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Creative Industries

Contracts between Art and Commerce

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Payola

"Payola" is a bribe paid in order to influence a gatekeeper's choice among competing creative products. In the United States broadcasting stations are legally restricted from taking pay for airplay. In fact payola occurs in markets for differentiated goods of all sorts, but it does have a special affinity for creative goods. That is because ***infinite variety*** tends to ensure a large number of creative goods clamoring at the gate, ***nobody knows*** which the ultimate consumer will prefer, and the creative good's cost is mostly fixed and sunk.

Logic of Payola

Some simple economic considerations point to the likely settings for payola. In a purely competitive market, many sellers provide a homogeneous product to many buyers at a single prevailing price. Each seller, if seeking maximum profits, offers the quantity of its good such that the last unit's marginal cost equals the market price. Since the last unit sold earns the seller zero profit, there is no gain from offering the buyer a price cut to purchase one more unit. Payola would not pay. In other market conditions payola is profitable for the seller, either as a selective bribe or as a regular rebate. They all involve the seller's "regular" price exceeding its marginal cost, creating a standing incentive to cadge an extra sale by a selective price cut, rebate, or bribe. The seller can sometimes identify reluctant customers who value the product less than the standard price but more than its marginal cost. A special price, which could take the form of a selective rebate or bribe, then makes a sale while bringing the seller some profit. The conventionalized prices commonly found in creative industries, when they exceed sellers' marginal costs, create the same incentive.

Two features that promote payola are common in creative activities. The first is the prevalence of costs that are fixed (do not vary with the seller's out-

put) and sunk (irrecoverable). These increase the gap between a price that covers the seller's average cost and marginal cost of another unit, thereby inflating the value of an extra sale and intensifying the incentive to "deal" or bribe. Conventionalized prices and price competition muffled by product differentiation *(infinite variety)* also weigh in.

The second feature appears when the buyer's purchase yields a spillover benefit to the seller without affecting the buyer's willingness to pay. When a radio station plays a pop record, it attracts listeners, who in turn bring the station profit from advertising revenue. Airplay causes some of these listeners to buy their own copies; the record label profits from those purchases, but the radio station gets no benefit. The spillover inflates the effective net price that the label gets without raising its marginal cost. Even if the station pays no explicit price for the individual record or the right to play it, the publicity spillover can still make a bribe profitable for the label.

The situation of the buyer (and bribe recipient) needs a closer look. The legal concept of bribery focuses on the employee (disk jockey—DJ) who accepts payment for playing (say) a record that is not the first choice of the station's listeners, and hence cuts into the station's profits. Payola could, however, be a profitable deal for the station. With records differentiated, in principle there exists one best playlist to maximize net revenue for the station, and any deviation lowers profits. *Infinite variety,* however, tends to make the loss of ratings and profit small, easily offset by a modest bribe.[1] The station is the loser, however, if the DJ employee pockets the bribe, unknown to the station owner who suffers the associated loss of profit. How bribe-prone is the DJ, and whether payola cheats the station, depends on the DJ's employment terms. Paid a straight salary and not monitored, he would take any bribe that came along. Dependent on the station's audience ratings, he would require a big enough payment to offset the likely drag of a weak record on the ratings. If he owns the station and receives all of its profits, the bribe must fully offset the station's expected profit loss. If taking payola is potentially profitable to the station, the payment might well be not a clandestine bribe but a factor rolled into the DJ's compensation package. In the former case the station owner shuns payola; in the latter he quietly welcomes it.

Payola and the Sound of Music

Payola's long history in the popular music industry began with publishers of sheet music in the nineteenth century and continues with record labels to the present day. The mechanism at work is clear. Many songs compete to be sung, or records to be played, and for the gatekeeper many are often close substitutes. The 1920s singer who popularized a song increased sales of its

sheet music, just as the station's airplay causes some listeners to purchase a record today.[2]

Music Publishing

The competing music publishers on New York's Tin Pan Alley (28th Street) employed "song pluggers" whose job was to make the nocturnal rounds of the city's bars, dives, and theaters to get the publisher's songs played or sung by whatever means worked. Petty bribery was the standard procedure: a round of drinks for the band, a small payment to the singer.[3] Hiring claques to applaud the publisher's songs was another practice. The rise of ballroom bands and of radio stations to broadcast them increased and formalized the payments. Bandleaders wanted arrangements suited to their styles, and publishers could be induced to hire expensive arrangers to supply them gratis. Leading singers could command a formal share of royalties for a period of years on songs that they introduced. Plugging an unknown song in the 1900s was said to cost around $1,300 for a cash advance and ongoing royalty payments, with the singer's picture on the cover of the sheet music as part of the deal. Some deals gave the singer a period of exclusive use of a song, providing a strong incentive to perform it.[4] Rent was extracted from the publishers fully enough to send some of them to deal with lesser singers, who might ask a fixed sum for a few performances.

The publishers could gain by colluding to restrict the transfer of rents to singers, and in 1917 the Music Publishers Protective Association (MPPA) was formed for this purpose. Interestingly, it was promoted by the trade publication *Variety,* whose advertising services competed with payola for getting a song played. Among the publishers, its support came mainly from those having trouble getting through to the top singers. It was no more successful than most cartels that are unable to detect and punish cheating, but it did manage to convince some vaudeville executives that payola distorted the choices of songs used in vaudeville acts enough to impair their profits significantly.[5] In 1934 the song pluggers themselves formed a union called Professional Music Men. Ostensibly founded as a mutual-benefit association, one of its main objectives was to deter payola, which the pluggers correctly saw as substituting for their own direct song-promoting services and reducing their employment.[6]

Payola and Radio Airplay

As phonograph records became more and more popular, the song publisher's efforts to maximize the value of its copyrights focused increasingly on getting

the firm's songs recorded. That made the labels' A&R (artist and repertory) personnel the natural targets for payola. The practice's best-known appearance comes, however, one step farther along in the production process as the label seeks airplay for the records it has released. The central role of airplay in a record's success was shown in Chapter 9. The best documented pattern of broadcasting payola came in the 1950s and led to Congressional hearings followed in 1960 by legislation that made payola under certain circumstances a crime.

A true entrepreneur of payola was broadcaster Dick Clark, who began his career by taking over the program *Bandstand* on a Philadelphia TV station. Records were played as teenagers danced to them, and recording artists occasionally appeared to lip-synch their songs. The popular program generated substantial local sales of the records that were played. Viewers got a chance to see the recording artists, and for the artists a *Bandstand* appearance substituted for numerous local promotional visits. Philadelphia was an excellent base for the program. A large metropolitan area with a number of local record-distribution companies, it was also a "break-out city" in which popular records were commonly tested before national distribution. The program's local success led the ABC network to pick it up for national distribution as *American Bandstand*.[7] It was a huge success on ABC, and it began to drive the playlists of local DJs around the country, as listeners would request local play of songs heard on *American Bandstand*.

Clark's predecessor *Bandstand* host had joined with partners to start his own record label to "cover" (re-record a song with a different singer from its originator) national rhythm and blues hits, and these records sold well in Philadelphia thanks to *Bandstand* exposure. Even before the program received national distribution, a local record company offered Clark 25 percent of the publisher's royalties to a promising song in exchange for a major promotional "hype," a practice that was already common among Philadelphia DJs.[8] Clark built up this practice by organizing a dummy company to hold the rights and receive payments, and it came out in the Congressional hearings that 145 of the 162 song copyright interests Clark then owned had been given to him.[9] Clark's empire expanded to soak up other rents generated by *American Bandstand*'s promotional prowess. Performers appearing on the program received union-scale wages for their appearance, but they were expected to sign these back to Clark's corporation, or have their record company pay for the performance directly. The ABC network had its own label, Am-Par Records, and Am-Par assigned Clark substantial publishing royalties for songs promoted on the program.[10] The program's practice of not playing songs on labels that lacked national distribution opened the way for package deals that brought artists onto Clark's program and to Am-Par Records.[11]

The several record companies that Clark himself owned joined with other Philadelphia record-company interests to form a distribution company, which extended Clark's rent-interception apparatus one step forward in the production chain.[12] It was also extended one step backward through Clark's ownership of a record-pressing plant, as record companies discovered that using this plant increased their chances of getting songs on *American Bandstand*.[13] Finally, Clark was partner in an artist-management company, which steered the promising rock 'n' roll guitarist Duane Eddy to one of Clark's record companies, where he apparently received a substantially lower royalty rate than competitive bidding would have supported. Eddy appeared many times on Clark's shows, and many of his releases made top-hit lists.[14]

The story of *American Bandstand* illustrates the situation of the payola recipient. Clark could not arbitrarily make a hit out of a weak song (some records that he played repeatedly never landed on the "top hit" lists), but he had discretionary influence and checked carefully on the degree to which the market was following his choices.[15] Evidence that emerged in the Congressional hearings of the late 1950s showed the widespread use of payola by record-label sales personnel with the DJs who were the gatekeepers of radio stations' airplay lists. The low ratio of new records played to records received by a station (see Chapter 9) ensured that many choices were made casually based on little consideration, which favored payola. The practice had greater value for small, independent labels than it did for the major ones. The majors' representatives dealt with the DJs on a regular basis and could offer their reputations as leverage to get airplay for records that the label thought would benefit the most. Independents lacked this asset but could deploy payola as a substitute. Also, independents worried less about loss of corporate reputation if payola should become a scandal.[16] The supply of payola was selectively enhanced by the concentration of radio stations on Top 40 Hits. For a song with a shot at the national list, the value to the record company of airplay on an additional station could be quite high, for the number of relevant stations was said to be only 42.[17]

Consequences of Payola and Its Regulation

If the Top 40 format encouraged the use of payola to break into the winners' circle, the format was itself encouraged by the public revelation of payola practices. Radio stations responded to the public scandal by taking their airplay lists out of the hands of DJs and placing them in the station's program director. By implication, payola had bribed the DJs against the interest of the station's profits. Station managers, however, could hardly have been ignorant of the apparently widespread practice. If DJs received compensation in the

form of payola, the station could get their services for less straight pay.[18] Payola reforms may have served the public's sense of morality more than the stations' economic interests. They may also have had some unintended consequences. Program directors live and die by the station's audience ratings, while most DJs have substantive interests in new music and performers and can capture some reputation benefits by making astute if risky selections among new records. This R&D or innovative function was cut back.[19]

The payola scandals and their aftermath also illustrate the efficiency advantage that bribe-based promotion may enjoy against "respectable" forms that cost more in economic resources. The case was vividly put by independent record-label executive Hy Weiss: "Payola is the greatest thing in the world because it means that you don't have to spend time with some schmuck you don't like, eat dinner and all that, you pay him off . . . Instead of having an army of promotion men spending your money . . . , living off your expense account, you give it all to one guy and save yourself a million dollars."[20] When payola was restricted by the Federal Bribery Act of 1960, the major record companies augmented their staffs of professional pluggers to persuade program directors to playlist their wares. The fixed cost of promotion staffs put the smaller independent labels at a disadvantage, and the disappearance of a number of independent R&B labels may have been due partly to the suppression of payola.[21]

The saga of payola and its restriction took a striking turn during the late 1970s and 1980s. The practice never died out after the 1960 legislation, if only because of generous loopholes in the statute. It addressed the payment of money or "valuable considerations," but it left untouched phony contests that DJs could win and no-work consulting assignments or master-of-ceremonies jobs for which they could be hired. Payola continued at a low level, though executives of major record companies remained studiously uninvolved, from fear less of the little-enforced bribery statute than the Racketeering Influenced and Corrupt Organizations Act.[22] During the 1980s payment by the record companies for airplay again escalated greatly, and in a way that resulted from the legislative restrictions.[23] Promoters of records to broadcasting stations could be either independents or employees of one company. Stations preferred the independents, whose prioritized recommendations among the gaggle of new records would at least be neutral among labels. So, at this time, did major labels, if only because any payola that passed from independent promoters to the stations could not be traced back to implicate the label's executives.

Beginning in 1980 most of the large record companies instituted a pay-for-play policy with the independent promoters, paying a set fee each time a radio station added a record to its playlist. Competition among the labels

quickly escalated the fee to the range of $500 to $3,000, raising the cost of promoting a hit single record to about $150,000. Eventually, the fee reached $10,000.[24] This form of incentive compensation proved all too powerful. It attracted to the independent-promotion business a group of men (large and accompanied by bodyguards) who were willing and able to gain control of radio stations' playlists. Their reliance on bribes and threats for this purpose is not well documented, but Mafia connections seem very likely. Worse yet, the independent promoters managed to collude with one another in their dealings with the record labels. They divided stations among themselves, so that each had a chain of stations whose playlists were his property. The labels dealt not with (say) one promoter per song, but with the promoter who controlled access to a particular station. The labels could not avoid what had turned into extortionate payments for independent promotion. In the early 1980s, CBS was spending $8 million to $10 million annually on independent promotion, and the industry as a whole was spending probably $40 million. By 1985 the industry was spending $60 million to $80 million at a (prosperous) time when its pretax profits were at most $200 million.[25]

Neither individually nor collectively could the major record companies resist effectively. In 1980 the Warner label initiated a halt to independent promotion. CBS followed, but other labels dragged their feet. The independents' network retaliated by knocking off the charts one promising song of each company that bowed out.[26] Prevented by the antitrust laws from colluding formally to restrict promotion, in 1985 the companies sought to have the independents investigated for payola through their trade association, Record Industry Association of America, but that plan also crumbled. One reason is that the recording artists and their managers had nothing to lose from the transfer of profits from labels to promoters (and possibly stations). The labels were bailed out exogenously by a TV journalist's report on the promoters' Mafia connections, which allowed the record companies to express shock and indignation and swear they would stop using independent promoters. The stations also reaffirmed their anti-payola policies, and the practice went into retreat.[27] One consequence is that independent promotion once again became an economical policy for small, independent labels. The major labels' thralldom to the independent promoters had had the incidental advantage of raising their smaller rivals' promotion costs.[28]

The evidence supports a simple interpretation of the economics of payola in broadcasting. Promotion benefits to the label cannot be captured directly by the broadcaster, who lives by advertising revenue that generally will not reflect this benefit. Payola compensates for valuable promotion, and leaves us wondering why it is stigmatized as bribery rather than recognized as payment for services rendered. The broadcasters evidently assume that their goodwill

asset with the listening public depends on the apparent exercise of independent judgment in the music to be played. This assumption might be accurate, or it might just internalize the regulatory constraint that U.S. broadcast licenses are held on a public-trust basis. Payola then looks like a compromise, invading this goodwill asset to an extent just offset by the net profit increase from the payment. But then why does the transfer so often seem to benefit station personnel rather than the profit of the broadcast enterprise? This paradox lends interest to a recent trend toward overt payments for airplay in broadcasting, analogous to the "infomercials" that are a staple of television.[29]

Recent interest in pay-for-play arises from the rapid reorganization of the U.S. radio broadcasting industry. Removal of Federal Communications Commission restrictions on stations' common ownership has led to a great turnover of ownership, with more than one-quarter of the nation's 10,000 or so stations having changed hands in two years. Ownership has become concentrated in groups such as Jacor Communications, Inc., with 192 stations. The logic of this consolidation, as with movie theatres and fast-food restaurants, lies in economizing on entrepreneurial or managerial input into relatively simple and similar business units. Any new owner naturally seeks additional profit opportunities, and radio chains pursue economies of centralized dealings with suppliers such as record companies. Jacor and CBS Radio both floated the idea of pay-for-play in country music, which might take the form of an hour-long showcase program broadcast over the firm's stations nationwide. Another idea was à la carte purchase of several plays for a single song. Country music is a natural site for the experiment, because sales of country albums have been declining, and labels' promotion budgets are smaller for country music than for rock records. The proposal left some record labels and broadcasters looking nervously at ghosts of payola past, and it was not obvious how the fact of commercial sponsorship could be conveyed in the broadcast with sufficient candor to satisfy the Federal Communications Commission.

Other examples have surfaced, such as a deal between an independent station and a label to play an emerging artist's song 50 times in five weeks in exchange for $5,000. A new artist's success is always highly risky, and the deal was seen as a sharing of risk between label and station. A music-video TV channel in 1994 adopted a program (called Playola) of showing a record company's video 42 times during two weeks in exchange for $27,000. These developments have met the standard objections about compromised independence and deception of listeners. Could compilers of Top Hits lists distinguish between autonomous and purchased play? The potential efficiency gains from pay-for-play, however, were also noted. It could replace under-the-counter contracts by which airplay depended on conventional ads on the

station purchased by a label. Artists are sometimes pressed to play concerts sponsored by radio stations in order to gain airplay or retain a place on a station's playlist.

Payola in Other Settings

The broadcasting sector illustrates one factor—spillovers—that promotes payola. Other creative activities also harbor payola driven by promotional benefits. In popular entertainment, fan magazines commonly trade mentions in their news columns for advertising purchases, free trips for writers, and the like. Reviewers are paid little but may receive records and other freebies, free travel, or possibly job opportunities from the companies whose records they review.[30] Television broadcasts and cable channels whose program content deals with cinema films commonly demand advertising from studios whose new films they feature, atop contributions to the cost of preparing the program material.[31] Some clubs and venues hold particular value for promoting artists beyond the listeners whom they attract directly. To obtain bookings there, a label may pick up part of its group's regular fee, or buy large numbers of tickets and pay charges for numerous invited guests.[32] A New York club of moderate size was viewed by promoters as a particularly attractive rung on a ladder of venues for successful groups, and in competitive bidding by presenters it obtained an arrangement to share profits on subsequent local appearances by groups that had performed there.[33]

Another spillover promotion benefit generates payment for the placement of a manufacturer's product in a cinema or TV film. The cornflakes box visible in the breakfast-table scene must be one brand or another, or perhaps a contrived one. Filmmakers once resisted giving incidental plugs to existing brands, on grounds of creative autonomy. But the cereal maker will pay for the exposure of its trademark. Because of the huge audiences attracted by popular films, the promotional benefits to products can be very large. When a child fed Reese's Pieces to a friendly alien in the film *E.T.*, the candy's sales rose 65 percent.[34] Filmmakers must obtain releases for the conspicuous exposure of any trademark, but rather than paying for the privilege, the game is to extract maximum rents from the trademark's holder. The product's placement can be more or less conspicuous or favorable in the film. The extra product sales can yield large or small profits to its maker. Hence, payments can vary from free provision of the product up to very large sums. Daimler-Benz reportedly paid $1 million for its M-Class sports utility vehicle to appear in *The Lost World*. Fees in the range of $20,000 to $100,000 are common; since a film might offer twenty to fifty potential placement opportunities, it can easily realize $1 million in additional revenue.[35] This market for

product-placement opportunities has attracted its own brokerage industry, with fifteen to thirty independent companies seeking placements for their manufacturer-clients and negotiating terms.[36] It has been an area of significant litigation, because studio and product-maker find it difficult to contract before the film is completed on the positiveness of the product's use.[37]

The other explanation for payola, sticky prices, has its own domain in the creative industries. It seems to apply to deals offered by chain bookstores and superstores to book publishers. Bookstores can selectively promote particular books by placing large quantities on display at the front of the store, giving publishers a special space for newly published works, including certain books in catalogues, and the like. The superstores and chains best able to offer these services are also the ones that commonly discount books from their retail list prices (so the buyer swayed by a book's promotion in one store gets no benefit from buying it at another). With special displays and promotions proximately benefiting the retailer's own sales, spillovers do not explain why publishers might pay extra for these services. The book chain does pick one book over others for special promotion, however, and the publisher is vulnerable to demands for payment to get his onto the front table. Publishers' prices to retailers are expressed as discounts from the trade book's suggested retail price; these do not vary from book to book, and so constitute the requisite sticky price. The chains can efficiently coordinate such promotions among their many stores, offering the publisher various promotional packages that cost little per book but do add substantially to the stores' profits. Barnes and Noble's "Discover Great New Writers" program assures that a book appears face-out in every store for two or three months and gets a review in a special brochure, for $1,700 per title. To have a book featured for a month on a special stand at the front of each store costs $10,000. End-of-aisle displays go for $3,000 a book or $10,000 for the whole display. Borders charges $15,000 for a package that includes a month of front-of-store display and advertisement of the book discounted by 30 percent in a special issue of *USA Today*.[38] Amazon.com briefly joined the party by charging publishers for putting titles on its recommended list.[39] These practices have entered into the controversy between publishers and the traditional independent booksellers over promotional allowances and other terms that disproportionally benefit chains and superstores. The problem in part is one of transaction costs: the deal that is worthwhile when it covers a chain's hundreds of stores does not repay the negotiating costs and paperwork for a single store.

The bookstores' practices resemble those of grocery chains, which also find their stores' shelf capacity inadequate to display all the products that manufacturers would offer. The solution is not simply to make the stores bigger, because (among other reasons) diminishing returns set in for the shopper as

the cart-miles needed to fill the grocery list increase. Given grocers' mark-ups, the store's shelf space comes to acquire a positive shadow price. New products come to require "slotting allowances" to get stocked, and end-of-aisle positions can command a premium.[40]

Vertical Corporate Mergers: Capitalized Payola

The essentials of payola transactions appear in a seemingly different setting—the mergers and acquisitions that have been common among large entertainment firms. A small number of major studios distribute films that, after their round of exhibition in cinemas, become available for showing on television. A small number of television networks and cable channels provide outlets for showing these films. The films' negative costs and the costs of their promotion to cinema audiences are fully sunk. Although the marginal cost of making the film available for broadcast exhibition is negligible, the studios are able to extract substantial rents from the broadcasters. A broadcaster might be nearly indifferent among several available films. Clearly, in a spot transaction a studio would willingly offer payola to get its film selected. Now allow a studio (Disney) to acquire control of a broadcast network (Capital Cities–ABC). The ABC network can be instructed to pick Disney films over those offered by other studios. ABC's payment to Disney is an internal transfer that leaves the firm's profits unaffected, while the same payment to another studio is a direct cost. The Disney film might draw fewer viewers than another studio's, but the in-house selection remains a good deal until the lost profit approaches the size of the license fee to another studio.

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Organizing to Collect Rents: Music Copyrights

One rides the elevator in a modern high-rise building soothed by a bland recorded arrangement of "Tea for Two." This respite from silence might be worth, say, $0.0025. Can the composer collect that sum? What about the recording artists? Creative goods enjoy legal copyright protection, but the holder of the copyright must enforce it and collect payments for use of the copyrighted good. Many legal and economic issues of intellectual property rights are not specific to creative industries and apply to patents and trademarks as well. One exception, localized to the music industry, is flagged by the elevator rider's benefit: the lumps of rent are very small, very numerous, and hence feasible to collect only through some cooperative organization.

Intellectual Property Rights in Creative Activities

Copyrights to music compositions make the same compromise between economic costs and benefits as other legal rights to intangible intellectual property. Songs are public goods. Once written down, recorded, or even just performed in public, they come available to persons other than the songwriter at no (or little) marginal cost. If the song is free for the taking, the songwriter reaps no reward for her creative labors. Valuing *art for art's sake,* she may still bestow her lyrical gifts on the world; but she must earn a living somehow, so supplies even of creative goods shrivel when no economic rewards can be claimed. Giving the songwriter a property right, however, leads to another social cost. If the resource cost of the song's passage to another listener is zero, yet the songwriter charges each listener a positive price, a market distortion results (price exceeds marginal cost). The best compromise solution to this problem is the one that public policy actually embraces: give the songwriter her monopoly and let her collect her tribute, but limit the monopoly in time (in the United States, the creator's life plus 50 years). After that the song reverts to the public domain.

Several other issues entwine the copyright. Even the artist ready to donate her lyrical gift still needs the collaboration of humdrum inputs. The firm that publishes the song or issues its recording holds out for a normal return on its investment. Although humdrum inputs demand their paychecks, they may be clever about obtaining them in other ways, if intellectual property rights are not available. A book publisher, for example, might print initially enough copies of an uncopyrighted manuscript to serve its expected demand. Once this fixed cost is incurred and sunk, any pirate faces the authorized publisher as a competitor with a zero marginal cost, hence willing to meet any low price the pirate quotes and preclude the pirate's covering his fixed costs. A drawback of the intellectual property right is the rent-seeking that it induces. Successful creative goods regularly attract lawsuits from parties who claim that the work was stolen from them. Songs are particularly vulnerable, because notes can be arranged in only so many ways, so similar (short) sequences can easily occur by chance.

Songwriters and Royalty Sources

Some historical background sheds light on the royalty streams earned by songs and the institutions that collect them. Popular songwriters (composers and lyricists) once were typically not performers, only authors who took their creations to publishers, who in turn printed sheet music for sale to professional and amateur performers. Their song-plugging efforts (Chapter 18) sought to promote the sheet-music sales that were the source of royalties to the songwriter and profits to the publisher. Time brought new technologies for delivering professional performance to the music-loving public: recordings, radio, sound motion pictures, broadcast and cable television. The parlor piano fell into disuse, sheet-music sales plummeted, and the royalty and profit streams for songwriter and publisher increasingly depended on public performance.

The role of the publisher was transformed to the point where the term is now a misnomer. First, the publisher's best strategy for maximizing the rent stream to himself and the songwriter abruptly shifted from subsidizing public performance to taxing it (Chapter 18). U.S. legislation in 1909 both provided for compulsory royalties on music reproduced mechanically (then, record cylinders and piano rolls) and permitted copyright holders to collect royalties for public performances undertaken for profit. This law launched an effort to organize institutions to collect the newly authorized royalties. Second, the seismic shift in popular-music styles since the 1950s and the rise of the songwriter-performer made the physical printing of songs increasingly irrelevant. Since 1976 copyright no longer requires a song to be fixed in

printed form (a recording will do), and many copyrighted songs are not printed. The publisher still promotes songs to performers and filmmakers who might use them, but he is mainly a collector of rents.

Mechanical Royalties

Under U.S. law, songwriters nowadays obtain royalty income from two major and several minor sources.[1] Mechanical royalties (the name harks back to the mechanical reproduction of sound) are paid by record companies for each copy of a song that they record. The complex job of negotiating and collecting royalties of a few cents per record was resolved mainly by legislation. The 1909 act set a statutory royalty rate of two cents per song per recording. That rate persisted until 1976 legislation created a Copyright Royalty Tribunal to set an inflation-adjusted rate, now 6.95 cents per song of standard length. A nonprofit organization, the Harry Fox Agency, emerged that gathers royalty revenues, audits recording company records, and disburses the revenues received minus its expenses.[2] In 1994 mechanical royalties made up 31 percent of music royalty income.[3]

Mechanical royalties stem from a compulsory licensing requirement. After a song's first recording, anyone else may record it, subject to the payment of mechanical royalties. When songwriter and performer were different artists, this practice was unexceptional. The interest of the songwriter and publisher lay in the song's widest possible dissemination—the most performers recording it, and the most records sold. The marginal cost to the copyright's owner was zero unless a singer somehow devalued a song's appeal to others. The singer picking a song to perform could hardly search the world's songwriters for one willing to knock off a penny per record. The terms for mechanical royalties resemble the other conventionalized or (in this case) statutorily fixed prices, around which most parties find no net benefit in negotiating. The correspondence is not quite complete, however. That is because the compulsory rate carries rather onerous record-keeping requirements, so record label and publisher often settle on a negotiated rate below (but apparently related to) the statutory rate.[4] Also, when the songwriter is also the performer, record-company contracts normally truncate what the artist receives for so-called controlled compositions at 75 percent of the statutory rate.

The singer-songwriter may well have reason to resist compulsory licensing. As a songwriter, she benefits from the maximum number of singers attracted to her sing. As a singer, however, she recognizes other singers as competitors whose records compete with her own. If allowed to set royalty rates for other singers, she could select the right set of singers and charge each a royalty rate that would maximize the joint profits from all versions of her song, and re-

quire other singers to remit the profit shares falling into their hands.[5] She is not allowed to set such a rate, however. The force of this limit was evident in the diffusion of rock 'n' roll in the 1950s, with "cover" versions of blacks' R&B songs, cleaned up for white audiences, taking the dominant share of the record market.[6]

Performance Royalties

Any public performance of music (with a few exceptions) incurs an obligation to pay performance royalties: live entertainment, recorded songs performed on radio or television, juke boxes, background music. A (near-) duopoly of copyright collectives, ASCAP (American Society of Composers, Authors, and Publishers) and BMI (Broadcast Music, Inc.), arose to negotiate royalty payments with these users. ASCAP is also responsible for another conventionalized price: the equal division of performance royalties between songwriter and publisher. The copyright collectives and the reorganization of the publishing industry that resulted from this fixed division of rents are treated subsequently. Performance royalties in 1994 accounted for 44 percent of total royalty income.

The benefits to music presenters from public performance of recorded music depend on the score devised and presented by songwriter and publisher, but also on the solo performer, background musician, recording engineer, record producer, the label's support personnel, and others. How many of these participants get performance royalties? A successful recording depends on at least competent performance by each of the participants (by the *motley crew* property). Market data cannot expose even roughly the values of individual contributions by most of these participants. That leaves their entitlements a matter of public policy and private rent-seeking efforts. U.S. public policy has cut off participants other than songwriter and publisher by means of the doctrine of first sale, meaning that their claims do not reach beyond the record buyer's purchase into the buyer's use of the recording. The American Federation of Musicians in the 1940s tried to capture performance rents by the indirect method of curtailing the production of new recordings in order to force public presenters to employ more "live" musicians. This campaign did succeed in imposing a tax on sales of recordings, with the revenue passing to the union and not to the particular musicians who made them. That choice caused trouble within the union by creating a conflict between musicians (especially in New York and Los Angeles) who were the sidemen on the recordings and other musicians who were the main beneficiaries of the tax. The former were allowed to bargain separately for higher recording-session wages,

and eventually captured revenue from a tax on payments for the reuse of filmed TV programs.[7]

Other Sources

When a copyrighted song is included in the soundtrack of a cinema film or TV program, the producer obtains a so-called synchronization license from the publisher. Unlike the mechanical and performance royalties, individual transactions are sufficiently heterogeneous and important to warrant case-by-case negotiations. While the rent that any one song can command is limited by terms quoted by the publishers of competing songs, the prices and terms vary mainly with the value of the song's use to both the filmmaker and the publisher. License fees for using a single song in a cinema film were quoted (in the early 1990s) between $12,000 and $35,000 for the life of the song's copyright. The conspicuousness of the song's use (for example, is it sung by a character in the film?) is one determining factor. For TV use the fee may vary with the particular channel(s) involved—free, cable, or pay TV. The price drops if the filmmaker commits to a nationally distributed soundtrack album—in this case the publisher reaps mechanical royalties as well, and the filmmaker can press for a co-ownership share of the copyright or share of the mechanical royalties to capture the film's contribution.[8] Synchronization license fees for TV are quite low ($3,000 to $8,000), because the publisher also receives performance royalties from TV showings. For the producer of a continuing TV series, price-shopping and quantity discounts may affect the license fee. TV synchronization income for the producer may have the advantage of depending little on the program's success, in contrast to feature films' highly variable box-office outcomes.[9] When songs are licensed for TV commercials, publishers tend to hold out for a high fee ($100,000 to $300,000 for a year's use), because of the likely negative impact on the song's potential for future mechanical and syndication licensing.[10]

Publishers' income from synchronization royalties in 1994 was 8 percent of their total royalty income. Royalties from printed music were similar (9 percent), based on a conventional 20 percent royalty rate on the retail price of single-song sheet music and about half of that on folios or collections of songs. The remaining 8 percent of royalty income stems from still other sources, such as "grand" rights for the performance of a whole musical-comedy score. These are negotiated individually.[11] The boundary line between grand rights and those for single songs cleared routinely through the performing-rights organizations is wobbly and litigious because the parties may differ as to which approach yields them the better terms.[12]

Copyright Collectives

This review of sources of royalties for publishers and songwriters indicates that performance royalties pose the most difficult problem for organizing the collection process. Hundreds of thousands of songs might be performed over vast numbers of radio and television outlets, hotels, clubs, ballrooms, juke joints, college campuses, and the like. For the holder of copyright in a single song, the transaction cost of authorizing or detecting performance and collecting payment would be prohibitive except for the most conspicuous and accessible users. Even a collective organization faces a daunting task of identifying all users legally obligated to pay, negotiating terms, monitoring their use of music, collecting the royalties and remitting them to the appropriate rights holders. The history of ASCAP and its main competitor, BMI, illustrates the many analytical and organizational problems posed by these tasks.[13]

Assembling the Coalition

In 1909 U.S. legislation first authorized the collection of royalties when copyrighted music was performed in public for profit. Organization to collect these royalties from venue owners coincided with efforts by the Tin Pan Alley song publishers (that is, the mainstream publishers of popular songs) to collude on limiting payola to performers for promoting a song's performance.[14] After World War I the sheet-music business underwent a meltdown, with many stores closing their music departments and sheet-music sales of reasonably popular songs falling from 500,000 in the 1920s to 50,000 in the 1930s. The publishers, recognizing that demand had grown less elastic as it contracted, tripled the price in 1919.[15] The receding importance of sheet music and the possibility of capturing royalties from public performance both reduced the spillover value of public performance and created a legal basis for collecting tribute. The publishers who joined the Music Publishers Protective Association (Chapter 18)—that is, the bulk of major publishers of contemporary popular music—were the same ones who shortly after climbed aboard ASCAP. The main problem of assembling the coalition of publishers was thus solved at the outset by their common interest in trying to reverse the stream of payments between publishers and the parties involved in public performance. Publishers could take different views of how to deal with their key revenue sources, however, and there were numerous withdrawals and rejoinings among the smaller publishers. The organization's feasibility was not confirmed until the U.S. Supreme Court resolved the meaning of "public performance for profit" (explained subsequently).

Collective organizations face the hazard of their membership unraveling,

when their core policies leave some members with better options outside and the defection of these members impairs the scale economies that benefit the still-loyal. Once ASCAP was established as a copyright collective, it was fairly well insulated against defection. The service it provided was not a public good, because nonmembers could be excluded from its benefits. Even a large independent publisher doing its own licensing could not touch its scale economies. The only holdout would be a publisher whose special situation made performance royalties easy to collect.[16] When ASCAP came to face competition from BMI (discussed subsequently), its problem was its own exclusion of publishers of popular music in styles other than Tin Pan Alley's, until it was forbidden to do so by the 1941 consent decree that followed an antitrust intervention. The ASCAP members may have sought to weaken or exclude competitors, or they may simply have acted from snobbery.[17]

Negotiating Royalty Payment

Rent-seeking is always highly litigious. The pot of gold need not be mined, only captured. Not picks and shovels but lawsuits and political campaigns are the tools of choice for either annexing or retaining property rights in streams of rents. The collection of performance royalties illustrates the point well: no substantial group of payers ever gave in without litigation, and skirmishes continue eight decades after ASCAP's founding. Hotels and clubs or cabarets were pressed at the outset. Both sought exclusion on the ground that they provided music as a bundled service and, while operating for profit, did not charge their patrons for music as such. This argument prevailed through the U.S. district and appellate courts, but the Supreme Court saw these music users' bundled services for what they are. Motion pictures were silent in ASCAP's early years, but film exhibitors did employ the piano accompanist to heighten the visual effect with whatever melodies seemed appropriate. The motion picture exhibitors were targeted by ASCAP for licenses. In response they raised a war chest, sought Congressional action, and instituted a lawsuit on grounds similar to the hotels' and cabarets'. ASCAP prevailed with its own infringement suit, with the district court rejecting the first of many claims that ASCAP violated the Sherman Antitrust Act. The theatre owners then proceeded with another two-pronged attack. They sought to enlist the film studios in a general boycott of music represented by ASCAP, and to develop non-ASCAP sources of music by promising the exhibitors' promotional assistance to any publisher supplying music outside of ASCAP. Neither maneuver worked, and by 1924 the majority of theatres were licensed.[18] ASCAP's cumulative total legal expenses then exceeded the royalty income it had received.

One puzzling feature of ASCAP's early operations is its failure to seek royalties from the vaudeville theatres that were then the nation's main form of musical entertainment. Like the touring theatre troupes, vaudeville was then manifestly declining in the face of motion-picture competition, and many theatres were converting in part to showing films ("pic-vaude houses"). ASCAP may have skipped a fight with the vaudeville interests for that reason alone, but the decision was apparently more complicated. Vaudeville theatres and the booking of talent were then largely controlled by the Albee-Keith organization. It apparently had significant monopsony power with performers, and was deemed capable of capturing some payola rents they had received for plugging Tin Pan Alley's songs. The Albee-dominated vaudeville managers' association proposed to ASCAP that it subcontract the collection of performance royalties from the pic-vaude houses and from non-Albee theatres, in exchange for a 50 percent cut of what it collected and exemption of Albee's own theatres from performance royalties.[19] This smelly deal never took effect.

New Music-Distribution Technologies

In the 1920s and 1930s, ASCAP dealt with two important new technologies for disseminating musical entertainment—sound motion pictures and radio broadcasting. Warner Bros.'s first sound film, *The Jazz Singer* (1927), was hugely profitable and made it clear that music would be embodied in films and not just played as accompaniment. As noted previously, the importance and heterogeneity of music's use in cinema films from the start warranted direct negotiations over licensing with the publisher rather than clearance through ASCAP. Nonetheless, the studios' switchover to sound films did affect ASCAP's core membership. In the late 1920s the studios bought controlling interests in several of the major music publishers. The reason for these acquisitions is clear. Music embodied in films would add greatly to the studios' profits, and exhibition of sound films would strongly promote their songs in other embodiments (recordings, sheet music). These spillovers would bring profit windfalls (performance and other royalties) to the music publishers, windfalls that would accrue to the studios if they could buy publishing firms at market values that did not fully anticipate these rents. The studios' fast action likely captured much of this prize. The studios may also have sought insurance against an ASCAP-mounted squeeze on music sources.[20] This development affected ASCAP's governance in that the studios now controlled a substantial bloc of its voting members. The studios had reason to welcome ASCAP's efficient mechanism for collecting performance royalties, however, and the captive publishers' relations with ASCAP continued un-

changed. ASCAP was in any case somewhat insulated from the defection of publishers (even if it had been in their interest to defect). That is because publishers and songwriters were admitted to ASCAP separately and on different bases, making it tricky for a publisher to exit without harming the interests of the songwriters it had published.[21]

The early radio industry relied heavily on broadcasting music, recorded or live, and became a key target for ASCAP in 1922. The broadcasters, not yet profitable and facing a property-right claim on their lifeblood, were understandably concerned. The major companies then involved in radio (RCA, AT&T, General Electric, Westinghouse) indicated a willingness to discuss reasonable royalties, but ASCAP made the tactical error of declaring that it expected radio to be a major revenue source. The stations rejected wholesale the temporary licenses that ASCAP offered, while long-run royalty rates remained unresolved. The National Association of Broadcasters (NAB), the independent stations' trade association, sought to develop non-ASCAP sources of music. Publishers with backlists of more traditional music indeed were not well represented in ASCAP in 1922, which provided an opening for the NAB, but ASCAP vigorously recruited them during the next two years. Several legal challenges from the NAB were defeated in the courts, and attempts to obtain an exemption from Congress or federal regulation of ASCAP's rates were unsuccessful. By 1932 all the major broadcasters were licensed.[22] Furthermore, ASCAP's publisher-members were congruent with the trade group that negotiated mechanical licenses for the broadcast networks' "electrical transcriptions," special recordings of music and programming for the use of network's member stations.[23]

Structure of ASCAP's Charges and Disbursements

ASCAP faced problems of both how to collect from users and how to divide the revenues among its members so as to keep the coalition together. The most efficient way to extract rents enjoyed by (say) a radio station is to identify the increment of profit associated with the use of ASCAP songs and demand it as payment in an all-or-nothing offer. The profit increment might be identified either as specific to each individual song played, or as an aggregate due to the station's selections from the whole ASCAP catalogue.[24] The latter, blanket-license approach had the great advantage of simplicity, but it also clearly placed ASCAP in the position of a cartel pricing the use of its members' songs collectively. If, instead, each ASCAP member priced its own songs' use separately, with ASCAP serving only as collecting agent and bookkeeper, the organization's subsequent vulnerability to antitrust charges would have been much lessened. But it was long accepted that individual

pricing of ASCAP's many songs, with each price conditional on user and use, was infeasible.[25]

ASCAP settled early on the blanket license for all ASCAP songs, with a royalty tied to the theatre's number of seats or the broadcaster's gross revenue (after deductions).[26] Besides keeping transaction costs low, this system could claim economic efficiency. The costs incurred to write and publish ASCAP's songs were all sunk. The marginal cost of using a song is zero. Therefore, it was efficient for ASCAP's charges to impose no tax on the use of an additional ASCAP song, on the replacement of a non-ASCAP song by an ASCAP-represented one, or on the use of one song rather than another.[27] Furthermore, the music user's costs typically did not vary with the number of ASCAP songs used, so that the songs' contribution to the user's profit was the same as their contribution to its total revenue.

While blanket licenses efficiently targeted the royalties for collection, the disbursement of the proceeds to members did require ASCAP (and later BMI) to identify what songs were actually used. This was done by requiring major users to keep logs of the music performed, while minor users were sampled.[28] A projection of the extent and nature of use of each song assigned it a certain number of "points," and the payment made per point was simply ASCAP's total receipts less operating costs divided by the total number of points awarded. Again, subject to sampling error, the system induced no biases among members by under- or overrewarding particular songs or types of songs.

Two features of the distribution of royalties that ASCAP collected, however, did have important effects. One was the convention of dividing royalties equally between publisher and songwriter(s), which to this day applies to mechanical and synchronization royalties as well as performance royalties. Its effects are discussed subsequently. The other is ASCAP's practice of rewarding songwriters and publishers not just on the basis of points allocated for current use of their music. The songwriter may choose between this plan and an alternative that favors cumulative play of the writer's songs and also benefits the classical composers who are ASCAP members. BMI adopted a similar system, without as much seniority bias but also including a feature that escalated the rewards to the most successful songwriters. Both collectives paid publishers on the basis of current performance.[29] This seniority bias in ASCAP's allocation became important when it faced competition from BMI, because it disfavored the currently "hot" songs and songwriters and pushed them to seek BMI membership. The problem with ASCAP's publisher members was similar. Due apparently to ASCAP's founders and its original governance structure, publishers were divided into several groups with the effect of multiplying or discounting the royalties due them in relation to the play that their

songs received. In 1935 Warner Bros.'s song publishers, on the losing end of this hierarchy, withdrew and sought to create their own licensing organization, but the scale-economy advantages of sticking with ASCAP proved overwhelming.[30]

ASCAP Faces Competition

By the late 1930s ASCAP had brought all major classes of music users under license for performance royalties. Its licensees were sullen but not mutinous. ASCAP then began maneuvering to impose an increase that would double its royalty stream from radio, with the change structured to load the burden on the broadcast networks and ease it on individual small stations.[31] With existing licenses expiring at the end of 1940, ASCAP furthermore was coy about exactly what terms it would demand, so the odor of a hold-up reached the networks' nostrils. In 1939 the National Association of Broadcasters set to work establishing BMI as a competitor to ASCAP. This did not prove a difficult task, because the radio industry (the principal source of performance royalties) stood ready to welcome new songs and songwriters. Only one major publisher was attracted from ASCAP, because of the problem of relocating a publisher and his songwriters all at once.[32] A substantial clientele of songwriters and publishers was receptive to the invitation, however, because the organization had never welcomed other music styles—such as rhythm and blues, country and western, and Latin.[33] Furthermore, in 1940 the admission of any publisher or songwriter to ASCAP was subject to rather stringent conditions of prior activity and success. Restrictiveness obviously benefited current members, who could divide the blanket-license revenue among fewer recipients, but it opened the door to a competing coalition.[34] In April 1940 NBC and CBS instructed their music departments to avoid use of ASCAP songs whenever possible, and a progressively imposed boycott eliminated ASCAP songs from radio play by the beginning of 1941. Between BMI's holdings and public-domain music, the boycott brought only a minor jolt to the nation's radio audience.[35] In the settlement finally reached with ASCAP in late 1941, royalty obligations were indeed focused on the networks (a function of their numbers of affiliates and gross revenues), with simple blanket licenses for individual stations, but the charges represented a cut rather than the increase that ASCAP had sought. One estimate held that, had ASCAP's 1941 contract been in effect during 1935, ASCAP would have collected \$3.1 million rather than the nearly \$5 million that it actually collected.[36]

Important changes in ASCAP's internal policies sprang from this competition, when it led the Department of Justice to intervene in 1940. Probably

intending to force an ASCAP-radio settlement, the Justice Department brought broad charges of illegal pooling, price-fixing, and discrimination against ASCAP, BMI, NBC, and CBS. BMI soon signed a consent decree permitting its members to license songs directly when they wished (that is, membership did not entail exclusive licensing) and requiring that per-piece or per-program as well as blanket licenses be offered. ASCAP came under similar restrictions. That organization was also forced to ease its entry restrictions and reform its old-boy governance structure. The reformed payment system placed increased weight on performance and decreased weight on seniority in payments to songwriters. In 1950 the consent decrees were modified to impose arbitration by a U.S. district court when ASCAP and licensees could not agree on terms. ASCAP became in principle a regulated monopoly, although there has been little resort to arbitration.[37]

This episode not only introduced competition in royalty collection but also affected the songwriting and music publishing industries substantially. The number of active music publishers and the turnover in their success with top-hits songs increased, and the copyright registrations of songs increased more than the nation's economic recovery seems able to explain.[38]

Ongoing Negotiation and Rivalry

ASCAP and BMI settled into a pattern of rivalry with each other and continual conflict with licensees and potential licensees involving a morass of negotiations, lawsuits, threatened lawsuits, and contests for political influence. The blanket licenses favored by both ASCAP and BMI have been under continuous attack despite their previously noted efficiency, and despite the fact that licenses on a per-program basis had to be offered since 1941. Licensees' attacks usually rested on this sort of reasoning: The licensee pays ASCAP (or BMI) $\$X$ for use of any or all of the many thousands of songs it represents, but it only wants to use a small fraction $1/n$ of these, so instead it should be allowed to pay $\$(X/n)$ for just the songs that it wants. Given ASCAP's legal power to extract the value added by performance of copyrighted songs, the argument is spurious. The licensee has in fact already made his choice of the $1/n$ songs that he actually uses, and pays a license fee reflecting (presumably) the value added by this ad-libed selection of songs. The tactical purpose of the position is to force ASCAP to quote license fees on specific songs; because the copyright collective may not prevent the publisher from making his own deal, that would allow the licensee to start a bidding war between ASCAP and its member publisher. The outcome would leave ASCAP serving only as a collection agency.[39] One version or another of this attack on blanket licenses was pursued first by the broadcast networks (led by CBS), then in a

class-action suit by local TV stations, and most recently by cable program suppliers and cable system operators. In each round, the courts declined in the end to find blanket licenses illegal.[40]

What one makes of blanket licensing as a matter of economic policy depends on the level of the license fees set. If transaction costs were magically swept away, and holders of song copyrights could compete freely to line up licensees and collect from them, the licensees would get the benefit of lowered prices due to rivalry among these differentiated products. If ASCAP's blanket licenses represented a pure monopolization of songwriters' services, they would create an economic distortion. ASCAP does compete with BMI, however. Also, it operates under supervisory court decrees that hold out arbitration as a cap on license fees. Although the effect on license fees cannot be quantified, ASCAP and BMI have certainly competed in setting terms with the main groups of licensees. Licensee groups do not typically seek bids and take one or the other collective's bundle of songs. Both are bought, but their bundles of songs (though different considerably in composition because they still reflect their respective origins) are comparable in overall size, so that one collective cannot generally hold out for a blanket license fee much higher than the other's.[41] The collectives appear to be unable to price their blanket licenses monopolistically, although the amount of shortfall is unclear.

Rivalry between ASCAP and BMI has also affected the terms that they offer to publishers and songwriters. ASCAP's favoritism of its old boys has been a point of vulnerability. If some members get more than the royalties imputable to their songs, others must get less, and the competing collective can perhaps offer them a better deal. Although each organization's rules impose some lock-in, they are active rivals in recruiting members, and this has squeezed out some of the redistribution implicit in their disbursement methods.[42] The favorable effects of rivalry between ASCAP and BMI in setting license fees and attracting members should be weighed against the element of natural monopoly that brought ASCAP into being in the first place. Each maintains an administrative apparatus that represents a separate fixed cost.[43] Combining them into a single entity would save one fixed cost, plus the cost of their continual legal skirmishes with each other, but the benefits of their competition would be lost.[44]

The struggle to bring public music users into licensee status continues. Jukebox operators succeeded for two decades in preserving a Congressional exemption from royalty payments, but finally lost it in the copyright legislation of 1976. Cable television also became liable for licensing at that time. The act removed the "for profit" condition on public performance subject to license, pushing the Public Broadcasting System into licensee status. Religious broadcasters were put under license, although they have lately followed

the course of seeking exemption or rate regulation from Congress.[45] ASCAP, with perhaps more legal propriety than political savvy, sought to license the Girl Scouts and other campfire singers of copyrighted songs.[46]

Songwriters' and Publishers' 50–50 Split

The equal division of all types of music royalties (except sheet-music sales) between songwriter and publisher is another puzzling conventionalized price. ASCAP adopted this rule early in its history, and songwriters and publishers hold equal numbers of seats on its board of directors. The rule cannot claim to be an equilibrium price, clearing the market for services of songwriters and publishers. Since publishers serve as gatekeepers, and many songs go unpublished (and unsung), the amount of music published will depend on this rule. Increase the songwriters' share, and fewer songs will be published, although each will earn more revenue. Over the twentieth century the publisher's contribution to a song's success has greatly diminished. The crumbled market for sheet music and the dominance of the singer-performer as recording artist removed most of the music publisher's promotional function (although the pursuit of mechanical and synchronization royalties remains) and left him with mainly bookkeeping tasks.

If the 50–50 split represented a market equilibrium when it was adopted in the 1920s, it evidently moved toward overvaluing the publisher's contribution. This could lead to a number of adjustments, such as underemployed publishers pursuing a diminished supply of songwriters and seeking kernels among the chaff of unpublished songs. In fact the publisher's role has contracted to the point where anybody can be a music publisher. The only essential task is the administration of the copyright, and that can be subcontracted to other firms. The movie studios first responded to this incentive with the coming of sound, which put them in need of access to music catalogues. It also generated opportunities to publish (and collect royalties for) music written for use in films, notably "work for hire" whose copyright benefit flowed to the employer rather than the salaried composer. By the early 1930s Warner Bros. controlled no less than 20 percent of ASCAP-assigned music.[47]

With the arrival of rock and the singer-songwriter, music royalties came to yield immense wealth to publishers as well as songwriters, incidental to the process of making and promoting recordings. By 1990 Paul McCartney's "Yesterday" had been recorded by 1,600 other artists worldwide, all yielding mechanical royalties to the songwriter.[48] The record labels moved vigorously to start or acquire their own music publishers, especially in Britain, land of the Beatles.[49] If the label could become a music publisher, so could the songwriter, and in the 1970s successful songwriters began owning their own pub-

lishing companies.[50] A publishing firm can dwell in a file drawer, owned by the songwriter but administered by one of the major (conventional) music publishers. As a consequence, ASCAP recently represented 29,400 songwriters but also 12,000 publishers, while BMI counted 65,000 and 37,000, respectively.[51]

Music publishers' royalties become a contention in contracts between songwriter-performers and labels because both wished to claim the publisher royalties. Labels tend to demand publishing rights for a new and untried artist because of the high probability that the advance will not be fully recouped. That is because mechanical royalties to the artist's publishing company are not recoupable by the label, while those due to its own publisher flow directly to its pocket. When the artist does retain the publishing function, the label caps the rate of mechanical royalties to 75 percent of the Copyright Royalty Tribunal rate.[52]

The publisher's share of music royalties has turned into a freely traded cash flow.[53] The copyright administrator still performs bookkeeping and perhaps promotional tasks, but the administrator may be the assignee rather than the owner of publishing rights, so nothing impedes trading them like any other speculative asset. In 1985 Michael Jackson bought the ATV catalogue, including some 250 Beatles songs and numerous others, for less than $50 million.[54] In 1988 the copyright on "Happy Birthday to You," with 22 years of life remaining, was bought by Warner Communications for $28 million.[55] Bargains have no doubt been available in this market when estate sales and corporate reorganizations put song catalogues on the market, but rivalry among international entertainment and publishing conglomerates has pushed up prices, to the benefit of owners of song catalogues.[56]

Creative Work without Copyright: British Novelists in Nineteenth-Century America

Copyright and other intellectual property rights are largely settled in the laws of the industrial countries, but they raise an international conflict with other countries that deny protection to foreigners' intellectual property and then do a brisk business in pirated and counterfeit editions. Economists are curious about how people adjust to different systems of property rights. In the field of copyright, history offers an adroit controlled experiment. The United States did not extend the copyright privilege to books by foreign authors until 1891, and so Britain's Victorian novelists and their publishers had to cope with a thriving band of piratical U.S. publishers.

Lacking a legal property right, parties seek a preemptive substitute.[57] Before 1891 British books were regularly pirated in the United States, but sub-

ject to considerable honor among thieves. A published book imported from Britain could be copied without payment to author or publisher, but it could be copied earlier if the British author were paid to provide proof sheets of the London edition. The U.S. publisher with a known head start had a decisive advantage, unless the book was so popular that it made a second American version profitable. That mechanism let British writers command substantial honoraria from the pirates. Typesetting technologies in the early nineteenth century caused the author to receive proofs in small batches over relatively long periods of time, and so the author's duplicate proofs often (without benefit of author's corrections) made their way across the Atlantic.[58]

This preemptive strategy was supported by a practice of "trade courtesy" among the U.S. publishers. When an ad was placed in *Commercial Advertiser* announcing the publication of a foreign author, it was accepted as fixing priority among a quite large number of reputable U.S. publishers (whether or not the British author got paid). Coordination problems were not absent, however, because U.S. publishers had no way to know whether the British author or the publisher held the right to publish abroad, so conflicting negotiations could take place.[59]

The lack of copyright did not necessarily preclude mutually agreeable repeated dealings between U.S. publishers and British authors, a practice well illustrated by the experience of novelist William Makepeace Thackeray. His first "book" was a pirated U.S. edition of a serial that had appeared in *Fraser's Magazine* in 1837, and it and subsequent piracies gained him a substantial reputation in the United States that later created an eager demand for his lecture tours (which Thackeray considered easy money). Harper and Brothers became his regular pirate, thanks to trade courtesy, and made substantial voluntary payments for all his books beginning with *Henry Esmond*. Only one duplicating pirate edition appeared, for *The Virginians*, which was expected to be his most profitable book in the United States. Appleton did issue Thackeray's works extensively in a paperback series, and they also offered compensation of 100 pounds sterling for editing volumes out of his contributions to *Punch;* these Thackeray could later use in a series of collections put out by his British publisher.[60]

Before 1891 American authors had long supported U.S. copyright privileges for their British colleagues, perhaps from professional courtesy, but certainly because their royalty-free volumes were low-cost competitors. Wendy Griswold sampled novels published in America between 1876 and 1910, divided about equally between U.S. and foreign authors. Before 1891, she found, books by American authors carried higher list prices ($1.04 versus $0.64 during 1876–1884); after 1891, American books were cheaper ($1.22 versus $1.38 during 1905–1910). The proportion of authors in her sample

who were Americans rose from 48 percent to 67 percent, as the obligation to pay royalties cut into the profitability of British authors' U.S. editions. She also found some evidence that, before 1891, American authors had differentiated their subject matter and themes some distance away from the British novelists. That divergence declined after the change in copyright policy.[61]

Copyright in Perspective

This chapter has focused on a few issues of the many that arise with intellectual property rights and the behavior that they promote. Composers of songs, symphonies, dances, and plays all require the collaboration of performing artists, and they all hold the right to collect royalties when their creations get public performance. Only song composers face a dire problem of efficient collection. The educational use of brief passages of published text, however, is quickly sending their copyright holders to watch over the photocopy machine and the website, hoping to scoop up increasingly similar streams consisting of many small particles of benefit. Collective collection seems inevitable in this area as well.

For other artists, rent streams are easier to capture, because public presentation of their works involves a large and conspicuous transaction—a new production of a play or opera, a new edition of a novel. Still others find themselves at a disadvantage, cut off from access to the small rents that could flow from their creations. The novelist collects every time her book is sold, but not every time it is read. She might price discriminate between libraries (many prospective readers) and sales to individuals (one or a few readers), as do many scholarly journals. The composer is fenced off by practicality from collecting each time a music-lover plays her recording. The legal doctrine of first sale here codifies practicality. The visual artist neither legally nor practically can collect from each viewer who enjoys her work on the museum wall—although she can now generally collect each time her work is photographically reproduced.

Similar margins of practicality affect other artists who might lay claim to rents. For complex goods assembled by a *motley crew* of artists, feasible collection falters because the proportional contribution of each to the finished work defies definition or negotiation. That has not precluded the bitter disputes over unexpected rents from cinema films, with the copyright owners repeated and vigorously pressed by creative participants to hand over some of the bounty (Chapter 7).