



## Law of averages: music lawyers hold court

Music law is tasked with building a business on shifting sand and predicting not just where the market will be in a year's time but also five year's time when new services and outlets that haven't even been created yet will redraw the map.

We spoke to some of the leading lawyers in the UK, Asia and the US about the issues that keep them awake at night, what boils their blood, who the innovators are (or who is dragging their heels) and what things they would change today to make a better business for tomorrow.

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# The UK



## Cliff Fluet, Partner – Media, Brands & Technology, Lewis Silkin

### What state is music law in today?

“We had a dead digital decade where many really interesting business models were drowned at birth – like ad-funded downloads. We’ve also seen new entrants like Sky, mflow and Datz Music Lounge not being allowed to bloom. The view is that from 2010 onwards stuff has been getting done. Now there are bundled deals being rolled out weekly and people almost not noticing when actually those things were extraordinarily ground-breaking [a decade ago].”

### What is your biggest bugbear in music law?

“The thing I still have the biggest rant about with regard to the music industry is that we

have the BPI saying there are around 70 licensed digital services out there. Yes, that’s good – but what for me is very depressing is how [few] different models of delivery there are within those 70 services. The thing that we are still not allowing is innovation to flourish without a vast arms race for cash behind it. We still enter a world where people have to pay vast sums of money or give over equity, or a mix of the two, to allow a business model to flourish; but then it can’t flourish as it’s spent all the money up front.”

### What deals changed things?

“After the Last.fm and YouTube [acquisition] deals were done, the whole ‘building a business on our backs’ narrative changed. It became very, very difficult after that. What we don’t want – at the risk of sounding like a supply teacher here – is one child spoiling it for everybody else. I have clients who feel that when they try to get licensed they are being penalised. There are a significant number of ‘platforms’ out there without licences in place or who haven’t had licences for years and are using music at the core of their business. We live in a world where being licensed is like feeling you are being unduly punished. That cannot be.”

### What is top of your wish list for music law?

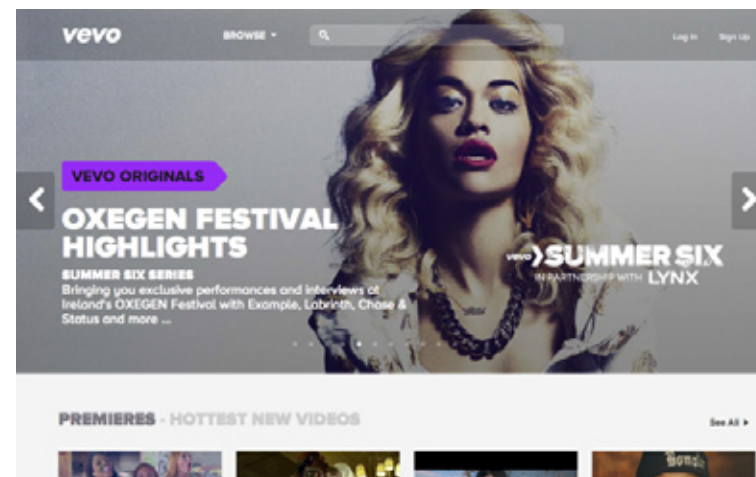
“We need to create frameworks that allow innovation to flourish. Copyright wasn’t set up as a control thing. It was effectively set up to

reward innovation. At this particular moment in time, if you enforce copyright strictly speaking, nothing gets out there. Innovation gets stifled. My view as a pragmatist is there is a huge amount of value being lost out there. We need to find temporary licences and experimental licences.

We need to allow people to innovate. People ask, ‘What if they flip their business?’ We can deal with that contractually. We need to create more structures and licensing frameworks in order to capture value because, at the moment, people who aren’t licensed are doing very well indeed. That should not be allowed to continue. People who get licences should be encouraged. The way to do that is to just make it easy. We need more frameworks rather than every single deal having to reinvent the wheel whenever any innovation comes along. If people are out to innovate, you’ll see the VCs come back.”

### Who, for you, is best in show?

“Probably the most exciting business in music at the moment is PledgeMusic. It started in people’s minds as a kind of tip jar for artists that couldn’t do it another way. But now



the average Pledge transaction is \$57. What you are seeing now is that it is much more about monetisation of the whole artist/fan relationship. I have got to give continued props to Vevo. [The deal with GEMA in Germany] is going to be hugely important. Music videos, back in the day, were simply seen as a cost. It was effectively an advert that you bought. The idea of them, outside of a compilation VHS, being monetised was ludicrous. Vevo, unlike some of the other platforms, is not subscription and is not a walled garden. Vevo started with high quality video, great UX, great UI and wants to be available everywhere. It is a very different and positive narrative for the music industry.”



# The UK



## Gregor Pryor, partner - Media & Technology, Reed Smith

### What needs to be fixed in music law in 2013?

“There are three core challenges. The first is a barrier to entry issue. Getting the licences completed in Europe and the US is fiendishly complex and time consuming. Because of the apparent success of Spotify and also because of increased digital adoption, the numbers are getting bigger. As the numbers are getting bigger, the level of expectation among the rightsholders gets much higher. If you are a startup music service, getting full repertoire is a challenge. The second challenge is a pure volume issue. You cannot clear even a pretty simple music service globally without a disproportionate amount of money. You

have to get the licences in so many different countries. It just takes forever. The third area that is really difficult at the moment is competition. By that, I mean there isn't much of it between the major rightsholders. They have such a big market share that it's pretty sewn up. And the indies, with the exception of Beggars, are increasingly weak. There is this difficult position where, if you want a significant chunk of repertoire, you don't have any choice but to engage with this situation.”

### If licensing is so hard and VCs are terrified to invest in new services, can any new players break through?

“I think it means they'll require a greater level of investment. Unless you have got a lot of money, it's going to be harder. I am thinking about some services that with a lot of investment maybe could have done

differently. Turntable.fm is one. You look at Songza and wonder if that is going to survive. I know why the VCs don't like it as you've got a vertical supply chain that doesn't have any security. Your average licence is one or two years long. If you are going to invest several million dollars, even on an exit plan of five years, labels are going to want equity and some other control. They will look over your shoulder and try and manage the service for you but not let you do the sensible thing. Then there is no guarantee you are going to get a licence without getting screwed over.”

### What companies or services are admirably proactive here?

“Without question, Universal Music are the best at contracting and doing a great job for their artists. There are some very smart business affairs people within that

company. And they innovate. I have a couple of clients who haven't yet launched and who can get a licence with Universal when they can't get a licence with the other majors because Universal takes more of a risk. Even if Universal are the biggest, in many ways

their licensing agreements are better and easier to negotiate. And more fair. On the licensee side, I think MusicQubed have done brilliantly. They are excellent. They have built a great relationship with the labels and they differentiated their proposition very clearly. On an investment return basis, per track they are so much more remunerative than Spotify, for example, for the labels. I think when Beats Music comes out, everyone will have to watch out for it. I think SoundCloud are amazing. I think the other one that has done something brave is Tesco. They bought we7 and are investing heavily in digital. It is brave and smart where you have a bricks and mortar business that sells a lot of products out there giving it a good shot.”

### What would you change to benefit the whole market?

“I think pricing - going down. There is too much pricing creep on a wholesale basis from the labels and the publishers. The percentage of revenue that they are each looking for from streaming services is too high. The retail price can't go up but they always want more money. They need to hold firm or even drop the pricing to allow these services to really grow. You wonder what would happen if Spotify's price point was £7 [a month]. Would they get a much bigger take up? It would be nice to see some pricing experimentation.”

The screenshot shows the Universal Music Group website. At the top, there's a navigation bar with 'Artists', 'News', 'Labels', 'Our Company', and 'Shop'. Below that, a large banner features Lady Gaga's 'Applause' album cover with the text 'Lady Gaga Mother Monster is back! Get her new single Applause now.' To the right, there's a colorful graphic for 'Schooled Back to Music' featuring various artists like Eminem, Drake, and Miley Cyrus. Below the banner, there's a 'Shop SALE Now' button. The bottom section is titled 'News' and includes a 'Prev Next All' navigation. A news item from 8/28/2013 mentions 'TEARS FOR FEARS ANNOUNCE THE HURTING 30TH ANNIVERSARY DELUXE EDITION WITH LIVE SESSIONS, B-SIDES AND REMIXES IN A UNIQUE BOX SET'. There's also an 'Artist Buzz' section with a 'Pop/Rock' filter and a tweet about Lady Gaga's album.

# The US



## Jeff Liebenson, founder – Liebenson Law and President of the IAEL (International Association of Entertainment Lawyers)

### What state is US music law currently in?

“We are working with a US copyright law that was developed for the traditional music industry in many respects and trying as best we can to apply it to the new digital realities. It has given rise to a host of issues where performance rights, under our copyright regime, typically had related largely to radio and television performance and now they are being applied to streaming digital services which are quite different. It has really complicated and delayed the licensing process in the US. As new technological possibilities arise, there are always issues under US law about what rights need to be

licensed and who to license them from. We have our statutory Safe Harbor which shields a lot of liability from digital service providers. But on the other hand we also have an aggressive statutory damages regime which gives great pause to those who fear they may not completely license all the rights that are necessary.”

### Is the DMCA still relevant and workable in 2013?

“From a content owner’s perspective it has created a lot of problems because large entities like YouTube can rely on the Safe Harbor provision of the DMCA to engage in activity that is not licensed and has set up this situation in which the rightsholders are playing Whac-A-Mole – constantly sending cease and desist letters. It doesn’t effectively address the problem. It is being litigated in several cases, including Viacom’s lawsuit against YouTube, but the decisions lately have largely been in favour of the digital service providers. That is leaving rightsholders very frustrated in the process.”

### What does the failure of SOPA/PIPA mean?

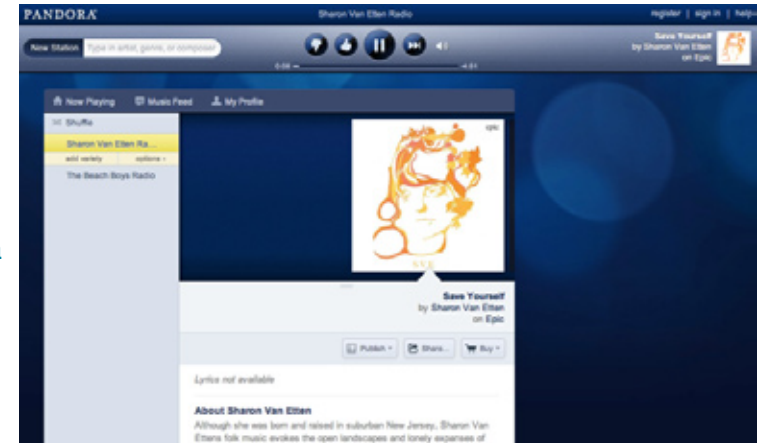
“It hasn’t changed the landscape as much as diminished the hopes of the content owners to develop new approaches. The service providers’ ability to galvanise public opinion to thwart SOPA and some more legislation has left the content industry wondering

how it can change the situation in which their content is used without permission and without liability.”

### What are the big issues the US is grappling with currently?

“A big US issue right now is that many music publishers are withdrawing their digital rights from the US PROs.

Under the US system, the mechanical and the performance rights to musical compositions for streaming services are licensed separately. Digital platforms typically would retain the mechanical rights under a compulsory licence and all the performance rights previously could be attained through licences with the three PROs – ASCAP, BMI and SESAC. Recently some significant publishers have pulled out their digital rights from these PROs and are licensing them directly to avoid some of the legal restrictions that the US PROs operate under. It is the same process for digital platforms. It requires them to negotiate more agreements and it requires additional advances. And raising their royalties as well. How this is going to proceed and how it affects the royalties payable to the PROs remains to be seen.”



### What things will really impact in 2014?

“One thing that bears watching is Cary Sherman of the RIAA and David Israelite of the NMPA recently announcing their shared goal to work together regarding various licensing issues. We’ll see how this develops, but that could have great potential to enable more licensing in future. We are all curious as to what the effect will be of iTunes Radio. It could have a dramatic effect on the streaming space and affect Pandora, Spotify and other services. I am very curious to see if streaming services in general, such as Spotify, will continue to gain significant traction in the US market or if they will stay at the current subscriber levels.”

# The US



**Bobby Rosenblum,**  
shareholder and  
co-chairman -  
Greenberg Traurig  
(Atlanta Entertainment Practice)

## What is the state of US law today?

“Without doubt the greatest challenge is publishing. There were the recent withdrawals of many of the publishers from the PRO system and the impact on licensing and for services being able to operate is going to be nothing short of disastrous. We are going from a world that is already complicated to one that is going to be almost impossibly complicated for many new

services that don't have the resources to do things the right way. At this moment, from what were originally three licences that you needed to get [from publishers], by January next year it could wind up being 10 or 15. With labels, you can get away with launching a service and rolling out the long tail over time as you can go to the majors and the key indies or indie aggregators and get a handful deals done. You can't really do that with publishing because of how it cuts across the line of sound recordings and often it's almost impossible to determine who the publishers are as you don't generally get the details from the labels.”

## If licensing is going to get even more complex, will VCs pull out of the music startup sector?

“I definitely think that is a concern. Over the years, I have heard that from so many people and a number of investment bankers - yet you still seem to have companies that are able to raise money. Music is so sexy and is something that people tend to be passionate about. Somehow or other, companies still seem to get out of the gate. I don't think it's as simple as saying this is going to kill companies' abilities to raise money through VCs or other avenues of fund raising. But I definitely think it has an impact. From my point of view, if it were easier to test the waters and to try new things out, it would certainly grease the wheels. The easiest thing in this space is to replicate what has come

before - not just from a technology point of view but also from a licensing point of view; you can go to all the rightholders as they have done this sort of deal before and don't have to reinvent anything so you can pretty much get an off-the-shelf deal. When you are looking to launch a new type of model - and we are doing a lot more of that now - it's very difficult as it's like herding cats. You have to line everybody up - the labels, the publishers, the collectives - and you have to do that globally for a global service. Whenever you are coming up with a new and innovative model - which is part of what investors are looking to invest in, rather than just a me-too model - it's a lot more challenging.”

## What would make your life easier?

“This is such a hard industry to change because of the various dynamics and competing interests. In the US there has been talk of Section 115 reform; there was movement five or so years ago towards new legislation called SIRA [Section 115 Reform Act]. Something that simplifies the publishing licensing structure would, without a doubt, be helpful. One of the challenges that you have with the labels is that they have become

very focused on big guarantees for deals. On some level this is part of a weed out process to separate those who are serious from those who are not. On the other hand, it's so challenging to get all the pieces together to work in this space. One of the challenges is that you don't know where the next big thing is going to come from.”

## What will be the big changes in 2014?

“It is very difficult to imagine a successful one-size-fits-all model. Music, historically, has been much more one dimensional than other forms of IP, particularly films as there have been various windows and various ways that people view motion picture content. With music, as time goes on, what would help the industry would be to have a whole array of models that work for people.”





# Asia

## Asia-based music and entertainment lawyer (who wished to remain anonymous)

### What is the state of music law in Asia?

“We have been doing a lot of work with DSPs who have been looking to launch in the region. It’s pretty tough, I have to say. There are some countries where it is easier than others. For example, Hong Kong and Malaysia are pretty easy as the licensing is a one-stop and centralised. You could probably get a licence – subject, of course, to you having met certain advances – within three months. In other territories like Singapore, Korea and China, it is much harder. In Singapore, it’s quite a ridiculous situation for a territory of 5m people where they have not got their licensing regime sorted out. It’s a bit of a problem.”

### What are the challenges in China?

“Getting paid is still a problem. The process of licensing from the content owners themselves is a bit labyrinthine and time consuming. It is slow and cumbersome – rather than being impossible.”

### Is the Chinese government doing anything to help here?

“I think they have other problems, frankly. It is not at the top of their ‘to do’ list. In Korea, for example, the government has spent

a lot of time on this but unfortunately, by getting involved, they have slowed things down as they are now trying to legalise the operations of DSPs and have issued a whole raft of regulations purporting to – ironically – make the position clearer but have actually muddied the waters even further. Hong Kong, by contrast, is relatively easy.”

### What would you change to make your job easier?

“To make the licensing process more transparent and more homogenous. I struggle to understand why processes, rates and practices should be so different from market to market. We are not selling unique products. We are selling pieces of

music. I understand that they can be priced differently, but the process by which they are licensed should be made more transparent and less complicated. For services, the licensing should be the easiest part of the process. The hardest part of the process for them should be selling those services to the consumers. At the moment, from my perspective, they have to have pretty deep pockets and be very patient to go through it all. To launch in Asia, I don’t think you could do it within 18 months or two years. To me, that is ridiculous.”

### Is it stopping local services coming to market?

“It is more of a hindrance to the international

services. The local services have maybe got a more realistic view on things. There are some local offerings that are Taiwan-only or Taiwan- and Hong Kong-only that have perhaps a more realistic view of their roll out. The Asian markets are 40+ territories with different legal systems, different cultural sensibilities and different musical tastes. They are not one-size-fits-all in terms of the way they operate. The international players perhaps tend to forget that when they are looking to launch here. I think they are beginning to understand that.”

### Are Asian markets looking, post-Psy, to export their acts to the West?

“Much that I would love that Psy is leading a charge to export Asian music to the West, unfortunately I think it is a one-off. If, God forbid, YouTube had been around when ‘Agadoo’ or ‘The Birdie Song’ had been monster hits in Europe, I think they would also have had 1bn hits on YouTube. The quality of production, particularly for K-Pop, is fantastic. But will it translate to a Western market? I doubt it. There may be niche interest, but to have a genuine crossover, ultimately they will need to speak English and need to be perceived as more American or more European. That will be the way it goes. It will be very difficult to sell an indigenous artist to an American or a UK audience. I would love to be proven wrong.”

