Willie Dunn. The second guitarist was actually white jazz guitarist Eddie Lang, but the racial sensitivity of that time prevented Okeh from issuing a recording of a black guitarist playing with a white guitarist. These may have been the first such commercially available integrated records ever made, but that fact was hidden from public view by the use of Lang's pseudonym.

7.

RALPH PEER AND COUNTRY MUSIC

The phenomenal success of "Crazy Blues," the first race record of the 1920s, ironically also gave rise to the genre we now call "country" music, the music of the white, rural south. The producer of the "Crazy Blues" recording was a young, white midwesterner, Ralph Peer. Working as a producer for Okeh records, Peer realized that blacks were not the only music consumers who longed for an opportunity to buy recordings of a style of music that reflected their own culture. White, rural, southerners also had a distinct musical style that up to the 1920s had gone unnoticed by the record industry. Okeh Records granted Peer the permission in 1923 to begin experimenting with this style by recording the winner of a local fiddle contest in Virginia, "Fiddlin'" John Carson. Given that the recording was only a solo instrumental, it caught even Peer by surprise when Carson's screechy fiddle tune quickly sold out its initial pressing of 500 copies. Peer had, indeed, found another previously untapped market.

RalRalph Peer (1892-1960)

Ralph Peer (date unknown, Public Domain)

Peer quickly built on his initial success by setting up recording auditions in several southern cities, where no record studios existed. To do so, however, he had to jump ship to another record lablel, Victor, after Okeh was purchased by now-struggling Columbia Records in 1925. Working with Victor, a record company eager to diversify its music offerings, Peer set up a temporary studio in Bristol, Tennessee and advertised to musicians in the Appalachian hill country to come audition for recordings. These 1926 recording sessions in Bristol resulted in several of the seminal recordings of what was then called "hillbilly" or "old time" music, but would later be known as "country" music. Two artists in particular, singer Jimmie Rodgers and the Carter Family, made recordings for Peer in these sessions that would cement their places as the founding musicians of the genre.

Ralph Peer demonstrated he was not just a good record producer and talent scout, he also distinguished himself as a formidable businessman and entrepreneur. Realizing that the structure of the music industry was still built largely around song copyrights and publishing royalties, Peer insisted that his artists sign over their song copyrights to his newly-formed publishing company, Southern Music Company. Peer's artists were paid a flat fee in the range of $25 to $50 dollars for their recordings, but the rights to the master recordings and the songs were retained by Victor and Peer's publishing company, respectively. No doubt, performers such as Jimmie Rodgers were elated to earn $50 for recording a record, but they had little idea how much they were giving up by assigning away all rights to copyright royalties.

While stories such as these initially inspire empathy for the unfairness of such deals, we need to remember that, at the time, Peer and Victor had no reason to assume that any of these recordings would be commercially successful. The record industry is built on the assumption of risk by the recording company. While the company benefits disproportionately from any upside profits made by a recording, the company also bears the risk that the recording will not sell. The artist, meanwhile, bears no share of the risk – but also none (or little) of any potential profit. This risk/reward scenario becomes even more fraught with accusations of unfairness when the issue of race is added to the mix. The same sorts of one-sided contracts were routinely signed by black rural blues artists in the 20th century, with one-time fees paid to the performer, who received no back-end royalties (but also no assumption of the risk of failure). In cases where the performer's recordings went on to some commercial success (a rarity in that time), the relationship seems unfair at best, and exploitative and racist at worst. Again, it's important to remember that this relationship was standard for nearly all performers, black and white, in these emerging rural genres.

By the 1930s, after the commercial viability of both blues and country had been established, Ralph Peer updated his approach by offering his recording artists a 50% share in the copyrights to their songs, a business relationship that would come to define the modern publishing industry. Peer and his Southern Music publishing company essentially invented the business model of the performer and songwriter who earn money not only from the sale of their recordings but also through their copyrighted songs. Peer was typically only interested in recording artists who wrote their own songs so that both he and the artist would earn copyright royalties rather than having them go to an unaffiliated songwriter.

8.

RADIO

The other big story emerging from the 1920s was the rise of commercial radio. Unfortunately, the sudden success of radio in the early 1920s also resulted in the record industry's first prolonged decline in sales. Radio had been invented by Thomas Edison in 1880, but he did not follow through on it due to other projects and the intensive amount of capital it would have required to build out the system. Edison's radio patents were eventually acquired by Italian inventor Guglielmo Marconi in 1895. Nikola Tesla, an American immigrant from Serbia who had worked in Edison's lab also pursued the technology early in the 20th century.

In the first two decades of the 20th century, interest in radios as a form of entertainment (as opposed to communication) was primarily limited to teenage amateurs who "broadcast" music to whomever might happen to tune into their home stations using mostly home-made equipment. The hazards of allowing unlicensed amateurs to experiment with radio transmission led to the Radio Act of 1912, which limited amateurs to certain defined frequencies, reserving other frequency bands for communications and commercial broadcasts.

In 1919, General Electric founded the first successful commercial radio broadcasting company, calling it Radio Corporation of America (RCA), after purchasing Marconi's American radio operations. During World War I, the United States Navy had seized control over all American radio broadcasters for national security reasons, and after the war decided to turn over radio broadcasting to only one American company, General Electric, to prevent any foreign control over the technology.

RCA set up its first commercial radio broadcasting station in 1921 (WDY) in New Jersey. In 1922, American Telephone & Telegraph (AT&T), expanding on its telephone monopoly, established its own radio station, bringing much-needed competition to the fledgling industry. AT&T's telephone cables enabled it to also create the nation's first radio network, allowing multiple broadcasting stations to transmit the same programming. RCA leveraged its ties to GE to also begin buying up patents and plants for the manufacture of radio transmitters and receivers, a market it soon dominated.

The rise of commercial radio in the early 1920s coincided with a downturn in the American labor market caused by the return of American servicemen from World War I. These two factors combined to suppress record sales in 1922 just as the expanding record industry was experimenting with new genres and independent labels. Victor's record sales, for example, declined by a third in 1922, and the industry entered its first sales slump. In contrast, RCA's sales growth from radio was growing just as fast as the record industry's was declining.

9.

THE GREAT DEPRESSION AND THE 1930S

The Great Depression (1929-1941) did not spare the American record industry, as record sales decreased from 104 million units in 1927 to 10 million in 1930, a decline of over 90%! The sale of record players saw a similar decrease. Some companies, such as Edison, could not survive and simply closed. Other record companies sold themselves to bargain-hunting investors. Columbia, for example, was purchased by a refrigerator and radio manufacturer in 1931. Others combined forces to weather the storm, such as English Columbia and English Victor joining to become EMI in 1931 (the company that would eventually sign The Beatles). (The British subsidiaries of Columbia and Victor had been earlier spun off of their American parent companies to be run independently.) The result of all the reshuffling of record company ownership as a result of the depression was a significant consolidation in the industry. By 1934, only four severely-diminished major record companies controlled most of the market: RCA, ARC (which owned the Columbia and Brunswick labels), EMI, and Decca.

The one bright spot in the industry was the rise of big-band jazz, featuring up-tempo dance tunes that kept America entertained through the period. Big-band jazz in the 1930s developed with the significant help of one producer immune to the ravages of the great depression, John Hammond (1910-1987). Hammond's mother was the great-granddaughter of Cornelius Vanderbilt, one of the wealthiest American industrialists of the 19th century. Hammond's elite education and appreciation for musical culture, together with his vast inherited wealth, gave him the ability to become one of America's most important producers of the 20th century. He had an uncanny ability (bolstered by economic security) to get behind extraordinary musical talents whose iconoclastic styles made them risky for those who needed quick and certain mainstream success. The list of talents recognized and promoted by Hammond over several decades despite (or because of?) their off-beat styles is remarkable for its breadth and quality: Billie Holiday, Benny Goodman, Count Basie, Robert Johnson, Pete Seeger, Bob Dylan, Aretha Franklin, and Bruce Springsteen. Each of the these had musical styles that did not fit squarely into mainstream tastes, but Hammond's belief in them and ability to advocate for them inside record companies resulted in careers that became among the most significant in popular music history. In the case of Mississippi bluesman Robert Johnson, Hammond's interest was piqued shortly before Johnson died in 1937. However, Hammond later pushed for the release of all of Johnson's relatively unsuccessful (and in many cases, previously unreleased) recordings in 1961 by Columbia, a project that propelled Robert Johnson to the status of a blues icon over 20 years after his death.

John Hammond also had a passion for trying to eliminate the segregated racial marketing bias that still gripped the recording industry in the 1930s. Hammond's support and encouragement of racial integration in the music industry led to many integrated performances and recordings in the 1930s that were the first to break those barriers. Hammond also personally produced a pair of monumental concerts known as "From Spirituals to Swing" in 1938 and 1939 in Carnegie Hall in New York City, featuring many of the iconic black performers of those years in jazz, blues, and gospel. Hosting such a concert at that time in America's premier classical music concert hall was a provocative and courageous challenge to those who still believed in the racial segregation of music.

Another positive industry development in the 1930s was inspired by the end of liquor prohibition in America in 1933. American's had not stopped drinking liquor during Prohibition (which began in 1919 with the ratification of the 19th Amendment, repealed by the 21st Amendment in 1933). Rather, the consumption of alcohol had merely moved underground to so-called "speakeasies" — bars and clubs that sold liquor illegally (and were thus more exciting and popular than legal bars had ever been). With the repeal of Prohibition, the speakeasies became legitimate establishments again, creating a newly-legal market for musical entertainment. The automatic, coin-operated, record playing machine, which would later be called a "jukebox," rushed in to fill this void. From 1934 to 1937, production of jukeboxes in America rose by over 1,000% (from 18,000 to 210,000), and by 1939, stocking of records to jukeboxes made up a significant percentage of record sales. The jukebox not only provided a new market for record sales and promotions, it provided instant feedback to marketers as to which record titles were most popular with certain demographics or geographic areas. When a customer put a coin in a jukebox and chose a particular song, that selection was recorded by the jukebox and collected by the record companies and media as a form of early opinion polling on popular music taste.

The record industry saw a significant recovery in 1938, as Decca and Victor dominated sales, combining to sell 33 million records in that year, and 225,000 jukeboxes were in operation, the stocking of which required 13 million records per year. Columbia Broadcasting Service, which by 1938 had become the third-largest radio broadcaster at the time, re-acquired its namesake Columbia Records in another sign of renewed optimism for the record industry.

10.

THE DEVELOPMENT OF NATIONAL RECORD CHARTS

The popular music listener's obsession with chart positions is nothing new. Ever since *Billboard* began publishing weekly chart information for pop songs, artists and their fans have been consumed by this seemingly objective measurement of a song's commercial success and, by extension, its inherent value. But the history and methodology behind *Billboard's* charts reveals much more about the values of popular music and its development than just counting sales.

Billboard is what is known as a "trade journal," a magazine published primarily as an "insider" source of information for the record industry. Billboard's subtitle for much of its history was "The World's Foremost Amusement Weekly." Unlike most trade journals, however, *Billboard*'s reach goes well beyond insiders because its charts have become icons of pop success. Every teenager in America since the 1950s seems to know what song is currently No. 1 on the charts.

Billboard published its first issue in 1894, when it was known as *Billboard Advertising* (the title was changed to just *Billboard* in 1897). The magazine's title comes from one of the most popular forms of advertising going back centuries — the posting of "bills" or posters on public boards (the forerunner of today's poster kiosks still found on college campuses). The magazine initially ran advertisements and reviews for all sorts of public entertainment, and had columns that detailed the news for several entertainment categories, including circuses, coin-operated amusement machines, movies, theater, fairs, carnivals, and burlesque shows.

In the early 1930s, *Billboard* began publishing a list of "Sheet Music Leaders" as well as songs most played by certain representative radio stations ("Network Song Census"), and the most popular songs on coin-operated juke boxes ("automatic phonographs," as *Billboard* called them). But it wasn't until 1936 that the magazine published its first record sales chart, which it would eventually call the "Hit Parade," but the chart only appeared sporadically through the next four years. This first pop record chart did not have any genre categories, and it listed only the top-10 records released by each of the three major labels at the time: Columbia, Brunswick, and RCA-Victor.

Billboard's 1939 description of how the Hit Parade was calculated gives an indication of the difficulty (and subjectivity) involved in making the list: "The Hit Parade checks on sheet music sales, record sales, request from band leaders at night clubs, ballrooms and hotels and request mailed to radio stations." One of the reasons that record sales weren't featured as a source of information at that time is that the record business had entered a steep decline in the early 1930s with the Great Depression, so record sales were not considered an accurate indicator of popular musical interest in the same way as radio and the much older business of sheet music sales.

In its July 27, 1940, issue *Billboard* revamped its music charts to come up with a comprehensive set of charts, "The *Billboard* Music Popularity Chart," which still separated out radio-play, sheet music, and jukebox charts, but now featured "National and Regional Best Selling Retail Records." This provides some evidence that 1940 is the year that record sales finally improved in both number and significance to finally rival, if not exceed, radio and sheet music as an industry-recognized measurement of commercial success. Prior to this time, the only regular record-sales data available was the jukebox chart, which *Billboard* published in the "Amusement Machines" section of the magazine rather than in the "Music" section. At this point, the music section of the magazine was still at the back of the magazine, behind general entertainment industry news and the sections on radio and television.

In its October 31, 1942 issue, *Billboard* made a major change to its charts by featuring a "Harlem Hit Parade" that listed the top 10 best selling records from selected record stores in the majority-black borough of Harlem in New York City. Though it took over 20 years after the first appearance of successful "Race Records" featuring black performers in 1920, *Billboard*'s Harlem Hit Parade chart finally recognized the distinct popularity of black music that wasn't reflected on its mainstream (that is, white) Hit Parade. In January of 1943, *Billboard* included a special feature on black music titled "The Negro Makes Advances: Edging into Radio, Films; Bigger Than Ever in Music; and Despite Many Obstacles."

On Jan. 8, 1944, *Billboard* began running commercially promoted record charts, the "Lucky Strike Hit Parade," which was tied to a CBS radio show of the same name. Lucky Strike was a brand of cigarette that sponsored the radio show. (At this time, radio shows were underwritten by sponsors in exchange for having the brand's name attached to the show. That model would continue with early television shows in the 1950s, such as the "Texaco Star Theater" and "Colgate Comedy Hour," two of the earliest television variety shows.) Tellingly, these two new charts continued the tradition of listing the songs with only the song title and publisher name, with no mention of a particular performer. This reflects the continued emphasis placed on songs, rather than performers, a lingering bias of the publishing-centric Tin Pan Alley model dating back to the late 19th century.

In February and March of 1945, *Billboard* introduced a series of significant changes to its charts, indicating that the post-war years would mark a significant turn for popular music in America:

- Beginning with its February 17 issue, *Billboard* replaced its Harlem Hit Parade with a new chart: Most Played Juke Box Race Records. This chart had a national scope, rather than being limited to Harlem radio stations, and used the old term "race records," which had been used since 1920 to indicate records made by black performers for a presumably black audience.
- In the March 24 issue, *Billboard* introduced the "Honor Roll of Hits: The Nation's Top-10 Tunes". Unlike most other chart changes, this was accompanied by a first-page headline in the issue: "Honor Roll of Hits Tabbed," which described the new chart as "the nation's first Honor Roll of Hits, an authenticated tab of music popularity based upon weekly surveys of every known practical indication of public tune yens." The Honor Roll of Hits continued the practice of referring to song titles and songwriters, but now added a list of *performers* who had made recordings of the featured song. The emphasis was still on the song, not the performer, but at least *Billboard* readers would now see the names of the performers who had recorded the song.
- The March 24 issue also added a "Play Status of Films with Leading Songs" chart to track what would continue to become an increasingly important tool for marketing

popular songs: their connection with films.

- The article describing these changes in March provides a thorough explanation of the metrics tracked by each of *Billboard's* charts and clearly shows the increasing importance to the magazine of its pop song charts.
- *Billboard* added a "Best-Selling Popular Record Albums" chart. We might at first suspect that this chart tracked the first LPs, or "long-playing records." However, the LP would not be introduced until 1948, so what this chart tracks is the sale of a collection of multiple 10-inch records sold together as an "album," a practice that dated back to the 1920s but had been used mostly for classical music, which required more than one 10-inch record due to the length of classical pieces. *Billboard* begins tracking classical albums as well in this issue. In this first "popular music album" chart, the Nat King Cole Trio's album, *Collection of Favorites*, holds the top position.
- *Billboard* added a new chart, "Most-Played Juke Box Folk Records," that tracked the top six songs of the genre we now call "country" music (though it was confusingly referred to as "folk" in 1945). Now, in addition to the "race record" category tracking the popularity of black artists, white southern musical styles had their own chart. Although barriers to racial integration of the music industry were falling, the separation of styles based on perceived racial difference

> was still ingrained in the industry's approach to marketing popular music. Featured in this first list of best-selling country songs are artists such as Al Dexter (the first country musician to record a song with the term "honky tonk" in the title), Bob Wills, Spade Cooley, and Gene Autry. Notably, six of the eight songs on this inaugural country chart were recorded by Okeh records, the company that pioneered the recording of both southern black and white musicians in the 1920s.

Billboard's chart configuration remained relatively stable until the June 25, 1949 issue quietly ushered in two changes in nomenclature that reveal a continued effort to keep pace with importance of southern music styles in shaping national listening habits. The previous "folk" label for white southern music was altered to include, in parentheses, the name "country and western," and more significantly the "race record" label was now changed to "rhythm and blues." The "rhythm and blues" term was apparently coined by Jerry Wexler, famed producer for Atlantic Records. Nowhere in the magazine is there any commentary on these changes to the chart names, but they indicate a belated recognition of the growing importance of these styles on the eve of the 1950s, the decade that would see these two styles merge into "rock 'n' roll". Both genres continued to be separated into separate retail record sales and juke box play charts, even though the song position listings on each chart were nearly identical. In its first issue of 1953, Billboard dropped the connection between folk and country music, with the chart now just labeled "country & western" rather than "Folk (Country & Western)".

On Nov. 12, 1955, *Billboard* debuted a new chart, "The Top 100" that was a forerunner to the "Hot 100" which remains today the primary pop singles chart. When it was introduced in 1955, the Top 100 was an auxiliary chart to the "Honor Roll of Hits" chart that was still the flagship chart for the trade. Like the Honor Roll of Hits chart, the Top 100 aimed to combine various metrics (retail sales, juke box plays, and radio plays) to determine a listing of pop song popularity for the previous week. *Billboard* had for years displayed these various metrics in separate charts for pop, country, and rhythm and blues, so these were not new metrics. But the primary and most significant change represented by the Top 100 was its *focus on performer recordings rather than songs*. The Honor Roll of Hits had focused on songs, listing the songwriter in prominent type next to the title, and in smaller type listing all current recordings by various artists of that song. This was the persistence of the old Tin Pan Alley business model, which valued songwriters and their compositions over performers.

The debut of the Top 100 indicates that in 1955, Billboard recognizes that the performer and their iconic recording of a song are becoming the point of attention rather than the song itself. By way of example, in the Nov. 12 issue in 1955, in which we first see the Top 100 chart, the number 41 song is Chuck

Berry's groundbreaking first hit single, "Maybelline." Berry's song is also listed on the Honor Roll of Hits chart for that week, at No. 29. Because Berry is the song's composer, Berry gets the large-type credit next to the song's title. However, by this point, several other performers had recorded covers of "Maybelline" — Johnny Long (and his orchestra), Jim Lowe, and Marty Robbins. So, Berry's iconic recording of "Maybellene" is listed in the Honor Roll as just one of many with no indication that it is of any more importance than Johnny Long's laughably forgettable rendition. (I urge readers to listen to Berry's "Maybellene" side-by-side with Long's cover, both easily found on YouTube, to hear first-hand how different they are.) By this time, the Tin Pan Alley songwriter-based business model was rapidly moving to the performer-based model we know today, and *Billboard* was struggling to keep its charts relevant to these changes.

Billboard introduced another chart in 1956 that indicates an important change in the industry and that would grow into one of its most important metrics, the "Best Selling Pop Albums" chart. Introduced in the March 24 issue, this chart (limited to 10 entries) would eventually become the Billboard 200 chart, listing the top 200 albums. The album had been tracked by *Billboard* prior to this, but not specifically for "pop" albums. Most early album sales were of classical music, whereas the single was still the primary sales unit for popular music. Increasingly in the 1950s, the album became an important vehicle for popular music sales as well. RIAA sales data highlighted in *Billboard* show one reason the album would become so important to the industry: the LP album earned a 37.6% share of sales revenue for 1955, while only accounting for 12.2% of the unit volume. The higher price charged for albums spiked industry revenues for the next several decades (particularly in the 1970s). Sales of albums in 1955 (by unit volume) were up 125% over 1954!

Calypso-folk crooner Harry Belafonte tops the inaugural Best Selling Pop Albums chart with his debut album, *Belafonte*, and the list also includes several film soundtracks (a perennial strong seller in albums). By the May 5 issue, Belafonte's hold on the No. 1 album spot had been taken over by Elvis Presley, with his debut album entitled simply *Elvis Presley*. Interestingly, this album does not include his big hits from 1956, such as "Heartbreak Hotel" and "Mystery Train". Oddly, the practice at this time was to exclude big hits from albums and put only the artists' slower-selling material on albums. The "Greatest Hits" album concept would not take off until the 1970s.

11.

WORLD WAR II AND THE ASCAP AND MUSICIANS STRIKES

By 1941, the year the U.S. entered World War II, the record industry had largely recovered from the Great Depression, with sales of 127 million records. And, rather than depressing record sales, World War II actually proved to be a boon to record sales as the war pumped up the economy and generated enthusiasm for American popular culture. The demand for recorded music even managed to overcome two potential drags on the industry in the early war years — first, a boycott in 1941 by NBC and CBS radio networks against the American Society of Composers, Authors, and Publishers (ASCAP); and, second, a general strike in 1942 against record companies by the American Federation of Musicians (AFM).

We will learn more about ASCAP in a later chapter, so for this discussion let's just say that it is a "performing rights organization" that collects and distributes song copyright licensing fees (royalties) to songwriters for public performances of those songs (such as plays on the radio). The ASCAP radio boycott was precipitated by radio stations pushing back against ASCAP's attempt to drastically increasing licensing fees charged to broadcast the many songs ASCAP represented. By 1940, ASCAP represented nearly all songwriters and publishers, with over 1.25 million compositions on its roster. ASCAP had set the licensing fee to broadcast its songs at 5% of a radio station's advertising revenue in 1932. However, in 1940 ASCAP announced that it was going to demand *triple* that fee (15%).

The radio industry decided to flex its muscle and show ASCAP the importance of radio to the record industry by refusing to broadcast any recordings of songs represented by ASCAP beginning January 1, 1941. To even further its leverage against ASCAP, the National Association of Radio Broadcasters set up a competing organization, Broadcast Music, Inc. (BMI) to give ASCAP competition and hopefully alleviate the pressure for increased licensing fees. BMI successfully challenged ASCAP's monopoly by focusing on newer genres such as blues, country, rhythm and blues, and gospel, leaving ASCAP with more traditional genres such as Tin Pan Alley pop and classical. During the boycott, radio stations avoided ASCAP fees by playing older music in the public domain (that is, no longer under copyright), as well as newer genres represented by BMI. This partly explains the sudden success of rhythm and blues and country music in the early 1940s.

The radio boycott ended in October of 1941 when ASCAP agreed to accept less in licensing fees (2.75%) than they had received when the boycott began — a huge success for the radio boycott and BMI. The radio industry had won, but to this day a sense of antagonism persists between the radio industry and performing rights organizations regarding the amount of royalties radio pays to songwriters and their publishers. Today, ASCAP and BMI are still the two largest performing rights organizations (PROs), though their distinctive parsing of musical genres between has largely been eroded, with both organizations representing just about every genre of music.

The ASCAP/BMI/radio skirmish of the early 1940s also inspired Congress to take a closer look at potentially anti-competitive behavior of these organizations. The result was a *consent decree* entered into between the U.S. government and ASCAP that controlled the amount and types of licensing fees ASCAP was able to collect. That consent decree still controls ASCAP's behavior today.

Just after the settlement of the radio ASCAP boycott, another legal battle erupted: In August, 1942, the union representing studio musicians (American Federation of Musicians, or AFM) began a strike against record companies, demanding that they agree to pay royalties into a trust fund for out-of-work studio musicians. The strike meant that musicians were not allowed to participate in recording sessions, though they could still play live (including on the radio).

Record companies had several weeks advance notice of the strike, so they quickly had their most popular artists make a stockpile of new recordings that could be released during the strike. Record companies also re-released recordings made before the strike, some of which (including Frank Sinatra's first big hit, "All or Nothing at All") became more popular upon re-release than they had been on their initial release. Another strategy the record companies employed during the strike was to record all-vocal groups (known as *a cappella*) with vocalized imitations of instrumental parts. The immense popularity of vocal quartets in the "doo wop" era of the 1950s resulted in part from this all-vocal strike-breaking practice.

Newer record companies that did not have backlogs of songs they could re-release (such as Capitol records, formed in 1942) were forced to settle with the union before the established majors. It was not until the fall of 1944 that Columbia, Victor, and RCA finally settled with the union by signing a contract that provided for the payment of royalties into a trust fund for studio musicians. The musicians' union had won, and the musicians trust fund continues to operate to this day.

The musicians strike contributed to several trends already in the works. The most noticeable was the decline of the big bands that had reigned supreme in the 1930s. Other factors contributed to this, particularly the war, but the recording strike certainly accelerated this trend away from big band music. Another related trend was the rise of the vocalist as the primary focus of fan interest, rather than the bandleader and instrumentalists. In the 1930s, the big bands employed vocalists that would occasionally be featured on particular songs, but the real stars were the bandleaders (such as Benny Goodman or Count Basie) and other star instrumentalists (such as Goodman band drummer Gene Krupa). During the 1940s, and partially due to the musicians strike, the vocalists became the stars. Singers such as Frank Sinatra, Billie Holiday, Perry Como, and others, emerged as celebrities and the instrumentalists and bandleaders were now cast in a supporting role. The collapse of the big band era also saw the rise of "be bop" jazz. The smaller ensembles and more challenging music of be bop were linked to the collapse of the big bands. Be bop musicians such as Dizzy Gillespie and Charlie Parker were able to record during the early 1940s with new independent record labels by using non-union musicians or union musicians who were willing to record under assumed names despite the strike. These out-of-work jazz musicians had little to lose by circumventing the union.

12.

POST-WAR BOOM, INDEPENDENT LABELS, AND ROCK AND ROLL

After WWII, the record industry enjoyed the same post-war optimism and economic vitality felt in the rest of the American economy. Record sales increased from 275 million to 400 million within just the first two years after the war (1946-47). Capitol records, founded during the war, and based Los Angeles, the city that would eventually become the new center of gravity of the record industry, saw its sales increase dramatically for such a young company (42 million records sold by 1946).

Several technological inventions, some the direct result of the war effort, would also transform the music industry. One such innovation, the long-playing (LP) record (the "album") would have a drastic effect in the way music was marketed and packaged to consumers, resulting in sharply increased profits for record companies. Columbia records introduced the 12-inch, 33 ⅓ rpm LP (album) in 1948. The 10", 78rpm, "single" record that had been the standard format since the 1920s allowed for only about 3 ½ minutes of playing time per side (thus the standard pop song length, still seen today, of about 3 minutes). The LP was capable of slightly over 20 minutes per side, or at least 10 standard-length pop songs per album. Whereas each record sold in the single format would result in the sale of two songs, the sale of each album would typically contain five times more music. The album would be priced higher accordingly, and many consumers would purchase an album when they were really only interested in hearing one or two songs from the radio. Artists could also now experiment with longer songs, which they frequently did in the late 1960s and early 1970s. Shortly thereafter, RCA introduced another new format, the 7-inch, 45 RPM single that allowed for somewhat longer sides (4 minutes each) and greater fidelity. It was the album, however, that would most alter the way music was marketed.

The optimistic spirit and sense of abundance after the war inspired the creation of many new record companies, small so-called "independent" labels that would have an historical effect on the creation of the newest musical genres — rhythm and blues and rock 'n' roll. Just as small, independent labels helped create the market for blues and jazz in the 1920s when the "majors" were not able to tolerate the risk of entering those markets, the independent labels of the late 1940's and 1950's similarly developed connections with local bands ignored by the majors, providing an avenue for these new musical styles to gain traction with the public.

A few of the independent labels started in this era include Sun, Chess, Bluebird, Modern, Imperial, Apollo, Atlantic, and King. Of these, three stand out as worthy of special mention: Chess, Sun, and Atlantic. Chess Records, founded by the Chess brothers (Leonard and Phil) in Chicago in 1947, specialized in recording black blues singers of the "Chicago blues" style. Most of those singers, such as Muddy Waters and Howlin' Wolf, had migrated to Chicago from Mississippi, which gave Chicago blues its gritty, southern flavor. Chess' specialization in black urban blues gave them an advantageous position to record one of the most prominent early rock 'n' roll artists, blues vocalist and guitarist Chuck Berry. Berry's Chess recordings from 1955 and '56 (such as "Maybellene" and "Johny B. Goode") stand as icons of early rock 'n' roll. Chess recordings of Chicago blues icons Muddy Waters and Howlin' Wolf also proved hugely influential to British blues revivalists in the early 1960s such as the Rolling Stones and Eric Clapton.

Sun Records, founded by legendary producer Sam Phillips in Memphis in 1950, became the studio that introduced the southern "rock-a-billy" sound to the world, with the first recordings by Elvis Presley, Carl Perkins, Jerry Lee Lewis, and Johnny Cash (1954-1956). As with Chess Records, Sun began by recording Mississippi bluesmen, such as B.B. King, a position that gave producer Sam Phillips a sense of the excitement and emotional directness of the blues. Phillips was a visionary for seeing the potential a white singer could have who could manage to tap into and convey the emotional energy of the blues for a white audience in an age when the record industry's color barriers were beginning to weaken. Elvis Presley was Sam Phillips' first experiment with that idea, and quite a successful experiment it was!

Atlantic Records was one of the few of these new, small independent labels that managed to survive the initial stages of high growth and survive into the high-profit era of the 1960s and '70s. Founded by the son of a wealthy Turkish diplomat, Ahmet Ertegun, Atlantic focused early on rhythm and blues, but ultimately had its greatest impact with a new genre that emerged in the 1950s: *soul*. Ertegun wisely hired a producer, Jerry Wexler, who, although a white, Jewish New Yorker, was very familiar with the southern black styles of blues and jazz and who knew how to let artists express themselves musically without stifling them through too much external control. Atlantic's biggest success from its early years was Ray Charles, who practically invented the gospel-based sound of soul music. Atlantic translated that success into becoming the dominant soul music label in the 1960s, with such artists as Wilson Pickett ("In the Midnight Hour"), Otis Redding ("Dock of the Bay"), and Aretha Franklin ("Respect"). Much of the success of Atlantic's southern soul sound came from their use of a studio in Memphis (Stax) that employed a raciallyintegrated house band (Booker T. and the MGs), giving their recordings an infectiously punchy and danceable groove.

13.

THE TRANSFORMATIVE 1960S

Whereas the 1940s and '50s featured small, independent record labels taking risks to create the new sounds of rhythm and blues and rock 'n' roll, the 1960s was a decade of phenomenal expansion and growth as the baby boomers reached maturity, ushering in the era of what we now just call "rock." Ironically, the path to rock travelled first through the unlikely genre of American folk music, and particularly through the music of Bob Dylan. To deepen that irony, Bob Dylan signed his first recording contract with the unlikely Columbia Records in 1962, when Dylan was 20 years old. This pairing was unlikely because Columbia at that time was a somewhat stodgy and conservative company known primarily for classical, jazz, and Tin Pan Alley crooners (such as Frank Sinatra). But, in an effort to reinvigorate their popular music offerings and reach a younger audience, Columbia had recently re-engaged the help of producer John Hammond, who had been instrumental in the big band movement of the 1930s.

One of Hammond's first finds in his new stint with Columbia was the leader of the American folk revival, Pete Seeger. Seeger, in turn, became enamored with Bob Dylan when he emerged in New York's Greenwich Village folk scene out of nowhere. What Dylan didn't want Seeger or others to know was that he was actually Robert Zimmerman, a recent transplant from rural Minnesota, not a vagabond from the southwest as he often told people. Though most other producers at Columbia were highly skeptical of Hammond's new interest in folk music as a commercial genre, Dylan proved them wrong with a steady increase in influence and, eventually, record sales.

Bob Dylan's influence can best be seen in the effect he had on the British Invasion bands of the early 1960s. The success of the Beatles in England in 1963, translated to America in 1964, was astutely orchestrated by manager, Brian Epstein, record company EMI, and producer George Martin. EMI had acquired Capitol Records in 1955, which gave it an American label through which to launch the invasion. Meanwhile, the other British major, Decca Records, had developed their own counter to the Beatles, The Rolling Stones. Through their manager, Andrew Loog Oldham (who had earlier worked for Epstein in managing the Beatles), the Stones pursued a blues-oriented strategy, presenting themselves as the anti-Beatles — scruffy, smirking, and sexual versus the Beatles' perpetually-smiling cuteness.

By 1965, having grown tired of battling the screams of adolescent girls, the Beatles set out to change their sound and audience, incorporating the acoustic instruments and more meaningful, poetic lyrics of their new hero, Bob Dylan. Dylan, in turn, altered his own sound to reflect his love of early rock 'n' roll by incorporating Beatles-esque rhythms and melodies into his increasingly complex lyrics. The result, from both the Beatles (primarily on their *Rubber Soul* album of 1965) and Dylan (beginning with his 1964 record, *The Other Side of Bob Dylan*) was to become known as "folk rock".

The folk-rock formula was copied immediately by other folk artists eager to expand their audience, particularly a new Los Angeles-based group, The Byrds. With their 1965 album, *Tambourine Man*, the Byrds cashed in on a formulaic pairing of folk-inspired lyrics (including Dylan covers such as "Tambourine Man") with Beatles electric instrumental backing. Byrds founder and guitarist Roger McGuinn perfected this formula by using the very same model of electric guitar (the Rickenbacker electric 12-string) that George Harrison had used to give many Beatles tunes their jangly sound. The Byrds were composed primarily of former folk singers, including McGuinn, and they initiated a trend of folk singers migrating from New York to Los Angeles to become part of the emerging folk-rock scene there. The Byrds recorded with Columbia Records, who thanks to their association with Bob Dylan and The Beach Boys were now finally on the cutting edge of popular music trends. The Byrds' producer, Terry Melcher, together with another LA-based producer, Lou

Adler, helped to define the sound of commercial pop music in the late 1960s through the folk-rock formula. Other LA-based folk rock bands included Buffalo Springfield (with former folk singers Stephen Stills and Neil Young) and perhaps the most successful of all, The Mamas and the Papas.

One of the ironic and often overlooked aspects of the folk rock sound resulted from its having been nurtured in Los Angeles, the emerging capitol of professional and industrial popular culture production. Although folk music is known for its "authentic" and rustic sound, Los Angeles folk-rock was actually crafted from cutting-edge music production techniques, including the liberal use of anonymous studio musicians. Most of the Los Angeles folk-rock recordings from the mid-1960s, including those by The Beach Boys, The Byrds, and The Mamas and the Papas used a loose collective of studio musicians known as "The Wrecking Crew" to create their light-rock soundtrack. While Roger McGuinn of The Byrds played the jangly Rickenbacker 12-string parts, the bass, drums, and other guitar parts were all provided by studio musicians rather than fellow band members. The Wrecking Crew included such legendary, though largely anonymous, musicians such as guitarists Glenn Campbell and Tommy Tedesco, bassist Carol Kaye, and drummer Hal Blaine.

One of the few *new* record companies of the 1960s that had an immediate and significant influence on the sound of the decade was Motown Records, based in Detroit, Michigan.

Motown was founded by black musician and entrepreneur Barry Gordy. Motown's formula was based on total control over their artists and product in order to assure success with the widest possible audience, particularly white teens. Nothing was left to chance, from the artists' wardrobes to their hair styles, their practiced choreography, and all aspects of their musical performance — Berry Gordy and his employees controlled it all. Motown songs were written by an in-house team of black songwriters, primarily brothers Brian and Eddie Holland and Lamont Dozier, and a group of black studio musicians who came to be known as the "Funk Brothers." The formulaic "Motown sound" was honed for immediate success: light, nonsexual romantic lyrics, performers groomed and dressed so as to diminish any sense of ethnic difference, and songs that were easily danceable yet not overly aggressive or challenging musically. Early Motown artists such as The Temptations ("My Girl", 1964) and The Supremes ("Baby Love", 1964) recorded a string of top hits that contributed to the company's phenomenal success in battling the British Invasion.

Another record company that rose to prominence in the 1960s cannot reasonably be called an independent as it was affiliated with one of the largest film companies in Los Angeles, Warner Brothers. Warner Bros. records was founded in 1958 and controlled by its parent film company. Through a series of convoluted ownership changes through the next 50 years, Warner Bros. records has emerged to become one of the "big three" record labels of the 21st century. In the 1960s, Warner Brothers struggled initially to gain commercial success, relying on a bland mix of soundtracks, comedy, and watered-down adult musical fare. One bright spot from the early 1960s was Warner's release of comedian Bob Newhart's debut album (yes, comedians used to release albums), which went to No. 1 on Billboard's album chart and won a Grammy for Album of the Year (1960).

It wasn't until 1963 that Warner Bros. had its first musical hit after signing Peter, Paul & Mary, a folk act that had great success bridging the gap between folk and commercial pop. Warner Bros. gave the folk trio complete control over their artistic decisions, a landmark concession in 1963 that would later become expected by high-profile artists. Warner's faith in the group was rewarded when their 1962 debut album spent seven weeks at No. 1 on the Billboard album chart. Through the rest of the 1960s, Warner built on that success mostly by buying up smaller record labels (Reprise, Valiant, Pye, etc.) and their artists, building up a rock and pop roster with considerable success. Perhaps their riskiest bet of the era was signing San Francisco acid-rock pioneers The Grateful Dead to their first record contract in 1967, an unlikely pairing of Los Angeles movie-studio culture with San Francisco Haight-Ashbury acid culture. The company continued their successful venture into emerging rock and folk acts by signing Joni Mitchell, Van Morrison, and Jethro Tull. But their biggest move was their acquisition of Atlantic Records in 1968, creating a powerful combination that put the company on its path to becoming a major global conglomerate.

14.

THE 1970S AND GENRE STRATIFICATION

The merger of Atlantic and Warner in 1968 serves as a symbolic tipping point between the free-wheeling 1960s and the mature and highly-profitable record industry that emerges in the 1970s. In 1967, the American record industry first earned over $1 billion, a revenue milestone indicative of the phenomenal success (and excess) of the 1970s.

Culturally, the 1960s ended quite abruptly with the Charles Manson murders in August of 1969 in Los Angeles and the violent rock festival fiasco at Altamont, California in December. The mythical showcase of hippie nonviolence at Woodstock in August of 1969 quickly gave way to the reality that the dreams of a cultural revolution fueled by rock and LSD had peaked in 1967. But for the record industry, the collapse of the counterculture's utopian dream only provided an opportunity to reach a demographic of young people who were now entirely engaged with popular music as a reflection of their personal identities. The collectivist dream of the '60s gave way to the individualist narcissism of the "me decade," and music genres suddenly came to life that would cater to every conceivable taste across the social spectrum: singer-songwriters, funk, heavy metal, soft rock, progressive rock, southern rock, blues rock, space rock, glam rock, jazz rock, disco, punk, country rock, etc. The industry was primed to cater to all tastes and it seemed any band could get a record deal if they offered a new flavor of music to a potential niche audience. *The loss leaders were given free rein because the industry was selling so many records that the risks of signing acts that didn't sell were easily absorbed.* (A "loss leader" is a an artist who doesn't sell enough records to break even, but who nonetheless has a loyal following of fans and critics that make the financial losses worth sustaining.)

The profusion of genres in the early 1970s can also be tied to another defining aspect of 1960s popular musical culture — the increase of artistic freedom and control given to artists to define their own sound rather than requiring them to conform to a musical template. In the early 1960s, producers such as Phil Spector and Motown's Berry Gordy demanded total control over the musical product and the way the artists presented themselves on stage. By the late 1960s, such levels of control were largely overtaken by an attitude that creative freedom was the ruling aesthetic, with few artistic choices off the table. The 1970s saw the full flowering of this aesthetic of creative freedom, from George Clinton's Funkadelic to the fantastical excesses of progressive rock exemplified by Yes, there were seemingly no limits to how far the musical boundaries could be pushed.

The development of FM radio (short for "frequency modulation") in the late 1960s injected an additional catalyst into this process. AM radio (short for "amplitude modulation") became the source for "Top-40" programming, playing only the top pop hits in a restricted playlist. FM became the source for a new form of programming, album-oriented rock (AOR). *With AOR, the album, rather than the pop single, became the object of musical delivery.* The 3-minute pop single, previously the aesthetic objective for all pop artists, instead became a sign of "commercial sellout" and the 5-minute rock song, nearly always including a guitar solo or other instrumental bonus became the AOR norm. At the extremes, bands such as Yes recorded albums on which an entire album side (40 minutes) was devoted to a single song (such as their 1972 album *Close to the Edge*). *This new emphasis on the album as the unit of sale rather than the single helps explain the surge in record industry profits, as albums were sold at a premium cost and lower manufacturing cost per song.*

In addition to the major record labels from the 1960s (primarily Columbia, EMI/Capitol, and Decca), it was the combination of three independents (Atlantic, Elektra, and Warner) coming together under the Warner name that stands out as a potent new force in the 1970s. By 1970, these three labels exceeded Columbia's revenue figures by earning over

$18 million annually under the Warner Communications corporate umbrella, which also included the famous film studio. Three of the legendary names of the industry were in charge of the labels making up this new juggernaut: Mo Ostin who continued to run the Warner/Reprise label, Ahmet Ertegun and Jerry Wexler of Atlantic, and Lac Holzman of Elektra.

In particular, Ertegun's success with the Atlantic label continued as it expanded beyond its soul music origins. In 1968, he signed one of the biggest-selling bands of the '70s, Led Zeppelin, and in 1968 wrestled the Rolling Stones away from Decca for their hugely successful 1971 *Sticky Fingers* album. Warner's success continued to be driven by its policy of letting its labels and artists have wide artistic latitude, while also contributing an equally creative approach to marketing, such that each artist's promotional materials reflected their own idiosyncratic image and the mindset of their young fans rather than conforming to a corporate-wide culture. The Rolling Stones' *Sticky Fingers* album cover provides an iconic example with its raunchy image of a man's denim-clad crotch complete with actual functioning zipper (designed by infamous pop artist, Andy Warhol).

Warner also added a new label to their roster, Asylum, led by newcomer David Geffen. Geffen had begun his career in artist management in the 1960s with the famous William Morris talent agency in Los Angeles. Seeing opportunity in the emerging singer-songwriter and country rock genres emerging in Los Angeles in the early 1970s, Geffen started his own company, Asylum Records. Asylum quickly signed several artists that would come to define the sound of the early 1970s: Jackson Browne, Joni Mitchell, Linda Ronstadt, Tom Waits, and The Eagles. Coming from the artist management side, Geffen's approach, like the other Warner labels, was artist-centered, an approach that was particularly effective with the Laurel Canyon singer-songwriter crowd who best represented the continuation of the hippie aesthetic from the '60s.

The 1970s also saw the emergence of three new genres challenging the sound and look of mainstream rock and the industry that supported it: glam, disco and punk. Intriguingly, each of these genres also provided a geographical counterbalance to Los Angeles as the seat of power in the industry by refocusing attention on both New York City and London. And, as had been true throughout the history of the record industry, the major labels were too risk-averse and disconnected from events on the ground to be an initial part of these new trends.

Disco emerged primarily from an unlikely source, an Italian-born German electronic music producer, Georgio Moroder, who combined his pulsing electronic dance music with the jazzy soul vocals of a black American singer then living in Germany, Donna Summers. Los Angeles-based independent Casablanca Records recognized the commercial potential in

Moroder's dance-oriented experiment, confirmed by the success of Donna Summers' disco hit "Love to Love You Baby" in 1975. The 17-minute length of this song provides testimony to the purpose of disco — endless dance music rather than 3-minute radio-friendly pop hits. Ironically, Casablanca's risky disco venture was bankrolled by the phenomenon of their other unlikely success — American glam-rock band Kiss, who gave Casablanca their first platinum album (1,000,000 copies sold). Casablanca followed up their Donna Summers experiment with one of the biggest selling disco singles of the era, "YMCA" by the Village People in 1976. Like Summers, the Village People were the brainchild of a European dance music producer, in this case France's Jacques Morali, who saw commercial potential in the gay subculture fueling New York's dance scene.

The punk phenomenon seemed to arise almost simultaneously in both New York City and London, primarily through the New York group The Ramones, and their even more flamboyantly rebellious proteges in London, the Sex Pistols. The Ramones released their debut album on Sire Records in 1976, a label founded by Seymour Stein in the early 1970s. Sire then signed the Talking Heads in 1977, another band then stirring up interest with the Ramones and other punk acts at the notorious CBGB club in New York. Both bands garnered critical acclaim for their early releases, but only the Talking Heads managed to translate that into mainstream success. These early punk signings got Sire the attention it needed to be purchased by Warner Bros. in 1977, providing the small company with the distribution and capital to expand their offerings as punk morphed into "new wave" in the late 1970s with greater commercial success.

In London, the Sex Pistols and their manager, Malcolm McLaren, were combining McLaren's line of sexual fetish clothing (sold at his London boutique named simply "Sex") with a rudely brash and politically provocative brand of punk. McLaren managed to get the band signed to EMI for the release of their first single "Anarchy in the U.K." in 1976, which did well enough to interest Los Angeles-based A&M Records in their debut album. The opening existed because EMI had released the Sex Pistols due to their relentlessly rude public behavior.

A&M Records had been founded in 1962 by Herb Albert and Jerry Moss (the first letters of their last names providing the company's name), which became known as an artist-friendly label specializing in instrumental music, jazz, and soft rock. A&M's early legacy was anchored largely by the success of trumpet-player Herb Albert's enormously successful "Tijuana Brass" recordings in the early 1960s. A&M's unlikely interest in the Sex Pistols, given their history with middle-of-the-road instrumental pop, gave rise to one of the more bizarre and entertaining episodes in record-industry lore. Just as A&M were about to sign the Sex Pistols, the A&M executives in London for the festivities were assailed by the band's predictably rude and outrageously vulgar antics. Realizing they didn't have the corporate stomach to stand behind the Sex Pistols, A&M quickly backed out of the deal they had just signed, offering the band $75,000 (half of their initial advance) just to tear up the contract. The band had just earned $75,000 for doing absolutely nothing (other than embarrassing both EMI and A&M record executives).

The Sex Pistols quickly signed to a small label with little to lose, Richard Branson's Virgin Records, demonstrating Branson's brash risk-taking style that continues to fuel his corporate ambitions to this day with Virgin Air and his latest efforts at commercial space travel. Meanwhile, A&M recovered from its initial whiff at getting involved in British pop by quickly signing three highly successful British new wave artists — Squeeze, Joe Jackson and The Police. With these and other successes, A&M became one of the most successful labels in the late 1970s and early '80s, making them ripe for being bought up by Dutch record company PolyGram in 1989, which in turn was later folded into what is now the largest record company in the world, Universal Music Group.

15.

THE 1980S AND 90S: CONSOLIDATION AND MTV POP SUPERSTARS

In 1979, the record industry faced its first major financial challenge since the Great Depression of the 1930s, with an 11% decline in sales. The causes of this were both external, a general recession that gripped the American economy from late 1979 to late 1982, and internal, a pause in new musical activity after the twin developments of punk and disco had largely run their course. So much money had been invested in the disco craze, including every major artist, even the Rolling Stones and Dolly Parton, recording disco hits, that the sudden drop in interest in disco hit some companies particularly hard. By 1982, Columbia's faltering profits forced it to lay off three hundred employees and close record factories.

Another internal factor was affecting record company profits during this period: the rise of independent radio promoters. Record companies had traditionally managed their own promotions and relationships with radio stations to get airplay for new records. The infamous "payola" scandal of the 1950s, culminating in Congressional hearings, brought light to this manipulative but otherwise legal practice of essentially bribing radio stations and their disc jockeys with cash, gifts, or decadent entertainments, to favor a company's new recordings on their playlists. After the scandal, record companies began outsourcing this unsavory but critical aspect of the business to third-party ("independent") promoters, who translated cash payments from record companies into radio play with little accounting for how that process occurred.

With the enormous rise of productivity and profitability of the 1970s, paying for independent record promotion for so many new artists became a cash drain on record companies. Smaller companies could not afford to compete with the majors in paying for increasingly expensive independent promotion, so they found themselves unable to get their recordings the radio plays needed to climb into the Billboard charts. The power of the independent promoters grew to such an extent that, when sales began declining in 1979, some of the larger record companies, led by Columbia, began boycotting the promoters and moving promotion back in-house. Again, smaller companies were unable to compete due to a lack of staffing and resources to join in the boycott. Ultimately, the boycott failed as independent promoters used their relationships with disc jockeys to freeze out noncompliant record companies from valuable playlists.

Once again, however, a new area of musical creativity was slowly entering America's consciousness, one that would eventually become the biggest-selling genre in the world: rap and hip-hop. The growth of rap, from an underground scene primarily in the Bronx borough of New York City, to pop singles on the national charts, was a slow process that, as always, involved new independent companies with the entrepreneurial, risk-taking mentality required for such a shift. Two new record companies in New York City took the initial steps, showing the potential for commercial success in a genre that defied nearly all the pop music conventions of the time: First up was Sylvia Robinson's Sugarhill Records, whose first release, "Rapper's Delight" in 1979 by the Sugarhill Gang, became the first commercially successful rap recording. Former disco music promoter Tom Silverman then revealed the creative musical potential of the genre with his discovery of pioneering hip-hop producer Afrika Bambaataa (born Robert Keith Wiggins) and release of Bambaataa's seminal "Zulu Nation" in 1981 and follow-up "Planet Rock" in 1982, both on newly-formed Tommy Boy Records. Bambaataa, who is said to have coined the term "hip hop," had helped pioneer the use of electronic drum machines, synthesizers, and turntables to create the collage of sounds that came to define the genre.

Meanwhile, another New York independent, Sire Records, was using cash from the sale of a 50% interest in the company to Warner, to leverage its New York punk pedigree to sign a new crop of British new wave and post-punk bands that would emerge as one of the signature sounds of the '80s, including Echo and the Bunnymen, the Cure, Simple Minds, English Beat, and Depeche Mode. These and other bands often used synthesizers and drum machines to extend the timbral and rhythmic range of punk into a form of hybrid punk-disco electronic dance music.

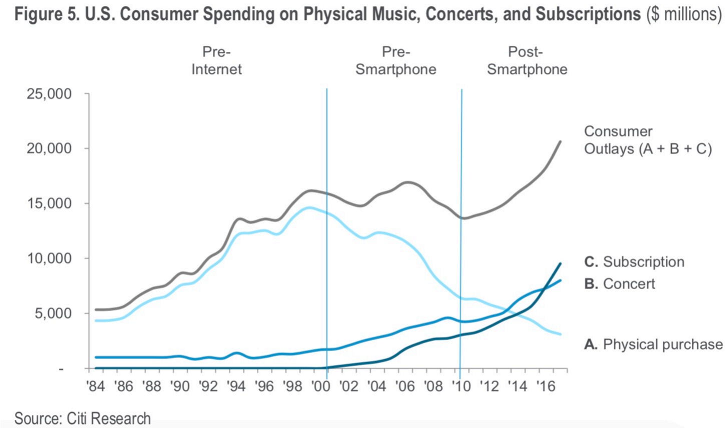
But the big stories of the 1980s were two developments that would transform the industry, the CD and MTV. The MTV 24-hour cable music video channel began airing August 1, 1981, and the record industry was forever changed from selling a primarily audio form of entertainment into one in which the visual element became as big of a draw as the music. The idea of combining audio with film to market popular music was not a new idea in and of itself. Since the 1920s, pop artists from Bessie Smith to Benny Goodman, Bing Crosby, Elvis, the Beatles, etc., had used films and television as an important element of marketing their music. However, the MTV format constantly streamed endless music videos into the homes of America's most affluent teenagers (those whose parents could afford cable television), making video marketing affordable to nearly any band with a record deal. It also increased the ability of artists to highlight sex appeal and visual charisma in a way a static album cover could only begin to touch.

CBS (Columbia's parent company) released Michael Jackson's triumphant solo album *Off the Wall* in 1979, capitalizing on the disco dance music craze by combining it with the former

Motown child star of The Jackson 5. To resurrect their flagging profits early in the '80s, CBS convinced producer Quincy Jones to work with Michael Jackson to produce a follow up. The result, *Thriller* (1982), was one of the best-selling albums of all time, earning over $60 million in revenues within one year. Michael Jackson's long-form *Thriller* video (14 minutes) helped cement the importance of MTV to selling records, the irony being that MTV refused to add black artists to its playlists until CBS threatened to boycott the station unless it aired the groundbreaking epic. Other music video stars, particularly Madonna and Prince, helped establish the music video as an essential element of music marketing and creative display.

The digital laser disc, known as the Compact Disc (CD), co-developed by Phillips and Sony, became available in 1982. Its advantages were primarily matters of convenience — small size, longer playing time, ability to instantly skip tracks, etc. (The supposed sonic advantages of digital reproduction were also pushed heavily, but first-generation CDs were actually known for their uninspiring brittle and thin sound.) The primary advantage from the record company perspective, however, was the availability of a new format that could be marketed to consumers as a necessary replacement for noisy, fragile, and cumbersome vinyl records. In a time of stagnating sales, record companies were able to convince consumers that they needed to re-purchase CDs of album titles that they had already purchased as vinyl.

The rebound success of the 1980s built on MTV superstars and the CD fueled a new round of consolidation in the industry, as the back catalog masters and publishing rights held by the larger labels became increasingly valuable assets. Global conglomerates with cash to invest saw sudden value in the recording industry. A few of the major deals from the 1980s provide ready evidence of this trend: In 1986, the German multimedia publishing conglomerate Bertelsmann purchased RCA Records from General Electric (which had owned the company since the 1920s) for $300 million. In 1987, Japanese consumer electronics giant Sony purchased the *grande dame* of American labels, Columbia, for $2 billion. In 1989, the Dutch PolyGram company purchased Island Records for $300 million and A&M Records for $500 million, and British stalwart EMI purchased Virgin Records' Chrysalis label for $75 million. The consolidation continued into the 1990s, with EMI purchasing the remainder of Virgin Records for $1 billion.



Citigroup 2018 Music Industry Report (Fair Use)

The MTV pop superstars of the 1980s also helped propel the U.S. and British record industries to new levels of global success. The consolidated major record companies now had the capital to establish global distribution networks to fund this expansion. The urban dance style of Madonna, Michael Jackson, Prince, etc., provided the globally accessible and visually alluring soundtrack to nearly world-wide commercial growth. The retail sales side of this expansion was fueled by a corresponding success of global retail music stores such as Virgin Records and Tower Records, whose dominance would not be threatened until even larger retail powers such as Walmart, Target, and Best Buy entered the music retail market in the 1990s.

Because of the supposed advantages of the futuristic new CD format, along with potentially longer running time (60 minutes vs. 40 minutes), CDs could also be priced higher than vinyl albums. Suddenly, the back catalogs of the major record labels had a whole new value as they were reissued as CDs. Another significant advantage was that there was no longer a viable "single" market, so consumers were pushed to purchase entire CDs to hear only one song they had heard on the radio, with a corresponding increase in profitability.

The twin stimuli of CDs and MTV helped resuscitate the record industry by 1983, though it was primarily the major labels who benefitted due to their back catalog CD reissues and the MTV superstars who sold millions of CDs based on expensive and visually exciting music videos. The typical recording musician saw little of that additional revenue.

But like the proverbial "broken record," the cycle of major-label consolidation followed by the rise of new independents continued into the 1990s as hip hop became a global phenomenon and yet another post-punk style, grunge, emerged with support of a small, independent label. The Seattle-based grunge movement in the early 1990s might well be one of the last gasps of independent rock creativity emerging outside the control of the major labels. The case of grunge is particularly compelling as it arose in a city, Seattle, that was completely outside the orbit of the record industry. The tiny record company, Sub Pop, was the work of one hardworking visionary, Bruce Pavitt. He had begun his journey as a student hosting a show on college radio, which gave him a platform for promoting his love of punk and a fresh hybrid musical style that blended the pounding rhythms and soaring melodies of heavy metal with the angst-ridden lyrics and rough vocal style of punk. The result was grunge, and the bands playing the style happened to all descend on Seattle in the early 1990s: Soundgarden, Pearl Jam, and the band that first earned global success, Nirvana. Bruce Pavitt was in the right place at the right time to promote grunge into a commercial success. His next step was to start a self-published fanzine, *Subterranean Pop.* This was pre-internet, so the magazine was truly underground, available only in its photocopied, stapled form in small record stores and other obscure locations. Moving to Seattle from Olympia, Washington in 1983, Pavitt opened a small record store, followed by a record label in 1986, shortening the name to Sub Pop. Sub Pop became yet another legendary independent label in 1989 with the release of Nirvana's critically-acclaimed debut album, *Bleach.* By the release of their second album, *Nevermind*, recorded in 1991, Nirvana had left Sub Pop and signed with David Geffen's new label, DGC Records, and the album quickly reached No. 1 on the Billboard 200 album chart.

The small, underground record stores and independent record labels finding overlooked local talent, demonstrated by Bruce Pavitt and Sub Pop, had become a recurring theme in the industry. This theme was again exemplified by the Rough Trade record store in London, which launched its own small record label in 1976 that became pivotal in introducing underground ska, new wave, and synth pop bands in the late '70s and early '80s.

In the 1980s, producer Rick Rubin became familiar with New York hip hop through a small record store in New York's eternally-alternative Greenwich Village neighborhood. For the white Rubin, hip hop functioned in the late 1980s not as an outlet for racial expression, but as an alternative to white rock and pop, much as punk had functioned for disaffected white youth in the 1970s. Rubin had played in a punk band in the early '80s, but was ultimately attracted by the transgressive potential of hip hop. He started his own label, Def Jam Records, in 1984, and eventually signed many of the most seminal hip hop artists of the late '80s and '90s, including Public Enemy, LL Cool J, the Beastie Boys, and Run DMC. From his self-started label, merging the transgressive energy of punk and hip hop, Rubin almost single-handedly provided the platform for hip hop to transition from an underground phenomenon to the best-selling music genre in the world.

London's Rough Trade Records, Seattle's Sub Pop Records, and Rick Rubin's New York-based Def Jam Records all proved the importance of entrepreneurial risk-taking and being close to "the street" in finding the next big thing in popular music. They also perhaps are the last pre-internet examples of that phenomenon. In the internet era, it's increasingly unclear whether the value of local "street" knowledge of underground musical culture retains its function or even meaning.

The 1990s also saw more signs of consolidation in the industry, primarily the purchase of PolyGram by Canadian liquor empire Seagram in 1995 for over $10 billion. Seagram then purchased a controlling interest in Universal Pictures and their MCA record division, merging these assets with the newly-acquired PolyGram under the Universal label. Universal Records, though now owned by French conglomerate Vivendi, stands today as the largest of the three mega-sized record companies (the two others being Sony and Warner), which together accounted for over 70% of all recorded music sales revenue in 2017.

16.

NAPSTER, THE IPOD, AND STREAMING: THE RECORD INDUSTRY IN THE NEW MILLENNIUM

Without a doubt, the big story of the new millennium has been the collapse of recorded music sales due to MP3 piracy and the subsequent recovery fueled first by Apple's iTunes and now streaming. The big non-story is the continued consolidation of the record industry into three major companies that dominate the industry globally. Let's start with the rise of Napster and MP3 piracy.

Recorded music piracy did not begin with MP3 files. There were previous underground markets for bootleg vinyl records, then a bigger market for easier-to-create bootleg cassette tapes, and then bootleg CDs. However, MP3 piracy became an industry-wide threat in the 1990s primarily for three reasons: (a) the advent of peer-to-peer (P2P) file networks and software that accompanied widespread availability of high-bandwidth internet, (b) a pervasive sense of entitlement to free music among consumers driven by a lack of respect for the record industry, and (c) the record industry burying its head in the sand rather than quickly moving into the internet age.

When 19-year-old college student Shawn Fanning started Napster in June, 1999, it was not the only peer-to-peer file-sharing network on the internet. But it was the easiest to use and Fanning marketed it successfully to young music consumers. So, it became the public face and name for both fans and critics of peer-to-peer technology. By downloading the free Napster software to their computers, users could put links to MP3 files that they had ripped from CDs onto Napster's index, allowing other users to search for songs (or other media files) and download them directly from the computer of the user who had listed them. This is an important point about P2P networks: the files themselves were not stored on central P2P host servers. Napster and other P2P networks only offered indexes of links to files stored on users' computers, thus the name of the technology — "peer to peer". This will become an important legal distinction as we move forward in this story.

Within a year of its release in 1999, Napster had over 100,000 users whose primary activity using the program was freely sharing, rather than purchasing, copyrighted music. The threat to the recording industry was so obvious and ominous that the Recording Industry Association of America (RIAA), whose mission it is to promote and protect the recording industry, filed suit in federal court against Napster, alleging massive copyright infringement. However, the publicity and sense of entitled anger at the "greedy" record industry only served to increase Napster's popularity among college-aged youth, who took advantage of high-speed internet on college campuses to increase their use of the service. The global consolidation of the record industry discussed above, as well as the elevated price of CDs, helped fuel a sense among young consumers that the industry deserved what they were getting. The sense of youthful rebellion, combined with a "revenge of the nerds" narrative of clever computer coders disrupting the world, fueled a narrative that "music should be free."

Seemingly lost in this mass youth rebellion against the industry was the fact that young musicians were just as likely as the "evil" record companies to suffer from music piracy. But musicians became the sacrificial lambs in this equation, a scenario no doubt fueled by the lingering Romantic idea of musicians not being in it for the money anyway. The alienation of musicians only increased when heavy-metal band Metallica and hip hop producer Dr. Dre joined in the fray with their own lawsuits against Napster in 2000. Napster settled out-of-court with Metallica and Dr. Dre, but the RIAA's lawsuit advanced to the point that Napster was ordered by the court to keep track of all downloads of copyrighted songs and their points of origin. Unable to comply with the court order, Napster shut down their service in July, 2001, after only two years of operation.

Napster's demise, however, did nothing to stem the tide of P2P file sharing, as other similar companies rushed in to fill the void, such as Kazaa, Gnutella, and Grokster. Unable to stem the tide of online MP3 piracy, the record industry made a fatefully ill-considered decision: rather than working to embrace and compete in internet music distribution, it decided to double-down by going after individuals who were sharing music on the P2P networks, filing 261 lawsuits against P2P users in 2003. In the first such case to go to a jury trial, a single mother in suburban Minnesota was held liable for $1.5 million in damages for sharing 24 songs online. (The damages award was so high because the damages were calculated not by the number of songs, but the number of downloads of those songs.) The resulting publicity from this and other cases was disastrous for the record industry, reinforcing the image of an industry doing anything to protect its profits and nothing to embrace the new technology.

The use of P2P networks to share copyrighted music continued to rise, and the damage to the industry was becoming clear: CD sales were down over 10% in 2002 and the declining trend continued nearly unabated until 2015. By 2015, recording industry revenues had declined to less than half of their pre-Napster levels! (It is difficult to factually attribute all of this decline to P2P file sharing, as there are numerous variables involved, but the correlation is clearly well beyond coincidental.)

The record industry did attempt in the late 1990s and early 2000s to sell music downloads on the internet to compete with the P2P piracy networks, but those efforts failed to gain traction with consumers due to high prices and policies that limited the duration and use of a downloaded file. The first such service, opened in 1998, required consumers to burn a CD from their downloaded file in order to listen to it. However, portable MP3 players had already become widely available by that time so consumers predictably viewed that as antiquated and inconvenient, if not insulting. Another industry-wide effort backed by Sony sold downloads for $3.50 per song for a file that expired after a certain duration requiring repurchase. These efforts failed to convince young consumers to abandon the concept of free music downloads using P2P internet services.

The record industry's inability to successfully transition to a sanctioned and attractive internet-based distribution of recorded music created an opportunity for another industry to fill that void. So, right on cue, Apple Computer stepped up to seize the opportunity, pulling the rug out from underneath the record industry and changing the industry's entire business model within just a few years. Apple introduced the iPod MP3 player and its accompanying iTunes on-line music store in 2003. By 2011, Apple had sold 300 million iPods and 10 billion songs through iTunes. But that represented less than 10% of Apple's total revenue during that period. Apple has continuously used music as a point of entry into its more lucrative phone and computer hardware sales, rather than as a profit center. Unlike a record company, music sales represent only a way for Apple to attract customers, rather than the main source of revenue. This allows Apple to compete on price in a way the record industry never could. Consequently, Apple was happy to sell songs at $0.99 for each download rather than pushing consumers to purchase whole "albums" of songs for $15, which was still the record industry model. Given the depressed state of CD sales from MP3 piracy, the record industry was in no position to refuse Apple the licenses to sell their music in this way (particularly as Apple had developed a secure rights-management system to ensure that their files could not be shared). Apple's online iTunes store quickly became the highest-grossing music retail outlet in the United States, hastening the demise of brick-and-mortar record stores. The largest and most iconic of those stores, Tower Records, declared Chapter 11 bankruptcy in 2004 and again in 2006, followed shortly that same year with complete liquidation of the company's assets. In just a few years, iTunes had complete destroyed the traditional retail music sales industry. (Not coincidentally, Amazon had previously done the same thing to the book publishing industry, which also was too late to compete with Amazon's online and electronic book sales before the retail bookselling industry was eviscerated.)

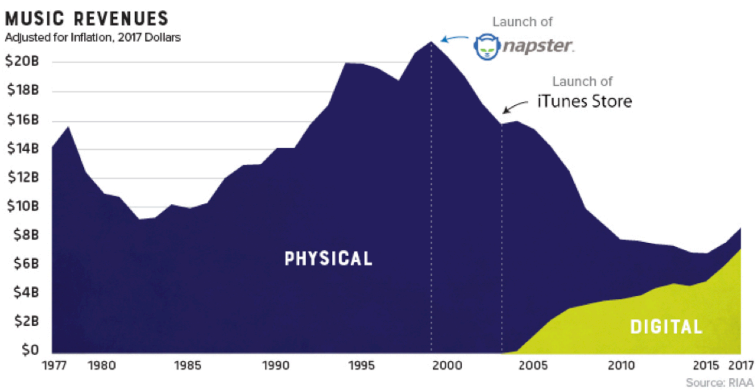
While the success of iTunes and legal MP3 downloads translated as a positive development for Apple, that was not the case for the record industry as a whole. It wasn't until

2015 that the record industry turned the corner and began to recover from the disasters of the previous two decades. The engine that fueled the recovery was not the sales of downloaded songs, however — it was an even more disruptive technology, music streaming. ***Music streaming comes in two flavors that are important to keep conceptually separate — interactive streaming and non-interactive streaming.*** The difference is relatively simple: Interactive streaming involves the consumer choosing which song to listen to, while non-interactive streaming involves the streaming company choosing which song to offer the customer (typically contained within a station or curated playlist). As we will see later in the chapter on copyright royalties, this difference is important in determining how much artists and songwriters get paid.

The first big streaming success came with Pandora, a non-interactive streaming site offering internet radio through its website and mobile app. Pandora curates its streams based on a customer's listening history and feedback, but the user does not search and choose which songs to stream (which makes Pandora non-interactive service). Pandora was founded in 2000 but did not gain traction with the public until roughly 2010, when it had 45 million users. By 2012, that number had grown to 125 million and in 2011 the company began offering its stock to the public. Like traditional "terrestrial" radio and most internet services, Pandora's revenue is based largely on advertising played to users in between songs. Like many internet services, however, Pandora was plagued by the structural limitations of its free-use advertising-based business model — steadily increasing revenues, but negative net-income (i.e., no profit). The costs associated with licensing the music to provide to customers always exceeded the ad-based revenue — in other words, the business model does not "scale", so growth is always accompanied by costs that exceed the increase in revenue. By 2018, Pandora realized its business model would never turn a profit, so it agreed to be purchased by satellite radio survivor, SiriusXM (itself the product a merger of the two pioneering satellite radio providers, Sirius and XM) for roughly $3 billion. Interesting, isn't it, that a company that had never turned a profit could be worth $3 billion? The value was apparently in was is known as the company's "goodwill," that is its name, customer base, relationships, and potential.

Pandora's inability to translate its success with users into profits was also partly due to the simultaneous rise of interactive streaming and its primary innovator, Swedish company Spotify, founded in 2006. Interactive streaming offers consumers the opportunity to choose their own music (what a concept!), so it has been able to accomplish what Pandora never could — get most users to agree to pay a monthly subscription fee rather than relying on advertising revenue. Pandora never managed to get more than about 20% of its users to convert from free, ad-supported memberships, to its premium ad-free membership that required a monthly fee. Spotify, however, has been able to achieve a nearly 50%

subscription rate among its users as of 2020. Subscription fees translate into not only increasing revenue but higher net-income (profit) because such fees create regular, guaranteed income, even from users who don't actually use the service frequently. *Most critically, that translates into lower music licensing fees per user.* However, even Spotify has itself trouble turning profits, with only one profitable quarter (4th quarter of 2018) since it went public in the spring of 2018 (companies do not have to report earnings unless their stock is publicly traded).



Music Revenues, RIAA 2018 Year-End Music Industry Revenue Report (Fair Use)

Spotify is not the only interactive streaming site, of course, so another major problem for the company is competition. Apple Computer has now become Spotify's primary competitor, and again the problem for Spotify is that Apple does not rely on revenue from its new streaming service (Apple Music) to fuel its profits. Apple, which earned *profits* of over $55 billion in 2019, can afford to run its music streaming service at a loss in order to achieve its real purpose, which is to drive customers to its hardware products, particularly the iPhone. *Apple's ability to compete with Spotify and other streaming services on price, but without worrying about profits for that service, poses a significant challenge to the music streaming business model.*

It is worth noting that Apple's formula for success, using the sale of media content to drive the more profitable sale of hardware, is the business model that was used successfully by the record industry in its first decades before the Great Recession. Victor Records, Edison, and Gramophone all made music record players as well as the records and cylinders consumers played on those devices. The higher-margin sales of the hardware supported the less profitable business of making and selling recordings. No doubt many record company executives currently wish that model had not been abandoned by the record industry when it rebuilt itself after the Great Depression.

17.

THE RECORD INDUSTRY TODAY

The record industry today is dominated by three large, multinational media conglomerates (Universal, Sony, and Warner) that collectively earn over 70% of the revenue of the entire industry. Independent record companies make up most of the other 30% of revenue and, as always, they play an important role in releasing new artists and genres that the major companies often ignore (folk, classical, bluegrass, jazz, etc.). Note that each of these major record companies also earns a significant amount of their revenue from non-music sources, such as movie production. For example, Sony's 2017 music-related total sales of $800 million comprise *less than 10%* of its company-wide revenues. *This highly diversified portfolio of revenues demonstrates the attraction of consolidation to an industry that has faced multiple financial downturns.* Sony and the other major media companies can survive the disruptions and ups and downs inherent in the music industry without worrying that the ship will sink, as some other unit in the company will likely provide ballast.

Another segment of the the record industry, which only makes up about 3% of total revenue, is nonetheless worth mentioning: self-released records and the internet-based companies that support them. Founded in 1998, CD Baby was the pioneer in this market segment, originally providing CD manufacturing, marketing and distribution services to musicians who did not have the support of a record company. With the advent of internet streaming, CD Baby has made the transition to offering that same level of support to musicians to get their music on the internet and onto streaming services. For a fee, CD Baby and other companies that have followed in its footsteps, such as DistroKid and SoundCloud, can offer musicians many of the services provided by a record company other than the up-front cash advance. The services provided by these companies rarely result in significant earnings for musicians, but they offer a potential point of transition to artists who can quickly build a following and then attract the attention of a traditional record company.

There are two glaring holes in this description of today's music industry that I will now address — YouTube and live music. I will only briefly touch on these topics in this chapter because I will discuss in them in greater detail later in the book. First, YouTube. YouTube is its own legal and financial universe and does not fit neatly into any other segment of the industry. But YouTube has nearly two billion users per month (!), and, according to Google (YouTube's owner), it paid out $3 billion in total revenue to the music industry in the year ending September, 2019.

YouTube functions more like the P2P file-sharing companies than it does any other music distribution model, with the major difference being that its revenue is derived almost entirely from advertising. YouTube is also legally protected from copyright infringement complaints due a law, the Digital Millennium Copyright Act, that we will discuss in a later chapter. Like P2P services, YouTube does not provide content to is users, other users do. YouTube hosts the shared files on its own servers, but it does not create them or pay to have them on the service. It only shares ad revenue with those who post the videos based roughly on the number of streams. *Because of this difference, YouTube does not pay licensing fees or other legally-mandated fees to record companies or musicians for the music used on YouTube videos.* Accordingly, *YouTube pays much less per stream to music creators and rights holders than do music streaming services such as Spotify*. And YouTube is not a profit center for Google as it apparently loses over $100 million per year according to Google. (YouTube and Google are subsidiaries of parent company Alphabet, which is not required to report the earnings data for those subsidiaries, only for the parent company as a whole. However, Alphabet voluntarily began providing more financial data on YouTube beginning in 2019.)

Another striking change in music industry revenues is the rise of live music ticket sales, which now make up the vast majority of most performing musician's incomes rather than sales of recorded music. Each spring, *Billboard* magazine publishes a list of the top-50 highest grossing musical acts of the previous year, breaking down the sources of their income. A quick look at the most recent such list shows how critical live performance revenue has become in comparison to recorded music sales: Taylor Swift was the top grossing musical performer in 2018, earning $99.6 million in the year. Of this, $90 million, or over 90%, was earned through live performances. Only about 5% of this came from streaming of her music! The second highest grossing act was Bruce Springsteen with a total of $53 million in revenue, of which over 95% came from touring and less than 3% from streaming and sales. Drake was 2019's leader in streaming revenue, but even for him that figure made up only less than a third of his total revenue. For all other performers on the list, the disparity between live performance revenue and sales revenue is even more striking.

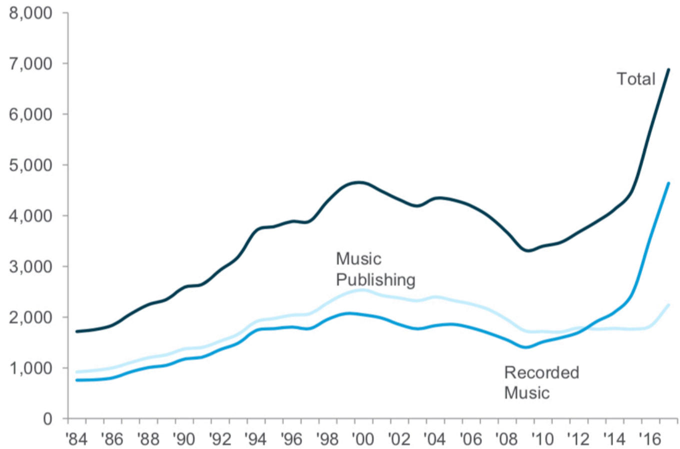
The Recording Industry Association of America (RIAA) provides annual financial data about the health of the recording industry (and mid-year updates). Using the latest full data set from 2018, supplemented by a 2018 report on the industry issued by CitiBank, here as a summary snap shot of the industry:

- **Revenues**. *In terms of gross revenue, the music industry has recovered from both MP3 piracy and the 2008 "Great*

Recession". Total music industry revenues in 2017 were equal to the previous music industry revenue peak of 2006. However, the source of those revenues has changed dramatically: In 2006, the vast majority of music industry revenues came from sales of CDs. Today, the vast majority of revenue comes from streaming (75%), followed by live concert ticket sales. Sales of physical product are a distant third place as a revenue category. In the streaming category, paid subscriptions make up 75% of streaming revenue as compared to ad-based revenue.

- **Royalties**. Another change reflected in the recent data is that, beginning in about 2013, royalty income paid to the holders of sound recording copyrights has exceed the royalties paid to the holders of song copyrights. Prior to this change, songwriters had always been more highly compensated from royalties than recording artists and their record companies. However, due to differences in the way royalties are calculated from streaming versus sales of music, songwriters now earn significantly less. This change may be reversed in the years to come due to changes in song copyright royalty calculations from streaming contained in the Music Modernization Act of 2019. We will explore the details of this change in the chapter on music royalties.

Figure 18. Total U.S. Music Royalties ($ millions)



Source: Citi Research; HFA; ASCAP; BMI; Warner Music

- **Streaming versus Downloads.** As streaming revenue has risen in recent years, revenue from digital downloads of music has decreased sharply. As consumers have become streaming service subscribers, there is no longer a demand to own, rather than rent, songs. Most music consumers now pay an "all you can listen to" monthly music rental fee. Accordingly, Apple has discontinue its iTunes app (now replaced by the Apple Music streaming app), and no longer sells song downloads.
- **Physical Sales.** Sales of all physical recorded product (CDs and vinyl records) declined over 35% from 2017 to 2018. Bucking this trend, sales of vinyl records *increased* over 12% in this period, but the total volume is far too low still to make up for the decline in CD sales.
- **Revenue to Artists.** In 2018, 42% (approximately $18

billion) of industry revenue went to artists and their record companies. However, of this, only about $5 billion, or 12% of total industry revenues, went directly to artists. Despite this seemingly small number, this represents an historic high mark for both the share of revenues and absolute dollar amount being distributed to artists. Another sobering statistic is that, despite the increasing revenue associated with streaming, artists make very little from this source. As Spotify's revenues have increased, the amount paid to artists per stream has decreased. At the current rate (as of 2018), it would take 312,827 streams for an artist to earn $100 from Spotify!

- **Costs of Internet Distribution and Delivery.** The largest category of costs in the music industry currently is the approximately $15 billion associated with running music delivery platforms on the internet (Pandora, Spotify, Apple Music, etc.). This fact helps explain why streaming sites such as Spotify continue to be unprofitable despite their large and rapidly increasing base of users.

18.

THE RECORD CONTRACT

The mythology of the "record contract" with a major record label may have largely run its course, but it still plays a large role in shaping the industry. The myth of the record contract has both a positive and negative spin: the positive is that of the young artist finally "making it," being recognized for her talent and launched into a career of fame and fortune; the negative spin is that of the "evil" record company squashing the fragile creativity of the artist through the deceptions and greed of the record contract, subjugating the artist to a life of servitude and dashed dreams. Like all myths, there are kernels of truth in both the negative and positive spins on the record contract.

In this chapter, I will summarize some of the most common and most important terms that govern record contracts, and some of the ways in which these terms have failed to achieve the intent of one or the other party to the contract. (Note that the use of the word "term" is often used it to describe the provisions of a contract generally, as in "What are the terms of your contract?". However, sometimes the word "term" is also used to describe the duration of a contract (how long it lasts), such as in "How long is the term of your contract?". So be sure not to confuse the two uses of the word, as they will used in both ways below.)

Negotiated Contracts.

The most important concept to understand about record contracts is that they are negotiated agreements (contracts) between independent parties. With very few exceptions, the law places very few obligations on the terms of a record contract, so they may be freely negotiated in or out of the contract, or altered to reflect the agreement of the parties. Record contracts contain common terms that end up in nearly all instances, but that does not make them required or non-negotiable.

Because nearly everything in a record contract is negotiable, the different relative *bargaining positions* of the parties frequently determines the terms of the contract. The term "bargaining position" describes the strength of one party's power to shape the contract relative to another's. Typically, the record company has a stronger bargaining position than the artist, but that is sometimes not the case. Artist's with proven track records or hot new singles may wield a great deal of bargaining power and be able to leverage that power to obtain contract terms that are more favorable to the artist than to the record company, and certainly more favorable to the artist than if they were unknown newcomers.

The best way to think about bargaining position is by considering who is in the better position to "walk," that is to leave and say "thanks, but no thanks" (or perhaps expressed in saltier language) when the negotiations aren't going their way. Young artists desperate to sign any record deal will often agree to just about anything and will rarely walk away from the table until they sign. Older, more experienced, artists come to the discussion with certain items they know the record company won't want but that they will insist on. Such negotiations can get difficult when each side is willing to walk away, but both know there is some deal that could be reached that would favor both of them. In such cases, personalities can be tested and the fate of the negotiations will often rest on the ability of highly-trained (and highly-paid) lawyers to help find compromises that will allow both parties to consider the negotiation a success. In discussing the terms of a typical record contract below, I will sometimes refer to how these terms may change with different bargaining positions.

Breach of Contract.

Before we get to the specifics of record contract terms, we should consider what happens when a contract is broken or, to use the legal term, when there is a "breach of contract." A breach of contract means simply that one party to the contract has not fulfilled her obligations under the contract. Some contract breaches can be minor (e.g., the artist failed to notify the record company of a change of address) and nothing other than a phone call or letter is required to fix the problem. Other contract breaches are significant (e.g., the artist fails to make a record within the time specified by the contract) and this will trigger what is known as a "default."

A contract default occurs when there is a major breach of a contract, such that the parties are now in an adversarial (contested) position. Typically, lawyers will get involved again when there is a contract default. Sometimes, the contract can be amended (altered) to fix the default, or maybe the parties to the contract will agree to terminate (end) the contract and go their own ways, sometimes with an agreed upon exchange of money to remedy any financial inequities resulting from the default. Of course, sometimes that parties cannot fix the problem that led to the default and one or both parties may file a lawsuit against the other in court. This, of course, often leads to long, drawn-out, and expensive legal battles. The parties more often than not will settle the lawsuit after discovery (the exchange of information early in a lawsuit), but sometimes the case will go to a trial.

Contract law is typically governed under *state*, as opposed to federal, laws. (But, as we will see, copyright is a *federal* legal framework because it was created by federal statute.) Because record contracts are governed by state law, law suits that occur after contract defaults are filed in state courts (often in California or New York, where many record companies are located). The state court system is entirely separate from the federal court system, and differs from state to state. Every state has its own system of municipal (city) courts, state trial courts, and state courts of appeal (the highest referred to as the state supreme court). The federal system has its own trial courts (District Courts), courts of appeal (Circuit Courts), and of course the United States Supreme Court. This is why when we discuss record contract cases, they will typically be from state trial courts or courts of appeal, and when we discuss copyright cases, they will typically be from federal Circuit Courts or the Supreme Court.

Exclusivity.

Record contracts nearly always require that the artist signing the contract agrees to be under contract *exclusively* with only the record company who is offering the contract. This is only very rarely negotiable, regardless of the artist's bargaining position. The following economic dynamic lies behind this non-negotiable provision and many other common record contract provisions as well: *the record industry relies on the record company's role in assuming the risk of failure by putting its own money up to finance the recording, distribution, and marketing of the record*. In exchange for taking the risk that the record might not sell, and thus that the company will be unable to recoup its investment, the record company will demand certain assurances to minimize that risk. The exclusivity clause assures the record company that its only competition in making a successful record with the artist will come from other artists, not from the same artist making records with other companies. If the artist is going to make a successful record, the company wants to be sure *they* will be rewarded for taking the risk on that artist, not some other company.

If the artist is a group of two or more musicians, the record company will also likely insist that the exclusivity applies not only to the group, but to each of its individual members. In other words, the contract will likely specify that band members cannot record independent projects (such as "solo projects") outside the scope of the band's record contract. Some band members may wish to perform as "side musicians" with other groups, so many contracts will require band members to receive permission from the record company for such work. This is why records that have guest appearances by other non-regular band members will typically specify that the performance is "Courtesy of XYZ Records". That "courtesy" is the record company having agreed to that instance of working outside the exclusive arrangement.

Term (Duration of Contract)

One of the most essential provisions of any contract is its duration. The duration of the record contract follows from the concept of exclusivity discussed above. If the artist and the record company tie themselves together exclusively, as in a marriage, they will want to spell out exactly how long that exclusive relationship will continue (unlike a marriage, which is presumed to last forever!). The record company will want the term to be long enough so that if the artist's records at least break even, the company will be able to benefit from multiple recordings with the artist to turn its investment into sustainable profits. The artist, in turn, will want some assurance that if their first effort at recording ends up losing money (not breaking even), then the artist would have one or more chances to improve that result on subsequent recordings without being dumped by the record company.

On the other hand, if the first and maybe even the second recording is unsuccessful, the record company will want to have a short enough contract that they are not stuck with a band that cannot make commercially successful records (whatever the record company's standard for success for that artist might be). And the artist might also wish to get out of a contract with a record company that the artist feels is not doing enough to successfully market or distribute their recordings. (when records fail to succeed, artists often blame a lack of marketing on the record company's part for that failure, rather than their own inability to make a record people want to listen to.)

Record contracts typically state their duration as a requirement for the artist to make an initial recording within a certain time frame (often one year), followed by successive one-year (or occasionally multi-year) options to extend the contract for up to seven total albums for a total of seven years. (I will explain the reason for the typical seven-year limit below.) The use of extension options provides flexibility for the record company to cancel the contract after deciding the potential returns no longer justify the continued investment in recording and other costs of further albums.

Note that record contracts and the industry still use the concept of an "album" today, even though the physical album (or even a downloaded album) is not typically what the consumer buys (most music is consumed one song at a time in the era of streaming). The album still serves as a useful concept for marketing a collection of songs recording at roughly the same time. The album is typically defined in the record contract to mean at least 10 individual songs totaling 50 minutes. Of course, those numbers may vary according to the genre and style of the individual artist (pop songs are typically three minutes long, while jazz or "alternative" rock songs may be significantly longer).

Acceptable Recordings.

Typically, a record contract will contain a provision that the artists' recordings must be acceptable to the record company "as technically and commercially satisfactory" (or some other similar phrase) before they will count towards the recording requirement under the contract. The record company will have a specified length of time (usually more than a month and less than a year) within which to review the recording and determine whether it meets whatever standard has been agreed upon. The record company, of course, wants to make sure that the recording represents the artist's best work and that it is of a sufficient artistic and technical quality to be commercially successful. Record companies will apply different measures of success to reflect the context of that artist and their previous work, the genre's commercial potential, and realistic expectations of the market.

We might think it unfair for a record company to have the ability to reject an artist's recording under a contract, but we must remember that the company has risked its money up front in the relationship and so has an expectation that the artist will do their best work in the partnership. Record companies rarely reject an artist's work — the company wants a record to sell and wants to have a successful relationship with the artist. However, sometimes record companies do reject an artist's recording as unacceptable, or may even sue an artist for providing recordings that do not rise to the artistic level expected by the record label.

One infamous case that demonstrates the importance of this provision in a record contract occurred in the early 1980s: In 1983, David Geffen, owner of Geffen Records, sued Neil Young for failing to make commercially marketable records under their recent contract. Young signed with Geffen's new label in 1982 when both Geffen and Young were interested in reviving their respective careers that had somewhat stalled after their peaks in the 1970s. In 1982, Neil Young provided Geffen with an unusual first album under this new partnership, *Trans*, which revealed a very different musical style from the one Young had crafted with great success in the '70s. The album sold poorly and got bad reviews, so Geffen criticized Young for not providing him with a more marketable product. Young's response to this criticism was to intentionally overcompensate in the other direction, giving Geffen a second album, *Everybody's Rockin'* (1983), that was a bizarrely deliberate throw-back to '50s-era rock 'n' roll and equally distant from Young's 1970s style. Geffen's response was to sue Young for failing to deliver recordings representative of Young's style. In turn, Neil Young countersued, arguing that his contract gave him complete artistic freedom. Young and Geffen settled their law suits, which included Geffen apologizing for his criticism of Young. But Young went back to his old label, Warner/ Reprise after the conclusion of the ill-fated Geffen contract.

Granting of Sound Recording Master Rights.

Record contracts almost always provide that the artist grants and assigns to the record company the *sound recording copyright* (known as a "master" right) to any recordings made under the contract (whether or not those recordings are released). This assignment will typically last the full length of the statutory copyright term, currently the life of the author plus 70 years. *Because the record company owns the master copyright to the sound recordings, it is the record company that negotiates and collects licensing fees and royalties resulting from the ownership of the copyright (unless otherwise specified by statute, such as for non-interactive streaming).* An artist with a great deal of bargaining power may be able to negotiate a reversion of the master copyright to the artist at some future date (for example, 20 years after the date of the contract), but such concessions are rare.

On the extreme end, the record company may also ask the artist to agree that their work product (that is, recordings and songwriting) under the contract will be considered *"work for hire."* This phrase means that the artist would be considered a contractor or employee under the contract and that all work produced by the artist would be owned by the record company, rather than licensed *to* the recording company by the artist. In a case where the record company is already getting a license of the master rights for the term of the copyright, the difference between these two might be minimal, but the artist should avoid their work product being considered "work for hire" under most circumstances. A licensing agreement is preferred, where the recording artist retains her right of ownership in the work product even if the master right is licensed for the full copyright term. At least then there will be some theoretical reversion to the artist at the end of the copyright term.

The record company may also want to include a provision that prevents an artist from re-recording the material recorded under the contract for some time period after the termination of the contract (e.g., 10 years). This will prevent an artist from creating new sound recordings of the same songs whose copyrights would be then be owned by the artist (or another record company) and could be re-released to compete with the original recordings.

Advances; Recording Costs

Some of the most important provisions in a record contract, and the ones that are highly negotiated and variable depending on bargaining position, relate to the payment of the various costs associated with recording, distributing, and marketing a record, and the relationship of those costs to royalty income derived from the recording. This issue again reflects the underlying economic reality of the record contract relationship — the record company is investing its money up front and assuming most of the risks of failure and therefore desires to both limit those risks and ensure that its investment yields maximum potential returns from sales.

Record contracts typically provide that the record company will make a cash payment to the artist upon signing of the contract, known as an "advance." The use of the term "advance" is important, because this is more like a loan than a payment for services. However, unlike most loans, the record contract advance will not necessarily have to be paid back. Record contracts typically provide that the artist will use the advance to pay for the costs of making the recordings called for under the contract, as well as any other up-front costs (including paying the artist's manager, lawyers, etc.). The advance represents the record company's investment in the potential success of the partnership with the artist.

How much do artists typically get as an advance? There is no easy answer to this question, because there is such a wide range of advances. The amount depends greatly on the bargaining position of the artist, the record company's expectations of success, and the level of competition with other companies to sign the artist. An untested new band that has not made a recording before might get as little as $20,000 to $50,000 (or maybe even no advance at all), but an established recording artist with a proven track record might get a $1,000,000 advance (or more). Most advances will fall somewhere between these two extremes but the amount will likely be determined by the perceived level of risk being taken by the record company. In making the determination as to the size of the advance, the record company will estimate the number of records it expects to sell throughout the length of the contract and sizes the advance as a percentage of those expected revenues. The less confident the company is about its ability to sell the artist's records, the smaller the advance will be. Another factor in this will be competition: if the record company knows that the artist is getting competing offers from other record companies, they will make a more generous advance offer in order to ensure that the artist signs with them. This is where a good lawyer or manager for an artist can make a difference — negotiating a record deal by maximizing the perception of competition to sign an artist.

The contract typically specifies that the artist will use the advance to pay any and all recording costs associated with making their first record. Sometimes the record company will make additional recording funds available in addition to the advance (but within a specified budget); this would be the case if the record company wanted to exert more control over the recording process. The contract may specify which recording studio will be used (particularly if the company owns its own studio). The recording costs paid by the record company's advance (and which will be recouped from sales — see below), include the studio time, the producer, the engineer and any assistant engineers, instrument rental and maintenance (including piano tunings), and the payment of any additional studio musicians who will play on the recording (in addition to the signed artist or band). If the artist is able to make the recording "under budget," the artist will typically be able to keep any amount of the advance left over. The artist's manager typically gets his percentage cut from this remainder of the advance after recording costs (though some might insist on being paid up front).

An artist may be able to negotiate additional advances to be paid by the record company prior to the artist making any subsequent recordings, whether or not the costs of the previous recording have been recouped.

Royalties; Recoupment of Costs

Typically, the artist will not earn any royalties from sales or other distribution of the recording unless and until the record company has earned back the recording and most other costs associated with producing the album (including the advance). This is called "recoupment of costs," and gives the record company the incentive to put its money up front for the advance and costs associated with the album. Before the artist makes a dime from the record (other than through the advance), the record company assures that it will at least break even (recoup its investment). *If the record never sells enough to recoup the record company's costs, the artist will not owe the* *record company for those un-recouped costs, but neither will the artist make any additional money from the recording.*

In addition to the advance, other costs that will need to be recouped before royalties are distributed to the artist typically include any artwork or photography associated with the recording, the cost of manufacturing the physical product (if any), the cost of mastering the recording, the cost of distributing the recording, any touring support costs the record company has agreed to pay, and some portion (often 50%) of the cost of any video associated with the recording. Obviously, to the extent that physical sales are now a smaller percentage of total sales when compared to internet streaming, those costs will be lower than they were in the past.

Marketing costs are often *not* part of the costs that will need to be recouped; that is, they are often assumed by the record company because the company often has an in-house marketing staff or a relationship with a marketing company that it relies on for those services.

Once the costs specified in the contract have been fully recouped by the record company, the artist will then begin earning a specified percentage share of the royalties associated with the sale and distribution of the recording. Those royalties will be distributed to the artist by the record company on an agreed-upon schedule (typically once per quarter). The royalties earned by young, unproven artists range between 10% and 20% of the gross revenues earned by the recording from sales (including streaming). This is a wide range, which indicates the different levels of expectation of success for the artist as well as the artist's relative bargaining position, which might be greater if more than one record company is attempting to sign the artist.

The royalty rate may be higher or lower depending on other aspects of the contract. For example, the record company may agree to a higher royalty rate if the artist agrees to a smaller advance. Some contracts might provide for a royalty rate as high as 50% if the artist agrees to no advance at all, putting her own money up for the costs of recording. Again, nearly all the terms of the contract are negotiable, so an artist confident of their success might bargain away some items in exchange for a higher royalty percentage.

The record producer also typically receives a 3% royalty in addition to any up-front payment they receive during the recording. Traditionally, the producer's royalty share will be taken out of the artist's royalty share. So, for example, if the artist's share is 12%, then the producer will be paid his 3% from that, bringing the artist's actual share to 9%. The Music Modernization Act of 2019, however, contains a provision that the record company can specify to streaming services that the producer be paid their royalty share directly from the streaming service, rather than by the record company.

In 2021 and 2022, the three major record companies —

Universal, Sony, and Warner — all announced that they were initiating new policies that would allow legacy (i.e., older) recording artists to receive their full contractual royalties on future sales *regardless of any unrecouped balances on their advances*. That is, these legacy acts would receive the royalties going forward that they would receive if their advances were fully recouped (paid back), even if that were not the case. These new policies were likely a response by the record companies to the increasing complaints about the high profits earned by those companies while some acts had yet to earn any royalties due to unrecouped advances. These new policies were purely voluntary on the part of the record companies; they were under no contractual or other legal obligation to make the changes. As such, they are part of a corporate "good will" campaign in response to consumer and artist complaints about unfairness and inequity in the record business. It should also be pointed out that the record companies are unlikely to lose much money due to these policy changes: Legacy artists with unrecouped balances are by definition artists whose recordings have not sold extremely well in the past. If those artists had chart-topping hit songs or albums, then the advances would have long been recouped. Legacy artists with unrecouped balances are likely not going to enjoy high volume sales in the future, so these new policies will likely have more impact as corporate public relations than actually achieving a meaningful change in distribution of record company profits to artists.

Controlled Compositions.

We learned above that record contracts nearly always provide that the artist assigns all interest in the sound recording copyright (the "master" rights) to the record company. But what about the royalties that follow song copyrights for songs on a recording that the artist has written? Songs written by the recording artist are known as "controlled compositions" (because the artist controls the song copyright) and they are dealt with differently than master rights.

To understand this concept, we must understand a vitally important point about music copyright that will underly much of the rest of this book. There are two different copyrights inherent to recorded music: there is the copyright in the *songs* (or "works") that are recorded and there is a separate copyright in the recording itself (known as the "sound recording" copyright). There are separate royalties (also sometimes referred to as licensing fees) payable for each of those copyrights.

To further complicate this picture, there are two separate statutory royalty streams that flow from the song copyright: *mechanical royalties* (from the reproduction of the song on a recording) and *performance royalties* (from the public performance of the song, including the performance that occurs when a recording is played in a public context). Record companies are not concerned about the public performance royalties, because they don't receive income from that royalty stream (except to the extent they own a publishing company). However, record companies do have to pay mechanical royalties to the holder of the song copyright when they sell a recording. So, when negotiating a record contract with an artist who writes her own songs, the record company will try to contractually reduce the amount of mechanical royalties it will have to pay the artist (as songwriter). The reasoning for this is that the record company is already paying for the recording of the song, so they feel they should get a break on the song copyright mechanical royalties they would otherwise have to pay that same artist for selling the recording.

Record contracts will typically provide that the record company will only have to pay 75% of the mechanical royalties to the artist/songwriter that would otherwise be owed to an unaffiliated songwriter (thus, a 25% discount). Again, an artist with a strong bargaining position may be able to negotiate a lower discount (or none at all), but that is rare.

The record company will also typically put a cap on the number of controlled compositions on a particular album for which they are willing to pay mechanical royalties. That cap might be in the range of 10 songs per album, such that the record company will not pay any mechanical royalties on controlled compositions above that number.

One major limitation of the controlled composition clause is that it only applies to physical sales of recordings, not to digital sales and streaming. This restriction was part of the 1998 Digital Millennium Copyright Law that we study in more detail in a later chapter. This makes the clause antiquated in the digital age and of limited value to the record company as physical sales represent a small source of revenue.

In October of 2020, record company BMG announced that it would eliminate the "controlled compositions" clause from its record contracts as part of a review of contract clauses that might be unfair or inequitable to artists. BMC urged other record companies to follow their lead, but whether that occurs is unknown as of this writing. Note that this concession from BMG sounds better than it is due to the fact that the provision they are giving up only applied to physical sales, as explained above. BMG is only conceding a provision that affects a very small portion of their business, and one that is rapidly decreasing. So, this is a good example of publicly trumpeting a change as a major concession to artists that actually costs the company very little, while gaining favorable attention and free press in the process.

Secondary Income; 360 Contracts

The record contract will also likely deal with how income from sources other than traditional sales of the recording will be treated. Income from any use of the recording in a video production (so-called "synch rights," such as film, television, advertising, etc.) will typically be split 50/50 between the artist and the record company. Revenue from merchandise sales related to the recording might also be covered in the contract. Lastly, revenue from live performance tours might be included in the contract, often tied to a certain level of touring support from the record company.

Name, Likeness, and Image.

Just as the artist will likely license their master rights to the recording to the record company for the term of the copyright, the artist will also be asked to license to the record company the use of the artist's name, likeness, and image for the purposes of promoting and marketing the recording. It will be important for the artist to limit this license to uses *only* related to marketing the recordings made under *this contract*. Without such a limitation, the record company could argue that it has the right to use the artist's name and image for a broader range of uses and even after the end of the contract. The artist might further want to explicitly retain the right to use their own name, likeness, and image in their own independent marketing efforts to sell the recordings (such as an artist's YouTube channel).

Likewise, the record company may wish to broaden the license of the artist's name and image to include marketing efforts on behalf of the company as a whole, rather than just a particular recording (such as listing the artist on the company's web site roster, etc.). The greater the specificity about the scope of this license, the less likelihood there will be disagreement about how the artist's name and image are used during and after the contract.

Key Man Provisions; Group Members

Both the record company and the artist may have an interest in including what is known as a "key man" provision in the contract. For the record company, if the artist is a collection of two or more people, it may be essential to the contract that all members of the group continue to be bound by the contract. One can imagine a record company signing the band U2 to a new contract: the record company would certainly insist that the contract would be terminated if Bono were to leave the band.

Similarly, an artist may feel that their relationship with a certain executive at the record company is essential to their continued success. The artist may try to negotiate a provision that they can terminate the agreement if that executive ever leaves the record company (for whatever reason).

Creative Control.

One of the eternal complaints about record contracts from the artist perspective is that they provide too little creative control or freedom to the artist. We can also understand why a record company would want to limit the artist's creative control: the record company has made a substantial financial investment in the recording and wants to make sure any creative decisions are made in a way that will maximize the commercial potential of the recording. There are many areas about which creative decisions can become difficult: which producer to hire; which songs to record; when and in which order to release songs; what album cover art to use; which recording studio to use; which photographer to use for marketing photographs; how to market the album; etc. Each one of these creative decisions are possible points of negotiation for a record contract. As always, the relative bargaining power of the company and the artist will determine the outcome of those negotiations.

Accounting and Audits.

Artists negotiating a record contract will want to make sure that they receive regular accounting reports from the record company (semi-annual reports, every 6 months, would be typical), detailing the costs incurred by the record company, the number of sales, the amount of any royalties received and paid out, etc. The accounting reports should occur even before there has been recoupment of costs and royalties paid to the artist, so that the artist and manager can track the financial progress of the recording. Further, the artist will want to make sure they have the ability to hire an independent accountant to audit the record company's books if there is reasonable evidence of a discrepancy. There will likely be negotiations regarding who is responsible for paying for the costs of any such audit.

Contract Termination.

Any well-written legal contract will contain provisions that govern how, when, and why the contract may be terminated by either party prior to its negotiated end date. The most obvious reason typically provided for termination by either party is when the other party has defaulted on their obligations under the contract. The contract will typically require the terminating party to provide notice to the defaulting party of a default with some period of additional time for the defaulting party to correct whatever situation gives rise to the default. In a recording contract, the default might be that the artist fails to deliver a recording within a stated time period, which would then trigger a default notice and a time for the artist (e.g., 90 days) to remedy the default and deliver the recording. On the other hand, the record company may default by failing to pay royalties when promised, in which case the artist would have the right to terminate the contract (and sue for unpaid royalties) after giving the company notice and a set period of time within which to correct the nonpayment.

Other events which might give one of the parties the right to terminate the contract could include the record company filing bankruptcy; the artist being convicted of a crime; the artist becoming incapacitated by illness, injury, addiction, etc.; the artist engaging in certain examples of notorious behavior or immoral activity that generate negative publicity; the record company failing to market or publicize the artist as expected; or the artist failing to cooperate with the record company's marketing and publicity efforts.

Breaking a Contract;

Over the past 50 years, there have been a handful of high-profile legal battles waged over whether an artist has the right to get out of a record contract. Typically, these are relationships between high-profile, successful artists and large record companies who do not want to give up their rights to the earning potential of those artists. Less successful artists and their record companies rarely get into these battles because the stakes are so much lower. A less-successful artist is typically happy to have a contract and not too worried about getting out of one. And if a less successful artist does want out of their contract, the record company is often willing to either renegotiate or simply let the artist go because there is little potential earnings at stake and the costs of fighting such a battle can be high. This section explains some of legal concepts that typically come into play when a recording artist wants to break their record contract.

Record Contracts as Personal Service Employment Contracts.

Courts have consistently construed record contracts to be personal service contracts, within the realm of employment contracts. The significance of this is that courts typically will refuse to allow the "employer" in such a contract (here, the record company) to force the employee (here, the artist) to remain under contract against their wishes. The public policy behind this is clear: people should have the right to quit a job if they wish for either personal or economic reasons and should not be forced to work in any capacity against their will.

However, courts have also found that some employer/employee relationships are different than others and they have carved out the principal that in contracts for artistic services, *where the employee is not readily replaceable due to their particular skill or talent, the employer is entitled to be compensated for the loss of potential income if a skilled artist terminates a contract before providing the artistic services specified in the contract.* Courts in such cases have held that an employer may sue an employee for the value of the undelivered artistic product (such as a recording) after an artist terminates a contract before its contractual end date.

In California, the state in which a majority of record contracts are signed and thus whose laws govern most of them, this principal has been *codified* into statute, resulting in several high-profile conflicts between record companies and artists. Section 2855 of the California Labor Code provides that personal service contracts "to perform or render service of a special, unique, unusual, extraordinary, or intellectual character" can be enforced by an *injunction* against the employee (artist) performing that service for anybody else *within a seven year period (including any options to extend the term up to seven years).*

This statute leaves open the question of what happens when a recording artist terminates a contract after seven years but has not delivered the required number of albums specified in the contract. A high-profile lawsuit in the late 1970s by pop singer Olivia Newton-John (star of the movie version of the musical *Grease* in 1978) resulted in a court decision stating that her record company could not sue her to force her to deliver late recordings after the stated term of her contract had expired. This result caused record companies to write their contracts differently, so that the term of the contract was stated as requiring the delivery of albums within a certain length of time, rather than the contract running for a certain number of years with an expectation of a certain number of albums per year.

Record companies also reacted to this uncertainty over record delivery within the statutory seven-year personal services contract limit by lobbying the California legislature to add a new provision to Section 2855 dealing specifically with record contracts. This provision (Section 2855(b)) gives record companies the ability to sue artists who terminate their contracts under section 2855 after seven years for damages to recover the value of any recordings the artists has failed to deliver under the terms of the contract.

Section 2855(b) was tested in court in 1999 when Courtney Love (wife of the late Kurt Cobain of band Nirvana) invoked Section 2855(a) to terminate her band Hole's contract with Geffen Records after the statutory seven-year period. David Geffen in turn sued Courtney Love under section 2855(b), the new damages provision, claiming that Love owed Geffen for failing to deliver *five* albums required by the record contract. Love in turn challenged the constitutionality of Section 2855(b) and organized state-wide protests against the law, some led by Eagles lead singer and drummer Don Henley, and inspiring legislative efforts to repeal it (which did not happen). Love's lawsuits with Geffen were settled out of court (for an undisclosed amount).

The result of Section 2855 means that, at least in California, *artists can terminate their contracts after seven years, but if they have not delivered the required number of records (typically seven after that many years — one per year), then they will face the prospect of being sued for the value of those undelivered records.* As we can imagine, it is very unrealistic for a record company to expect an artist to record an album once every year given the need to tour a previous album, write new material, etc. Most record companies would probably not even want an album every year, as it requires a great deal of money and most fans would not expect it. Section 2855(b) thus may have the effect of tying successful artists to record contracts for longer than seven years because the recording requirements are unrealistic and difficult to fulfill. Yet, they may be sued if they try to leave the contract before the recordings are made.

Other artists, such as Metallica, Don Henley, and Kesha have been involved in disputes with their record companies involving the artist's desire to get out of a contract before all albums have been delivered, but these have so far all been settled out of court so the application of these statutes remains uncertain. Several legal commentators and organizations representing recording artists have continued to call for Section 2855(b) (the provision allowing damages for undelivered albums) to be repealed. In 2022, the California State Legislature considered a bill to repeal Section 2855(b), called the Free Artists From Industry Restrictions (FAIR) Act. However, the bill faced predictably strong opposition from the powerful recording industry and did not make it out of committee for a vote. Artist rights groups in support of that bill vowed to continue their fight against Section 2855(b) despite this most recent legal setback.

Note that the Section 2855 issue typically only comes up with respect to very successful artists, those whose record companies would like to keep them under contract for multiple albums. Given that at least 90% of all albums end up losing money for the record company, most artists will not have their options for additional albums exercised by their record company and the seven-year limit will never be reached. Further, the record company will not want to sue for damages even if the seven-year limit is reached because the recordings of most artists are not profitable so the damages to be recouped from such a law suit would be unlikely to exceed the attorney fees required to sue and collect damages.

California Civil Code Section 3423 (the "$9,000 Plus Provision") provides another level of protection for artists who wish to break their record contracts (at least those signed in California). As explained above, California law (and in most other states as well) will not typically enforce a personal services contract beyond seven years. However, this does not always mean that an artists will then be able to sign another contract with another record company for similar services. Although the artist may be free of an unwanted contractual obligation after seven years, if there are remaining services that the artist has not provided under the contract (such as recordings), the record company may be able to obtain a court-ordered injunction (sometimes referred to as "equitable relief") to prevent that artist from working under the same capacity for another record company. The legal reasoning for this is that it would be unfair to allow an artist (or other personal services employee) to get out of a contract they signed simply because they can earn more money somewhere else. The court might not force you to work for a record company under a contract after seven years, but they might prevent you from using that as a legal loophole just to make more money doing the same service for someone else.

However, California Civil Code Section 3423, limits the ability of record companies to obtain an injunction preventing an artist from signing to another record company after terminating a contract. The law states that in order for a record company to obtain such an injunction, they must have made guaranteed payments under the broken contract of $9,000 the first year (previously $6,000), $12,000 the second year, and $15,000 for any remaining years up to year seven. A California court held in 1979 that the guaranteed payments required by a record company to obtain an injunction under this statute could be met by the payment of advances if the artist has the reasonable ability to control the costs in order to retain enough of the advance to meet the statutory payment amounts (*MCA Records, Inc. vs. Newton-John* (1979)).

Bankruptcy as a tool to get out of a contract. Most people believe that bankruptcy is a last-resort legal situation that people find themselves in when they have no money, high debt, and the next step might be homelessness. However, both personal and corporate bankruptcy is often used as a legal tool to restructure debt and other obligations, even when the bankrupt's financial situation is far from what most people would consider to be dire. One of the little-understood aspects of declaring bankruptcy is that it allows not only for the restructuring of debt but also the termination of ongoing contracts that might be encumbering the bankrupt's financial future. Several recording artists have used bankruptcy as a legal means to break or force renegotiation their recording contracts.

For example, in 1998, seven-time Grammy award winning R&B vocalist Toni Braxton filed bankruptcy in what many observers assume to have been primarily motivated by her desire to be free of her record contract to BMG's LaFace Records label. The bankruptcy filing came after Braxton's unsuccessful attempt to renegotiate her contract following two very successful album releases in 1993 and 1996 (with combined sales of over 15 million units). Braxton's bankruptcy filing succeeded in its goal, as LaFace agreed to renegotiate the contract with higher royalty payments to Braxton. Remarkably, Braxton filed for bankruptcy a second time in 2010, claiming debts of over $50,000,000! Other artists who have used bankruptcy filings to get out of or renovated record contracts include rap trio Run-D.M.C. in 1993 and R&B girl-group TLC in 1995.

Bankruptcy filings are not a fail-safe method of getting out of or renegotiating a contract, however, as the bankruptcy judge may not be willing to go along with the strategy. If the judge feels that the bankruptcy filing is in bad faith, that is not actually motivated by the need to get out of difficult financial situation, the judge may decide that the contracts should remain in place.

Unenforceable Contracts (such as with a minor). Another potential way that recording artists can get out of unfavorable recording contracts is to assert that the contract is unenforceable due to some unusual condition being present when the contract was signed. Broadly speaking, a contract is unenforceable if it is made under duress (when one party feels forced to sign), made when one party is incapacitated (by illness, intoxication, etc.), or when a party is a minor (the age of contractual consent varies by state, but is typically 18). The parties to a contract may proceed with their contractual relationship without a problem, but if one party decides to abandon the contract, they may be able to prevent the other party from enforcing the contract legally if they assert one of these conditions.

A well-known instance of this occurred in the mid-1979s when bubble-gum pop and TV superstar David Cassidy asserted that his contract was unenforceable because it was originally signed when he was a minor (under 21, the age of consent in California at that time), even though he had been releasing records under that contract for several years including after he turned 21. He was then able to renegotiate the contract on more favorable terms. Because it is not uncommon for pop stars to be under 18 years old when signed to contracts, record companies will sometimes protect themselves by having a judge certify the enforceability of a contract with a minor to make sure its terms are fair, that the parents or guardian of the minor have agreed, and that there has been no coercion. For example, Billie Eilish signed her first record contract with Interscope Records (a Universal Records label) when she was 15, so the contract was presented to a family law judge in Los Angeles County to have it verified to be a fair contract with the approval of her parents. This legal process would make it very difficult to Eilish to later claim that her contract is unenforceable because she was a minor when she signed it.

19.

THE LIVE MUSIC INDUSTRY

Live Performance as Revenue Source

As discussed above, the record industry has largely recovered from the slump in sales as a result of MP3 piracy early in the 21st century. However, that recovery has not restored the industry to its former self. Rather, the industry has been transformed by the emergence of streaming audio from the internet in place of physical sales and paid downloads. As reported in December, 2019 by the RIAA in their *2019 Mid-Year Music Industry Revenue Report,* revenue from streaming now accounts for 80% of total recording industry revenues, representing a 26% increase from the previous year.

However, despite the robust increase in industry earnings from streaming, we can see from looking at *Billboard's* list of Highest Paid Musicians of 2018 (released July 19, 2019), that the bulk of the earnings of these top earners comes not from streaming revenue but rather from live performances. For example, Taylor Swift tops the list of highest-paid performers of 2018 and 91% of her $99.6 million in total annual earnings came from touring. Her streaming revenue contributed less than 6% of that revenue. No. 2 on the list was Bruce Springsteen, whose reliance on touring revenue was even more striking. In 2018, Springsteen earned 96% of his total revenue from touring and less than 2% from streaming. No. 3 on the list is Drake, who was the leading artist for streaming revenue for 2018. However, even for Drake, his industry-leading streaming revenue accounted for only a bit less than one-third of his total revenue, with the bulk of the remainder coming from touring.

The primary reason that streaming revenue makes up such a small percentage of performer's revenues is that streaming payouts to artists are at a significantly lower rate than was the case for both physical sales and downloads. The reasons and numbers for this change will be discussed in a later chapter. In order to make up for the lower revenues earned through sales of recorded music, artists have had to increase their earnings from other revenue sources. As can be seen from the numbers cited above, live music has become, by far, the greatest source of revenue for artists. The live music industry has had to quickly expand in order to meet this new role as the primary driver of revenue for artists, and this transition has not been without growing pains.

One trend that has become clear is that large music festivals and mega-tours by the upper tier of artists and bands makes up the majority of earnings in this category. Older, so-called "heritage" acts such as Paul McCartney, U2, Guns and Roses who no longer record new music earn a disproportionate share of this revenue. Lesser known bands and artists who do not appear at the large festivals (and even some that do), must settle for a much smaller piece of this growing pie. Inequality among touring artists seems to be built into the live music industry as it now operates.

LiveNation and their Near-Monopoly over the Live Concert Industry

The global live concert promotion, production, and ticketing company Live Nation Entertainment now enjoys a dominant market share over the live concert industry, and has for over a decade. As the largest live entertainment company in the world, Live Nation Entertainment dominates its competition in the areas of concert promotion, ticketing services, concert sponsorships, and concert advertising. In terms of global ticket sales, Live Nation enjoys a market share of approximately 50%, with its nearest competitor, AEG Live, coming in at just under 20% market share.

Live Nation Entertainment was created in 2010 out of the merger of Live Nation and the then-leading ticketing agency, TicketMaster. As in many other businesses, particularly those dominated by a single company, Live Nation built its commanding market share by purchasing potential competitors, particularly in markets where it seeks to expand. For example, in July, 2019, Live Nation purchased a controlling share of the stock of the largest concert promotion and ticketing company in Latin America, OCESA Entretenimiento.

Through its dominant position in the quickly growing live music industry, Live Nation continues to produce record-breaking revenues. In its latest financial reporting for the 2019 fiscal year (ending 12/31/19), Live Nation boasted an increase in total revenue of 7% from the previous year to a total of $11.5 billion. This revenue is associated with 2019 concert attendance of 98 million patrons at Live Nation events in over 700 venues. In 2019, Live Nation promoted over 40,000 concerts in 42 countries.

Because Live Nation is a publicly-held company, it issues quarterly earnings reports, which enable us to look a bit more deeply into the revenue sources of this industry and their relative profitability. In their financial reports, Live Nation divides their business into three sectors: Concerts, Ticketing, and Sponsorship. Of these, concerts provide the vast majority of the company's gross revenue: $9.5 billion for FY 2019 out of total company gross revenue of $11.5 billion (83%). By comparison, ticketing accounted for $1.5 billion of the company's gross revenue, only 13% of the total. Sponsorship revenue was the lowest of the three, with about $600 million, only 5% of the total.

However, despite accounting for only 13% of Live Nation's gross revenue, ticketing was the company's most profitable activity, earning the company a little over 50% of its operating profits for the 2019 FY ($942 million total). This represents a profit margin for that sector of about 31%. The profitability of the ticketing side of Live Nation's business arises from two factors: lower costs and higher user fees. Selling tickets has a much lower "overhead" cost structure than putting on concerts. Concert production requires a great deal of coordination and effort, including venue rental, marketing, talent booking, management and maintenance, food and beverage concessions, security, sound, lighting, stage construction and design, merchandising management, etc. The ticketing side of a concert involves far less complexity and costs. Perhaps more importantly, ticketing provides an opportunity to charge so-called "service fees" to customers when they purchase tickets. These service fees are nearly pure profit for Live Nation, as we can see from the 31% profit margins of that sector.

The Live Nation/Ticketmaster merger was initially opposed by the U.S. Justice Department over concerns that it would result in too much concentration of the live concert and ticketing business in one company. The Justice Department eventually consented to the merger in 2010 under certain conditions set forth in a 10-year "consent decree," including the condition that Live Nation would not retaliate against live entertainment venues that contracted with ticketing services other than those provided by Live Nation.

However, in September of 2019, the U.S. Department of Justice filed action against Live Nation, claiming that it had repeatedly violated the terms of the 2010 consent decree. The DOJ was responding to complaints from some venues that Live Nation was punishing them for not using their Ticketmaster subsidiary by diverting artists away from those venues, the very behavior the 2010 consent decree sought to prevent. In December of 2019, the Department of Justice announced that it reached an agreement with Live Nation to extend the term of the consent decree for an additional five and a half years (to mid-2025), with the addition of the following conditions:

- Live Nation may not threaten to withhold concerts from a venue if the venue chooses a ticket service other than Ticketmaster;
- A threat by Live Nation to withhold any concerts because a venue chooses another ticket service is a violation of the consent decree;
- Withholding any concerts in response to a venue choosing a ticketer other than Ticketmaster is a violation of the consent

decree;

- The Antitrust Division of the Department of Justice will appoint an independent monitor to investigate and report on Live Nation's compliance with the consent decree;
- Live Nation will appoint an internal antitrust compliance officer and conduct regular internal training to ensure its employees fully comply with the consent decree;
- Live Nation will provide notice to current or potential venue customers of its ticketing services of the clarified and extended consent decree; and
- Live Nation is subject to an automatic penalty of $1,000,000 for each violation of the consent decree.

It is too soon to know whether the revisions to the Live Nation consent decree will result in a more competitive live music industry, but that will be an interesting and important area to keep an eye on.

20.

MUSIC IN SOCIAL MEDIA

Most of this book concerns what we might call the "legacy" music economy, consisting primarily of consumers directly purchasing or streaming their preferred artists on demand, along with the use of music on radio, movies, television, and advertising. However, that legacy music economy is increasingly being overshadowed by a new music economy: the use of music in social media posts, particularly in short videos posted on TikTok, Instagram, and YouTube.

While the context of music in social media video posts might be new, the concepts and copyright laws governing this new economy are the same as we've learned for other contexts. For the short-form TikTok and Instagram style video posts, we are dealing with music-video synchronization (i.e., "synch rights"). It is critical to remember that when music accompanies any moving image (anything other than a still photo), the special rules of synch rights apply. Avoid making the common mistake of applying mechanical licensing concepts to situations involving video, where such concepts hold no sway. Video *always* demands a synch rights analysis, whether the context is animation, major motion pictures, television advertising, documentaries, or short-form social media video posts.

The second thing we should remember in approaching music in this context is the potential liability to the social media platforms. That inquiry leads us back to the "Safe Harbor" rules of the Digital Millennium Copyright Act of 1998 (DMCA) (see Chapter 36). Those rules provide legal protection for "internet service providers" (which includes social media companies such as Instagram and TikTok) for any copyright infringement occurring on their sites *provided* those companies abide by certain rules. Those rules include taking down any copyright-infringing material on user posts and policing the platform to discover any offending posts. As long as the social media platform abides by those rules, the DMCA shields the social media platform from legal action in a "safe harbor." YouTube is the most obvious example of a company that relies on the safe harbor of the DMCA to shield itself from legal trouble when its users post copyrighted material (including music) without a proper license.

Keeping these two concepts in mind, we can apply them to gain an understanding of how social media companies ran afoul of copyright law during their early years of high-growth and have only recently made headway in putting themselves in a position to avoid threats of copyright infringement claims and music blockades by the large recording companies. Set forth below are a few of the highlights and milestones in that development:

The paradigm situation involves a user of a social media platform, such as TikTok or Instagram, posting a short-form video that contains copyrighted music. Because the music accompanies video, synch rights are involved, meaning that the right of the video creator to use that music requires a synch license negotiated with the copyright holder of the song and the recording (typically a record company and its affiliated publishing company).

In the early years of explosive growth of video-oriented social media platforms such as Instagram (founded in 2010), the primary concern of these companies was to attract new users. Without users, the platforms would not be able to sell advertising, which is their primary source of revenue. While TikTok and Instagram could have obtained safe harbor protection by taking down posts that used copyrighted music, that would have severely dampened the user experience and the business model would have failed. So the social media companies let users make copyright-infringing posts and assumed they could work through the copyright legal problems later after establishing themselves. They would also then have a better bargaining position with the recording companies by promising a volume of listeners for popular recordings used in user videos.

This strategy has turned out to have been successful. Predictably, record companies and publishers threatened to sue social media companies and/or embargo their music from use on the sites unless the proper licenses were negotiated. Because social companies were able to point to their large and growing user bases, they were able to use that as leverage to negotiate more favorable terms with the rights holders. Social media companies were able to leverage the potential marketing power of their user base against the demands for high licensing fees.

There are two primary types of licensing deals that social media companies ended up negotiating with record companies and other music rights holders. One type of license involves "revenue sharing" deals, in which the social media company agrees to share advertising revenue with the music rights holder in proportion to a song's popularity on the social media platform. A second type of deal is a "buy-out" deal, in which the social media company pays a an up-front lump sum for the rights for its users incorporate a certain song in their videos over a certain time span (e.g., one year).

As social media companies have seen their income increase exponentially in recent years, the "buy-out" model has become more common as it allows the social media platforms to limit the amount of money spent on songs that "blow up" on social media as they've locked in the rights to use those songs early in their popularity cycle. To get a sense of the newly powerful bargaining position these companies now enjoy, TikTok posted earnings of approximately $12 billion in 2022, which is triple the amount posted for the previous year. With their increasing financial power and leverage of a large user base, social media companies are now in a position to negotiate favorable licensing terms for their users to include even the most popular songs in their social media video posts.

However, the financial and market-share power of social media companies brings increased concern among music rights holders that social media companies will be able to use that leverage to negotiate deals that limit the rights holders ability to be fairly compensated. This concern is heightened by the increased use of "buyout" licenses, in which the social media company pays a lump sum for the right to license a song for its users over a fixed time period. Rights holders have recently expressed concern that this type of license does not account for how frequently a song gets used on the social media site. Songs that "go viral" on a social media site will not be compensated for the frequency of their use, as the license includes as many (or as few) uses as may occur, with only one fixed payment. The songwriters and other rights holders of exceptionally popular songs will not see a corresponding increase in their earnings on a social media platform under such a "buyout" arrangement. The social media company is earning additional revenue from the use of the viral song in user videos (from increased ad revenue), but the songwriters, musicians, and even record companies do not see that same increase to their revenue. To put a concrete number to this, TikTok earned $4 billion in the United States in 2021, most of which came from ad revenue.

Of course, record companies and artists must acknowledge that TikTok and other social media sites provide more than just licensing revenue — they provide an extremely valuable marketing platform that can translate into plays on streaming sites, concert tickets, merchandise sales, etc. The social media companies leverage their role in marketing music when negotiating licensing agreements with record companies. As of the middle of 2022, the social media companies would seem to have the upper hand in these negotiations with their ability to enter into "buyout" agreements that do not require proportionate revenue sharing and instead rely on lump-sum license fees for unlimited use on the site.

In mid-2022, evidence emerged that record companies and publishers are attempting to even the playing field with social media companies by threatening to withhold licenses while simultaneously pointing out the unfairness of "buyout" licenses to music creators. In July of 2022, Kobalt Publishing (who hold the rights to over 700,000 songs) announced that they were restricting use of any of their songs on both Facebook and Instagram (both owned by umbrella company Meta). Within days of Kobalt's embargo announcement, Facebook parent company Meta announced that, going forward, it would adopt a "revenue share" music licensing scheme rather than its previous "buyout" license. Meta's new licensing scheme (which initially applies only to Facebook, not Instagram) will allocate 20% of the ad revenue to the video creator with the remaining 80% of revenue split between Meta and the copyright holder(s) of any music used in the video. (It was not clear from the announcement just how the 80% would be split.) There is no direct evidence that Meta was responding directly to Kobalt's embargo action, but the close timing indicates that it was likely not a coincidence.

Another recent development with social media companies, particularly TikTok, is the possibility that they may actually leverage their popularity to usurp the functions of traditional record and streaming companies by offering those services themselves. In this scenario, social media companies might recruit musical acts among their own user base to record and distribute original musical content through the social media company, as well as offer a streaming service to its own users that could host exclusive musical content as well as mainstream musical selections. As an early example of this trend, in March of 2022, TikTok launched an in-house music distribution service it calls "SoundOn." TikTok's users can use this service to distribute their music to TikTok's own streaming platform ("RESSO") as well as more widely to mainstream platforms such as Spotify and Apple Music. TikTok's SoundOn distribution service will also offer music marketing and other advice to TikTok users hoping to find an audience for their music. In other words, SoundOn would provide most of the services offered by legacy record companies, but with the benefit of a massive and growing user base (and audience) tied to the social media platform. TikTok's user base (currently 1.4 billion as of August, 2022) provides a tremendous potential source of leverage and synchronicity for this new business model that record companies (and other independent music distributors such as SoundCloud) cannot match. At the moment, TikTok's forays into music production and distribution are in the formative stages, but with the current rate of change in the music industry, social media companies could prove to be a transformative force moving forward, disrupting the large record companies in their current dominance of market share.

21.

INDEPENDENT MUSIC PRODUCTION AND DISTRIBUTION

The preceding chapters have documented many significant changes to the music industry over the years. But arguably the most significant change is one that is the most recent and potentially disruptive — the rise of completely independent music production. The term "independent" has been used in the music industry since its inception to refer to small record companies that exist outside the "mainstream." An early example of a successful independent record company would be Okeh Records in the 1920s while a more recent example would be Subpop Records in the 1990s. This chapter is not about small, independent record companies, which have been discussed at length above. Rather this chapter involves music production that it does not involve a record company at all. This new form of independent music production enables musicians to market recordings directly to the public without the intermediation of record studios, record companies, or traditional record distribution channels.

Independent music production is highly dependent on new technologies that eliminate economies of scale and other technological barriers to entry into the recorded music market. Economies of scale arise due to the fact that it is more cost efficient to make many units of a product than to just make one. Going back to the earliest years of the record industry, it was always possible to make a single recording of a song as an amateur. However, the cost of making hundreds of copies of a recording was prohibitive without the financial support (and industry connections) of a record company. Record companies provided many benefits to a musician, but perhaps the most important was the investment of funds in recording and manufacturing the recorded product. Musicians simply did not have access to the capital and expertise required to make their own recordings until the developments discussed below.

Changes in technology in the second half of the 20th century gradually provided musicians with more opportunities to produce their own recordings, with the most recent of those changes being unfettered access to streaming music platforms. Here is a summary of these changes and how they enabled independent music production:

Magnetic tape recording: We saw above that the first "format war" was between the cylinder and the disk, with the disk winning broad acceptance as the superior format shortly after the turn of the 20th century (c. 1910). However, making and duplicating disks was (and still is) a capital-intensive process requiring expensive equipment and technical expertise, making it out-of-reach for music self-production. In the late-1920s and early 1930s, a new and more accessible technology, magnetic tape recording, became available. So-called reel-to-reel tape machines (or "decks") became widely available, which were smaller, more mobile, less expensive, and easier to operate than disk cutting machines. One of the primary advantages of tape recording machines is that they could be easily moved from place to place, enabling "field" recordings away from dedicated recording studios. The famous Smithsonian folk and blues field recordings made by the father-son folklorist team of John and Alan Lomax in the 1930s and '40s are an iconic example of the recordings enabled by this technology. The Lomax's could fit their tape recording gear in the trunk of a car, making it possible to drive throughout the country making "field recordings." One prominent example of the Lomax recordings is that made of blues legend Muddy Waters in 1941 in Mississippi, in Waters' home. Waters' recording by Alan Lomax inspired him to subsequently move to Chicago to launch his commercial recording career with Chess records in 1948. Waters quickly became the leading "Chicago Blues" artist, building on his modest start as a subject for Lomax's folklorist field recordings.

Tape recording technology improved to the point that it quickly became the standard professional recording-studio equipment, reaching its pinnacle in the 2-inch, 24-track decks of the 1970s, a format that remains the state-of-the-art in analog recording technology today.

The tape cassette: Two-track (1/4 or 1/2-inch) reel-to-reel tape decks were inexpensive enough by the 1960s that amateur musicians could use them to make their own recordings. However, duplicating those recordings for distribution to even a few friends proved costly and difficult. In 1963, a new tape format was introduced known as the tape cassette, which placed the tape reel in a small plastic case, enabling it to be stored safely and conveniently and avoiding the delicate process of threading the tape through a deck's spindles. Cassettes also allowed for easy rewinding. Their sound quality was inferior to the larger tape reels (due to the narrow and thin tape used in the cassette), but their increased convenience and ease-of-use outweighed the inferior sound quality for most users.

The cassette tape brought about two other major enhancements that enabled independent music production: easy duplication and the idea of a multi-track "home studio." The self-contained and inexpensive cassette proved ideal for duplication, even on a mass scale using multi-cassette duplication machines. A musician or band could distribute multiple copies of their cassette by paying a modest fee to a small business who owned a cassette duplicator. The cost of distribution was suddenly within reach of musicians and bands without a record deal.

In 1979, the Tascam company introduced a revolutionary product based on the audio cassette — the Portastudio. Tascam's Portastudio was a self-contained, four-track, home recording "studio" built into a unit about the size of a shoebox. The recording medium was the by-then familiar cassette tape, but now controlled by a small mixer and controls that enabled an inexperienced user to record and layer four separate tracks. Portastudios were soon also equipped with another relatively new development, the "drum machine," so that musicians could avoid the difficult process of recording drums while also providing a new level of rhythmic precision to their recordings.

The Portastudio was a huge and instant success, as amateur musicians could now make multi-track recordings in their own homes, with even a single musician able to combine vocals, guitar, bass, and drums into a compelling mix on a cassette tape that could be easily duplicated for friends and fans. High-speed "home dubbing" cassette duplication machines also because popular, so that musicians could run off multiple copies of their cassettes without paying for access to the high-volume duplicators. On a personal note, I well-remember when my guitarist bandmate in the early 1980s bought a Portastudio. Although our drummer wasn't thrilled with it, it enabled the guitarist, myself (playing a keyboard), and our bass player to create multi-track recordings in our guitarist's apartment (including a track dedicated to the built-in drum machine). It was a game-changer. (That guitarist is now an

Emmy-winning composer who writes and records television soundtracks for children's animation shows in his home studio. That career all began for him with the cassette Portastudio.)

The Digital Revolution: The introduction of digital technology to music production in the 1980s had a tremendous effect on the ability of musicians to create studio-quality recordings in their own homes. I divide these new digital technologies into three types, discussing each in turn:

The **compact disc** (CD) is known to most (and discussed above) as a revolutionary new format to consume recorded music. However, the CD also quickly became just as revolutionary a method for recording music in the home. As explained above, the cassette tape offered great convenience over reel-to-reel tape, but it had several deficiencies. The sound of a cassette tape is significantly inferior to that of both a vinyl disc and traditional reel-to-reel tape formats. Cassettes have significant hiss, distortion, and speed flutter. (Dolby noise reduction was introduced to cassettes in the late 1970s, but this offered only a relative improvement and required specialized playback decks loaded with the Dolby encoding and decoding technology.) Cassette tapes were also subject to damage from heat and were prone to being "eaten" by low-quality tape decks such as those in cars. Finding a particular song on a cassette was also very difficult without specialized "gap detection" algorithms available only in the more expensive decks.

Compact disks, introduced in 1982, overcame nearly all of the cassette's deficiencies. The sound quality of a CD was far superior to that of the cassette, particularly it's signal-to-noise ratio. (Signal-to-noise ratio refers to the amount of constant background noise, such as "hiss".) The CD was also more durable and capable of easy track location (no rewinding required). But perhaps the most remarkable feature of a CD from the perspective of a recording musician is that with the invention of the "recordable CD" (CD-R), a musician could now record straight to a CD through their personal computer (which typically came loaded with a CD-R drive). (CD-R drives became available in computers around 1995.) The computer could also make an infinite number of copies of the CD with no loss of fidelity from the original. With a home color printer, a musician could even print labels and CD inserts, allowing for a production experience quite close to that of a retail CD. High-speed CD duplication machines also enabled musicians and bands to pay a relatively low fee for hundreds or even thousands of CDs, with labels and inserts, from many companies offering such duplication services. Boxes of self-produced, professional looking CDs could now be sold at live shows or even distributed to independent record stores by bands looking for an audience.

In 1998, the **CD Baby** company was founded, which provided one of the first commercially successful online distribution sites for self-produced CDs. With a CD Baby account, musicians could now have their CDs marketed, sold, and distributed on a public platform available to anyone with internet. Now, not only was independent music *production* possible, but also independent music *distribution.* Distribution is not the sexiest part of the music industry, but it is arguably the most important. Without distribution, nobody would be able to find new music (or old music, for that matter).

Another digital music technology that forever changed music production was the development in 1981 of the **Musical Instrument Digital Interface (MIDI)**. MIDI is a digital language protocol allowing electronic music instruments (such as synthesizers) to communicate by a simple cable both with each other and with computers. The MIDI language controls musical parameters such as pitch, note on/off, volume, sustain, etc. The language is simple, fast and reliable, with only 128 gradations possible of each parameter. MIDI itself was a useful but not game-changing development. However, when MIDI was used in conjunction with **Digital Audio Workstation (DAW)** software, the result significantly democratized the access to professional-quality music production. By democratized, I mean that now the average amateur musician could produce studio-quality music in their own homes with affordable equipment based around a personal computer.

The Digital Audio Workstation is typically a software suite running on a personal computer (Apple or PC), but can also refer to similar software running within a stand-alone digital synthesizer. At the core of the typical DAW software suite is a digital sequencer, which allows the user to program a sequence of pitches (such as notes on a synthesizer or hits on a drum machine) that get repeated ("looped"). The DAW sequencer is typically multi-track, meaning multiple instruments or tracks can be sequenced simultaneously. Because the recording digital, there is theoretically no limit to the number of tracks that can be layered, with the processing power of the computer being the limiting factor (rather than tape width). These sequenced tracks contain MIDI data governing the pitch, sound, duration, and other parameters of the music. However, DAW software later incorporated recorded digital audio into the MIDI sequence, so that a combination of synthesized and recorded sounds could be layered into a complex musical composition. The use of recorded audio requires an **audio interface**, which converts the analog audio signal from a microphone or electric instrument (such as an electric guitar) into digital data (0s and 1s), which is then sent to the computer and the DAW software.

The first DAW software programs were introduced in the late 1970s and early '80s. In 1991, the Digidesign company introduced its Pro Tools DAW software, which quickly became the default software used in digital recording studios. It wasn't long after the introduction of Pro Tools that several other companies introduced their own competing software DAW products, including Cubase, Digital Performer, Sonar, Ableton Live, and Logic. Each of these products offered some unique feature or competitive pricing, leading to fully-featured DAWs that were affordable (some even free, such as Audacity) and easy to learn. Beginning in the 1990s, amateur musicians working at home with DAW software on their computers could put together professional-sounding multi-track recordings.

The ease of use of these DAW programs enables even musicians working alone to create recordings with multiple vocal and instrument tracks, including authentic sounding orchestral string or brass parts and vocal harmonies. Many of these home "project studios" became so technologically sophisticated that by the 21st century many television, advertising, and even film scores were being entirely produced in the homes of professional musicians. It is easy to see why: a solo musician working in a project studio with sophisticated digital synthesizers and DAW software is far less costly to a TV or film producer than hiring multiple musicians to spend hours in a professional studio.

The next major step in independent music production arrived with social media and internet streaming sites, particularly those catering specifically to amateur, "unsigned" musicians. The earliest social media sites, such as MySpace (launched in 2003) and Facebook (2006) enabled musicians and bands to quickly create pages where they could market their music, including recordings and video. Musicians could already design their own internet web sites, but MySpace and Facebook were free and allowed musicians to easily market through an expanding social network.

In 2007, two new companies, Bandcamp and SoundCloud created online distribution platforms catering explicitly to independent musicians. These services provided an internet platform where musicians could upload their recordings and listeners could download or stream those songs. Links to Bandcamp or SoundCloud recordings could then be shared on social media and almost overnight the marketing and distribution reach of amateur musicians was expanded exponentially on a global scale. For the most successful of these independent artists, exposure on platforms such as SoundCloud would lead quickly to being signed by a major record label. The list of major pop acts that got their start in this way is lengthy and includes Billie Eilish, Post Malone, Lorde, Juice World, and Marshmallow. Of course, new social media sites such as Instagram and TikTok have added an important new dimension to this process with the short video format.

The latest development in this cycle of increasing independent music production access to the marketplace has been the rise of **digital music distribution services** that will place independent recordings to all of the major streaming services, collect any resulting royalties, and even offer professional marketing services. One of the earliest of these services is DistroKid, which launched in 2013. DistroKid had a notable success in 2015 when a song distributed on the platform by artist Jack & Jack reached the top of Apple's iTunes download chart without any other intervention by a conventional record label. Because DistroKid charges a fixed fee for distribution, rather than taking a cut of royalties, the artist was able to retain 100% of the royalties from their hit song — something that had never happened before. This anecdote highlights one of the major advantages of independent music production and distribution: the artist not only has easier access to the market, but they are able to retain copyright ownership of their music and keep all the royalties that their recording and/or song may earn.

Another somewhat ironic advantage to independent music production is that it provides a platform for being more easily discovered by traditional record companies, particularly in the streaming age. Prior to streaming, a new artist would have to rely primarily on word-of-mouth or sending "demo" recordings to a record company in order to attract major-label attention. With independent distribution to streaming platforms through companies such as DistroKid, record companies can simply look at the popularity charts of the various streaming companies to find "viral" artists. Many artists over the past decade have landed contracts with major record labels after their independent music productions have been "discovered" from streaming or social media. An early example of this was Billie Eilish, whose 2015 song "Ocean Eyes" went viral on the independent music platform SoundCloud. Eilish had recorded the song in her bedroom with her brother, Finneas, when she was 14 years old. The success of "Ocean Eyes" on SoundCloud led to it being heard by a talent scout with a relationship to Interscope Records (now part of Universal Records), who released the song in 2016. Eilish quickly rose to become one of the most successful and influential singers of her generation, a process that began with her posting a song on SoundCloud when she was 14!

There are many other recent examples of commercial success that began with independently produced and distributed recordings. In fact, such stories have become routine, with record companies now using independent music platforms as a primary source of talent. For many such artists, the question now becomes whether the advantages of a record company contract (marketing and other support) outweighs the attending loss of control over royalties and copyrights. An artist such as Billie Eilish highlights the advantages that a major label contract can still provide, including merchandising, movie deals, global marketing, etc. But many artists may decide that with the recent advances in independent production and distribution, keeping control over one's artistic product may be preferable to the loss of control that comes with a record deal.

22.

WHO DOES WHAT IN THE RECORD INDUSTRY?

Over the roughly 100 years of its development, the record industry has developed a division of labor with certain roles and specializations carved out for specific sets of skills and responsibilities. These roles are not set in stone and technological and economic changes can quickly make some roles no longer necessary or create a need for a new set of skills. In some cases, certain people have overlapping skill sets that enable them to fill two or more of these roles simultaneously or sequentially throughout their careers. Here is a basic outline of those roles and how they have developed over time.

Producer:

The role of the record producer is best imagined as a creative link between the financial interests of the record company and the creative interests of the artist. As such, the producer's job is to create a product that, ideally, will be artistically satisfying to the artist and the consumer but also profitable for the company. Erring in either direction can result in a record that may be profitable but leaves the artists unsatisfied or unable to replicate, or in the other direction with a record that might be artistically groundbreaking but leaves the record company unable to justify it in economic terms. Neither outcome is desirable, though many records likely fall into one of those two extremes. Examples of records that are both profitable and creative watermarks stand out as the acknowledged masterpieces of the industry. Pink Floyd's *Dark Side of the Moon* is just one such example, an album that is among the best selling in history but also an example of groundbreaking artistic achievement that few would quibble with.

Until the 1960s (and in some cases, later), record companies employed their own "in-house" record producers, such as Columbia's John Hammond or Atlantic's Jerry Wexler. In smaller record companies, the company owner or founder might also be the producer, such as Sun Records' Sam Phillips or Motown's Berry Gordy. However, since roughly the 1970s, the record producer has become a "free agent" or independent member of the team. Record companies will certainly have a recommendation as to whom they think is best suited to produce an artist, but that person will often work with many different record companies and artists.

The skills needed to be a successful a record producer fall into several broad categories: musical skills, management skills, and people skills. The best producers combine these skills with an informed sense or vision of current trends in the market so as to find a musical niche that hasn't already been filled or that offers a new twist on a style that will resonate with listeners. This last skill is often just as much a matter of intuition or luck — being the right producer of the right artist at just the right time.

Musical Skills: A good producer needs to know music and how it is made. A producer will need to have informed opinions about what songs the artist should (and should not) record; what tempo or instrumentation works best for a certain song; when the artist has recorded a definitive (or at least adequate) "take" or version of a particular song or when it needs more practice or another take; which songs should be prioritized for release as a "single" because they seem more likely than others to sell; whether certain songs could benefit from small adjustments (a key change? A different tempo? An addition of another instrument?) or even a major rewrite (the addition of a bridge, a new melody, changes in the harmony, a different groove, etc.). In some cases, a record producer might need to get into the weeds and help rewrite songs or suggest specific instrumental or vocal techniques, acting as an impromptu coach, songwriter, or arranger.

Of course, the producer's musical skills will need to match the genre the artist is aiming for. A producer of folk music likely won't have much to offer a heavy metal band, and vice versa.

Of course, unusual genre hybrids can sometimes resonate with new audiences, but generally the producer should be able to speak the same musical language as the artist.

Management Skills: Making a record is typically a labor- and capital-intensive endeavor. Studio time is expensive, there are often at least several highly skilled and expensive employees involved in the process who must be paid high hourly wages (studio engineer, assistant engineer, additional studio musicians, piano tuners, instrument technicians, etc.). There is also often a great array of expensive instrumental and technical gear that must be purchased, rented, updated, and maintained. Putting all of those pieces together at just the right time at one (or multiple) locations requires an under-appreciated level of management and logistical skill. Multiple schedules and interests must be accommodated, and delays can be both costly and aggravating.

People Skills: The best producers know how to get musicians to give their best performances in a stressful environment, the recording studio. Any musician who has done much recording knows how alienating and uncomfortable it can be to try to give an inspired and creative performance in a studio. Knowing how to make creative performers comfortable with the recording process, and how hard to push them to achieve their best possible performance, is a special skill, and each producer has her own methods. Some methods may work for some artists, but those same methods might irritate another artist or cause them to lose confidence. Some producers (such as Phil Spector) were known for their very controlling (if not tyrannical) approach — "Here's what I want you to sing, how I want you to sing it, and if you don't do it my way then I'll find another singer." — or something to that effect. But most producers find a way to make the artist feel that they are collaborating with them, that they both are on the same team, working together in the same creative direction.

Manager:

The manager is a position most people seem familiar with — the hustler who gets an artist gigs, helps them negotiate a record deal, helps them with marketing and selling merch, etc. Ironically, the manager is also the position that is least well defined in the music industry and one that has no credentials or other educational path to success or even landing a job. One reason for the nebulous job description and career path of a manager is that the job is almost unbounded in the type of skills it might require. Managers essentially do whatever an artist needs to have done and can't do themselves (apart from actually making the music). The list is nearly endless: find gigs for the artist and negotiate pay with the venue; help with band personnel issues (or find backup musicians); help with gig logistics (sound, lighting, security, etc.); tour planning and promotion; general marketing and promotion; social media; design, order, and distribute merchandise; help with any legal issues that might arise; help the artist with any psychological or health issues that might arise; plan a long-term strategy for the artist's success; manage the artist's finances; etc. Given the broad range of possible skills a manager might need (legal, financial, business, marketing, etc.), there is no defined "career path" to this position. Managers are generalists who typically learn on the job. The qualities good managers seem to have in abundance are typically matters of personality: good mangers are persistent, outgoing, and resilient. Managers are task-oriented and typically will not take "no" for an answer. They know how to get what they want from people, either through charm or intimidation, and sometimes a combination of the two. Mangers typically get paid a percentage of an artist's earnings (10%-20%).

Because they are often in control over an artist's total finances, managers also find themselves in a position of fiduciary responsibility. Consequently, there have been more than a few instances of highly successful artists later claiming (rightly or wrongly) that their managers have taken advantage of their positions to embezzle funds from the artist. Two highly publicized cases of suspected embezzlement or unethical behavior by managers were Elvis Presley's manager, Colonel Tom Parker, and the manager for the boy band NSYNC, Lou Pearlman. Each of these cases were explored in highly regarded films, both of which I recommend as examples of the dark art of artist management: *The Boy Band Con: The Lou Pearlman Story (2019)* and *Elvis* (2022). Another noteworthy and surprising story in artist management involves Pat Corcoran, who became the manager for independent rapper Chance The Rapper in 2011. Corcoran helped Chance create one of the the most notable early examples of a successful independent career for a rap artist without any involvement with a traditional record label. Corcoran had very little experience as a manager when he met Chance, who was himself also very inexperienced, so their mutual successes as artist and manager came from a remarkable trial-and-error process that turned the conventional wisdom of how to succeed in the music industry on its head. Unfortunately, even this feel-good story ends with incriminations of financial wrongdoing: In 2021, Corcoran and Chance both sued each other over allegations of breach of contract. An extensive interview with Pat Corcoran on YouTube provides an excellent portrayal of what is involved in artist management and in particular how those skills are learned on the job.

Music Supervisor:

Movies, television shows, documentaries, and live theater will often employ someone in the role of "music supervisor," the person whose responsibility it is to choose, record, license, edit, and synchronize music that will track with the narrative of the project. The music supervisor does not typically write or perform any of the music in the project, but rather will help decide which composer or performer will be hired to do so.

In projects that use pre-existing music, the music supervisor will assist in selecting the musical selections and then arrange for any licensing or "synch" rights to that music. The role of the music supervisor can vary widely according to the project, from a very creative role where choosing the musical style can have a significant impact on the success of a project, to a a more technical or even clerical role where the project has a small music budget and the music supervisor can only choose from very limited options within a style already predetermined by a director or producer.

Recording Engineer:

The recording engineer is responsible for creating the technical conditions necessary to capture the specific recorded sound desired by the artist and the producer. Typically, the engineer does not have any creative control over the choices of just what sounds get recorded, but rather translates the desires of the artist and producer into the available or chosen technology to achieve those sounds. Obviously, the role of the engineer has changed drastically over the years with changes in recording technology. But throughout all those changes, the engineer's success has consistently been to make sure the technology does not become an impediment to creative progress, but rather transparently contributes to the creative product. If an engineer cannot create an inspiring sound from the available technology, the artist and producer will become frustrated, time will be lost, money will be wasted, and the recording session will frustrate everybody involved. The engineer's job may consequently be the most stressful and demanding of all the jobs listed here as she will be held responsible for any technical problems, but will not get much credit for the result if things proceed smoothly.

A successful engineer will typically be a very detail-oriented and highly organized person. The engineer must be able to quickly locate, set up, and operate any piece of musical or recording equipment needed for a recording session without delay. No excuses will be tolerated in a recording session for delays while an engineer tries to find an essential cable or adapter, consults a manual to remember exactly how to configure a piece of equipment, or finds that an instrument or device in a studio doesn't function properly because of deferred maintenance.

A good engineer will also be a repository of practical experience generated over thousands of hours of practice, as well as practical knowledge of just how previous engineers created the iconic sounds in earlier recordings. Engineers will need to know how to reproduce almost every sound ever recorded, so when a producer says "I want that piano sound that Elton John had when he recorded *Captain Fantastic*, the engineer will have an idea of just what microphones were used to get that sound and how they were placed. The variations on these sorts of demands are almost endless and the engineer will have to come up with some sort of practical solution based on experience or insights gained from historical knowledge.

Artists and Repertory (A&R):

The A&R executives at record companies are responsible for finding artists who have the greatest chance of being signed to a contract and subsequently making successful records with the company. As such, A&R executives have a great deal of direct contact with the recording artists and are thus more visible to the musicians and their fan base. When we say that an artist was "discovered," it is often the A&R executive that was responsible. The skill set of a successful A&R executive is much less technical than most of the other jobs at a record company, relying more on intuition, people skills, and a gut instinct for style and trends. A&R executives need to be in a position to hear upcoming artists, so they need to be comfortable hanging out at clubs, bars, social media, or wherever else unsigned artists tend to go to display their emerging talents. And they need to sense when an artist has potential to translate and scale up their success from a local level to be profitable on a national or even global stage.

There is no degree or other formal education for the skills required for successful A&R work, as they are almost entirely based on social and musical intuition. Only an extremely small percentage of musical artists will become commercially successful recording artists. Picking which ones will be able to make that transition, having the confidence to stake one's professional career on those judgements, and convincing the artist to put their careers in the hands of the company you represent, requires a rare blend of intuition, experience, and "street smarts."

Marketing and Promotion (PR):

In many ways, a record company's success is dependent primarily on its ability to market its products. If the potential fans of an artist don't know about them, no amount of musical talent will overcome that handicap. This is one of the major reasons why it makes sense for an artist to sign a major record deal rather than trying to go the "independent" route. Big record companies have the resources, personnel, relationships, and experience to make sure that the information about a new record gets pushed to the radio stations, news media, social media influencers, trade publications, etc. to maximize a record's potential. Not only must the information get out quickly to the right sources, but it must have a look and tone carefully crafted to appeal to the intended audience. Marketing a singer-songwriter, for example, requires a very different approach than marketing an EDM artist. The marketing team has very little room for error, as once a product is mis-marketed with an approach that fails to attract positive attention, that opportunity is gone and it will be difficult to catch up after an artist has failed to catch on. Few record companies are willing to "throw good money after bad," so successful marketing from the beginning is critical to an artist's prospects with that company. When a record fails to sell, the marketing effort is one of the first targets for blame and scapegoating, while the credit for any success will rarely be attributed to a good marketing campaign.

Legal:

As you will soon realize when reading this book, if you don't already, the music industry has been built upon a scaffolding of extraordinarily complicated financial and legal relationships. There is a reason that many of the most successful music industry executives got their start as lawyers — through their training and experience, they have an advantage in seeing that legal structure and how it shapes the chances for and level of commercial success in the industry. Clive Davis, the legendary President of Columbia Records in the 1960s, founder of Arista Records in the '70s, and now Chief Creative Officer of Sony Entertainment, got his start as a young lawyer with Columbia Records in the late 1950s and moved up the corporate ladder to president. He has no musical training or experience, but has nonetheless earned five Grammy Awards and is a member of the Rock and Roll Hall of Fame.

A lawyer in a business setting essentially operates as a risk manager. Lawyers employ their training and knowledge to minimize the risk of financial investments through well-written contracts, focused negotiations, and remedial actions (lawsuits) when the inherent risks of business relationships emerge as open conflicts. Because the music industry involves inherently risky investments in unproven and unpredictable creative products, governed by an intensively complex system of laws and regulations, lawyers have become an essential part of the process.

Accounting:

As you will learn throughout the rest of this book, the flow of money in the record industry is very complex and highly contested. From tracking copyright royalties, to artist advances, the record industry presents a unique challenge to the accountants who must track all of these payments, set up systems for accurate reporting and payment, and contact artists to ensure that everything is as it should be. Every industry needs accountants, but the record industry seems to need more of them. As with any other industry, at the top of the accounting chain of command sits the Chief Financial Officer, who oversees the group of accountants in a company and who translates the data into policy recommendations for the Chief Executive Officer.

Licensing:

In the following chapters you will learn about the various copyright licensing systems that govern the rights to sell and use recorded music and the money that flows to the copyright holders from those uses. Record companies hold the "master rights" to the records made by their artists and their publishing companies administer the song copyrights to the songs written by their recording artists. Publishing companies administer the copyrights of independent songwriters and recording artists. There are many jobs associated with administering and tracking the licensing rights and associated royalty payments. Licenses must be negotiated and tracked, and royalties collected and paid out to the individual songwriters in accordance with their publishing agreements. Requests for "synch" rights from video producers must also be fielded and any agreements negotiated, documented, and tracked. So, record companies and publishing companies typically have a staff of licensing professionals who know every detail of copyright law and licensing practices. Licensing staff do not have to be lawyers, but they are often led by a lawyer who makes sure the company's practices track with the ever-changing field of copyright law and how royalties are calculated and negotiated.

Record Company Chief

Executive Officers (President):

At the top of every company in every industry sits a single person, typically with the title of Chief Executive Officer or President, who is responsible to the company's Board of Directors and shareholders for successfully managing all the parts of the business. The music industry is no different than others in this respect, with the possible exception being that there may a more widely varied set of career paths to this top spot than in some other industries. That is because the skill set required to be a musician has very little overlap with the skill set required to be a good manager. In fact, those skill sets may often be quite antagonistic to each other. While there have been successful musicians who also successfully managed large record companies (Herb Albert of A&M Records is one example), that is the exception rather than the rule. Most chief executives rise up the ranks from one of the other career areas mentioned in this chapter (A&R, marketing, legal, accounting, licensing, etc.), because the practical knowledge of the industry gained in those careers hones and rewards the skills required of an executive manager. Musical skills are rarely required or rewarded at the executive level.

For examples, let's look at the current CEOs of the big three record companies and how they got to those positions:

- The current CEO of **Warner Records**, **Aaron Bay-**

Schuck, gained experience working in the marketing and A&R departments of different labels under the Warner umbrella (Interscope and Atlantic). He has no musical experience or background and was a political science major at Columbia University in New York.

- **Doug Morris**, the current CEO of **Sony Music Entertainment**, was a professional songwriter for a music publishing company in the 1960s. He wrote the Chiffon's 1966 hit "Sweet Talkin' Guy." He eventually started his own record company, Big Tree Records, which was eventually purchased by Atlantic Records. He also eventually became President of Atlantic Records after it was purchased by Warner. Passed over for the CEO position at Warner, he left to become CEO of Universal Records in 1995. After being replaced in that position in 2011, he jumped ship again to become CEO of Sony Music. So, Morris has held upper executive positions at **each** of the three largest record companies in the world! Morris attended college at Columbia University, where he majored in sociology.
- **Sir Lucian Grainge**, the current CEO of **Universal Music Group**, has been named in four different years by *Billboard* magazine as the "most powerful person in the music business." Grainge's early career was spent in the music publishing business, where he worked as a publishing A&R executive, finding songwriting talent for various publishing companies. He eventually became

> the director of RCA Music Publishing company, then A&R director for MCA Records, and eventually CEO of Universal Music Group. Grainge did not attend college and is not a musician.

So, for the three top executives in the recording industry, not one of them had a career as a recording artist, and only one had any musical background at all with only a brief career doing anything directly related to making music. Not one had any formal education or training in anything related to music, or even the business of music. All of them worked their way into their leadership positions primarily through entry-level publishing, marketing, or A&R positions.

PART II
COPYRIGHT AND MUSIC

23.

COPYRIGHT THEORY AND HISTORY

"The more artistic protection is favored, the more technological innovation may be discouraged; the administration of copyright law is an exercise in managing the tradeoff." United States Supreme Court in *Sony Corp. v. Universal City Studios* (1984)

Unlike many obscure legal terms, the nature of "copyright" reveals itself transparently in the term itself. Copyright law provides the *right to copy* to certain individuals or corporate entities. This last point is important — copyright does not recognize a fundamental or natural right applicable to all. Rather, it grants a right to copy to only a small subclass of individuals, creating in effect a monopoly power (ostensibly for a limited time) to make copies of a certain defined set of works (books, music, films, etc.).

Copyright protects the expression of ideas, not the ideas themselves. For example, suppose you wrote a song about a rainy day that is in the key of D minor in a slow, triple meter. Your copyright is only on your particular song on that subject using those musical components in a particular way. Somebody else could also write a song about a rainy day in D minor in a slow triple meter *without violating your copyright.* **You don't own a copyright on your idea for a song, only on the particular song you have written using those ideas.** Those same ideas can be used by others to write songs that are different enough in musical particulars that they would not infringe on your copyright.

The first U.S. copyright law was inspired by and modeled on a British law enacted in 1710, the Statute of Anne (named after Queen Anne of England, who ruled from 1665-1714). This was the first legal statute governing the right to copy printed works, rather than leaving such arrangements to private negotiation. But the Statute of Anne did not extend that right to all people. Rather, it created a time-limited monopoly by granting the right to copy a work *exclusively to its author* for a period of 14 years (renewable once), after which the work would enter the *public domain*. The act also preserved another pre-existing monopoly held by a single British publishing firm, Stationer's Company, in its right to publish books in the United Kingdom. In order to secure the copyright, the statute required that authors publish their works only through the Stationer's Company. The significance of the Statute of Anne is primarily its recognition of the rights of authors to control the making of copies of their works, thus giving them a measure of *economic control over their creative product*.

Public Domain

The U.S. federal copyright scheme described in this chapter bifurcates musical (and other) works into two classes: those that are copyrighted and those that are not. Musical works that are not subject to a copyright exist in the *public domain*. The public domain consists of all musical works (a) that predate the first copyright act of 1790, or (b) whose copyright term has expired. It used to be that the public domain also included musical works whose authors did not register their works with the U.S. Copyright Office. *However, registration is no longer required (as of 1976) for a work to be copyrighted, so all works are copyrighted regardless of registration until the term of copyright has expired.*

If a work is in the public domain, then that particular expression of musical ideas cannot be the basis for a copyright infringement claim as nobody owns it. However, a new musical work that incorporates musical elements in the public domain may contain enough original material so that the new work could gain copyright protection. However, the copyright of the new work containing public domain elements would only cover those original expressions found in the new work and not the public domain elements themselves. These concepts will be explored further below when we look at copyright infringement cases.

The Beginning: Copyright Act of 1790

Article 1, Section 8 of the United States Constitution (the "Copyright Clause") gives Congress the power to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."

The first session of the U.S. Congress (1789-1790) resulted in passage of both the Patent Act of 1790 and the Copyright Act of 1790 to implement the Constitution's Copyright Clause. Copying the language of Britain's Statute of Anne, the Copyright Act confers on authors of certain printed material (books, maps, and charts) an exclusive right for a period of 14 years to control the making of copies of their works. The 14-year term was renewable once during the the author's life for works not published prior to the date of the act. The Copyright Act only applied to United States citizens until passage of the International Copyright Act of 1891.

The first Copyright Act did not expressly mention musical works, though musical works that were printed *as books* were routinely allowed to be registered and protected under the law. The Act required works to be registered with the clerk of the author's local federal District Court in order to receive protection (for a fee of 60 cents) and copies of the work to be deposited with the clerk. The Act specified that any person who was shown to have infringed another's registered copyright would be "liable to suffer and pay to [the copyright owner] all damages occasioned by such injury."

Copyright in Musical Compositions and Extension of Term: Copyright Act of 1831. In 1831, Congress made its first revisions to the Copyright law, recognizing *printed* musical compositions as copyrightable works and *doubling the term of a copyright from 14 years to 28,* with one option to renew for an additional 14 years. It is important to distinguish here that this law only protected *printed* musical works and not the *performance* of musical works.

Adding International Protections: International Copyright Act of 1891 and the Berne Convention. The International Copyright Act of 1891 provided copyright protection under U.S. laws to citizens of other countries that wished to register their works in the U.S. The Copyright Act of 1790 extended copyright protection only to U.S. citizens. One limitation of the act is that it only provided copyright protection to works that were printed in the United States. The 1891 act formalized an agreement by the United States in 1889 to abide by the terms of the Berne Convention, an international copyright agreement reached among many other countries in Berne, Switzerland in 1886. The Berne Convention lists the minimal copyright protections that member countries agree to, and provides that member countries will respect the copyright laws of the "country of origin" for the copyrighted work in question.

1897 Amendment to the Copyright Act. In 1897, Congress further amended the Copyright Act to extend copyright protection of musical works to *public performances* of those works. Note that this amendment provided for a general copyright for public performances, not only those "for profit," which was language added to the 1909 Copyright Act (see below), which seemingly limited the public performance copyright. The "for profit" limitation was eroded by subsequent case law and the 1976 Copyright Act eliminated the "for profit" limitation entirely.

Copyright Act of 1909. The Copyright Act of 1909 was the first wholesale, major revision of U.S. copyright law since the initial act of 1790.

- **Compulsory Mechanical License**. In 1908, the United States Supreme Court ruled in *White-Smith Music Publishing Company v. Apollo Company* that pianola music rolls (cylindrical rolls with holes punched in them that served as the "software" for player pianos in the early 20th century) and other reproductions that are part of a mechanical music playback process are not eligible for copyright protection as copies of printed music because they are not intelligible as music notation. In response to this ruling, Congress included in the 1909 act one of the foundations of modern music copyright law, the **compulsory mechanical license**.
- The license created by this act provides that, after a

copyright holder initially agrees to the duplication of their composition by a mechanical process (such as recording), thereafter the copyright holder is compelled to issue a license to any other person who wishes to also make a mechanical duplication of that composition. The only stipulations to this compelled license are that the licensee **give notice** of the intent to make the recording to the copyright office and pay the copyright holder **a statutory royalty of $.02** for every mechanical copy sold (an amount that has subsequently been increased).

- Congress's intent in creating the compulsory mechanical license was to prevent some person or entity from creating a monopoly on recordings or other reproductions of musical performances and thus constraining the free market for music. This was not a hypothetical fear, as at the time the Aeolian company had a near-monopoly on player piano rolls.
- **Publication and Notice**. The 1909 act specifies that only published works that contain a copyright notice are protected by the federal copyright law. By extension, unpublished works could only be protected under state law. (Note: The notice requirement has since been removed.)
- **Extension of term**. The Copyright Act of 1909 again extended the duration of a copyright to 28 years, with one 28-year extension, for a total term of 56 years.

Copyright Act of 1912. This act added *motion pictures* to the list of works that could be protected through copyright.

Sound Recording Amendment of 1971. This act extended copyright protection to *sound recordings* (rather than just musical compositions) published before the act's effective date of February 15, 1972. (The Music Modernization Act of 2018 has since extended federal copyright protection to sound recordings published before 1972.)

Copyright Act of 1976. *The Copyright Act of 1976 was a complete revision of the U.S. copyright law and superseded the Copyright Act of 1909.* The primary impetus for the new act was to address the impact on copyright of various media and reproduction technologies that had transformed the media landscape since the 1909 act, such as audio recording, movies, photocopying, television, etc. The act also brought U.S. copyright law into compliance with the Universal Copyright Convention, an international copyright protocol with which the U.S. had become affiliated in 1955. The 1976 act specified that its provisions would go into effect on **January 1, 1978**.

- **Protection for unpublished works.** The 1976 Act extends the protection of federal copyright law to any work that is **"fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with**

the aid of a machine or device." *This broad definition does away with the previous requirements that the work be published and contain a copyright notice.* It also extends protection to all new media technologies including those which are yet to be developed.

- **Enumerated Exclusive Rights.** The 1976 act revised the 1909 act's list of protected rights that a copyright holder possesses to the following:
    - the right to **reproduce (copy) the work** into copies and **phonorecords**,
    - the right to **create derivative works** of the original work,
    - the right to **distribute copies** and phonorecords of the work to the public by sale, lease, or rental,
    - the right to **perform the work publicly** (if the work is a literary, musical, dramatic, choreographic, pantomime, motion picture, or other audiovisual work), and
    - the right to **display the work publicly** (if the work is a literary, musical, dramatic, choreographic, pantomime, pictorial, graphic, sculptural, motion picture, or other audiovisual work).
  - **Fair Use**. The 1976 act incorporated a four-part balancing test to determine if a use of copyrighted material falls within the doctrine of "fair use" that

had been developed as a defense to copyright infringement in the courts. We will learn the details of the fair use doctrine in a later chapter.

- **Copyright Registration Not Required.** *The 1976 act removed the requirement for a work to be registered with the U.S. Copyright Office in order to be protected.* However, in order to bring a copyright infringement suit in court, the work would have to be registered (which would apply retroactively to the date the work was created).
- **Term**. The 1976 act continued the practice of extending the term of a copyright with every major copyright revision. In this case, the term was substantially extended from the previous 56 years of the 1909 act (28 years, plus 28-year extension) to "the life of the author plus 50 years." The 1976 act also provided that previously-copyrighted works that had not used the 28-year extension and were not yet in the "public domain" were now eligible for a 47-year extension, bringing the total term for those works to 75 years. (The Copyright Renewal Act of 1992 later made the copyright extension automatic.) For anonymous works and "works for hire" (to be discussed later), the act specified a term of 75 years.

Berne Implementation Act of 1988. This act allows the

United States to join the international Berne Convention on copyright laws, effective March 1, 1989. It amends the 1976 Copyright Act by doing away with copyright notice requirements, as required by the Berne Convention.

Copyright Renewal Act of 1992. This act removes the copyright renewal requirement that at the time still applied to works published between 1964 and 1977, making the renewal automatic.

Copyright Term Extension Act of 1998. *This Act extended copyright terms once again, to* ***life of the author plus 70 years****, and for "works for hire" to 120 years after creation or 95 years after publication, whichever is earlier.* These remain the current copyright term lengths today. Copyright protection for works published before January 1, 1978, was increased to **95 years** from publication date. This made U.S. copyright terms consistent with those of the European Union, which was seen as desirable (though not required) after the U.S. formally adopted the Berne Convention in 1989.

Fairness in Music Licensing Act of 1998. Passed simultaneously with the Copyright Term Extension Act, this act provided for an exemption to music performance licensing requirements for small restaurants and bars under certain square footages and using only certain playback equipment.

Digital Millennium Copyright Act of 1998. This act has five titles, but we will focus here on only the two most significant to the music industry:

- **Digital Rights Management Evasion**. Title I of this act provides for penalties for the evasion or circumvention of digital rights management (DRM) protection built into various recording technologies.
- **Online Copyright Infringement Liability Limitation Act**. Title II of the act provides for heightened penalties for copyright infringement on the internet. More significantly, the act also creates a "safe harbor" for internet service providers against claims of infringement provided they comply with certain guidelines. We will go into more detail on this "safe harbor" in the chapter on copyright infringement claims, particularly with respect to YouTube, which relies on this safe harbor to avoid such claims.

Music Modernization Act of 2018. This act revises copyright law as follows:

- **Blanket Streaming Licenses**. In its most significant change to existing law, the act provides that digital music streaming companies, such as Spotify, can apply for a blanket license to stream any copyright-protected musical work by agreeing to pay a royalty to songwriters determined by the Copyright Royalty Board. The complexities of this royalty scheme will be explored in detail in a separate chapter below. The act also provides that streaming companies may choose to voluntarily negotiate directly with publishers and songwriters to pay a different amount of royalties.

- **Mechanical Licensing Collective**. The act establishes a new organization, the Mechanical Licensing Collective, whose mission includes the following:
    - Administer the newly created blanket licenses for digital streaming of musical compositions;
    - Collect and distribute the mechanical royalties on musical compositions, including digital downloads and streaming;
    - Create and maintain a "musical works database" containing information about the various rights holders in musical works, their addresses, etc. Before this act, the only database of musical works protected by copyright and their rights holders was that maintained by the U.S. Copyright Office. The Copyright Office's database was notoriously incomplete, such that streaming services could often claim they could not locate rights holders, even to such well-known acts as Ed Sheeran and Brian Wilson of the Beach Boys.
    - Co-ordinate identification of owners of rights in musical works or sound recordings, and process claims of ownership related to those rights

The Mechanical Licensing Collective is staffed by 14 voting members representing publishers and songwriters.

- **Unclaimed Royalties.** Because many streaming providers claimed to be unable to locate the rights holders to musical works and thus pay them accrued royalties, this act provides that all unclaimed royalties can be held for only three years, at which point they must be distributed according to the proportional market share of all songwriters and publishers.
- **Pre-2018 Lawsuits limitations against Streaming Providers**. In a major concession to the streaming industry, the act prevents musical work rights holders from suing streaming companies after January 1, 2018 for any damages other than actual royalties owed (no lost profits or other damages).
- **Pre-1972 Sound Recordings**. This act provides federal copyright protection for sound recordings published before 1972, which had previously been excluded when sound recordings were first granted protection in 1971. The act also creates four new tiers of copyright expiration for these newly-protected pre-1972 sound recordings: Recordings made before 1923 get three years protection from October 11, 2018; recordings made between 1923 and the end of 1946 get 95 years from date of first publication plus 5 years; recordings made between 1947 and the end of 1956 get 95 years from

date of first publication plus 15 years; all recordings made after January 1, 1957 will have their protection terminate on February 15, 2067

- **Producers**. The act provides that producers will be paid royalties directly from SoundExchange (the company that distributes sound recording royalties from non-interactive streaming and satellite radio) when the recording company or artist has sent a letter to SoundExchange notifying them of the producer's royalty share.

24.

ADDITIONAL MUSIC COPYRIGHT TERMS AND CONCEPTS YOU SHOULD KNOW

Copyrights, Patents, and Trademarks: What's the difference?

Copyrights, patents, and trademarks all provide intellectual property rights protected by federal law. However, that's nearly the extent of the similarity, and the differences among them are significant and important to understand. A **copyright**, as explained above, protects the author's right to control the duplication and distribution of copies of original and particular *creative or intellectual works*, and the financial rewards thereof.

A **patent** is the federal protection of an *invention*, which provides its author with the sole ability to license the use of that invention. There are three types of patents: 1) *utility patents* for inventions of a machine, process, or material; 2) *design patents* for original ornamental designs of a manufactured good; and 3) *plant patents* for discovery of a new variety of plant (such as a new breed of rose or apple). Abstract ideas are not patentable; rather, patents will only be approved for inventions and ideas that are *useful,* that is that can be applied to the manufacture of a goods and services. One cannot patent a mathematical formula, geometric shape, or philosophical idea. But one could patent the detailed and specific process of applying a mathematical formula to a manufacturing process in a new way to improve the product. A patent must specify the precise mechanism or process for applying the idea, not merely the abstract idea or suggestion for such a mechanism or process.

A **trademark** is a word, symbol, or name used to indicate the source of goods or services and distinguish them from other goods or services. Trademarks prevent others from using the same word or symbol to identify or market similar goods or services, rather than preventing others from offering those goods or services. Just as a patent will not be issued for abstract ideas, a trademark will not be issued for generic words or images that do not meet a threshold for originality and specificity. For example, one could not trademark the name "Running Shoes" for a new shoe design because that name is too generic. Similarly, one cannot copyright a sequence of notes that sounds just like a major scale or a common harmonic progression — a copyrightable musical work must be original enough to distinguish itself from other works that use similar generic musical elements.

Whereas copyrights are governed by the U.S. Copyright Office, patents and trademarks are governed by the United States Patent and Trademark Office.

The U.S. Copyright Office.

After the Copyright Act of 1790, copyright registrations and claims were handled by the clerks of the U.S. District Courts, the lowest level of federal courts. As part of the Copyright Act of 1870, the job of registering and administering copyrights shifted to the Library of Congress, the federal agency created in 1800 for the purpose of holding the books and records important to the administration of the federal government. By way of a Congressional appropriations act, the United States Copyright Office was created as a separate division within the Library of Congress, to be led by a Register of Copyrights, to be appointed by the Librarian of Congress (who, in turn, is appointed by the President of the United States). The total budgeted appropriation for the U.S. Copyright Office for the 2020 fiscal year is about $93 million.

Copyright Registration and

Deposit Requirements.

The Copyright Act of 1790 provided for a copyright term that would last "fourteen years *from the time of recording the title thereof in the clerk's office*" (emphasis added). Furthermore, the act provided that no copyright would be recognized unless the author "shall before publication deposit a printed copy of the title of such [work] in the clerk's office of the district court where the author or proprietor shall reside." However, the Copyright Act of 1976 greatly relaxed the registration requirements for copyright protection. Since January 1, 1978, there has been no requirement that a work be registered with the Copyright Office to obtain copyright protection. However, in order to file a suit for copyright infringement, the author will have to register the work prior to filing the suit. In other words, ***creative works are currently eligible for copyright protection at the moment of their creation, regardless of whether the author takes any steps to register them or mark them as copyrighted***.

When a work is registered with the Copyright Office, a copy of the work must still be deposited with the registration (or, two copies if the work has already been published). Either musical notation or a recording will suffice for a musical work copyright; obviously, a copy of the recording is required for the deposit for a sound recording copyright.

*A notice of copyright **may** be affixed to a work to indicate that it has been copyrighted, but such a notice is no longer required*.

Derivative Works (including Arrangements and Remixes) and Compilations

The copyright owner of a musical work may exclude others from making derivative works based on the preexisting copyrighted work, such as an arrangement, re-mix, or other reworking of the original musical material. The copyright owner may also create a new derivative work based on their copyrighted preexisting work and copyright the new work as a separate, copyrighted work. The newly-copyrighted derivative work would cover only the modifications to the original work that are expressed only in the new work.

A new musical arrangement of a preexisting work would be one common example of a *derivative work*. For example, a string quartet arrangement of a song originally for solo piano would be considered a derivative work, which would require a license from the copyright owner of the original song (unless it is in the public domain). A remix could be considered a type of arrangement, in which the elements of a recorded popular song are rearranged into a new audio "mix", again requiring a license from the original song's copyright owner.

As with any other copyright, the owner may license others to make such derivative works on whatever financial or other terms and conditions as she may choose. However, the licensed author of the new, derivative work will only own the copyright to the new work to the extent the work contains original and non-trivial modifications to to the preexisting work. The licensed author of the new derivative work will not thereby own any portion of the copyright to the preexisting work solely by virtue of having authored a licensed derivative work.

A compilation of preexisting musical works into a print music book or album can also be considered a new copyrightable work to the extent the compilation consists of some demonstrable creative effort to arrive at the particular combination of works. The copyright in such a case would extend only to the originality of the choices made in creating the compilation, rather than in the separate musical works making up the compilation. For example, a music book or album that compiles the "Greatest Power Ballads of the 1980s" could be copyrighted as a compilation, thus excluding others from copying that particular collection of songs.

Song Titles, Lyrics, and Band Names.

A song title is not a copyrightable work. There is not enough unique and original content to the song title to grant it an independent copyright. So, if you come up with a new song, you are free to use a title for the song that has been used before.

However, there is an exception to this general rule. Some song titles have become so well known and associated with particular songs or artists that to copy them might constitute an action for *unfair competition by appropriation*. This might even apply to the use of a famous song title for a different service or product. For example, the Red Hot Chili Peppers sued a television producer for making a TV series called "Californication," which was the title of one of the Red Hot Chili Peppers best-known songs. That suit was settled out of court, so we don't know how it would have been decided. But an action for unfair competition is *not* a copyright action because there is no copyright involved in a song title.

Another exception to this general rule is that an artist could obtain a *trademark* on the name of a song that has become a sort of brand for their image. David Bowie, for example, registered a trademark in the phrase "Ziggy Stardust." But again, a legal action based on this would be a trademark claim, not a copyright claim.

Song lyrics are an integral part of a vocal song, and are thus an element of the song copyright. Song lyrics, if they are original enough, could also be copyrighted separately apart from the songs to which they are related. Some lyrics are so generic and simple that they might not be separately copyrightable and thus their copyright value would always depend on their context as lyrics joined to a melody or other musical expression.

Band names are also not capable of being the subject of a copyright, as they are not substantial enough to constitute a creative work. However, a band name could be registered as a trademark, assuming it is unique and has not been previously trademarked. Trademarking a band name might also be a good idea as it could help settle any later disputes between band members over who owns the name and what happens to it if the band changes membership. Even without a federal trademark, a band with a strong reputation might still have a legal cause of action against a competing band for unfair business practices, but they would have to prove that their use of the name preceded that of the new band and that they would suffer financial harm if the new band were to use the same name. Some bands even go so far as to trademark their band logos to protect them from competition (for example, the Rolling Stones' iconic tongue logo or AC/DC's lightning bolt logo).

Note that trademarking a band name or logo is not free. With the legal and application fees, the cost could be close to $2,000 to properly secure a trademark. Bands will only want to pay that cost when they are reasonably certain that there is something worth that much to protect. But certainly, the legal fees of fighting off a band using a similar name would be much more costly than the cost to trademark the name, so bands should not wait too long to secure that protection once they begin to establish a reputation worth protecting.

25.

THE MUSIC ROYALTY SYSTEM TODAY

Introduction to music royalties

A copyright is a form of *property right* conferred by federal statute. Because it is a property right, it can be sold, assigned, or licensed just as most any other property right. When a copyright holder licenses another person to use their copyright for a limited time or purpose, the copyright holder typically collects rents for that license, just as the owner of an apartment would collect rent from a tenant. In the case of music copyright licenses, the rents charged by the copyright holder (or required by statute) are typically referred to as *royalties*.

The system by which monetary royalties are distributed to the holders of music copyrights is extraordinarily complex. To understand how this system works (and how it often does not work), we must keep in mind two important conceptual distinctions as we work through this material. (***Warning***: *Failing to understand these important distinctions will absolutely prevent you from performing well with tests and other* *assessments related to this material, so you should re-read this chapter as many times as necessary until these distinctions become clear.*)

Musical Works vs. Sound Recordings.

The most important distinction that you absolutely must understand concerns the difference between a copyrighted *musical work* and a copyrighted *sound recording* (referred to as a "phonorecord" in the Copyright Act). When first enacted in 1790, the federal copyright law did not refer to musical works at all, as it was designed to protect only printed material such as books, newspapers, etc. Of course, notated music can also be printed, so the law was amended in 1831 to extend copyright protection to printed musical works. It was not until 1971 that federal copyright protection was extended to sound recordings.

So, there are now two *separate* creative expressions protected under U.S. copyright law, the musical work and the recording of that musical work. Let's take as an example the song "Take It Easy" by The Eagles, released as a recording in 1972. Jackson Browne and Glenn Frey wrote the song, so they share half of the copyright of the musical work, the other half being owned by the song's publisher, Warner/Chappell Music. However, the band's record company, Asylum Records (David Geffen's record company) owns the copyright of the recording of "Take It Easy". When a consumer purchases (or streams) a copy of the recording, two royalties will be paid from the proceeds of the sale, one to the owner of the musical work copyright and one to the owner of the sound recording copyright (often referred to as the "master right"). *These are two separate royalties, with amounts calculated differently, and payable to two separate copyright owners.*

To continue this example, in 1973 Jackson Brown, who was not a member of the The Eagles, released his *own* recording of "Take It Easy," also on Asylum records. This new recording resulted in a separate copyrighted sound recording, but the underlying musical work copyright did not change and is still owned by Browne, Frey, and Warner/Chappell. In this case, both sound recording copyrights were owned by Asylum records, but they were different copyrights. *Every new recording of a song creates a new sound recording copyright, but there will only be one copyright of the musical work (song) itself.* As we will see below, not only are the royalties associated with musical works and sound recordings different, but the law pertaining to infringement of those copyrights has also developed along separate lines because the protectable legal elements of a musical work are different from those of a recording of that work.

Mechanical Rights vs.

Performance Rights.

Once you have grasped the distinction between the musical work copyright and the sound recording copyright, you then need to understand the two layers of protection and accompanying royalties afforded to the *musical work* copyright: *mechanical rights vs. performance rights*. We will deal with the performance right first, as it is easiest to understand. When musical works were added to the list of copyright protected works in 1831, that protection extended only to the printed notation. Individual performances of those works did not require a license or payment of any royalty to the owner of the musical work copyright. However, the 1909 Copyright Act extended the exclusive copyright in a musical work to any *public performance* of the musical work for profit. Of course, most songwriters *want* their songs to be performed publicly, so we will see below how *"performance rights organizations" created blanket licenses and a royalty payment system to allow for the very broad public music performance environment we enjoy today.*

It typically surprises many students how broadly the copyright law interprets the concept of a public performance of music, well beyond the understanding of that concept in 1909. The U.S. Copyright law defines a performance as follows: "to recite, render, play, dance, or act [the copyrighted work], *either directly or by means of any device or process.* Under this expansive definition, playing a record in a restaurant constitutes a performance of the musical work, as does playing a record on the radio, or playing it by streaming over the internet. Those are all considered public *performances* of a musical work. Keep in mind that we are still discussing the *musical work* copyright and not the sound recording copyright. The sound recording is not what gets performed in these cases, it is the underlying musical work, or song.

Contrary to the performance right, the *mechanical right* involves the exclusive right to *mechanically reproduce and distribute copies* of a musical work. The vague term "mechanical reproduction" was used because legislators in 1909, when the mechanical right was introduced, wisely understood that the technology of music reproduction would change over time. In 1909, the most common form of mechanical reproduction was the perforated rolls used in player pianos. Of course, this would soon be eclipsed by wax cylinders and then flat discs ("records"). The copyright law now refers to the making and distribution of a "phonorecord" when discussing the mechanical right, with the term "phonorecord" being used to mean the fixation of a musical work on any distributable medium, *including digital files*.

Now that we have drawn these important distinctions (musical work vs. sound recording, and mechanical right vs. performance right), we are ready to dive deeper into the details of how these rights are both protected and licensed today.

26.

MECHANICAL RIGHTS

Compulsory License:

The Copyright Act of 1909 extended the musical works copyright to include the exclusive right to reproduce and distribute those works mechanically. *However, in one of most significant legislative decisions in copyright history, the 1909 act also includes a "compulsory license," allowing for the mechanical reproduction and distribution of musical works by those who do not have any copyright interest in the work.* We call this license "compulsory" because the copyright holder(s) cannot opt out of it or otherwise block others from obtaining the license provided they abide by the few requirements. (Note that you may sometimes see the compulsory mechanical license referred to as a *"Section 115" license* because it can be found in Section 115 of the U.S. Copyright Code.)

Conditions for a Compulsory License:

- *A recording of the musical work must have been previously* *distributed with the consent of the copyright owner(s)*. In other words, the person seeking to use the compulsory license cannot be attempting to make and distribute the *first* recording of the work.

- The license includes the right to make an arrangement of the musical work to suit the style of the new performer, but the arrangement "*shall not change the basic melody or fundamental character of the work*." There are no hard-and-fast rules about when an arrangement would change the fundamental character of a work. However, we could assume, by way of example, that a "dubstep" EDM version of "My Heart Will Go On" (the theme song from the film *Titanic*) would alter the fundamental character of the original work, and so would likely not be eligible for a compulsory license if challenged in court.
- The new recording cannot be a duplication of a previously-existing recording (unless specifically authorized by the copyright owner). This is the most obvious requirement: the compulsory license extends only to *new recordings* of a musical work, not to the duplication of previous recordings.
- *Notice of intent to make and distribute a recording of a work under the compulsory license must be given to the copyright owner* no later than 30 days after making and distributing the work. If the identification and contact address of the copyright owner are not available in the

Copyright Office's records, then the notice can be made to the Copyright Office itself. (Note that since the passage of the Music Modernization Act of 2018, this notice and record-keeping function will likely be taken over by the newly formed Mechanical Licensing Collective.)

- *Payment of all applicable royalties must be made monthly* to the copyright holder (see below). If royalty payments are not made, the copyright holder can terminate the license.

Mechanical License Royalties:

The rates for royalties payable to the copyright owners under a mechanical license are determined by the Copyright Royalty Board (CRB), which is a panel of three copyright royalty judges. The CRB determines the compulsory license rates for 5-year periods, the latest being the period January 1, 2018 through December 31, 2022. The 5-year mechanical license royalty periods are as "Phonorecords I," "Phonorecords II," etc. The 2018-2022 5-year period was "Phonorecords III." The CRB determines the rates for the new period based on public comments and hearings during a review period. The CRB's rate decisions can be appealed to the United States Court of Appeals, District of Columbia Circuit (see below for a discussion of Spotify's current appeal of the new streaming rates).

The CRB determines and sets the royalty rates for mechanical licenses based on the type of reproduction and distribution, as follows:

Negotiated Rates:

Before we dive into the complicated methods the CRB uses to set the mechanical license royalty rates, we need to be aware that *the licensee and the copyright owner are free to negotiate their own rates and thereby ignore the rates set by the CRB.*

Physical phonorecords, permanent digital downloads (PDD), and ringtones

The simplest category of compulsory mechanical licenses involves those used to make and distribute physical phonorecords (including CDs, vinyl records, etc.), mobile phone ringtones, and "permanent digital downloads" (PDDs). PDDs are computer files stored on a computer, iPod, phone, or other device that the user owns and can play from their device whenever desired. PDDs are often protected from copying by digital rights management software (DRM), but the purchaser still owns them and can renew the rights to play them, so they are called "permanent." Copyright law treats PDDs differently from digital *streaming* files, which are not stored permanently on a computer or other device and cannot be played by the user other than through requesting a new temporary file from the streaming service such as Spotify. (This is a legally important point: the file that gets downloaded to your device when you stream a song is carefully designed to be temporary — it vanishes from your device once the stream is over or has been interrupted.)

The rates set by the CRB for the 2018-2022 period (Phonorecords III) were as follows:

- For each copy of a physical phonorecord or permanent digital download, *either 9.1 cents or 1.75 cents per minute of playing time or fraction thereof, whichever amount is larger*
- For ringtones, *24 cents for each distributed ringtone*.

Note that these rates are the same as the rates that have been in effect since 2006. That is, the CRB chose not to change them for the current 5-year period (Phonorecords III).

In the early spring on 2022, the record companies and publishers submitted a negotiated proposal to CRB that the mechanical royalty for physical and downloads should remain at 9.1 cents for the 2023-2027 period (Phonorecords IV). However, the CRB rejected this proposed settlement because it felt the physical/download rate had been too "static" for too long, a fairly obvious conclusion as it hadn't changed since 2006. In a surprising response, the parties submitted a new negotiated settlement to the CRB in May of 2022, suggesting a rate of 12 cents for the upcoming 5-year period, with automatic "cost of living" adjustments for each successive year of the period. This represents an immediate 32% increase in royalty payments to songwriters and publishers for physical sales and downloads. In December of 2022, the Copyright Royalty Board formally accepted the 12 cent negotiated rate for the 2023-2027 5-year period (Phonorecords IV). This is nowhere near as significant as the rate for streaming (discussed below), but physical sales of vinyl is an increasing category of revenue.

Interactive Streams and Limited Downloads:

The Music Modernization Act of 2018 created a new blanket mechanical license for interactive music streaming on the internet. Before this act, streaming companies voluntarily paid a royalty on mechanical licenses even though they simultaneously argued that interactive streaming was not technically part of the mechanical license framework due to the ephemeral (temporary) nature of the corresponding computer file. The term "blanket" license means that that it applies to all music streamed, regardless of its ownership by different individuals or companies. In other words, the streaming companies do not have to apply for this license to each copyright holder. The Music Modernization Act codified the applicability of interactive streaming as part of the compulsory mechanical license for musical works by creating blanket licenses for streaming services (such as Spotify and Apple Music).

The CRB's difficult assignment for the new 5-year term beginning 2018 was to come up with a royalty rate for interactive streaming that would apply to the new blanket streaming licenses. In its decision, the CRB judges chose to adopt what is known as the "All In" rate that streaming services had already been voluntarily paying before 2018. The All In rate strikes a balance between a streaming service's "percent-of-service revenue" with its "percent-of-TCC" (total cost of content), and the rate paid is based on the greater of those two numbers. ***Once that total royalty rate is determined for each streaming service, it is allocated among the musical work copyright owners based on the number of streaming plays for each work from that service.***

The rate is called an "all in" rate because the streaming services are able to deduct from the mechanical royalties due under this calculation the amount of royalties they also pay to musical works copyright holders as part of the *performance right* royalties (discussed below). Whatever royalty amount is calculated under this formula includes mechanical *and* performance royalties as well as royalties paid to record companies for the sound recording license (thus, "all in") and the other royalties actually paid by the service are then deducted, leaving the effective mechanical royalty payment payable to the musical work copyright holder.

The percentage rates applied for the "greater of" calculation are to be phased in year-by-year during the 5-year period as follows:

	2018	**2019**	**2020**	**2021**	**2022**
Percent of Revenue	11.4%	12.3%	13.3%	14.2%	15.1%
Total Content Costs (TCC)	22.0%	23.1%	24.1%	25.2%	26.2%

The rationale behind this complicated rate formula is as follows: Music streaming services currently operate at a loss because they compete for customers and market share by offering introductory low rates (particularly to students, their biggest audience). Thus, the streaming companies revenues are currently depressed by stiff competition, so *basing royalties only on revenues would artificially suppress royalty payments until the revenues begin to rise*. So, the royalties are instead based on the "greater of" figure, which balances the total licensing costs against revenues. If a service has very low revenues because it lowers its subscription fee, it will then pay royalties based on a percentage of its costs rather than on a percentage of its revenues. On the contrary, if a service lowers its costs significantly by negotiating very low rates with record companies, it will then pay mechanical royalties based on revenues.

CRB Rate Determination Appeal:

The CRB's rate determination for this new period was a major victory for songwriters and publishers. The tiered rate increases for streaming shown above represent a 44% increase over the 5-year period. *This means that songwriters and their publishers (who typically split the mechanical royalties) will be getting a 44% raise in this period.* This might seem like a large increase, but it must be put into the context of changes in the music industry that have been depressing songwriting and publishing royalties since the decline of physical sales and downloads and the subsequent rise of streaming. Streaming royalties amount to approximately ½ of a cent for each stream. Compare that to the royalty payment of 9.1 cents for a downloaded song and you will quickly realize how streaming has resulted in lower royalties to songwriters.

But the 44% raise being given to songwriters and publishers also represents a corresponding increase in the costs of the so-far unprofitable music streaming business. So, in March of 2019, all streaming services other than Apple Music chose to appeal the CRB's new rate determinations. This decision to appeal produced a highly accusatory and negative reaction from songwriters (and their publishers) to the streaming industry. This volatile and contentious relationship between songwriters/publishers and streaming companies can be seen in the harsh language used by the outspoken president of the National Music Publishers Association, David Israelite, who publicly asserted that "these big tech bullies do not respect or value the songwriters who make their businesses possible" and vowed that the NMPA would do whatever possible to protect the CRB's new rates from the appeal.

The fact that Apple Music did not appeal the new rates highlights the difficulty independent streaming companies such as Spotify face when competing against established tech companies such as Apple, Google, and Amazon. The vast majority of Apple Computer's profits come from the sale of hardware (such as iPhones), and Apple is one of the most profitable companies in the world. Apple uses its music streaming service primarily as a feature to drive hardware sales, not as a primary source of revenue. Apple can thus afford to pay higher royalty rates to songwriters whereas Spotify still struggles to turn a profit under the existing rates. Spotify has had only one profitable quarter (4th quarter of 2019) since its public stock offering in April of 2018. The 44% increase in mechanical royalties will only further delay streaming's ability to turn a profit.

The battle between songwriters/publishers and streaming companies has taken on a moral dimension that makes it a public relations minefield for streaming companies. The publishing companies (the largest of which are owned by the major record companies) spin this as a battle between the "little guy" (songwriters) being treated unfairly by the big corporate streaming companies (Spotify, Amazon, Google, etc.). To the average music fan, the unfairness seems obvious as they don't realize that there are large multinational companies on both sides of the battle, and that streaming is not currently a profitable business.

On August 7, 2020, the U.S. Court of Appeals for the D.C. Circuit issued its opinion in the CRB rate appeal case, remanding (returning) the rate determination back to the CRB for further deliberations. The Court of Appeal agreed with the streaming companies that the CRB had not properly justified its decision to raise the mechanical rate increases and the methods by which they would be determined, nor had it allowed the streaming companies adequate opportunity to argue against those increases. In other words, the Court of Appeal found flaws in the process by which the CRB made its rate decisions.

On July 1, 2022, the CRB announced that after reconsidering its process in the Phonorecords III rate-setting decision, it had decided to stick with the 15.1% of revenue rate that had been appealed. The songwriters and publishers had thus prevailed against the appealing streaming services, even after the decision was remanded for further consideration by the D.C. Court of Appeals. This represents a major victory for songwriters and publishers, though the songwriters are quick to point out that they have only regained their losses from streaming and that there still exists an imbalance in royalty payments between songwriters, on one hand, and the record and streaming companies on the other.

While most industry observers were girding for yet another contentious battle between songwriters and streaming services for the next 5-year period (2023-2027, Phonorecords IV), things took a surprising turn in the summer of 2022. While the CRB has the authority to set the mechanical license rates, the Copyright Act also provides that the parties (songwriters, publishers, streaming and record companies) can also negotiate the rates among themselves and collectively settle on a rate for any future 5-year period. Surprisingly, the parties decided to avoid another costly and protracted legal battle for the Phonorecords IV rate-setting and announced on August 31, 2022 that they had settled on a streaming rate for the upcoming period (2023-2027). The rate they settled on is 15.35% of revenue, a slight rise from the 15.1% rate that ended the Phonorecords III period. The agreement also makes other adjustments to the "total cost of content" (TCC) calculation, and other factors involved in calculating the royalty rate. The negotiated rate still has to be approved by the CRB, which it could withhold if significant opposition arises. However, it seems likely that the CRB will approve the good-faith negotiations between songwriters and streaming platforms.

27.

PERFORMANCE RIGHTS

ASCAP and the Birth of Performance Rights Organizations.

Congress amended the Copyright Act in 1897 to expand the musical works copyright to include public performances of those works. Prior to this, only the works themselves were protected, not their public performances. However, the act did not provide a framework or system for owners of musical works copyrights to enforce and profit from this new extension of the copyright. How would a copyright holder prevent an unauthorized public performance, or how might they go about licensing someone to give a public performance of their work in exchange for some royalty?

Into this breach of uncertainty stepped the American Society of Composers, Authors and Publishers (ASCAP), founded in 1914. ASCAP's mission was to create a "blanket licensing" system, whereby public venues (such as restaurants, bars, concert halls, etc.) that wished to provide musical entertainment for their customers could purchase a license from ASCAP that would give them the right to perform any of the works of ASCAP member songwriters in exchange for a single annual royalty payment. ASCAP then charged a royalty for the blanket license, based on a percentage of the gross revenue earned by the venue (the licensee). The venue would pay the royalty to ASCAP and then not have to worry about musical performance copyright infringement claims, *so long as they only performed songs written by composers who were members of ASCAP*. ASCAP would collect these royalties and then distribute them to its member composers and publishers **proportionately based on ASCAP's determination of the relative popularity of each musical work**. A musical work that was determined to rarely have any public performances would receive a far smaller share of the royalties than a very popular work that was frequently performed. The determination of those proportionate percentages involved research into sheet music sales, record sales, radio plays, advertised public performances, etc.

ASCAP was founded by American classical composer Victor Herbert and its list of founding members includes many of America's most important songwriters from early in the 20th century, including John Philip Sousa, George M. Cohan, and Irving Berlin. ASCAP was the first, and for over thirty years, the only such *"performance rights organization" (PRO).* If a composer, songwriter, or publisher wanted to be a part of the blanket license scheme developed by ASCAP, they would need to join ASCAP. Performances of songs whose copyrights were not owned by ASCAP members would have to be licensed directly from the copyright holders or performed in violation of the copyright.

In the 1909 Copyright Act, the public performance of music copyright was limited to only those performances that were "for profit." This limitation was added so as to carve out a space for free musical performances that would not require licenses. One question about the music performance copyright raised by this was how to determine when a public performance is commercial or "for profit". Clearly, a public concert that requires a paid ticket is "for profit," and just as clearly an individual singing a song while walking to work is not engaged in a for-profit public performance, even if many people hear him singing the song. But there is a vast middle ground. Are we hearing a public performance for profit when a man plays a piano in a bar, who does not get paid and for which there is no admission charge? In 1917, the United States Supreme Court addressed this issue and held that a musical performance that is part of any commercial enterprise, *even if there is no specific charge for the musical performance*, is considered a copyrighted public performance (*Herbert v. Shanley Co.*, 1917). In that case, a restaurant had claimed that its free musical performances of the plaintiff's song did not constitute a violation of the public performance copyright because the restaurant did not charge its customers specifically for the music. But the court made it clear that the music in a restaurant or bar or other venue, even if it is freely included, is *part of the total exchange of value the customer makes for the food or other service*. A separate fee for the music is not required to make it part of a commercial exchange. The same would be true of a retail store that provides background music while customers shop – that music constitutes a commercial musical performance and must be licensed. In the 1976 Copyright Act, the "for profit" language limiting the copyright of musical performances was removed, so that any unlicensed public performance is potentially infringing on the copyright (absent some other defense or exception).

ASCAP, Cinema, and Radio.

Lobbyists for the emerging radio industry attempted to have radio broadcasts of music exempted from music performance copyright protection. However, they were unsuccessful in passing legislation to create that radio exemption, and in 1924 the Federal Communications Commission (FCC) ruled that music broadcast on the radio was indeed a "public performance" and thus subject to copyright protection and, in turn, ASCAP's blanket license requirements.

Similarly, the nascent movie industry also tried to evade having music played along with silent movies considered as copyrighted public performances. Cinema companies went so far as to attempt a boycott of ASCAP in 1917 to avoid paying public performance royalties, but the boycott was unsuccessful, as were attempts to change the law through lobbying efforts. After several lawsuits against movie theaters, ASCAP prevailed in forcing movie theaters to obtain blanket licenses covering the use of ASCAP music in movies shown in those theaters. ***However, in 1946, movie theaters were successful in using antitrust law to win a federal court decision against ASCAP that exempted them from public performance license requirements for music used in movies (though the film producers must still license the music). Note that while U.S. theaters no longer have to pay music performance royalties, foreign theaters, particularly in Europe, do not make that exception***. So, songwriters and their publishers earn money from foreign showings of films that include their music, while they don't earn that royalty from U.S. showings of the same film.

Selling blanket licenses to radio stations and movie theaters became a significant source of royalties for ASCAP composers and publishers throughout the 1920s and '30s. Royalties from blanket licenses in radio continue to be a major source of revenue for songwriters and publishers today.

BMI.

ASCAP was the only PRO throughout the 1920s and '30s, so it had a monopoly in selling blanket licenses to radio stations and other performance venues for the right to perform ASCAP music. ASCAP was also an exclusive organization — its membership was restricted to composers (and their publishers) who could demonstrate that they were commercially successful. This left out many songwriters in less mainstream genres, such as blues and country, that had been growing in popularity but had no access to performance rights royalties because they were shut out of the ASCAP system.

ASCAP used its monopoly over radio performance royalties to steadily increase what it charged as a royalty for its blanket licenses. After growing increasingly irritated by ASCAP's stranglehold on radio performance licenses, the National Association of Broadcasters (NAB) decided in 1939, after another round of ASCAP royalty rate increases, to start a competing performing rights organization: Broadcast Music Incorporated (BMI). Representing radio stations throughout the country, NAB founded BMI in an attempt to open up the competitive landscape for performing rights licenses and to provide competitive pressure on ASCAP to keep its royalty rates from increasing. BMI attracted members by opening up membership to songwriters who had been shut out of ASCAP, particularly in the country and blues genres. The creation of BMI and the popularity of regional radio stations led to country and rhythm and blues suddenly becoming much more commercially successful in the 1940s.

PROs and Antitrust Concerns: The ASCAP and BMI Consent Decrees.

ASCAP enjoyed a monopoly on performance rights licenses until 1939, and after that had only one competitor, BMI. Together, ASCAP and BMI still control over 90% of the performance rights license market today. Complaints from movie theaters and radio broadcasters about this monopoly situation resulted in an antitrust investigation by the United States Justice Department that began in 1935 (recall that movie theaters still had to pay performance royalties at that time). In 1941, the Department of Justice settled its antitrust case against ASCAP through the use of a *consent decree*, which is a formal contract that settles a legal dispute by the parties agreeing to govern their relationship according to specific terms. The Department of Justice also brought BMI into its antitrust investigation and settled that case with a separate consent decree in 1941.

The antitrust cases against ASCAP and BMI depended on the authority granted to the Department of Justice by the Sherman Antitrust Act of 1890, as extended by the Clayton Antitrust Act of 1914. The authority for the Sherman and Clayton Antitrust Acts, in turn, rests on the U.S. Constitution's commerce clause, which gives the federal government the authority to regulate interstate commerce.

The Sherman and Clayton acts make it a federal felony to monopolize or conspire to monopolize trade or commerce, including through such activities as price fixing, tying arrangements, exclusive dealing agreements, price discrimination, etc. (The Sherman Act was used to break up large oil and tobacco companies early in the 20th century and the large phone company AT&T in 1982. More recently, in 2019 the Depart of Justice and the Federal Communications Commission (FCC) began to investigate the three large tech companies, Google, Apple, and Amazon, for possible antitrust violations. As a result of those investigations, an antitrust suit against Google was filed in court in October, 2020.) The Justice Department accused ASCAP and BMI of anti-competitive activities in their sale of music performance licenses enabled by their near-monopoly over those licenses. Those cases did not go to trial, as they were settled with the consent decrees, which are still in force today.

Here is a summary of the behavior required of ASCAP and BMI under the consent decrees (as amended in 1950 and 2001):

- **Limitation to Performance Rights:** The consent decrees limit ASCAP and BMI to only administering public performance rights by issuing blanket licenses, thus preventing them from using their monopoly power to expand their services into other music licensing services;

- **Per-Program and Blanket Licenses:** Under the consent decrees, ASCAP and BMI must offer a per-program license (covering just one entertainment program) as well as blanket licenses (covering all programs offered by a licensee), with a meaningful difference in price between the two. ASCAP and BMI may not license individual works, or groups of works; they may only license their entire catalogs under blanket licenses to prevent discriminatory or inequitable pricing;
- **Nonexclusive Licensing:** The consent decrees require ASCAP and BMI to allow their members to license works outside of ASCAP and BMI systems, directly to licensees.
- **Requirement to Grant Licenses:** The consent decrees mandate the ASCAP and BMI must grant music performance licenses to any individual or group who applies and meets the stated requirements. ASCAP and BMI cannot use their monopoly positions to deny licenses or play favorites;
- **No License Required for Movie Theaters:** In 1948, the Southern District of New York ruled that ASCAP (and by extension, BMI) could not require movie theaters to obtain music performance licenses to play movies that included copyrighted music, under the theory that the movie producer had already obtained a license for use of the music in the film. This court-ordered exemption of movie theaters from obtaining

public performance licenses was later written into the consent decree. (Note that this exemption only applies to U.S. theaters; movie theaters in most other countries, including Europe, are required to obtain music performance licenses and pay the associated royalties.)

- **Right to Appeal Fee Determination to Special Court:** If a licensee wishes to appeal ASCAP's or BMI's stated license fees, they may do so directly to a special rate court created by the consent decree.

In 2019, the Depart of Justice announced that it was opening a formal review of the ASCAP and BMI consent decrees, prompted by recent hanges in the music industry, particularly the rise of digital streaming services. While the Department of Justice wants to make sure the consent decrees are useful and relevant to today's music industry, ASCAP and BMI would like to modify or do away with the consent decrees entirely, arguing that a "free market" approach to public performance licensing would better fit today's music industry. BMI, ASCAP and many other parties interested in the outcome of the Department of Justice review have filed briefs making their cases for either keeping the consent decrees as is, modifying them in some way, or doing away with them entirely. The public comment period ended in August, 2019, so we are now awaiting the Department of Justice's findings.

SESAC

Although ASCAP and BMI collectively control over 90% of the music public performance licensing market, they are not the only PROs. SESAC (the Society of European Stage Authors and Composers), founded in 1930, is the third largest Performing Rights Organization. Two important differences distinguish SESAC from ASCAP/BMI:

- SESAC is a private, for-profit organization, while ASCAP and BMI are both non-profit associations. This means that ASCAP and BMI distribute all the royalties they collect (minus the costs needed to run the association) to their respective composer and publisher members. SESAC, on the other hand, retains a portion of the collected royalties as profit. ASCAP and BMI retain about 12% of collected royalties for administrative expenses; presumably, SESAC retains a higher percentage allocated between expenses and net profit.
- Unlike ASCAP and BMI, SESAC does not offer membership to anyone who applies. According to SESAC's website, "SESAC is an invitation-only creative community that works with the top songwriters, composers and music publishers in the industry." SESAC therefore has an exclusive membership that prides itself on only representing "the top" composers and songwriters.

Global Music Rights

The fourth and smallest performance rights organization is Global Music Rights, founded by music industry veteran Irving Azoff in 2013. Azoff is a former Chairman of MCA Music Entertainment Group and former Chairman of Ticketmaster. Like SESAC, Global Music Rights is a private company that only represents songwriters on an invitation-only basis. Also like SESAC, Global Music Rights claims that its small size allows it to better represent the rights of its represented composers and provide them with a more elite service in obtaining royalties in exchange for performance licenses.

Global Music Rights claims to represent over 81 songwriters with a combined catalog of over 41,000 works. This is compared to SESAC's membership of over 30,000 songwriters and 400,000 works, BMI's membership of over 800,000 songwriters and 13 million works, and ASCAP's 650,000 songwriters and 11.5 million works.

How Does a Songwriter Choose a Performing Rights Organization?

Many new or aspiring songwriters will wonder how they should choose among the four performing rights organizations to represent them and their songs in collecting performance royalties. This question has no easy answer, and ultimately it matters little whether one chooses ASCAP or BMI, as they both offer essentially the same services. First off, a new composer can eliminate consideration of SESAC and Global Music Rights because those two organizations only represent songwriters who they invite into their exclusive group. There may be ways that a successful songwriter can get themselves invited through lobbying existing members, but that's only possible for songwriters who already have a track record of success.

So, the vast majority of songwriters will only choose between ASCAP and BMI. The similarities between those two are far more numerous than the differences, as both are governed by the consent decrees discussed above in how they conduct their business. *The only concrete difference between them is that ASCAP requires a $50 fee to join, while BMI membership is free*. ASCAP is the older of the two, but BMI has now been around for 80 years, so it's not exactly a new organization. When first formed, BMI represented primarily country and R&B songwriters who had been shut out of ASCAP membership, and there may still be a sense of BMI being more attuned to those genres than ASCAP. But, in reality, both organizations represent many songwriters from all genres, so that distinction would have little practical impact. If ASCAP's $50 application fee represents a lot of money to you, then

BMI is probably a good choice. If you don't care about the application fee, then you might as well flip a coin or just decide which web site you find more attractive.

As we will see below, for the *sound recording* performance royalties, only one organization administers them, SoundExchange, and arguably that arrangement would work better for public performance royalties as well. That there are four PROs is a byproduct of historical forces no longer relevant today, so a single government-sponsored or sanctioned entity, such as SoundExchange, could result in less confusion and a higher percentage of royalties available for distribution to songwriters. That would likely be more efficient than funding marketing and publicity campaigns for the four separate organizations, two of which are under government consent decrees, trying to distinguish themselves from each other.

28.

SOUND RECORDINGS

In 1971, Congress passed a long-overdue and very significant amendment to the copyright act that recognized for the first time a new copyright protection for what it calls "sound recordings." Record companies had been urging Congress to secure copyright protection for sound recordings repeatedly since the 1909 Copyright Act, and many laws to do so were proposed in Congress, but it took until 1971 for such an act to become law. This new right created a bifurcation in the copyright scheme, between songs and recordings, a distinction that creates continual confusion among those who aren't trained in the intricacies of copyright law. Students studying this book are urged to continually keep this distinction in mind: ***there are TWO distinct copyrights involved in popular recordings: 1) the copyright in the song itself (the composition), and 2) the copyright in the particular recording of the song***.

The 1971 Sound Recording Act provided that only the copyright owner of a sound recording made on or after February 15, 1972 could "duplicate the sound recording in a tangible form that directly or indirectly recaptures the actual sounds fixed in the recording." The primary goal of this act was to prevent the sale of pirated recordings duplicated without permission. However, it soon became clear that this right, like the song copyright, could be licensed to allow for permitted duplication and performance, and royalties collected from those licenses.

A simple example will help clarify this important distinction: In 1973, the Jamaican reggae band The Wailers recorded the song "I Shot the Sheriff," written by their lead singer, Bob Marley. Bob Marley, as the songwriter, owned the copyright to the *song*. However, the copyright to the recording of the song on the Wailers' *Burnin'* album was owned by Island Records, the record label that released the recording. As discussed in the chapter on record contracts, nearly all recording contracts specify that the rights to the so-called "master" recordings are owned by the record company rather than the artist. However, in 1974, Eric Clapton released his own version of this song (the one most Americans heard first on the radio) on his album *461 Ocean Boulevard,* released by RSO Records. Clapton's recording thus constitutes a separate sound recording copyright (master), owned by RSO Recordings. The *song* copyright associated with Clapton's recording is still owned by Bob Marley, which is why Marley's name appears in parentheses underneath or next to the song title on the list of tracks on the Clapton album. Eric Clapton had no copyright ownership on either this song (owned by Marley) or on the recording (owned by RSO Records). Clapton certainly received sound recording royalties from sales of the recording (after he repaid the advance), but only so much as provided by his record contract — the underlying master was owned by the record company.

Pre-1972 Recordings.

Because the 1971 Sound Recording Act only covered sound recordings made on or after February 15, 1972, those recordings made before that date were not covered by a federal copyright until 2018, when the Music Modernization Act of that year extended copyright protection to those recordings. Before 2018, pre-1972 recordings were sometimes protected under "common law" (that is, non-statutory case law) in some state laws, but that protection required costly lawsuits and uncertain application of previous case law.

Soundalike Recordings.

The 1971 Sound Recording Act also provided that the sound recording copyright does *not* "extend to the making or duplication of another sound recording that is an independent fixation of other sounds, *even though such sounds imitate or simulate those in the copyrighted sound recording. . . .*" (emphasis added). Thus, **the sound recording copyright only extends to a particular recording (as instantiated on**

some physical or digital medium) and not to the *sound* of a particular recording. One could use the exact same instruments, same musicians, same recording studio, same microphones, etc., to make a recording that sounds *exactly* like another recording of the same song and that perfect imitation recording would *not* violate the copyright of the original sound recording because they are, in fact, two separate recordings.

This bizarre hypothetical actually sometimes occurs in the real world. For example, sometimes a musician will lose control over the copyright to her original recording (which is usually owned by the record company) and then decide to re-record a popular song so that she will then be able to re-release the song as a recording over which she now owns the copyright. For example, in 2019, Taylor Swift threatened to re-record and then re-release some of her extremely successful recordings after her previous record label refused to sell back to her the copyrights to those recordings. Whether she carries through on that recent threat remains to be seen.

No Performance Royalty for Sound Recordings.

The 1971 Sound Recording act by its language only protects against unauthorized *duplication* of a sound recording, confirming that the intent of the statute was primarily to deal with the issue of piracy involving unauthorized duplication of recordings. However, that left open the question as to whether the copyright conferred on sound recordings might also be extended to performances of those sound recordings in the same manner as performances of song copyrights had been protected since 1897. Record companies and musician unions had urged Congress since 1965 to provide for a sound recording performance right and corresponding royalty, but Congress did not put such a right in the 1971 act. In 1975, Congress held further hearings about the need for a sound recording performance right, but Congress again declined to provide for such an extension of the sound recording copyright in the major 1976 Copyright Act. In 1978, the U.S. Register of Copyrights urged Congress to provide a sound recording performance right, but Congress again declined, demonstrating the political power of the nation's radio broadcasters, who had been free from paying royalties to record companies since the inception of the industry.

Because Congress had never provided for a performance royalty for sound recordings, to this day traditional radio broadcasts (known as "terrestrial radio") do not generate any revenue for holders of sound recording copyrights. Thus, when a terrestrial radio station plays Eric Clapton's "I Shot the Sheriff," it does not have to request permission from the record company or Clapton, or pay either of them any royalties for that use of the recording. To be thorough, we should note that the radio station playing "I Shot the Sheriff" will have to pay royalties to Bob Marley (or rather his estate, since Marley died in 1981) because there is no terrestrial radio exception for the performance of a copyrighted *song*, but those royalties will be covered by the blanket license the radio station pays to ASCAP (which administers the rights to Marley's songs).

The record industry has long argued that they should enjoy the same performance royalty that songwriters and publishers enjoy, and have repeatedly lobbied Congress to change the law to provide for it. In November, 2019, legislation was introduced into the U.S. Senate by Marsha Blackburn of Tennessee which would create a performance royalty for sound recordings played over terrestrial radio similar to the performance royalty for musical works. The act is called the "Ask Musicians for Music Act," resulting in the acronym "AM-FM." (This has to be the most awkward attempt to create an acronym from a legislative title that I can remember.) Similar legislation was introduced into the House of Representatives by Rep. Jerrold Nadler (NY). As of the date of this writing, this legislation has not advanced beyond being referred to committee and, given the gridlocked state of the U.S. Congress it seems unlikely that such a bill will become law any time soon.

Digital Performance Right in Sound Recordings Act of 1995 (DPRA).

The rise of digital audio and the internet in the 1980s and '90s finally compelled Congress to provide for a limited performance right for sound recordings. However, again a testament to the power of the traditional radio broadcast industry, Congress specifically excluded "terrestrial radio" broadcasts from the obligation to obtain a license or pay royalties for this new performance right. *The Digital Performance Right in Sound Recordings Act of 1995 granted sound recording copyright holders the exclusive right to perform those recordings publicly, but only limited to "digital audio transmission" and explicitly exempting traditional "over the air" radio broadcasts (even if they are broadcast digitally).* The technical legal reasoning behind this separate digital performance right is that Congress is providing for a license of what it calls "ephemeral" copies of the original digital file that is the sound recordings. In other words, this is not actually a "performance" of the sound recording, but rather the duplication of the sound recording for a short time in order to transmit (broadcast) the copy electronically to the user. After the transmission (streaming), the "ephemeral" copy of the computer file is erased from the user's computer and cannot be further replayed, copied, or transferred. This right to make an "ephemeral" copy of the digital file is what the copyright owner is licensing (for a fee) rather than the right to "perform" the sound recording publicly. Though technically this license is for the making of "ephemeral" copies, it is often referred to as a sound recording performance right. This license is sometimes referred to as a "Section 112" license because it is provided by Section 112 of the Copyright Act, titled "Limitations on exclusive rights: Ephemeral recordings" because the license scheme is a limitation on the exclusive rights of sound recording owners to control the duplication of those recordings.

The DPRA created a three-tier system of licenses for this new digital transmission right, with the three tiers distinguished by the likelihood that the transmission might negatively impact record sales:

Tier 1: Transmissions that occur through an ***interactive* digital service** (that is, one in which the consumer chooses which music to listen to, such as Spotify) have only a *discretionary (negotiable) license* from the owner, who can refuse to provide a license. This first tier, because the consumer could choose which music to listen to, was perceived to pose the greatest threat to record sales, so the license was made discretionary.

Tier 2: **Non-interactive subscription digital transmissions**, such as satellite radio (Sirius), subscription internet radio (such as Pandora, now owned by Sirius), and webcasts, were determined to be less of a threat to record sales because the consumer could not choose the music that was played (thus, non-interactive). Therefore, for this second tier, the DPRA provides for a *compulsory statutory license* at a rate determined and published in the Federal Register by a "copyright arbitration royalty panel" or a different rate negotiated between the owner and the licensee. Because the owner cannot deny an applicant a license for this use, it is considered compulsory. The DPRA further specified that non-interactive subscription digital services could not publish their playlists in advance, to prevent listeners from making duplicate recordings of particular songs.

Tier 3: The third tier of digital sound recording transmissions are those non-subscription and non-interactive transmissions that *require no license*. These include **digital retransmissions of terrestrial radio broadcasts**.

The digital transmission right created by the DPRA enabled owners of sound recording copyrights to earn performance royalties from both interactive and non-interactive streaming, which now account for the vast majority of record company earnings. However, the limitation of the royalties to only digital internet streaming, as opposed to terrestrial radio broadcasts, preserves an inequity in the industry that is difficult to justify. Why should internet radio non-interactive streaming services pay royalties while terrestrial radio does not? The radio broadcast industry argues that their radio plays of recordings provide valuable promotion for the record companies, driving record sales, and they should therefore not have to pay royalties on those recordings. However, aren't the same arguments true for satellite and internet radio? One other argument available to terrestrial radio is that internet and satellite radio are able to charge subscription fees for their services, whereas radio is free to the consumer so terrestrial radio must rely on advertising revenue, which disrupts the consumer's enjoyment of the broadcast.

Administration of the Section 112 License; SoundExchange

As described above, Tier 2 (*non-interactive* streaming and webcasting) of the three-tier scheme provided by the Digital Performance Right in Sound Recordings Act of 1995 is subject to a compulsory statutory license (the Section 112 license referred to above). This license is administered by a the SoundExchange company, and has been since the license went into effect on June 1, 1998. SoundExchange is a non-profit collective rights management organization, similar to ASCAP, except that it collects, administers, and distributes *sound recording* performance royalties rather than *song* performance royalties.

The Copyright Act requires the Copyright Royalty Board to determine the fees for obtaining a blanket license for non-interactive digital transmissions every five years, with the latest such period beginning January 1, 2018 (expiring at the end of 2022). For this current period, the Copyright Royalty Board has set the fee for a Section 112 license (non-interactive digital transmission) at 7.5% of the gross revenue earned by the licensee from their digital music transmissions of this kind.

SoundExchange allocates the Section 112 performance royalties it collects (after paying its own administration costs of approximately 5%) in accordance with the Copyright Act as follows:

1. 50 percent of the receipts are paid to the copyright owner of the sound recording (typically the record company).
2. 2½ percent of the receipts are deposited in an escrow account managed by an independent administrator jointly appointed by copyright owners of sound recordings and the American Federation of Musicians or any successor entity) to be distributed to non-featured musicians (whether or not members of the American Federation of Musicians) who have performed on sound recordings.
3. 2½ percent of the receipts are deposited in an escrow account managed by an independent administrator jointly appointed by copyright owners of sound recordings and the Screen Actors Guild-American Federation of Television and Radio Artists (or any

successor entity) to be distributed to non-featured vocalists (whether or not members of the American Federation of Television and Radio Artists) who have performed on sound recordings.

4. Forty-five percent of the receipts are **paid directly**, on a per-sound-recording basis, to the recording artist or artists featured on such sound recordings (or the persons to whom rights in the artists' performance on sound recordings have been subsequently conveyed).

In 2019, SoundExchange distributed over $908 million in royalties collected for non-interactive, subscription streaming services (representing over 3,000 licensees), and it claims to have distributed approximately $7 billion dollars since its inception in 2000.

Interactive Streaming Royalties

As noted above, the Digital Performance Right in Sound Recordings Act of 1995 provided that interactive streaming (Tier 1), in which the consumer chooses which song to listen to from a catalog of works (such as on Spotify), are licensed fully at the discretion of the rights holder (typically the record company). In other words, **the record company (or the artist, if not affiliated with a record company) has the sole discretion as to whether their recordings are available for interactive streaming on any given service,**

and what royalties they will demand from that service per play. This is why, when talking about interactive streaming, we can only talk about an average per-stream rate *paid to recording artists (not songwriters, who earn the mechanical royalty)* on any given service. There is no rate set for such streams by any copyright royalty board. The rights holder names their own price, and can refuse to allow their songs to be streamed on the service if an agreement is not reached.

The current method by which record companies, and in turn the artists they represent, are compensated for interactive streams is through a process of total subscription fees divided by the number of streams per artist. Under this this system, subscription fees are aggregated and then distributed to artists on that system proportionately to their percentage of overall streams on the system.

There are some who feel that this aggregated subscription fee system unfairly favors major artists and does not allow independent artists who have smaller fan bases to benefit from the subscription fees paid by their fans who listen mostly to these independent artists. Put another way, a fan streaming only independent artists ends up disproportionately supporting the major artists, even if they never listen to them. The subscription fees of all fans go primarily to the most-streamed artists, even of those who never listen to those artists. This is why some independent record companies, and at least one streaming service (Deezer) have proposed a different model of payment, by which a user's subscription fee will go only to those artists actually streamed by that user. This would bring more money to independent artists, and give users a sense they are directly supporting their favorite artists, rather than indirectly supporting other artists they don't care about. As of September, 2019, the streaming company Deezer has begun shopping this idea around to record companies and claims to have come up with the technology to apportion streaming royalties using this new system, which it calls a "user-centric payment system." As you might expect, the smaller independent record companies have eagerly embraced the idea, but the large record companies (who benefit most from the current aggregated system) have yet to agree to it.

29.

SYNCH RIGHTS FOR VIDEO AND MUSIC

We have already seen how various compulsory and voluntary licensing schemes govern the copyright for songs and sound recordings. However, none of those licenses apply to the use of copyrighted music when synchronized to video (such as in a movie, television show, video advertisement, etc.). The use of the word "synchronized" for this category misleadingly implies music aligned with specific moments in a film. However, so-called *"synch rights" apply to any use of music that accompanies video*, regardless of the extent to which the music is actually "synchronized" with that video.

Just as with other music copyright issues, we must keep in mind with respect to synch rights that there are still two separate music copyrights that a video maker must respect: the song copyright and the sound recording copyright. When a video producer wishes to use copyrighted music in a film, television show, or other video, she must license not only the song but the sound recording as well.

Works-for-hire. The "work-for-hire" concept frequently comes into play with music used for video. A "work-for-hire" is a musical composition made under the direction or employment of another person who has a contractual agreement with the songwriter to provide music in exchange for a commission, fee, or some other compensation. When a songwriter composes a work under a "work-for-hire" arrangement, which is frequently the case for film scores and soundtracks, advertising jingles, etc., the copyright to the resulting music is typically owned by the person (film producer, television producer, etc.) who is paying the songwriter for her services. Whether or not we consider a piece of music a "work-for-hire" depends on the specific contract between the songwriter and the person requesting the music. If there is no written contract, there may be other oral evidence or intent of the parties needed as evidence of the arrangement.

If the music used in a video is a "work-for-hire," then the video producer will not need to secure "synch rights" for that music as they already own the copyright to the music. However, if the video producer wishes to use music for which they do not own the copyright, and assuming it is not in the public domain, then the producer will have to procure "synch rights" to use the music in the video, and performance rights for each showing of the video (the synch rights and performance rights are typically secured in the same negotiation/contract).

Given the exponential growth of video in popular culture over the past 100 years, it will come as no surprise that synch rights and how they are managed constitute a fast growing aspect of the music industry. The niche market of synch-rights management software provides an example of the depth of this segment of the industry. One of the leading purveyors of this software platform, SynchTank, puts out a SynchBlog and weekly newsletter about the synch rights industry (www.synchtank.com/blog). In an age during which live performance of hit songs marks one of the few areas making significant money for artists (at least pre-Covid), synch rights represents a consistently high-paying and expanding potential revenue stream. Many musicians have found writing songs and incidental (background) music for video projects one of the more stable and lucrative markets for their musical talent.

The royalty-free and pre-licensed music market is another area where we see the potential of the synch rights market. Dozens of companies have set up digital libraries of high-quality background music, incidental music, musical cues and other musical elements from which a video producer could create a whole soundtrack without ever directly hiring a musician, all within a matter of minutes and at an affordable price with just a few clicks of a mouse. Needless to say, using royalty-free music does not create the same impact as having a soundtrack composed specifically for your video, but most video producers cannot afford the time, expense, or uncertainty of custom soundtracks. So, thousands of composers populate online libraries with their compositions of pre-licensed music. If you browse through such libraries on-line, I suspect you will be impressed with the overall quality of the music available to a video producer who just wants to pay $30 for a 3-minute cue to add an air of mystery to her first documentary film.

At the other end of the synch-rights spectrum, the songwriters and composers most in demand for their experience and track-record have the luxury (like in-demand actors) to only accept the jobs they think will give their music the best chance of being part of a hit movie with corresponding top-selling soundtrack. Since the 1940s, film sound tracks have been one of the most reliable top-earners among album sales, and they continue to sell in large numbers today. Recent soundtracks, such as those for *Black Panther* (2018) and *A Star Is Born* (2018), both among the best-selling albums of that year, show the continued strength of the soundtrack as a marketing category.

Unlike mechanical and performance royalties, unfettered negotiations between “willing sellers and willing buyers” (a phrase often used in the music industry to refer to an open negotiation) govern the value of synch licenses. Whether or not a music copyright holder determines to license her music for a video, and on what terms (including any fees), is up to the copyright holder. There are no statutory fees, or royalty boards, or compulsory licenses, or consent decrees, or performance rights organizations, or any of the other mechanisms we have discussed with respect to the other contexts for music licensing. Synch rights occupies its own world, one that operates entirely through open negotiations. Because of that, there is far less to explain about synch rights and far less to remember in terms of licensing and royalty structure.

But we can list a few observations about the structure of typical synch rights deals, understanding that these represent common patterns that evolved through the trial-and-error of many negotiations (and lawsuits when those negotiated contracts fail), not legal mandates:

- **Synch rights typically involve a one-time, flat fee, even though the license is ongoing and encompasses both synchronization rights (the use of the music synchronized to a video production) *and* performance rights (the right to publicly show — perform — the video in a commercial setting, such as in a movie theater)**. As we've discussed, in the United States, movie theaters do not pay performance royalties for music in films they show, but such performance rights are paid by theaters in most countries outside the U.S. So, the negotiation of total synch rights typically includes world-wide performance licensing. In Europe, movie theaters pay between 1% and 2% of net box-office receipts for performance rights to films shown in European theaters. So, even thought U.S. theaters do not pay performance royalties, film producers can still collect significant performance royalties from non-U.S. theaters.

- **When a video producer uses *pre-existing*, copyrighted songs for their film (a practice sometimes referred to as "interpolation"), they will typically negotiate with the publisher of those songs for synch rights.** The video producer will want to negotiate a single fee that will encompass all future uses of those songs in conjunction with the film (including marketing, trailers, soundtracks, video games, television spin-offs, etc.). However, the publisher will wish to limit the synch rights being licensed to only the use of the song in the film and performance rights associated with showing the film. The publisher will want to retain the rights to to receive any additional royalties that may come from a soundtrack release, additional marketing opportunities, etc. On the other hand, the publisher will want to negotiate for the music they represent to be included in any potential soundtrack or other opportunities, but often also with an additional fee.
- **A film soundtrack, because it has been edited, mixed, and assembled, represents a separate, copyrightable work apart from the film itself.** As a sound recording that also contains copyrighted songs, the various licensing and royalty structures that apply to sound recordings will also apply to the film soundtrack.

When it becomes a sound recording, the film soundtrack is no longer a synch right, but a sound recording and collection of copyrighted musical works. As noted above, film soundtracks can be extremely important revenue producers on their own.

- As with all open negotiations, the relative bargaining positions of the parties will determine the outcome. If a film producer wants to use a hit song by a leading pop artist in her film, she will likely be unsuccessful in getting full license to the use the song in subsequent marketing efforts, soundtracks, etc. However, if the song was written by a young songwriter just breaking into the business, an established film producer will likely be able to obtain full and ongoing synch rights for a relatively minimal one-time licensing fee.

30.

DRAMATIC MUSICAL WORKS

Copyright law treats music written, performed, and recorded for the purpose of *live theater and drama* differently than other music. Common examples of such music include operas, music for Broadway and other musicals, and "incidental" music written specifically to be used during plays.

The Dramatists Guild of America, a voluntary professional organization formed in 1912 for playwrights, composers, and lyricists working in U.S. theaters oversees the administration of contracts and rights associated with theatrical music. (Note that, despite the use of the name "guild," the Dramatists Guild is *not* a labor union.) Among its functions, the Dramatists Guild publishes an Approved Production Contract (APC), suggesting the acceptable terms that govern the rights among composers, lyricists, and producers involved in theater productions. The typical agreement in modern musical productions involves the concept of a *profit pool*, under which the producer, composer, lyricist, director, and others who are paid royalties from the show are awarded a weekly guarantee during the run of the show, together with a share (typically 40% total) of the net operating profits (as opposed to a gross percentage plan). The other 60% of the net operating profits are then paid to the show's investors, providing a greater incentive for the speculative investments needed to finance a theatrical show's many production costs (actor pay, scenery design and construction, lighting, venue rental, costumes, etc.).

Grand Rights and Small Rights for Dramatic Performances

Copyright law recognizes a distinction between what are known as "small rights," those associated with most nondramatic music performances, and "grand rights," those rights associated with the performance of music within the context of dramatic or theatrical productions, such as plays, operas, ballets, musical theater, etc. "Grand rights" are often referred to as "dramatic rights." This distinction between "grand" and "small" rights is not codified into the U.S. Copyright statutes themselves, but rather has developed as a matter of practice in the way musical copyrights are administered by publishers, theatrical agencies, and performance rights organizations.

In order to perform, record, or otherwise use music covered by the "grand rights" associated with a dramatic performance, a producer will need permission from the rights holder (typically the publisher) as well as a negotiated licensing ("rental") fee for the particular performance in question. Similarly, if the producer wishes to adapt a pre-existing *non-dramatic* musical work for a new dramatic work, that will likely convert what would otherwise be a "small rights" performance into a "grand rights" performance requiring permission and potentially a licensing fee. For example, if a producer wasn't to incorporate an existing pop song into a play, she will not be able to rely on the compulsory performance license that a concert performance of that song would enjoy; instead, she would be required to contact the copyright holder of that song and request specific permission for its use in the play, and then pay any licensing fees that she negotiates for the use.

The performing rights organizations we discussed above administer only the royalties from "small" performance rights, that is non-dramatic rights. In order to license music for dramatic purposes, the producer of the dramatic work will have to seek a license and pay any associated licensing fees *directly from the publisher or other copyright holder* of the work. The license fees charged by the publisher/writer will often vary depending on the context. For a small production of limited duration in a small venue, a one-time flat fee would often be appropriate. However, for an extended theatrical tour or a large-venue run with significant ticket revenue potential, the publisher will often request a percentage of ticket revenue in order to scale the licensing fee to the financial results of the performance.

Dramatic and Non-Dramatic Uses of Music

The distinction between a dramatic versus a non-dramatic use of music is not always easy to make. In general, two categories of dramatic uses of music implicate the attribution of "grand rights":

1. *Music with words woven into and carrying forward the plot and accompanying action of a theatrical performance.* Examples of this type of dramatic music would include a song written for a character to sing in a Broadway musical, such as the song "Memory" from *Cats*.
2. *Pre-existing or commissioned music adapted for use in a dramatic context.* For example, a pre-existing popular song might be adapted for use in a new Broadway musical, such as the use of ABBA's "Dancing Queen" in the musical *Mamma Mia*. Or music might be commissioned for a theatrical play (known as "incidental music") to set the mood for certain scenes in the play.

The distinction between "grand" and "small" rights becomes even more difficult when only part of the work is performed or when a work from a dramatic production is performed in a non-dramatic (or even a *less* dramatic) context. *The distinction hinges on whether the portion of the work, or the context in which the portion is performed, conveys a significant portion of the plot of the original dramatic work*, or whether it functions only as a non-dramatic musical performance without attempting to convey the plot of the original dramatic context. A few examples will help clarify this distinction:

1. A performance of a *single* aria (song) from an opera in "concert" form (without sets, staging, or costumes) would not require "grand rights" permission because it does not convey enough dramatic or plot information. It would be considered only a "small rights" performance, similar to the performance of a pop song.
2. A performance of one opera aria, however, would likely require "grand rights" permissions if the singers are in costume, with staging and scenery accompanying the aria such that the plot associated with that aria is conveyed to the audience, even though it is only a single piece from the opera.
3. Similarly, performance of an *entire* opera in "concert" form (or a significant proportion of the opera), even without costumes and sets, would still convey the full meaning of the plot through the music, so it *would* be considered a dramatic performance which would require "grand rights" permissions.
4. An orchestral performance of the music from a ballet,

such as Copland's *Rodeo,* but without the accompanying dance would *not* be considered a dramatic performance because the plot and drama are carried primarily through seeing the dancers on stage. The music alone would not be enough to trigger "grand rights" permissions.

Original Cast Albums

In addition to ticket revenue, an album recorded by the original cast of the production often represents an important source of revenue for music theater, particularly the large Broadway shows (such as *Cats*, *Hamilton, Rent,* etc.). These *original cast albums* have historically been among the most commercially successful recordings of all time. For example, the original cast album to the musical *Hamilton,* released in 2015, reached No.1 in the U.S. rap album charts and No. 3 on the overall album charts. Other even more successful original cast recordings include those for *Les Miserables* (1987), *Wicked* (2003) , and *Phantom of the Opera* (1988).

The producer of a theatrical cast albums receives a much higher percentage of royalties than for a standard (non-theatrical) music album. The total royalty rate paid from the record company will approach what the featured musicians would receive for a standard music album — 12% to 15% — but the theatrical show's music composers receive only about about 60% of that, with the producers getting about 40%. By way of comparison, a music album producer typically receives 3% in album sales royalties. This difference reflects the much larger list of duties and responsibilities borne by a theatrical show producer, who must also deal with multiple casts, stage crew, live musical performances, lighting, costumes, etc.

Subsidiary Rights.

Theatrical shows also offer many opportunities for what are known as “subsidiary rights,” or opportunities for income after the initial “run” of the show and the accompanying cast album. Those subsidiary rights include later revivals of the show (including increasingly popular national tours with multiple casts), amateur productions of the show, movies that may be made of the show (such as the recent *Cats* movie in 2019), soundtrack albums, and merchandising.

Amateur productions of musical theater shows, such as in schools, offer a long and continuous source of revenue for successful theatrical productions.

31.

COPYRIGHT CRITICISM AND ALTERNATIVES

As we've discussed, copyright law is meant to reflect a balance of public interests: on the one hand, a society has an interest in allowing artists and other creators to profit from their original creations for a period of time free from plagiarism; on the other hand, society also has an interest in allowing artists to freely create original works inspired by the works of the past. Art always builds upon the work of previous generations and without the process of creative borrowing and interpretation, the arts will suffer. Copyright law initially balanced these two opposing interests by keeping the duration of copyright protection to a minimum — after a reasonable time to profit from a work, the artist's copyright would eventually expire and the work would enter the public domain where it would be available as a resource to the next generation of artists.

The original duration of a copyright was set by Congress in 1790 at 14 years, but it has now reached 95 years! For many commentators and artists, this hyper-inflation of copyright duration is a sign of untrammeled corporate control over artists and their ability to function creatively. These commentators believe the balance of interests described above has tilted too heavily in favor of copyright holders and away from the rights of artists to creatively use the influence of their predecessors. One of the more outspoken of the copyright critics has been Lawrence Lessig, a law professor and author who has written widely on this issue, most prominently in two books, *Free Culture: The Nature and Future of Creativity* (2004) and *Remix: Making Art and Commerce Thrive in the Hybrid Economy* (2008). In these books, Lessig points out that copyright law has failed to acknowledge the important distinction between unpermitted republishing of a work (direct copying) and an artistic reworking or transformation of a pre-existing work. This distinction can best be seen (or heard) in the use of sampling in hip hop music production. The hip hop producer uses samples as a means to transform previous recordings into something new, not to copy wholesale a previous work. (We will explore in detail the law surrounding sampling in a later chapter.) Lessig fears that copyright law too often favors the interests of copyright holders rather than the creative needs of artists to creatively transform existing works.

Creative Commons:

Most critics of the current state of copyright law do not advocate for a legal free-for-all without any copyright protection. Rather, they argue for a relaxation of current copyright law (such as through shorter copyright duration) or the adoption of alternative licensing schemes by which creators can decide to create a more open and less restrictive marketplace of creative sharing. One alternative licensing scheme that has proven to be both effective and popular is Creative Commons, a non-profit organization co-founded by Lawrence Lessig in 2001. The mission of Creative Commons is to advocate for a more open exchange of creative works and ideas, with the primary method to that end being the development of a common licensing scheme by which artists can make their works more widely available to other artists. Using these licenses, artists typically retain their copyright but allow (license) other artists a level of access to the work that promotes transformative inspiration or simply a wider range of use or copying than would otherwise be the case.

The Creative Commons open licenses have become so popular that over 2 billion such licenses have been registered, including large open-source networks such as Wikipedia, Khan Academy, and Flickr (with over 45 million Creative Commons-licensed photos). In fact, this book, the one you're currently reading, is covered under a Creative Commons license often used for open-source textbooks. What started out as a fringe idea in 2001 has blossomed into a significant global force for open sharing of creative content. The Creative Commons licenses are not unlimited licenses to copy, but rather finely-tailored to allow for the re-use and sharing of open-source material while respecting basic proprietary ownership rights. For example, you could not simply run off copies of this book and sell it under your name, as that's not allowed under the Creative Commons license. All Creative Common licenses require attribution of the original author/creator when using the work. But you can read the book for free in this class and other teachers are encouraged to use it (or parts of it) for free in their classes at any school. Take a look at the Creative Commons website to learn more about how these open-source licenses work and explore the range of works you can access (and use) that have open licenses.

The downside to Creative Commons licenses is that they are not well-suited to extracting financial value (i.e., royalties) from a work. By agreeing to put a work into the Creative Commons, the creator typically forgoes any future financial benefit from selling copies of the work. Consequently, musicians who wish to make money from their recordings or compositions would not typically choose to use a Creative Commons license. As we've seen, however, even the most popular musicians make most of their money from live performance, not from selling recordings. And under a recording contract, the record company typically takes ownership of the recording copyright ("master"). So, the value of a copyright for performing musicians is not as great as some might believe. But for songwriters who wish to make money from their talent and skill but who do not also perform, the traditional copyright is their primary source of income so a Creative Commons license would not be helpful.

PART III

COPYRIGHT INFRINGEMENT OF MUSICAL WORKS

32.

HOW A MUSICAL WORK COPYRIGHT INFRINGEMENT CASE WORKS

In this part of the book, we will discuss what happens when the owner of a musical work copyright believes her exclusive copyright has been infringed. (Note that we are talking here about the *song* copyright (the musical work), *not* the *sound recording* copyright. We will turn to the infringement of sound copyrights in the next part of the book.) We will first go over the legal requirements of a musical work copyright infringement claim and in subsequent chapters we will dive into how the courts have developed the legal theories around music plagiarism and where they stand today.

Federal law.

The United States Copyright Law is a federal, as opposed to a state, statute. Therefore, legal claims of copyright infringement must be filed in federal, as opposed to state, court. The lower federal court where a claim (also known in legal terminology as a "complaint") would be filed is known as the Federal District Court. The District courts are located in each state and many states have more than one District court (depending upon the population of the state). There are currently 94 federal judicial districts.

District courts can hear both criminal and civil cases. Civil cases are those where a plaintiff sues a defendant, typically for monetary damages or some other court-ordered relief; criminal cases are those in which the *government* prosecutes a defendant for a misdemeanor or felony, with the potential penalty being a fine, parole, or a prison sentence. The District court is known as a lower court or trial court, as opposed to an *appellate* court, because the parties in this initial "court of first impression" play out their dispute through all the phases of litigation. If a party wishes to appeal the verdict reached by the federal District court, they will then make that appeal to a federal Circuit Court of Appeal. There are nine Federal Circuit Courts of Appeal, plus a D.C. Circuit Court of Appeal for special claims involving the federal government itself. Finally, if a party wishes to appeal the ruling of a Federal Circuit Court of Appeal, they will make that appeal to the United States Supreme Court. The Supreme Court may or may not choose to hear an appeal, depending upon whether the court believes the case presents a pressing issue of federal law that the Circuit Court of Appel did not settle.

Copyright infringements of a musical work copyright are nearly always *civil* cases, a lawsuit filed by a plaintiff against a defendant, rather than the government against a defendant. The plaintiff filing the complaint typically alleges a copyright infringement by another party (the defendant). However, that is not always the case, as sometimes the plaintiff wishes to preemptively prove that they have *not* infringed upon a copyright when they have been alleged to have have done so outside of court (such as in the media) and wish to get the upper hand by filing first. We will study a famous recent example of this below that backfired badly on the plaintiff. But because that is not typical, for the rest of this section I will refer to the plaintiff as the party who owns the musical work whose copyright has allegedly been infringed.

The Copyright Act also provides that a *criminal* case may be brought by the federal government in cases of infringement involving a person who *willfully* infringes a copyright (a)for commercial or private profit, (b) by distributing $1,000 worth of copies of phonorecords within 180 days, or (c) by uploading to the internet for public access a copy of a copyrighted work being prepared commercially. Criminal copyright cases rarely occur in in musical work plagiarism disputes, and are more likely to occur in piracy cases involving the sound recording copyright.

Phases of a Civil Law Suit.

Civil lawsuits begin when a party files a "complaint" with a court, and then "serves" the complaint on the defendants (in person or by mail). This begins the "pleading" phase of the suit. In the complaint, the plaintiff specifies her name and address as well as the names and addresses of all the defendants they wish to name in the case. The complaint also sets forth the nature of the legal claim being made (in this case, copyright infringement), as well as a statement of all the alleged facts that support the claim. The plaintiff will also state their "standing to sue" (explained below) as well as why the particular court they are using is the correct "venue" for this claim (both because of the legal nature of the claim as well as the geographic location of the parties or alleged infringing activities).

After receiving the plaintiff's Complaint, the defendant(s) will then have 21 days (in a federal court) within which to file their "Answer" to the Complaint. The Answer gives the defendant an opportunity to refute the plaintiff's statements of both fact and law, or to make arguments as to why the court has no jurisdiction over the defendant or is the improper venue for the claim. Often, after receiving the Answer from the defendant, the plaintiff will then file an "Amended Complaint" to make any legal adjustments to their claims based on the defendant's Answer, or to add or remove one or more defendants to the list.

During this pleading phase, the defendant may file a "Motion to Dismiss for Failure to State a Claim," which asks the court to dismiss (terminate) the plaintiff's law suit due to some fatal legal flaw in the plaintiff's complaint. For example, the defendant might claim that the suit should be dismissed because the plaintiff does not actually own the copyright in question or because the defendant is not the person who engaged in the acts the plaintiff alleges to have been committed. If it is clear to the judge that the complaint is flawed in a way that the plaintiff cannot remedy by filing an amended complaint, the judge may dismiss the suit at this stage.

After the pleading phase has concluded, the parties then begin the "discovery" phase of the litigation. Discovery constitutes the fact-finding phase of the lawsuit, during which the plaintiff and defendant send requests to each other for documents relating to the law suit; "interrogatories," which are lists of questions that must be answered in writing; and requests for "depositions," which are interviews between the parties conducted by lawyers from the opposing side. Depositions constitute sworn testimony, which can result in perjury charges if the court finds the party being deposed not to have been truthful. Due to their being sworn testimony, a court reporter transcribes the statements made at a deposition and they are typically also video recorded. There is no judge present at a deposition, but, as in a court room, lawyers can "object" to questions asked during a deposition so that a judge will later have a basis for limiting the ability to use answers to those questions in the trial. The discovery phase of a case can last months, or even years in more complex cases.

After discovery, the case moves to the pre-trial "motions" phase, during which the parties make various motions to the court to settle various legal and evidentiary issues that have arisen in the discovery phase. One or both of the parties will commonly file a "Motion for Summary Judgment," in which a party will ask the court to decide the case in their favor without a trial based on established law and the existence of certain "stipulated" or mutually agreed facts. Cases will often be concluded because of these summary judgements when a judge decides that, after the initial pleadings and discovery, there are no remaining issues of law or fact remaining to be argued during a trial that will be dispositive to the outcome, so the judge can decide the outcome without a trial. When the judge rules on a motion for summary judgement, that ruling will often form the basis for the losing party to appeal the judge's decision, as appellate courts are more likely to overturn a judge's ruling than a decision by a jury. Other motions typically filed at this stage include those aimed at limiting what evidence the jury will be allowed to see or hear, which witnesses will be allowed to testify, and defining the scope of any expert testimony (a very important part of a music copyright case).

After pleadings, discovery, and rulings on various motions, the judge will typically press the parties to settle their dispute without a trial. Settlement talks may have already begun, but they will certainly accelerate with pressure from the judge to avoid the time and expense of a trial. Recent statistics indicate that about 95% of all civil cases will settle before trial. The costs of going to trial are enormous and at this point in the case (just before trial), the evidence and legal arguments that will be disputed at trial are well-known by both parties. So, there is a great deal of time, money, stress, and uncertainty that both parties can avoid by coming to an agreement before trial.

Given that so many cases settle before trial, we typically do not know the outcome of most civil disputes because settlements are a private matter that are typically not disclosed publicly. This is true of the vast majority of music copyright cases as well: we know that an infringement claim was made, and we can make our own guesses as to how the case was resolved, but because the cases often settle without a trial, we never know for sure how much money changed hands in the settlement.

If the case does go to trial, then the familiar courtroom drama ensues: opening arguments, calling witnesses to the stand to be examined and cross-examined, closing arguments, jury deliberations (unless the plaintiff has decided on a bench trial, that is without jury), the reading of the verdict by the jury foreperson, and lastly the penalty phase where the jury awards damages (or other court-ordered relief) if the plaintiff has prevailed.

Ownership of Copyright Claim; Authorship; Standing to Sue

The plaintiff in a copyright infringement suit must make and prove two factual claims: (a) That she is the owner of the copyright she claims has been infringed, and (b) that the defendant impermissibly copied the work. Proving these seemingly simple claims in court often involves a very difficult and complex process, so we will treat them separately and fully, starting with the need to assert and prove copyright ownership.

In some cases, particularly when the plaintiff is the original creator (the "author") of the musical work and has a copyright filing in her name to prove it, the plaintiff can easily prove ownership of the copyright. But complications can arise. One complication involves whether the musical work copyright claimed by the plaintiff actually constitutes a copyrightable musical work. The author of a copyrighted musical work must not only come up with the idea for the work, but actually create the work by fixing it in some medium (typically by writing it down or recording it). Remember, copyright attaches to the particular *expression* of an idea, not the idea itself. One cannot claim copyright infringement because someone else copied their *idea* for a work; the copying must be of the actual work itself, not just the idea. So, the plaintiff must show that she is the person who created a particular musical work by writing it down or recording it.

If two or more authors each make substantial, independent, and original contributions to a work, they may share the copyright in that work jointly, but only if they intend to do so. Joint copyright owners do not have to have contributed equally to a work to be joint owners, so long as each contributed substantially to the work such that their contribution could be the basis for an independent copyright. Merely contributing an idea to the work is not sufficient to be a joint owner; each joint owner must contribute to the expression of the ideas in the work. As joint owners of the copyright, any single owner or any group of joint owners may initiate a claim of copyright infringement; it is not required that all joint owners act together. A joint copyright is different from a copyright that is jointly owned by virtue of some assignment of a partial interest in a copyright. A joint copyright is one owned by two or more authors of the work, but if a single author assigns part of their copyright to another person who was not an author of the work, the copyright is jointly owned but the work still has only a single original author.

These complications of copyright ownership often arise in copyright infringement lawsuits. For example, the plaintiff may have inherited the copyright from a deceased parent or other relative and will thus have to provide evidence that they are the rightful heirs of the copyright. There may be competing claims to a copyright that will cloud the plaintiff's ownership. For example, the plaintiff may have obtained the copyright by a contractual assignment from a previous owner, so the chain of ownership through various contracts might have to be proven in the pleadings. Even if asserted successfully in a complaint, the plaintiff's ownership of the copyright might continue to be an issue throughout discovery and even the trial itself, as the defendant attempts to argue that the plaintiff does not own the copyright and thus lacks the standing to bring the suit.

If the copyright of a work is shared among two or more persons or entities, then any one of the people who own any share of the copyright may file a complaint for infringement. There is no requirement that all of the copyright owners in a particular work file a claim jointly.

To show standing to sue for copyright infringement, the plaintiff will also need to prove that the musical work in question has been registered with the U.S. Copyright office. However, there is no requirement as to *when* that registration has to have been made, as long as it is made by the time the plaintiff files the complaint. Recall that there is no longer any legal requirement to register a musical work (or any other copyrighted work) in order for that work to be considered protected under copyright laws. A work is considered protected under U.S. copyright law the moment it is "fixed in any tangible medium of expression." *But in order to file suit to enforce the copyright, the work must be registered before the complaint is filed*.

Works for Hire.

Whether or not a musical work constitutes a "work for hire" may also complicate the plaintiff's ability to showing ownership of a copyright. Recall that a work for hire is a creative work (of any medium) *produced by an employee at the direction of an employer*. While some relationships are easily classified as employee/employer, many fall into a grey area where it is not clear whether the author is acting as an employee, in which case their creative output is a "work for hire," or whether they are creating the work under their own authorship. The employer owns the copyright to a work for hire, not the employee who created the work, so this distinction becomes critical for determining who can sue for a potential infringement of the copyright.

If no clear documentary evidence exists showing whether a work is a work for hire (such as when a contract explicitly states as much), the court will look at the circumstances of the relationship between the author and the employer and whether the work was made within the scope of the author's employment. The following characteristics will weigh in favor of the work being treated as a work for hire:

1. It is the kind of work the employee is employed to create;
2. It occurs substantially within authorized time and space limits; and
3. It is made, at least in part, for the purpose of serving the employer.

Certain works are typically considered works for hire unless the contract specifies otherwise, such as film and television scores, advertising jingles, corporate audio logos, and other works where a corporate employer clearly directs and benefits from the musical work. As stated above in regards to record contracts, some record companies will attempt to have artists agree that their compositions created as part of a record contract are works for hire, but most recording artists will resist such a level of control and ownership of their creative work (though they will still likely be required to assign ownership of the master recording right to the record company as part of the contract).

Statute of Limitations.

Another consideration that the plaintiff's complaint will address is the copyright *statute of limitations*, which sets at ***three years*** the maximum amount of time that a civil copyright violation claim can be brought after the date of the alleged infringement. For the purpose of a musical work copyright infringement claim, the three-year period begins on the day the infringing (plagiarizing) musical work is distributed for sale. However, applying this seemingly simple rule in copyright cases involves an important complication: *Each successive individual act of infringement starts (or "tolls" in legal terminology) the three-period anew*. The following example will help clarify that complication: If a recording artist, represented by her record company, distributed an album containing an infringing song on January 1, 2000, the copyright holder of the song alleged to have been improperly copied would have until January 1, 2003 to file a claim for that infringement. However, if the artist also distributed a single of that same song on January 1, 2002, the statute of limitations for *that* separate infringement would enable a claim to be filed until January 1, 2005. Similarly, if the artist released a *Greatest Hits* album containing the song in 2010, claims related to that infringement would be allowed until 2013. We can see that, at least for successful pop songs that may get re-released on new formats and repackaged into new compilations over many successive years, the statute of limitations will rarely, if ever, prevent a civil copyright claim from being brought. Further, if the song has not been redistributed, rereleased, or repackaged after three years, then the value in bringing a copyright suit is likely to be so low that few plaintiffs would bother.

The advent of internet streaming has further complicated the statute of limitations for musical works. If the defendant's infringing song can be streamed on Spotify, for example, any act of streaming the song represents a distribution of that song that can start the three-year limit. That creates a situation where it can reasonably be said that for musical works available on the internet, there is effectively no statute of limitations while that work is available.

Independent Creation; Proving Defendant's *Access* to the Copyrighted Work.

We turn now to the second foundational factual basis for making a copyright infringement claim: proving that the defendant actually copied the plaintiff's work, rather than having created the new work *independently*. Only in rare cases will a plaintiff have direct evidence that a plaintiff copied a previous song as part of their work process. Songwriting typically involves a solitary process that has no witnesses and leaves no trail of evidence as to how it occurred. So, short of an admission from a defendant that they actively copied another work, there will rarely be other evidence of copying. ***Courts therefore have allowed plaintiff's to prove improper***

copying by showing that (a) the defendant had "access" to the copyrighted work before the alleged copying, and (b) that the two songs are "substantially similar." (We will address the more complicated issue of "substantial similarity" below.) To put all this another way, the courts have come up with a general principle that "independent creation (of a work) is a complete defense to copyright infringement." Sometimes, two people will come up with very similar works independently and that is not in itself proof of infringement — *there must be proof of actual copying* of the preexisting work.

This brings us to the concept of *access*: If the defendant can cast reasonable doubt to the court or jury that they ever heard the musical work in question, then the infringement claim will be severely undermined. How could a defendant have improperly "copied" the work in question if they never heard it? A musical work that happens to sound nearly identical to a preexisting copyrighted musical does not infringe the author's copyright if that similarity occurred by coincidence, or just because the two songwriters happened to come up with the same work independently. *The plaintiff must prove that their preexisting work was the source of inspiration (either consciously or not — there is no need to prove intention) for the new, infringing work.*

Successful plaintiffs typically prove access through one of two routes: (a) the plaintiff can show a particular chain of events through which the defendant would likely have heard plaintiff's work, such as the plaintiff having sent a copy of the song to the defendant or the defendant having been present during a performance of the work; or (b) the plaintiff can show that their work had been played on the radio or other mode of widespread distribution to the extent that the defendant must be presumed to have heard it. The facts supporting either of these claims will have to be confirmed during the discovery phase through interrogatories or in a deposition — "Do you remember receiving a demo recording of plaintiff's song in the mail in January of 2017?" Or, " Were you in the habit of listening to pop radio during the summer of 2015?"

One other unusual route a plaintiff can use to show access in the absence of any other evidence is a "striking similarity" between the plaintiff's and defendant's works. Even if the plaintiff cannot provide direct evidence that the defendant had access to plaintiff's musical work, a striking resemblance between the two works, much more than even the "substantial similarity" discussed below, then the jury could *infer* from the high level of similarity that the defendant *must have had access* to plaintiff's work.

Some courts have articulated an "inverse ratio rule" to link the level of access shown by the plaintiff to the amount of additional evidence required to show similarity between the works to prove that some copying was involved. The more evidence of the defendant's access to the preexisting work the plaintiff can show, the less similarity between the two works will be required to demonstrate that the defendant copied from the plaintiff's work. If there is little evidence of access, the plaintiff will need to show that the two works are very similar to convince a jury that the defendant copied the plaintiff's work. Conversely, if there is irrefutable evidence that defendant had access to plaintiff's preexisting musical work, then only a minimal similarity between the two could be sufficient to show that defendant copied plaintiff's work.

Originality and Non-infringing Copying.

Once the plaintiff has shown that the defendant copied her work, the plaintiff will then have to prove that the *degree* of copying constitutes copyright infringement. Not all copying constitutes copyright infringement. Recall the purpose of copyright: to protect a particular *expression* of an idea, not the idea itself. Ideas cannot be copyrighted, only the particular manner in which those ideas find expression in works. Copyright only applies to the *original elements* of a work; the non-original elements of a work remain in the *public domain* and do not lose that status just because an author incorporates them into a new work. Only an author's original expression of ideas in a particular work enjoy copyright protection.

For example, one could not copyright the idea of a song using the 12-bar blues harmonic progression. However, one could copyright a particular, unique *use* of the 12-bar blues progression in the form of a specific song (a particular set of lyrics with a particular melody, for example). But even after a songwriter the 12-bar blues progression to create a new, copyrighted song, that sequence of chords will remain in the public domain for another to use in coming up with another original expression using those chords. The original part of that new song that enjoys copyright will reside in the particular combination of lyrics, melody, rhythm, etc., not the 12-bar chord progression. Some degree of copying is to be expected in nearly every creative endeavor, as each artist cannot be expected to invent the materials of their craft wholesale from scratch. In the case of music, musicians learn chord progressions, scales, riffs and conventional figures, typical rhythms, etc., that many songs share in common. Those common elements remain in the public domain.

Similarly, the use of common melodic fragments (moving down a scale from the 5th degree to the tonic), or a trill on the seventh scale degree, are so common that they could not possibly be considered original elements of a composition. With lyrics, there are also certain phrases and words that are so common to song lyrics ("let's rock," "I love you," "I can't be satisfied," etc.) that they fail to rise to the level of originality required to form the basis for copyright infringement. There are countless other examples of these conventional musical elements that cannot form the basis for a copyright infringement suit.

So, a plaintiff must show that the defendant impermissibly copied the *elements* of a preexisting composition that constitute the peculiarly original combination of musical elements that make one song unique and distinct from another. As we will see, that line is often difficult to discern, and it has shifted significantly in the plaintiff's direction in recent years.

Burden of Proof; Standard of Proof

As in nearly all other *civil* cases, the burden of proof in a copyright infringement suit rests with the plaintiff (the party typically trying to prove that another party impermissibly copied their work). The level of proof required is a *preponderance of the evidence*. Preponderance of the evidence means simply that the evidence in favor of the plaintiff's claim is *more convincing* than the evidence against it. It does not mean that there is quantifiably more evidence (measured numerically), but that the evidence that does exist is more convincing. There could be only one very convincing piece of evidence favoring the plaintiff's position, but many unconvincing pieces of evidence in the defendant's favor, but the plaintiff would still have the preponderance of evidence in her favor.

In criminal cases, the prosecution must show the defendant's guilt "beyond a reasonable doubt," which requires a far greater weight of evidence than a preponderance. Note also that in civil cases we do not use the terms "innocent" or "guilty" to describe a defendant. When a jury determines that a defendant has committed copyright infringement, we describe them as being "liable" to the plaintiff for the payment of whatever damages are assessed or other equitable relief (such as an injunction). "Guilty" is a verdict reserved for criminal cases.

33. HOW MUCH COPYING IS TOO MUCH?

Substantial Similarity; Extrinsic vs. Intrinsic Test

Once a plaintiff has shown ownership of the copyright to the work in question and that the defendant did engage in *some* copying of plaintiff's work, the next and most difficult allegation to prove is that the *amount* of copying constitutes infringement. Recall from above that not all copying is impermissible. Copying a formulaic chord progression or a common phrase from a lyric typically does not rise to the level of infringement. So, how do we define the threshold above which copying can be said to constitute musical plagiarism? The courts have settled on the phrase **"substantial similarity"** as the level of copying that a plaintiff will need to prove to succeed in a case of copyright infringement. This phrase, like most legal concepts, depends entirely on the facts and context of each case. We cannot define it in the abstract. So, in this section we will examine several historical cases as guidelines for what constitutes musical plagiarism and what does not. The interpretation of this standard has changed and evolved over the years, particularly in recent years. So we will also look at recent and controversial cases that indicate trends that will shape this dynamic area of music law going forward.

Over the years, courts have crafted a two-part test to determine whether musical works are "substantially similar," known as the "intrinsic vs. extrinsic" test. The *extrinsic* part of the test seeks to determine whether the *objective musical elements* or ideas of the works involved in the lawsuit, such as harmony, melody, rhythm, lyrics, etc., are substantially similar. 'Extrinsic' might seem like an odd choice for this concept, so let's examine the use of this word. The prefix of the word, *-ex,* means outside, such as "external". The musical ideas with which the extrinsic test concerns itself do not consciously involve a listener's subjective, or inward, impression of the song. When listening to a song, most people (unless they have advanced musical training) do not track the harmonic progression, melodic phrases, tempo, meter, etc. on an analytic level. Most listeners take in music on a holistic level, responding to the song subconsciously through bodily movement (dance), emotion, singing along to a catchy chorus, or some other non-analytic level.

The extrinsic test thus seeks to determine the level of similarity between the musical concepts or ideas expressed in two musical works on an objective, analytic level that requires formal musical training. Accordingly, the extrinsic test typically requires *expert witness testimony* to explain to a jury the similarities (or lack thereof) of specific, objective musical elements employed in the two songs. The two sides to a music copyright suit often call upon musicologists, music theorists, or performing musicians as expert witnesses to explain these elements to a jury so that they can judge whether the similarity rises to the level of infringement.

In establishing infringement, the plaintiff's expert witnesses will attempt to prove not only that both songs contain similar objective musical elements, but that those elements constitute *protected elements* and are used in both songs in similar ways. On the other hand, the defendant's expert witnesses will attempt to show the jury that the extrinsic musical elements plaintiff claims are common to both songs are in fact not *protected elements* because they are too generic, conventional, or common to constitute protected elements of musical expression. Unprotected musical characteristics — those that are generic, common, or conventional ideas — cannot be the basis for infringement. If the plaintiff can show that the defendant's song copied *protected* musical elements of plaintiff's song, then the copying must also be shown to be of a degree that would not be expected to occur independently or from coincidence. So, the plaintiff's experts will attempt to show that the use of similar protected elements in both songs could only have occurred through copying (whether intentional or not).

The courts have come to recognize that no comprehensive checklist can be constructed for *protected* musical elements critical to every music copyright infringement claim. This is because every musical work uses the many various elements of musical composition to a different degree and in different combinations. For example, some musical works rely primarily on a distinctive melody (a set of particular pitches from a scale, heard in a particular order and rhythm) to convey their originality, with little of interest happening rhythmically or harmonically. However, a different song may have no perceptible or memorable melody, but an original and foregrounded rhythmic pattern that identifies the song. Another song may use an unusual chord progression and a distinctive melody, but a very common and unremarkable rhythm. There are a practically infinite number of combinations of these *protected* elements, so while we might wish for a checklist or formula for determining substantial similarity under the extrinsic test, the complexity and variety of musical expression makes that impossible.

The extrinsic test not only helps to distinguish *protected* from *unprotected* musical elements, it can also show, paradoxically, that some particular, unique *combination* of *unprotected* musical elements could result in a *protected* musical expression. For example, the extrinsic test could show that a conventional chord progression, lyrics consisting of common expressions, and a simple melody consisting of a simple scale descent constitute a set of *unprotected* musical elements because they are so generic. However, a plaintiff could still argue that this particular combination of otherwise unprotected musical elements is so unusual that it should warrant copyright protection. In other words, a combination of otherwise generic musical elements might sound so *uncommonly* "generic" that it is in fact original.

The extrinsic/intrinsic test is meant to be an "*and*" test, not an "*either/or*" test. So after finding that a song contains objective, extrinsic musical elements that were likely copied from the preexisting musical work, the jury must then *also* determine that there is enough *intrinsic* similarity between the songs so that, *taken together*, the extrinsic and intrinsic similarities constitute substantial similarity between the two songs. If the jury finds no objective, extrinsic similarities, then even if finds intrinsic similarities there should be no verdict based on substantial similarity.

Unlike the extrinsic test, the *intrinsic* test asks the jury to consider the *subjective impression* of the "total concept and feel" of the songs as a whole rather than an objective, analytic consideration of constitutive musical elements. In making this intrinsic determination, the jury will rely on what it considers the untrained impression of an "ordinary, reasonable person," rather than on detailed musical analysis presented by a music expert. Given the objective musical similarities already shown by the an expert witness, would an average music listener also hear the defendant's musical work as being substantially similar to the plaintiff's? Or, would an average listener, *despite* the presence of some objective similarities, nonetheless find that the two songs are *not* substantially similar?

Vicarious and Contributory Liability (Secondary Liability)

When someone has infringed on another person's copyright, they are said to be *liable* for that infringement (rather than saying they are "guilty" of infringement, which is a criminal concept). Lawyers use the term "primary liability" to describe this sort of direct liability of a person for directly causing harm to another. However, two other important forms of *secondary* or indirect liability that can also arise in music copyright cases: *vicarious liability* and *contributory liability.*

Vicarious liability occurs when a third party (other than the plaintiff and the primary defendant) benefits financially from the copyright infringement even though that third party did not directly engage in the infringing activity. In other words, the third party vicariously benefited from the infringement without directly engaging in the infringing behavior. *In order to prove vicarious infringement, the plaintiff must show three elements: (a) that the third party benefitted financially from the infringement, (b) that the third party had the right and the ability to supervise or control the primary defendant's infringing activity, and (c) that the third party failed to exercise that control* *or supervision.* In order to find a third party liable of vicarious infringement, the primary defendant must also have been found liable of infringement.

An example of vicarious infringement would be a record company whose president knows their recording artist has copied a demo recording sent in from another artist and passed the song off as his own. The record company, through its contractual relationship with the primary defendant (the recording artist and plagiarizing songwriter) stands to benefit directly and financially from the recording of the infringing song, and has the supervisory ability to instruct its artist to rewrite the song or not release it due to the infringement. If the record company fails to exercise that supervisory capacity, they could be held liable for vicarious infringement.

Contributory infringement, or contributory liability, occurs when a third party knows of the infringing activity, or had reason to know of it, and also intentionally *induces or contributes* to the infringement. *To prove contributory infringement, the plaintiff must provide evidence that the third party clearly expressed an intent to assist in the infringement or took other affirmative steps that encouraged or assisted the infringement.* Again, the plaintiff must also prove the primary infringement case in order to also prevail in a claim of contributory infringement.

Taking the above example of the record company being liable for vicarious infringement, it could also be liable for contributory infringement if it not only failed to exercise supervisory ability to stop their artist from copying the plaintiff's song, but also provided the plaintiff's song demo to the songwriter and *encouraged* them to copy it. We will discuss a more widespread and subtle form of contributory liability below when we discuss internet piracy of sound recordings.

34.

FAIR USE

The average person knows few details about copyright law, but one thing most people seem to be aware of is the concept of "fair use," because it comes up frequently when those accused of copyright infringement (or afraid of being accused of infringement) explain why they believe their behavior to be permissible. What most people do not realize, however, is that "fair use" is not a set of rules or bright-line guidelines for avoiding a copyright infringement claim. Rather, fair use is a set of four factors in a *balancing test* that can be asserted *as a defense* after an infringement claim has been made. Fair use cannot be used as a shield against copyright infringement claims, but rather must be argued as a defense to those claims in court.

The fair use test developed by judges trying to decide copyright infringement cases, and was thus a principle derived from case law (rather than statute). In the Copyright Act of 1976, however, the four-factor fair use test was codified into statutory law, giving it greater clarity and certainty. But despite now being part of the copyright statute, *fair use is still only a defense after a claim of infringement has been made — it* *cannot be relied upon as an automatic shield to ward off infringement claims.*

The Four Factors of Fair Use:

The four factors that will be weighed by the courts to determine whether a defendant's copying of preexisting material constitutes "fair use" are as follows:

1. **The purpose and character of the use, including whether the use is of a commercial nature or is for nonprofit educational purposes;**
2. **The nature of the copyrighted work;**
3. **The amount and substantiality of the portion used in relation to the copyrighted work as a whole; and**
4. **The effect of the use upon the potential market for or value of the copyrighted work.**

Before we dive deeper into each of these four factors, there are three important aspects to this test to understand.

First, we need to remember that this is a "balancing test." This means that no specific formula exists to determine whether the threshold between unfair and fair use has been crossed. Each case of potential fair use will be decided based on the specific facts of that case. In some cases, one of the four factors may prove dispositive, while in other cases one of the other factors may be the tipping point. Any combination of evidence and any proportion of evidence among the four factors may constitute fair use. The outcome of the test constitutes a factual determination resting with the jury, not a threshold legal issue to be decided by the judge.

Second, because defendants must raise fair use as a defense, it must be asserted and proved to the jury *by the defendant* rather than plaintiff. In other words, unlike most other matters in a civil case, *the defendant has the burden of proof in showing that the infringement constitutes fair use*.

Third, the fair use balancing test need not be limited to these four factors. If a court finds there is another factor that weighs in favor of the defendant (such as good faith), the defendant may be able to present evidence of that "fifth" factor even though it is not included in the factors listed in the statute.

Here is a summary of how these four factors of fair use come into play during a musical work copyright infringement case:

Purpose and character of the use.

The purpose and character factor in the fair use test allows the defendant to argue that their use of the plaintiff's copyrighted work is for a purpose or has a particular character such that holding the defendant liable for copyright infringement would needlessly stifle creativity or work against a countervailing public purpose. Examples of purposes and characters that have successfully been used by defendants as a fair use defense against infringement liability include **parody, criticism, commentary, educational use, charitable (nonprofit) use, and "transformative" uses** where the new work takes on a new character separate from that in the original work.

One of the most significant and recent court cases showing a successful application of the "purpose and character" factor in a fair use defense occurred in *Campbell v. Acuff-Rose Music, Inc.,* decided by the United States Supreme Court in 1994. This case involved alleged copyright infringement by the rap group 2 Live Crew, with the plaintiff claiming that 2 Live Crew's 1989 song "Pretty Woman" infringed upon the copyright of the well-known 1964 song "Oh, Pretty Woman" written by famed pop-country singer, Roy Orbison.

The case is titled *Campbell v. Acuff-Rose, Inc.* because Luther Campbell was one of the members of 2 Live Crew and was listed first among the multiple defendants in the complaint, and Acuff-Rose is the name of the publishing company, one of Nashville's most powerful, that owns the copyright to the Orbison song. Although Acuff-Rose was the plaintiff in the original complaint, in this appeal of a 6th Circuit Court decision, 2 Live Crew is the "petitioner" asking the Supreme Court to overturn the 6th Circuit's decision, and the petitioner's name comes first (before the "versus") even though they are the defendant. Note that the 6th Circuit includes the city of Nashville, Tennessee, the center of the country music industry.

2 Live Crew's "Pretty Woman" clearly copies Orbison's song without permission (the musical material is not just substantially similar, but nearly identical), but the song also just as clearly represents an intentional *parody* of the original, making fun of the lyrics and the sentiment of the original song in a crude fashion. The District Court in this case had no trouble agreeing with the defendant that their song is a parody and thus might be considered a fair use under the "purpose and character" clause. However, the District Court and the 6th Circuit Court of Appeal were split on the question of whether the clearly commercial nature of 2 Live Crew's = song outweighs the public policy of supporting fair use for parodies. 2 Live Crew's album on which this song appeared sold over 250,000 units, so its commercial nature could not be disputed. This case thus pits two of the elements of the purpose and character clause against each other: parody vs. commercial character.

In determining whether the commercial nature of a work prevents a fair use defense, courts have looked at whether the new work could negatively affect the market for the original song. Would consumers potentially purchase the new work instead of the original work, thus damaging the market for the original? In this case, the Supreme Court found that the parody of "Oh, Pretty Woman" was of such a different character to the original (which was already established as a "classic") that it could not possibly affect the market for the original. Nobody would choose to listen to the crude and rapped parody when what they had in mind was Orbison's original. The Supreme Court's ruling affirmed that the commercial nature of a work, although important in weighing the factors in a fair use test, does not itself make a fair use defense impossible. The court held that even if a use is commercial, another characteristic of the work, such as parody, may be so important and so clear that the fair use defense can overcome the commercial character of the work.

Nature of Copyrighted Work.

The second of the four fair use factors weighs the nature of the original, copyrighted work that has allegedly been copied. The distinction most often drawn in this factor is that between works that are informational in nature versus those that are fictional or made primarily for entertainment. If the work is informational and factual, such as a biography or encyclopedia article, then this will tend to support a finding of fair use as compared to when a work is primarily intended for entertainment. This distinction, and this second factor in general, rarely comes into play in cases involving copyrighted musical works, which are nearly always created for purposes of entertainment.

Amount of Copyrighted Work Used.

The amount of the original work copied by the defendant will also factor into whether the fair use defense is successful. There are several obvious examples of this intuitive principal. For example, if a teacher copies an entire novel for her class to use, rather than having them purchase the book, the fact that she is doing this for educational purposes would be far outweighed by the amount of the copying and the fair use defense would be unsuccessful. But how much is too much? Despite what many people may believe, there are no hard and fast rules and this factor will be balanced against the other three based on the specific facts of each case.

The court will also consider the *quality* of the material copied in relation to the proportion of the whole work that is copied. If the material copied from the original is less central to the unique character of the original work, then the court may allow for more to be copied. On the other hand, if the copied material is critical to the unique or original character of the original, then only a small portion may prevent the fair use defense.

In the 2 Live Crew case discussed above with respect to the "purpose and character" factor, the court also looked intently at the question of how much of Roy Orbison's song the rap group had copied in their parody. The Supreme Court noted that in order to prevail on a fair use defense, a parodist should only copy as much of the original work as may be required to make their parody effective. If an excessive amount of the song is copied, more than necessary to make the parody effective, the parodist risks losing the fair use defense. In the case of 2 Live Crew, the court held that, even though the rap group had copied the "heart" of Orbison's song, the distinctive rising bass guitar riff that is the song's primary musical feature, that amount of copying was necessary to clearly identify which song was the object of the parody and did not thus block the fair use defense. Again, the context and specific facts of each case will determine the outcome in this and the other fair use factors, rather than any bright-line rules or guidelines.

Effect on the Potential Market of the Original Work.

The last of the four factors considers the effect the defendant's work will have on the market for the plaintiff's copyrighted work. If the defendant's work diminishes the potential sales of the plaintiff's work, then this fact would weigh against defendant's fair use defense. If the defendant does not plan to widely market their work or even sell it commercially at all, such is in an educational setting, the defendant will likely prevail on the fair use defense. On the other hand, if the potential consumers of the plaintiff's work might overlap with the potential consumers of the defendant's work because they both make similar sorts of music and the copied work is very similar to the plaintiff's, even if it is a parody or some other "fair use," then the defendant might lose their defense due to the impact it would have on the market for the plaintiff's work.

The mere fact that the defendant profits from their copying of the plaintiff's work (rather than a nonprofit use such as education) does not in itself disqualify the defendant from claiming fair use and does not automatically point to a potential diminishment of the market for the plaintiff's work. Rather, the court will take into consideration the different market niches the two works might inhabit. In the 2 Live Crew case, the defendant's rap parody, although commercially very successful, clearly appeals to a very different market than Roy Orbison's original song. Very little, if any, overlap exists between the classic rock or country pop market for Roy Orbison and the market for 2 Live Crew's raunchy '90s rap. We would have a hard time imagining that someone who wants to listen to Orbison's classic song would be satisfied by instead listening to 2 Live Crew's parody of it. So, in some cases, the application of this factor will require more than a simple finding that defendant's musical work will be profitable.

In making this determination in parody cases, courts will sometimes refer to the "likelihood of confusion" between the two works. If the defendant's work is so similar to the plaintiff's that a consumer might become confused as to which is the original, then there is a greater likelihood that the defendant's fair use defense will fail because the copied song might have a negative effect on the potential market for the original.

Fair Use and "Weird Al" Yankovich

Nearly everybody who listens to much pop music has heard the brilliant and successful parodies created by "Weird Al" Yankovich, which date back to 1976 and include parodies of such artists as Michael Jackson ("Eat It"), Imagine Dragons ("Inactive"), and Madonna ("Like a Surgeon"). In many cases, Weird Al's parodies have sold nearly as well as the chart-topping hits they parody! Weird Al's parody songs would seem to be an excellent example of a creative musician using the fair use defense to its best advantage: his parodies substantially copy the copyrighted songs they are meant to parody, and there is no question he would be liable for infringement if it were not for the fair use defense. Weird Al copies songs quite clearly for comedic effect, with clever changes of lyrics and song titles. Despite his faithful recreations of the musical fabric of the songs, nobody would mistake his parodies for the originals once he starts singing the altered lyrics in his quirky voice.

However, Weird Al has never had to avail himself of the fair use defense for his parodies because he has *never been accused* *of copyright infringement*. The reason for this is because *Weird Al has always asked for permission* from the original song's copyright owner before making his parodies, and he does not make them if that permission is refused. Weird Al also offers either a flat-rate, one-time fee to obtain a license from the copyright owner and/or a share in future royalties in his parody songs. So, even though he would likely win on a fair use defense, Weird Al wisely chooses to avoid the legal costs and bad publicity of having to make that defense in court, instead obtaining licenses for his parodies. Everybody wins, except those who deny him permission because they stand to lose a significant amount of money given the success of his recordings.

Interestingly, 2 Live Crew also asked permission to make their parody of Roy Orbison's "Oh, Pretty Woman," but that permission was denied. Given the raunchy and irreverent nature of 2 Live Crew's parody, we can imagine why Acuff-Rose publishing did not want to give permission. But 2 Live Crew went ahead and made their parody anyway. Although it was a very long legal struggle, 2 Live Crew eventually prevailed in their claim of fair use and made legal history in the process by defining the limits of the fair use doctrine when applied to music parodies.

35.

DAMAGES

If the plaintiff prevails in their infringement case against the defendant, the last step in the process is for the court to assess what are called "damages." Damages should not be confused with a penalty or a fine, as those are typically assessed in a criminal case. Rather, damages provide financial compensation (which is why they are often called "compensatory damages") from the defendant to the plaintiff to "make the plaintiff whole" from any financial loss suffered as a result of the defendant's actions. The goal of damages consists less in punishing the defendant as in allowing the plaintiff to regain what she has lost as a result of the infringement. (Under some state laws, but not in federal copyright law, a court may assess what are known as "punitive damages" that go beyond a plaintiff's actual financial losses; punitive damages are typically awarded in those cases where a defendant acted willfully or maliciously.)

Statutory Damages.

The plaintiff in a copyright suit has a choice between collecting *actual damages*, the measured past and expected future profits lost due to defendant's infringement, or *statutory damages*, a specific amount determined by the federal copyright statute. The plaintiff must elect which of the two types of damages will be assessed prior to the court's determination of liability ("final judgement"). If the plaintiff elects to pursue actual damages, she will have to prove the amount of those damages by a preponderance of evidence. If the plaintiff is unsuccessful in his attempt to prove actual damages, the plaintiff can then seek statutory damages. However, once the plaintiff elects to pursue statutory damages, they are precluded from later attempting to prove actual damages.

The imposition of statutory damages, however, is not subject to any proof and therefore can be considered "punitive" in nature (rather than compensatory) in cases in which the plaintiff cannot prove any actual damages. The amount of statutory damages, as prescribed by Section 504 of the Copyright code, is determined as follows:

- No less than $750 and no more than $30,000 *per work* that has been infringed by the defendant(s), the exact amount to be determined "as the court considers just."
- If there is more than one defendant, their liability is "joint and several," meaning that they can each potentially be held responsible for paying the full amount of the damage award, unless they jointly agree on a method for splitting the payment, so long as the

plaintiff is paid the full amount.

- If the plaintiff can prove that the defendant infringed plaintiff's copyright *willfully*, then the maximum penalty is raised to $150,000 per work, at the discretion of the court.
- If the defendant can prove that he was unaware that he was infringing on plaintiff's copyright, and had no reason to reasonably believe that he was, then the court can reduce the damages to not less than $200 per work.

Actual Damages

If the plaintiff elects to pursue actual damages against the defendant rather than statutory damages, the determination and proof of the amount of those damages can often be as complex as the process of proving liability. ***There are two components to a plaintiff's actual damage award: (a) the reduction of the fair market value of the copyrighted work caused by defendant's infringement, and (b) the amount of any profit realized by the defendant that was attributable to the infringement of plaintiff's copyright.***

Typically, a plaintiff will find it easier to prove the amount of profits the defendant made as a result of the infringement than to prove the reduction in the market value of the plaintiff's work. If the plaintiff's musical work was never released to the public, was not commercially successful before defendant's infringing work, or was successful but only well before defendant released her work, it will be difficult to prove any loss in market value. The defendant's profits may be the only measurement of damages available. However, if the defendant's work is released at a time when the plaintiff's work is still commercially available with a significant fan base, it may be possible to prove that the defendant's infringing musical work has diminished the market value of plaintiff's work.

In any case, the defendant's profits from his infringement will likely form the bulk, if not the entirety, of the plaintiff's case for damages. If the defendant's infringing work is not commercially successful, then it is likely the plaintiff would never have brought the suit to begin with, or would choose statutory damages and an injunction (explained below) in order to keep the defendant's work off the market.

If the damages are based on the defendant's profits, that amount would be calculated as the gross revenue less the defendant's costs in producing the infringing work. Only the defendant's net profits can be claimed as damages. The plaintiff will also have to prove a connection between the infringement and the defendant's profits. *In some cases, the jury will decide that only a portion of the defendant's profits are due to the infringement, such as when only a distinct portion of the song can be attributed to infringement* or when the infringing song is only one song on an album. For example, if the verse of the defendant's song is clearly copied from plaintiff's song, but the chorus is not, then the jury may proportionately reduce the amount of the defendant's profits that will be awarded as damages to the plaintiff. On the other hand, if the defendant's infringing song was the "lead single" from a successful album, then a greater share of the album's profits than a simple ratio obtained by the number of songs on the album might be appropriate. Just as with the liability phase of the trial, expert witnesses may be required to explain either or both parties' evidence regarding the calculation of damages to the jury.

If there are multiple defendants, each defendant is only severally (not jointly) liable for their own profits attributable to the infringement. However, each defendant is jointly and severally liable for any actual damages due to a loss of market value of plaintiff's work.

Injunctions and other Equitable Relief

In addition to, or in lieu of, awarding damages to the plaintiff, a court also has the power to create other remedies, known as "equitable relief." The most common form of equitable relief involves the issuance of an *injunction*. An injunction consists of a court order forcing or forbidding some action on the part of defendant. In music copyright infringement cases, the most common form of injunction a plaintiff may request of the court would be to force the defendant to recall and destroy all copies of the infringing song from the market. Alternatively, the plaintiff may be willing to allow defendant to continue selling their infringing song, but only on the condition that they give credit to the plaintiff as a songwriter and award some portion of the future royalties of those sales. In other words, the court may allow the defendant to purchase a license from the plaintiff to sell the song under certain conditions, but it would be up to the plaintiff to decide whether that was an acceptable arrangement. If the defendant's song is likely to continue to have commercial success, then the plaintiff will probably want to be a part of that success rather than simply force the defendant to stop selling the song.

Criminal Copyright Infringement

Section 506 of the Copyright Act provides that a person can be judged *criminally* liable for *willful* copyright infringement if the infringement was:

(A) for purposes of *commercial advantage or private financial gain*;

(B) by the reproduction or distribution, including by electronic means, during any 180–day period, of 1 or more copies or phonorecords of 1 or more copyrighted works, which have a total retail value of more than $1,000; OR

(C) by the distribution of a work being prepared for commercial distribution, *by making it available on a computer network* accessible to members of the public, if such person knew or should have known that the work was intended for commercial distribution.

In criminal copyright cases such as this, the plaintiff (or "prosecutor" in this case) would be the federal government rather than an injured private person or entity, and the trial would use the rules and procedures for criminal prosecutions rather than civil cases. Those differences include the following:

- The standard of proof required of the prosecution would be the higher standard of "beyond a reasonable doubt" rather than the "preponderance of evidence";
- The statute of limitations is five years (rather than three years for civil copyright claims); and
- The infringement is considered a federal felony and the penalties can include up to 10 years in federal prison and/or a fine of up to $1,000,000, depending upon the nature of the infringement and whether or not it is a first or subsequent offense.

Criminal copyright infringement prosecution is uncommon, but not unheard of. Whether or not to prosecute is up to the discretion of the U.S. Department of Justice (through the U.S. Attorney's office), and the decision will often involve the seriousness of the offense and the probability of a successful prosecution. One trigger that will often lead to criminal copyright prosecution is when an infringer continues to engage in infringing activity after having already been judged liable of civil copyright infringement, which provides clear evidence of *willful* conduct.

36.

LANDMARK MUSICAL WORK COPYRIGHT INFRINGEMENT CASES

The following cases constitute some of the more high-profile and significant copyright infringement disputes over the previous 100 years:

"Happy Birthday to You" (2016):

In 2016, a federal judge ruled that the traditional birthday celebration song, "Happy Birthday to You," is in the *public domain* and therefore the many copyright claims over the past 80-years related to the song are invalid. Since 1988, the Warner/Chappell Publishing Company had been enforcing its claim that it owns the copyright for "Happy Birthday" and collecting royalties based on that claim. Warner had been charging and collecting royalties from anyone wishing to use the song in a profit-making context. This, in turn, resulted in many new and creative birthday songs to avoid paying royalties to Warner. The song apparently brought in about $2 million in royalties to Warner annually.

It turns out that what Warner actually owned was a copyright in a particular piano arrangement of a related song with the same melody, but different lyrics, obtained in a series of transactions dating back to 1935, but not to the underlying song itself. The song was based on a new lyric put to the melody of "Good Morning to You," a published song written in 1893 by a school teacher and her sister. The birthday themed lyrics were conjoined to that melody in the early 20th century. The judge held that the original party from whom Warner thought it had purchased the copyright in 1935 never owned a copyright to the birthday lyrics, only to a particular arrangement of "Good Morning to You." The "smoking gun" evidence for the decision came from a 1922 songbook that included the "Happy Birthday" song without any copyright mark, which at that time was required to assert a copyright claim. The copyright in the underlying melody written in 1893 had long since lapsed into the public domain.

In 2018, Warner agreed to pay approximately $14 million to settle class-action claims made against it by those who had paid royalties to Warner for use of the "Happy Birthday" song since 1949!

This case amuses us if for no other reason than that it concerns one of the most widely known and performed songs in history.

It also satisfies our sense of fairness when a large corporation is forced to return money to “the little guy” after being shown to have profited unjustly from claiming ownership of something that seems so obviously to be a part of our common cultural heritage. But it also shows how profitable copyright ownership can be in an era when the length of the copyright term has been extended as far as it has. My guess is that many students reading about this case would be surprised that people had been paying millions of dollars to Warner over the years just to have someone sing “Happy Birthday to You” in a film. I know I was surprised to learn of this when this case was decided. Were it not for a legal technicality, those profits would have been perfectly legitimate and Warner would have continued to rake them in from owning something most people would think could not be owned.

The Beach Boys’ “Surfin’ USA” (1963):

In one of the first high-profile plagiarism disputes involving two well-known rock ’n’ roll artists, legendary rock pioneer Chuck Berry accused The Beach Boys of infringing his copyright on the song “Sweet Little Sixteen,” which he released in 1958. Brian Wilson of The Beach Boys has said that he meant for his song “Surfing’ USA” to stand as a tribute to Berry, and apparently had not thought about the legal implications of adapting Berry’s city-inspired lyrics as a travelogue of favorite surfing spots. After Berry had his lawyers send a letter to The Beach Boys threatening a law suit for copyright infringement, The Beach Boys wisely admitted the clear similarities and offered to avoid litigation by giving Berry the songwriting credit for "Surfin' USA," thus avoiding an embarrassing lawsuit. Beginning in 1966, all copies of "Surfin' USA" contain the attribution to Chuck Berry as songwriter, rather than the original attribution to Brian Wilson.

George Harrison's "My Sweet Lord" (1970):

In 1970, publisher Bright Tunes Music sued Beatles' guitarist George Harrison for copyright infringement, claiming his 1970 song "My Sweet Lord" violated the copyright of the 1963 Chiffons hit "He's So Fine," written by Ronnie Mack in 1962. Mack was not a party to the suit, as he had died in 1963. In their early years, 1962-1964, The Beatles were known for having been highly influenced by American girl groups, covering several of their songs including two songs by The Shirelles ("Boys" and "Baby It's You") that appeared on The Beatles' first album. The Beatles' fascination with the sound of the girl groups made the issue of "access" easy to prove, as Harrison readily admitted in court that he and the rest of The Beatles listened to American girl groups frequently, and that their style was influential to The Beatles' original songwriting. Harrison's "My Sweet Lord" was also produced by Phil

Spector, the legendary producer of several girl group hits from the early 1960s.

The case against Harrison went to trial in February of 1976 after attempts by Harrison to settle the claim out of court failed. Harrison acknowledged the striking harmonic and melodic similarities between his song and "He's So Fine," but claimed not to have been consciously influenced by it when he was writing "My Sweet Lord". The jury had little trouble hearing those significant similarities and awarded the plaintiff $1,599,987 to be paid by Harrison from his earnings from "My Sweet Lord." Recall that lack of intent does not constitute a defense to copyright liability — unconscious copying can result in the same liability for infringement as deliberate plagiarism, and the judge's opinion in the "My Sweet Lord" case explicitly points out that Harrison's liability for copyright infringement "is no less so even though subconsciously accomplished."

Harrison's involvement in this copyright infringement suit inspired him to write "This Song" in 1976, the year of the trial, which contains lyrics that include the phrases "don't infringe on anyone's copyright" and "this tune has nothing Bright about it," a clear reference to the "My Sweet Lord" plaintiff, Bright Tunes Music.

Led Zeppelin's "Bring It on

Home" (1969) and "Whole Lotta Love" (1969).

In 1972, Chess Records' publishing arm, Arc Music, sued Led Zeppelin, claiming their 1969 recording of "Bring It on Home" infringed on their copyright in a song of the same title recorded in 1966 by Sonny Boy Williamson and written by Willie Dixon. In 1985, Willie Dixon sued Zeppelin under his own name, claiming their 1969 song "Whole Lotta Love" infringed on his song "You Need Love" (recorded in 1962 by Muddy Waters). Both lawsuits were settled out of court, with Arc Music and Willie Dixon receiving unknown settlements from Led Zeppelin. The settlement also provided Dixon with copyright acknowledgement on subsequent releases of the recordings. Dixon was also forced to sue Arc Music in the 1970s to receive his correct portion of the copyrights for "Bring It on Home" and other Chess Records blues classics that he argued had been improperly kept from him at the time of those recordings.

Led Zeppelin's seeming disregard for the laws of copyright as exemplified by these Willie Dixon songs raises numerous difficult questions regarding the common use of American black blues compositions by white blues-rock artists as source material in the 1960s and '70s. While some blues-rock groups such as the Rolling Stones and Cream went out of their way to credit the original black artists as inspiration for their cover songs and originals, other groups, such as Led Zeppelin and ZZ Top, either crossed into or flirted with copyright infringement by claiming to be the originators of songs that clearly plagiarized earlier blues songs.

The fact that these blues imitators of the 1960s and '70s were white and those they copied were most often black also raises the question of whether a lack of cross-racial respect plays some role in this. Were white blues imitators less respectful of the copyrights of black blues originators than they would have been if the copyrights were held by white songwriters? Or was there a sense that there was little to risk due to a belief that black songwriters were less likely to have the legal awareness or resources to defend their rights? Led Zeppelin's Robert Plant provides a candid confirmation of the views of some blues-rock musicians from the 1960s and '70s when asked about this case: "At the time, there was a lot of conversation about what to do. It was decided that it was so far away in time and influence that … well, you only get caught when you're successful. That's the game."

"Blurred Lines" (2013):

This case, involving the 2012 No. 1 pop song "Blurred Lines" by Robin Thicke and Pharrell Williams, has been one of the most controversial music copyright infringement disputes in history, and it continues to generate commentary and concern from those interested in the future of music copyright law. The dispute is a relatively straightforward infringement claim involving whether "Blurred Lines" infringed on the musical work copyright to Marvin Gaye's 1977 hit song "Got to Give It Up". Despite this simple premise, however, the controversial trial and resolution of this case highlights aspects of copyright law that observers feel point to fundamental problems with how these disputes are decided and the financial incentives for bringing infringement claims that has resulted in a flood of such cases in recent years.

Before looking under the hood at the various legal issues presented by this case, let's examine the unusual procedural history and ultimate outcome: The original complaint was actually filed by Robin Thicke and Pharrell Williams, the writers of the allegedly infringing song, "Blurred Lines." Typically, copyright suits are originated by the owner of the copyright that has allegedly been infringed. However, Thicke and Williams had been in failed negotiations with the estate of the deceased Marvin Gaye, who had threatened to sue them for this alleged infringement, so Thicke and Williams decided to initiate the legal proceedings themselves, hoping a judge would quickly dispense with the infringement claim therefore putting an end to the claim before it could even be asserted. This aggressive legal strategy backfired, however, as the judge refused to rule that the claim had no merit and the Gaye estate counter-sued to enforce their copyright.

After a lengthy trial featuring the usual back-and-forth between expert witnesses arguing the musical merits of each side's case, the jury concluded that "Blurred Lines" had in fact infringed on the copyright to "Got to Give It Up," and awarded the Gaye estate a total of $7 million dollars in damages. Then, rather than force Thicke and Williams to stop selling "Blurred Lines," as requested by the Gaye estate, the judge also awarded the Gaye estate a 50% share of the copyright to "Blurred Lines" and any additional royalties earned from the song.

The primary legal issue that surrounds this case is that of whether and how the sound recording of Gaye's song could be used in trial as evidence. *The Copyright Act of 1976 made a significant change in copyright evidentiary law by providing that a sound recording of a song could stand in place of the traditional music notation as the "deposit copy" documenting the existence of a song copyright.* However, that act also specified that only sound recordings made on or after January 1, 1978 could serve that purpose, and that songs copyrighted prior to that date are evidenced only by the sheet music deposited with the U.S. Copyright Office.

Gaye's "Got to Give It Up" was composed *before* 1978, so the protected musical elements of the song could only be proven by the sheet music deposit copy, not the recording. The controversy arose from the fact that the Gaye estate's attorneys and expert witness during trial played portions of the sound recording to illustrate similarities between the two songs that were not shown on the sheet music, giving the jury an opportunity to consider elements of similarity that perhaps should have been excluded. The 9th Circuit Court of Appeals ruled that the trial court was within its discretion in allowing the jury to hear these portions of the recording in order to "interpret" the sheet music.

Those musical elements that Gaye's expert witness pointed to in the sound recording that were missing from the sheet music included a bass line, a keyboard part, and a now-infamous cowbell rhythm. *Allowing the jury to consider similarities of those elements arguably also allowed the jury to base their decision on musical elements that have not traditionally been considered to be protected by copyright, elements that would be considered more related to the arrangement of a song rather than the traditional melodic and harmonic details of the song itself.* As interpreted by critics of the ruling, the trial court had allowed the "groove" or arrangement of the song to be a protected element, which would indeed represent a significant expansion of what has historically been considered the musical elements protected by copyright. Can a rhythmic groove be copyrighted? A cowbell pattern? A background keyboard part? Does any song that imitates the generic groove or feel of a historical style now potentially violate the copyright of every song that also used those generic elements of that style? What are the limits to that approach to music copyright?

After losing at the trial court and court of appeals level, Thicke and Williams decided against further appealing this highly controversial decision to the U.S. Supreme Court, so this case stands as an outlier whose ultimate influence on copyright law is yet to be determined.

In another twist to an already bizarre case, "Blurred Lines" co-songwriter Pharrell Williams was accused in a 2019 complaint of having committed perjury (lying under oath) during the trial. The nature of the complaint stems from the finding in the original case that Williams did not intentionally commit copyright infringement, so was not liable for the plaintiffs' attorneys fees on top of the damages award. (A judge can add a plaintiff's attorney's fees to a damage award when the defendant is shown to have intentionally committed copyright infringement.) The Marin Gaye Estate's legal fees in the copyright infringement case amounted to approximately $3.5 million, so this is far more than a mere squabble over words and feelings.

The supposed perjury occurred when Williams testified in his deposition that "I did not go in the studio with the intention of making anything feel like, or to sound like, Marvin Gaye." However, in a 2019 interview with producer Rick Rubin, Williams admitted that one of his songwriting methods is to "reverse engineer" previous pop songs to come up with something similar and that he "got himself in trouble" by doing just that with "Blurred Lines." "What [we'd] always try to do," Williams said, "was reverse engineer the songs that did something to us emotionally and figure out where the mechanism is in there, and as I said to you before, try to figure out if we can build a building that doesn't look the same but makes you feel the same way". The Marvin Gaye Estate claims this is factually inconsistent with Williams' having said in his deposition that "When I am searching for music, which I don't expect you to understand this, but we look into oblivion. We look into that which does not exist".

Williams has responded to this new allegation by claiming that his concept of "reverse engineering" songs is not legally equivalent to intentionally committing copyright infringement. The court has not yet responded to this new claim as of the time of this writing.

Led Zeppelin: "Stairway to Heaven" (2015).

This epic legal battle involved one of the best-known recordings of the 1970s: Led Zeppelin's "Stairway to Heaven" from their 1971 album *Led Zeppelin IV*. The copyright infringement claim was filed by the estate of deceased songwriter Randy Wolfe (aka "Randy California"), who was also the leader of the 1960s band, Spirit. The claim is that Zeppelin's famous power ballad infringed on the copyright to

Spirit's song "Taurus," composed by Randy Wolfe in 1966 and released on the band's first album (*Spirit*) in 1967.

The portion of "Stairway" that the Wolfe estate claimed to have violated the "Taurus" copyright was limited to the slow introduction, featuring a slow, arpeggiated chordal guitar part in A-minor (famously played on the 12-string half of Jimmy Page's famous Gibson double-neck electric guitar). The arpeggiated chords are played over a chromatically-descending bass line. Spirit's song "Taurus" contains a remarkably similar arpeggiated chordal guitar part in A-minor over a similar descending chromatic bass line. The dispute in this case was not over whether the "Stairway" introduction is similar to "Taurus" (they are nearly identical), but whether the musical elements of that introduction constituted copyright-protected elements, or whether instead they are musical conventions that are so generic as to be unprotectable and thus not subject to copyright infringement claims.

The initial copyright infringement complaint in this case was filed in the United States District Court in California (Central District) in 2014, 43 years after the release of the "Stairway to Heaven" recording. The complaint was filed by Michael Skidmore, a co-trustee of the Randy Wolfe Trust that had been established by Wolfe's mother after his death in 1997. The complaint named all the members of the Led Zeppelin band as well as their publishing and record companies (Warner and Atlantic, respectively). The reason this complaint could be filed despite the long duration between the initial record release and the date of the complaint is that the alleged infringement was ongoing due to the continued popularity of the song (to say the least) reflected in continued sales and streaming.

In 2015, a five-day jury trial resulted in a verdict in favor of Led Zeppelin, finding that, although the Wolfe trust did hold a valid copyright to the song "Taurus," and Led Zeppelin had access to that song at the time they wrote "Heaven," the two songs were not substantially similar under the objective extrinsic test. The jury was persuaded by Led Zeppelin's expert musicological testimony during the trial that the similarities between the two songs are based on "unprotectable common musical elements." In other words, the musical similarities between the songs involve generic musical conventions, such as the minor arpeggio over a descending chromatic bass line, that have been common musical building blocks for many songwriters over several centuries. One might wonder how Led Zeppelin was shown to have had access to the little-known song "Taurus," but this issue was easily adjudicated after Zeppelin guitarist Jimmy Page testified in court that he owned the Spirit album on which the song appeared and that the two bands had performed together before "Starway to Heaven" was written.

Another important issue decided by the District Court trial was that the issue of the "deposit copy" for the song would be governed by the 1909 Copyright Act, which allows only notated sheet music as evidence, rather than the 1976 Act, which allows for either notation *or* a recording to serve as the deposit copy. Due to this ruling by the District Court judge, the jury was only allowed to look at the skeletal notations of "Taurus" and "Stairway to Heaven," rather than listen to the recordings in order to compare them. This is a similar issue to the one presented in the "Blurred Lines" case discussed above, although the "Stairway to Heaven" jury was not allowed to listen to edited "mashups" of the recordings as was allowed in the "Blurred Lines" case. The restriction of the evidence to notation likely contributed to the jury's finding for Led Zeppelin, as the similarity between the two songs is even more apparent when listening to the recordings rather than just looking at notation. This is particularly true given that most of the jurors likely could not read music and thus relied on expert testimony rather than being able to form their own subjective (intrinsic) opinions regarding the similarity of the songs. This is not to say that the result would necessarily have been different had the jury been able to listen to the recordings, but it raises the likelihood of a different decision.

Skidmore (trustee of the Randy Wolfe trust) appealed the District Court verdict to the Ninth Circuit Court of Appeals. Skidmore's appeal challenged various rulings and jury instructions made during the trial, including the finding that the song recordings were not available for evidence to the jury in determining "substantial similarity." A three-judge panel of the Ninth Circuit Court of Appeals ruled in 2018 that the District Court judge had made errors in instructing the jury regarding elements of substantial similarity and remanded the case to the District Court for a new trial.

The trial court's 2015 ruling in favor of Led Zeppelin had the effect of reducing the level of concern among musicians about copyright infringement following the 2013 "Blurred Lines" decision. Musicians had justifiably been concerned following "Blurred Lines" that courts would allow juries to find substantial musical similarities from relatively common musical elements without requiring similarities among a combination of more specific musical elements such as unique lyrics, melodies, and harmonies. The initial jury verdict seemed to indicate that "Blurred Lines" was an anomaly and that traditional copyright analysis had been restored. However, the Ninth Circuit's reversal of that verdict in 2018 rekindled the flames of fear, if not outright panic, that the copyright rug was pulled out from under the feet of songwriters. (Of course, those who believed that songwriters should be held to a stricter level of originality would have been pleased with the reversal.)

One of the quirks of an appeal to a federal Circuit Court is that it has two levels: The first appeal is to a three-judge panel rather than a larger group of judges. If the appellant wishes, however, they may further appeal the decision of the three-judge panel and ask for the case to be heard *en banc*, meaning in front of a panel of *eleven judges, including the Chief Judge* *of the court.* The Court of Appeals is not required to accept this request for an *en banc* hearing, but will do so when there is enough support on the court to revisit the decision of the smaller panel. After Led Zeppelin appealed the decision of the three-judge panel, the Ninth Circuit agreed to hold an *en banc* rehearing of the appeal.

After the *en banc* rehearing of the appeal, the Ninth Circuit in 2020 reversed the decision of the three-judge panel to remand the case to the District Court for retrial, this upholding the original jury verdict in favor of Led Zeppelin. After this second Ninth Circuit decision, songwriters again felt relieved that a sense of order had been restored to copyright law after the shock of the "Blurred Lines" decision. That sense of renewed calm was reinforced in 2022 when the Ninth Circuit ruled in favor of Katy Perry, who had been found liable for copyright infringement by a jury in 2019. Perry had been sued by rapper Marcus Gray ("Flame") for perceived similarities between his song "Joyful Noise" and Perry's song "Dark Horse." The Ninth Circuit ruled that, despite the jury's verdict, Perry's song was not substantially similar to Gray's because the portion of Gray's song allegedly copied did not constitute an original musical expression. This finding is similar to the one in the "Stairway to Heaven" case, where the musical similarity between the two songs involved generic musical elements rather than original musical expression. Perhaps what these recent cases indicate more than anything else is that juries do not have the appropriate musical training to assess whether musical similarities involve generic musical elements rather than original musical expression. This provides opportunities for juries to be swayed by expert witnesses who are being paid to make a case for their client, rather than provide unbiased opinion. The "battle of the experts" does not always lead a jury to a result that can withstand lengthy and costly appeals.

PART IV

COPYRIGHT INFRINGEMENT OF SOUND RECORDINGS

37. CONSUMER SOUND AND VIDEO COPYING DEVICES — THE CASSETTE AND HOME VIDEO RECORDER (SONY VS. BETAMAX)

Before the 1970s, there was relatively little concern about piracy of music, movies, or other mass media. That lack of concern was largely due to the state of technology. Before the rise of the cassette tape recorder, the economics of piracy favored the owners of copyrights, rather than the potential infringers. Reel-to-reel tape recorders were introduced in 1935 and were not prohibitively expensive, but few consumers owned tape recorders or wanted to deal with the inconveniences associated with them (such as rewinding or storing the fragile tapes). Transferring tapes back to discs required expensive lathes that in turn required maintenance and expert operators to produce a product of sufficient quality.

Commercial records were also reasonably priced, so the net benefit to pirates required high-volume sales to earn much profit.

But the economics of piracy changed drastically with the invention of the cassette tape recorder and its video analog, the video tape recorder. The audio cassette was invented in 1962 and became available to consumers in 1964 (along with the associated hardware player/recorder). The first cassette recorder/players were small and affordable. However, the fidelity was relatively low due to the narrow width of the tape (less than ¼ inch as compared to the standard ½-inch width of reel-to-reel tape). But the small size and rigid plastic case of the cassette made up for the low fidelity with convenience, durability, and ease of storage. By 1966, both pre-recorded and blank cassettes had carved out a niche in the consumer audio market.

Like all technologies, the quality of the cassette improved over the years, so that by 1971, with the advent of Dolby noise reduction and improved motors, cassette recorders could produce an audio quality that approached that of the average record player. The primary advantage of the cassette lay in its portability, both of the tape itself and the players, so much so that by the early 1970s cassette players were becoming available as an upgrade in cars. The ability to bring one's music collection into the car, rather than relying on whatever the local radio station played, was a momentous event in the history of portable audio. The Sony Walkman, available in 1977, took portability even one step further, offering an affordable, and battery-powered cassette player that could be held in one's hand. The Sony Walkman even came in a model that offered recording as well as playback, using built-in stereo microphones, enabling live recording of concerts.

Due largely to the lack of unauthorized copying of sound recordings, there was no recognized federal copyright in sound recordings before the 1971 Sound Recording Act provided that only the copyright owner of a sound recording made on or after February 15, 1972 could "duplicate the sound recording in a tangible form that directly or indirectly recaptures the actual sounds fixed in the recording." The fact that this law was passed just as high-quality cassette recording technology was reaching the consumer is no coincidence.

The cassette offered another revenue stream for record companies, and provided incentive for consumers to purchase cassette copies of recordings they already owned on vinyl in order to have a portable version. However, the cassette also came with a built-in liability: consumers could use it to *record copies* of music they had not purchased. Home "dubbing" of vinyl records to cassette became a common way to expand one's record collection by borrowing records from friends or family to dub to cassette. Multiple high-speed cassette recording decks also became available to those wishing to sell pirated cassettes on a mass scale. Record companies preached against this practice and tried various methods to prevent it, including introducing the slogan "Home Taping Is Killing Music" in the early 1980s.

However, the record industry largely viewed cassette piracy as not much more than a nuisance as the continued growth of the industry indicated that most consumers still chose to purchase vinyl records, and then CDs after 1983, rather than taking the time and effort to dub copies. Particularly after the introduction of the CD, which offered an even more portable, durable, and high-fidelity experience than the cassette, the record industry largely ignored cassette piracy.

The home *video recorder* was a different story, however. With the introduction of the Sony Betamax video recorder in 1975, the movie and television industries faced a sudden piracy threat that resulted in one of the most significant U.S. Supreme Court decisions of the 1970s, *Sony Corporation of America v. Universal City Studios, Inc.* (1984) (known as the "Sony Betamax" case).

In the Sony Betamax case, Universal Studios sued Sony for violation of their federal copyrights for various television shows broadcast over public airwaves. Universal claimed that Sony, through the manufacture and distribution of its "Betamax" home video recorder (a proprietary videocassette format that competed with the "VHS" cassette format), allowed and encouraged consumers to make unlicensed copies of its copyrighted television broadcasts. Critical to this lawsuit is the fact that Universal was suing Sony, the *manufacture* of a video recorder, rather than suing the *consumers* who were alleging using that device to make unlicensed copies. This case became a high-stakes test of the novel legal theories of ***vicarious liability*** and ***contributory liability*** when applied to copyright infringement.

Universal's allegation of vicarious liability is grounded in the idea that Sony was liable for the infringing actions of its customers, arguing that Sony acted vicariously through its customers to infringe on Universal's copyrights. Universal's related allegation of contributory liability against Sony put a somewhat different spin on that theory, arguing that Sony contributed to its customers' infringing activities by providing them with the means to carry out the infringement. In the end, the U.S. Supreme Court ruled that Sony was not liable for copyright infringement, either on the vicarious or contributory liability theories. However, the court's explanation of its reasoning in this case set important legal **precedent** for several later music copyright cases that also involved the concepts of vicarious and contributory liability.

There was no dispute in the Betamax decision as to the potentially infringing activity of those consumers who had purchased the device: many were clearly using their new video cassette recorders (VCR) to record copyrighted television broadcasts so that they could watch them at a more convenient time ("time shifting"). The Supreme Court recognized that the unlicensed copying of television broadcasts by consumers using the Betamax was likely a copyright infringement. However, the allegation was against Sony, not its customers who purchased the Betamax. Therefore, the court said, it's important to note that there are other, non-infringing, uses of the Betamax that the device is also well-suited to perform, such as recording home videos or making copies of non-copyrighted material. Thus, the court looked to Sony's actual marketing of the Betamax to determine whether it had encouraged or specifically aided consumers in using the device specifically to infringe copyrights, and whether it knew that copyright infringement would be the primary use of the device.

After considering these questions, the court held that Sony could not have had actual knowledge of exactly what use its customers would make of the Betamax, since it was capable of a variety of uses in the hands of a consumer, some of which did not involve copyright infringement. Thus, Sony could not be held to be vicariously liable for any infringement that its customers committed using the device. Further, the court found that Sony did not encourage or instruct consumers to use the Betamax to commit copyright infringement through its marketing of the device, so Sony was also not liable for contributory infringement. As we will see, however, *the court's analysis of Sony's potential knowledge of the infringing potential of its product, and its marketing activities of that product, would provide important legal grounds for holding* *internet service providers liable for the copyright infringements of their customers in the coming fight against internet music piracy.*

38. CONTRIBUTORY AND VICARIOUS LIABILITY FOR PEER-TO-PEER FILE SHARING SERVICES: THE NAPSTER AND GROKSTER CASES

As described above in Part 3 (History and Structure of the Recording Industry), the recording industry in the early 21st century was deeply impacted by rampant copying of digital music files (primarily in the MP3 format) over the internet. The new internet companies that facilitated this process were known as "peer to peer" file-sharing services ("P2P") because they operated on the principle of a distributed network of users who hosted and shared digital files, rather than the service itself hosting and sharing those files. The P2P service provided the platform and software that enabled its users to find and share files, but did not actually distribute the files among its users. Napster, which began service in June of 1999 quickly became the most popular of these services, peaking in size with a user base of over 26 million in 2001.

Napster was sued for copyright infringement in 2000 by two high-profile artists, Metallica and Dr. Dre, and A&M Records. In the case by A&M records (and other plaintiffs), the federal District Court (Northern District, California) granted a ***preliminary injunction*** against Napster to prevent them from uploading, downloading, or otherwise distributing plaintiffs' copyrighted songs during the case. Given that obeying such an injunction would effectively put Napster out of business for an extended period, Napster not surprisingly chose to appeal that ruling to the federal 9th Circuit Court of Appeal. The 9th Circuit stayed the District Court's injunction while it held hearings and made its decision. (A "stay" puts a hold on enforcing the injunction until a court can rule on its legality.)

The 9th Circuit ruled largely in favor of the plaintiffs (led by A&M Records), but asked the District Court to modify the injunction. The 9th Circuit's ruling in 2001, and the imposition of a modified injunction later in 2001, effectively shut down Napster's existing peer-to-peer business model, forcing it to ultimately settle the lawsuit for approximately $26 million and declare bankruptcy. The Napster name was eventually acquired in bankruptcy by Roxio and subsequently sold to Rhapsody, which used the Napster name for its relatively unsuccessful music streaming service.

The plaintiffs in the Napster case used the contributory and vicarious liability theories from the *Sony Betamax* case to allege that Napster had committed copyright infringement. Although the *Sony Betamax* case had ultimately exonerated Sony of liability, the Supreme Court in that case had also validated and provided useful analysis of the contributory and vicarious liability theories to the extent that they were more likely to prevail against a defendant who did not have Sony's same basis for defense of not knowing to which use its customers would put its recording device. (Having a U.S. Supreme Court opinion to cite in favor of a legal theory is always the ultimate basis for argument in a federal court, even if the ruling in the cited case happened to be decided against the party asserting that claim due to some particular factual peculiarity of that case.)

In the 9th Circuit's *Napster* opinion, the court dealt with the plaintiff's contributory and vicarious liability claims, as well as Napster's safe-harbor defense under the Digital Millennium Copyright Act (DMCA). I will summarize the 9th Circuit's holdings in turn. Contributory liability for infringement, the court summarized, occurs when a defendant engages in conduct that "encourages or assists the infringement" committed by another. In order to show contributory liability, a plaintiff must also show that the defendant knew or had reason to know of direct infringing activity enabled by defendant's actions or services. The 9th Circuit held that "if a computer system operator [such as Napster] learns of specific infringing material available on his system and fails to purge such material from the system, the operator knows of and contributes to direct infringement." (*A&M v. Napster*). The court also acknowledged that, in accordance with the Supreme Court's decision in *Sony*, if the computer operator does not know of specific infringement being committed on its system, then the mere possibility that users could commit copyright infringement using the system is not enough to find contributory liability. "Napster," the court held, "has actual knowledge that specific infringing material is available using its system, that it could block access to the system by suppliers of the infringing material, and that it failed to remove the material." The court also found that Napster "materially contributes" to the infringing activity of its users by providing easy and free access to those songs through its software.

Turning to the issue of *vicarious liability*, this occurs when a defendant "has the right and ability to supervise the infringing activity and also has a direct financial interest in such activities." The court made quick work of finding that Napster benefitted financially from its expanding user base, which was clearly tied to the availability of copyrighted music available through the software. To find an "ability to supervise" the infringing activity, the court relied on Napster's technical ability to restrict access to the system by users who were found to be downloading copyrighted material. Napster had admitted that it had that ability, but it was also clear that it rarely blocked user access. For the court, that ability to restrict access constituted an "ability to supervise" any potentially infringing activity. "Turning a blind eye to detectable acts of infringement for the sake of profit gives rise to liability," the court concluded.

Napster attempted to defend itself from copyright infringement liability by claiming safe-harbor under the DMCA. However, the court raised significant doubts about Napster's DMCA defense based on Napster's knowledge of the infringing activity and its unwillingness to curb that activity on its system as required by the DMCA. The court found that a preliminary injunction was appropriate given the likelihood that a DMCA defense would fail if taken to trial. (Given that Napster was unable to successfully assert a DMCA safe harbor defense, I will delay discussing the details of that defense until Chapter 39.)

Interestingly, one of Napster's other arguments against the injunction was that the court should create a new royalty payment scheme that Napster would pay to copyright holders rather than being forced to shut down as a result of an injunction. In effect, Napster in this argument was asking the court to create a new licensing mechanism for MP3 downloads to compensate artists and record labels. The court declined to take such a step, correctly asserting that was a job for Congress and not the courts. But it is interesting that Napster's argument foreshadowed the world in which we live today, in which just such a compulsory licensing scheme for online streaming is now in place and functioning to channel royalty payments to artists and record companies when consumers stream copyrighted songs online. As we now know, Napster's greatest fault was that it was too far ahead of the curve of both the industry and the laws supporting the industry.

The Supreme Court's *Grokster* Decision

Napster's demise did little to stem the tide of peer-to-peer networks and mass copyright infringement through MP3 file sharing enabled by those networks. The *Napster* decision discussed above only related to a preliminary injunction against Napster pending trial. That trial never occurred because the injunction forced Napster into settlement of the claims against it, and ultimately a sale of company's remaining assets (essentially only its name) in bankruptcy.

So, legal resolution of the issues surrounding copyright infringement by peer-to-peer networks had to wait as additional legal challenges made their way through the federal courts. That wait would not be long. In 2001, the same year of Napster's demise, another peer-to-peer network, Grokster, had risen to such a level of success that it too was sued by a group of plaintiffs, including movie studios, recording companies, and music publishers. That group of plaintiffs was led by movie studio Metro-Goldwyn-Mayer, so the case became known as *MGM v. Grokster*.

Grokster and other "second-generation" peer-to-peer networks hoped to avoid legal liability by allowing users to exchange MP3 and other files directly between each other's computers, without those files passing through the service's servers. That indirect file sharing protocol meant less control by the service provider and, such providers hoped, less likelihood that they would face legal liability for copyright infringement. Initially, the new P2P network system seemed to be working to avoid legal liability as the District Court issued a summary judgment in favor of defendant Grokster, holding that it could not be found liable as a matter of law for contributory or vicarious infringement due its limited ability to control the exchange of files between its users, and the fact that the system had potentially non-infringing uses.

There was no dispute as to whether or not copyright infringement was occurring on Grokster's system. An analysis showed that over 90% of all files available on the system were unlicensed copies of copyrighted material. The issue was whether Grokster was contributorily or vicariously liable for that infringement. Following the analysis used in the *Sony Betamax* case, the District Court found that Grokster's P2P system was *capable* of performing substantial non-infringing uses, such as a way to transfer non-copyrighted files, or copyrighted files to which the owner had granted permission for the transfer. The court emphasized that it was not relevant whether the system was actually being used in a non-infringing way, but only whether it was *capable* of such non-infringing uses and that those non-infringing uses were of some potentially commercial value. Given that finding, the plaintiff's would not be able to show that the defendant Grokster had *constructive knowledge* of copyright infringement, and the plaintiffs would thus have to show that the defendant had *actual knowledge* of specific infringement on its system and *failed to act* on that knowledge. The District Court held that, because Grokster had no ability to stop its individual users from swapping copyrighted files due to the distributed architecture of its system, and that Grokster did not materially contribute to any infringing activity simply by making its software available that could be used for other purposes, Grokster could not be held to be contributorily liable for those infringements. The District Court also absolved Grokster of *vicarious* liability because it did not have any supervisory authority over its users behavior with respect to files located only on the users computers rather than on Grokster's own servers.

In 2004, the 9th Circuit Court of Appeals affirmed the District Court's summary judgment of the *Grokster* case in favor of the defendant, setting the stage for an appeal of that ruling by the plaintiffs to the United States Supreme Court. As you are likely already aware, the U.S. Supreme Court is not bound to accept and rule on every appeal that is presented to it. The Supreme Court in fact declines to hear most appeals. The Supreme Court typically receives over 7,000 requests for appeals each year (known as "petitions for writs of certiorari"), but only decides to hear and decide on about 100 of those. The Supreme Court sets a very high threshold to requesting it to hear an appeal and issue an opinion, so it is noteworthy at the outset to acknowledge that in the *Grokster,* case the Court felt that it needed to weigh in on an important legal issue. The opening pages of the Supreme Court's *Grokster* opinion indicate that the Supreme Court accepted this appeal not only to clarify an issue of law, but to do so in a context that it felt the lower courts had failed to appreciate: the alarming growth in digital copying technologies and their potential to rapidly alter the legal and economic dynamics of the recording industry. The Supreme Court summarized this development as follows:

"The tension between the two values is the subject of this case, with its claim that digital distribution of copyrighted material threatens copyright holders as never before, because every copy is identical to the original, copying is easy, and many

people (especially the young) use file-sharing software to download copyrighted works. This very breadth of the software's use may well draw the public directly into the debate over copyright policy, and the indications are that the ease of copying songs or movies using software like Grokster's and Napster's is fostering disdain for copyright protection. As the case has been presented to us, these fears are said to be offset by the different concern that imposing liability, not only on infringers but on distributors of software based on its potential for unlawful use, could limit further development of beneficial technologies."

In its *Grokster* decision, the Supreme Court held that the 9th Circuit Court of Appeals had relied too heavily on a narrow reading of the *Sony Betamax* case to find Grokster without liability simply because the system had other potentially non-infringing uses and that Grokster did not have actual, specific knowledge of infringement. That analysis, the Supreme Court stated, ignored the fact that there was also significant evidence available that Grokster *intended* for its users to commit copyright infringement, and that its business model was in fact predicated on that infringing activity by its users. The Supreme Court thus used a different legal theory, that of *inducement*, to create liability for copyright infringement: "one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties" (p. 937).

The Supreme Court in *Grokster* then identified several items of factual evidence that showed that Grokster and another defendant in the case, StreamCast, had actively promoted the infringing use of their software to their users, specifically targeting former users of Napster and urging them to now use their new services to continue the downloading of copyrighted popular music. The court also noted that the business model of these new services, free software supported by advertisements, relied on high-volume use of the service. That high-volume use was predicated on the use of the software for downloading of copyrighted popular music by users; the non infringing uses of the software would have generated nowhere near the volume of use required by the business model.

39.

THE DIGITAL MILLENNIUM COPYRIGHT ACT

The rise of digital music recording technology in the 1980s, followed by the public internet in the 1990s, gave rise to a multitude of legal and technological challenges for the recording industry. New technologies created several new means for music consumers to make and distribute unlicensed copies of recordings, thus threatening the financial reward structure of the industry.

In a relatively rare and quick response to changing technology, the U.S. Congress passed a set of amendments to the U.S. Copyright law in 1998 designed to control the spread of digital piracy of music and video over the internet and to establish a legal framework for adjudicating the growing number of allegations of copyright infringement against internet providers. This set of amendments was named the Digital Millennium Copyright Act (DMCA) and has been an important source of both resolution and continued conflict as the internet has exceeded nearly all expectations of the extent to which it would transform the consumption and distribution of music and other creative content.

The most important part of the DMCA for our purposes is a set of provisions known as the "safe harbor" rules. These rules are contained in a set of new laws created by the DMCA and known separately as the Online Copyright Infringement Liability Limitation Act. (Other parts of the DMCA govern other issues related to copyright, computers, and the internet.) These safe-harbor provisions of the DMCA that relate to online infringement are contained in Section 512 of the U.S. copyright law, titled "Limitations on liability related to material online."

The "safe harbor" rules provide a set of actions that an internet provider can take to shield themselves from copyright infringement claims, thus giving them a "safe harbor" from legal liability. Here are the steps the DMCA requires of an "internet service provider" (ISP) to take advantage of this legal shield:

- The ISP **must not have actual knowledge** that the copyrighted material or an activity using the material on the system or network is infringing;
- In the absence of such actual knowledge, the ISP **must not be aware** of facts or circumstances from which infringing activity is apparent; or upon obtaining such

knowledge or awareness, **acts expeditiously to remove, or disable access** to, the copyrighted material;

- The ISP **does not receive a financial benefit** directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity; and
- Upon **notification of claimed infringement**, the ISP responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity.

The term **"internet service provider" is broadly defined** to mean any person or company that either offers online access to a network or provides any services on such an online network.

The DMCA's safe-harbor provisions constitute what is known as an "affirmative defense," which means that a defendant in an infringement claim must affirmatively prove that they have met all the elements of the defense. In other words, it is not up to the plaintiff to prove that the defendant does *not* meet the safe-harbor threshold; rather, the defendant has to prove that they *do* meet that threshold.

Many companies rely on the safe-harbor provisions to allow users to provide online content of copyrighted material, most notably YouTube, but increasingly other services such as Amazon's Twitch service, and TikTok. *The safe-harbor provisions are not available to online companies that initiate* *the provision of copyrighted material themselves, such as Spotify.* Those companies are not shielded from liability for any copyrighted material they place online without license to do so. However, for companies such as YouTube that rely on their users for placement of copyrighted material, rather than making it available themselves, the DMCA's safe-harbor provisions are a crucial legal shield to copyright infringement claims.

YouTube and the DMCA

YouTube has become a high-profile laboratory for implementation of the DMCA's safe-harbor rules. Let's take a look at how YouTube stays in compliance with the DMCA's legal safe harbor, which will in turn allow us to see where those rules may be creating new copyright problems while trying to solve the problem of online music piracy.

- **User's upload content and YouTube only provides the network.** The most basic requirement for taking advantage of the DMCA safe-harbor provisions is to create a platform on which the content is created and shared by the user, rather than by the service provider (YouTube in this case). YouTube does not create video or music content (with the only very rare exception, such as YouTube's infamous "best of YouTube" compilations); rather, it hosts a platform on which users post the content. YouTube plays the user content other users choose to view without altering that content.

However, we can also see in YouTube's actions a potential flaw in their system: YouTube is not completely passive in its stance towards content. Rather, YouTube actively promotes and "suggests" certain content to users, and it "demonetizes" or outright bans certain content that it feels is outside the parameters of its guidelines. YouTube might claim that its guidelines are enforced and suggestions generated automatically through its "algorithms," but those algorithms are not made public so suspicion arises that they are not as objective or automatic as YouTube claims them to be.

- **YouTube removes access to videos when it becomes aware that they contain unlicensed copyrighted material**. YouTube has put in place a well-known system by which the owner of copyrighted material can file a "takedown notice" that alerts YouTube of an allegedly infringing video. YouTube then offers the copyright owner a choice of whether it would like to have the offending video taken down or, in the alternative, "monetize" the video so that any ad revenue from the video gets redirected to their own account rather than to the user who uploaded it. By implementing this mechanism, YouTube retains its legal safe harbor under the DMCA by taking down infringing videos when it becomes aware of them (or allowing the copyright owner to claim any financial benefits from them).

There are two unfortunate consequences of this self-enforcement mechanism mandated by the DMCA. First, there is no mechanism to ensure that those who file these takedown notices are actually the copyright owners of the material in question, so many videos are falsely flagged for allegedly copyright violations. The takedown and monetization penalties are thus enforced with little to no fact-finding as to whether the claims are legitimate. YouTube does provide an appeal mechanism for users whose videos are issued takedown notices, but it's unclear how many users are aware of their rights in such appeals, how long such appeals take, and whether the outcomes of such appeals accurately reflect the true ownership of the copyrighted material. There have also been cases of people filing fraudulent takedown notices against YouTube creators, falsely claiming that their videos are infringing copyrights, and then demanding payment from those users to withdraw their claims lest the users lose monetization of their content or face a ban from the site from multiple violations. In 2019, YouTube successfully sued one individual who had repeatedly filed false takedown notices in such an effort to extort payments from YouTube creators. The individual was forced to apologize for their fraud and was fined

$25,000. (*YouTube vs. Christopher Brady,* USDC, Dist. of Nebraska, 2019.)

- **By removing access to the infringing videos, and banning repeat offenders, YouTube does not financially benefit from copyright infringement on the site.** YouTube's takedown notice and content removal mechanism allows YouTube to comply with the DMCA's requirement that a provider must not financially benefit from any copyright infringement on its site in order to obtain the legal safe harbor.

These issues were addressed in an important legal dispute between Viacom (and other plaintiffs) against YouTube initiated in 2007, in which Viacom claimed that YouTube infringed on the plaintiffs' copyrighted video and audio content by hosting videos that contained that content. In 2010, the District Court held that YouTube was protected from legal liability under the DMCA safe-harbor rules, and that judgement was affirmed in part and reversed in part by the 2nd Circuit Court of Appeals in 2012. Before the District court could reconsider the issues reversed by the Court of Appeals, however, the lawsuit was settled by the parties. The 2nd Circuit Court of Appeals opinion issued in 2012 provides some insight into how YouTube manages to retain its legal safe-harbor despite the presence of unauthorized copyrighted material on its site.

The Viacom decision first affirms that the "actual knowledge" component of the DMCA requires that the internet provider have knowledge of *specific, unlicensed copyrighted material* on its service, not just knowledge that there is likely some unlicensed material somewhere on the site. Thus, YouTube (and other online providers) would only have to address the specific unlicensed copyrighted material that it becomes aware of, rather than having the duty to be sure that there could not theoretically be any unlicensed material on the site. YouTube's "copyright takedown notice" system, which asks users to identify unlicensed material they find on the system, gives YouTube the actual knowledge of such specific infringements without having to concern themselves with *potential* infringement that *might* be present in the system. This application of the statute seems reasonable and practical: we would not want to require a service provider to hunt down *potential* copyright infringement among millions of videos because that would likely be impractical. Instead, it is more practical to only ask the provider to respond to actual instances of copyright infringement that it becomes aware of.

The DMCA and Fair Use.

The DMCA was enacted by Congress in an attempt to catch copyright law up to the internet age. In particular, the safe-harbor provisions of the DMCA discussed above provide an extra-judicial process and guidelines for internet service providers to deal with copyrighted content being posted by users on their services. Those guidelines have generally served to limit the amount of unlicensed copyright material appearing on the internet, thus protecting the rights of copyright holders. However, because this process skirts the judicial system and relies instead on the actions of internet service providers in a self-policing mechanism, some of the protections that have evolved to protect content creators from over-aggressive enforcement of copyright laws have been pushed aside.

In particular, the set of protections that come under the name "fair use" have taken a back seat to the efficiency of the "safe-harbor" protections. As we learned above, fair use is an argument that a defendant can raise in a legal proceeding when their content may technically violate a copyright, but when that violation is excused because the purpose or non-commercial nature of the content weighs in balance against its restriction due to a lack of a license. However, when anyone can file a copyright take-down notice on YouTube, and the result is an immediate takedown or demonetization of the content, the opportunity to assert a fair-use defense is often lost, or at least delayed or encumbered.

A copyright takedown notice system is not a legal proceeding: there is no judge, no jury, no witnesses, and no legal representation. The content creator may have some ability to appeal the takedown notice, but that appeal is also not heard in a judicial setting. Recall that a fair-use defense is a factual argument that is meant to be considered by a judge and jury after witness testimony and legal argumentation. Those process protections are only an after-thought in the DMCA safe-harbor guidelines, leading many content creators who might have very legitimate fair use arguments left to merely wonder why they have no forum in which to make those arguments in a system that is clearly tilted in favor of copyright holders.

The issue of fair use in the context of DMCA takedown notices was considered by the 9th Circuit Court of Appeals in a well-known 2016 decision, *Lenz v. Universal Music*, involving the music of Prince. The *Lenz* case was initiated by a mother who had posted a 29-second video to YouTube of her toddler son dancing to the Prince song "Let's Go Crazy." The focus of the video is clearly on the young boy and not on the particular music, which is coming from a phone or other low-fidelity audio source in the background. However, a Universal Music employee manually monitoring YouTube for copyright violations involving Prince's music by searching for song names came across the video of the dancing toddler. The Universal employee, who promptly filed a takedown notice of the offending video, had not been instructed to consider fair use in making his determination, focusing instead only on whether a Prince song could be identified in the sound of the video.

Remarkably, the mother of the dancing toddler sued Universal for misrepresentation in its takedown notice, claiming that by not considering the potential fair use claims involved in the offending video Universal had not complied with the DMCA, which requires that a copyright holder have "a good faith belief that the use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law." The 9th Circuit not only agreed with plaintiff Lenz, but clarified that because the fair use balancing test had been written into the 1976 Copyright Act — whereas previously it had only been a caselaw doctrine — it had thus been transformed from an affirmative *defense* into a *right* to use copyrighted material under certain circumstances. Given their determination that fair use is a right to use copyrighted material under certain circumstances, the 9th Circuit concluded that *copyright holders must consider in good faith a potential fair use claim before sending a DMCA takedown notice*.

However, despite the 9th Circuit's *Lenz* decision, it is clear from the number of copyright takedowns of videos with readily apparent fair use arguments that copyright holders are not actually following the spirit of that decision. Part of that failure to consider potential fair use claims is certainly also due to the fact that DMCA claims have become mechanized under sophisticated "Content ID" algorithms that automatically flag videos for use of copyrighted material based on almost instantaneous recognition of a digital thumbprint of copyrighted sounds or images. Such automated systems, as sophisticated as they are, cannot yet account for potential fair use of the copyright material they find.

The issue of fair use rights being trammelled by the DMCA has begun to get a great of public attention in recent years, particularly as YouTube content creators have begun to complain that their use of copyrighted material for educational, criticism, and parody videos has been subject to takedown and demonetization by copyright holders who do not respect the fair use doctrine. Several of the more prominent music-education "YouTubers," such as Rick Beato, Adam Neely, and Paul Davids have been vocal about their struggles to provide educational or critical commentary on popular music without facing demonetization or takedowns of their video content on YouTube, despite what they feel to be the obvious fair-use defense of their use of copyrighted music in those videos.

Criticism of the DMCA on several fronts, including its inability to adequately provide account for the fair-use defense, has increased to such an extent that the U.S. Senate Judiciary Committee, Subcommittee on Intellectual Property, has scheduled a series of hearings in 2020 to consider whether the DMCA should be revised. The issue of fair use was the topic of one such hearing on July 28, 2020, which heard from a range of witnesses, including copyright protection advocates and fair-use content creators (including YouTuber Rick Beato). One of the witnesses in these Senate hearings was Jane

Ginsburg, professor of Literary and Artistic Property Law at Columbia Law School. In her testimony, Professor Ginsburg provided several possible fixes to the DMCA for Congress to consider in order to align the takedown procedures with fair use:

1. Require copyright holders to conduct a fair-use determination before filing a takedown notice. In other words, prior to filing a takedown notice, copyright holders could be required to confirm that they had reviewed the allegedly infringing material for potential claims of fair use. Intriguingly, Professor Ginsburg alluded to the possibility that this could be done automatically through artificial intelligence, though she admitted it is unclear how that might work or whether that capability is currently feasible.
2. Provide for an "alternative dispute mechanism" for content creators to appeal a copyright takedown based on evidence of fair use. Such a mechanism could be built into the process, allowing content creators to quickly access a mechanism to provide evidence of fair use, rather than having to first appeal a takedown after it has already occurred and wait for replies to their appeals that might still be in the hands only of the copyright holder.
3. Encourage voluntary agreements between service providers and copyright holders that use of content below a prescribed minimal threshold percentage would

> automatically be deemed "fair use". Ginsburg admits that such voluntary measures might be wishful thinking and less than accurate or predictable, but that they could be easily automated.

In his Senate testimony, YouTuber Rick Beato offered another solution that seems at least as capable of remedying the problem as those presented by Professor Ginsburg. Beato proposes that creators could apply to become certified "blue check" creators who have demonstrated that their content is made under a pre-cleared "fair use" intention and agreeing to follow certain guidelines to maintain that pre-clearance. Beato references Twitter's similar "blue check" system for certifying its users to demonstrate the practicality of such a solution. The government already employs such pre-clearance systems in airline security with the TSA "precheck" flight security status.

Whether congress will eventually craft a legislative solution to the conflict between the DMCA takedown system and fair use is far from certain. Certainly, the current takedown situation is proving to be untenable for content creators who wish to create educational, critical, or parodic content on the internet using copyrighted material. Given the state of political paralysis currently gripping Congress, one would hesitate to bet on any quick resolution of *any* issue, but this issue does seem to be getting a great deal of attention in the public so anything is possible. Perhaps the level of attention to this issue will cause the internet service providers to craft a voluntary resolution of this issue in the hopes of avoiding legislative regulatory measures that they would find even more restrictive than what they can come up with themselves. At the time of this writing, it is far too early to tell which direction this will go.

40.

SAMPLING AND SOUND RECORDING COPYRIGHTS

Another technological development in the 1980s, digital sampling, and an entire genre of music that developed around that technology, further strained the interpretation and application of the recent sound recording copyright. Digital sampling involves the use of a digital recording device (the "sampler") to digitally record short fragments of sound that can later be edited, transformed, and replayed by the user within a new musical context. The recorded material can come from a new live recording or from copying parts of a previously existing recording.

Just as with the video cassette recorder and computer MP3 file sharing software, digital sampling technology is one that has a multitude of uses, only some of which result in infringement of sound recording copyrights. However, in the newly-emerging rap and hip-hop genres during the 1980s, the digital sampler became a fundamental and ubiquitous component of both the style and composition technique of those genres. Prior to the digital sampler, “DJ’s” would use one or more turntables to loop and “scratch” short portions of existing vinyl records as part of the musical fabric of rap and hip-hop. The digital sampler extended that technique and made it more accessible, convenient, and predictable through the application of digital recording technology to the process of reusing fragments of previously recorded material to create a new song.

Sampling is by its very nature a copying technology, so it is no surprise that sampling technology created a challenge for copyright law. Unfortunately, the application of copyright law to sampling has been, and remains, inconsistent and confusing. *The first thing that we need to get straight about sampling and copyright is that when sampling is used in a recording, both the work (song) copyright and the sound recording copyright are both potentially involved.* That is, sampling a pre-existing recording may result in two separate claims of infringement: the song copyright and the sound recording copyright. And each of those copyrights may be owned by different entities, and the merits of each of the two infringement claims will require a separate (though likely similar) analysis. It is critical to understand this fact and keep straight in your mind which copyright is being discussed when dealing with this issue. In this chapter, we are dealing primarily with the effect of sampling on the *sound recording copyright*, not the song (work) copyright.

The reason I do not include a separate chapter on how sampling involves the song copyright is that the legal analysis for song copyright infringement follows the same logic regardless of the technology involved. There are no legally distinct issues involved in determining whether a new song infringes on a copyrighted song that depend on whether or not a sampler was involved or not. In other words, the technology involved in copying does not change the legal analysis of *song* copyright infringement. The question this chapter addresses is whether the technology and technique of sampling changes the outcome of the *sound recording* copyright infringement analysis.

With respect to the sound recording copyright, the issue of technology complicates the legal analysis because the very concept of what constitutes a "copy" of a sound recording can vary dramatically depending on the technology. As we will see, this technological aspect involving sound recording copyrights has caused the law regarding sampling and sound recording copyrights to become muddled and controversial.

Sampling and the *de minimus* rule.

The controversy regarding sampling and the sound recording copyright has boiled down to an open legal dispute as to whether or not there should be a *de minimus* exception applied to sampling cases. In nearly all areas of the law, including copyright law with respect to the *song* copyright, there exists a legal principal, commonly stated in the original Latin as with many legal concepts, based on the phrase *de minimis non curat lex,* commonly shortened to just *de minimis*. This phrase translates loosely into English as "the law does not concern itself with trifles." In other words, it is a legal concept used to express the concept that, even though a set of facts may indicate legal liability under the letter of the law, a specific case may involve such a trivial violation of the law that it should not result in liability.

To take an obvious example, when driving we would not expect to be pulled over by the police and issued a citation because we were driving one mile-per-hour over the speed limit, or even five miles-per-hour over the limit. The police apply a *de minimis* rule to their enforcement of the speed limit because they know that judges would also apply that principle and no ticket would be upheld for such a minor infraction. The *de minimis* exception applies in many areas of the law, including infringements of the song copyright. As discussed above, the song copyright uses the standard of *substantial similarity* to determine whether a songwriter has plagiarized a copyrighted song in creation of a new song. Copying two notes of a melody, or two words from a song's lyrics, would in nearly all cases fall below the level of substantial similarity and thus also be examples of the *de minimis* rule in action.

However, with respect to the sound recording copyright, there exists a line of cases that have held that there can be no *de minimis* exception with respect to sampling. Those cases have held instead that there exists a *bright line rule* such that *any amount* of sampling of a copyrighted sound recording, regardless of whether it is even recognizable, will constitute infringement of the copyrighted sound recording. This line of reasoning reached its apex in the case of *Bridgeport Music v. Dimension Films*, in which the 6th Circuit Court of Appeals, based in Nashville, ruled in 2005 that there can be no *de minimis* exception in sound recording copyright infringement cases involving sampling. This case was very important because it came out of a federal circuit court of appeal and there was no Supreme Court decision on that issue, so the *Bridgeport* decision was at the time the highest court ruling on the subject.

The *Bridgeport* decision involved a two-second sample of an electric guitar riff from the Funkadelic song “Get Off Your Ass and Jam” (1975) which was then looped by the defendant for 16 beats in the song “100 Miles and Runnin’” from the film *I Got the Hookup* (1998). The Court of Appeals in *Bridgeport* summarized its holding as follows: “The heart of [the plaintiff’s] argument is the claim that no substantial similarity or *de minimis* inquiry should be undertaken at all when the defendant has not disputed that it digitally sampled a copyright recording. We agree and accordingly must reverse the grant of summary judgement [for defendant].” (798) The court went on to assert that “[t]he music industry, as well as the courts, are best served if something approximating a bright-line test can be established." (799) "If," the court asks rhetorically, "you cannot pirate the whole sound recording, can you 'lift' or 'sample' something less than the whole? Our answer to that question is in the negative." (800) "When you sample a sound recording you know you are taking another's work product," the court observed, leading to the practical outcome of the case: "Get a license or do not sample." (801)

Revival of the *De Minimis* Standard and a Circuit Split: *VMG Salsoul v. Ciccone* (Madonna) (2016)

In 2016, the 9th Circuit Court of Appeals issued a ruling overturning a summary judgement from the Central District of California that created a rare and momentous "Circuit split" between two U.S. Circuit Courts of Appeals. The split occurred because the 9th Circuit openly refused to follow the 6th Circuit's opinion in the *Bridgeport* case discussed above. The 9th Circuit held that there *is* a *de minimis* defense to copyright infringement claims with respect to the sound recording copyright, and that the 6th Circuit had erred in holding that there was not.

The *VMG Salsoul* decision arose from the use of sampled horn hit in Madonna's massive 1990 hit single, "Vogue." The sample was taken from a horn hit lasting 0.23 seconds in the much less successful 1983 song "Ooh, I Love It (Love Break)" by The Salsoul Orchestra. An interesting aspect of the facts to this case is that the producer of Madonna's "Vogue" was also the producer of the Love Break song, Shep Pettibone, and the one who created the sample. This is an unusual case of "self-plagiarism" because Pettibone did not own the copyright to the earlier sound recording, so was not actually suing himself. He was, however, named as a defendant (along with Madonna) in the case.

If Pettibone had not been the producer of both recordings, it seems unlikely that this lawsuit would have ever been filed. The sample in question is so short (0.23 seconds, though it is repeated several times), that it seems unlikely that anyone would have noticed where it had come from were it not for the fact that Pettibone was involved in both recordings, and had specifically directed his assistant to place the altered sample from his earlier work in Madonna's new recording.

In its *Salsoul* decision, the 9th Circuit relied on the very short length and altered sound of the horn hit: "After listening to the audio recordings submitted by the parties, we conclude that a reasonable juror could not conclude that an average audience would recognize the appropriation of the horn hit. That common-sense conclusion is borne out by dry analysis. The horn hit is very short — less than a second. The horn hit occurs only a few times in Vogue. Without careful attention, the horn hits are easy to miss. Moreover, the horn hits in Vogue do not sound identical to the horn hits from Love Break." (880)

The 9th Circuit explicitly declined to follow the 6th Circuit's "bright-line" rule regarding sampling and sound recording copyright infringement despite the plaintiff's specifically arguing for the court to follow that relatively new rule: "Other than *Bridgeport* and the district courts following that decision, we are aware of no case that has held that the *de minimis* doctrine does not apply in a copyright infringement case. Instead, courts consistently have applied the rule in all cases alleging copyright infringement." (881) The 9th Circuit also pointed out that, despite the 6th Circuit's decision, every other District Court outside the 6th Circuit had declined to follow it. (886)

The 9th Circuit's interpretation of the U.S. Copyright statute convinced it that Congress intended for sound recordings to be treated similarly to other copyrighted works (including musical works), all of which are judged based on a standard of "substantial similarity," and the court failed to find any language in the U.S. Copyright statute that excluded sound recordings from a *de minimis* standard. Finally, the 9th Circuit addressed the 6th Circuit's reasoning in *Bridgeport* that the "bright-line" rule would lead to a clear enforcement of the law and a market-based system for licensing of samples: "[The 6th

Circuit argues that] its bright-line rule was easy to enforce; that 'the market will control the license price and keep it within bounds'; and that 'sampling is never accidental' and is therefore easy to avoid. Those arguments are for a legislature, not a court. They speak to what Congress could decide; they do not inform what Congress *actually decided*." (887, quoting *Bridgeport*).

Because the 9th and 6th Circuit Courts of Appeal are both courts of equal standing, the split between them on this issue of law creates a conflict in how the law is interpreted. The lower District Courts in the 6th Circuit (based in Nashville) are required to follow the *Bridgeport* decision, just as the District Courts in the 9th Circuit (based in San Francisco) will be required to follow the *VMG Salsoul* decision. District Courts in other jurisdictions will be able to choose which of these two precedents to follow, or create their own interpretation, as they are not bound by either the 6th or 9th Circuit decisions.

As the 9th Circuit noted in its *VMG Salsoul* decision, most (if not all) District Courts outside the 6th Circuit have been following the same legal reasoning as the 9th Circuit in allowing a *de minimis* defense in both music works and sound recording copyright disputes, including those involving digital sampling. However, the 6th Circuit and its District Courts are still bound by the bright-line rule of the *Bridgeport* decision. That split will remain until the U.S. Supreme Court decides to accept an appeal on this issue, or the 6th Circuit decides to overturn its own decision. A Circuit Court split is one of the reasons the Supreme Court agreed to hear a case, so it seems likely that this issue will eventually be resolved.

The problem with such a split is that it provides an incentive for a plaintiff to *forum shop* — deciding to file a case in the 6th Circuit rather than the 9th Circuit if they want to take advantage of the bright line rule against a *de minimis* defense. Of course, in order to file in the 6th Circuit, which includes Nashville, the plaintiff will have to show that the courts in the 6th Circuit have *jurisdiction* over the case. Given the importance of Nashville in the music industry, it may often be possible for plaintiff's to prove that court's jurisdiction in their dispute.

"Sound alike" Recordings.

The issue of digital sampling brings up another related issue with a non-intuitive result. Imagine you decide that you love a recording of a song so much that you want to copy it as faithfully as possible, so faithfully that an average listener would not know your recording was not the original. For example, let's say that recording is the Michael Jackson song "Thriller," one of the biggest-selling songs of all time. You are aware that the recording is copyrighted as a "sound recording" and so you cannot literally reproduce it and pass it off as your own, as that would certainly be flagged as piracy and you would immediately be sued for copyright infringement of the sound recording when you tried to sell or otherwise distribute it. So, you come up with a new plan: because you are an excellent musician, vocal mimic and sound engineer, you believe you can perfectly imitate the sound and playing style of every instrument on that recording and even imitate Michael Jackson's voice. After laborious efforts, you finally manage to recreate in your own home studio the exact sound of "Thriller" through your own efforts without actually duplicating the original recording through any technological means — you played all the instruments on your recording and sang all the vocal parts. But everybody who listens to your recording believes it's Michael Jackson's original recording and can't believe it when you tell them otherwise.

Are you infringing on any copyrights when you try to market and sell your recording of "Thriller" under your own name?

Believe it or not, you would actually likely *not* be infringing on any copyrights through your self-produced *sound alike recording,* regardless of how indistinguishable it is from Michael Jackson's recording. First, let's deal with the issue of the *musical work* copyright (the song, rather than the recording). As we know, the U.S. Copyright law provides for a compulsory license for musical works, so that when you record a cover song, all you have to is give notice of your recording of the song to the copyright holder and ensure that the appropriate royalties are paid after sales or streams of your cover song. There is no infringement of the song copyright due to cover songs as long as the relatively simple steps are taken to assert the compulsory license.

But what about the *sound recording* copyright? Doesn't your new recording, which sounds identical to the original, infringe on that copyright? The answer is, somewhat surprisingly, no. You imitated the original sound recording, but you did not literally reproduce it. The voices and instruments on your recording were all played and sung by you, not by Michael Jackson and his various studio musicians. You did not *copy* the original recording; you only *imitated* it when making your own recording. It does not matter how closely you imitated it; as long as you didn't literally *reproduce* that recording, you are not infringing on the copyright.

The concept of the "sound alike" recording is even explicitly allowed in Section 114(b) the U.S. Copyright statute itself: "The exclusive rights of the owner of copyright in a sound recording ... do not extend to the making or duplication of another sound recording that consists entirely of an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording."

After you've thought about this issue for a bit, I think you'll come around to seeing that while at first counterintuitive, this result makes sense. The sound recording copyright extends only to a particular recording fixed at a particular place and time in some recording medium (vinyl, tape, computer file, etc.). The sound recording copyright does not apply to the sounds made by the instruments in that recording, or the playing style of the musicians in that recording, or the vocal style of the singer in that recording, etc. The sound recording copyright applies only to *that specific and particular recording* of those instruments, sounds, and voices. Any other recording of those sounds, instruments, and voices would be a separate sound recording, eligible for its own sound recording copyright. So, not only would your sound-alike recording of Michaels Jackson's "Thriller" not violate the copyright of the original sound recording, *your* new recording of the song would itself be covered by its own sound recording copyright. If somebody were to copy *your* new recording of "Thriller," they would be infringing on *your* sound recording copyright but not on the copyright of Michaels Jackson's original sound recording.

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