



IP Watch™

Intellectual Property Law Alerts from Ober|Kaler's IP Group

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Intellectual Property Group

E. Scott Johnson, Chair
Royal W. Craig
Jonathan M. Holda
Anthony F. Vittoria
James B. Wieland
Cynthia Blake Sanders
Christopher F. Lonergo
Jed R. Spencer
Kyle E. Conklin

Carlyle C. Ring, Jr.
(Counsel)

IN THIS ISSUE: *Even amid the most recent negative earnings announcements from the major video game and equipment manufacturers, the video games industry has proven remarkably resilient from our economic downturn. In fact, most analysts tend to remain bullish on the sector in general. Maryland and the Mid-Atlantic region have grown to be a significant location for video game and related companies to be headquartered. Our news items feature some of the most recent additions to this already vibrant industry. Ober|Kaler's unique skill set and expertise have allowed it to provide counsel to video game companies on a variety of intellectual property and business concerns. In addition to advising individual video game developers, Ober|Kaler attorneys sit on industry group boards, interact with governmental agencies focused on the sector, attend relevant seminars and stay current with industry news. The articles in this issue of IP Watch provide a brief overview of two issues that have been of heightened interest recently.*

Music Wins Gold in Video Games

E. Scott Johnson
410-347-7388
johnson@ober.com

The video game market presents exciting opportunities to promote music and artists to new audiences. Video game exposure can result in follow-on opportunities (e.g., a popular video game could be made into a motion picture, requiring re-licensing of the music), and allow recording artists to engage with fans in compelling new ways. Consequently, publishers, songwriters, record companies (i.e., copyright owners) and recording artists are working hard to get their music into video games.

For example, *D.J. Hero*, developed by FreeStyleGames and due out this fall from Activision (*Guitar Hero*), will feature a turntable-shaped controller for PlayStation 3, X-Box 360 and Wii, and feature tracks by Jay-Z, Eminem, and 50 Cent, with a special edition to include new greatest-hits CDs from Jay-Z and Eminem. Jay-Z was recently quoted in *U.S.A. Today*: "I have a ton of content, just need the pipeline. I love the freedom of (*DJ Hero*). I could wake up tomorrow morning with an idea for a song, call the guys at Activision and start working on getting it out."

Even the Beatles, notoriously resistant to licensing their recordings to iTunes for digital download, entered into a major video game deal in late 2008, setting the stage for the use of Beatles tracks in the *Rock Band* video game. Recording artists have even provided voices as actors for video game characters, as in *Grand Theft Auto: San Andreas*, which features rapper Ice-T as in-game rapper Mad Dogg and George Clinton as the "The Funktipus" on the radio station Bounce FM.

Along with ring tone/master tone licensing, video games are one of the new media

revenue opportunities for music publishers and record companies, sorely needed given the decline in revenues from CD sales. There are many competing suppliers of video game music — from stock music houses with specialized catalogs of music for video game developers on a budget, to new media specialists at major music publishing companies. Music in Sid Meire's *Civilization IV* video game includes works of Bach, Beethoven, and Purcell, all composers whose music is firmly in the public domain (i.e., "free"), and thematically appropriate for the *Civilization* video game. Of course, sound recordings of those musical compositions must be licensed or commissioned, presenting income opportunities for owners of classical music sound recording catalogs, or for musicians who perform classical music on new commissioned recordings. As in film, the cost of commissioning original music for a video game can range from low-budget local band productions, to big-budget, major orchestral scores composed and produced by well known film/television composers.

Video game licenses have typically involved a flat-fee "buyout" payment for the use of music. Video games such as *Grand Theft Auto* that use many tracks, cap license fees, with a "ceiling" on what is offered for each song. While flat fee licenses are common, interactive music games such as *Guitar Hero* and *Rock Band*, where specific song selections are crucial to the success of the games, present more lucrative licensing opportunities. Such interactive music performance game licenses typically involve both a fixation/synchronization-type fee to include the song in the game, as well as royalties on sales, such as in game downloads. The way music is used in video games varies, and affects both the nature of the license required and the license fees paid. Interactive music performance games such as *Guitar Hero* rely on well known recordings of popular songs, while other games use music more for generic background, which can make the musical content seem more fungible and thus less expensive to license.

When licensing a pre-existing song for use in a video game, a license akin to a synchronization license for the use of music in a motion picture must be secured. While a synchronization license refers literally to the synchronization of sound with video images as in a linear audiovisual work, e.g., a television program or motion picture, the interactive nature of a video game requires a more careful delineation of the potential means of reproduction, distribution and public performance of the game. If the music will be publicly performed or distributed in downloads, the scope of license would encompass public performance and digital delivery, rights which would not be required in a license to include the music on video games embodied in physical media, such as CD-ROMs. The video game license will specify the product platforms licensed, with the licensor focused on restricting the license to specific product platforms, e.g., Nintendo Wii, Sony PlayStation 3, while the licensee seeks the broadest license terms: e.g., "all manner and media now or hereafter known". For games accessed, distributed or played on-line, the license grant should address whether the music as embedded in the game will be distributed via the Internet, wireless devices, personal digital assistants and mobile telephones, as well as whether "updates to such platforms, devices and methods of distribution" are covered.

The fees for licensing pre-existing songs are negotiated based on the same key factors taken into account when licensing music for film and television: value of the sound recording copyright and the song copyright (e.g., hit songs command higher fees than lesser known songs) and prominence of the use in the game, but most importantly the nature of the video game itself. Video games that promote new songs and artists can affect the size of the license fees.

Even though video game sales revenue now exceeds motion picture box office receipts, the license fees paid for the use of original music in video games tends to be lower than fees paid for comparable uses in major motion pictures. Whether video game licenses ever generate revenues on a par with synchronization licenses for television and film productions remains to be seen, but it is clear that video games have become an important media for exploiting music and sound recording copyrights, and for promoting artists to new audiences.

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