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Video Game Music: Where it Came From, How it is Being Used Today, and Where it is Heading Tomorrow

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Video Game Music: Where it Came From, How it is Being Used Today, and Where it is Heading Tomorrow

*Michael Cerrati**

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Video games and interactive software have transformed from a soundless, black and white visual representation to a movie-like, surround sound experience in the last quarter of a century.¹ Technology has dramatically improved the auditory and visual effects transmitted to the consumer now available on a variety of gaming platforms, including the Internet. The dynamic and constantly-evolving creativity contributing to the design and development of today's games has helped establish the video game industry as a multi-billion dollar revenue force now attracting worldwide attention.²

Currently, the interactive software and video game industry ("video game industry") seems to be hitting its stride as the music industry is being forced to search out new ways to make a profit. This has spawned a tremendous crossover of talent and an influx of music, new and old, into the current games. Placing music in games has reinvigorated the waning careers of established artists and become essential in the "breaking" of new acts.³ The results have become so valuable that game developers have generally been able to do as they please, including paying little or no fees, when acquiring the music of

1. See generally STEVEN L. KENT, *THE ULTIMATE HISTORY OF VIDEO GAMES: FROM PONG TO POKEMAN – THE STORY BEHIND THE CRAZE THAT TOUCHED OUR LIVES AND CHANGED THE WORLD* (2001).

2. See generally James Ulmer, *Console Games to 8 Billion by '08*, THE HOLLYWOOD REPORTER.COM, Sept. 28, 2004, available at <http://biz.gamedaily.com/industry/feature/?id=7993>.

3. See generally Lorri Freifeld, *Jammin': The Continued Convergence of the Video Game and Music Industries Spells Merchandising and Promotional Opportunities*, LICENSE!, May 1, 2004, <http://www.licensemag.com/licensemag/article/articleDetail.jsp?id=95290>.

their choice. Unfortunately, for many recording artists and composers, the video game market has largely become a publicity-driven model in which music is licensed at reduced rates, if not for free.

Until recently, video games were one of the only media without a secondary stream of revenue.⁴ In the last decade, however, games expanded into new markets such as television, cellular phones and the Internet. These new markets created ancillary revenue sources for the game developers and publishers, as well as the recording artists and composers supplying the music.⁵ This article proposes that composers should be allowed greater participation in these budding additional revenue sources. Permitting greater participation will allow composers to compete better in a publicity driven market dominated by licensed music. For example, an increase in online gaming will create revenue streams for the composers from the public performance of their copyrighted musical compositions over the Internet. However, this is only feasible if composers retain such rights in their contracts. In other instances the owners of the sound recordings streamed over the Internet may also receive a public performance royalty under somewhat recent amendments to the United States Copyright Act.⁶

Several obstacles presently lie in the way of composers receiving more participation in the ancillary revenue streams created by the placement of their music in the games. First, many of the work-made-for-hire agreements under which the original music is created generally exclude public performance rights for composers, thus eliminating any potential revenue.⁷ Secondly, online gaming is still in a rather infantile state and is not currently capable of generating a significant amount of income.⁸ Perhaps, with the restructuring of composer agreements to provide for the payment of public performance royalties in connection with an increased presence of online gaming, composers will receive a more substantial return for their copyrighted works.

4. *Id.*

5. *See generally id.*

6. *See generally* Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336 (codified as amended in scattered sections of 17 U.S.C.); *see also* Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (codified as amended in scattered sections of 17 U.S.C.).

7. *See generally* 1 GREGORY J. BATTERSBY & CHARLES W. GRIMES, MULTIMEDIA AND TECHNOLOGY LICENSING AGREEMENTS § 3:9 (2005).

8. Telephone Interview with Billy Martin, Composer, Lunch With Picasso Music, in Los Angeles, Cal. (Apr. 1, 2005).

This article addresses the many facets of the video game industry and the exceptional role that music has played and continues to play in this expanding industry. Part I tracks the history of music's role as video games developed over the years. Part II discusses the manner in which music is obtained for use in video games and the contractual setting in which this takes place. Part III comments on the current state of the video game industry, exploring ways to shift the paradigm from one that is publicity-driven, to one that recognizes the importance of music. The final section, Part IV, explores what the future of the industry may look like and some of the creative innovations that lie ahead.

I. CHARTING MUSIC'S ROLE THROUGHOUT THE EVOLUTION OF VIDEO GAMES

The evolution of sound throughout the history of video games has always been based on the technological capabilities of the computers or game consoles on which the games are played.⁹ Generally, the history of video game music can be classified into various periods highlighted by the type of technology existing at that time. First, there were the early games created on archaic, slow and costly computers. Once computers became more economical and efficient to manufacture, the generations of video games were characterized by the number of "bits" offered by the processor contained in the systems.¹⁰ Consequently, the history of video game music is highlighted by the 8-bit, 16-bit, 32-bit, 64-bit, and lastly the 128-bit eras. By analyzing the development of computer technology in relation to the manner in which sound and music were integrated into the games of that era, it is easier to understand how games have progressed over time.

9. Glenn McDonald, A History of Video Game Music, <http://www.gamespot.com/features/6092391/> (last visited Mar. 20, 2006) [hereinafter McDonald Navigation] (The author notes that "the mark of superior sound design is that you don't consciously notice it at all." In fact, according to the author, "it [the music] goes to work on you subconsciously--heightening tension, manipulating the mood, and drawing you into the gameworld faintly but inexorably.").

10. See generally Dave Kosak, 64-Bit PC Gaming is Coming. Will it Change the Way You Game?, <http://archive.gamespy.com/gdc2003/64bit/> (last visited Mar. 20, 2006). The number of "bits" refers to the measurement of the size of instructions that the computer processing unit accepts. *Id.*

A. In the Beginning

Just as silent films entertained and captivated audiences in the early days of the movie industry, the first video games lacked a sound component.¹¹ Two of the earliest forms of silent video games were created on primitive computers in 1958 and 1962, by William Higinbotham and Steve Russell, respectively.¹² These early creations paved the way for hundreds of thousands of arcade and home video games that would become mainstream over the next five decades.

In 1972, Magnavox released the *Odyssey*, which quickly sold 100,000 units and became the “first video game machine for use on a television.”¹³ This early analog home video console was also without sound and featured rudimentary black and white graphics.¹⁴ In the same year, Atari released the famed *Pong* with sound and quickly became the forerunner of arcade video games.¹⁵ The simple blips of *Pong* were soon replaced by Milton Bradley’s 1974 release of *Simon*, a popular handheld game that became “the first game to incorporate music as a game element.”¹⁶ One year later, Midway Games incorporated a microprocessor and a one-channel amplifier to supply gunshot sounds in the video game *Gunfight*.¹⁷

B. The 8-Bit Generation of Games

The use of 8-bit microprocessors in home computers and video game consoles began in the mid to late seventies and continued well into the 1980s.¹⁸ Technological improvements allowed memory to be

11. Glenn McDonald, A History of Video Game Music, <http://www.gamespot.com/features/6092391/p-2.html> (last visited Mar. 20, 2006) [hereinafter McDonald The Early Days].

12. See KENT, *supra* note 1, at 18. Higinbotham created an interactive game called *Tennis For Two* that was displayed on an oscilloscope, while Russell created *Spacewar*, in which players duelled with individual rocket ships. *Id.* *Spacewar* was the first interactive computer game, and required over two hundred hours of labor spanning six months. *Id.*

13. MATHEW BENDER & COMPANY, 5 ENTERTAINMENT INDUSTRY CONTRACTS § 110.03[1] (2005) [hereinafter MB ENTERTAINMENT CONTRACTS].

14. The Dot Eaters, Player 1 Stage 1: Bits from the Primordial Ooze, <http://www.emuunlim.com/doteaters/play1sta1.htm> (last visited Mar. 20, 2006). The system came “with a set of two sizes of colour mylar overlays to put on the television screen to represent the various playfields” *Id.* Additionally, there were “12 different plug-in circuit boards available to make the machine play different games” *Id.*

15. The Dot Eaters, Player 1 Stage 2: Atari Rising, <http://www.emuunlim.com/doteaters/play1sta2.htm> (last visited Mar. 20, 2006).

16. McDonald The Early Days, *supra* note 11.

17. *Id.*

18. Wikipedia, History of Computer and Video Games, <http://en.wikipedia.org/wiki/>

loaded from storage and executed on general purpose microprocessors, instead of being coded permanently on computer chips.¹⁹ The introduction of game programs stored on individual game cartridges allowed consumers to accumulate entire libraries of games.²⁰ Although this change relieved gamers of being limited to the games included in the original console, there were still limitations. While advanced for their time, game cartridges would prove to have smaller memory capacity than later-developed CD-ROM technology, which severely impaired the sound capabilities of the early 8-bit processors.²¹

Nintendo's release of *Donkey Kong* in 1981 marked a notable progression in arcade game music.²² Shigeru Miyamoto composed the early soundtrack with the use of a small electronic keyboard.²³ Later that year, Atari got serious with its video game sound with the introduction of *Tempest*, which featured Atari's POKEY chip, designed specifically to generate sound.²⁴ Following the release of the game, Atari also released a separate game soundtrack album "believed to be the first stand-alone audio soundtrack in the video game industry."²⁵

In 1982, the video game industry saw its first venture with the music industry with the release of Atari's *Journey Escape*.²⁶ This game featured digital versions of Journey compositions, as players manipulated members of the rock group through various levels involving obstacles such as groupies and photographers.²⁷ One year later, the first video game to utilize laser-disc technology debuted.²⁸ That game, *Dragon's Lair*, by Cinematronics, was one of the first to

History_of_computer_and_video_games (last visited Mar. 20, 2006) [hereinafter History of Computer and Video Games].

19. *Id.*

20. *Id.* In 1977, Atari released its Video Computer System (the "VCS") with nine game cartridges. *Id.* The 8-bit system featured two audio channels for noise and sound. Tekla Perry & Paul Wallich, *Design Case History: The Atari Video Computer System*, IEEE SPECTRUM, Mar. 1983, available at http://www.atarimuseum.com/videogames/consoles/2600/Atari_case_history.html. It sold over twenty-five million VCSs and grossed more than five billion dollars by 1978. MB ENTERTAINMENT CONTRACTS, *supra* note 13, § 110.03[1].

21. *See generally* History of Computer and Video Games, *supra* note 18.

22. Glenn McDonald, A History of Video Game Music, <http://www.gamespot.com/features/6092391/p-3.html> (last visited Mar. 20, 2006) [Hereinafter McDonald 1980-1985].

23. *Id.*

24. *Id.* (The POKEY chip "has four separate channels, and the pitch, volume, and distortion values of each can be controlled individually.")

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

use stereo sound and actual human voices.²⁹ Another release, the popular *Spyhunter*, became one of the forerunners of stereo sound games.³⁰

Nintendo entered the market in 1985 with the 8-bit Nintendo Entertainment System and its revolutionary *Super Mario Brothers* game.³¹ The music and sound design of *Super Mario Brothers* vastly changed the industry by “constantly shifting tone to match the action onscreen.”³² At this time, both Sega and Atari also released 8-bit systems,³³ but Nintendo quickly dominated the market and outsold all other rival consoles by ten to one.³⁴

C. The Shift to 16-Bit Processors

The year 1989 saw the leap from 8-bit to 16-bit consoles with NEC's TurboGrafx-16 and Sega's Genesis 16, both of which featured six-channel stereo sound.³⁵ The 16-bit processing chip offered by Sega could process two times as much data per cycle as the earlier 8-bit processors.³⁶ Additionally, it included an 8-bit processor solely for sound.³⁷ Combined, this resulted in a clearer, fuller sound; larger, more detailed games; better developed characters; complex graphics; and faster action.³⁸ Finally, home video game systems could compete with the performance features of the much larger coin-operated arcade games.³⁹ With this increase in technology, Sega was able to surpass the Nintendo system in sales by 1991, and became the industry leader throughout the early nineties, led by its character, Sonic.⁴⁰

In 1989, Sega and Michael Jackson collaborated resulting in the creation of *Michael Jackson's Moonwalker* for the Sega Genesis, and featuring synthesized versions of “Billie Jean,” “Beat It,” and several other of the pop star's songs.⁴¹ Around this same time, Nintendo released its version of a 16-bit system, Super Famicom, with

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. Glenn McDonald, A History of Video Game Music, <http://www.gamespot.com/features/6092391/p-4.html>. (last visited Mar. 20, 2006) [hereinafter McDonald 1986-1990].

34. MB ENTERTAINMENT CONTRACTS, *supra* note 13, § 110.03[3].

35. McDonald 1986-1990, *supra* note 33.

36. KENT, *supra* note 1, at 401.

37. *Id.*

38. *Id.*

39. *Id.*

40. MB ENTERTAINMENT CONTRACTS, *supra* note 13, § 110.03[3].

41. McDonald 1986-1990, *supra* note 33.

improved audio quality incorporating eight separate music channels.⁴² In fact, Nintendo's release of *ActRaiser* for Super Famicom in Japan was "one of the first [games] to "effectively incorporate a sweeping symphonic score."⁴³

Concurrently, sound cards had emerged as a major feature in personal computers, greatly enhancing audio capabilities.⁴⁴ In 1989, Creative Labs created the Sound Blaster sound card featuring an eleven voice FM synthesizer, which quickly "became the top-selling add-on in the [personal computer] market."⁴⁵ However, due to their high costs, sound cards did not achieve mainstream use until the early nineties.⁴⁶

As technology continued to improve, game cartridges were slowly phased out, and the optical disk came to the forefront.⁴⁷ The CD-based format allowed developers to store more information, vastly improving the video and audio experience. The additional memory allowed game developers to include movie and music clips in the games, and the new CD-ROM technology could be manufactured quicker and cheaper than the cartridges used previously.⁴⁸ In 1993, one year after Sega's release of its Sega CD System, Sega released its Sonic CD as one of the industry's first CD-quality game soundtracks.⁴⁹

D. The Introduction of 32 and 64-bit Game Systems

From 1993 through 2000, the video game industry jumped from 16-bit to 32-bit, and eventually to 64-bit systems.⁵⁰ As 64-bit systems emerged, the mere classification of "bit" numbers became less important due to the fact that performance now depended on increasingly important factors such as processor clock speed, bandwidth and memory size.⁵¹ However, there were benefits to be

42. *Id.* Famicom, an abbreviation for Family Computer, was first released in Japan and then in the United States two years later as the Nintendo Entertainment System. KENT, *supra* note 1, at 278-88.

43. Glenn McDonald, A History of Video Game Music, <http://www.gamespot.com/features/6092391/p-5.html> (last visited Mar. 20, 2006) [hereinafter McDonald 1991-1995].

44. *See* KENT, *supra* note 1, at 455.

45. *Id.*

46. History of Computer and Video Games, *supra* note 18.

47. *See generally* KENT, *supra* note 1, at 511.

48. *Id.*

49. McDonald 1991-1995, *supra* note 43. The music credits featured various composers, arrangers, mixers and musicians. *Id.*

50. *See* Wikipedia, History of Video Games (32-bit / 64-bit era), [http://en.wikipedia.org/wiki/History_of_video_games_\(32-bit/_64-bit_era\)](http://en.wikipedia.org/wiki/History_of_video_games_(32-bit/_64-bit_era)) (last visited Mar. 20, 2006) [hereinafter 32-bit / 64-bit Era].

51. *Id.*

gained from the 64-bit upgrade. Enhanced speed and memory allowed games to render more realistic collisions, lifelike simulations of graphics and real-time multi-channel audio features.⁵²

This era proved to be dominated by the Nintendo 64 and the Sony PlayStation.⁵³ Sony entered the market in 1995 at the 32-bit level with its PlayStation able to provide “CD-quality stereo sound,” including “built-in support for digital effects such as reverb and looping.”⁵⁴ One year later, Nintendo released its 64-bit console, which sold over 1.5 million units in its first several months.⁵⁵ Inevitably, though, Nintendo’s choice to continue using game cartridges, rather than CD-ROMs, would allow Sony’s PlayStation to outsell the Nintendo 64.⁵⁶

As the video game sound quality increased, so did the input and interaction from the music industry. In 1996, Trent Reznor of music group Nine Inch Nails created the soundtrack for Id Software’s *Quake*.⁵⁷ That same year, Sony’s *Wipeout XL* featured music from “The Chemical Brothers, The Prodigy, and Future Sound of London.”⁵⁸ The latter game was one of the first to allow players the choice of an individual track to listen to as they raced.⁵⁹

In 1998, Nintendo took a step further in its blending of game elements and music. *The Legend of Zelda: Ocarina of Time*, created for the Nintendo 64 platform, was “one of the first titles to feature music-making as an element of its gameplay.”⁶⁰ During the game, players “use the ocarina, a type of flute, to teleport, open portals or summon allies.”⁶¹ In addition, the game featured a musical puzzle in which players followed the bass lines of a song to complete a certain level of play.⁶²

The late nineties also saw the debut of online gaming capabilities incorporated into the gaming systems. In March 1999, Sony launched its subscription based *EverQuest*, a massive

52. Kosak, *supra* note 10.

53. 32-bit / 64-bit Era, *supra* note 50.

54. McDonald 1991-1995, *supra* note 43. Sony’s PlayStation went on to record sales totaling 20 million by the summer of 1997. MB ENTERTAINMENT CONTRACTS, *supra* note 13, § 110.03[3].

55. History of Computer and Video Games, *supra* note 18.

56. *See id.*

57. Glenn McDonald, A History of Video Game Music, <http://www.gamespot.com/features/6092391/p-6.html> (last visited Mar. 20, 2006) [hereinafter McDonald 1996-2000].

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

multiplayer online game (“MMOG”) for personal computers.⁶³ Under this gaming format, thousands or even hundreds of thousands of gamers can simultaneously interact in a virtual world that continues even when a gamer retires for the day.⁶⁴ Shortly thereafter, console platforms such as Microsoft’s Xbox, began offering online options for players to compete in console games.⁶⁵ Several years later, a third online option debuted which allowed gamers to purchase and download a game from the Internet to their personal computer.⁶⁶ Currently, these downloads are starting to merge into a subscription service, known as “games-on-demand,” which allows members to play an unlimited number of games for a set monthly fee.⁶⁷

E. The 128-Bit Era

The present 128-bit era, also known as the Handheld or Nostalgia era, is dominated by three main consoles: the Nintendo GameCube, Sony’s PlayStation 2 and Microsoft’s Xbox.⁶⁸ These advanced consoles feature processors similar to those found in many personal computers.⁶⁹ More importantly, their capacity to play digital CD-based music, as opposed to chip-based music, provides an optimal platform for composers and music performance in general. CD-based music virtually eliminates issues regarding sound quality and allows composers a practically limitless medium for music development and creation.⁷⁰

Beginning in 1999, Sony made the PlayStation 2 console more music friendly by incorporating a drive that allowed users to play games, DVDs or audio CDs through one system.⁷¹ Music licensing

63. John Gaudiosi, *Sony on ‘Quest’ to Boost MMO’s*, THE HOLLYWOOD REPORTER.COM, Nov. 11, 2004, available at <http://biz.gamedaily.com/industry/feature/?id=8313>.

64. Paul Hyman, *MMO Makers Hope Persistence Pays Off*, THE HOLLYWOOD REPORTER.COM, Apr. 1, 2005, available at <http://biz.gamedaily.com/industry/feature/?id=9299>.

65. Glenn McDonald, *A History of Video Game Music*, <http://www.gamespot.com/features/6092391/p-7.html> (last visited Mar. 20, 2006) [hereinafter McDonald 2001-Today].

66. See Yoav Tzruya, *Capitalizing on Games-on-Demand* (Mar. 29, 2005), <http://biz.gamedaily.com/industry/feature/?id=9262>.

67. *Id.*

68. Wikipedia, *History of Video Games (Sixth Generation Era)*, http://en.wikipedia.org/wiki/History_of_video_games_%28Sixth_generation_era%29 (last visited Mar. 20, 2006) [hereinafter Sixth Generation Era].

69. *See id.*

70. *See generally* Greg Kasavin, *It’s All Noise: Composing Music Good Enough for Games* (Mar. 1, 2005), http://www.mp3.com/games/feature_itsallnoise.html.

71. *See* MB ENTERTAINMENT CONTRACTS, *supra* note 13.

also became a major factor in Sony's *Thrasher: Skate and Destroy*, and *Tony Hawk's Pro Skater*, in which the soundtracks featured classic hip-hop and punk titles, respectively.⁷²

One year later, orchestras made their first appearance in the video game industry.⁷³ In 2000, the Budapest Symphony Orchestra was commissioned to create the backdrop for Io Interactive.⁷⁴ In the fall of 2001, Microsoft introduced the Xbox console marketed as having "movielike" sound.⁷⁵ While Microsoft's popularity has increased in the industry, the sales have yet to top those of Sony or Nintendo.⁷⁶

In 2003, Playstation's *Tony Hawk Underground* took song licensing to a new level. The soundtrack featured over seventy songs in various genres with major artists such as Kiss, The Clash and Sublime.⁷⁷ The game also includes a format that allows players to disable and prevent the playing of entire genres or individual audio tracks during gameplay.⁷⁸

Currently, this era of platforms provides the most advanced technological features for the complete enhancement of sound. Rather than worrying if audiences will turn away due to poor sound quality, game developers are now creating soundtracks that can provide enjoyment apart from the game. The improved audio quality combined with a movie-like video component is now helping game developers produce some of the most complete audio-visual experiences ever.

F. Current Industry Statistics and Projections

As the technology and sound quality improved, so did the revenues from individual video game sales. A 2004 report stated that the United States video game market alone totaled \$7.6 billion in 2003, and was expected to grow to \$15.3 billion by 2008.⁷⁹ Worldwide,

72. McDonald 1996-2000, *supra* note 57. Also noteworthy, but only released in the UK and Japan, *Vib Ribbon* for Play Station allowed gamers to insert their own audio CDs into the console "to generate entirely new levels based on the tempo of the music." *Id.*

73. *Id.*

74. *Id.*

75. McDonald 2001-Today, *supra* note 65.

76. MB ENTERTAINMENT CONTRACTS, *supra* note 13, § 110.03[3]. In 2002, Sony recorded fifty million units sold, Nintendo had eleven million and Microsoft reported eight million. *Id.*

77. McDonald 2001-Today, *supra* note 65.

78. *Id.*

79. Ulmer, *supra* note 2. The video game market referred to in the "report reflects consumer spending on console games, personal computer games, online games and wireless games, but does not include spending on the hardware and accessories used in playing the games." *Id.*

the video game market is projected to reach total sales of nearly \$55.6 billion by the end of 2008.⁸⁰ Additionally, despite the growth of the online gaming market, console game sales are expected to increase from \$5.8 billion in 2003 to \$8 billion in 2008.⁸¹

Massive sales figures such as these do not go unnoticed. As video game popularity increases, so do the interests of many artists and music industry executives eager to tap into this flourishing market. Part of the popularity is attributable to the fact that many of today's musicians and executives are gamers themselves, attracting professionals that help to create a video game experience more tailored to the intended audience.⁸²

In addition, the sheer numbers of gamers worldwide make the game setting a prime opportunity to "break" new bands and gain exposure for older groups making a comeback. Recent studies have shown that, "60% of all North Americans and 40% of all Europeans play video games," with women making up one-third of these gamers.⁸³ In 2004, Americans spent more time playing video games "—about 75 hours on average—than watching rented videos and DVDs."⁸⁴ While the average gamer is twenty-nine years old, adult males, eighteen years and older, still make up the largest group of gamers at thirty-eight percent.⁸⁵

The exposure to a specific song or soundtrack of a game can be tremendous. Industry statistics report that "an average of 2.5 people play each sports game sold," with each player averaging close to fifty hours.⁸⁶ Reports further indicate that a specific song is "identified on screen at least twice each hour."⁸⁷ Factor in the potential for being included in a hit game that sells several million units, and it does not become difficult to see why this is such a desirable market for composers and recording artists.⁸⁸

80. *Id.* The report further expected the majority of the growth to come from the Asia/Pacific region, which is projected to expand from \$8.4 billion in 2003 to \$23.8 billion in 2008. *Id.*

81. *Id.* In spite of slow dial-up speeds, online game players are predicted to number close to twenty-five million by 2008. *Id.*

82. Telephone Interview with Billy Martin, *supra* note 8.

83. *Games: They're Playing Our Songs*, ASCAP PLAYBACK MAGAZINE, Summer 2004, available at <http://www.ascap.com/playback/2004/summer/games.html>.

84. *Id.*

85. Ulmer, *supra* note 2.

86. *See Games: They're Playing Our Songs*, *supra* note 83.

87. *Id.* (exposing a particular song nearly 100 times to the average player of a sports game throughout the life of the game).

88. *See id.* Also noteworthy, a recent survey of gamers ages 13-32 reported that "40% learned about a new artist after hearing a song in a video game." *Id.* Furthermore, one-third of those surveyed, then bought that artist's album. *Id.*

II. SECURING MUSIC FOR USE IN VIDEO GAMES

A. *Relevant Parties to the Transaction*

An essential element in understanding any industry is knowledge of the competing parties and how they interact with one another. With regard to the music issues in the video game industry, there are various parties involved in the creation, acquisition, administration, ownership and control of the copyrighted material.

On one side are the content owners, the same parties involved in the film and television industries.⁸⁹ There are artists who may or may not write their own music, and composers who may or may not perform their own compositions.⁹⁰ Additionally, there are record companies and publishing companies who own all or portions of the sound recordings and underlying musical compositions, respectively.⁹¹ When music is acquired for use in a game each of these parties may be involved in the acquisition process depending on the desired use.⁹²

Working in conjunction with the content owners are the parties that need to obtain the proper authorization to utilize the music in a specified manner in their games.⁹³ These parties include the game developer and game publisher. The game developer is the company that focuses on the creation of the intellectual property.⁹⁴ In a sense it acts similarly to an artist or composer by physically making the visual components of the game and designing the computer code to interact in the intended manner.⁹⁵ The game publisher's role, akin to that of a record label or music publisher, is to acquire the intellectual property and market it effectively.⁹⁶ Many creative people are associated with the game developers and publishers and work closely with the

89. See generally RIAA, Frequently Asked Questions – Webcasting, http://www.riaa.com/issues/licensing/webcasting_faq.asp (last visited Mar. 20, 2006) [hereinafter RIAA, FAQ].

90. See generally Bob Kohn, *A Primer on the Law of Webcasting and Digital Music Delivery*, ENT. L. REP., Sept. 1998, 4.

91. *Id.*

92. *Id.*

93. See generally JEFFREY BRABEC AND TODD BRABEC, *MUSIC MONEY AND SUCCESS: THE INSIDER'S GUIDE TO MAKING MONEY IN THE MUSIC INDUSTRY* 422 (4th ed. 2004) (1994).

94. Telephone Interview with James Charne, Esq., in Los Angeles, Cal. (Mar. 18, 2004).

95. *Id.*

96. *Id.*

composer to create a certain feel for the game.⁹⁷ Various interactive software companies, especially the larger ones such as Electronic Arts, (“EA”), one of the world’s largest interactive software publishers, have in-house music departments that focus primarily on the identification and acquisition of music for their games.⁹⁸

B. Licensing Procedures and Commissioning the Creation of Original Music for Video Games

Before the popularization of music in the video game industry, most of the entertainment software music was provided by employees of the publisher or by amateur composers through simple consulting agreements.⁹⁹ As the technological quality and consumer expectation increased, so did the formalization of music contracts.¹⁰⁰

Setting the proper mood for a video game is an essential element to any successful game.¹⁰¹ In doing so, game developers have an abundance of music to choose from and various ways of acquiring it.¹⁰² Currently, securing music for video games is similar to securing music for film and television. Pre-existing music may be licensed for use in the game or new music may be created by composers specifically for a particular project.¹⁰³ The type of game being developed will dictate which type of music will be used. Licensed music, for example, is generally used in sports, racing and fighting games, while original music composed specifically for a particular game is used on adventure, mystery and fantasy games.¹⁰⁴

1. Licensing Pre-Existing Music for Video Games

a. Choice of Music

Similar to acquiring music for use in film and television, music for video games may be licensed from record companies or other

97. *Id.* See also generally William Vitka, *The Music Behind the Video Games*, CBSNEWS.COM, Dec. 8, 2004, <http://www.cbsnews.com/stories/2004/12/21/tech/gamecore/main662411.shtml>.

98. See generally *Games: They’re Playing Our Songs*, *supra* note 83.

99. See generally MB ENTERTAINMENT CONTRACTS, *supra* note 13, at § 110.04.

100. See generally *id.*

101. See generally *Games: They’re Playing Our Songs*, *supra* note 83.

102. See *id.*

103. See generally BRABEC & BRABEC, *supra* note 93, at ch. 1.

104. Telephone Interview with Billy Martin, *supra* note 8.

entities that control the desired sound recording.¹⁰⁵ Subsequently, any monies received by the licensor or record company are then shared with the owner of the copyright in the underlying musical composition, mainly the music publisher, songwriter or composer.¹⁰⁶ As part of the selection process, game developers may elect to incorporate music from established artists.¹⁰⁷ This allows the game developer to feature songs that have already become popular and widely accepted by the public.¹⁰⁸ Songs from established artists may come with a higher price tag, but this is validated by the proven track record associated with the selection.

Alternatively, a game developer may choose to utilize the novelty and uniqueness connected with the exploitation of new, emerging artists.¹⁰⁹ This trend is prominent at EA where currently more than ninety-five percent of the music in its games comes from new artists.¹¹⁰ Despite the low price for attaining the music, going after new artists allows publishers to strive to obtain cutting edge music and create new trends.¹¹¹ For obvious reasons, the right combination of game and music could be instrumental in “breaking” a new artist and jumpstarting a successful career. Consequently, in these situations everyone seems to benefit. The game developer keeps the cost of music down, and on the music side, everyone from the artists to the composers, publishers and record companies receives income from a new revenue stream.¹¹² Additionally, there are companies that function as music libraries and offer royalty-free music licensing for use in various contexts, including games, commercials and films.¹¹³

105. BRABEC & BRABEC, *supra* note 93, at 31.

106. *Id.*

107. *See generally Games: They're Playing Our Songs, supra* note 83.

108. *Id.*

109. *See* Freifeld, *supra* note 3. In fact, Chuck Doud, music director for Sony Computer Entertainment America, Inc., comments that “[w]e love to find emerging artists so we look like we are in the know.” *Id.*

110. *See Games: They're Playing Our Songs, supra* note 83.

111. *See id.*

112. *Id.*

113. For example, Soundrangers.com offers a variety of licenses for music and sound effects. *See* Soundrangers.com, Licensing Information, <http://www.soundrangers.com/html/licensing.html#music> (last visited Mar. 26, 2006). Other similar companies are: Magnatune, *see, e.g.*, Magnatune, <http://www.magnatune.com> (last visited Mar. 21, 2006), DynamicTracks.com, *see, e.g.*, DynamicTracks.com, <http://www.dynamictracks.com/Home/home.html> (last visited Mar. 21, 2006), StudioKraft Creative Services, StudioKraft Creative Services, <http://www.studiokraft.com/> (last visited Mar. 21, 2006), and Primary Elements, Primary Elements, <http://www.primaryelements.com/> (last visited Mar. 21, 2006).

b. *Contractual Concerns Regarding the License*

When licensing pre-existing music for a video game there are two sets of licenses that need to be acquired for each musical piece. Under the United States Copyright Act, a copyright exists in the underlying musical composition, and another exists in the sound recording embodying such musical composition.¹¹⁴ Generally, the copyright in the musical composition is owned by the songwriter(s) and/or publisher(s), while the copyright in the sound recording is owned by the record company which paid to have the musical recording made.¹¹⁵

In order for the video game publisher to use the sound recording, the game publisher must obtain a “master recording license” or “master use license” from the record company who owns the copyright in the desired recording.¹¹⁶ This license authorizes the video game publisher to use the pre-existing sound recording of the musical composition in the game.¹¹⁷ The costs of such licenses vary greatly depending on the popularity of the musical recording and artist as well as the type of game being developed.¹¹⁸

The second license to be obtained is the synchronization license, or “synch” license, which is for the use of the musical composition in timed synchronization with visual images.¹¹⁹ Fees for this license are negotiated directly between the copyright owner, usually the music publisher, and the game developer or publisher.¹²⁰ This license also includes a grant of the right to reproduce and publicly distribute the musical composition, rights that are typically otherwise granted in a mechanical license.¹²¹

114. See 17 U.S.C. § 102(a) (2000).

115. Kohn, *supra* note 90, at 5-6.

116. BRABEC & BRABEC, *supra* note 93, at 422.

117. DONALD S. PASSMAN, ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS 158-59 (5th ed. 2003) (1991).

118. See BRABEC & BRABEC, *supra* note 93, at 422.

119. PASSMAN, *supra* note 117, at 225; see also AL KOHN AND BOB KOHN, KOHN ON MUSIC LICENSING 767 (3d ed. 2002). Also known as the master use sound recording synchronization license, this simply permits the making of a recording of music in synchronization with an audio-visual work and the making of copies of that recording. *Id.*

120. See, e.g., Passman, *supra* note 117, at 225 (discussing hypothetical synchronization license terms).

121. BRABEC & BRABEC, *supra* note 93, at 20. Pursuant to § 115 of the Copyright Act, once a composition has been released to the general public, any other recording artist may record and release the very same composition, subject to mechanical royalties payable to the composer and music publisher. *Id.* Currently, the statutory rate for a mechanical license is \$.091 per composition. PASSMAN, *supra* note 117, at 199. In fact, under the compulsory licensing provision of § 115, the copyright owner of a composition must license

While royalty arrangement scenarios do exist for the fees involved in each of the licenses described above, it is far more common for the game developer to pay a one-time lump sum to the copyright owner for the use of the chosen pre-existing music, regardless of the number of units sold.¹²² This fee varies based on the type of composition, genre, duration and amount of use, stature of the composer or music publisher and the type of budget and game being produced by the developer.¹²³ With these factors in mind, license fees generally range from \$2,500 to more than \$20,000 per composition.¹²⁴ Additional factors also include the value of the composition, the prior history or anticipated sales of the game, bargaining power of the parties, and the needs of the video game producer, music publisher and composer.¹²⁵

When purchasing music from the music libraries described above, the transaction takes the form of a royalty-free license.¹²⁶ While viewing the music library website, licensing customers are invited to preview the assortment of music and sound for their desired use.¹²⁷ Prices are based on type of track, length of track and whether there is an automatic looping feature, which programs the track to play continuously.¹²⁸ An extra fee is required if the track will be used beyond a specified number of copies sold.¹²⁹ Next the customer chooses from various types of licenses depending on the intended use, ranging from a general license for use as simple background music on a web site, to music featured in a full length film.¹³⁰ Once the proper license is obtained, the licensee is authorized to use the track as many times as desired, for an unlimited duration, and in as many productions, or in this case games, as they wish.¹³¹

the composition to anyone that chooses to use it in a phonorecord after the original release by the copyright owner. *Id.* at 197-98.

122. BRABEC & BRABEC, *supra* note 93, at 421.

123. *Id.*

124. *Id.*

125. *Id.* at 421-22.

126. See SoundRangers, Licensing Information, <http://www.soundrangers.com/html/licensing.html> (last visited Mar. 20, 2006).

127. See *id.*

128. *Id.*

129. *Id.* For example, this type of license with Soundrangers.com covers 500 units. *Id.*

130. *Id.* If the intended usage is for a broadcast media – radio, film, television or cable – then the user is also required to produce cue sheets and report all uses to one of the performing rights organization (ASCAP, BMI, PRS, SOCAN or SESAC). *Id.*

131. *Id.* Keep in mind that some licensors require licensees to pay another fee for uses above a stated number of units. *Id.*

2. Commissioning New Musical Works on a Work-Made-For-Hire Basis

a. Compensation for the Composer

Instead of licensing music for a game, a developer may choose to contract with a composer to create the musical backdrop for a game. In these instances, the composer is generally paid a fixed fee for his services without any additional royalties.¹³² As with film and television composers, this fee will be based on the game's budget, and the skill, quality, quantity and type of work desired from the composer.¹³³

The overall budgets for interactive games can range from \$3,600 to \$360,000.¹³⁴ The compensation paid to a composer for a fairly popular game title is roughly \$1,000 to \$1,500 per minute of music, for anywhere between thirty and seventy minutes.¹³⁵ Generally, when a composer is hired to create an entire game soundtrack they produce close to fifty minutes of music.¹³⁶ In the last several years there has also been an increasing trend among composers to utilize sixty to one hundred piece live orchestras to record their video game compositions.¹³⁷ In these instances, the additional costs of live recording and orchestration are borne by the game developers and completely separate from the compensation paid to the composer.¹³⁸

In rare instances, a composer will be offered a per-unit royalty to create, write and compile a musical composition to be used in conjunction with an electronic video game.¹³⁹ The royalties offered generally have four standard parts: (1) a certain number of cents for every game sold or distributed by the game developer; (2) a specified percentage of the gross licensing income received by the game developer for licensing others to use the game that incorporates the

132. MB ENTERTAINMENT CONTRACTS, *supra* note 13, at § 115-2. Similar to film and television, fifty percent of the fee is paid upon execution of the contract with the balance being paid within thirty days of completion of the project. *Id.*

133. *See generally id.*

134. Gamedaily.com, Music's Increasingly Important Role in Games (Oct. 4, 2004), <http://biz.gamedaily.com/industry/feature/?id=8033>.

135. Telephone Interview with Billy Martin, *supra* note 8.

136. *Id.*

137. GIGnews.com, Ssssound: Music for Games (Apr. 2002), <http://www.gignews.com/musicandgames2.htm>.

138. Telephone Interview with Billy Martin, *supra* note 8.

139. MB ENTERTAINMENT CONTRACTS, *supra* note 13, at § 115-2; *see* BATTERSBY & GRIMES, *supra* note 7, for an example of a contract.

composition; (3) a specified percentage of the net sales income received by the game developer or its licensees from the sale of printed copies of composition arrangements, except that in the event that the work is included as part of a folio or album, the net selling price shall be apportioned based on the total number of compositions contained in such folio or album; and (4) a specified percentage of the net sums actually received by the game developer from a grant to others of any rights in the composition other than as provided for above, including a grant of mechanical rights, phonorecords, electrical transcription and reproduction rights, motion picture synchronization, and television rights.¹⁴⁰

In one popular payment method, the composer is paid a fixed amount of compensation in addition to a royalty on unit sales that incorporate the composition.¹⁴¹ As described above, the composer is paid a fixed amount determined by the composer's stature and skills.¹⁴² Royalties are then paid on unit sales that exceed a mutually determined figure, or a figure the game publisher has targeted as the amount that it expects to sell without the use of the composer.¹⁴³ For example, if a game publisher predicts a game will sell 150,000 units as is, plus an additional 50,000 units with the addition of a score composed by a rap or rock star, then the publisher will pay royalties on units above 150,000.¹⁴⁴ It is common for this royalty to range from two to five percent of net receipts depending on whether an entire group is used versus a well-established solo artist.¹⁴⁵

A slight deviation from this scheme is to pay the composer one lump sum initially, and then bonuses in lieu of royalties at specified sales levels.¹⁴⁶ If a game publisher must sell 250,000 units to recoup all development costs, then the composer may receive a bonus when sales reach 500,000 units and yet another at 750,000 units sold. In other situations, a composer may negotiate for an additional lump sum payment if the game publisher desires to offer the game on a different platform.¹⁴⁷ In this context, if a game originally made for the

140. BATTERSBY & GRIMES, *supra* note 7. Generally, the composer receives \$0.08 – \$0.15 for every game sold or distributed by the game publisher. BRABEC, *supra* note 93, at 421.

141. MB ENTERTAINMENT CONTRACTS, *supra* note 13, at § 115-2.

142. *See id.*

143. *Id.*

144. *Id.* Thus, the units above 150,000 are treated as attributable to the star. *See id.*

145. *Id.*

146. Telephone Interview with Jack Wall, President, Mystical Stone Entertainment, LLC, in Los Angeles, Cal. (Apr. 7, 2005).

147. *Id.*

personal computer is then offered on Xbox, for example, then the composer would receive a payment for this conversion.

b. Additional Pertinent Contractual Provisions in the Video Game Context

When an original musical work is desired by the game developer, the services to be provided by the composer become crucial. The composer's duties may range from the creation of a short piece for a portion of a game to providing the entire musical score for a game.¹⁴⁸ The composer may also be required to assemble musicians as well as technical personnel to deliver the music in the designated format.¹⁴⁹

One of the most important provisions in the composer contract is that regarding the ownership of the compositions.¹⁵⁰ The majority of composer agreements provide that all work performed by the composer under the agreement is treated as a "work-made-for-hire" under the United States Copyright Act,¹⁵¹ and therefore all underlying copyrights and shall be owned by the entity commissioning the composer's services.¹⁵² Under such a scenario, the game developer will be deemed the "author" of the music under United States copyright law, therefore entitling the developer to any public performance

148. See generally MB ENTERTAINMENT CONTRACTS, *supra* note 13, at § 115-2. The composer may be required "[t]o provide music for all major themes, all major cartoon sequences, and such musical pieces as may be required incidental thereto, totaling approximately (45 minutes) in length in the aggregate [but not more than 60 minutes in total duration] consisting of approximately (50) musical pieces . . ." *Id.*

149. See generally *id.* Generally, the MIDI (Musical Instrument Digital Interface) format is used for music files.

[A]dopted by substantially all manufacturers of electronic instruments such as keyboard synthesizers and drum machines and used by substantially all music composition software, sets a uniform standard for data representing musical "events" such as turning notes on and off or changing the volume of a note. The MIDI file, usually on an IBM compatible or Macintosh disk: (i) can be used by the [p]ublisher or its software developer on a computer running sequencer software to cause a synthesizer to play the composition which can then be recorded into the interactive optical disk; (ii) the [p]ublisher or developer can use software "tools" to convert the MIDI data to formats compatible with built-in sound generating chips in video game consoles or in 'add-on' audio boards such as Creative Laboratories' "Sound Blaster TM"; or (iii) the [p]ublisher can directly incorporate the MIDI data into its programs such as music instruction software where customers are likely to have music synthesizers.

Id.

150. See generally *id.* This is not an issue when works are licensed due to the fact they are pre-existing and thus already have established owners of the sound recording and musical composition incorporated therein. *Id.*

151. See also MB ENTERTAINMENT CONTRACTS, *supra* note 13, at § 115-2.

152. See 17 U.S.C. §201(b) (2000).

royalties that may come due.¹⁵³ Such performance royalties will arise anytime the music is played over the radio, television or Internet.¹⁵⁴

In these “work-made-for-hire” contexts, the issue then becomes whether the composer has negotiated for any rights to ancillary uses of the work, such as public performance rights. Other ancillary uses include ringtones, wireless games for cellular phones, television advertising, or other licensing arrangements concerning various uses of the music.¹⁵⁵

The larger game developers, such as EA and Sony, utilize a model similar to that used in television and motion pictures.¹⁵⁶ In this model, the performance royalties and some additional ancillary monies are split evenly between the composer and the game publisher or developer.¹⁵⁷ Unfortunately, this practice is not as commonplace with smaller, less experienced gaming companies.¹⁵⁸ Oftentimes the smaller gaming companies’ composer agreements will provide that the composer has no right to receive performance royalties for their music because the work is being created on a work-made-for-hire basis.¹⁵⁹ For obvious reasons, this scenario greatly limits the amount of income a composer may potentially earn for his or her work. However, as the industry grows and business practices standardize, many predict that the film and television model will prevail.¹⁶⁰

An additional important provision in contracts to license and commission video game music deals with the type and description of the configuration or gaming platform on which the music is to be used. Some contracts may narrowly confine this provision by specifying use only on DVD, CD-ROM, console arcades, handheld devices, magnetic diskettes or optical disks.¹⁶¹ While this limiting language would be favorable to the recording artist and composer, other contracts may broadly provide for use in all software programs or other electronic products in any format or platform that is designed for use with computers.¹⁶² Furthermore, with the introduction of online gaming,

153. See *id.* § 106.

154. See *id.* §§ 101, 106. But see *id.* § 110.

155. Telephone Interview with Billy Martin, *supra* note 8.

156. *Id.*

157. Telephone Interview with Jack Wall, *supra* note 146.

158. *Id.*

159. It appears that public performance royalties were not provided for in early composer agreements due to the fact that there is no public performance involved when a video game is played in one’s own home. Cf. 17 U.S.C. § 101 (defining public performance without including performances in a private home).

160. Telephone Interview with Jack Wall, *supra* note 146.

161. BRABEC & BRABEC, *supra* note 93, at 421.

162. *Id.*

which involves a transmission over the Internet via phone lines, satellite and other broadband formats, a clear designation of the proper usage rights is necessary.¹⁶³

The contract will also provide for the type of use and composer credit information to be provided.¹⁶⁴ This information includes how much of the composition is used, which part, how many times and if any editing or modifications are allowed.¹⁶⁵ As with other licensing scenarios, the proper title, composer, recording artist, record label and publisher will be noted for attribution purposes.¹⁶⁶ Appropriate crediting is usually given on the inside of the video game packaging, but may be placed in the game's manual, the credit screen shown at the conclusion of the game, or, in some cases, displayed on the screen as the game is played.¹⁶⁷

The term of the license is another pertinent provision and varies depending on the context in which it arises. If a composer is hired in a work-made-for hire situation, the term refers to the duration of the services to be provided by the composer.¹⁶⁸ The term involved in such a contract may either be for a fixed period or for an unstated period of time tied to completion of the project.¹⁶⁹ As a result of the work-made-for-hire arrangement, the newly created music will be owned outright by the game developer or publisher allowing them to use it exclusively for the duration of its copyright.¹⁷⁰

By contrast, when dealing with licensed works, the term refers to the duration of the synchronization license, or amount of time the licensed music may be included in new copies of the video game.¹⁷¹ Most agreements provide for a fixed term ranging anywhere from five years to the life of the composition's copyright or for as long as the game is in distribution.¹⁷² In reality, many video game developers will agree to a shorter term, ranging from five to ten years, due to the short life span of many of the games.¹⁷³ In such circumstances, the

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.* at 422.

168. *Id.*

169. BATTERSBY & GRIMES, *supra* note 7.

170. *See id.*

171. BRABEC & BRABEC, *supra* note 93, at 422.

172. *Id.*

173. *See* KOHN & KOHN, *supra* note 119, at 782. In this regard, synchronization licenses for video games are more analogous to those found in the television industry. *See id.* The motion picture industry, on the other hand, typically grants a synchronization license for perpetuity. *Id.*

manufacturer will also usually have a stated “sell-off” period to allow for the sale of the existing inventory of games after the conclusion of the term.¹⁷⁴

Agreements for music use will also contain provisions relating to companion products and collateral materials.¹⁷⁵ For example, since many popular video game characters have transformed or “crossed over” to children’s television characters, many game publishers want to acquire broad music rights in anticipation of any such activity.¹⁷⁶ Such rights involve the authorization to release the composition in audio soundtrack CDs, DVDs of the game, ringtones, commercials or other companion products such as dolls or caricatures that sing or play a song when activated.¹⁷⁷ Logically it follows that the game publisher will also have a need to use the composition in the advertising, promotion, and marketing activities associated with the release of the game.¹⁷⁸ This includes a wide-range of in-context usages, such as in-store promotions and demonstrations, and DVD trailers.¹⁷⁹

Lastly, the territory for the majority of these types of contracts allows for distribution throughout the universe.¹⁸⁰ The contracts will also include the standard provisions for notice, applicable law, audit, representations and warranties, and indemnification as found in other licensing arrangements.¹⁸¹ Noticeably absent from this list is a provision dealing with exclusivity, which is simply not a factor.¹⁸² Similar to film and television, the products are usually sufficiently distinct so that the video game companies do not require exclusivity to the music in order to differentiate their games from others.¹⁸³

174. BRABEC & BRABEC, *supra* note 93, at 422.

175. *Id.*

176. MB ENTERTAINMENT CONTRACTS, *supra* note 13, at § 115-2. Wim Stocks, executive vice president of Atari, stated that “[a]s we’re getting involved in incorporating music, we want the broadest rights possible – integration, sound track, and download rights” Freifeld, *supra* note 3.

177. BRABEC & BRABEC, *supra* note 93, at 422. Sometimes fees are actually set in the agreement (100% or 75% reduced stat rate for a CD) and other times there is a good faith negotiation provision to be dealt with when the occasion arises. *Id.*

178. *Id.*

179. *Id.* The contract generally excludes out-of-context usages or other types of advertising campaigns such as network, cable or satellite television. *Id.*

180. *Id.*

181. *Id.*

182. KOHN & KOHN, *supra* note 119, at 1184 (“[S]oftware and new media is [sic] usually differentiated sufficiently that a licensee would not normally require exclusivity to the music in order to help differentiate his product in the software market.”).

183. *Id.*

III. CURRENT INDUSTRY TRENDS FOR INCORPORATING MUSIC INTO VIDEO GAMES

In the last five to seven years, music has transitioned from purely background filler to a major selling point in the video game industry. Concurrently, the roles and relationships of the parties in the music and video game industries have taken interesting new shapes. Licensing music for video games has quickly shifted from an additional revenue source for a recording artist, to a crucial marketing and publicity outlet for known and unknown artists alike. Perhaps this is the result of illegal downloading and piracy that has recently plagued the music industry; or the millions of sales recorded by video game companies; or it may be attributable to a lack of truly talented artists that have enough creativity to last longer than one hit song or album. Whatever the reason may be, the dynamics have shifted in such a way that video game developers and game publishers now have the luxury of choosing their songs and naming their prices when populating their games with music.¹⁸⁴

One explanation for this shift is that the video game and music industries both target the same consumers.¹⁸⁵ The very same consumers that refuse to buy CDs when they can download the song or album for free will go out and buy a video game containing the same music without hesitation.¹⁸⁶ In addition to the same consumers, the games and the music are now sold in the same retail channels, such as Best Buy, and are sometimes packaged together.¹⁸⁷

A. Marketing and Licensing Ventures between the Music and Video Game Industries

When millions of units of games are sold, marketing and promotional executives in the music industry see an exposure opportunity for their artists. For example, EA “was offered over 2,000 for the 23 slots available on” its *2004 NFL Madden* game.¹⁸⁸ These offers came quickly on the heels of *Madden 2003*, which featured the band Good Charlotte, who reportedly went from selling 300,000 albums to 3.5 million after their music was licensed for inclusion in

184. See Freifeld, *supra* note 3.

185. See *id.*

186. See generally *id.* A recent report by The NPD Group showed that in 2003 alone, “45% of video gamers also buy music.” *Id.* Surveys also found that Hip-Hop music is often the common genre between the two industries. *Id.*

187. *Id.*

188. *Id.*

the game.¹⁸⁹ The exposure Good Charlotte received on the previous version of the game sparked a trend, resulting in music executives competing fiercely for their artists' songs to be included on the new version of *Madden*.¹⁹⁰

While this may have been one of the first major crossover success stories, it was not the last. According to Steve Schnur, Worldwide Executive of Music for EA, Avril Lavigne was first heard by European audiences thanks to her inclusion on the game *FIFA Soccer 2003*.¹⁹¹ Similarly, the European band, Jet, used the exposure they received from having their music featured in EA's *Madden NFL 2004* to land their American iPod commercial.¹⁹² Even established artists such as Outkast, Radiohead, Christina Aguilera, Kings of Leon, Jermaine Dupri, Nelly and Jimmy Eat World have worked with EA in the last two years on licensing their music for various games.¹⁹³

In 2004 alone, EA licensed over 250 songs, an increase of more than 275% from 2001.¹⁹⁴ Many times there is more than a simple license involved in the transaction. More recently, the artists have begun to work closely with EA in the creation of the game.¹⁹⁵ Often this involves offering input on design, plot ideas, as well as character dialogue, fighting styles and finishing moves.¹⁹⁶ Apart from the artists, the record labels mount entire album launches around a band's inclusion into a recent game.¹⁹⁷

More specifically, EA and Sony recently collaborated on EA's *NFL Street* game released in January of 2004.¹⁹⁸ The game featured licensed tracks from Sony Music Entertainment artists such as "Korn featuring NAS, Killer Mike and Baby D," and included an all-original score by the X-ecutioners.¹⁹⁹ In what is now becoming a more common practice, a number of the tracks used in the game were released before the artists' albums.²⁰⁰ Additionally, two of the tracks were made into

189. *Id.*

190. See generally *id.*

191. *Games: They're Playing Our Songs*, *supra* note 83.

192. *Id.*

193. *Id.*

194. GameDaily.com, The Man Behind the Music (Oct. 12, 2004), <http://biz.gamedaily.com/industry/feature/?id=8090> [hereinafter The Man Behind the Music].

195. *Id.*

196. *Id.*

197. *Id.*

198. Freifeld, *supra* note 3.

199. *Id.*

200. *Id.* In such scenarios, the game publisher, record label and the recording artist devise a strategy to release new music by the artist exclusively in the game prior to the release of an album or single. See *id.* While working with the label and artist the game

music videos, featuring footage from the game, as well as released as singles for radio play.²⁰¹ The project also included various cross-promotional activities, such as Sony Music artists performing at *NFL Street* events.²⁰² MTV and MTV2 also aired a program entitled "Making of the Game: *NFL Street*," which included interviews with Sony artists.²⁰³ Lastly, some consumers at select retail outlets even received a bonus disc with a playable demo of *NFL Street* when they purchased new releases from participating Sony artists.²⁰⁴

Similar promotional activities have also been used by other game publishers in the industry. In 2003, Microsoft Game Studios and Sumthing Else Music, Inc. released a special edition of their best selling soundtrack for the Xbox video game *Halo*.²⁰⁵ This release included a Bonus DVD with trailers and videos from the *Halo 2* game, in addition to "previously unreleased Surround Sound versions of new music composed by Marty O'Donnell" who composed the original *Halo* score.²⁰⁶

When it comes to placing and securing music in their games, Atari has three basic approaches.²⁰⁷ The first deals with a game based on an underlying movie and involves a close collaboration with the record label, the writers and director of the movie and the game developer.²⁰⁸ Atari's *Enter the Matrix* game is a prime example. In this case Atari worked with Maverick Records and Larry and Andy Wachowski, the writers and directors of *The Matrix*, to combine original songs with songs from the movie soundtrack to create the music for the game.²⁰⁹

publisher gains knowledge and access to unreleased music being created by the artists. See *id.*

201. *Id.*

202. *Id.* Sony artists performed at the *NFL Street* After Party following the EA Sports Madden Bowl at this year's Super Bowl. *Id.*

203. *Id.*

204. *Id.*

205. XboxSolutions.com, Coming Soon – Xbox Game Soundtracks (Nov. 25, 2003), <http://www.xboxsolution.com/article1055.html>.

206. *Id.* Recently, a very unique distribution deal was orchestrated between SCEA and Atlantic Records regarding the packaging of a PlayStation 2 game with a CD release from the group P.O.D. Freifeld, *supra* note 3. For a price of \$20, consumers could purchase the CD/video game package. *Id.* Moreover, the first one million copies of P.O.D.'s new album contained an exclusive bonus Playstation 2 DVD with a custom video game track and a newly recorded non-album P.O.D. track. *Id.* This disc, playable only on the Playstation 2, also featured a 50-minute behind-the-scenes documentary as well as a special feature on the artist who created the paintings and sketches for the album package. *Id.*

207. *Id.*

208. *Id.*

209. *Id.*

In the second approach, Atari works closely with a hired company, such as a music consultant or music supervisor, to specifically clear and license the selected tracks.²¹⁰ This method allows Atari and the game developer to collaborate directly in selecting the music to fit the game sequences, and then to rely on a third party to obtain the proper rights clearances.²¹¹ Often times the music placement aspect has become so promotional for the artist that there are no license fees.²¹² In fact, in one instance, Atari receives royalties from a video game soundtrack released by Sony for the artists' use of the game's name on the soundtrack.²¹³

The third approach Atari uses is 100% promotional.²¹⁴ This approach is very similar in nature to the various cross-promotional projects described previously.²¹⁵ Atari, like EA, is looking to take advantage of cross-promotional opportunities and parlay them into exclusive offerings.²¹⁶ For the future, Atari is investigating a concept which gives video game consumers the ability to customize the music in their games by allowing them to download "the songs they want for their games from the Internet in an authorized manner."²¹⁷ While now only a portion of the technology exists, such a reality is at least a year away due to complications regarding the clearance of the associated rights involved.²¹⁸

Along those same lines, EA has developed a "new in-game jukebox feature, *EA Sports Throwback Trax Powered by Rhino*."²¹⁹ This feature allows fans to customize their own soundtracks with selected music offerings from Rhino Records' catalog of late eighties and nineties tunes.²²⁰ *Throwback Trax* is the latest product from EA

210. *Id.*

211. *See id.*

212. *Id.*

213. *Id.*

214. *Id.*

215. An example is a collaboration between Universal Motown Records Group's band DropBox with Atari's new *Transformers* video game for PlayStation 2, featuring a closely timed game and album release, game footage in the band's new video, DropBox performances in Atari's radio and TV advertising, and unlockable bonus tracks of DropBox's hit single in the game. *Id.* The campaign also features a plethora of on-air and online promotion including live appearances and daily downloads. *Id.*

216. *See id.* Wim Stocks of Atari stated, "Next year, we'll have a project involving prominent artists in which songs will be available only in the game for the first 90 to 120 days, then we'll launch the singles . . ." *Id.*

217. *Id.*

218. *Id.*

219. *The Man Behind the Music*, *supra* note 194.

220. *Id.* This feature premiered in *Madden NFL 2005*, and will be part of the 2005 editions of *NBA Live*, *FIFA Soccer*, *NASCAR*, *Rugby*, *NHL* and more. *Id.*

TRAX, “a series of promotional partnerships between EA and major music labels,” that first began in the fall of 2002.²²¹ Essentially an in-game jukebox, EA TRAX provides gamers with a selection of songs from new and established artists specifically picked for each game.²²² The partnership allows record labels to introduce new acts as well as provide established artists with a new interactive platform to debut new music and develop audiences.²²³ The venture has proven successful at doing just that. In addition to receiving the first-ever “RIAA certified platinum videogame soundtrack”, it also created “the most successful videogame soundtrack of all time . . .” for *NBA Live 2003*.²²⁴

With the growth of online gaming, the crossover will be even easier and more widespread. According to Steve Schnur, in the summer of 2004 “[t]he number of CD buyers who have bought digital music [] more than tripled . . .” over the previous year.²²⁵ Of the 186.4 million games sold in 2003, more than 23 million possessed capabilities for online gaming.²²⁶ Factors such as the rapid creation of new hardware and “software, widespread broadband access and legally downloadable music,” combined with a large online gaming audience provide the framework for a tremendous industry in the future.²²⁷

B. Composing Music for Video Games in Today’s Market

Similar to the motion picture industry, the gaming industry is now starting to recognize various composers that set the standards for the competition. Whether these composers will be able to command the seven-figure payouts seen in the movie industry is questionable and yet to be determined. Arguably, since the revenue earned by each industry is comparable, one could reasonably foresee an analogous rise in video game composer payments in the future.

As the bar is raised for musical standards so is the expertise and skill of the composers in the industry. Bob Rice, a music industry veteran from Four Bars Intertainment, recently remarked that he is

221. DreamStation.cc, EA Sports Throwback Trax Powered by Rhino (June 8, 2004), http://www.dreamstation.cc/news/video_games/id4108.

222. *See id.*

223. *See id.*

224. *Id.* (“feature[ing] songs by Busta Rhymes, Snoop Dogg, Fabulous, Just Blaze and others”).

225. *Games: They’re Playing Our Songs*, *supra* note 83.

226. *Id.*

227. *Id.*

convinced there are a few video game composers that “are as good if not better than some A-list film score composers.”²²⁸ Some of the industry’s top composers are Michael Giacchino, Chance Thomas, Jeremy Soule, Inon Zur and Danny Pelfrey.²²⁹ While there is some crossing over between the film and video game industry, the transition has not become common practice.²³⁰ In fact, much of the transitioning has been film and television composers being hired to compose a main title piece for a high profile game.²³¹ However, one basic theme similar in both industries is that it is much more difficult to put music to a film or game than to write a stand alone musical composition.²³²

Despite the similarities in the industries, composing for video games and interactive software can be much different than it is for other media. In an interview with Tom Salta, a music industry veteran who has created scores and main themes for a number of video games, ’stated that there are basically two categories of video game music: cinematics and in-game music.²³³ Cinematics equates to working in a linear process where you have a ten to thirty-second movie clip and the composer makes music to accompany it.²³⁴ In-game music, on the other hand, is what really distinguishes the game composers from composers of other media.²³⁵ Music of this type has to be very dynamic and flexible so that it can react to the changes in the game as they are controlled by the players.²³⁶ In some games Salta has worked on, the music has to react with every scene, forcing him “to construct music in a way that the game can reconstruct it in any way that it sees fit”; similar to a jigsaw puzzle for which the composer simply supplies the pieces.²³⁷ Other games, Salta says, require music that reacts “to the emotions of the Artificial Intelligence in the game.”²³⁸ In this scenario, the composer is required to construct blocks of music that reflect happy, sad and various other emotions, which can be mixed around and reassembled in different ways as the game is played.²³⁹

228. Music4Games.net, Interview with Bob Rice, http://www.music4games.net/f_bobriceiv2.html (last visited Mar. 20, 2006).

229. *Id.*

230. *See generally id.*

231. Telephone Interview with Billy Martin, *supra* note 8.

232. *Id.*

233. Vitka, *supra* note 97.

234. *Id.*

235. *Id.*

236. *See id.*

237. *Id.*

238. *Id.*

239. *Id.*

To add to the complexity of the task, occasionally the composer works without a completed visual picture of the game of which the music will be a part.²⁴⁰ Generally, the game developer will at least supply the composer with a concept design or a primitive version of the game to work with.²⁴¹ Other times the composer must work from game artwork, screen shots and discussions with the creative director to create the music.²⁴² Working in this fashion is difficult, and forces a composer to rely on his or her inherent video game knowledge to create music that can easily adapt to various moods and settings.²⁴³

C. Finding Additional Revenue Sources in a Publicity-Driven Market

Placing music in video games is still a publicity mechanism for the music, not a strong source of revenue for the recording artist and composer. As the individual game budgets increase proportionately with the video game sales figures, it follows logically that the payments to the composers and licensors of the music would increase as well. However, this is generally not the case. While music continues to be integrated into games in quite unique ways, the game developers' focus is on selling another game unit, not the music played in the background.²⁴⁴

1. The Realities of Licensing Pre-Existing Music

In the case of licensing pre-existing music, it is easy to understand why music placement in games is publicity driven. As mentioned above, for popular games such as EA's *Madden NFL*, EA received over 80 times more songs than they had slots for in the game.²⁴⁵ Under a basic economics theory this makes perfect sense. With such a large supply of music and a relatively low demand, represented by the placement opportunities in games limited by the number of games actually made each year, it is quite clear that the price to be paid for the music will remain low. Consequently, the game developers and software publishers readily control the market and can offer their low prices on a take it or leave it basis. If an artist,

240. *Id.*

241. Telephone Interview with Billy Martin, *supra* note 8.

242. *Id.*

243. *See* Vitka, *supra* note 97.

244. *See* GIGnews.com, *supra* note 137 (quoting Mike Naylor, Vice President of Pinch Hit Records: "[T]he fans of the band were excited and the artist/label got a decent check for licensing the track, he believes the ability for the game to generate retail album sales for the artist is still questionable.").

245. Freifeld, *supra* note 3.

record label or publisher is not willing to license a track for a particular price, there are likely to be several hundred other lower-priced songs that will serve as a replacement.

However, in some instances the market is big enough to allow some artists and composers to command more than just exposure. In games where music serves as the focal point, such as karaoke games, the artist will have more leverage in the negotiation. In addition, there are also superstar artists, such as Outkast, that have the ability to set the price for their music.²⁴⁶ Conversely, when the focus is on the game and the music is merely background or secondary, such as *Grand Theft Auto*, the game developer retains the leverage in the bargaining.²⁴⁷ At the moment, music-driven games are in the minority, and the “story-driven” model appears more frequently.²⁴⁸ In essence, licensing music for games and licensing music for film and television are parallel revenue streams for artists, and similarly subject to the ebb and flow of their respective markets.

2. Potential Ancillary Revenue Streams for Composers Creating Original Music for Video Games

As the industry grows it will be interesting to see if it is possible to shift the paradigm from one that is publicity-based to one that is more favorable to the composer and artist as a strong revenue source. As stated above, market forces will continue to define the prices paid for licensed music and to composers as commissions. Since video games are the only media without immediate secondary revenue streams, perhaps composer and artist participation in the newly emerging ancillary markets is a possible solution. More specifically, the rise of online gaming may allow public performance monies to play a larger role as a revenue stream for composers whose compositions have been used in a game.

Under United States copyright law, the owner of a copyrighted musical work is granted the exclusive right to perform it publicly.²⁴⁹ A performance occurs when a work is transmitted, displayed or otherwise communicated to the public, “by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.”²⁵⁰ Thus, any time

246. Telephone Interview with Jack Wall, *supra* note 146.

247. *Id.*

248. *Id.*

249. 17 U.S.C. § 106(4)-(6) (2000).

250. *Id.* § 101.

someone other than the owner wishes to perform a copyrighted work publicly, a license must be obtained from the owner of the work. Licenses may be obtained in one of two ways. A direct license may be issued from the copyright owner to the desired user for a specific composition or group of compositions,²⁵¹ or a user may obtain a license from a performing rights society, such as ASCAP, BMI or SESAC in the United States.²⁵² These performing rights societies have licenses with millions of composers and authorization to use a larger amount of material. Licensees in either situation then pay a license fee to the copyright owner or performing rights society for the performance of the desired copyrighted works.²⁵³

In addition to public performance royalties payable to composers, the recording artist and record companies may also be able to receive revenues provided by online performances of games. Under the Digital Performance Right in Sound Recordings Act of 1995 ("DPRSRA"), and the 1998 Digital Millennium Copyright Act ("DMCA"), the owners of the sound recording of a song will also receive a royalty when the sound recording is performed in prescribed circumstances.²⁵⁴

The DPRSRA essentially amended the Copyright Act in two significant ways. First the DPRSRA created a digital public performance right in sound recordings where none existed before.²⁵⁵ Secondly, it broadened the compulsory mechanical licensing provision of § 115 "to include the reproduction and delivery of musical works in sound recordings by digital transmission."²⁵⁶ As a result, under the DPRSRA the owner of the sound recording is entitled to a performance royalty if certain performance criteria are met: (1) it must be a digital public performance of the work; (2) it must be an audio-only sound recording that is performed; and (3) it must be performed as part of a subscription transmission in which the listener pays for the right to hear the station or broadcast.²⁵⁷ Pursuant to this scheme, compulsory licenses are available if the performance meets additional criteria, and

251. See generally PASSMAN, *supra* note 117, at 219.

252. *Id.* at 219-20 (this is called a "blanket license").

253. See *id.*

254. See Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336 (codified as amended in scattered sections of 17 U.S.C.); Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (codified as amended in scattered sections of 17 U.S.C.).

255. Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336 (codified as amended in scattered sections of 17 U.S.C.).

256. KOHN & KOHN, *supra* note 119, at 1256.

257. PASSMAN, *supra* note 117, at 283; see 17 U.S.C. § 115.

if not, then the user must negotiate a direct license with the owner of the sound recording.²⁵⁸

The DMCA, passed in 1998, extended this limited right of public performance royalties to webcasting, or audio streaming of sound recordings over the Internet.²⁵⁹ The DMCA does create an exemption for “non-subscription transmissions” if conducted by an FCC licensed broadcaster, therefore anyone unable to meet that requirement must pay a license fee.²⁶⁰ The license rates and applicable terms are either decided by a compulsory license and fee set by the Copyright Arbitration Royalty Panel,²⁶¹ or by voluntary direct licenses between the parties.²⁶² Thus, with the implementation of the DMCA and DPRSRA the artists and record companies may now be able to share in the royalties generated from the online performances of their music if the transmissions meet the specified criteria; unless of course these public performance rights are contracted away.

Read together, the DPRSRA and the DMCA allow sound recording copyright owners and recording artists to receive a public performance royalty for non-interactive, digital transmissions of their copyrighted works.²⁶³ Since all performances over the Internet are digital performances, as well as those on satellite radio and satellite television, and subscription services are becoming more popular, this may become a viable source of income.

One potential hurdle for video game music appears to be the audio-only performance requirement. This requirement eliminates a recording artist from being paid for performances of a master in films or television shows.²⁶⁴ A literal reading of this requirement would suggest that since video games contain a performance of an audio-visual work containing music, there is no mandatory license available for the performance of the sound recording. Nonetheless, a

258. See PASSMAN, *supra* note 117, at 283-84.

259. BRABEC & BRABEC, *supra* note 93, at 366. In addition, the DMCA also added anti-circumvention prohibitions regarding technical measures used by content owners to protect against unauthorized copying, as well as creating statutory safe harbors for online service providers in specific scenarios. KOHN & KOHN, *supra* note 119, at 1256.

260. PASSMAN, *supra* note 117, at 285.

261. *Id.*

262. BRABEC & BRABEC, *supra* note 93, at 366.

263. See Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336 (codified as amended in scattered sections of 17 U.S.C.); Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (codified as amended in scattered sections of 17 U.S.C.). See generally SoundExchange, Inc., <http://www.soundexchange.com> (explaining that Sound Exchange “collect[s] and distribute[s] statutory royalties to sound recording copyright owners and featured and non-featured artists”).

264. PASSMAN, *supra* note 117, at 283.

synchronization license, described earlier, would always be necessary to obtain the rights to use the music in the audio-visual work. Arguably if the music is streamed separately from the visual component of the game, in a virtual subscription radio service, then the performance would entitle the copyright owner of the sound recording to a compulsory license fee.

In terms of the non-interactive service requirement, video games do not qualify as interactive music services, and thus a royalty is payable.²⁶⁵ Contrary to regular broadcast services known as non-interactive transmissions, interactive transmissions allow a recipient to select a specific musical work for transmission.²⁶⁶ Digital jukeboxes, for example, qualify as interactive services, thus requiring the operator to obtain performance and reproduction licenses directly from the copyright owners.²⁶⁷ On the other hand, a subscription-based Internet radio station does qualify for the compulsory license, thus requiring payment to the copyright owner of the sound recording at issue.²⁶⁸

As previously mentioned, online gaming capabilities first emerged in the late nineties and have steadily become more popular. In 2004, over ninety million American homes regularly used the Internet, with thirty million connected via broadband.²⁶⁹ While marginal growth is expected in the United States, China, with eighty million Internet users, is expected to be the largest online gaming market by 2007.²⁷⁰

Essentially there are now three different variations for online games. The first is comprised of consoles that allow for online play.²⁷¹ Consoles, such as Xbox, provide for connected gameplay among

265. KOHN & KOHN, *supra* note 119, at 1259 (explaining interactive service requirements).

266. *Id.*

267. Therefore, a digital jukebox service offered online, EA Trax, for example, was featured in online games, would not, enable the sound recording copyright owners to receive a royalty for this public performance of their music.

268. See RIAA FAQ, *supra* note 89.

269. Gamedaily.com, Industry Vets Betting Online (Sept. 27, 2004), <http://biz.gamedaily.com/industry/feature/?id=7983> [hereinafter Industry Vets Betting Online].

270. Gamedaily.com, China to Lead the World in Online Gaming (Oct. 6, 2004), <http://biz.gamedaily.com/industry/feature/?id=8056>. Perhaps in response to such predictions, EA has made plans to open a "global center for developing online games, with a 500- person studio that will help it generate \$1 billion in Asian revenues by 2010." *Id.* (internal quotations omitted).

271. See GameOgre.com, *Console Online Gaming*, <http://www.gameogre.com/consoleonlinegaming.htm> (last visited Mar. 20, 2006).

various players in the same game.²⁷² While other platform manufacturers are beginning to incorporate online capability in their consoles, the overall number of players participating has not yet matched those involved in the other two forms described below.²⁷³

Secondly, there are MMOGs, as described earlier, which provide everlasting, virtual worlds for players to interact in.²⁷⁴ The typical MMOG model requires players to pay an initial fee for the game, roughly fifty dollars, and then at the conclusion of a thirty day trial period the player can subscribe for an average of fifteen dollars a month.²⁷⁵ These games are considered successful when they reach the two hundred thousand subscriber level.²⁷⁶ Recent forecasts predict the worldwide MMOG market will total \$5.2 billion in 2006 and continue growing to nearly \$9.8 billion by 2009.²⁷⁷ There are, however, several obstacles that have impeded the early growth of these games; mainly time commitments, costs and steep learning curves.²⁷⁸ To combat these obstacles several of the top MMOG providers, such as Sony Online Entertainment, have started licensing large Hollywood themes for MMOG development.²⁷⁹ MMOG providers hope that popular game themes will broaden their audience worldwide.²⁸⁰ With budgets for these new games in the twenty to thirty million dollar range,²⁸¹ composers and recording artists alike will have yet another option for ancillary income.

The third type of online gaming option is personal computer based downloadable games. With nearly fifty million people playing

272. See generally *id.*

273. See *id.*

274. See Hyman, *supra* note 64.

275. *Id.*

276. Gaudiosi, *supra* note 63. Two of the more popular titles are *EverQuest* and *Asheron's Call*, which have reported 500,000 and 125,000 total subscribers, respectively. Hyman, *supra* note 64.

277. Gaudiosi, *supra* note 63.

278. Hyman, *supra* note 64. A typical player in many of these games spends ten to twenty hours a week over nearly ten months a year involved in the game. See *id.* Usually the game worlds are so intricate and demanding that players must devote large amounts of time to advance at all initially. See *id.* Additionally, the narrow spectrum of game themes also stunts mainstream acceptance; a reported 83.7% of current MMOGs are "Dungeons and Dragon" themes. *Id.* For players looking for a brief and casual gaming experience rather than a game based on wizards and orcs like the involving Dungeons and Dragons type games, paying a subscription for such limited enjoyment is not worth it. See *id.*

279. See Gaudiosi, *supra* note 63. For example, Sony Online Entertainment has been working with parent company Sony Pictures on three or four potential projects, while Sega-Warner Brothers Interactive Entertainment released *The Matrix Online* on January 18, 2004. *Id.*

280. *Id.*

281. See *id.*

online games daily,²⁸² downloadable games are expected to reach \$760 million in revenue in the United States by 2007.²⁸³ Under the simplest scenario, consumers can browse a catalog of games and then purchase a title, for roughly twenty dollars, without ever leaving their living room.²⁸⁴ Another option, Games-on-Demand, allows players to pay a monthly subscription that provides access to more than one hundred different games for approximately fifteen dollars a month.²⁸⁵ In the first scenario, a game is downloaded at the moment of purchase therefore providing a one-time payment to the composer for the reproduction of the music contained in the game. With Games-on-Demand, the owner of the composition and possibly the copyright owner of the sound recording benefit because the game is streamed to the media center or personal computer of the user.²⁸⁶ However, as mentioned earlier, the "audio-only" requirement of the DPRSRA may prevent the copyright owner of the sound recording from receiving a public performance royalty if the music is streamed together with the visual element.

In any of the above-referenced online situations, when a game developer, such as EA or Atari, offers a game online, it must obtain the necessary public performance rights from the copyright owner of the music.²⁸⁷ The web site or webcaster providing the game online must then either obtain a direct license from the copyright owner or a blanket license from a performing rights society to publicly perform the game and music over the Internet.²⁸⁸ Often, with smaller webcasters, the game developer will obtain a direct performance license so that the webcaster does not have to pay for a performing rights license from one of the named societies.²⁸⁹ The fee paid is then remitted to the owner of the copyrighted work as a public performance royalty.²⁹⁰

Another common occurrence in this context is for a single entity to act as the game developer and the webcaster.²⁹¹ Here, the same company offering the online games is the author of the music

282. Tzruya, *supra* note 66.

283. Industry Vest Betting Online, *supra* note 269.

284. *See id.* Some companies now offer a free trial period to test out the game before purchasing. *Id.*

285. Tzruya, *supra* note 66.

286. *See id.* (explaining that games received from the Games-on-Demand service are streamed to the media center/computer).

287. *See* RIAA FAQ, *supra* note 89.

288. *See id.*

289. Telephone Interview with Jack Wall, *supra* note 146.

290. *See* RIAA FAQ, *supra* note 89.

291. Telephone Interview with Billy Martin, *supra* note 8.

created under a work-made-for-hire arrangement.²⁹² Under this arrangement, the company does not need to pay a public performance fee to itself for the use of the music online.²⁹³ When a third party runs the web servers, such as Microsoft, then a license must be granted for this public performance.²⁹⁴ If a composer retains their public performance rights in the initial contract with the game developer, then the composer will be entitled to this fee.²⁹⁵ Currently, the majority of online games are offered by single companies that own the game and the music publishing rights associated with it, so no fee is owed for the public performance of the music.²⁹⁶

As more games, and thus music, are transmitted online, public performance royalties may provide a significant source of income to composers. With the increase in profits from public performance royalties, composers may be able to subsidize the rates being paid for acquiring the music on the front end. Unfortunately, while the revenue predictions for online game companies are tremendous, the music royalties currently being generated are rather insignificant.²⁹⁷

In spite of these narrow and relatively new provisions, the industry is still focused on a publicity-based model. In fact, this model may exist as long as music continues to play a secondary role in the game experience. Perhaps, similar to film and television music, video games should be viewed as an ancillary revenue stream for composers. For those composers making their living solely in the video game industry, they must battle in a Darwin-like manner to gain prestige, clout and leverage when dealing with game developers.

As mentioned earlier, one solution for composers is to urge the video game industry to adopt the film and television model in which composers retain the public performance rights to their works. This would allow for payment pursuant to the statutory licensing schemes provided by the DPRSRA and DMCA referenced above.²⁹⁸ Directly opposed to this view are the video game developers and publishers, who insist on retaining complete ownership.²⁹⁹ Their argument is based on the fact that they paid for the creation of the music.³⁰⁰ The music is a critical element of the intellectual property they are

292. *Id.*

293. *Id.*

294. *Id.*

295. *Id.*

296. *Id.*

297. *Id.*

298. *See supra* text accompanying note 263.

299. Telephone Interview with Billy Martin, *supra* note 8.

300. *Id.*

bundling and selling as a video game, and they understandably want to have as much control over that as possible.³⁰¹ More recently, composers have compromised with video game developers by relinquishing public performance rights for participation in ancillary uses.³⁰² Such uses include iTunes sales, commercials, soundtracks, ringtones and other licensing opportunities.³⁰³

Somewhat recently, an organization was created to attempt to shift the focus on video games to the music and to promote the fact that the music has value apart from the game. The Game Audio Network Guild, (“G.A.N.G.”), is a non-profit organization primarily focused on the advancement of interactive audio and the surrounding community.³⁰⁴ G.A.N.G., founded by video game industry professionals, strives “to empower its members by providing resources for education, business, technical issues, community, publicity and recognition.”³⁰⁵ In addition, the organization reaches out to content providers and listeners by promoting awareness of interactive audio and helping to produce more competitive and entertaining products.³⁰⁶ Hopefully, with the increased publicity about the importance of music through the efforts of G.A.N.G., the gaming industry will react in a more composer-friendly manner by providing these talented composers with the compensation they rightfully deserve.

IV. THE UNPREDICTABLE FUTURE OF VIDEO GAME MUSIC

The future of the video game industry and music’s increasingly popular role will be quite interesting to observe. G.A.N.G. and other video game executives have been pushing for video game soundtracks to establish a market all to themselves; in essence creating their own genre of music.³⁰⁷ This goes for both soundtracks comprised of licensed tracks and original works created specifically for the game, similar to motion picture soundtracks. Presently, game soundtracks

301. Telephone Interview with Jack Wall, *supra* note 146.

302. *Id.*

303. *Id.*

304. GIGnews.com, *supra* note 137.

305. *Id.*

306. *Id.*

307. See Vitka, *supra* note 97. A common argument among composers is that unlike several years ago, the complexity and sheer amount of work out there of a certain caliber is sufficient to distinguish video game music from other types of music, and allow it to stand on its own as music without the game. See *id.* At the moment, video game soundtracks are similar to motion picture and television soundtracks in that they need to accumulate more content and develop their own style to draw more attention and become recognized as an individual genre. See *id.*

sell exponentially better in Japan than in the United States, with hundreds of thousands of units being sold.³⁰⁸ Soundtrack sales in the United States generally sell ten to thirty thousand copies, unless they contain popular, licensed songs.³⁰⁹ For these reasons, the soundtracks are mainly used as marketing tools for the games.

Along these lines, in 2000 the National Academy of Recording Arts and Sciences first allowed “interactive games [to] compete in the annual Grammy awards.”³¹⁰ While there is not yet a video-game-specific category, individual composers or record labels can submit their soundtrack music “in one of three general categories: “Best Soundtrack Album; Best Song; or Best Instrumental Composition for a Motion Picture, Television or Other Visual Media.”³¹¹

Similarly, MTV has taken this a step further and now presents an award for best video game soundtrack at its annual MTV Video Music Awards.³¹² In 2004, when this category debuted, of the five games nominated, *Tony Hawk's Underground* emerged as the winner.³¹³ It is noteworthy that all five of the soundtrack albums nominated consisted entirely of licensed music.³¹⁴

An interesting development took place in 2004 when Electronic Arts and Cherry Lane Music Publishing announced the formation of Next Level Music, LLC.³¹⁵ The joint-venture music publishing company signs both new and established artists, acquires publishing catalogs and creates original music that EA will exploit and market in their games.³¹⁶ In addition, Cherry Lane handles the worldwide administration of the compositions and masters, including licensing “EA’s existing music assets to commercials, films, film trailers, ringtones and other commercial media.”³¹⁷ At the moment it is still too

308. Telephone Interview with Billy Martin, *supra* note 8.

309. *Id.*

310. McDonald Navigation, *supra* note 9.

311. *Id.*

312. Gamespot.com, Tony Hawk's Underground Honored at 2004 MTV Video Music Awards (Sept. 1, 2004), <http://www.gamespot.com/ps2/sports/thug/news.html?sid=6106287>.

313. MTV.com, 2004 Music Video Award Nominees, <http://www.mtv.com/onair/vma/2004/nominees/> (click on “Best Video Game Soundtrack”) (last visited Mar. 20, 2006).

314. Kasvin, *supra* note 70.

315. Press Release, Electronic Arts, EA and Cherry Lane Music Enter Joint Venture (Nov. 15, 2004), http://www.cherrylane.com/clpub/html/body_newsdtl.cfm?fSYSID=45&fNewsDetail=True.

316. *Id.*

317. *Id.* This combination pairs an interactive software industry leader, who had twenty-seven titles that sold over one million copies in 2003, with a publishing company that spans almost every genre of music, from John Denver to the Black Eyed Peas. *Id.*

early to rate its successfulness, but it has the making of a major force in both the music and video game industries.³¹⁸

The recently popular and highly lucrative cellular phone ringtone market has also become populated with video game music. Literally hundreds of websites currently offer polyphonic, monophonic, MIDI, wav or other similar downloadable versions of some of the most classic and obscure themes from past video games.³¹⁹ These arrangements provide another stream of income for the music publisher and composer of the compositions.³²⁰ Presently, the industry standard for royalty payments is the greater of \$0.10 per completed download, or ten percent of all monies earned and/or received by the ringtone company for the download or other authorized exploitation of a particular composition.³²¹ Public performance royalties are payable as well and are ensured by the licenses between the ringtone company and one of the applicable performing rights societies.³²² Similar to the online gaming scenario described earlier, some ringtone companies will obtain a public performance license directly from the game publisher or composer.³²³

Live touring companies and bands that play video game theme songs as part of their live shows are also emerging. Specifically, composer Jack Wall and his company, Mystical Stone Entertainment, LLC have partnered with Clear Channel to present a national tour of video game music entitled Video Games Live.³²⁴ Performances, which began in July, feature a live orchestra and choir along with a light and laser show.³²⁵ Similarly, bands such as the Minibosses, regularly play live shows and tour across the country featuring improvisational versions of popular video game music and themes.³²⁶

The television became more than just a marketing device to gamers in 2003 when Comcast launched its one-of-a-kind, twenty-four

318. Similarly, Take-Two interactive Software and Sega signed an exclusive worldwide co-publishing and distribution agreement in June of 2004 for, "all Sega ESPN Videogames sports titles." Under the deal, the titles will be exclusively distributed through Jack of All Games and Take-Two Europe in North America and international territories. Press Release, Take-Two Interactive, Take-Two and Sega Sign Exclusive Worldwide Co-publishing & Distribution Agreement for ESPN Videogames (Jun. 8, 2004), *available at* <http://ir.take2games.com/ReleaseDetail.cfm?ReleaseID=136700>.

319. BRABEC & BRABEC, *supra* note 93, at 370.

320. *Id.*

321. *Id.* at 416.

322. *Id.* at 418.

323. *Id.*

324. Telephone Interview with Jack Wall, *supra* note 146.

325. *Id.*

326. See minibosses, <http://minibosses.com> (last visited Mar. 20, 2006) (providing information on the band and samples of their work).

hour video game channel on cable.³²⁷The channel, G4, “targets males between the ages of 12 and 34.”³²⁸ G4 entertains their viewers with news programs, game reviews, profiles of industry stars, clips of in-game movies and even a hidden tricks segment.³²⁹ Video gamers, rumored to be the most educated media consumer out there, could prove to be quite a sought after market as the industry continues to expand.³³⁰ Furthermore, G4 provides additional licensing opportunities for video game music as well as commercials that feature public performances of the music.

All of this activity in the video game market has also attracted the attention of major advertisers. Massive, a New York company, has engineered a way to place advertisements in personal computer and video games.³³¹ Massive is able to insert permanent or constantly changing advertisements into billboards, storefronts and other parts of the scenery, as well as track the number of times the ads are viewed by gamers.³³² While many predict this business model will reap hundreds of millions of dollars annually,³³³ a similar song-based model may also be realistic. Perhaps, similar to EA Trax, game developers can partner with music publishing companies and record labels to offer online games with a constantly streaming game radio. The ability to track the songs being played would make it easier for the performing rights societies to compensate the composers and copyright owners of the sound recordings used in the games.

V. CONCLUSION

Since its inception over fifty years ago, the video game industry has become a profoundly lucrative market. Undoubtedly, music has played an integral role in this process. The creative collaborations between the music and video game industries have only begun to lay the groundwork for future games. As new technologies emerge, record companies, music publishers, recording artists, composers, game developers and game publishers will have to quickly and cohesively adapt to keep the industry progressing in a smooth manner.

327. See Gary Gentile, *Video Game Channel Takes Off*, CBSNEWS.COM, June 13, 2003, <http://www.cbsnews.com/stories/2003/06/13/tech/main558682.shtml>.

328. *Id.*

329. *Id.*

330. *See id.*

331. Dean Takahashi, *Video Games to Get Ads; Makers to Get Richer*, SAN JOSE MERCURY NEWS, Apr. 11, 2005, available at <http://medialit.med.sc.edu/videogameads.htm>.

332. *Id.*

333. *See id.*

This article was intended to illustrate the growth and importance of music's place in video games and highlight several of the ways in which the creators of this music can share in the revenue generated by these games. The underlying rights in the sound recordings and musical compositions that make up each and every song are indeed very valuable. If unprotected, the value of these rights can quickly diminish, as evidenced by the recent effects of Internet piracy and peer-to-peer file sharing. By understanding how these rights are incorporated into current and future technologies, such as online gaming, copyright owners of the music may be able to share in a larger portion of the revenues generated by this fascinating industry.