

NEWSLETTER

An Entertainment Industry Organization



**THE DRM MANIFESTO:
 Reality For Musicians, Artists, Songwriters, their Lawyers
 and Everyone Else Who Clearly Isn't Paying Attention**

by Moses Avalon

The President's Corner

Ed Arrow

Beginning this month, we present two consecutive panels dealing with digital music distribution. Digital music distribution is the most important issue confronting the music industry today. It may be the most important industry issue ever. The potential of this relatively young music distribution model has simultaneously caused both fear and optimism in our industry.

Record companies continue to evaluate their business models in an attempt to adjust to a new marketplace. Both record companies and music publishers are trying to monetize the digital distribution of music. Artists such as Radiohead are taking matters into their own hands and experimenting with new pricing models.

We hope that our knowledgeable panelists will help you to derive some order out of this chaotic market.

Thank you.

pricing of 99 cents: DRM-free will cost about 30% more than other sales. Response from the other three competing Major labels was shock and disappointment. Will they be forced to also do DRM-free to compete?

Two weeks later, the **U.S. Copyright Office** decided that Major labels will be allowed to charge higher rates to webcasters for streaming music. Response from Tech Companies was shock and disappointment. Will they have to pay labels more to provide the public with a radio service they don't even charge for?

What would the perfect music business look like?

Would it be one where distribution is a given to anyone who thinks they have talent? Or do you think there should be some form of filter because Joe Average doesn't have time to sift through millions of **MySpace** pages? A filter is what we have had with the Major label system since the 1960's. It's one

In the Winner Take All in the Cage Match Between Music And The Net Are You Helping the Wrong Side Win?

PROLOGUE: In March of 2007 **EMI**, facing serious strategic challenges, became the first Major label to issue DRM-free (no copy-protection) downloads on **iTunes**. To facilitate this, **Apple's** CEO broke his promise to maintain uniform

many trying to squeeze through its bottleneck resent. Now, technology is putting that system to the test by giving artists and consumers new choices. But is the price for choice too high? Is it at the expense of an entire industry that has supported tens of thousands for over seven decades and produced some of the greatest music ever recorded?

Although creators of commercial music are artists, it is because of sequencers and samplers they are compelled to become, to some degree, “techies” as well. And since technology has aided pop music production, many of us think they have complementary agendas. The reality is that the tech world and pop music are at war and these two super-powers are vying not only for control of music distribution but also for the loyalty pop music’s creators. One side is trying to make a complete fool out of them.

THE PREYED UPON AND THE PREYED

In one corner we have the “Tech-Masters,” as I call them: computer/gadget makers and internet service providers. They use pop music as a loss-leader to attract new consumers. They may be music fans, but they resent record companies the same way we resent paying the monopolistic electric company for a necessity we can’t even touch.

In the other corner, the four major record/publishing companies. To support the huge bets they place on artists, they need to protect their inventory-- copyrights.

To Tech-Masters, music copyrights are an inconvenience; a road-block

to their master plan—selling gadgets and internet services to everyone and their grandmothers. If they cannot rely upon record companies to license them music cheap, their logical alternative is to avoid paying for it *at all* by challenging copyright law, BUT... only as it applies to art—not their software. It’s a delicate trick but one to which they have committed undisclosed millions. If we let them, they will eventually turn pop music into the free toy at the bottom of their proverbial cereal box.

And here’s the scary part; the Tech-Masters are getting you, music’s creators, to help them.

IN DRM WE TRUST

The recent Tech-Master campaign is “DRM-free music” which is tech-talk for downloads that have no copy protection encryption. DRM is a software mojo that prevents or limits the copying of a song-file. Consumers love the idea of DRM-free because it means they can wax record company and distribute many copies of your work at will while only paying for it once. Is it good for the music business?

Tech-Masters think so. They want record companies to stop whining about P2P piracy and license their catalogs without this stingy, confining DRM thingy. They try to persuade the Majors with arguments like “If people can make copies, they’ll buy more music. Remember cassettes in the late 1970s?”

Labels don’t agree. Back then, people could not make 100s of copies with a mouse click. Tech-Masters retort, “But CDs have no copy-pro-

tection, what’s the dif?” Labels sigh and shake their heads, “First off, the only reason we don’t have copy protection on CDs is due to complex technical issues and second, CDs cost us about 60 cents and we sell them for about \$10. Downloads have a narrow margin and invite theft via illegal P2P.”

So, if gentle persuasion isn’t working what’s the Tech-Master’s next step? It seems to be shaming the Majors via a winning of the public’s hearts & minds: dehumanize the enemy; make the public think record companies are too dumb & greedy to see the “logical” path for the future. Eventually, they hope, Majors will cave. The plan is working.

The vast majority of music business stories in the press are negative. They focus almost exclusively on the RIAA’s litigation and label firings. Why don’t we hear about the good side? The tech industry grosses about \$85 billion a year, eclipsing the music business with its \$15 billion. While the Tech industry spends tens of millions in advertising with the mainstream press, ask yourself when was the last time you saw a big add spread for a new album release. Advertising revenue influences editors more than anything else. That’s not conspiracy paranoia. It’s a fact.

But the “objective” press (deliberately or not) ignores the bigger issues at stake for artists if labels falter:

If the Tech world loses this campaign, they will simply have to pay a bit more for their loss leader item. Since they tend to bundle music with other products this expense

will not be felt in any significant way by the consumer. It will just shave the tech industry's gross a tiny bit to about \$87 billion.

But if art loses this war, that is to say, if record companies/artists lose their ability to control who gets to license their work and at what price, the music business, as we know it, *ends*. Music itself will suffer as an art form and the Tech-Masters will absorb the labels, bundle their catalogs, and in a few years you'll buy a lap-top and it will come pre-loaded with an entire Juke Box of Classic Rock, Rap, Jazz, whatever.

This may sound great if you're a consumer, but if you're a music company you will make only a small licensing fee and your artists and songwriters will see a paltry fraction of this sum. The trickle down effect for studio owners, producers, lawyers, managers, etc, will naturally be devastation.

As a music professional, if you're not pissed off, you're not paying attention.

Fortunately it's not too late to stop this insanity.

JOINING THE COLLECTIVE

A truly successful Orwellian "hearts & minds" campaign means also turning YOU, the very person who relies on copyrights to earn a living, into someone who thinks that technology's need to progress should be senior to author's rights. This too is a tough trick but the Tech-Masters are succeeding. How? Because we love to bash our own industry! It's cathartic. We just love to opine about the "dying record biz." The momentum has

caught many of us. I read this recently in a chat room, "I can't see it being anything but good if the top four record companies went out of business. The whole industry needs a fresh start." Many on the page agreed.

These "pro music" websites who celebrate negative views on the Majors are not friends to anyone who makes a living with music. (One example that has me puzzled is **Downhill Battle**. They purport to be doing artist advocacy while simultaneously insisting that you *never* buy Major label music. The site is owned by software developers www.downhillbattle.org) Many of these sites peddle a covert pro-tech agenda with half-truths about the music biz. The most recent one is yet another attempt to make us feel that resistance is useless: *income from declining CD sales is NOT being offset from digital sales*. Sounds bleak. Even a poorly researched and very tech-biased article in the Wall Street Journal agreed. So it must be true.

But it's not.

Tech-Masters don't want you to know that according to the annual reports of **Universal, Sony** and **Warner**, in 2006 the music biz had one of its best years ever, revenue wise. Or that sales from the mobile space and other new licensing sources has and will continue to put billions of *new* revenue into our space. They don't want you to know this because it would deflate their argument for DRM-free.

Instead, they focus journalists on how Majors are dial-up dumb, lazy and hurting artists by price-gouging internet radio stations out of exis-

tence (more on this next month). They highlight the hollow statistics of bad first quarter CD sales. (Which are always low. It's just after Christmas duh!)

They are hoping journalist don't ask the fiscally logical question: in the face of a recession, where automobile and many other industries are showing sales slumps, plus a radically changing technology landscape and all the negative publicity, Majors are still showing respectable numbers. So just how dumb are they? Who cares if sales of CDs are back to 1992 levels? That was still a very profitable time for music and anyone who says that companies like Sony and Universal cannot survive a shift in sales paradigms is either lying, misinformed, brain-washed, selling a book, or a sour-grapes ex-record executive caught in the downsizing that this changing landscape requires.

My personal favorite Tech-Master sophistry is, "Illegal P2P file sharing hurts (tech owned) music subscription services too. It drives up our cost and we also have to compete with free." This is true Machiavellian genius; *compete with free for a service that is a loss-leader to them in the first place?* How dumb do they think we are?

Reality: it's *because* of techies that illegal P2P exists in the first place and if illegal P2P prevails, record companies will be forced to issue DRM-free music to compete. Which brings us to poor, almost defeated EMI and their decision to take the advice of Tech-Master, **Steve Jobs**.

Steve is the classic Tech-Master. According to his annual report, he

does NOT make any significant money off of music sales--iTunes is a break-even division for Apple. Like all Tech-Masters he uses iTunes as a loss leader to promote the sale of his cash cow-product--iPods. He could care less if Majors make a profit.

If EMI's DRM-free move catches on, the other Major's will eventually be forced to do the same. If Jobs turns out to be right and sales go up, up, up—great, I'll personally issue a mea culpa. But if he's wrong, the Majors will not be able to re-cork the Genie. Their catalogs will be permanently devalued and they will eventually be forced to sell out on the cheap. On that day, you can bet, Tech-Masters will be waiting with their checkbooks.

SO WHAT? WHO NEEDS THE MAJORS? LET THEM DIE!

Nice fantasy. Sometimes I share it. And in terms of karma there might be some justice there as well. But then I wake up and realize something: The benefits would not outweigh the utter financial chaos it would cause to *Indie* artists.

Major Labels are the “banks” of our industry. They loan money to 1000's of artists, who then spend it in 1000's of studios and with 1000's of producers, who hire 1000's of engineers, who buy gear and invest in new artists, who sign with labels, and so on.

Even if you're an independent or emerging artist, you are in the wake of this economy. Big artists draw people into music outlets/venues and thus expose them to new music. Also, the big spending by Majors pushes down the off-peak rates

on studio time, materials, and CD replication. It also creates the upside potential to justify investment in emerging artists.

The fantasy that “if Majors die a Phoenix will rise from the ashes” is very unlikely. The higher probability is that in order for there to be a viable music industry *at all* Majors *need* to stay in business.

WHO SHOULD YOU BELIEVE?

So called experts and analysts who applaud EMI's “wisdom” and curse the **RIAA**'s defense of copyrights are just sucking up to the Tech-Masters who give them a media platform. Then disgruntled music executives grant interviews and ignorantly agree just to relieve their angst. This bandwagon effect is helping Tech-Masters load the gun they have pointed to our heads.

Think people! Have you ever heard a technology spokesperson *agree* with labels or argue in favor of copy protection? NEVER! They argue for DRM-free music to make a more “consumer friendly experience.” They are arguing that the consumers' rights are senior to the artists'. Let me repeat that: *they are arguing that the way consumers buy music is MORE IMPORTANT than the rights of the people who create it.*

As creators (or their advocates/vendors) one would think we would refuse to help and insist on arguing with anyone who tries to convince us that unprotected music is better for the music business or that because the law requires Tech-Masters like **AOL**, **Yahoo** or **Microsoft** to cow-tow to a group

that you also find repellent --the Majors--that Tech-Masters are somehow the “victims” in all this. That is asinine.

The enemy wants your work for free. To seduce you, they offer gadgets. To convince you to abandon faith in your industry, they peddle hopelessness. It's as simple as that. Don't give in. Because, if you think the bottleneck was tough when you had to deal with only four Major record companies, imagine what it will be like under three or four Tech companies, run by people who value silicone over a melody!

It's time we started thinking like artists again. Not computers, or computer makers.

This is winner take all. Should choosing sides really be that difficult?

Moses Avalon

For a really well written and lucid musician's viewpoint by **Charlie Gillingham** keyboardist for **The Counting Crows** go here: <http://www.countingcrows.com/news/news.php?uid=2353>

For examples of what I'm talking about and the thread that inspired this piece:

<http://episteme.arstechnica.com/forums?a=tpc&s=50009562&f=174096756&m=479001304831&r=479001304831>

<http://arstechnica.com/news.ars/post/20070320-nfl-fumbles-dmca-takedown-battle-could-face-sanctions.html>

<http://digitalmusicnews.com>

Uses, Licensing and Rights for Online Content

by Christian Castle

Following this introductory section, we have reproduced a chart to guide licensors and licensees of content through the high level issues of online licensing. The following are some points of advice for licensors and licensee.

Tips for Licensors

Uncharted Waters: Copyright owners who are considering licensing their content for online exploitations must understand that they are venturing into still largely uncharted waters with few reliable partners. It's better than it was in 2000 or even 2003, but it's still not an entirely stable environment and there are dangerous shoals along the route. Don't assume that words you have seen in contracts for decades have the same meaning to your licensee as they would to a court.

Get the Money: Licensing content to many online distributors or retailers is much the same decision as licensing to unscrupulous distributors in small third world countries. Experienced licensors will likely try to get the biggest advance they can, assuming they will be robbed blind on actual sales. Many such licensees go into their deals with the intent to deceive--like so many other aspects of the Internet culture the business question is often not what's right, but what you can get away with.

The best example I have of this is a deal I did a few years ago with a large online company. I pointed out in the negotiation that there was no audit provision in the contract that would have applied to the online company. I was told that the reason there would be no audit clause is that the company had decided that being audited was not an efficient use of their resources.

This is clearly not true of Apple or Napster, but when a potential licensee cannot demonstrate clearly how they intend to account or even use the content, the choices are usually don't make the deal, or make sure you have a very large—nonreturnable--advance.

Another example of the disconnect between the tech world and the content world when it comes to audits is a conversation I had with the CFO of a tech company (who was also a CPA). I mentioned the need for good record keeping in the case of audits, and he said he wasn't worried about it because he could get a SAS 70 certificate (which relates to Sarbannes Oxley) and there wouldn't be any need for licensors to audit. When I told him he had completely missed the point, he argued with me vigorously. I eventually prevailed.

Shakedown Licensing: All too often in this environment, the licensor finds themselves forced to grant a de facto license to an infringer simply because the licensor lacks the ability or financial wherewithal to pursue claims, or even to send "takedown notices" to the infringer. In the case of Google's YouTube, this means sending a

continuous stream of such notices to YouTube until the issue is litigated. This "Mars Attacks" strategy is common with Internet companies who seek safety in the massive numbers of the mob of people who want to get music for free.

Unplanned Subdistribution: A licensor may also find themselves entering into a distribution agreement with a third party who itself has a license agreement with one of the offending services, such as YouTube. If a licensor does not use care in their negotiation, they may inadvertently find themselves being distributed in a manner they did not anticipate or think that they were authorizing. This is a problem because YouTube claims that they cannot filter, and it would be a good guess that if they can't filter, they can't account on any basis.

If, for example, a copyright owner is asked to clear the use of a sound recording or musical work for broadcast on television, the copyright owner must now ask where that broadcast signal is going to appear. If the signal is going to be rebroadcast or syndicated on a television network that has a deal with, say, YouTube, but the copyright owner doing the clearing does not, then the copyright owner should take this into account.

A simple solution to this problem is to include "downstream" provisions that would be binding on the syndication partner or at least create an obligation in the licensee to act on behalf of the syndication partner. For example, while a licensor may not object to a simple rebroadcast

of a television program on Joost or another IPTV service which is essentially a rebroadcast of the original TV signal, they may prohibit clips being shown on YouTube (if for no other reason than this may create a “reuse” payment obligation with AFTRA or SAG).

Tips for Licensees

Do Not Underestimate Complexity: Licensing content rights is a very complex process. It always takes longer than you think, sometimes a lot longer. You need to think seriously about hiring someone in-house with many years of experience in the field, otherwise the legal fees will kill you, and even if you hire someone in-house you’ll still need outside counsel in all likelihood.

It is a Round World: Do not forget that the Internet is a world-wide medium, so be sure you get, or can get, all the rights you will need in all the countries in which you wish to operate. Too many tech companies approach music and motion picture rights licensing like they are setting up a glorified lemonade stand. These are industries that have been around for decades, and in the case of the music industry, hundreds of years. There are well-settled business practices that are slightly or greatly different from country to country. Just because you are on the Internet doesn’t mean you can magically make these rights go away, and you will look like an immature yokel if you try to tell, e.g., the French, why the Internet will solve all their problems.

Do Not Start By Calling Everyone

An Idiot: Many tech folk see nothing wrong with starting their negotiations by telling everyone on the other side that they are stupid. This is not a good way to start things off. You probably couldn’t get your dry cleaning if you followed this tact, and you certainly won’t get a content license.

It’s a Big Queue: There is a very long line ahead of you whenever you jump into the licensing game. Your job is to wheedle your way up to the front. Be nice. Be patient. You are going to be very, very frustrated by how long everything takes. There are lots of people with lots of ideas trying to get the attention of relatively few people at the labels and publishers. Don’t be tempted to just launch without licenses unless your name is Google, and then you know who you are and you can get your own advice.

Have a Good Deck: You need to hone your elevator pitch until it is perfect. If you can’t explain what you’re doing in 100 words or less, keep practicing until you can.

Have A Lot of Money: Even after you get through the licensing process, it takes a lot of money to launch a consumer brand online. If wishes were horses, beggars would ride.

Don’t Forget the Music Publishers: Almost every tech company—especially, it seems, the ones with high priced Silicon Valley lawyers—forgets that they have to license the songs in addition to the sound recordings. Songs are

not “tracks” and “tracks” are not songs. They are separate and equal copyrights. It is very cumbersome to license musical works in the current regime in the United States except for permanent download purposes.