

# Building International Empires of Sound: Concentrations of Power and Property in the “Global” Music Market

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*The merger of the recorded music divisions of Sony and BMG, finalized on August 5, 2004, created the world’s largest music company while reducing the “Big Five” labels to the “Big Four.” The new goliath Sony BMG Music Entertainment will now control over 30% of the global music market. As power and resources were being consolidated in the music industry, regular amendments to the length of copyright terms were extending private ownership of creative works, delaying their passage into the public domain. This study analyzes how the world’s media giants use their power and property to influence national and international laws in order to lock down culture and control creativity.*

## Introduction

The merger of the recorded music divisions of Sony and BMG, finalized on 5 August 2004, reduced the “Big Five” record labels to the “Big Four.” The new goliath Sony BMG Music Entertainment will now control 25.2% of the global music market. This threatens the dominant position of Vivendi Universal, which commands the world’s largest collection of record labels and holds 25.9% of the global market. Between the two companies, they now control more than 50% of the world’s music market. EMI and Warner share approximately 23.9% of the market, and independent labels make up the remaining 25% (IFPI, *Recording 4*). Through a concentration of power and property, the four remaining media conglomerates have slowly built international “empires of sound” (Millard 174), which now exercise control over 75% of the world’s musical output.

As power and resources were being consolidated in the music industry, regular amendments to the length of copyright terms were extending private ownership of creative works, delaying their passage into the public domain. Steadily, since the first

copyright act of 1790, the term has expanded from 28 years to the life of the author plus 70 years. Ironically, copyright law was originally intended to discourage *perpetual* monopolies over “literary, artistic, or musical works” by granting *limited term* monopolies; however, the numerous term extensions have accomplished quite the opposite.

This study focuses on the most recent 25 years of a century-long history with special attention paid to the “consumer digital age” (1997–present) when digital music production tools became available to the consumer. In this new environment, to maintain the status quo and guard against new technologies seen as threatening, the world’s media giants use their power and property to influence national and international laws in order to “lock down culture and control creativity” (Lessig, *Free*). Further, through a case study of recent events in Brazil, I will demonstrate how the music oligopoly, centered in industrialized nations, coerces developing nations into intellectual property treaties that preserve corporate hegemonic control over the music of the world (often at the expense of local cultures).

### **The Nature of the Beast**

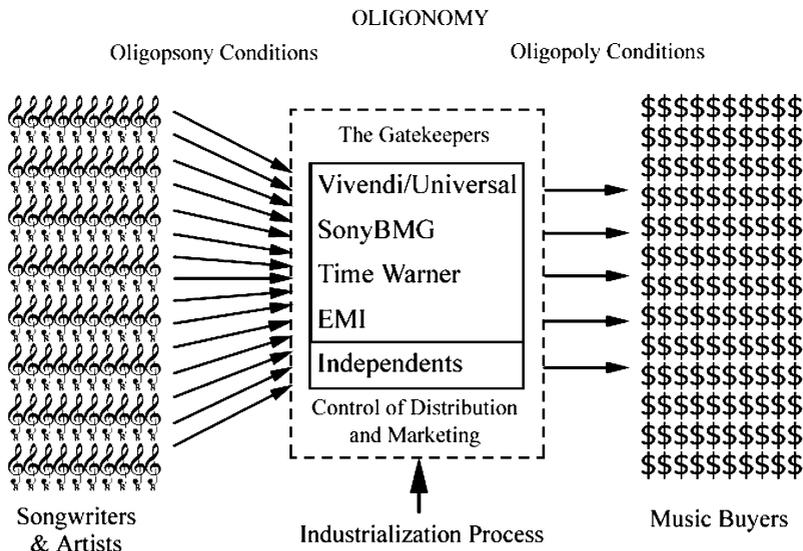
The music industry rose like a phoenix from the struggles of monopoly building during the late nineteenth century. And from its very inception to the present day, the industry has remained an extremely litigious entity. During the now famous “patent wars” of the 1890s and early 1900s, numerous patent holders pleaded their cases in court, all seeking monopoly control over their versions of the newly invented phonograph and gramophone. The subsequent legal cases and injunctions stifled the early development of a recording industry in the United States. However, much was at stake. Controlling technology meant, and still means, controlling its associated market; therefore, among the most valuable assets of any successful record company was patent ownership. After more than a decade of war, the three main players concluded that it was better to share ownership through cross-licensing agreements than to hold up the industry indefinitely.<sup>1</sup> The oligopoly formed by Edison, Columbia, and Victor, “the big three,” owned nearly every important patent on phonographs and records (Millard 65). With ownership issues settled, the potential industry was free to get under way. One hundred years later, the importance of patents to record companies has yielded to copyrights; however, ownership is still the driving force behind the billion-dollar music industry. The industry that we know today was built through 100-plus years of corporate struggles for ownership and control. To retell this fascinating story here would be a major digression, but suffice it to say that the growth of the music industry is as intertwined with monopoly building as it is with technological advancements. For it has been the ownership and control of technology, and music, that have built today’s music empires, where, more than ever, ownership equals power.

When considering the music industry in 2005, it is important to keep in mind that, despite outward appearances, the industry is not comprised of four media

conglomerates marching in concert toward a common goal. Quite the opposite, each strives individually to capture the “lion’s share” of the world’s music markets for itself. According to industry executive Ted Cohen the overall “intercompany competition is very fierce. It’s not [four] companies working in lockstep” (Alderman 82). When it comes to the music business, the model is integration: “control as much of as many things as you possibly can.” For this reason, the mega conglomerates of today are the result of an evolution that has taken place over the past 100 years, through a series of acquisitions and mergers. If we consider the “music industry” as a single entity, it may seem to operate as a monopoly, and in many ways it does, but the overall picture is a bit more involved. The business structures of the remaining four major labels (Vivendi/Universal, SonyBMG, AOL-Time Warner, and EMI) conform to an interesting economic condition recently identified by economists as *oligonomy*. As we all know, an oligopoly exists when a few sellers control a particular market. An *oligopsony* is a market in which there are many sellers, but few buyers. “In an oligonomy, companies act as an oligopoly to one group and an oligopsony to another” (Hannaford). For example, in its retail dealings with the music-buying public, the record labels operate as part of an oligopoly, where a few sellers (the big four and a group of independents) control a market in which there are many buyers. An oligopoly naturally creates a seller’s market. At the same time, the record labels are oligopsonies for songwriters and artists who represent innumerable anxious sellers, in a market where there are relatively few willing buyers. An oligopsony encourages a buyers’ market. This oligonomic condition gives the record labels the power to have the best of both worlds as they fashion anemic artist contracts to obtain low-cost content, then sell that content to music buyers at inflated retail prices in the market, which it controls (see Figure 1).

Acting as the “gatekeepers” to the industrialization process through which music must pass in order to be entered into the global market (Frith 54), the labels, especially the big four, gain and maintain control over what music is conceived, performed, transmitted, and received by any audience at any given time (Bishop 161). The occurrence of this process within an oligonomy allows the labels to enjoy unfair advantages on both the supply and demand sides of their business. Below the glamour, glitter, and stardom, the bottom line of the music industry is to obtain high-quality content as cheaply as possible and to vend that content to as many people as possible for the highest price the markets will bear. An oligonomy helps make the labels’ dream come true.

Now that we have seen how the individual record companies operate as oligonomies, we can return to considerations of the music industry as a whole. The major labels are organized globally under the International Federation of the Phonographic Industry (IFPI), a Swiss non-profit entity with its registered office in Zurich, Switzerland, but its Secretariat office located in London, England. In the United States, the world’s largest market, labels are organized under an affiliated association, the Recording Industry Association of America (RIAA). The RIAA was chartered in September 1951, as a non-profit organization in the state of New York.



**Figure 1** Oligonomy of the Record Labels

“It was officially designed to deal with legislation, the allocation of materials, [and] preparation of industry statistics” (Sanjek 243). What it has become in the 21st century is quite another thing, as we shall see below. Both the RIAA and the IFPI receive their funding from the membership fees of their member labels and, therefore, they *do* march in lockstep toward a common goal: ensuring that the financial interests of their members continue to grow despite continually fluctuating market conditions. In recent years, the release of CD burners to the public (1998) and the MP3 explosion on the Internet (1997–present) have meant launching the highly publicized “war on piracy” to suppress consumer use of these new technologies in order to preserve the status quo, but more on that later. For now, I simply want to point out that concentrating the interests and resources of thousands of record labels worldwide under the umbrellas of the IFPI and the RIAA empowered these associations politically on national and international levels. Representing an industry responsible for 32 billion dollars of commerce annually the associations have amassed incredible lobbying power, such that their efforts have yielded numerous Constitutional amendments designed to protect the “old guard,” their members, against the “new.” Alone, the music industry does not pack enough powder to load a weapon sufficiently powerful to affect governmental policies. Therefore, it must be kept in mind that each of the record labels is part of a much larger whole, and is simply a division, a “shifting piece in the wealthy mosaic of communications and entertainment conglomerates” (Alderman 82). This is where the real power lies. In the comfort of this enormously wealthy and powerful mosaic, international empires of sound were constructed.

## **Empires of Sound**

Out of the consolidation of power and property within the media industry over the past century stepped a small group of mega-conglomerates that now wield control over the vast majority of music, films, television, radio, newspapers, books, and technologies that reach the general public. The concentration in the media industry is extraordinary. As of 2000, the top six media firms that dominated all American mass media, in order of annual revenues AOL-Time Warner, Disney, Viacom, News Corp., Bertelsmann and General Electric, had more revenues than the next 20 firms combined (Bagdikian x). According to media critic Ben Bagdikian, these conditions have created “a communications cartel of a magnitude and power the world has never seen” (xi). The current level of corporate control over information and cultural expression should place worry lines across the brow of every free-thinking human being around the world. I believe it would were not the media giants so adept at using their power to direct public opinion and influence government policy. Communications professor Robert McChesney has questioned the legality of such a concentration of media power: “This oligopoly would never have passed legal muster if the regulators at the Federal Communications Commission and in the antitrust division of the Justice Department were doing their jobs, or if the Telecommunications Act of 1996 were not railroaded through Congress” (McChesney). How two government agencies and the United States Congress can be “railroaded” for private gain becomes a bit clearer in the following section, but, first, I would like to put some of the pieces of the puzzle in place to help visualize the overall picture of power consolidation within the music industry.

The “big four” music labels of today—as mentioned, Universal, SonyBMG, Time Warner, and EMI, in that order—though each constitutes a major international corporation on its own merits, are but branches on the family trees of the world’s largest media conglomerates. Here it will be useful briefly to touch upon the most significant corporate strategies that have reduced the “big six” of the 1980s down to the “big four” left standing as of this writing. Of the many strategies used in the music industry to obtain market dominance, two have had the most significant effect on its development: horizontal integration and vertical integration. The act of consuming, or controlling, other similar size fish in a community tank is an example of horizontal integration. Having a large fish that owns the tank, the water, the plants and rocks, and the food supply, which is distributed to the other fish under conditions controlled by the large fish, is vertical integration. Each has its advantages and disadvantages, of course, but for those at the top of the tank there are clearly more of the former than of the latter. A great example of horizontal integration is the German media giant Bertelsmann, which owns Random House (books), Grune+Jahr (magazines and newspapers), Arvato Printing (printing and media services), direct marketing groups (book clubs, CD clubs), online interests (CDnow.com, Book of the Month Club, BMG Music Service), and, of course, the monstrous Bertelsmann Music Group, or BMG, which consists of the world’s third largest music publisher and

the internationally recognized label. In this example we can also find the strategy of vertical integration, where Bertelsmann, a publisher since 1853, owns its manufacturing and assembly facilities, its marketing and distribution, and the outlets for the products it sells. Such vertical integration not only helps a company improve its supply chain efficiency, but also allows it to capture previously elusive “upstream” and “downstream” profits. Horizontal integration, on the other hand, allows companies to increase revenues by expanding their share of the market through acquisition or merger. Both strategies consolidate resources while concentrating ownership into fewer corporate hands. However, excessive horizontal integration creates market monopolies that threaten free markets and is therefore governed by the anti-trust laws administered by the US Department of Justice. To hedge against changing economic conditions, the consolidation of record labels and the concentration of ownership have accelerated dramatically since the 1980s due largely to the strategy of horizontal integration. A closer look at the creation of today’s big four offers a perspective on that process and demonstrates just who owns what in today’s music business (also see Figure 2).

Despite being only seven years old, Universal is the world’s largest collection of record labels, controlling 25.9% of the world’s music markets (IFPI, *Recording* 4). How it achieved this monumental feat was simple: horizontal integration—i.e. the merger of MCA and PolyGram Records. MCA (Music Corporation of America), a stalwart of the American movie scene since 1924, began as the Chicago booking agency of Dr Jules Stein and before long expanded into the music publishing and film business with Universal Studios (Southall 119). The English label Decca Records opened operations in the United States in 1934 and, by 1952, had purchased controlling interest in Universal Pictures. Six years later, MCA purchased the Universal Studios Property and Paramount’s pre-1948 film library for its MCA TV

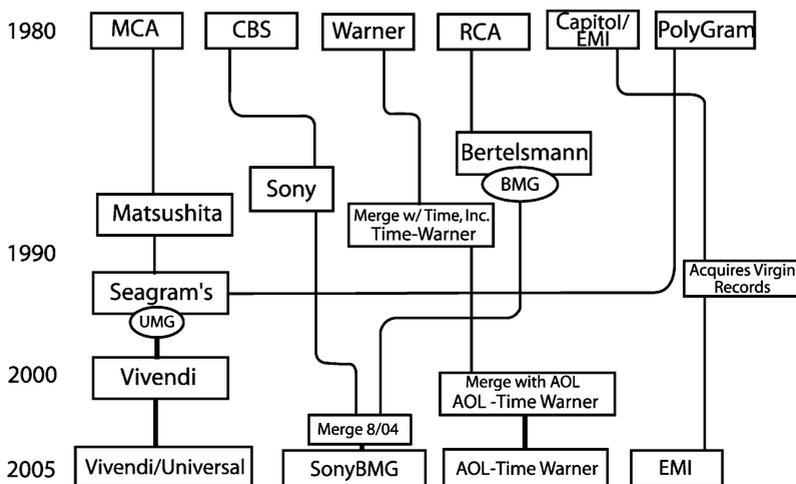


Figure 2 Industry Consolidation 1980–2005

division, incorporating under the name MCA, Inc. However, when the merger of MCA-Decca-Universal was proposed in 1962, the Justice Department charged MCA with violating the anti-trust laws (Sanjek and Sanjek 153). In order for MCA, Inc., to merge with Decca Records and subsequently Universal Studios, it was necessary for MCA to surrender its franchise as a talent representative, which it did without hesitation. By 1973, the Decca label had evolved into MCA Records, which then absorbed ABC Records in 1979, Motown in 1986, and Geffen Records in 1989.<sup>2</sup> The following year, MCA, Inc., was acquired by Japanese electronics giant Matsushita, the parent company of Panasonic, for US\$6.6 billion (Millard 344). This gave Matsushita: Universal Pictures, Universal Television, MCA Home Video, MCA Records, a large number of theaters, and numerous other holdings. At the time, the deal made Matsushita the largest entertainment conglomerate in the world. In 1995, Canadian distiller Seagram's purchased 80% interest in MCA, Inc., now named the MCA Music Entertainment Group. Three years later, Seagram's purchased PolyGram and merged it with MCA to create the Universal Music Group (UMG), maintaining the MCA name as a separate label (Southall 119). In 2000, Seagram's sold the music conglomerate to French media giant Vivendi, which promptly changed the corporate name to Vivendi Universal.

As MCA was absorbing and being absorbed, two of the world's largest electrical engineering and electronics companies, Philips and Siemens, became major players in the music industry. The German firm Siemens had originally founded the Deutsche Grammophon Gesellschaft in 1898 to offer a line of classical recordings to the German and European elite. In 1924, Siemens launched a second label, Polydor, for popular music (Southall 143). The Dutch company Philips, founded in 1891, had gained international fame and fortune as the manufacturing facility for the mass production of Thomas Edison's incandescent light bulb and other electric products. Philips entered the music business in 1950 by creating Philips Phonographische Industries (PPI), and by the following year established the label Philips Classics. Continuing to build its musical holdings, Philips acquired Mercury Records in 1960, and two years later, with Siemens, established a joint venture linking the Deutsche Grammophon and PPI under the name Phonogram (Southall 140). Finally, in 1972, Philips and Siemens combined Phonogram with Polydor to create PolyGram. PolyGram bought out several labels in the United States, most notably MGM and Verve, and took over the United Artists record distribution system (Millard 334). As mentioned, in 1998 Seagram's purchased PolyGram and merged it with MCA to create UMG.

Sony BMG Music Entertainment, formed by the 50/50 merger last August, is the world's second largest music conglomerate and holds 25.2% of the world's music markets (IFPI, *Recording* 4). Sony Music Entertainment grew out of the Sony Corporation, founded in 1946 war-torn Japan as Tokyo Telecommunication Engineering (TTEC). In 1954, an American firm, the Regency Company, using a Texas Instruments transistor, introduced the first transistor radio. The following year, TTEC introduced its own transistor radio, the TR55, which utilized a chip that

TTEC had designed. “It carried the brand name Sony” (Millard 218). In 1957, TTEC was renamed the Sony Company and introduced a transistor radio small enough to fit into a shirt pocket. The transistor radio was so popular that, by 1959, “there were twelve million in use; soon there were more radios than households in the United States” (Millard 219). After three decades of amassing an empire as the manufacturer of consumer and professional lines of audio/video equipment, Sony “took the plunge” in 1988 and became involved in the software business through the purchase of CBS Records for 2 billion dollars (Millard 344). The following year, the corporation continued the trend and purchased Columbia/Tri-Star Pictures (Negus 41). “The purchase of Columbia Pictures Entertainment in September 1989 was one part of a business strategy to make Sony Corporation of Japan a multi-media entertainment empire” (Millard 344). The media empire soon formed the Sony Software Corporation in 1991 to oversee the record business, which had been renamed Sony Music Entertainment. In 2004, Sony merged its music interests with BMG to create SonyBMG Music Entertainment, the second largest collection of labels in the world.

The other half of the SonyBMG Empire is the German mega-conglomerate Bertelsmann, which became deeply connected to the early days of American recording history with the 1986 purchase of RCA Records from General Electric. General Electric (GE) was formed in 1892 through the merger of the Thomson-Houston Electric and the Edison General Electric Companies (Israel 336). Post World War I measures placed the control of radio patents in the hands of public US corporations sparking patent wars over the use of the vacuum tube. To quell the wars and avoid costly delays, in 1919 the Radio Corporation of America (RCA) was formed to control the patents and act as a sales agency for radio equipment.<sup>3</sup> In 1926, the Victor Talking Machine Company was sold to the banking firm of Seligman and Speyer, which acted as a holding company (Sutton 238). On 4 January 1929, Seligman and Speyer sold Victor to the Radio Corporation of America (RCA) forming RCA-Victor (Sutton). Over the next six decades RCA, the parent company of RCA Records and the NBC television network, would become one of the world’s largest media companies. In 1985, when General Electric repurchased RCA, their sights were on obtaining NBC; therefore, in order to finance the deal, the following year GE sold off RCA Records to the Bertelsmann Publishing Company of West Germany. Bertelsmann named its new music empire the Bertelsmann Music Group, or BMG. The merger with Sony not only created the world’s second largest music empire, it combined CBS (Columbia) and RCA (Victor), the two remaining labels of the original big three, which once included Edison.

The third of the big four, AOL-Time Warner, was created in 2000 by the merger of Time Warner with AOL. The deal, worth \$183 billion, was the largest corporate merger in history. Ted Turner Broadcasting purchased the failing Metro-Goldwyn-Mayer (MGM) in 1986 for \$1.6 billion, then sold off the studio’s film laboratory and real estate. In the transaction, Turner netted \$1.1 billion in a single asset, the MGM

film library (Goldstein, *Copyright's Highway* 165). In 1989, Warner Communications and Time, Inc., merged, forming Time-Warner, Inc., at the time the world's largest entertainment and music conglomerate. In 1991, the Internet bulletin board system Quantum Computer Services changed its name to America On Line. The new company began being publicly traded the following year. After the passing of the Telecommunications Act of 1996, which essentially deregulated the holdings of the media conglomerates, Time-Warner acquired Turner Broadcasting. In 2000, AOL merged with Time-Warner, yielding a corporation valued at \$350 billion, history's "largest merger in media, or any other enterprise" (Bagdikian x). The merger was finalized in January 2001. In 2003, debts incurred from AOL led to the liquidation of corporate assets, and Time Warner confirmed the sale of the Warner Music Division (including its record labels Warner Brothers, Atlantic, Elektra and music publishing division Warner Chappell) to the Thomas. H. Lee investment group led by Edgar Bronfman, Jr., heir of Seagram's of Canada. And in 2004 Time Warner finalized deals to sell the WEA CD and DVD manufacturing division to Cinram International of Toronto.

On 21 April 1931, amidst the Great Depression, the British component of Victor, the Gramophone Company of London (HMV) (His Master's Voice), merged with the British Columbia Graphophone Company to form the holding company Electrical and Musical Industries Ltd (later to be known as EMI) (Martland 136). In November of that same year Electrical and Musical Industries constructed the world's first purpose-built recording studio complex in Abbey Road, St. John's Wood, and to this day the facility remains the center of EMI's recording and post-production work. In 1979 the English electric manufacturer Thorn acquired EMI, taking Thorn from an engineering firm to an international entertainment conglomerate, Thorn/EMI (Millard 344). Thorn/EMI then acquired Richard Branson's Virgin Records (founded in 1972), in 1992. In pursuit of the objective to focus only on globally competitive businesses, Thorn/EMI reduced itself to EMI, the Thorn Rental Group, and HMV. By 1996 the two companies had de-merged creating the separate entities of the EMI Group and Thorn, plc (Martland 268). During the late 1990s and early 2000s EMI attempted to merge with Warner and BMG. Due to regulatory concerns, European Union Commissioner Mario Monti denied both attempted mergers. It is no coincidence that EMI, which ranks last in market share among the big four, is the *only* one not backed by a corporate parent with deep pockets. However, EMI is one of the world's largest music publishers in terms of copyrights owned, controlled, or administered, with rights to more than one million musical compositions and offices in thirty countries. The same could certainly be said about Warner/Chappell, especially since the 1994 deal that brought CPP/Belwin publishing into their fold.

In addition to the big four, another force that shaped the music industry and led to the creation of one of today's six largest media empires was Music Television (MTV), launched in 1981. In 1979, American Express purchased 50% of Warner Communications' cable division to create Warner-Amex Cable Communications, which soon spun off the Warner-Amex Satellite Entertainment Company (WASEC),

“to develop specialized program services for cable” (Banks 31). MTV’s idea was to air the videos that the industry had been making since the mid-1970s for European promotion. In the proposed deal the record labels would provide the content and MTV would air it for free. Although the industry was skeptical, with the sagging sales of the 1980s they had nothing to lose. MTV was billed as a 24-hour cable service showcasing an endless stream of music videos, short visual productions featuring current pop and rock songs (Banks 1). “MTV, or Music Television premiered on cable television systems on August 21, 1981, at 12:01 A.M. EST with a video of the song, ‘Video Killed the Radio Star’ by the Buggles” (Banks 34). The Financial Interest and Syndication Rules (Fin-Syn Rules), created in 1970 to increase programming diversity and limit the market control of the three US broadcast television networks, led to the break-up of CBS, out of which Viacom was formed as a TV program syndicator. In the mid-1980s WASEC sought to sell MTV (Banks 117), and in 1985 Viacom International acquired a two-thirds interest in MTV Networks and a one-half interest in the premium cable programs Showtime and The Movie Channel. In March the following year, Viacom purchased the remaining third of MTV in a deal that was reported to have been worth more than \$690 million. Through vertical integration, Viacom has amassed financial interest in broadcast and cable television, radio, the Internet, book publishing, and film production and distribution, including the CBS network, MTV, MTV2, Nickelodeon, Infinity Broadcasting (185 radio stations), Simon & Schuster, Blockbuster, and Paramount Pictures. In 2005, Viacom remains the third largest communications conglomerate in the world with more than 122,000 employees and annual revenues of \$26.6 billion.

Although this summary of the consolidation of the big six into the big four was certainly a surface treatment, its purpose was briefly to illustrate the consolidation of the world’s record labels as shifting pieces “in the wealthy mosaic of communications and entertainment conglomerates” since the 1980s. Today’s music business is in the hands of mega-corporations, which also control TV, radio, publishing, electronics manufacturing, and global communications networks. The deep concentration of power in the media industry works to influence legislation, which grants measures of control meant to maintain the status quo. It is in this way that big media uses the law to “lock down culture and control creativity” (Lessig, *Free*).

### Measures of Control

Nearly everyone alive on earth today has heard of, or has seen the image of, Walt Disney’s Mickey Mouse. Through Disney’s powerful marketing apparatus, the trademark mouse ears are among the world’s most recognizable corporate logos. However, far fewer people are familiar with *Steamboat Bill Jr.*, or *Steamboat Willie*. *Steamboat Bill, Jr.* was the last independently produced silent film of comic genius Buster Keaton. Film had been successfully synchronized to sound by 1927, when *The Jazz Singer* premiered with music chosen and performed by Al Jolson (Sanjek and Sanjek 34). Keaton’s *Steamboat Bill, Jr.*, released the following year, was indeed one of

the last silent films of a great era. “The film was classic Keaton—wildly popular and among the best of its genre” (Lessig, *Free* 22). So, what do *Steamboat Bill, Jr.* and *Steamboat Willie* have to do with Mickey Mouse? Everything.

*Steamboat Bill Jr.* appeared before Disney’s Cartoon *Steamboat Willie*. The coincidence is not coincidental. *Steamboat Willie* is a direct cartoon parody of *Steamboat Bill*, and both are built upon a common song as a source. It is not just from the invention of synchronized sound in *The Jazz Singer* that we get *Steamboat Willie*. It is also from Buster Keaton’s invention *Steamboat Bill, Jr.*, itself inspired by the song “*Steamboat Bill*,” that we get *Steamboat Willie*, and then from *Steamboat Willie*, Mickey Mouse. This “borrowing” is nothing unique, either for Disney or for the industry. (Lessig, *Free* 22–23)

Throughout its history, Disney (or Disney, Inc.) has “ripped creativity from the culture around him, mixed that creativity with his own extraordinary talent, and then burned that mix into the soul of his culture. Rip, mix, and burn” (Lessig, *Free* 24). This type of “Walt Disney Creativity”—“a form of expression and genius that builds upon the culture around us and makes it something different” (Lessig, *Free*)—is the very nature of the creative cycle. Pop artist Andy Warhol owed his fame and fortune to this process. Through “ripping” external cultural stimuli and “mixing” them with his own special brand of genius, Warhol “burned” his pop art into the fabric of American culture. Rip, mix, and burn. That has always been the cycle of creativity—until quite recently.

The creative freedoms of today, compared with those of 1928, have been drastically restricted through regular revisions to our copyright laws pushed through the United States Congress by the lobbying power of the internal “copyright industries” and by external pressures from the international copyright community to conform to the global standards. Copyright, like music, is intrinsically linked to technology. Its concept traces back to the “first copyright technology,” the movable type printing press, invented by Johann Gutenberg in Germany *circa* 1440 (Samuels 11). Its legal history originates in 16th-century England when the crown bestowed *perpetual monopoly* control over book publishing in the UK to the Stationer’s Company. After a century and a half of domination, opposition to control and monopolies in general became strong enough to become disruptive. To end the growing chaos, Queen Anne issued the Statute of Anne in 1710, which replaced the perpetual monopoly with that of a *limited term*: 14 years and a renewal term of an additional 14 to the author, if living. After that period, the privately held work would fall into the “public domain”, where others could draw upon it for future creativity. Therefore, copyright was originally conceived as a mechanism to balance private and public interests by eliminating perpetual monopolies over creative works.

When President George Washington signed into law the United States’ First Federal Copyright Act in 1790, the Act in many respects mirrored the Statute of Anne, especially in length of copyright terms. In the first general revision of copyright law in 1831, Congress extended the initial term of copyright to 28 years, plus the 14 renewal years, for a total of 42 years (Samuels 205). Another important change

granted the right to a living widow or children of the deceased to acquire the renewal term (Patterson 201), and, for the first time, musical compositions were added to the types of works eligible for federal copyright protection. In 1909, the re-codification of the copyright law extended the renewal term to 28 years, bringing the total years of protection to 56 (Samuels 205). In 120 years the total copyright term had exactly doubled from 28 to 56 years. So, by 1928, when Disney was “ripping” Steamboat Bill, Jr. from the culture around him, “mixing” it, and “burning” his new creation, the copyright law granted him control of Mickey Mouse until the year 1984. However, in 1976 the United States finally caved in to external pressures and adopted the copyright standards that prevailed throughout the rest of the world: the life of the author plus 50 years (Samuels 206). In some parts of the world, and especially Europe, copyright protection had increased to life of the author plus 70 years (*ibid.*). Despite considerable opposition to matching the global standard, the “Sonny Bono Copyright Term Extension Act” of 1998 amended chapter three, title 17 of the *United States Code*, extending the duration of a copyright by 20 years. The duration of the copyright term increased to the life of the author plus 70 years, in the case of individual works, and from 75 years to 95 years in the case of works of corporate authorship and works first published before 1 January 1978. The Copyright Term Extension Act (CTEA) was enacted on 27 October 1998 in memory of the congressman and musician, Sonny Bono, who believed that copyright should last forever (Lessig, *Free* 215).

In the first 150 years of copyright, the term was increased only twice: once in 1831 (from 28 to 42 maximum years) and once in 1909 (from 42 to 56 maximum years). “Then, beginning in 1962, Congress started a practice that has defined copyright law since” (Lessig, *Free* 134). Since 1962, there have been eleven term extensions to existing copyrights consisting mainly of short one- or two-year extensions. However, in 1976 Congress added 19 years to all existing copyrights and, by 1998 in the CTEA, “Congress extended the term of existing and future copyrights by twenty years” (*ibid.*). The intended effect of these extensions was to prolong private control and further delay the passing of works into the public domain. “This latest extension means that the public domain will have been tolled for thirty-nine out of fifty-five years, or seventy percent of the time since 1962” (*ibid.*). Although “life of the author plus 70 years” is technically a limited-term monopoly, its effects on culture are the same as perpetual control: it locks it down. For example, let us assume that in 1980 a 25-year-old composer wrote a song, the publisher copyrighted it, and it become very popular. As of today, the average lifespan of a healthy male is just over 70 years. Our composer is healthy and lives to be 70. It is now the year 2025. At this point the “plus 70 years” kick in and continue to protect the work until the year 2095. However, since a corporation holds the copyright the post mortem extension is “plus 95 years,” securing the work until the year 2120. And, with the trend of extending copyright terms as it is, it seems certain that before 2120 the term will again be extended at the behest of the copyright industries. In this example, the limited term of the copyright would be 140 years, which is not unusual. Under current conditions, the majority of

copyrights can last well over a century, which is not much different from the perpetual monopoly held by the Stationer's Company in 16th- and 17th-century England. It seems in this regard we have indeed regressed back to the days of merry ol' England as a small "inner circle" of media giants are given monopoly rights over the cultural output of society. The balance between public and private interests, originally intended by copyright law, has been dangerously shifted in favor of the private, the ownership class, the media conglomerates, at the expense of the public domain and cultural creativity. By locking down culture and controlling creativity, "the old" maintains its status quo and uses its power against "the new."

In the 1990s, with the rise in available digital audio devices and the growing popularity of the Internet, the music industry went running to Congress for protection from the new technologies that threatened its hegemony. When digital audio tape (DAT) and DAT recording devices began making their way into the American gray market by 1988, the record industry threatened to sue the manufacturers for contributory copyright infringement. Under the threat of litigation, and for a variety of other reasons, the manufacturers held off introducing the DAT format to the United States (Samuels 49). For one thing, the recording industry's marketing strategy focused on pushing the CD format, rather than DAT, to the mass consumer. For another, the industry feared the mass proliferation of digital recorders and players would enable pirates to create high-quality digital copies, thereby threatening their monopoly on digital production. In 1989, the manufacturers and *sound recording* copyright owners reached an agreement that a serial copy management system (SCMS) be built into the DAT players/recorders, and the following year the format was introduced to the US market (Hull 81). No sooner had the format been introduced than legal action levied by the *musical composition* copyright owners brought the DAT market to a standstill. Subsequently, a series of complicated negotiations began between hardware manufacturers, record companies, music publishers, songwriters, recording artists, and performing rights organizations, all seeking to protect their interests (Hull 82). After continual breakdowns in negotiations, in June 1991 the parties reached a "historic compromise" that was introduced in Congress, and, after a year of hearings, the bill was signed into law by President George H. W. Bush on 28 October 1992. The Audio Home Recording Act of 1992 represented a major legal response to the digitization of music (Samuels 49). The AHRA amended title 17 of the *United States Code* by adding a new chapter 10, "Digital Audio Recording Devices and Media." The Act placed a royalty surcharge on the sale of all digital recording devices and blank media sold in the United States to compensate the music industry for lost revenues due to digital copying. However, by placing its enormous resources behind the CD format, the music industry effectively "killed" the DAT as a consumer format. Sony abandoned the consumer DAT in favor of the MiniDisc format, and Philips and EMI "placed their bets" on the new digital compact cassette (DCC) they had been developing (Hull 82). As history has shown, they both lost out, for the DCC never caught on in the United States and the MiniDisc enjoyed only moderate success. Through powerful media campaigns, the

music industry squashed the competition of consumer digital recording devices and herded the music buyer toward their format of choice, the CD. Having done so, the AHRA was essentially a “digital dead duck” (Hull). However, the CD format presented an interesting twist of irony for the music industry: on one hand, the CD saved a failing industry in the 1980s; on the other, consumer CD recording technology of the late 1990s made it possible for the music buyer to create digital copies equal in quality to the originals. The rapid growth in popularity of consumer “CD burners” and CD-Rs resurrected the usefulness of the AHRA. Although the industry received its royalties from the sale of digital copying devices and blank media, its nightmare was now a reality: digital recording technology was in the hands of the consumer.

Causing equal despair for the industry was the power of the Internet and related music technologies, especially the MP3, which became widely popular beginning in 1997. The copyright industries quickly called upon Congress for protection from the threat of the new technologies. It is here that the powerful lobbying efforts of the media empires truly paid off. Congress responded with a very hastily assembled set of statutes known as the Digital Millennium Copyright Act (DMCA), which President Bill Clinton signed into law on 28 October 1998. The DMCA was a hurried, ill-conceived fix to a problem that was little understood by the lawmakers. According to Siva Vaidhyanathan, “The best example of legislative recklessness is the Digital Millennium Copyright Act of 1998” (174). The DMCA drew many criticisms for its potential infringements on the First Amendment of the Constitution. Since they were enacted, the “anti-circumvention” provisions of the DMCA have not been used as Congress envisioned. The objective of Congress was to stop copyright pirates from defeating Serial Copy Management Systems. However, “[i]n practice, the anti-circumvention provisions have been used to stifle a wide array of legitimate activities, rather than stop copyright piracy. As a result, the DMCA has developed into a serious threat to several important public policy priorities” (EFF). According to the Electronic Frontier Foundation, the DMCA stifles free expression and scientific research, jeopardizes fair use, impedes competition and innovation, and becomes an all-purpose ban on access to computer networks (*ibid.*). Although numerous examples exist, perhaps most illustrative of these claims is the case of Princeton Professor Edward Felten whose first amendment rights were violated by the RIAA, which was enforcing the wording of the DMCA. The dispute between Felten and the recording industry began in September 2001, when the Secure Digital Music Initiative (SDMI, started by the RIAA), whose members then included Universal Music, Sony Music, Warner Music, EMI Group, and Bertelsmann BMG, called on the digital community to break the code for technology that was designed to prevent people from stealing digital music. Felten and his team cracked the code, but they did not apply for the \$10,000 cash prize. Doing so would have required them to sign a non-disclosure agreement. Instead, they wrote a paper about their process that they planned to present at a technology forum in April 2001. Shortly before the conference, Felten received a letter from the attorneys for the SDMI and the RIAA

threatening legal action under the DMCA. After a counter suit was filed in June, the attorneys backed away from the threat and Felten's team presented their paper at a conference in Washington the following August. Many such cases exist in which the rights of researchers, developers, and end users alike have been suppressed by legislation designed to protect the entertainment and software industries while limiting the freedoms of the public. In the United States it is no secret that money equals power, and that power often corrupts. As Bagdikian reminds us, "Media power is political power. The formal American political system is designed as though in response to Lord Acton's aphorism that power corrupts and absolute power corrupts absolutely. Media power is no exception" (1vii). Through tremendous lobbying power, the music industry corrupts the legislators of the government into siding with big business, rather than the constituents who have placed faith in them. In the end, it is all about the money. In 2004, the entertainment industry ranked twelfth on the list of top contributors to politicians, with expenditures of \$28,861,668, \$13,373,366 of which went to Congress and the principal recipient, John Kerry. In the past decade the industry contributed \$152,671,704 (Center for Responsive Politics). The music industry specifically contributed \$2,539,118 in 2004 and \$12,798,640 over the past ten years (*ibid.*). Much of the influence of the industries' money is spread closest to its home, California. In 2004, Senator Barbara Boxer (D-CA) received a total of \$157,099 from Time-Warner, Viacom, Sony, Disney Co., and Vivendi, and Senator Dianne Feinstein (D-CA) received \$91,300 from Disney Co., William Morris Agency, Vivendi, and Time-Warner. Among the other notable recipients was US Congressman Howard Berman of District 28, who added \$66,000 to his coffers courtesy of Time-Warner, Disney Co., News Corp. (Rupert Murdoch), Sony, Viacom, and Gang, Tyre, Ramer & Brown (entertainment attorneys in LA) (*ibid.*). Another senator of note, John McCain (R-AZ), is deeply in the pockets of the communications conglomerates with annual contributions of \$335,929 from Viacom, Time-Warner, Qwest, Verizon, AT&T, Bell South, and SBC Communications (*ibid.*). Of course, there was the case of the RIAA bribing the Chair of the House Judiciary Committee, James Sensenbrenner, with an \$18,000 five-day trip to Taiwan and Thailand in January 2003. Three months prior to the trip, Sensenbrenner took an interest in the Small Webcasters' Settlement Act (HR.5469), which proposed to set the royalty rates for small webcasters. "According to participants in the negotiations, Sensenbrenner forced the webcasters to come up with a royalty settlement with the RIAA, threatening to use his staff to write the terms instead" (Orlowski). Naturally, the details of the rates and conditions were entirely unacceptable to the small webcasters.

These boring details could go on page after page showing "who gives what" and "who gets what," but the examples used here are demonstrative of how the entertainment industry uses its resources to influence the political process in order to maintain control over music production and distribution year after year despite continually changing social, economic, and technical conditions. Relying on the government for protection has long been part of the corporate strategy that "aims

to control and order the unpredictable social processes and diversity of human behaviours” (Negus 31).

Armed with the DMCA, the music industry felt protected against its initial fears of cyberspace: that “copyright control was effectively dead; the response was to find technologies that might compensate” (Lessig, *Free* 157). Such technologies would be copyright protection technologies designed to control the replication and distribution of copyrighted material. Such technologies “were designed as *code* to modify the original *code* of the Internet, to reestablish some protection for copyright owners” (ibid.). This level of protection against cyberspace was soon put to the test.

### **Cyberwars I: New Pioneers of Music—the Rebel Forces**

The new pioneers of music rode in on the Internet wave and were instantly perceived as a serious threat to the old guard of the music industry. First, the industry intrinsically feared the Internet for its philosophy of open source, sharing, freedoms, and common space. For theirs was a world built upon strict control. Second, they dreadfully misunderstood the new technologies of streaming media, MP3, and peer-to-peer (P2P) applications, and that ignorance led to missed early opportunities. Therefore, anyone developing, distributing, and using these technologies became enemies of the old guard. Though developed in Germany in 1987, the MP3 format became popular in the United States a decade later after the format was demonstrated to Internet developers in Silicon Valley.<sup>4</sup> Prior to the MP3 revolution, music on the net was most likely heard in one of two formats, Real Audio or Liquid Audio. Each had its proprietary format and players had achieved some degree of success, but both were completely caught off guard by the tsunami of MP3s and MP3 portals that flooded the Internet by 1998. Of those, I wish to focus on two specific, but completely different, technologies that posed the greatest “perceived” threat to the music industry: MP3.com and Napster. MP3.com was the brainchild of entrepreneur Michael Robertson, which launched in November 1997 (Alderman 47). MP3.com was started to encourage unsigned musicians to produce and distribute their music across its site. Unlike the major labels, which controlled the means of distribution, MP3.com “offered creators a venue to distribute their creativity, without demanding an exclusive engagement from the creators” (Lessig, *Free* 189). Exclusivity is invariably a condition of the major labels’ contracts. At MP3.com artists were free to leave at any time and take their content with them. Though the music industry was none too pleased about this new form of distribution outside of their control, they had no recourse against MP3.com since it was not facilitating unauthorized transfers of copyrighted materials.

On 12 January 2000, that all changed when Robertson launched a new service he called My.mp3.com (Alderman 119). My.mp3.com purchased 45,000 CDs, converted their content to MP3 files, and placed the files on a server. Through this new service consumers could access the music in two different ways. First, through cooperating sites, the consumer could purchase a CD (which was sent directly to the customer),

but the music would be made available immediately through the consumer's user account at My.mp3.com. The second way was through a program designed by MP3.com called Beam-it. The concept was to make a person's music collection available online without their having to expend laborious hours converting and uploading files. With Beam-it installed on the user's machine, when the consumer placed a legitimate CD release in the CD drive of his or her computer, Beam-it sent the CD's information to the server. My.mp3.com scanned the CD, confirmed its legitimacy, and, if the files existed in the MP3 database, the files would be available in the user's account, which could be accessed from any computer. The more CDs the user purchased or "beamed" into the server, the larger the user's online library would grow. Built upon the existing technologies of the Internet and MP3s, My.mp3.com was an imaginative innovation that "enabled consumers to 'space-shift' their CD collections" (Alderman 119). By allowing users to access their music whenever they were at a browser, My.mp3.com added after market value to the industry's product (Lessig, *The Future* 193). This was a service that made it easier for consumers to access music they had already purchased. It did not facilitate copyright infringement or encourage the "stealing" of music.

Napster, on the other hand, presented an entirely different model. Created by Shawn Fanning and Sean Parker, Napster was a technology that simplified file sharing for MP3 files. As a college student at Northeastern University, Fanning became perturbed by the difficulty of finding the MP3s he desired online and by the growing number of unreliable downloads. He knew that many individuals stored MP3s on their computers. He also knew that others (like himself) wanted copies of that music. He and Parker engineered a system that would connect those music files with those who wanted them through a peer-to-peer network. Napster compiled a database of music files stored on participants' computers. "And when someone searched for a particular song, the database would produce a list of who had the song and was on the line at that very moment" (Lessig, *The Future* 130). The user could then choose the file to download and the user's computer would establish a connection with the computer that stored the desired file. "The system would function as a kind of music matchmaking service—responsible for finding the links, but not responsible for what happens after that" (*ibid.*). However, unlike My.mp3.com, which gave consumers easier access to music they had already purchased, Napster encouraged the trading of unauthorized music files between peers. The Internet, and especially the MP3, gave the music buyer new options, which threatened a music industry that maintained its hegemony by directing its customers through an intricately constructed labyrinth of *its* products. Competitors were not welcome.

Although I promised to limit my discussion to My.mp3.com and Napster, I should also mention that the exploding popularity of MP3s on the Internet led to the creation of a new technology for making MP3 files portable. In 1998, Diamond Multimedia Systems, Inc., a leader in interactive multimedia and PC entertainment, released the Rio PMP300, the world's first portable MP3 player. The Rio contained 32 mega-bytes (MB) of internal flash ram, and could store up to four hours of MP3

audio content depending upon the quality level of the encoded MP3s. Essentially, the Rio took My.mp3.com's idea a step further by making a music buyer's music files portable, and available at all times, not just while at a computer terminal. Like My.mp3.com and Napster, the Rio player threatened the industry enough for them finally to take action.

### **Cyberwars II: The Empires of Sound Strike Back**

Rather than embrace the possibilities of the new methods of distribution and accessibility introduced by Internet-based music technology, the empires of sound reacted in a very predictable manner. They panicked. Seeing the MP3 as a threat to the industry, they assembled a wall of attorneys who combed through the recently created AHRA and DMCA, built cases against the new technologies, and then struck. On 16 October 1998, Federal Judge Audrey B. Collins of the Central District Court of California heard the argument of the RIAA against Diamond Multimedia claiming that the Rio violated the AHRA legislation requiring digital audio recording devices to implement serial code management systems to curb serial recordings of copyrighted music (Hu). The judge subsequently granted the RIAA a restraining order to halt the sale of the Rio PMP300 for ten days as she considered the RIAA's request of a preliminary injunction. After a ten-day moratorium, Judge Collins denied the RIAA an injunction against the sale of the Rio, stating that, while the device "is likely to be covered" by the AHRA, since the MP3s downloaded from the Internet "would not contain the codes necessary for such technology to operate" and the Rio itself did not facilitate serial copying, the SCMS was not applicable (RIAA). The ruling was an unexpected blow against the empires of sound; however, it would be the only one that they would lose in their ongoing crusade against the new technologies.

Determined to squash MP3s and file sharing, the RIAA started off the new millennium slaying dragons on the Internet. On 6 December 1999, the RIAA filed suit in San Francisco's District Court on behalf of every major record company, accusing Napster of contributory and vicarious copyright infringement (Menn 125). If that sounds familiar, it is because it is the same argument that was used against the digital recording devices (DAT and DCC) that led to the creation of the AHRA in 1992. This time, there was no hardware upon which to attach a royalty surcharge, and there were no royalties to be gleaned from the sale of blank media. This war was against "rebel" music technology: the MP3. And, when the RIAA struck, it may have been a colossal mistake. Before the lawsuit was filed there were just fewer than 200,000 users of, but, after the news of the suit hit the media, the number of users exploded to 57 million (Lessig, *The Future* 130). Napster's growth was particularly epidemic on college campuses, where there was free access to high-speed connections. The use of Napster was so widespread that it caused severe congestion on many university networks. One such case was the University of California, San Diego, where the problem got so bad that, on 1 February 2000, the university banned the use of Napster on its network.

More than 100 other campuses quickly followed suit (Menn 133). The college ban was exploited by the press, which called further attention to Napster, spurring further users to subscribe before it was too late. In response to the suit filed the previous December, Napster was scheduled to face off with the RIAA in court on 1 April 2000. The case proceeded like a tennis match with victories volleying between both sides, each relying on the copyright law to support its position.<sup>5</sup> After a cycle of injunctions, appeals, and stays, Napster was finally vanquished by bankruptcy in September 2000. Delaware US bankruptcy judge Peter Walsh appointed an impartial trustee to dispose of Napster's assets and, in November, Roxio, Inc., maker of the EZ CD Creator, agreed to a deal worth 5 million dollars in cash, \$200,000 in temporary financing, and warrants for 100,000 Roxio shares (Menn 305). After two long years, the empires of sound had won an important battle.

A mere ten days after launching My.mp3.com on 12 January 2000, Mp3.com received a letter from the RIAA attorneys claiming that the service was a blatant violation of copyright laws and ordering them to take the service off the Internet. When Mp3.com refused, the RIAA filed suit in US district court, asking for more than \$100 million in damages (Lessig, *The Future* 192). From the RIAA's point of view, MP3.com had violated copyright laws when it made digital copies of those 45,000 CDs. The question became whether or not the copies were fair use. Although My.mp3.com was a free service, the industry contended that their property was being used to generate revenues through sponsorships and advertisements on the site. In the eyes of the RIAA, this constituted making copies for a commercial purpose, and by the letter of the law they were right. "But when you stand back from the outrage and ask, 'What's really going on here?,' this case looks a lot different" (Lessig, *The Future* 193). Lessig astutely points out that My.mp3.com did not facilitate the theft of any music. "The existing system permits theft; My.mp3.com didn't add to that" (ibid.). He continued that the service increased the value of the industry's product by allowing music buyers to space-shift their CD collections. He reasoned that the "same piece of plastic is now more valuable" and that the increase in value "should only increase the number of CDs that are purchased" (ibid.). Lessig also makes it clear that what My.mp3.com did for consumers they could have done for themselves by ripping their own MP3s and uploading them to a server (often hosted by companies that provide free server space). Consumers could then access the music whenever they were at a browser connected to the Internet. My.mp3.com simply saved them the time and effort of creating and uploading the files. My.mp3.com was truly one of the missed early opportunities for the old to embrace, and benefit from, the new technologies, but the industry's technophobia kept them blinded to the potential. In the end, the courts showed "no patience for MP3.com's innovation" and imposed 100 million dollars in damages (Lessig, *The Future* 194), which closed the site down. "For experimenting with a different way to give consumers access to their data, MP3.com was severely punished" (ibid.). Unlike Walt Disney, the powerful empires of sound denied My.mp3.com the creative process of ripping, mixing, and burning its way into popular culture.

Whether it was the “space-shifting” offered by My.mp3.com, or the new form of distribution found in the file-sharing architecture of Napster, the music industry refused to share the market with the upstart Internet rebels. Instead, they used their considerable political power to change the playing field and preserve the status quo. “Rather than striking a balance between the claims of a new technology and the legitimate rights of content creators, both the courts and Congress have imposed legal restrictions that will have the effect of smothering the new to benefit the old” (ibid.). The preservation of the music industry’s oligopolistic control over the technology and content of popular music culture could not be accomplished without the support of the US government. This is true domestically as well as internationally, as we will see in the following sections.

### Schismogenesis in the Global Music Market

Globalization has not been the shining beacon of hope it had promised to be for everyone involved. In fact, it has made life more difficult in many parts of the developing world (Anderson). In *The Globalization Gap*, Robert Isaak demonstrates how globalization is widening the disparity of wealth between the “haves” and “have-nots” around the world. Industrialist/philanthropist George Soros agrees: “Far too few resources have been devoted to correcting the deficiencies of globalization. As a result, the gap between the rich and poor continues to grow. The richest one percent receives as much as the poorest fifty-seven percent” (10). Soros acknowledges that conditions of inequity “were not necessarily caused by globalization, but globalization has done little to redress them” (ibid.). Where international business is concerned, globalization has inevitably created inequities, while constructing dichotomous, dominant/submissive relationships between nations involved in international trade agreements. Anthropologist Gregory Bateson developed the concept of *schismogenesis* to define “a process of differentiation in the norms of individual behavior resulting from cumulative interaction between individuals” (*Naven* 175). In other words, processes of differentiation are simply how humans react to “cumulative interaction” with one another, either individually or as a group. Schismogenesis was intended as an umbrella term for several types of differentiation outlined by Bateson. I have used creative license in the application of the condition of *complementary differentiation* as a paradigm for exploring the intercultural political behaviors between the more and the less powerful nations engaged in the global music market. In complementary differentiation, behaviors are “mutually promoting actions [that] are essentially dissimilar but mutually appropriate” (Bateson, *Steps* 109), such as dominance-submission or exhibitionism-spectatorship. The existence of one is dependent upon the other. As group “A” displays a certain behavior, that behavior elicits a response from group “B.” Group B’s response, in turn, generates a counter-response from group A, and so on. I have found this paradigm useful in analyzing political encounters between the “dominant” (the fully developed) and the “submissive” (developing and least developed) member nations of the World Trade

Organization (WTO), particularly in regard to issues of intellectual property rights protection.

Against the consensus of member nations, the United States, Japan, and the European community began developing a draft of a “trade-based” international property rights (IPRs) protection policy that would be enforceable under the mechanisms of the GATT (General Agreement on Tariffs and Trade).<sup>6</sup> In 1994, this group of industrialized, copyright-exporting nations succeeded in convincing enough members of the GATT to include the TRIPs Agreement (trade-related aspects of intellectual property rights) in the treaty. It was also agreed that the name of the organization be changed to reflect more current conditions and the World Trade Organization was created. The TRIPs Agreement, signed at Marrakech, Morocco, on 15 April 1994, along with the WTO, came into full force the following January (Goldstein, *International* 55). The main goal of TRIPs was “to reduce distortions and impediments to international trade and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade” (Preamble to the Agreement). TRIPs established the minimum standards for intellectual property rights protection that each member state must provide in regard to: copyright and related rights, including computer programs and databases; trademarks; geographical indications; industrial designs; patents; integrated circuits; and undisclosed information (trade secrets) (Correa 1).<sup>7</sup> The level of IPRs protection required under TRIPs was much higher than most WTO members had in place prior to the new agreement. Developing countries “reluctantly negotiated” increased protection for IPRs, which required their making important concessions in terms of reforms to their IP legislations, “without obtaining any compensating concession from industrialized countries” (Correa 3). Meeting the “minimum standard” posed problems of compliance for developing nations, many of which were without the additional resources necessary to step up the physical enforcement of IPRs. Despite the four-to-ten-year transitional period allotted to such nations to bring their laws into compliance, this requirement has proven over-burdensome for many already subjugated economies. Failure to comply can result in blacklisting and international trade sanctions, which further exacerbate the hierarchy of developed versus developing, and least developed, nations in the global economy. By enforcing intellectual property rights through trade threats and economic coercion, TRIPs seems a contradiction of itself. It is clear that, in practice, “the measures and procedures to enforce” IPRs can themselves become “barriers to legitimate trade.” For this and many other complicated local socio-economic reasons, developing nations unsuccessfully resisted linking IPRs to international trade policies (Maskus).

“Intellectual properties”—while we, as music scholars, tend to locate the term in the musical realm, it also encompasses many, more essential societal needs, including pharmaceuticals, food production, plant varieties, seedlings, technologies, trademarks, and economic sovereignty. These are very serious and, in some cases, life-sustaining areas of culture that have fallen under the control of the WTO due to TRIPs. In general, TRIPs, and the formation of the WTO, “has benefited the rich

industrial nations. Most developing countries (especially the least developed and weaker economies) have lost out” (Kohr 23). TRIPs obviously served the needs of the developed nations, particularly where music was concerned. The concentrated power of the music industry lies within six of the world’s most industrialized and developed nations: Vivendi/Universal (France/US), SonyBMG (Japan and Germany), Time Warner (Canada), and EMI (UK). The WTO currently has 148 member nations, the great majority of which are classified as developing, or least developed, most of which opposed passing TRIPs, yet, through political pressures, the will of the five dominant copyright-exporting nations has been done. The WTO is undeniably protectionism for the corporate interests of industrial nations, at the expense of local cultural development worldwide.

The organ of protectionism for the big four, the IFPI, maintains branch offices in 48 countries where it conducts ongoing investigations and physical raids on counterfeiting operations. Beginning in 2003, the IFPI began its own list of offenders with the “Top Ten Priority Territories.” According to the IFPI, the top ten are chosen for their consistent failures in anti-piracy enforcement. “Piracy hits these markets hard, stifling local talent, funding organised crime and diminishing economic growth. Tackling this problem is in the interest of the governments of those territories, as it is everywhere” (Berman 2). The first ten nations to make Berman’s “hit parade” were Brazil, China, Mexico, Paraguay, Poland, Russia, Spain, Taiwan, Thailand, and Ukraine. “These are the territories that are failing to protect and enforce intellectual property rights and tackle unacceptable levels of piracy” (IFPI, *Newsletter* 16). During 2003, Poland “adopted optical disc regulations that are expected to prevent its massive optical disc production capacity from being used for illegal purposes” (IFPI, *Commercial* 14). Additional crackdowns on pirates running CD stands on the premises of the Warsaw Stadium and other public locations earned Poland its way off the list of priority territories. When the list for 2004 was published, Pakistan had taken its place.

Another organ responsible for patrolling the world making sure its members receive every penny they have coming to them is the International Intellectual Property Alliance (IIPA), representing: the Association of American Publishers, Inc. (AAP); Business Software Alliance (BSA); Entertainment Software Association (ESA); Independent Film and Television Alliance (IFTA); Motion Picture Association of America (MPAA); and Recording Industry Association of America (RIAA). The IIPA is certainly an alliance of intellectual property owners, though it is international in terms only of its reach, for every one of its six members is a US-based corporation. Through a close relationship with the United States Trade Representative (USTR), the IIPA has the mechanism to pursue, through trade sanctions, retribution for IP infringements. In its war on piracy, the IIPA estimates the revenues lost to piracy in countries around the world. The estimated data are translated into the USTR’s “Special Report 301,” which maintains the countries on a list that is subdivided according to level of infringement: “Priority Foreign Country,” “306 Monitoring,” “Priority Watch List,” and “Watch List.” The list is currently occupied by 52 nations,

and a continued presence on this list results in trade sanctions and restrictions against the offending nations. The pressure of the USTR is enormous and many nations struggle in vain to remove themselves from the list; however, due to inadequate resources it is nearly impossible for many nations to comply with all aspects of the TRIPs Agreement.

With these three levels of pressure—WTO, IIPA, and IFPI—the schismogenetic dominant-submissive relationship between developed and developing nations is further enforced. As the industrial world presses the rest to conform to its standards, the question arises: with the vast diversity of races, cultures, beliefs, ideals, philosophies, societies, and economies in the world, is it feasible to expect every nation to conform to the same IP standards and methods of enforcement as espoused by the United States, the European Union, and Japan?

### **Global Frontiers in IP Protection: Case Study Brazil**

Brazil offers a unique opportunity to analyze the schismogenetic nature of the global music market. Having spent a great deal of time conducting field research in Brazil over the past fifteen years, I witnessed many of the effects of the changing political atmosphere on local music culture, particularly after TRIPs was initiated. The cultural industry in Brazil formed as part of the country's general process of economic development, and, as for many other so-called Third World countries, this meant dependence upon the industrialized powers of the United States and Europe. The condition of economic and cultural dependence stretches from today back to the age of discovery. "The power of the industrialized societies over the non-industrialized ones was strengthened through processes that ranged from the use of subtle political persuasion to the violent physical destruction of any attempts at independent growth" (Camargo 27). Out of the position of submission and dependence, the mass culture industry of Brazil was built. Though TRIPs became effective in January 1995, Brazil, like many other nations, had been granted a transitional period of several years in which to bring the country into compliance. Once that term ended, the hounds were released.

In March 2001, through threats of economic sanctions, the IIPA was successful in forcing the Brazilian government to create the Inter-Ministerial Committee to Combat Piracy (IMC) as a federal agency meant to coordinate anti-piracy efforts nationwide. One month later, with the ink still drying on that decree, the IIPA complained to the United States Trade Representative (USTR) that the Brazilian government had shown "no tangible progress in fighting and reducing piracy" and outlined enforcement standards that *they* want to see implemented in Brazil. The IIPA, claiming that Brazilian officials consistently fail to meet the requirements, was successful in convincing the USTR to place Brazil on its "priority watch list" in 2002, stating that the "Inter-Ministerial Committee has failed to produce and implement any coordinated national anti-piracy plan" (IIPA 71). On the other hand, Brazilian officials feel they are in compliance and are making positive strides in the war on

piracy. However, in a remarkable display of self-exuberance, the IIPA, unsatisfied with the progress made in Brazil, insisted on *its* standards being applied throughout the country. Here, the powerful trans-nationals of the United States dictate Brazilian law and policy through threats of global economic sanctions.

In Brazil, however, such aggressive actions on the part of the United States have left many local officials puzzled. The main agency responsible for combating piracy in Brazil, among others, is the APDIF, Associação Protetora dos Direitos Intellectuais Fonográficos (Association for the Protection of Phonographic Intellectual Rights). According to the APDIF attorney Doctor Tais Miranda, since the enactment of the Inter-Ministerial Committee the agency has shut down more than 2,800 websites illegally trading MP3s and has made thousands of arrests resulting in the apprehension and destruction of more than 4 million pirated products (Sana). With such successful efforts being discounted by officials in the US, Brazilian enforcement agencies are left with a feeling of frustration. In the opinion of attorney Erica Aoki, "The Brazilian government may not be able to do more than guarantee that the law provides the necessary tools for protection. The enforcement must come through the actions of the intellectual property owners" (Aoki 2001). However, the intellectual property owners do not want to invest in such actions, believing that they will not be able to recover their costs. Instead, they press the Brazilian government through the WTO, IIPA, and IFPI to fund the entire cost of protecting *their* private property as part of the annual budget of the Ministry of Justice. In the real world, however, it simply may not be financially feasible for Brazil to expend huge public revenues to protect the private profits of the trans-national corporations. Aoki also contends that such assessment of Brazil's efforts is unfounded since Brazil has amended its copyright laws bringing them into compliance with TRIPs in 2001. According to the Agreement it is not enough to have laws on the books, member nations must also prosecute criminal offenses under the agreement. It is here that Aoki's statement that the "Brazilian government may not be able to do more than guarantee that the law provides the necessary *tools* for protection" demonstrates Brazil's financial concerns in meeting some of the basic requirements of the imposed TRIPs Agreement.

As the media conglomerates press for more governmental assistance in their profiteering, they turn a blind eye to the economic realities of their consumer base. Instead, they appeal to governments worldwide to enact laws that preserve their pricing structures, which are often out of proportion with local economies. A brief comparison of economic conditions in Brazil and the United States illustrates this problem. The minimum-wage worker in Brazil earns around 200 Brazilian Reais per month, currently the equivalent of \$52.63. Conversely, the minimum wage in the United States yields approximately 900 dollars per month (\$892.66), or R\$3,400. These figures indicate that working-class Brazilians earn approximately 17 times less per month than their North American counterparts. The annual GNP per capita in Brazil is US\$3,437 compared to the US\$33,496 of the average US citizen (IFPI 2001). Comparing the Brazilian gross national product per capita with that of the United

States illuminates in dollars and *sense* the disparity between the social classes of the countries. The difference of US\$30,496 makes selling the same product for a similar price in both societies an absurdity. However, CDs bear a similar sticker price (in terms of monetary units) in both economies. To illuminate this comparison, I made some CD purchases in July 2002 during which the currency exchange rate was two and a half Reais to the dollar (R\$2.50=US\$1.00). The average price on the Brazilian shelves for new releases was R\$24.90, or US \$9.96. For a worker earning a monthly income of 200 Reais, this represents more than 12% of his or her monthly income. In the United States the average price was \$15.99, or less than 2% of a minimum wage earner's monthly salary. If the same 12% scale that exists in Brazil were applied to the United States, one CD would bear a price of more than \$90. If such were the case, it seems safe to assume that the percentage of piracy in Brazil and the United States would exist on a more even plane. At this writing the current exchange rate for one US dollar is R\$2.67. The continuing devaluation of the Brazilian currency has driven the cost of products even higher in recent months.

These conditions are not unique to Brazil and exist throughout the developing world. They are the by-products of advanced corporate globalization and its increasing disparity of wealth. They are the side effects of a music oligopoly that exercises its international political power with an iron fist. They are the end result of the schismogeneses that define the global music market.

## Epilogue

The elimination of all forms of piracy, in all lands, has become the obsession of the music industry and its political powers. To be sure, any future changes to existing laws will reflect this obsession. Unfortunately for the industry, piracy is a response to corporate globalization made possible by advancing technology. Piracy exists as part of the informal, or underground, economies worldwide, and operates on a hidden, often ignored, plane running parallel to the formal economy. Piracy in general, as part of the informal sectors of the world, serves a very real social need for its consumers that has been ignored by the formal market. Brian Winston has labeled this state the supervening social necessity, which drives individual choices (Winston 6). In the case of music piracy the "perceived" social necessity for the music is created by powerful media marketing campaigns, which, according to communications professor James Lull, promote an anxiety in consumers, which perceivably can be relieved only by obtaining the product (Lull 98). Lacking the funds necessary to purchase this relief through formal markets, one turns to the informal sector. *The Almanac of Global Inequality* demonstrates that 75% of the world's population lacks "sufficient funds" (Crow). In this light it becomes easy to see how quickly the informal economies can grow to meet this need. The media empires use their enormous powers of persuasion to influence consumer habits, habits that are governed by individual motives that represent not only a physical drive, but a rudimentary cognitive orientation directed toward need gratification (Lull). The

industry could easily ignore the estimated financial losses due to piracy, but what they refused to accept was the existence of consumer alternatives that threatened their monopoly grip on music cultures worldwide. Controlling consumer habits is central in maintaining market control. The emergence of the Internet and the MP3 presented an alternative that challenged the status quo and current business models. In response the media industry called upon the government to make these technologies illegal; that is, until they had time to gain control over them. Today, Napster, the same Internet technology that was illegal in 2000, is now legal, since it has been tucked under the wing of industry control. Although the war in cyberspace continues, with the RIAA chasing down Napster clones that have popped up on the Internet in the hundreds, as well as individuals, obedient consumers may enjoy music downloads to their hearts' content now that the industries are getting their slice. In the end, it is all about the money, not the rights or the property, but the money. The extensions on copyrights are all about the money. Extending ownerships into the next generation ensures that those in the present generation earn maximum income from the rights. There is no regard for the public domain, or the future of creativity. Control in the music business equals power, and power equals wealth. And the strategies of consolidation and integration bring it all home for the industry. As it continues to consolidate, the next logical step for the industry would be for EMI to be acquired by one, or two, of the other three. Since the acquisition of EMI by any one media group may break anti-trust laws, the company may have to be divided. At any rate, we are currently living in a time when the smallest number of corporations controls the largest percentages of all media, and four conglomerates control more than 75% of all music available to the public.

What we as freethinking humans and music lovers must guard against is the encroaching point of mass culture where music becomes homogeneous, for oligopolies breed musical stagnancy (Burnett 101). We may already have reached it, depending on your personal viewpoint. It feels that way to me. Oligopoly control in the music industry repels diversity, which has led to the creation of so many independent labels, most of which, since the media and distribution are in the hands of the oligopoly, have had to associate themselves in some way to the big four in order to survive. Popular music in the United States has become predictable and in some cases boring. Through vertical integration the same stars are marketed to the public through music, films, television, and advertisements. If that is not an example of encroaching homogeneity, then I am not sure what is. Diversity and the music industry are incompatible terms.

We must also guard against the erosion of our rights, even those that may seem petty and insignificant. Each grain of freedom that is taken from the public is added to the hegemony of the corporate world. The damage done to public freedoms by the DMCA, and the current attacks of the RIAA, should not be considered lightly. The industry has successfully used the media to influence public opinion to make its actions acceptable in a free society. They have made it a case of right versus wrong, and it is not that simple. We should remember that, after all, it

is our music that is “ripped” from culture, “mixed” with an industrialization process, and “burned” into the fabric of pop culture. Rip, mix, and burn. If they can do it, why can’t you?

## Notes

- [1] When Edison and Columbia began their war, a music industry was nowhere in sight. They were warring over control of recording technology as a business application to take its place as a dictation machine beside the telegraph and the typewriter. After 1890, a coin-slot industry emerged giving rise to the use of the phonograph for entertainment.
- [2] ABC Records was founded in 1955 as a division of Paramount Pictures and in 1966 acquired Lou Adler’s Dunhill Label creating ABC-Dunhill. Throughout the 1960s ABC acquired Dot, Neighborhood, and Blue Thumb Records. Berry Gordy founded the Motown Record Company in Detroit in 1959 on \$800 dollars. When MCA acquired the label in 1988, they paid more than \$61 million dollars.
- [3] In 1912, the Radio Act reserved takeover powers for wireless technology to the US government in the event of war, which it invoked during World War I. Following the War the US government as well as General Electric agreed that the patents for radio technology should remain under US control. This meant that the interests of British radio pioneer Guglielmo Marconi were absorbed by the newly created RCA. In addition, patent wars were raging over rights to the use of the vacuum tube in radio technology. To avoid extensive delays caused by patent litigation, RCA was formed as the controlling body of the patents belonging to General Electric, Westinghouse, United Fruit and AT&T. However, in 1932, a federal investigation into illegal monopoly building forced General Electric and Westinghouse to sell their shares of RCA.
- [4] In 1987, Fraunhofer Institut Integrierte Schaltungen, the “German MIT,” began work on perceptual audio coding under a project named Eureka UE147, Digital Audio Broadcast (DAB). In cooperation with the Friedrich Alexander University in Erlangen, Karlheinz Brandenburg of the Fraunhofer IIS created an algorithm for compressing music files for easier transfer across phone lines, and later cable. Once the algorithm met with the approval of the International Standards Organization, the format was standardized as the ISO-MPEG Audio Layer – 3, commonly known as MP3. Fraunhofer IIS received the patent in Germany for MP3 technology in 1989. In the tradition of the Internet technologists, Fraunhofer IIS supported open source coding and made MP3 technology free for anyone to use and distribute. In 1996, a patent was issued for MP3 in the United States. The following year Brandenburg visited Silicon Valley to demonstrate his invention to the most powerful Internet developers on earth. MP3 compression utilizes a psychoacoustic model that eliminates redundant and “unnecessary” sounds and the frequencies that the human ear cannot detect but which exist in the original uncompressed music. Likewise, the psychoacoustic model dictates that when a loud sound and a quiet sound occur simultaneously, the average listener ignores the quiet sound. Therefore, this information is also deleted during compression (<http://www.iis.fraunhofer.de/amm/techinf/layer3/>).
- [5] The RIAA claimed that Napster was guilty of “Contributory and Vicarious Copyright Infringement” under US copyright laws (17 U.S.C.§502). Napster’s primary defense against the allegations by RIAA is based on the DMCA, which grants immunity to Internet Service Providers (ISP) (17 U.S.C. §512(a)). Napster contended that they were essentially an ISP and that, therefore, their entire system fell within the protections of this act.
- [6] The GATT (General Agreement on Tariffs and Trade) was the body that governed international trade from 1948 through 1994 when, during the Uruguay Round (a series of GATT meetings during 1986–94), it became known as the World Trade Organization (WTO).
- [7] Geographical indications are those that identify goods as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to their geographical origin.

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