PROLOGUE: THE KING IS DEAD

On June 25, 2009, some of the earliest notes of man-made music echoed from the recesses of a cave in southwestern Germany, when archaeologists reported discovering flute fragments fashioned more than 35,000 years ago from vulture bones and mammoth ivory.¹ Scholars can only speculate as to what drove a cave-dwelling Neanderthal to design, craft, and perform on a musical instrument. Was it a non-communal, anonymous impulse, an individual way to satisfy an urge for creative self-expression? Or perhaps a means of connecting with his community in ceremony, ritual, or celebration? One thing is certain: It was not a commercial endeavor, for it would be thousands of years before modern man made the art of music into a business.

Later the same day the reports came streaming in: Michael Jackson was dead at age fifty. The passing of the self-proclaimed “King of Pop” was a massive global event. Networks groaned under the weight of news coverage, rumor, commentary, and tributes, not to mention the commerce, with Jackson becoming (posthumously) the first artist to sell more than one million digital song downloads in a single week. Fans also flocked to purchase Jackson’s songs in more traditional formats, sending compact disc versions of his albums again to the top of the charts.

If an anonymous cave man fingering the notes of his handmade flute marked the humble, solitary beginnings of popular music, the death of Michael Jackson represented an endpoint of sorts—not of music altogether, of course, but of an era in the music business when small cadres of talented and well-promoted artists dominated the marketplace: the global superstars who fed the beast of the modern music industry. As one commentator put it, the commercial reaction to Jackson’s death was “a clear reminder of the sort of sales that were possible before technology and choice fractured the listening public into a million little niches, when the mainstream still ran strong.”²

Jackson came of age in a time when recorded music was still a physical “product”—a recording made at the expense and under the close supervision of a

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corporation that owned the resultant art, had the means to create demand through heavy promotion, and, significantly, controlled the distribution of those physical objects of music entertainment (in Jackson’s day, vinyl discs, tapes, and later CDs) to music retailers to complete the final link in the chain by selling to consumers. It was an opaque industry, controlled by monolithic corporations that could afford to remain blissfully disconnected from their ultimate customers. These so-called major music labels, along with a small class of recording superstars like Jackson, and the songwriters and music publishers who supplied raw material in the form of songs, were the major beneficiaries of the late twentieth century business of music.

But a new century had arrived, and in 2009 the mainstream no longer “ran strong.” A decade had passed since digital music storage and file-sharing software combined to disrupt business as usual by taking the “physical” out of music product, enabling anyone with an Internet-linked computer to access and share—that is, “distribute”—music. “Disintermediation” had come to the music business, sending shockwaves through the industry.

Even the likes of U2, one of the world’s premier rock bands, felt the effects of the new music economy. In March 2009, U2’s No Line on the Horizon went to No. 1 in the U.S. but, despite a massive marketing blitz, sold less than 60 percent of its predecessor, 2004’s How to Dismantle an Atomic Bomb. Few were surprised. Regardless of its artistic merit, the release entered a music retail environment that was a shadow of its former self, the latest example being the announced closing of the remaining six Virgin Megastore locations in the United States. At peak activity there had been twenty-three stores—true music “destinations” with events, star-studded promotions and rows of deep music catalog—generating $230 million in annual sales. Revenue had since dropped to $170 million, leaving the real estate venture that owned the chain to search for higher rents from new, non-music tenants. Moreover, repeating what had become a regular occurrence for star-level artists, U2’s latest release had “leaked” onto file-sharing networks pre-release, where hundreds of thousands of perfect digital copies were snapped up, without payment, before the music was available in stores or through “legitimate” online channels.

The business of selling recorded sounds was not what it used to be, calling for more creative approaches to marketing, in some cases through the mass-retail chains that commanded an increased share of a dwindling retail market. Following a trend established at Walmart by the Eagles and AC/DC, proudly independent artists Pearl Jam and Prince announced that their latest releases would be available exclusively at Target stores. Prince had earlier raised the ire of his distribution partners by giving away CDs with concert tickets and bundled into newspapers, the latter as a means of promoting his series of sellout performances at London’s O2 Arena. Others adopted similar tactics, “giving away” recorded music in the name of promotion. Fans who purchased a $15 “membership” to the rock
band No Doubt’s reunion tour received free downloads of the band’s entire eight-album catalog, along with other perks. And up-and-coming artists discovered that giving away downloads through Web sites and social networking portals had the effect of increasing sales of those same tracks through retailers such as the Apple’s iTunes store, which as of August 2009 was responsible for a full 25 percent of all recorded music sales in the U.S. The line between merely promoting and actually selling music had become blurred.

In the same post-Napster decade, music licensing had taken on a new complexion as well. The placement of songs—in television and film productions, and in advertising—had gone from a stigmatized afterthought to a royalty-generating and promotional strategy sought after by nearly every recording artist, label, songwriter, and publisher. At the time of Michael Jackson’s death, the Jackson 5’s 1970 No. 1 hit, “I’ll Be There,” was getting new exposure as the soundtrack to a State Farm Insurance commercial, the latest example of a trend established by the 1999 pairing of Sting’s “Desert Rose” single with Jaguar, a synergistic placement widely credited with jump-starting the sales of the artist’s Brand New Day release, and repositioning Jaguar as a Baby Boomer brand. The placement opened a floodgate of licensing activity, lending credibility to a practice followed in subsequent years by nearly every major act. For emerging artists, a national advertising placement became a Holy Grail of sorts, its promotional strength at least as valuable as royalty dollars.

Faced with recorded music revenues that had been cut in half to $6.3 billion over the course of a decade, music content owners—the labels who owned recordings, and the music publishers holding rights in underlying songs—pursued legal strategies intended to protect their interests. Record labels the world over flexed their legal muscles in the form of copyright infringement suits, attempting to stem the file-sharing tide. In the spring of 2009, a Swedish jury returned a guilty verdict in music labels’ latest litigation against a file-sharing platform, The Pirate Bay, handing down prison terms to company founders and levying a $3.5 million fine. International music trade group IFPI CEO John Kennedy, a trial witness, said the case “was about defending the rights of creators, confirming the illegality of the service and creating a fair environment for legal music services that respect the rights of the creative community.”

Closer to home, the labels’ powerful lobbying arm, the Recording Industry Association of America (RIAA), touted court victories over other file-sharing platforms, and also in trials against two individual users. In what was widely regarded as a public relations disaster, the RIAA was nearing the end of a massive copyright litigation campaign in which it sued more than 30,000 of its own customers for file-sharing infringements. Most cases settled quickly for a few thousand dollars,

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3. According to a Forrester Research Forecast, based on RIAA numbers, the United States recorded music business fell from a high of $14.6 billion in 1999 to $6.3 billion in 2009, a 56% decrease.
but an occasional defendant refused on principle, and in early 2009 two cases came to trial. In the first case, Boston College student Joel Tenenbaum was found liable for willfully infringing thirty recordings, resulting in a $675,000 jury verdict, an eye-opening award of $22,500 per song.\(^4\) The news was even worse for Minnesota homemaker Jammie Thomas-Rasset, whose unprecedented third file-sharing retrial resulted in yet another jury verdict of liability, this time for $1.5 million, $62,500 for each of twenty-four songs.\(^5\) Debates raged over the industry’s heavy-handed strategies, raising the larger question of whether the copyright system itself was “broken,” too archaic to keep up with technical advances, and unable to strike the proper balance among content owners, artists, technologists and fans. But the legal bottom line was clear—copyrights were routinely upheld against the unauthorized commercial use of music.

Meanwhile, 2009 witnessed the meteoric rise of another “legitimate” digital music provider. Spotify, an advertising-supported music streaming service initially available only in Europe, quickly surpassed six million users, coaxing investments from each of the four major labels—Warner Music Group, EMI, Universal, and Sony Music Entertainment—as well as a consortium representing the independent music community. Spotify’s supporters declared that the future of the music industry depended on moving from one primary source of revenue—CDs—to many different revenue streams, including new forms of Web-enabled broadcasting, paid for indirectly through advertisers, directly by consumers in the form of subscription fees, or, in the case of Spotify, both.\(^6\) In the meantime, similar services were gaining traction (and RIAA’s lawyers’ attention) in the race to put music “in the cloud,” dispensing music “as a service,” instead of a physical product.

In this arena, and in the United States in particular, the recorded music industry was playing catch-up with music publishers—the owners of underlying songs—who had long enjoyed a larger bundle of copyrights, and consequently more streams of revenue, particularly in the all-important realm of “public performance,” such as broadcasting. Indeed, in August 2009 BMI, a major collecting agency representing more than 400,000 songwriters, composers, and music publishers, announced its twenty-fifth consecutive year of growth, gathering more than $905 million in revenue based on the public performance of its members’ songs in all media—traditional radio, television, cable, satellite, and the Internet. Along with its counterpart and competitor, ASCAP, these performing rights organizations collected an unprecedented $2 billion on behalf of their constituents.

\(^4\) The award was later declared unconstitutional by the trial judge, who reduced it by 90%. Both sides appealed. See Capitol Records, Inc. v. Thomas-Rasset, 799 F. Supp. 2d 999 (D. Minn. 2011).

\(^5\) The presiding judge declared the verdicts excessive, reducing the third award to $54,000—$2,250 per song. The RIAA appealed the reduced award and other aspects of the case going back to 2008. See Sony BMG Music Entm’t v. Tenenbaum, 721 F. Supp. 2d 85 (D. Mass. 2010), aff’d in part, vacated in part, rev’d in part, 660 F.3d 487 (1st Cir. 2011).

\(^6\) Spotify made its much anticipated U.S. debut in the summer of 2011.
On the other hand, SoundExchange, a much newer collecting agency working on behalf of the owners of sound recordings (labels and recording artists), collected just over $100 million in 2009, based on a less generous right of public performance that applied to digital broadcasting only. As 2009 wore on, American labels and artists continued their long battle for broader rights, pressing Congress to pass the Performance Rights Act, designed to create an additional revenue stream based on traditional terrestrial radio broadcasting, in addition to digital performances. As it had done before, the National Association of Broadcasters dug in its heels, labeling the initiative a “performance tax” that would decimate radio stations and disrupt the “symbiotic relationship” the broadcasting and recorded music industries had known for decades. In the process, a seemingly endless series of hearings and debates focused again on the value of recorded music, and whether, and how much, broadcasters should be required to pay to use recordings in various forms of broadcast media.

What kind of music industry had Michael Jackson left behind? At the end of the first decade of the twenty-first century, the business of music was a roller-coaster ride of trends and countertrends, apparently adrift in a sea of controversy and unending litigation, facing an uncertain future.

The goal of this book is to provide context and clarity amidst the chaos of these moments. To do so, we explore the history of music and copyright in the United States, revisiting earlier watershed periods in which technology disrupted the industry, only to create long-term opportunities for growth. As we shall see, many of the current issues and challenges are not new at all, but rather variations on themes that have played themselves out in the not-so-distant past. We look back at the artifacts of American music copyright, representing the resolutions of earlier debates concerning music as both art and commerce, seeking guidance from earlier tugs-of-war between creators, business people, and the consuming public.

At the end of the day we will find ourselves within sight of the Celestial Jukebox, an idyllic future in which music lovers expect to enjoy unfettered, on-demand access to the entire universe of recorded music, at any time, through any device, at a reasonable cost. The lessons of the past hold the potential for a beautiful future where creative artists have incentive to bring music to life, in alignment with the commercial interests who transform art into commerce, serving the passionate devotees who form the most important link in the chain running from Neanderthal caves to Michael Jackson and beyond—technology-empowered fans, for whom music transcends commerce to form bonds, organize communities, and create shared histories that are the common threads in the fabric of our lives.