

Silicon Valley artists need IP protection, too

By Marcela Davison Avilés

“What do we need music to do? How do we visit the land in our head and the place in our heart that music takes us to? Can I get a round-trip ticket?” — David Byrne

The arts and entertainment scene in Silicon Valley is vibrant, innovative, and most of all, entertaining and commercially viable. But in a region that is envied all over the world for its technology entrepreneurship, our regional artists and entertainers often get short shrift when it comes to protecting and monetizing their intellectual property. The IP protection issues that arise in the arts are analogous to those that arise in software development — copyright, trademark, service mark, for example. And while the entire legal infrastructure of Silicon Valley has developed to protect technology-related rights, all too often the soft IP of local, talented artists goes unprotected.

Knowledgeable software developers wouldn't dream of going solo — and neither should the knowledgeable artist!

Artistic riches

The Bay Area musicians and music professionals honored at the Grammys this year represent a wealth of genres, including R & B, New Age, Latin Rock, Classical Orchestral and Regional Roots music. Despite the misinterpretation of Gertrude Stein's famous quote, there has always been a “there, there” in Oakland, San Jose and San Francisco. The history of innovation in the Bay Area arts scene features several waves of artistic movements, cultural institutions, tech booms and busts, legendary impresarios, fine artists, and con artists stretching back to the days of the Gold Rush.

And it used to be that if a musician had professional ambition the road first led to Los Angeles, New York or Nashville before touring to places like San Jose or San Francisco. Not anymore. Today, the Bay Area boasts a vibrant music industry ecosystem with hugely successful festivals, and industry giants like AEG and LiveNation competing with Bay Area non-profit promoters for market share in the lucrative Latin and American folk genres. Unfortunately, the artistic IP protection piece of the infrastructure has not caught up with our friends in SoCal.

As reported by the San Francisco Chronicle, in 2014 the Bay Area's diverse consumer population is projected to drive over \$120 billion in spending. According to the Bay Area Council Economic Institute, the growth trend includes digital en-



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tertainment. The Internet has made it possible for music to have a life of its own and turn into something bigger. Artists can control everything about production and distribution of their work, or they can control some of that process, or none of it.

Artists have choice

Today's artist drives revenue primarily through licensing of content. And more often than not, today's artist — not the label — owns the content, but he or she may not understand or appreciate this fact. The concept of preserving one's ownership of valuable IP can be overwhelming and alien to an emerging artist who “just wants to be an artist,” and does not have knowledgeable professional advisors.

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Even sophisticated players can, through careless stewardship, lose the ownership rights, as happened with the well-known Frank Capra classic, “It's A Wonderful Life.” A clerical error prevented the copyright from being renewed properly in 1974. Despite the lapsed copyright, television stations that aired it still were required to pay royalties. Although the film's images had entered the pub-

lic domain, the film's story was still protected by virtue of it being a derivative work of the published story “The Greatest Gift,” whose copyright was properly renewed by Philip Van Doren Stern in 1971.

More recently, the modern clashes of the digital era over “culture, policy and copyright law” in *Capitol Records v. ReDigi* resulted in a ruling by the Southern District of New York that ReDigi's web-based service, which enables users to sell legally acquired digital music to other users at a fraction of the music's price on iTunes or other legal sources, is unlawful copying. This case underscores the intrinsic difference between nondigital and digital goods, and that there is no “digital first sale doctrine.”

From a licensing standpoint this means that digital files are intrinsically worth less over their lifetimes than are physical media like CDs and DVDs. The ruling confirmed the rights of copyright holders to control whether customers can resell or transfer digital goods.

Silicon Valley does technology

Thus, the issues involving stewardship of “soft IP” are just as compelling, from the standpoint of monetization, as those involving patents and other “hard IP” matters.

A young software engineer launching a start-up at an incubator or within an academic setting likely will have not only finance and business advice to rely on, but excellent legal counsel as part of the start-up infrastructure.

Musicians and artists, on the other

hand — even those graduating from prominent music academies — too often find themselves ill-equipped to deal with the myriad legal and business issues that today's web-based environment presents.

Production, publication and transmission of original content, and the possibility of getting ripped off, is now as easy as turning on your smartphone. Today more than ever, it is critical that people who create original content — whether it is an original song or an original phone app — understand the importance of protecting that content.

What's an artist to do?

The contract, licensing and legal issues inherent in protecting ingenuity form a complex web. That killer song could turn into the killer app, which turns into an asset on a balance sheet, and creates a family legacy.

Owning the master recording and retaining publishing rights requires expertise in crafting appropriate licenses. The ubiquity of modern dissemination means emerging artists can generate licensing income from buyers today in ways never thought possible just 10 years ago. And even if an artist is not interested in generating income from his or her works, who would not want to protect the ownership rights?

The business models available to artists are almost as myriad as the new devices invented to spread their content. Like a singer's interpretation of a classic song, they can morph and evolve. An artist can start out self-distributing, then transition to licensing to a distributor, and end up with a standard distribution deal. Or, the model may be something that uses elements of all of these in an à la carte fashion, to create a custom business model that suits his or her touring and lifestyle.

For both established and emerging artists, this is a great time, full of options and possibilities. This is especially true in the Bay Area, where informed ingenuity is the coin of the realm.

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