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BEYOND STREAMING: LAW, TECH AND ENTERTAINMENT



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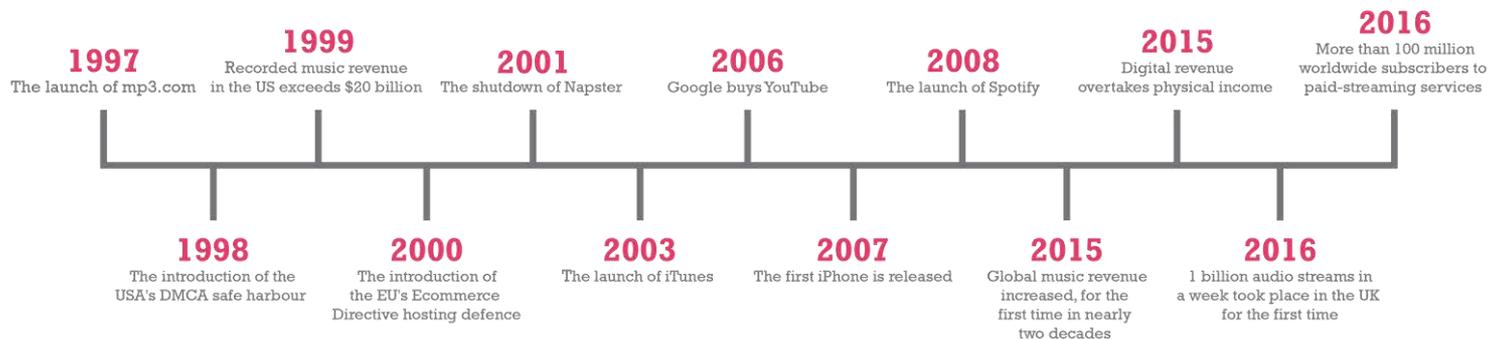
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Beyond streaming: law, tech and entertainment

The music industry is growing again. Technology inflicted some serious, deep wounds starting in the late 1990s; technology, in the shape of portable devices, downloads and streaming services, started to stem, slowly, the flow of blood from the mid-2000s; and now technology is supporting a return to growth and generating disruptive and evolving avenues for revenue growth. We've gone from technology destroying value in the industry, to supporting value creation. The BPI's Geoff Taylor puts it nicely when attributing positive growth figures for 2016 to "recorded music's investments in a digital future".

Some milestone dates chart the impact of technology over the past twenty years:





Tech: evolution and disruption in 2017

And now, in 2017, the IAEL's annual book looks to the future of technology in the music and entertainment industries. We do so hopeful that these technologies will drive even more growth in the industries which mean so much to so many people. The technological platform which has been built over the past two decades is a launchpad for exciting, value-generating disruption and evolution in the entertainment industries.

With this book, our goal is to help and inform people working in the entertainment industries by considering the legal implications of some of the disruptive and evolving technologies which will provide opportunities for growth in those industries. We will consider the technologies driving new ways of consuming, creating and interacting with entertainment content and supporting innovation behind the scenes. Central to the discussions will be how intellectual property, data protection and other laws do and could regulate and facilitate those technologies.



We will then provide a global view on how those technologies are impacting the entertainment industry as a whole.

More specifically, we will discuss how the law across the world is evolving to support the industries' disruption and evolution and identify areas where there is demand or need for change. Our survey deals with developments in virtual and augmented reality, the challenges of live streaming on social media, resale of digital content, blockchain, usage of tracking technologies. It also addresses how technology is providing answers to an ever-evolving piracy threat, how data protection laws regulate monetization of data, targeted content and smart homes, and how the international legal framework might need adjusting to strike a different balance between competing interests.

**‘TECHNOLOGY IS PROVIDING ANSWERS
TO AN EVER-EVOLVING PIRACY THREAT’**



What does growth mean in the music industry

News of growth comes from a number of sources. The headline news coming out of the IFPI for 2015, was that, for the first time in nearly twenty-years, global music revenue increased, albeit at a modest **3.2%**. 2015 also marked the first year that digital music sales surpassed physical music sales. CISAC (The International Confederation of Societies of Authors and Composers) reported that in 2015, its music collections grew by **8.5%**, with an overall increase of **21.4%** in collections from digital platforms.

Looking just at the UK, a market for which 2016 data are available, music consumption was up **1.5%** to **123 million albums**, based on the album equivalent sales metric. This was attributed to an "explosive" rise in audio streaming, which has increased **500%** since 2013. There is equivalent good news coming out of the US, based on RIAA half-year figures reporting **8.1%** growth in overall revenue. Announcements such as PRS for Music saying that it processed over **4 trillion** performances of music in 2016, an increase of **80%** year on year, show how the technologies involved in collecting, handling and improving data can support revenue growth.



Looking to the future, Goldman Sachs predicts that "the rising popularity and sophistication of streaming platforms is ushering in a second digital revolution" and that "the growth of streaming will help music revenues almost double by 2030 to **\$104 billion**".

Streaming growth and the challenges of the value gap and piracy

Streaming is undoubtedly the source of this growth. The RIAA H1 2016 report shows an "explosion" in streaming revenue, growing **57.4%** to **\$1.61 billion**, with the biggest growth coming from paid subscriptions, doubling subscribers from **9.1 million** to **18.3 million**. Even ad-supported streaming revenue had a marked increase, rising **23.6%** to **\$195.4 million**. In the UK, audio streaming now accounts for over a third of all UK music consumption and there was a **68%** rise in audio streams in 2016. But it would be over-enthusiastic to ignore the threats present in the streaming market. Growth is uneven and there are a number of services whose market share does not compete with the two giants: Spotify and Apple Music.



Life is difficult for those at the bottom of the streaming industry (witness the troubles faced by Pandora, Deezer and Rdio) and even Spotify is still making an operating loss, although it is profitable in the UK. And that's before we mention the challenges posed by the value gap and piracy.

'STREAMING IS UNDOUBTEDLY THE SOURCE OF GROWTH'

It is difficult not to characterise streaming as a disruptive technology anymore; it will no doubt continue to evolve but we see it evolving in combination with other, more disruptive, technologies, and technologies which are not yet materially threatened by the value gap and piracy.

It is on those more disruptive technologies which we have focused this year.



How usages and laws are responding to growth technologies

Three sets of technologies with promises of growth are covered in the book: **virtual, augmented and mixed reality; smart homes and the internet of things; and monetising data.**

Perhaps more behind the scenes, we see the use of technologies to help track, monitor usages and power more personalised services. We see as well the potential for blockchain to assist joining the dots in transferring value around the music ecosystem and fighting fire with fire, as technology helps support anti-piracy initiatives. We don't have space in this paper to answer all of the questions these technologies pose for law and regulation around the world; but what we can do is raise them, with the promise that there is more to come.



Virtual, augmented and mixed reality

The combined VR/AR market has been estimated by Goldman Sachs to be worth \$80 billion by 2025. VR has the potential to reshape completely the existing ways of experiencing content. It is different from any previous medium as, unlike TVs or other screens, it closely reproduces how we experience the real world. For many, this technology is more exciting and presents a wider array of use cases than VR, interestingly enough at both ends of the price spectrum, with enterprise applications on the one hand and low or no-cost mobile applications on the other being primary drivers. Compliance with data privacy regulations, including cyber security issues, will likely be a principal challenge.



The increasing volume of personal data collected and the multiplicity of purposes for which it may be used will increase the importance of legal compliance, particularly in the context of the General Data Protection Regulation, and may also give rise to adverse publicity issues.

If content is king in the real world, it will be also the case in virtual and augmented worlds. We will therefore have to ask how the content created in and for virtual and augmented worlds is protected by copyright and, where it is, who owns it.

Likewise, as the technology involves a relatively uncommon marriage of software, hardware and content we will need to work out how contracts dealing with its creation and exploitation should be handled. Content licensing strategies will need to be revisited to encompass the new possibilities.



Internet of Things and Artificial Intelligence

Internet of Things and Artificial Intelligence are new areas of growth in the entertainment industries. They concern equally our cars, our homes, our health and any physical devices that we use on a daily basis. In the book, we focus specifically on smart homes, and technologies like Alexa from Amazon. We attempt to answer the many questions raised by these new practices, related to liability risks, personal data, consumer protection and contract laws. Internet of things and Artificial Intelligence are definitely a great challenge for the law to adapt to.

‘INTERNET OF THINGS AND ARTIFICIAL INTELLIGENCE ARE NEW AREAS OF GROWTH IN THE ENTERTAINMENT INDUSTRIES.’



Monetisation of data

Increasingly, value is created through the collection and processing of user data. Applying data analytics in the entertainment business allows for new and better products in the digital sphere through personalization and optimization of content and targeting of advertising. And, of course, leading online businesses such as Facebook creates value almost exclusively by using personal data.

The data protection current concept linked to informed user consent (e.g. by checking a box, clicking on "I read and agree" or just continuing using a website after having been informed of the existence of a privacy policy) remains largely a fiction in the age of big data analytics. The GDPR (General Data Protection Regulation by the European Parliament) intends to improve the position of the user by providing more information and ways to control the use of personal data, including provision of information such as the purpose of the data processing, the recipients of the personal data and the rights of the data subject. For providers of online platforms and services, the balance between the compliancy of the consent formats linked to data privacy and the usability and attractiveness of the services will become more challenging.



Tracking and monitoring usages

The explosion of streaming platforms and digital service providers has created an incredible amount of data that can be hard to process. This is especially the case for performing rights organizations that wish to monitor these data in order to redistribute income to their right holders.

However, new technologies using fingerprinting and machine learning have been developed to improve this online tracking of usages, from music to audio-visual streaming, allowing more transparency and efficiency and fairer distribution. Apart from online monitoring, these identification technologies are also used to help collecting societies monitor the use of music in public spaces such as clubs and festivals, in order to improve the precision of the redistribution of public performance royalties. These content recognition technologies have become an essential tool for the entertainment industries, and will keep helping right holders get the recognition they deserve.



The incoming use of blockchain technology in the entertainment industry

Widespread adoption of some kind of blockchain technology is inevitable for all undertakings that touch or concern money, rights and transactions. The music industry is no exception.

Blockchains will affect not only the parties who have a financial interest in the distribution of music; e.g. artists, composers, producers, labels, rights managers, digital service providers and performing rights organizations. Blockchains will affect listeners and fans, in how they experience and interact with the music. Blockchains will also affect our culture, as music takes its place among the Internet of things.

Trusted arbiters, particularly those who administer copyright, will not be replaced by blockchain, as their decision-making and judgment will still be needed but they will likely co-opt identity-based and permissioned blockchains, using them as a cost-savings tool to weed-out inefficiencies. Anonymous and permissionless blockchains which need miners verifying the authenticity of newly-created blocks of transactions, could be the true drivers of innovation and disruption in areas where trust is not so important, providing new ways to connect with artists, music and each other.



Disrupting piracy

And, finally, it is time for disruptive technology to disrupt the pirates. Given the prevalence and sheer number of pirates, the fight against them descends into an interminable 21st century game of 'whack-a-mole'.

'IT IS TIME FOR DISRUPTIVE TECHNOLOGY TO DISRUPT THE PIRATES'

And, as live streaming of events on digital and social platforms, outside of the traditional linear broadcast channels, becomes more prevalent and in tune with where the audience spends their time consuming media, it is becoming more and more difficult for rights holders to keep track of the unlicensed use of their works. Advances in legal remedies, especially in the realm of copyright law, have armed rights owners in the wider fight against illegal access to their content but there is still much to do.



Beyond streaming: law, tech and entertainment

However, given the importance of acting within real time to protect the ‘licence window’ and exclusivity of premium content, technological solutions are proving to be more successful in dealing with the sheer volume of infringements.

In that sense, it is for rights owners to ‘out-pirate’ the pirates. In recent years, advancements in digital fingerprinting technology have made “stay down” of both static and live content on online distribution platforms a more realistic requirement for platforms to adhere to. Content ID and similar systems enable content to be identified at the point of upload, creating a form of “stay down”. For example, **Facebook is offering rights holders tools to identify and take down infringing live streaming** feeds on its Facebook Live platform. Some right holders are directly using these technological tools to chase unauthorized use of their work online and issue “take down” notices.



How regional and international law are developing

Comparing the global debates on copyright reform from 20 years ago and now is very revealing as to the shift in priorities.

The mid-1990s saw the high-point of global attempts to strengthen copyright law, by making it fit for a digital age, notably through the introduction of the ‘making available right’. Ironically perhaps, with the benefit of hindsight, it was only two years after the WIPO copyright treaties, that the DMCA introduced the US safe harbor regime, the legal cause of what is now known as the value gap.

Flash forward 20 years and we see almost a reversal of these dynamics. There are few suggestions that new intellectual property rights are on the cards, and the EU Commission's attempts to introduce an ancillary copyright for digital press publications show the difficulties in doing so.



Indeed, the focus in the EU has shifted to expanding the list of exceptions, improving the rights of users (e.g. through digital portability) and of creators (e.g. the so-called better-seller provisions) and facilitating licensing (e.g. the cross-border licensing provisions in the collective rights management directive).

The EU Commission's attempt to address the value gap seems designed to please both sides of the debate but may end up having relatively more effect on smaller services than the main targets of the music industry and creating satellite disputes about what measures are "appropriate and proportionate". In particular, in light of article 13 of the proposed new copyright directive, it seems that **“content recognition technologies” could become mandatory for digital service providers**, which could have an important impact on small platforms. Other burning issues at a European level include portability of content and IPTV and the reform of the cable and satellite directive.



The entertainment industries now focus on improving remedies, to make it easier to disrupt piracy, but are having more success with voluntary measures (witness the deal in the UK, brokered by the Intellectual Property Office, between the music and film industries and the Google and Bing search engines) than in achieving meaningful legal reform.

At the same time, we have seen the rise in the importance for all entertainment industries of data protection and ecommerce laws which have an increasing role to play in determining how digital services operate. Just as technologies are evolving and disrupting, we also see changes in the directions of legal discussion.

We hope that the 2017 IAEL Book will help readers navigate their way towards these new directions and contribute usefully to working out where we are all heading.

ABOUT THE AUTHORS

The IAEL was officially founded in 1977 at MIDEM, Cannes. However, for three years prior to that the lawyers who were to become the Association's founding members had been holding informal seminars and discussion groups for MIDEM participants interested in the legal aspects of the entertainment industry. Over the past 40 years, the IAEL has come to fulfil a unique role for lawyers involved in the industry throughout the world. It has expanded enormously in terms of both the numbers of its members and the scope of its activities. Nonetheless, continuity of membership (some of the founding members of the Association are still actively involved with the IAEL) combined with the energy of its officers, past and present, mean that the Association's style remains distinctly personal.

IAEL members have areas of expertise that cover nearly all aspects of entertainment law. If you are a lawyer or executive working in the entertainment industries, you may wish to find out about joining the Association or merely to contact us via Duncan Calow at duncan.calow@dlapiper.com

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