International Journal of Music Business Research

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AIMS AND SCOPE

The International Journal of Music Business Research (IJMBR) as a double-blind reviewed academic journal provides a new platform to present articles of merit and to shed light on the current state of the art of music business research. Music business research is a scientific approach at the intersection of economic, artistic, especially musical, cultural, social, legal, technological developments that aims at a better understanding of the creation/production, dissemination/distribution and reception/consumption of the cultural good music. Thus, the IJMBR targets all academics, from students to professors, from around the world and from all disciplines with an interest in research on the music economy.

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CONTENTS

Editorial

Peter Tschmuck[1] *and Dennis Collopy*[2]

One might wonder if there is a need for an academic journal on the music business. Several high-profile trade publications on the music business are published regularly and in the torrent of academic journals one can find titles that focus on popular music, the creative industries, cultural economics and arts management. Nevertheless, there is a gap for a publication wholly dedicated to the academic research of music business and industry topics. Academics from several disciplines – economics, management sciences, sociology, law, cultural studies, musicology, media studies, psychology, anthropology etc. study the economic aspects of musical life. Until now, however, there has been no specialised outlet for academic articles on the phenomena of the music economy. The International Journal of Music Business Research (IJMBR) provides an interdisciplinary platform to disseminate research results on the music business and industry.

The IJMBR is also the voice for an emerging international scientific community focusing on music business research. Before the millenium the annual output of monographs, edited volumes, journal articles and even working papers on music business/industry topics was very limited. However, with the advent of the digital revolution, which affected the music economy very early, interest in the structures of and processes within the music economy grew exponentially over the years. Articles on filesharing of music, the concert business, pricing of music products etc. have been published in highly rated academic journals in various disciplines. This highlighted the importance of a relatively small business

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sector for the economy and the global society in a digitised world. Currently the output of academic contributions to music business industry research is vast and continues to grow. The IJMBR as a double-blind reviewed academic journal provides a new platform to present articles of merit and to shed light on the current state of the art in this research field.

The music economy is a broad field encompassing various research activities. Articles on musician's income sources and earnings, their social and economic welfare and status should be included as well as on the conditions of production, distribution and use of music. Research on the organisations within the music economy such as record companies, music publishers, collecting societies, music educational institutions, concert promoters, booking and artist agencies, ticketing companies, manufacturers of music instruments all fit within the scope of the IJMBR along with the institutional framework for the production, distribution and use of music such as music related intellectual property rights (such as copyright, moral rights, patents, trademarks and brands), music business contracts and policy issues (e.g. public funding, competition policy, taxation, social policy for musicians). In addition articles on the international music trade (such as the licensing of music and music export initiatives) and music market structures are welcomed as well as features on music professions, music professionals, music management, marketing, sponsoring and merchandising. There is also room for papers on all music genres and for so-called functional music such as music for religious practices and rites, films, TV-series, commercials and even "elevator" music, sound design, sound branding, music visualisation. Last but not least all aspects of the history of the music businesses should be highlighted in the IJMBR.

The first issue of the IJMBR reflects a wide range of music business research topics that fit within the scope of the journal's remit. In a theoretical piece, Patrik Wikström argues that the economic value created from recorded music is increasingly based on context rather than on ownership and that the focus of music distribution should shift from download and streaming to contextual models of music experience. The second paper presented initially by Pinie Wang at the first Young Scholars' Workshop of the Vienna Music Business Research Days 2011 highlights, in a historical analysis, the complex inter-relationship between the US media, advertising and music industries. Martin Kretschmer then addresses his contribution to the recent EU-copyright term extension for sound recordings, proposing that copyright interests should be transferable only for an initial term of 10 years, after which they will revert to the creator. This should lead to a remarkable decrease in orphaned work and should foster creativity and innovation.

IJMBR targets all academics, from students to professors, from around the world and from all disciplines with an interest in music business research. Interdisciplinary papers are especially welcomed if they address economic and business related topics in the field of music. The IJMBR should also garner interest from musicians, music business professionals, music teachers and also of policy makers and art administrators. All articles are subject to a double-blind review and three editors from academic institutions, each covering different research fields, are responsible for the reviewing process. The IJMBR is published twice a year in April and October and it is always possible to submit papers for consideration. The guidelines for submissions can be found at the end of this issue.

In conclusion we look foward to receiving as many interesting papers as possible and request submissions are sent to **music.business.research@gmail.com**.

A Typology of Music Distribution Models

Patrik Wikström[3]

Abstract

A typology of music distribution models is proposed consisting of the ownership model, the access model, and the context model. These models are not substitutes for each other and may co-exist serving different market niches. The paper argues that increasingly the economic value created from recorded music is based on context rather than on ownership. During this process, access-based services temporarily generate economic value, but such services are destined to eventually become commoditised.

Keywords: music distribution, value creation, co-creation, ownership, context

1 Introduction

In this conceptual paper I propose a typology of music distribution models to give a new perspective on the on-going transformation of the music industry. Much of the current debate (e.g. eMusic, 2011; Mangalindan, 2011; Robertson, 2011b) on the transformation is focused on the viability and impact of online subscription music services (such as Spotify, Rdio, Deezer, etc.) that provide access to music, without providing ownership of that music. At the core of the debate lies the question whether such services will make traditional music distribution models obsolete. In this paper I attempt to look beyond this debate and argue that even though access-based models to some extent are replacing ownership-based models, the access-based models are unable to serve as a long-term solution for the industry. I suggest that "context-based" services which allow people to "do things" with music have greater po-

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tential to create economic value than those services that merely provide access. I also suggest that context-based models not only have implications for the distribution of music but also for the creative process and the musical artefact itself.

2 The ownership model

According to the music distribution model that dominated most of the last century, consumers acquire music recorded on plastic discs or cassettes. They keep the discs in their homes, sometimes in expensive wooden cabinets that have been designed and made for this particular purpose. Music listeners who follow this model value the material and the tactile properties of the discs (Giles, Pietrzykowski & Clark, 2007). The music collection is one of their most important identity markers together with other material possessions such as vehicles, furniture and clothes and they have a strong emotional attachment and sense of ownership of the music they treasure. Record labels reinforce this sense of ownership by using verbs such as "buy", "own", "steal" in their marketing, even though in practice they only grant their users a limited license to listen to the music (e.g. Peoples, 2011). This well-established model can be referred to as the "ownership model", even though very few people actually do own the music that they listen to.

Physical music distribution has plummeted during the last decade, and even though online music distribution has been unable to compensate for this drop, online distribution of recorded music nevertheless is growing rapidly in importance (IFPI, 2010). It is interesting to note that when music distribution moves online, many virtues and practices are transferred from the physical to the virtual world. For instance, two successful services during the first decade of online music distribution merely transferred the ownership model from the physical to the virtual context. Apple's music service iTunes introduced one of the most successful models for online music retailing, "single-song download" to the mainstream audience. This was indeed an innovation but fundamentally, iTunes closely mimicked traditional music distribution logic, which made it easy for rights holders and consumers to comprehend and embrace the service (e.g. Wikström, 2009). eMusic, another early online music service, also mimicked the physical world logic by transferring the record-of-the-month model to the virtual context (ibid). Both these models were based on principles of acquisition and ownership even though the physical record had been removed from the equation. Music listeners still "bought" and "owned" the music files that were distributed by the online services (e.g. Apple, 2011; eMusic, 2011).

However, as the Internet continues to undermine the rights holders' ability to control the flow of digital information, concepts such as ownership and acquisition have slowly become increasingly irrelevant (e.g. Shirky, 2008; Strangelove, 2005; Wikström, 2009). When a music consumer is able to download hundreds of songs in a few seconds (without paying) and to keep thousands of songs on their laptops, the concept of the once cherished and carefully selected record collection crumbles. As a consequence, a new kind of music listening behaviour emerges that complements the traditional ownership model. For this music distribution model it is of little relevance whether music listeners actually "own" a song or not and far more important that they are able to find and access the music, everywhere and at anytime.

3 The rise and fall of the access model

As is observable in the contemporary music economy, this "access model" does not immediately replace the ownership model. CDs continue to be appreciated by a large part of the music listening audience although access-based music services are going through a period of rapid growth (IFPI, 2010), Both models continue to exist side-by-side but as time goes by, market data indicates that the music business seems to tilt towards the access model and away from the ownership model (ibid). Besides the increasing number of online music services that are based around the principles of the access model, there is also a growing tendency among music listeners to accept these services and behave according to the same principles. One example of this gradual shift from ownership to access concerns the role of music as an identity marker. I have already recognised the traditional importance of the record collection as an identity marker within the logic of the ownership model, but how does this identity marker correspond to the access model, where the record collection has lost its relevance? In an era of social media, the act of listening to recorded music becomes increasingly social and public (e.g. Mjøs, 2012; Suhr, 2012). Certainly, listening to music has always been a relatively social activity (e.g. Frith, 1996), but with social media services such as last.fm and Facebook, music listeners are able to continuously broadcast to the world what they are listening to at a given moment (Baym, 2010). The role of music listeners' record collections as manifestations of their music identity is replaced by a steady flow of information about their real-time musical experiences. A collection of physical objects loses its relevance as an identity marker and is being replaced by a list of tracks listened to during the last hour, week or year. Experience replaces ownership.

Experiences are usually packaged and sold as services rather than as products, and while the ownership model shares features with product-centred industries such as chocolate bars, toothpaste and socks, the access model shares features with service-centred industries such as hotels, restaurants and banks. Numerous access-based music services like Deezer, Grooveshark, MOG, Pandora, Rdio, Slacker, Spotify, and Wimp, have been launched during the last few years. The access model is still in its early days and the market for these services is still very immature. They are still actively searching for an optimal service structure and pricing model that is able to maximize the revenues from subscription fees and advertising. Currently, most of these services are limited by for instance the size of their music catalogues, the number of countries they are available in, how often and with what flexibility it is possible to listen to a certain song, the range of supported mobile devices, etc. Considering the diversity of the services it is possible to claim that the competition between the services simply is not very intense. However, fundamental economic theory states that as time goes by, also this market will evolve and mature as well as the differentiation between these services will be shrinking and the competition between them will be intensifying (e.g. Pindyck & Rubinfeld, 2004). Eventually, as their search for an optimal service structure continues, those services who survive will all be able to offer more tracks than their users care to worry about, they will be available in every relevant market, they will offer the same technical quality, and they will support every conceivable mobile device. In other words, the subscription market for music services based on a pure access model is destined to eventually become a commodity market where competition is primarily based on price. The dynamic of such markets for products and services such as electricity, water or iron ore is well known. Such markets are characterised by fierce competition and low profit margins, and they are usually not a very attractive place to do business, unless you are a very large and strong actor (ibid).

4 The context model

When the aforementioned state of the market has been reached and the room for innovation and differentiation based on the pure access model is exhausted, online music service providers will need to look for other ways to differentiate their services and to maintain their profitability. One way of doing this is to go beyond the pure access model and to create services and features that provide a "context" to the songs that the users can access. That context may for instance enable music listeners a way to search and easily find the song they are looking for at a particular time, to share their music experiences with their friends, to organize their favourite music experiences in convenient ways, etc. Such context-based services provide a less deterministic and far more expansive space for innovation than those services that are based on a pure access model. While innovation within the access model framework can lead towards the same ultimate goal (universal access to all songs ever recorded), innovation within the context model framework lacks such a clear-cut outcome. A provider of a context-based music service has a greater potential to create a competitive advantage by using unique, innovative features than within the access model framework. The fundamental difference between the two models makes it far more appealing to invest and develop a context-based service rather than to an access-based service.

This transformation from access to context is illustrated by the evolution of the online music service Spotify. When Spotify launched in 2008 it was primarily focused on providing basic access to music. The company's business development focused on expanding its music portfolio, improving the technical quality, increasing the number of supported mobile devices, launching in new territories, etc. All these initiatives focused on providing better access to music, but did not enable the listeners to do much more than to listen to songs via the service. The focus of the company's service development efforts has shifted somewhat during 2011 as they put more emphasis on contextual features. Spotify's strategy for developing contextual features has been based on partnerships with other service providers, most notably Facebook (Ek, 2011a). The have also encouraged and facilitated other companies' (such as Billboard, Rolling Stone, Pitchfork, Soundrop, and the Guardian) efforts to develop applications which have become part of the Spotify application platform (Ek, 2011b). Over time, Spotify's ability to charge a premium for their service will not depend on their ability to provide access to a large music library via a wide range of mobile devices, but on their ability to provide an array of contextual features that allow subscribers to discover, share, organize, and be creative with music. In other words, the value created by the service is primarily created by the context-based features and not by the access-based features.

5 Consequences for rights holders

So far this paper has argued that one way of structuring and understanding music industry distribution models is by using a typology consisting of the three archetypes "ownership", "access" and "context". The paper has argued that even though all three models are able to coexist, there is a trend for the industry to move further away from the ownership model via the access model and towards the context model. In the traditional music industry most of the value created by recorded music was based on the ownership model. During this transitory period as the industry is moving from physical distribution to Internet distribution, the access model is gaining in momentum. However, I argue that this model is a cul-de-sac and that it eventually leads to the commodification of music access. As a consequence, a growing percentage of the value which is created on recorded music is generated by services which take the universal access to music as a given and which provide different tools and features allowing users to "do things" with the music and sounds they cherish.

This shift has severe implications for music right holders. In the ownership model, rights holders primarily earn their revenues as a fixed royalty based on how many copies of a song or an album the music retailer is able to sell.[4] This revenue model has served the industry well over several decades and many rights holders have tried also to maintain the same model when they entered negotiations on licensing terms with access based music services such as Spotify and others. However, the access model is not compatible with the rights holders traditional revenue model and makes it difficult to create a business model that is sustainable for all the partners involved (ibid). Even though the negotiations were lengthy, eventually mechanisms for generating revenues for rights holders from access based music services have developed allowing Spotify and a number of other similar online music services to get off the ground. (Wikström, 2009)

The second shift from an access model to a context model has similar implications for rights holders as the shift from ownership to access. Rights holders that use access or ownership as the basis for their revenues will run into problems as the value created by these two models continue to diminish. In order to capture some of the growing value generated by contextual services, rights holders need to find new principles and mechanisms for how sharing this value.

[4] It should be noted that some rights holders such as composers, authors, and interpreters mainly earn their revenues from non-recoupable advance payments.

Contextual features are often integrated with services that also provide basic access to content, as shown in the Spotify case briefly presented earlier in the paper. Such services, which offer both access and context, do not lead to an immediate pressure on rights holders to create new revenue generating mechanisms. These services have a proper business relationship with rights holders and whenever a song is used or listened to, the service provider pays a fee to the rights holder. However, what ought to be increasingly concerning from a rights holders' perspective is the fact that a growing number of context-based music services operate with no concern for how the songs have been acquired or accessed.

One example of this type of stand-alone context-based service is the range of services referred to as "online lockers", "cyberlockers", or "cloud-based drives". These services allow users to upload songs to an Internet-based data storage and listen to the music from their computers and mobile devices. Services such as "Hotfile", "RapidShare", "MP3Tunes/Airband", and "Dropbox/BoxyTunes" all provide such services but online giants such as Amazon, Apple, and Google have also launched their own versions of the cloud-based drive.

Most of these services lack agreements with major rights holders and the service providers argue that no such agreement is necessary since it is impossible to distinguish an online locker from an ordinary external hard disk drive (e.g. Robertson, 2011a). As a consequence no royalty is paid when users upload or download songs from their lockers and all of the revenue that these services generate from subscription fees and advertising sales is retained by the service providers. Music and film rights holders on the other hand argue that online lockers cannot operate legally without such agreements and without the rights holders being compensated (e.g. MPAA, 2011). Consequently, they have launched legal actions against some of the online locker operators, but so far without any significant success (ibid).

The legal status of online lockers is still in its early days and it remains to be seen how it will eventually play out. The argument that online lockers provide the same functionality as physical external hard disk drives may lead to some interesting potential consequences. For a numkber of years several European countries have applied a blank media levy on recordable CDs, DVDs, etc. (e.g. http://www.copyswede.se, http://www.hyvitysmaksu.fi). Some of these countries (e.g. Finland) have already implemented these levies on external hard disk drives (ibid). If cloud-based drives provide the same function as an external hard disk drive, rights holders may attempt to extend the scope of blank media levies to include cloud-based drives as well. Regardless of whether such a development is considered to be desirable or not, it would indeed be a rational development and it would also be a way for rights holders to capture a portion of the value created by contextual services without arguing the case of copyright infringement.

6 Let's play together

So far this paper has discussed how the music industry is shifting from an ownership model via an access model further towards a context model. In other words, economic value is increasingly created by providing the audience with tools which allow them to "do things" with music rather than by providing the audience with basic access to music. The discussion has up until now been focused on the distribution of music, but this section takes the reasoning one step further and argues that this transformation has implications also for other segments of the music industry value chain.

A number of artists and composers have during recent years implemented the context model in the creative production of their musical works. Rather than only making polished recordings for the audience to experience and enjoy, they have created services and practices that involve the audience in the creative process and allow the fans to "do things" with music. There have been several attempts to create such services and practices. For instance, the Swedish pop artist Robyn has created an online-based rhythm tool for her album Body Talk that invites fans to play with sounds and images in collaboration with other fans. The rhythm tool generates new music and new remixes of Robyn's loops and sounds for other fans to enjoy, but perhaps more importantly, it strengthens the relationship between Robyn and her fans (http://www.robyn.com). This relationship is of substantial economic value, since it leads to an increased propensity to pay for her other products such as merchandise, concerts and recorded music.

Another European pop artist who is using a different and somewhat more ambitious strategy to engage with her audience is the British artist Imogen Heap. During the last couple of years Heap has done several different projects intended to involve fans in her creative process. She has for instance invited fans to remix her music with the promise that the remixes will be released as an album and that the potential revenues will be shared between fans and Heap. She has encouraged fans to contribute to her official biography by tweeting their thoughts and impressions of the star. During the spring of 2011 she launched another project that eventually developed into her next album. A new song is created, recorded and released over a period of a few months and after three years the new album will be finished. What makes this project particularly interesting is how Heap invites her fans to contribute with sounds, words, images, and videos that she uses as building blocks in the making of the songs. (http://www.imogenheap.com)

It is difficult to determine whether Heap's workflow and business model for the new album project really is viable or not but it is nevertheless interesting to see how she is using her fans as contributors in the production, and once the production is finished, she sells the songs and videos back to her fans.

A third example is a project created by yet another European female musician and singer, Björk, originally from Iceland. In Björk's most recent album project Biophilia, she complemented the traditional album with an ambitious application for the Apple iPad and iPhone. The application is sold for approximately the same price as the traditional full album, but in a similar way to the Robyn example, it allows the audience to create new sounds and rhythms and to explore Björk's visual and musical world. (http://bjork.com)

It is not only Björk that has been inspired by the possibilities offered by technologies and gadgets such as the Apple iPad and other tablet computers. A quick survey of the applications offered for Apple's mobile devices iPad and iPhone shows that a majority of the most successful music applications (free and paid) are not for listening to music, but for making and playing with music.[5] Data on revenues these music apps have generated is not readily available, but based on reports from Apple in March 2011, US$ 2 billion had been paid by Apple to app developers since the launch of the iOS platform (Apple, 2011b). Based on information that music apps constitute approximately 5-10% of the total apps downloaded from iTunes, one might assume these music apps have generated approximately US$ 100-200 million for the developers (Chomp, 148Apps, & Cillingo, 2011). Information about how these revenues are distributed among specific developers is not available. Perhaps not that much when compared the entire music industry, but nevertheless a substantial amount.

During the last decade, the global recorded music industry based on selling and owning recorded music has shrunk by more than 50 per cent (IFPI, 2010). At the same time, the total entertainment industry, in spite of rampant difficulties caused by online piracy and digitisation, has not shrunk at all, but grown by more than 60 per cent (Gunnarsson, 2011). The recorded music industry which once was the second largest entertainment sector accounting for 22 per cent of the consumer spending on entertainment media is now the smallest, accounting for only six per cent (ibid).

In the light of this development, it makes sense for all actors in the music industry to pay attention to the emerging contextual music service business. Björk, Robyn and Imogen Heap use slightly different approaches in their ambition to engage their fans in the creative process, but all three try to grow their revenues created by interactive contextual services when their revenues from traditional sales of recorded music continue to decline.

[5] The top 200 free and paid applications for both iPad and iPhone (total 800 apps) were counted and categorised during a week in May 2011.

7 Conclusions, implications and suggestions for further research

The purpose of this paper is to suggest a typology for music distribution models consisting of three models, namely the ownership model, the access model and the context model. The models are not in any way perfect substitutes and they may coexist and respond to demand of different market niches. However, I argue in this paper that the economic value created from recorded music is increasingly based on the context model and to a lesser extent on the ownership model. I also argue that during this transformation, the access model will play a temporary role as a framework for creating economic value but that such pure access based music services ultimately are destined to become commoditised.

In the second step of my reasoning I argue that the increasing importance of the context model has implications that go beyond music distribution and affect the very core of the musical art form. Examples were presented that showed how popular music artists spend their creative effort on making tools and software that allow their audiences to play with music and to get involved in a creative process. These tendencies raise fundamental questions about the boundaries and definitions of the music industry and the music organizations. Will tools and software for playing with music become an important part of the mainstream music industry? If so, what will this mean for the evolution of music companies? As live music and music publishing became increasingly important industry sectors in the first years of this millennium, traditional record labels reinvented themselves as 360-degree music companies, with equal emphasis on all three music industry segments. If the reasoning brought forward by this paper is indeed correct, music companies will need to add new competencies and perhaps a new business area to their organizations that will enable them to capture the increasing economic value created by context-based music services.

This paper is exploratory and conceptual in its character and it calls for empirical research in order to verify the suggested structures and market dynamics. Primarily, the paper calls for studies in order to measure the value generated by context-based music services as well as the commoditization of access-based music services.

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Music and Advertising. The Influence of Advertising and the Media on the Development of the Music Industry in the USA

Pinie Wang[6]

Abstract
This paper examines the previously unexplored influence of advertising on the transition of the music industry from its beginnings in the USA during the second half of the 19th century until today. The strong influence of advertising on the music business is evident in the theoretical association of these two industries in an interpenetration zone between the economy and the media, within which both subsystems constantly interact. In addition this article explores the various core competencies of the music business resulting from changes in the Media and analyses its original hybrid nature.

Keywords: music industry, music, advertising, media, USA

1 Introduction

There can be little doubt the music industry is undergoing radical change.The conventional core business of the sales of records has been in an inevitable decline for the last decade and the main players of the music industry have changed. Advertisers and their ad agencies have joined the music business. At the start of each year the BBC („the Sound of:") announces the most promising new music for the year ahead. The artists on the list will be chosen by UK-based tastemakers. They are experts in current and new music, whose tastes and decisions are regularly reflected in the media and are capable of setting the musical agenda and

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influencing audiences. However, fewer and fewer newcomers succeed in gaining great commercial success. In early 2009, the BBC predicted the promising future of the Australian band Empire of the Sun. However, the band could only achieve moderate success in their home country and little success in other countries. It was not until Vodafone used the band's song "We Are the People" for its TV commercial in Germany in October 2010 that Empire of the Sun finally topped the German charts (musicline.de). This example demonstrates the impact of advertising on the current music industry.

The emotional and communicative effectiveness of music in advertising has been widely studied since the 1950s. Collaborations between music and advertising, however, started long before: street merchants sang advertising jingles and sheet music was used to advertise products at the end of the 19th century. As media changed, so did the style of music and its content. Advertising as a means of financing played a vital part in this development. After all, advertising not only finances the media, but it also defines their way of working. Looking back to the 1930s, when radio gained prominence in the USA, we see prime time programming lay in the hands of the advertisers. They decided on the music's contents and performers. Tobacco manufacturers in particular were said to be responsible for the invention of the chart show as well as format radio. After the Second World War these music programs were exported throughout the world. As we can see, music as a means of transferring public communication through the media is influenced and shaped by advertising. Advertising agencies were responsible for designing programs and even changed the music industry's modus operandi.

The strong influence advertising has on the music business can be found in the theoretical association of these two industries as an interpenetration zone between the economy and the media, in which both subsystems constantly interact. This paper examines the (previously unexplored) influence of advertising on the transition of the music industry from its beginnings in the USA during the second half of the 19th century until today. Furthermore it reviews various core competences of the music business as a result of changes in the media and discover its original hybrid nature.

2 Theoretical Background

The complex historical relationship between the US media, the advertising and music industries can be examined using a theoretical model that offers multiple perspectives on the connection of media and cultural development: the "Medien-Kulturen-Modell von Kommunikation" (the Media Culture Model of Communication) by Carsten Winter. Media scholar Carsten Winter divides complex social communication into four different concepts of action: "production", "allocation", "reception" and "utilization" (Winter 2008: 429, Winter 2003: 90-92). "Allocation" deals with the "distribution of communication", which enables us to study how advertising and the music industry distribute their content to the public. As a result of the differentiation between several means of communication one can learn about the connection between changes in the media and the development of the music and advertising business. The separation of primary, secondary, tertiary (Pross 1972: 127-229) and quaternary media (Faßler 1997: 117-118) enables us to discover the music industry's various core competences throughout history.

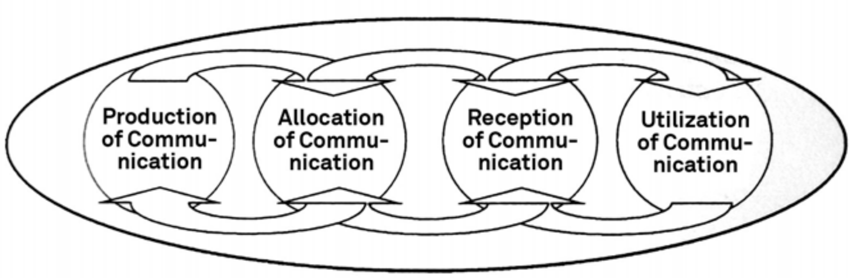

Figure 1: The Media Culture Model of Communication (source: Carsten Winter 2003: 92)

The emergence of the public sphere is a necessary requirement for the formation of the music and advertising industries. This rise of the modern public was the result of a historical progress whose beginnings can be found in the 18th century, when the change in communication politics shaped social interactions. During this time the royal courts lost more and more of their primary functions. The rise of print media as well as political and social communication led to the beginnings of a "literary public" (Hohendahl 2000: 8-17). Until the late 18th century all types of music had a representative function. This utility music primarily served the purposes of church services as well as festivities held in royal courts. Composers were employed as church, court or town musicians and worked on commissioned contracts. Common people were rarely offered the opportunity to listen to music outside church or aristocratic gatherings. Then private Collegia Musica were created, which were soon followed by public concerts. Due to a booming economy and the widespread use of print media in the second half of the 19th century advertising pioneers were able to launch their businesses. Initially they were selling advertising to the printed media and subsequently freed themselves to become agencies. From the early 20th century onwards advertising established itself as an essential component of any company's communication strategy. For these reasons music as well as advertising can be seen as a form of public communication. Both are transferred through the media and constitute a part of collective knowledge.

The theoretical attribution of the advertising and music industries is based on the theory of interpenetration – a phenomenon of mutual penetration between systems and the corresponding interconnectedness of system logics. As early as in the 1990s Richard Münch (1991: 332-333) and Joachim Westerbarkey applied this concept to the relationship between politics and the media. Gabriele Siegert and Dieter Brecheis (2010: 129-131) conceptualised advertising as an interpenetration zone between the media and economic systems. One cannot analyse advertising without the economy and the media into account. Siegert and Brecheis state that the economic system is unable to work without advertising's information function just as the journalistic system cannot survive without advertising based financing.

Like advertising the music industry aims for the attention of the public. It is the only way to reach a wide audience and distribute its products. The music industry cannot be studied without considering the media. Since the music industry is a producer of media content and therefore oriented towards the maximizing of profits it also needs to be seen as an interpenetration zone between economy and the media. Hence both, the music industry as well as the advertising business, are locked into financial payments and the creation of attention. Furthermore, both industries influence and are aware of each other and use each other's strategies to achieve their respective goals in content production and economical organization.

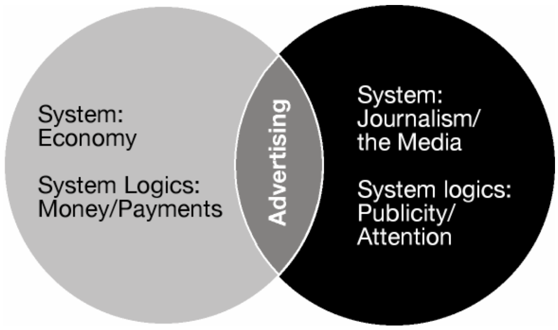

Figure 2: Advertising as interpenetration zone (source: Siegert and Brecheis 2010: 131)

The rise of music and advertising as specific forms of public communication is primarily the result of the development of communicative influences between economy, politics and the media (see Imhof 2008: 75). The political system wields an indirect influence by providing and controlling the legal regulations in the field of the media (e.g. broadcasting laws) as well as the economy (e.g. laws against unfair competition, advertising bans or restrictions).

The political system comprises political organizations, such as governments, parliaments, parties and unions. The recipient of its communication is its own clientele as well as civil society in its sovereign political role. When it comes to music performing rights organizations such as ASCAP (The American Society of Composers, Authors and Publishers) and BMI (Broadcast Music, Inc.) or music associations such as AFM (American Federation of Musicians) and MPA (Music Publishers' Association) have a large influence on music's public distribution. On behalf of their members these organizations watch over music events and, as a result of their close collaboration with record companies, they possess an indirect authority over content. At this point the US telecommunications authority FCC (Federal Communications Commission) should also be mentioned. FCC is an independent organization whose role is to guarantee the compliance with the guidelines of the Telecommunications Act. It started out as FRC (Federal Radio Commission) monitoring radio only and over time FRC changed into FCC and now supervises the entire field of telecommunications in the USA.

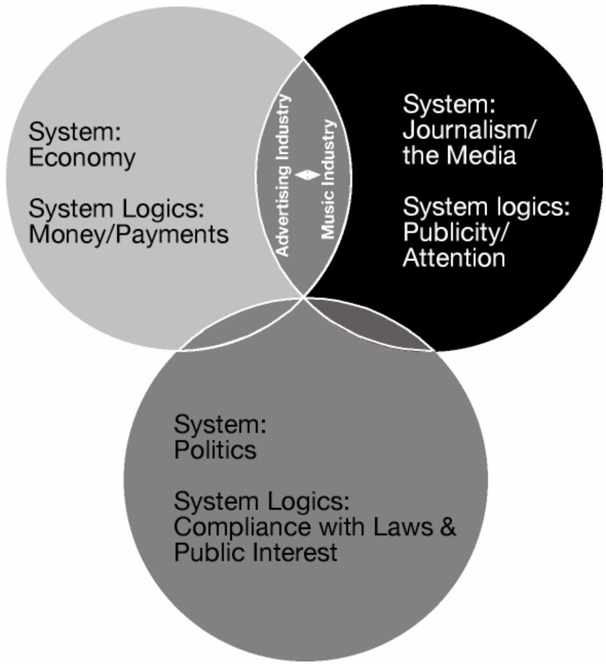

Figure 3: Advertising and music within the economical, medial and political systems

The economic system contains commercially oriented enterprises. As a competitor for public attention and reputation it cannot function without public communication. Apart from employees and equity owners, its addressees can be found in the public. They are divided into groups according to their consumer roles with reference to purchasing power, education and life style. In the field of music, business and food-companies focusing on music marketing are significant. The most influential business when it came to affecting the development of popular music was the tobacco manufacturer American Tobacco Company. Its president, George Washington Hill, known as the originator of the hit parade and the testimonial technique and was a pioneer in youth marketing. He sponsored artists such as Bing Crosby and Frank Sinatra.

The media system involves private media organizations as well as public companies. Similar to the economic system, it approaches an audience, segmented according to buying power, education or affinity with certain life style groups and addresses its audience in their role as media consumers. In the area of music influential players are radio stations and TV networks, the music press as well as the social media such as music blogs, Internet radio, media sharing systems and social networks. Before World War II the most important US broadcasting networks were NBC (formerly RCA), CBS and ABC (formerly NBC-Blue), all of which have been transformed into media groups. Today's aspirants are Google, Apple and Facebook.

3 Case Study USA

Since no other country has proven to be more trend-setting in the development of the media and advertising industries, this study will be limited to the USA and its innovative pioneers. By the late 1920s, the commercial type of radio broadcasting had already established itself in the USA – a type which, under US influence, soon spread to Latin America and other regions. Apart from a few exceptions (Luxembourg, Great Britain), it only made its way to Europe in the 1980s. Since then it has manifested itself as the second pillar of the dual system. The USA has always embodied a leading position for media systems worldwide. Musicologist Keith Negus goes as far as to refer to a US-American "media imperialism" (Negus 1996: 165-166). Progresses which started there have been transferred and further developed all over the world.

The big US media and entertainment corporations also regulate the global market on an economic level. Since financially sound corporations aspire to international contestability, media concentration is furthered and facilitated through deregulations and re-regulations (Knoche 2007: 129). Globally operating media companies have had a considerable influence on national markets for a long time. In the worldwide music business the USA is without doubt the most important and largest market. Despite last decade's decreasing sales the USA can still hold their ground as the country with the highest digital market shares – absolute figures. According to the International Federation of the Phonographic Industry (IFPI), the USA were able to take the position as the most high selling country at the top of the list below.

Rank	**Country**	**Trade Value US$ (M)**	**Market Split – Physical**	**Market Split – digital**
1	USA	4,167.7	49%	49%
2	Japan	3,958.6	73%	25%
3	Germany	1,412.2	81%	13%
4	UK	1,378.5	67%	25%
5	France	866.1	74%	17%
6	Canada	394.2	66%	29%
7	Australia	392.7	68%	27%
8	The Netherlands	261.4	70%	8%
9	Italy	237.1	75%	15%
10	Brazil	228.5	75%	17%

Table 1: The top 10 music markets (source: IFPI, Recording Industry in Numbers 2010: 20)

4 The Development of Core Competences in the Music Industry

As a result of a changing media and economic system the operating principles of the music industry as an interpenetration zone have changed as well. Since the emergence of the music business four different core competences have evolved:

- Live business
- Live music broadcasting
- Record manufacturing
- Music services

4.1 Live Business as a Core Competence of the Music Industry

Thanks to the spreading of print media such as the printing press and sheet music the US music industry was able to establish itself in the second half of the 19th century. Theatre impresarios and music publishers (Tin Pan Alley) were in the centre of the music industry. Up until the 1920s the live business was the core competence of the American music industry. During this period its main players closely interacted. They were collaborating and providing each other with content and financial support. Their collaboration can be illustrated as in figure 4.

Theatres, newspapers and magazines, sheet music producers, instrument manufacturers, advertisers and their agencies merged into a strong alliance. Musical theatres acted as the most important medium for the acoustic distribution of music. Consequently the sheet music producers of Tin Pan Alley tried to control the music in Minstrel shows and later in Vaudeville theatres. Firstly they would convince stars of theatre to perform their music and later on they even managed to shape the mainstream of US-American popular music by turning song writers, lyricists, and singers into stars. Newspapers and magazines were the advertisers' most important communication channels. Instrument manufacturers as well as theater impresarios needed newspapers and magazines to promote their products and programs. As a result of the triangular relationship between theatre, newspaper and Tin Pan Alley several kinds of conflict of interest arose. When theatre impresarios allowed sheet music to be enclosed with Sunday newspapers in exchange for playbill advertisements, the publishers were outraged: free supplements could have a negative influence on the sales of expensive sheet music. Advertising took over a crucial role in this relationship, not only by financing the media and using musical content as sales messages, but also by creating clarity in the structure of the print media and establishing its "mediating function". With the standardization of the advertisement system the media had defined their mode of practice. Editorial content was mostly oriented to an homogenous readership.

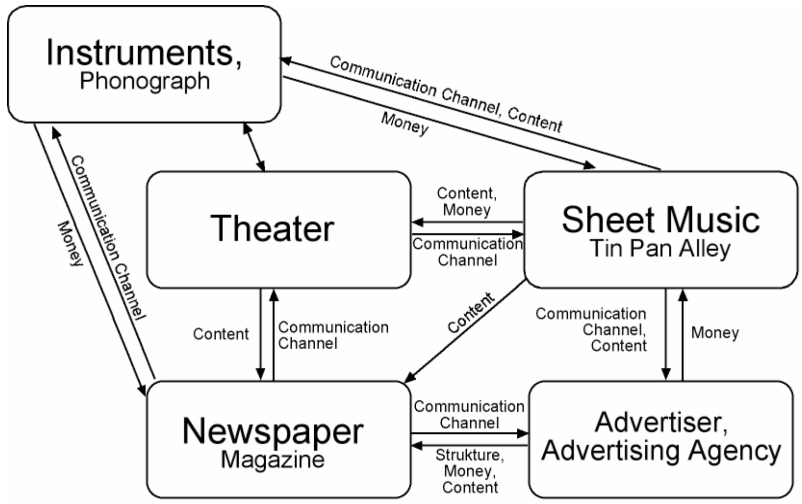

Figure 4: Live business as a core competence of the music industry from the 2nd half of the 19th century until the 1920s

4.2 Live Music Broadcasting as a Core Competence of the Music Industry

In the 1920s, when the radio conquered the living rooms of US families, the music industry's alliance underwent a radical change. New players such as the film industry and radio broadcasters entered while old players such as instrument manufacturers lost their influence on the music industry. With the rise of radio sheet music gradually disappeared and by the 1940s, the publishers of Tin Pan Alley no longer controlled the music business. Newspapers also realised the potential threat of radio. Initially the new medium was publicly criticised, and, after a boycott failed, they allied with the broadcasting industry. Many newspaper publishers took over radio stations, and record labels also managed to occupy a place in this new collaboration. However, due to their lack of understanding radio they exerted little influence on the development of the music industry until the end of World War II. It seemed that music's evolution was shifting into the hands of Hollywood film studios and radio broadcasters. The premiere of the first talking film "The Jazz Singer" on October 6th, 1927 turned the whole film business upside down. Music had never been that important before. The fight over music publishing houses between the broadcasters and film studios began (Barnouw 1996: 232). Within a year, RCA was trying to acquire the ten most important music publishing houses. Warner Bros. Pictures won the auction for Max Dreyfus's Music Holdings paying US$ 8.5 million (Ruhlmann 2004: 57, Sanjek & Sanjek 1996: 71-73). At the end of 1929, the RCA managed to take over the music publishing houses of Leo Feist and Carl Fischer and launched the Radio Music Company (Sanjek & Sanjek 1996: 88).

In the 1930s, film and theatre enterprises suffered from the economy's collapse and radio broadcasting managed to gain the upper hand in the development of the music industry. People could no longer afford expensive theater and cinema tickets and turned to free entertainment offered by the radio stations. When smaller firms were forced to abandon their radio commercials, financially stronger companies and their advertising agencies took over their place. From this point on only a few advertisers and agencies controlled the nation-wide prime time programmes. Live performances were the common way of broadcasting music. As a consequence of tertiary media's new dominance, music broadcasting was considered the new core competence of the music industry (figure 6).

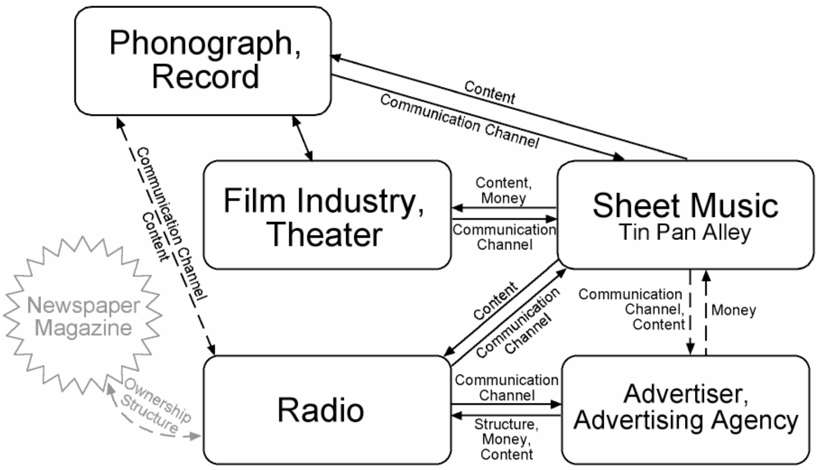

Figure 6: Music broadcasting as a core competence of the music industry from the 1920s until the 1950s

In this process advertising once again played a substantial role. Not only did it serve as financial source for the media but it was also responsible for program arrangements and the development of new radio music formats. In the 1930s, programs such as Top 40 radio, casting shows and daily soaps were developed by advertising agencies and broadcast on radio. In addition advertisers were the first significant players to use records for their sales messages. Only easily reproducable media enabled advertising messages to be spread quickly on a vast scale. In the 1930s, even in the United Kingdom, where radio advertising was forbidden, listeners could receive commercial radio shows on Radio Luxembourg. These broadcasts were recorded using electrical transcriptions in London and eventually forwarded to Radio Luxembourg, which began its regular broadcasts to the UK in 1934 (Scannell and Cardiff 1991: 231).

Inspired by the success of "Make Believe Ballroom" featuring early DJ Martin Block, radio producers finally realised the commercial potential of records. In 1940, a court decision laid down the legal basis for the use of records on radio, which led to the era of records.

Before moving on to the (re)birth of the record industry, let us take a closer look at an important person who created a great deal of program innovations: George Washington Hill of the American Tobacco Company. Even though he never sang, played no instrument and did not write one single note of music, he was the main figure in the early development of the broadcasting of popular music (Eberly 1982: 32). Hill established the mainstream sound of the 1930s and is considered the inventor of the testimonial and advertorial techniques. He relied on well-known personalities and trusted in musical contents for radio shows. His "Your Hit Parade" can be seen as a forerunner of the Top 40 radio format and MTV. Two characteristic features of Hill's style in radio programming were:

- The emphasis on public figures and closeness
- The focus on entertainment and hits

Looking at sales strategies, personal touch has always been an important aspect. Street vendors as well as traveling salesmen based their success on personal recommendations and communication. After the market grew and mass consumption emerged the individual relationship between customer and seller could not be maintained. Now it was up to newspapers and radio to spread advertising messages. As a result personal interaction has become lost. George Washington Hill, however, realised that personal closeness could only be conveyed through real life personas. In 1926, he was the first to use testimonials in his advertisements and radio shows. Hill chose an astonishing mixture of public figures stretching from business tycoons and socialites rather than athletes to movie stars (Marchand 1985: 95-96). By using well-known faces he tried to get closer to his customers and to better communicate sales messages. Back then the use of testimonials was an entirely new advertising technique which established itself as a marketing strategy in the late 1920s. At the beginning of the 1930s, Hill specifically chose crooner Bing Crosby to advertise Cremo cigars, since Crosby's soft voice created an intense feeling of intimacy. As a result of Bing Crosby’s success the importance of singers as part of an orchestra grew. Band leaders understood the need to intergrate singers into their orchestras to get gigs in radio networks and theaters (Eberly 1982: 110). The end of 1946 marked the end of the swing era. Popular music was no longer controlled by band leaders but turned into the domain of lead singers (Eberly 1982: 74). Since the emphasis on personality and intimacy could most effectively be conveyed by singers, the swing era became the "singing era". Up to this day the central role of singers in the field of popular music remains unchanged.

In the 1930s and 1940s the tobacco industry was the biggest sponsor of popular music in network radio. Radio shows financed by tobacco firms gave a good overview of the most popular US-artists of the time. With his appealing and popular dance radio shows George Washington Hill raised the entire tobacco industry’s interest to create music shows for a younger audience. NBC’s "Lucky Strike Orchestra" was the first successful nationwide radio show produced by George Washington Hill. It was the first important program in which Hill emphasised on entertainment and hits. The content of this radio show was solely decided on by its advertisers and their agencies with George Washington Hill being the most active person in the programming of the "Lucky Strike Orchestra". He socialised with the artists and musicians and devised con-cepts to approach the young target audience (Eberly 1982: 32). He gave the band the instructions only to perform well-known, popular music and stressed: *"I want real dance music that people will like to dance by, and I don’t want their attention diverted by French horn gymnastics. Let’s give the public what the public wants and not try to educate them. We should not be concerned about introducing new numbers and novelties"* (Fox 1997: 154). After the launch of the "Lucky Strike Orchestra" Hill decided to stop advertising in other media to test the show’s success. In November and December 1928, Lucky Strike cigarettes' sales rose an impressive 40 percent. This success caught the attention of other tobacco firms, who relocated their budgets from outdoor advertising to radio (Fox 1997: 154-155).

In 1935, "Your Hit Parade", an innovative radio program that would turn the entire music industry upside down, went on air. "Your Hit Parade" was the very first chart show broadcast weekly, in which the most popular songs in the US were presented. Until now music publishers had refused to publish their sales figures as this would have enabled music stores to place their orders based on this information. The success of "Your Hit Parade" resulted in complications concerning the distribution of records and sheet music. A song's sudden descent led to an abrupt cancellation of orders, and the show was constantly encountered a lot of opposition. A long-term dispute between the MPA and Lucky Strike was triggered by the enormous influence of "Your Hite Parade" on sheet music sales.

As a result of the development of "hit radio" only 350 to 500 of the 2.000 songs that were released each year by the big publishing houses made it into jukeboxes or radio stations in the late 1930s. Out of these, only about 100 were able to gain wider attention. In order to become a hit, a song had to sell over 70,000 copies. About 20 songs exceeded the 200,000 mark with five selling over 300,000. As they were played on the radio, these hits became the most well-known in the US. Thousands of other songs were printed and recorded, but by being "less commercial", they were barely noticed by the program developers (Sanjek 1983: 22).

In comparison to the strategies of music publishers, who concentrated on current public events, George Washington Hill shifted the musical focus to public figures and well-known hits in order to attract the target audience's attention. Thus, the success of Hill's programs changed also the content of popular music. Up to the present days, the emphases on singers as well as the concentration on hits are common strategies of the media and the music industry.

4.3 Record Manufacturing as a Core Competence of the Music Industry

The establishment of the phonographic industry was ultimately based on two developments: first of all, on the emergence of television as a central, nationwide medium, and secondly, the shifting focus on the so-called "race market". The acceptance and speedy growth of television after the Second World War shattered the previous medial structure. Television took over the role of radio as a carrier of national shows. Large-scale enterprises and their advertising agencies relocated their programs to television and radio became a regional medium. This newly decentralised landscape of radio stations provided social groups apart from the white "Anglo-Saxon mainstream" with the opportunity to devise special radio programs. In some US cities the large size of the African-American population led to the emergence of the so-called "race market". This market niche was discovered by primarily white entrepreneurs and filled by generating radio programs and records for the black community. In order to produce their programs in a more economical way, radio broadcasters made use of records. As a result of this new and strong collaboration of record producers and radio stations the record industry was able to establish itself as an independent player on the market. By the mid 1950s, when nationwide TV shows were still produced live, local radio programs relied on records.

At the end of the 1950s, the conflict between advertising agencies and television over the programming got out of control and turned into a public scandal. As a result of the so-called "quiz scandal", the single sponsor system, which had been prevalent for 20 years, ended and the era of TV commercials began. This directly led to the "Payola" scandal. Rock 'n' roll-DJs were accused of having accepted bribes for airplay music (pay for play). Eventually the conflict led to the emergence of format radio. Now preselected playlists were in demand. After the establishment of radio formats and TV commercials, advertisers and media had given up their control in the music industry. The record industry was able to separate itself from the old alliance and became independent. The new core competence of the music industry was to manufacture and to distribute records. Record labels were now solely responsible for the music they recorded. The former allies such as newspapers, magazines, TV and radio stations were only used to promote the record industry's products.

Between 1955 and 1999 the US record industry was able to increase its market volume to over 53 times of its initial size. Its annual revenue grew steadily - apart from a declines at the end of the 1970s and 1990s - from US$ 277 million to US$ 14.6 billion (Tschmuck 2003: 129 and 224). This constant growth over 45 years can be ascribed to two record label strategies: On the one hand the music repertoire was expanded by exploiting youth culture and its subcultures. Secondly, technical innovations improved record formats, players and the audio quality. Other positive influences on the development of the music industry were its close collaboration with the film industry, advertising firms, radio stations (independent music promotion, which caused another type of "payola") and television (e.g. MTV). Initially this collaboration served promotional purposes only, but when record sales stagnated in 2000 it proved to be more necessary than was originally assumed.

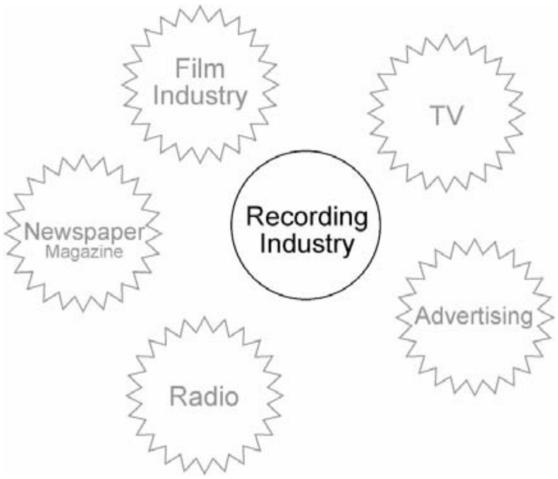

Figure 6: The independence of the recording industry in the 1960s

4.4 Music Services as a Core Competence of the Music Industry

The new millennium saw the US media moving in two directions: Online content distribution was decentralised through quaternary media. Furthermore, global media conglomerates emerged. In 1996, the new US Telecommunications Act allowed the foundation of media groups, which could own an unlimted number of radio stations as well as at least two TV staions and a cable network in the same market (Sterling and Kittross 2002: 668-669). This meant that the few big media corporations were now dealing with countless users and their individual online contents.

From 1999 to 2010 the worldwide market for recorded music decreased by over 40 percent. The music industry is now looking for new ways to compensate for these losses. In doing so a contract model used in management was applied to recording contracts, enabling the music industry not only to profit from record sales but also to share in artists' other revenue streams from licensing, live performances and merchandising. The so-called "360 deal" is nothing other than an agency contract, which allows a record company – not unlike an agent – to participate in the artists' various income sources. Consequently the music industry's competence has shifted from record manufacturing to supporting services. And the labels return to the former alliance with film and TV production, the advertising business as well as game producers. The music industry produces content, which is delivered to its business partners, and offers management services.

This new constellation – centralised and highly integrated media conglomerates and decentralised social media structures – now offers the possibility of distributing content in both, a centralised and a decentralised way. Central distribution comprises network radio and prime time television, Hollywood blockbusters, popular TV soaps, games and casting/reality shows. This shows that in the age of quaternary media the content has become a medium in itself. This is exactly what Manfred Faßler (1997: 117) meant when arguing that the networking of technical senders and receivers turns the content itself into the medium. Social media applications such as YouTube, Twitter, Facebook, Google Blog and online radio stations distribute music in a decentralised way. And again advertising plays a central role in this network by collaborating with each player (including the distribution media) as investor as well as content designer.

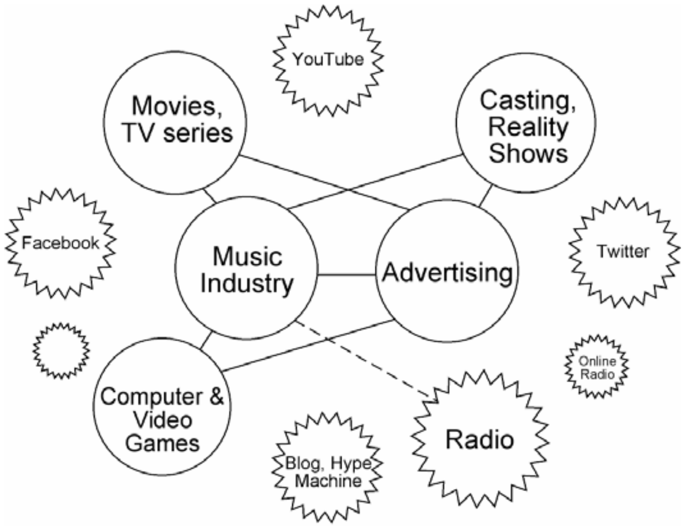

Figure 7: Music services as a core competence of the music industry in 21st century

5 Hybrid Music

By looking at the concept of the mutual penetration of systems and the interconnection of system logics, I was able to highlight mutual development of the music and advertising industry in an historic perspective. In doing so I discovered further subsystems in the interpenetration zone between the economic and media systems, such as the film business. These subsystems of the interpenetration zone form an alliance and influence each other as a result of media and economic developments. As a consequence of the tightly woven network of subsystems we can imagine music in a hybrid form. As a type of public communication music is invariably connected to media and economic systems as well as to the subsystems of the interpenetration zone.

In the 1950s, the establishment of the record industry and major changes in the media and advertising systems broke the alliance of the subsystems. As a result the music industry became independent. In my opinion this independence was unusual and temporary. This exceptional state lasted for about half a century until the new millennium, when the record/recording industry once again forged new alliances. Today, the advertising and music industries are connected in the interpenetration zone through important subsystems such as the film and gaming industries.

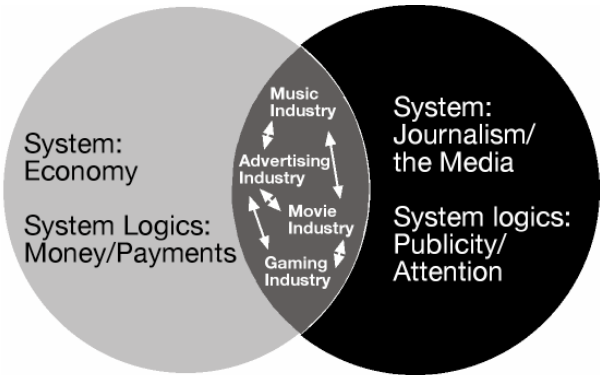

Figure 8: The interpenetration zone and its current players

If the music industry is located within a network of subsystems and the interpenetration zone, one has to differentiate between primary and secondary content.

When regarding music as primary content the main topic is music itself. In order to attract attention the focus is on very popular musicians. Relying on public figures (such as Madonna and Lady Gaga) and by combining well-known songs music content can reach the masses. This explains, among other things, why music on radio and TV offers less diversity and sounds quite familiar.

When unfamiliar music is produced around a public topic or event, our attention can also be diverted to the music and the musicians. This tendency can be seen, for example, within sport events such as the US Super Bowl, Soccer World Cup and the Olympic Games as well as the Eurovision Song Contest. That is why music producers and artists as well as advertisers try to place their songs in these events. However, this also means that without public awareness it is nearly impossible for unknown artists to become commercially successful on a primary level. One way of distributing unfamiliar music to a mass audience is to use material generated by a different content producer. Music as secondary content can be applied in commercials, films, TV series, casting shows, games, etc. When doing so it is not important to use well-known music or melodies, but to find the right music for a particular setting. For that reason unknown artists may be more suitable for this type of production. On the one hand there are cost savings while on the other fresh and unknown music is made available.

By integrating the recording industry into a new alliance, control over the dissemination of music could shift. Record companies could now turn their efforts to media, film and advertising businesses, just as happened during the era of broadcasting when the music industry was controlled by radio networks. The people responsible for nation-wide sponsored programs were the ones who put the music on air. Today's biggest record labels are subsidiaries of giant media and electronics companies. The Universal Music Group, which recently agreed to buy EMI, is owned by French media conglomerate Vivendi, which also specialises in Pay TV, games and telecommunication, while Sony Music Entertainment is part of the Japanese Sony Corporation, which produces electronic devices and is an important player in the film industry. The Warner Music Group was bought by Access Industries, which owns - among other things – telecommunication companies, TV production firms and film distributors. Being part of global conglomerates and a tightly woven network within the media and economic system, it is only logical that music increasingly becomes a "secondary content" through its use in film and TV productions, games and commercials.

Even though the major labels are already closely collaborating with the media, film and advertising industry, they mainly focus on music as a "primary content". Advertising deals are mainly seen as a way to promote an artist's new release. Musicians who have not put out anything new are not taken into consideration. This opens up new chances for independent labels. If they focus on music as a "secondary content" by licensing it to film/TV productions, commercials and games and by promoting it through social media (blogs, YouTube, Facebook, Twitter), it is very likely that they will be able to compete with the majors.

The development of subsystems in the interpenetration zone is a dynamic and a changing process. It is to be expected that further down the road more subsystems will develop while others will fall away. Music will no longer be "primary content" anymore, but will exist in a hybrid form as a "secondary content" within other media.

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Copyright Term Reversion and the "Use-It-Or-Lose-It" Principle

Martin Kretschmer[7]

Abstract
This brief article makes an argument for the use of the legal device of term reversion, as a means of bringing unexploited works back into use, and mitigating the undesirable effects of the excessive term of copyright protection. It proposes to legislate a simple rule that copyright interests will be transferable only for an initial term of 10 years, after which they will revert to the creator. If carefully implemented, the rule is compatible with the current constraints of international and EU law. By stimulating artist-led innovation, term reversion may also improve the financial position of creators.

Keywords: copyright, copyright term, term reversion

1 Context: Excessive Copyright

Copyright law awards exclusive rights that now often last more than 100 years.[8] Typically, these rights are transferred by authors to third parties

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[8] The Berne Convention for the Protection of Literary and Artistic Works (1886) prescribes a term of life of author plus 50 years (the latest version of the Berne Convention is the Paris Act 1971, as amended in 1979). The U.S. acceded to Berne in 1989. In 1994, the Berne Convention was integrated into the WTO Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS) that is all 153 members of the World Trade Organization (as of 10 February 2011) are now bound by it. The EU Copyright term was harmonized to life plus 70 years with the 1993 Council Directive (93/98/EEC, codified as 2006/116/EC). The U.S. Sonny Bono Copyright Extension Act (1998) extended the term by 20 years to life plus 70 years, or 95 years for "works for hire" (works created under employment by corporations). In Europe, sound recordings, broadcasts and performances are only protected as neighbouring or "related rights". For phonogram producers and performers on music recordings, the term will change from 50 to 70 years with the implementation of the 2011 Copyright Extension Directive amending Directive 2006/116/EC (2011/77/EU).

who accumulate back-catalogues of rights. A large percentage of works in these back-catalogues are not available for cultural, social and commercial innovation. We have reliable indicators of the scale of the problem. Studies conducted in the United States at the time of the constitutional challenge to the Copyright Term Extension Act[9] found that only 2.3% of in-copyright books and 6.8% of in-copyright films released pre-1946 remained commercially available (Mulligan & Schultz 2002).[10] A study for the Library of Congress on the reissues of U.S. sound recordings found that of a random sample of 1521 records issued between 1890 and 1964, only 14 percent were available from rights owners (Brooks 2005). For a large number of in-copyright books (the European estimates differ between 13% and 43%), the owner is unknown.[11] For photographic collections of museums and archives, the numbers rise to 90% of all items.[12] These so-called "orphan works" could not be lawfully reissued even if the will was there. The concentration of back-catalogues of rights in an oligopolistic industry structure (as an unintended side-effect of copyright law) may also create a barrier to entry for new firms and artists (Tschmuck 2009).

It is an empirical question what length of term would provide sufficient incentives for the production and distribution of culture. Some have argued that the correct approach to setting the copyright term would be to reduce it step by step, until creative production starts to fall: *"Ten years may still be longer than necessary"* (Stallman: 2010). By way of contrast, consider the regulatory approach underlying the first

[9] Eldred v. Ashcroft, 537 U.S. 186 (2003).

[10] In the United States, works published between 1927 and 1946 would have fallen out of copyright under the earlier (pre-1976) term of 56 years if the constitutional challenge had been successful. Landes and Posner (2003a: 212) analyse data from the American Library Annual and Book Trade Almanac for 1872–1957, and find that of 10,027 books published in the USA in 1930, only 174 (1.7%) were still in print in 2001.

[11] The 13% figure is a "conservative" estimate from a study for the European Commission (Vuopala 2010). A rights clearance study for the British Library produced orphan figures of 31% for all books in the sample, and 43% for the sub-sample of "in-copyright" books (Stratton 2011).

[12] *"The Chair of the Museum Copyright Group, Peter Wienard, believes that from the total collection of photographs of 70 institutions (around 19 million), the percentage of photographs where the author is known (other than for fine art photographs) is 10 per cent"* (Gowers Review of Intellectual Property 2006: 69).

UK Design Copyright of 1787.[13] The Act created an exclusive right of two months for "new and original" patterns on linens, cottons, calicoes and muslins, securing innovators a short lead-time in the market.

Empirical data indicate that the investment horizon in cultural industries is well below 10 years (Breyer 1970-71). There is also compelling evidence that the most intensive commercial exploitation takes place at the beginning and the end of the exclusive term (St Clair 2004, Höffner 2010). However, setting a term that rationally balances under-production and under-use of copyright works is closed as a policy option, as international and European law stands. Still, the idea that works that are not being exploited should lose protection to the degree they can be used by others is consistent with general principles of law.[14] This is where the concept of term reversion becomes fruitful: limiting the time for which copyright interests can be assigned, after which they revert to where they came from. Term reversion could be a key tool for opening up unexploited back-catalogues, and enable artist-led cultural and social innovation.

2 The proposal

It is proposed to legislate a simple rule that copyright interests will be transferable only for an initial term of 10 years, after which they will revert to the creator. After 10 years, authors would have the choice of –

(i) re-assigning or re-licensing their work if there is still demand,

(ii) joining a collective management scheme (converting in effect the exclusive right into a right to remuneration), or

[13] An Act for the Encouragement of the Arts of designing and printing Linens, Cottons, Callicoes, and Muslins, by vesting the Properties thereof, in the Designers, Printers and Proprietors, for a limited time (1787, 27 Geo.III, c.38. – http://www.copyrighthistory.org/).

[14] We find similar principles in the law of real property (landowner may lose title if rights are not asserted), in competition law (compulsory licences), contract law (revision and termination), even patent law: there is a provision in the UK Patent Act 1977 (s.48B(1)) that allows the issue of compulsory licences *"where the patented invention is capable of being commercially worked in the United Kingdom, that it is not being so worked or is not being so worked to the fullest extent that is reasonably practicable."*

(iii) abandoning the work.[15]

Term reversion would be compatible with international and EU law, as the term itself would not be affected. Objections that the measure would constitute a limitation that prejudices the legitimate interests of the "right holder" contrary to Article 13 of the TRIPS Agreement apply equally to many common law, civil law and competition law interventions affecting copyright contracts.[16] They can be overcome.[17]

The challenge for the legislator will be to create a simple and transparent scheme providing incentives to creators to convert reverted, non-exploited rights into non-exclusive licences after a fixed period. Only in combination with such a measure will term reversion free back-catalogues, while remaining compatible with international law.[18] Any reversion scheme needs to result in absolute clarity about the location of rights. At the very least, this requires making the reversion inalienable (i.e. reversion cannot be subverted by a contract), and some kind of register.[19] Such a scheme would reduce the frictional costs of licensing for both exploited and non-exploited works. It also would have the advan-

[15] It is contentious whether it is possible to abandon personal property in law, and the treatment varies by jurisdiction (Hudson & Burrell 2010).

[16] Many civil law countries have provisions that allow authors to recall rights in certain circumstances: Under §41 of the German UrhG, there is a right to recall (Rückrufsrecht) because of insufficient exploitation. Our study for the UK Strategic Advisory Board for Intellectual Property Policy (SABIP) summarises the jurisprudence relating to the revision and termination of contracts (Kretschmer et al. 2010).

[17] In this context, it is also useful to consider the requirement of use for trade marks circumscribed by TRIPS Article 19: *"If use is required to maintain a registration, the registration may be cancelled only after an uninterrupted period of at least three years of non-use, unless valid reasons based on the existence of obstacles to such use are shown by the trademark owner. Circumstances arising independently of the will of the owner of the trademark which constitute an obstacle to the use of the trademark, such as import restrictions on or other government requirements for goods or services protected by the trademark, shall be recognized as valid reasons for non-use."* Countries seem to have found few difficulties creating a reliable process for the revocation of these property rights.

[18] Extended collective licensing clearly is compatible with international law. Even compulsory collective management may be: Article 9 of the Cable and Satellite Directive 93/83/EEC imposes compulsory collective management for the *"exercise of the cable retransmission right"*.

[19] Stef van Gompel (2011) analyses to what extent the benefits of registration can be reconciled with the elimination of formalities by the Berne Convention (Berlin revision 1908).

tage of being compatible with several proposed solutions to the orphan works problem (Hansen 2011).

Drafting techniques that may be used in framing term reversion include:[20]

- Automatic reversion "notwithstanding any agreement to the contrary";
- Continued exploitation of derivative works created prior to term reversion;
- Special arrangements for works first owned by corporate authors;
- Provisions to solve the coordination problem for works of multiple authorship ("Where the authors are unable or unwilling to act in concert, the rights must be vested in a collecting society");
- (Opt-out) licensing schemes for works demonstrably published before a certain date.

[20] A good source of drafting language is the U.S. Report of the Register of Copyrights on the General Revision of U.S. Copyright Law and the preliminary copyright draft bill of 1964. Useful "use-it-or-lose-it" language is included in the EU's (otherwise unfortunate) 2011 Term Extension Directive for Sound Recordings (2011/77/EU). Art. 1(2a) reads: *"If, 50 years after the phonogram was lawfully published or, failing such publication, 50 years after it was lawfully communicated to the public, the phonogram producer does not offer copies of the phonogram for sale in sufficient quantity or does not make it available to the public, by wire or wireless means, in such a way that members of the public may access it from a place and at a time individually chosen by them, the performer may terminate the contract by which the performer has transferred or assigned his rights in the fixation of his performance to a phonogram producer (hereinafter a "contract on transfer or assignment"). The right to terminate the contract on transfer or assignment may be exercised if the producer, within a year from the notification by the performer of his intention to terminate the contract on transfer or assignment pursuant to the previous sentence, fails to carry out both of the acts of exploitation referred to in that sentence. This right to terminate may not be waived by the performer. Where a phonogram contains the fixation of the performances of a plurality of performers, they may terminate their contracts on transfer or assignment in accordance with applicable national law. If the contract on transfer or assignment is terminated pursuant to this paragraph, the rights of the phonogram producer in the phonogram shall expire."*

3 Projected effects of term reversion

The political attraction of term reversion is that it is able to combine a "use-it-or-lose-it" principle (implied in many branches of legal doctrine), with economic appeal. For example, reversion overcomes the well-known economic problem of valuation of copyright by allowing the market to work in the "future". The present value of a shorter term is likely to offer a greater economic incentive to the original creator, whereas a longer term favours incumbent commercial exploiters (Landes & Posner 2003a: chapter 8 and 2003b).[21] There is disagreement whether term reversion will be financially advantageous for creators. For example, Raustiala & Sprigman (2011) argue: *"Because buyers can expect, on average, to make lower profits when the law contains the termination provision, they will offer less in the initial transaction. Thus, sellers will be more willing to accept less, because they know that if a work later proves valuable, they can terminate and demand some additional payment. So the most likely effect of the termination provision is to force deal prices down across the board"*. As with many arguments in the law and economics literature on copyright, this is based on a plausible sounding theoretical proposition that ignores the dynamic effects of subsequent innovation from un-locking underused back-catalogues.[22]

10 years after publication, there is only a small number of works for which there is still demand. These would remain on the market, as a new set of exploitation contracts would be negotiated, based on more accurate expectations of future earnings. For the majority of works, after 10 years no investor will be willing to take the risk of further market-

[21] George A. Akerlof, Kenneth J. Arrow, Timothy F. Bresnahan, James M. Buchanan, Ronald H. Coase, Linda R. Cohen, Milton Friedman, Jerry R. Green, Robert W. Hahn, Thomas W. Hazlett, C. Scott Hemphill, Robert E. Litan, Roger G. Noll, Richard Schmalensee, Steven Shavell, Hal R. Varian, and Richard J. Zeckhauser (2002), "Brief as Amici Curiae in Support of Petitioners", *Eric Eldred et al v. John D. Ashcroft, Attorney General,* the Supreme Court of the United States of America, No. 01-618

[22] Boldrin & Levine (2002: 210) characterise copyright and patents which control subsequent use as a distortion of property rights: *"When you buy a potato you can eat it, throw it away, plant it, or make it into a sculpture. Current law allows producers of CDs and books to take this freedom away from you. When you buy a potato you can use the 'idea' of a potato embodied in it to make better potatoes or to invent French fries. Current law allows producers of computer software or medical drugs to take this freedom away from you."*

ing and distribution expense. Under current legal arrangements, these works would now sit in the back-catalogue, possibly out of print, possibly within an on-demand database, waiting for something to happen. However, if term reversion kicks in, decisions will have to be made, both by the original creator and the first exploiter. The creator may see a different, innovative avenue for exclusive re-use, or may prefer to offer the work under a standard non-exclusive licence that could be accepted by any taker. The latter option is likely to adapt the familiar model of collective management to a wider range of uses.

Lessons need to be learned from previous experiences with term reversion. Under the Statute of Anne of 1710, copyright went back to the author after a term of 14 years who could then assign it again for one further term.[23] There is little evidence that much use was made of this provision. Authors continued to assign copyright outright by a contract that included the second term.[24] The United States followed a similar structure until the 1976 Copyright Act, with an initial copyright term of 28 years that could be renewed once. In the 1976 Act, Congress introduced an inalienable termination right for authors after a period of 35 years (for all grants of rights after 1977).[25] There are many practical difficulties with both the old and the new mechanism. The provisions may turn out to be a rhetorical nod, with little practical use for improv-

[23] An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, During the Times therein mentioned, 1710, 8 Anne, c.19. (http://www.copyrighthistory.org/). The last section reads: "*Provided always that after the expiration of the said term of fourteen years the sole right of printing or disposing of copies shall return to the Authors thereof if they are then living for another Term of fourteen years."* The original parchment copy of the act shows that the section was tacked on as a late addition in the legislative process. Deazley (2004: 43) argues that the divided term was intended *"to benefit the author and only the author"*. He also shows that the 10 year assignment concept was first mooted in a 1737 Bill for the Better Encouragement of Learning:

[24] Bently & Ginsburg (2011: 1493) trace 18th century jurisprudence to the effect that the second term could only be assigned by an express term. Few authors appear to have taken advantage of the reversionary right.

[25] Under § 203 of the U.S. Copyright Act of 1976, 17 U.S.C. ("Termination of transfers and licenses granted by the author"), termination notices can begin in 2003, with the earliest reversion possible in 2013 (for copyrights acquired in 1978). For copyrights acquired before 1978, term reversion is possible after 56 years (§ 304 "Duration of copyright: Subsisting copyrights"). Transitional measures are too complex to summarise here.

ing the bargaining position of authors, nor for opening up back-catalogues.[26] The introduction of term reversion would have to be prospective, i.e. it could only affect future copyright contracts. So existing works for which there is no longer demand would remain locked for the foreseeable future. Still, innovation effects would be felt immediately. Modes of exploitation would change (as the incentives against warehousing of rights start to bite).

4 Concluding thought

The current focus of liberal reform initiatives is on the scope of grant, i.e. regulating the activities that can be permitted without the consent of the copyright owner in a more coherent manner.[27] The argument in this article suggests that a complementary solution would be to break up the excessively long copyright term. Politically this is achievable if creators and consumers see the joint benefits of facilitating innovation in a copyright industry structure that currently favours incumbent owners of large back-catalogues. Rather than framing the debate as a stand-off between right owners (creators and investors) and users over issues of enforcement, term reversion offers creators the opportunity to reconsider the gains from unanticipated re-use, and enter a coalition with consumer interests. In my view, it is one of the last openings for reforming copyright law from within.

[26] Since application of the provisions is uncertain (in particular in relation to sound recordings), a wave of litigation is currently making its way through the U.S. courts (Menell & Nimmer 2010).

[27] Examples include the UK's proposal for a new exception for data and text mining (Hargreaves Review, chapter 5: Copyright: Exceptions for the Digital Age); the EU's draft orphan works legislation (Commission Proposal for a Directive of the European Parliament and of the Council on Certain Permitted Uses of Orphan Works, COM (2011) 289 final (24 May, 2011)); and WIPO's focus on print disabilities ("Working document on an international instrument on limitations and exceptions for visually impaired persons/persons with print disabilities" (document SCCR/23/7), Standing Committee on Copyright and Related Rights (SCCR) Twenty–Third Session Geneva, November 21 to 25, 28, 29 and December 2, 2011).

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