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NEWSLETTER

An Entertainment Industry Organization

CALIFORNIA COPYRIGHT CONFERENCE

What's the Score?
Musical Composers' Rights in Game Deals.

Jim Charne

The President's Corner

David Hirshland

I would like to wish everyone a "HAPPY NEW YEAR"

We are looking forward to a number of exciting programs in 2007.

Best wishes,

David Hirshland President

Until as recently as 2001 or so, there was almost no reason to consider issues relating to composers' deals in game development.

That's because until the emergence of the last generation of console hardware systems, musical underscore was not a material factor in games.

Way back in the pre-historic game days (the 1980's), when the Atari 2600 was nearly the only game in town, no one expected much more than blips and bloops to emit from a game.

Early console hardware systems did not have music synthesis capability or sufficient computing power to pull it off. For example, the Atari 2600 had limited audio capability and was not even able to reproduce all 12 true tones of a musical scale. (If you ever get a chance, look for "Pressure Cooker," an early Atari 2600 game from Activision and visionary designer Garry Kitchen that does attempt a musical "score" – it is a short repeating tune composed using only the eight true tones in the musical scale that could be coaxed out of the 2600! "Pressure Cooker" was composed by New York City musical director, Stephen Gaboury.)

As newer systems became more powerful, their audio capability evolved; but the focus remained on more realistic sound effects. Only in the last generation of console hardware – the PlayStation 2 / Xbox / Game Cube generation - did we finally see systems with the horsepower and on-board hardware needed to present a fully formed musical score as an enriching element of the game playing experience.

As a practitioner working in the software games industry since the earliest Atari days, I have had the opportunity to watch the business models and practices of our industry form and evolve. Primarily, in the console games business, these practices came over, and were adopted, from the recorded music industry.

Computer game code is most often treated the same as master recordings in the recorded music industry.

Each is seen as work for hire, with game developers agreeing that "from the moment it is fixed in any tangible form of expression, the end product and all intermediate embodiments will be treated as a work made for hire specially commissioned for use as a part of an audio-visual work with the (game publisher) as the employer for hire."

Any music embodied in a game is treated as just an other part of that integrated audio-visual work.

In one important way, composers and performers of game music have been at a disadvantage when compared with their counterparts in the recorded music industry. Recording artists may earn royalties if they recoup recording costs. Recording artists may earn performance royalties, mechanical royalties, and other music publishing income, from exploitation of their own musical compositions.

But music score in games, even if performed by the composer, is generally treated as work-for-hire and all rights are forfeited. Except in rare circumstances, there is no contractual differentiation of the composition from the performance, and there is no consideration given to the composer or performer apart from the overall game.

Game royalties may be earned after recoupment of production costs by the developer (which is an increasingly unlikely circumstance!), but the score is only a small part of the larger overall work. Like the musical score of a motion picture, it is a discrete work that is subsumed into the whole. The composer will be paid a fee; but under prevailing games industry practice, no further income will be forthcoming.

However, the games industry may be approaching a crossroads. Contracting practices evolved from music industry models; but these days, the organization, costs, staffing, and economics of console game development more closely approximate feature film production.

In a recent interview, Namco Bandai President Takeo Takasu stated that any game the company makes for the Sony PlayStation 3 needs to sell 500,000 copies before it will turn a profit. The high cost of development (an average of $8.6 million per game) resulted in the high sales target the company must reach." (http://gamasutra.com/php-bin/news_index.php?story=11909.

While games are treated as works-for-hire, ownership rights are no longer monolithic. There are some elements of code that developers do not hand over. Game developers and their counsel fought the battle years ago to reserve rights to their tools and underlying technology. In a modern game dev agreement, developer's technology (however that may be defined – it is a hotly negotiated issue) is reserved to the developer, subject to a broad license grant to the game publisher.

This may provide an opening for composers looking to preserve rights in their music. Composers may want to look to a motion picture model that is increasingly relevant to the modern day console development/ production business.

Like game score composers, motion picture composers frequently work for a fixed fee, and assign all rights to their music to the motion picture producer or studio. But unlike the current situation in the games industry,

through diligent negotiation, motion picture composers may reserve rights to receive performance income and a portion of income generated from uses of their music that is ancillary from its use in the motion picture.

We have known for well over 100 years that music has a very long life apart from its original application. Popular songs from the 1960's (or earlier) regularly turn up in advertisements and movies. Hit Broadway shows are based on music from the 1930's or before. Abba, a pop group from the 1970's, has had "Mama Mia," a hit show featuring only its songs, running all over the world for many years.

There is no reason not to believe that certain iconic compositions integrated into game score would not have a similar afterlife. Who would disagree when I predict a Broadway show based on "Halo" that could open as early as 2010?

It is only a matter of time before a musical composition and performance breaks out of a console game and becomes a huge international hit ---- like the motion picture theme from "Chariots of Fire" by Vangelis in 1981, and numerous examples since then.

But under current games industry practice, the creator of that work would not share in any of the income earned from this use.
It is our job as counsel to see that would not be the case.

Learning from motion picture industry models, game composers and their counsel should, at a minimum, reserve the right of the composer to register the work with his or her performing rights society so he or she can be paid for performances. This represents no loss to the game publisher who can not collect the composers' share.

Uses of the music that are ancillary to the game should also be compensated. There is no reason why the composer should not receive as good a deal as a staff writer at a major music publisher. This means "writer's share" for all exploitation of the compositions should be accounted and paid to the composer.

If the composer is also the performer (lots of game scores are created in the composer's home studio), he or she should be identified as the "artist" in all instances of use of the master recordings, and paid as the performer, conductor, or arranger at music industry rates in any case where the master recordings are sold, downloaded, licensed, or otherwise utilized apart from the game.

Music has a history of its own as a unique element of entertainment properties. Game publishers, who have come late to the business, either do not understand the course of dealing, or choose to ignore it for their own benefit.

But by engaging these issues when negotiating on behalf of our composer clients, and by taking time to educate, I believe that composers and performers of game score music can get better deals and share in the ongoing and future success of their work.

Jim Charne is a Santa Monica-based lawyer whose monthly column, "Famous Last Words," discussing software games legal and business topics, appears at igda.org/columns/lastwords.

By Jim Charne