Pace Intellectual Property, Sports & Entertainment Law Forum

Volume 6
Issue 1 *Spring 2016*

Article 11

April 2016

Copyrightability of Music Compilations and Playlists: Original and Creative Works of Authorship?

Marc A. Fritzsche

Follow this and additional works at: http://digitalcommons.pace.edu/pipself

Part of the Entertainment, Arts, and Sports Law Commons, Intellectual Property Law Commons, and the International Law Commons

Recommended Citation

Marc A. Fritzsche, *Copyrightability of Music Compilations and Playlists: Original and Creative Works of Authorship?*, 6 Pace. Intell. Prop. Sports & Ent. L.F. 258 (2016).
Available at: http://digitalcommons.pace.edu/pipself/vol6/iss1/11

This Article is brought to you for free and open access by the School of Law at DigitalCommons@Pace. It has been accepted for inclusion in Pace Intellectual Property, Sports & Entertainment Law Forum by an authorized administrator of DigitalCommons@Pace. For more information, please contact cpittson@law.pace.edu.

Copyrightability of Music Compilations and Playlists: Original and Creative Works of Authorship?

Abstract
Music compilations and playlists have a common nucleus of an act of gathering songs and ordering them. Their selection and arrangement can be decisive of the success and therefore can be valuable. And here is where the legal issues about their ownership arise: Are music compilations and playlists protectable under the regime of Copyright Law? This article will discuss the legal and practical issues connected with that question. Thereby, it will consider the United States, Europe in general and also the United Kingdom and Germany in particular. The individual legal systems and statutes will be analyzed, as well as the comprehensive jurisprudence. Finally, the most recent developments in the matter will be discussed.

Keywords
music, compilations, playlists, copyright

This article is available in Pace Intellectual Property, Sports & Entertainment Law Forum: http://digitalcommons.pace.edu/pipself/vol6/iss1/11

PACE INTELLECTUAL PROPERTY, SPORTS & ENTERTAINMENT LAW FORUM

VOLUME 6 SPRING 2016 NUMBER 1

COPYRIGHTABILITY OF MUSIC COMPILATIONS AND PLAYLISTS: ORIGINAL AND CREATIVE WORKS OF AUTHORSHIP?

Marc A. Fritzsche, Ph.D., LL.M.

TABLE OF CONTENTS

INTRODUCTION **258**

I. COPYRIGHTABILITY IN THE UNITED STATES **259**

II. THE EUROPEAN APPROACH **262**

A. COPYRIGHTABILITY IN THE UNITED KINGDOM 264

B. COPYRIGHTABILITY IN GERMANY 268

III. RECENT DEVELOPMENTS IN THE UNITED STATES **269**

CONCLUSION **271**

INTRODUCTION

"Music defies age, occupation and culture. It connects us to memories, moments and each other."[1] With music having become part of our lives more than ever, legal issues and questions have increased, especially in the digital media world that we see today. For example, "classic" copyright infringement has come a long way from unauthorized physical copies of records, tapes and Compact Discs to internet related music piracy via illegal file sharing. However, new legal issues, such as the question of ownership and copyrightability, occur with today's increasing popularity of compilations and playlists, especially in the context of online music streaming services.

---

1. *See* RIAA, available at http://riaa.com/media/F39C4C51-0714-035C-3663-0A64B91F86DA.pdf (last viewed Apr. 13, 2015).

For a better understanding, it is helpful to first define compilations and playlists. A compilation is defined as "a group of things (such as songs or pieces of writing) that have been gathered into a collection".[2] Music compilations appear in an extensive variety. For example, there are single or group artist themed compilations, such as "Greatest Hits" or "Best of", various artist themed compilations, such as Christmas songs or romantic songs, various artist genre compilations, such as dance, rock, jazz and many more.

By definition, a playlist is "a list of recordings to be played on the air by a radio station; *also*: a similar list used for organizing a personal digital music collection".[3] While radio playlists are the "classic" versions of playlists, the second part of the definition mirrors the development to a digital music age. For example, in today's social media and cloud computing world, online music streaming services have become immensely popular. They allow their customers to arrange songs to their taste at will and share those playlists with others. The important role of playlists and internet music streaming services in today's digital music market will be explained in further detail later in this article. However, there are still DJs' playlists, also known as "livesets", performed in front of an audience, or even on the radio.

So, music compilations and playlists have a common nucleus of an act of gathering songs and ordering them. Their selection and arrangement can be decisive of the success and therefore can be valuable. And here is where the legal issues about their ownership arise: Are music compilations and playlists protectable under the regime of Copyright Law?

This article will discuss the legal and practical issues connected with that question. Thereby, it will consider the United States, Europe in general and also the United Kingdom and Germany in particular. The individual legal systems and statutes will be analyzed, as well as the comprehensive jurisprudence. Finally, the most recent developments in the matter will be discussed.

I. COPYRIGHTABILITY IN THE UNITED STATES

Firstly, the United States Copyright Law shall be considered. Pursuant to Section 101 of the Copyright Act of 1976, "[a] "compilation" is a work formed by the collection and assembling of preexisting materials

---

2 *See Compilation*, MERIAM-WEBSTER.COM, http://www.merriam-webster.com/dictionary/compilation (last viewed Mar. 7, 2015).

3 *See Playlist*, MERIAM-WEBSTER.COM, http://www.merriam-webster.com/dictionary/playlist (last viewed Mar. 7, 2015).

or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship."[4] Whether a music compilation or playlist falls under this statute, has not yet been decided. There are cases, in which data and preexisting materials played the major role. In *Feist Publ'ns, Inc., v. Rural Tel. Serv. Co.*,[5] the Supreme Court held that, in a telephone book, alphabetical listings of names, accompanied by towns and telephone numbers are not copyrightable, because "it lacks the modicum of creativity necessary to transform mere selection into copyrightable expression."[6] Unlike other courts, the Supreme Court did not reward *Feist* with copyright protection for "hard work that went into compiling facts."[7] (known alternatively as "sweat of the brow" or "industrious collection" doctrine, internal citations omitted). Rather, the constitutional requirement of originality and some creative spark were necessary to qualify for copyright protection.[8] Original means an independent creation by the author with some minimal degree of creativity.[9]

In *Mason v. Montgomery Data, Inc.,* 967 F.2d 135 (5th Cir. 1992), the Appellate Court found that the disputed maps can be drawn in a variety of ways, depicting various expressions which are separable from the underlying idea and therefore, are copyrightable.[10] It also concurred with *Feist* that if the selection, coordination, and arrangement of the information are sufficiently creative to qualify as a creative expression, compilations of factual data are copyrightable.[11]

Even after considering those two cases, it remains uncertain whether the act of compiling songs or arranging a playlist fulfills these criteria. In support thereof, one could argue that it requires at least some low level of creative effort to select certain songs and put them into a certain order when the motivation is something beyond mere genre or style related gathering. Rather, it is a way of expressing a mood or a feeling in some creative way. For example, one compiles Mozart with Metallica.

But there is a line drawing problem: When could we speak of a transformation from mere selection into copyrightable expression? How many songs need to be selected and arranged to reach that creative threshold?

On the contrary, one could argue with the Supreme Court in *Feist* that compilations and playlists are just an arrangement of preexisting

---

4. 17 U.S.C. § 101.
5. Feist Publ'ns, Inc., v. Rural Tel. Serv. Co., 499 U.S. 340 (1991)
6. *Id.* at 362.
7. *Id.* at 352
8. *See Id.* at 345 – 346.
9. *See Id.* at 345.
10. *See Id.* at 138 – 139.
11. *See Id.* at 141.

materials or data. Under *Mason*, the maps could be drawn in a variety of ways, establishing a creative expression. So, can a music compilation or playlist be depicted in different ways? The answer is no, because basically, it is a list. And, whatever category, style or genre the arrangement falls under, there generally is a dominating logical element of order in it that withdraws any approach of creativity. For example, "Greatest Hits" are logically the commercially most successful songs. A playlist of "Workout Music" is logically some kind of upbeat, motivating sort of music. Looking at "the resulting work as a whole" requirement[12], in compiling songs, there is not enough of a creative leap above an alphabetical order of names and phone numbers to grant protection under 17 U.S.C. § 101.

Furthermore, it could be argued that the selection falls under the "sweat of the brow" doctrine and is merely a necessary work process. And, that the arrangement has to be made somehow anyway, thus just being a necessary and logical step in order to get a compilation or playlist. Additionally, under a policy rationale, some substantial concerns should be taken into account: Granting a copyright to everyone who selects and arranges songs in a certain order to express themselves creatively would cause an unmanageable amount of monopolies (assuming that the threshold of an original work of authorship was reached). And, it is unlikely that society would benefit from millions of, if not more, "thin" copyrights, which would be granted for the life of the "author" plus 70 years. Furthermore, would people even notice "infringements" if, for example, their instantfm.com[13] playlist was mimicked by others? Probably not. Would it cause any harm or damage? Probably neither. But even if so, would the dynamic costs of legal actions justify the protection of such a low level of creativity? Probably not.

But what if the playlist or compilation was beyond private use? What if it had an actual commercial value (assuming that people's only motive for purchasing a compilation, buying tickets to a DJ performance or listening to a specific radio station was the selection of the songs itself and their arrangement)?

Under the statutory "originality" requirement of 17 U.S.C. § 101, the commercial value seems to be secondary. But tailoring the protection towards commercially valuable acts of compiling music corresponds with the idea of U.S. Copyright Law protecting primarily the author's economic rights[14].

However, for example, a DJ "liveset" is already protected under 17 U.S.C. 106 (4) as a public performance. Is an additional protection just for the selection and arrangements of the songs necessary? And,

---

12. *See supra*, fn 3.

13. Instantfm.com, is a website that allows users to easily and quickly make and share their own playlist of music.

14. *See* 17 U.S.C. § 106.

rewarding the invested work would, again, fall under the "sweat of the brow" doctrine, not granting Copyright protection.

Overall, a Copyright protection for music compilations and playlists under the current U.S. Law is unlikely.

II. THE EUROPEAN APPROACH

The European Community sought to harmonize the Copyright Laws of its member states to reconcile diverging standards within the Community.[15] On 11 March, 1996 the European Parliament and Council Directive 96/9 on the Legal Protection of Databases was passed. This European Database Directive "struck a compromise by offering two tiers of protection – one for original, creative databases that satisfy the "intellectual creation" standard and the other for non-original, noncreative databases that meet only the lower "sweat of the brow" standard."[16] So, contrary to the U.S., in Europe the "sweat of the brow" doctrine still exists.

The initial question is as follows: Does a music compilation or playlist even qualify as a database? Article 1.2 of the Directive states: "… 'database' shall mean a collection of independent works, data or other materials arranged in a systematic or methodical way and individually accessible by electronic or other means." A music compilation or playlist, whether on a CD or in electronic form, consists of a collection of independent works, is arranged in a certain way and is also individually accessible by electronic or other means, and therefore can be qualified as a 'database'.

The next question would then be again the one of originality and creativity, which leads to the same considerations as stated above in the U.S. context.[17] But maybe music compilations and playlists could be subject to the "sui generis" protection under the Directive, not requiring creative expression?

Pursuant to Article 7.1 of the Directive, "[m]ember states shall provide for a right for the maker of a database which shows that there has been qualitatively and/or quantitatively a substantial investment in either the obtaining, verification or presentation of the contents to prevent extraction and/or re-utilization of the whole or of a substantial part, evaluated qualitatively and/or quantitatively, of the contents of that database."

---

15. JOHN T. CROSS, AMY LANDERS, MICHAEL MIRELES & PETER YU, GLOBAL ISSUES IN INTELLECTUAL PROPERTY LAW 108 (2010); *See* also http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31996L0009&from=DE (last viewed Apr. 12, 2015).

16. Cross *supra* n. 8 at 108.

17. *See* supra, II.

Firstly, the purpose of the protection by the sui generis right "is to promote the establishment of storage and processing systems for existing information and not the *creation* of materials capable of being collected subsequently in a database."[18] "That interpretation is backed up by the 39th recital of the preamble of the directive, according to which the aim of the sui generis right is to safeguard the results of the financial and professional investment made in 'obtaining and collection of the contents' of a database."[19]As music compilations and playlists operate with existing information, there is no contradiction with the purpose of the sui generis right. But, though the term "investment" includes "any investment whether of financial, human or technical resources"[20], it is highly questionable whether that investment in either the obtaining, verification or presentation of the contents in a music compilation or playlist can be considered "substantial". Compared to *British Horseracing Board Ltd. v. William Hill Organization Ltd.* (where compiling the data was carried out by about 30 people and running the database cost about £ 4 Million per year), the resources to create a music compilation or playlist are negligibly small.

However, the 19th recital of the preamble states that "[w]hereas, as a rule, the compilation of s*everal* (emphasis added) recordings of musical performances on a CD does not come within the scope of this Directive, both because, as a compilation, it does not meet the conditions for copyright protection and because it does not represent a substantial enough investment to be eligible under the sui generis right."

Keeping in mind that the Directive was passed in 1996, when the Compact Disc was the most common sound recording medium, and music streaming services and cloud computing were yet far away in the future, it seems only logical that today's playlists, which are basically "electronic versions" of CDs, are also meant to be comprised by the 19th recital, though not explicitly mentioned. The only difference between the two things is the storage medium. Two decades ago, it was a tangible medium. Today, music is mostly stored electronically, because, inter alia, it is more convenient, more efficient, and allows for higher sound recording quality. Notwithstanding the foregoing, the term "several" is crucial. Because of its vagueness, there is no determinable number of recordings of musical performances that (in addition to the necessary creative spark) could reach

---

18. JOHN T. CROSS, AMY LANDERS, MICHAEL MIRELES & PETER YU, GLOBAL ISSUES IN INTELLECTUAL PROPERTY LAW 114 (2010), discussing Article 7 in connection with British Horseracing Board Ltd. v. William Hill Organization Ltd., European Court of Justice (Grand Chamber), Case C-203/02, 2004 E.C.R. I – 10415 (emphasis added).

19. *Id.*

20. *See The Implementation and Application of Directive 96/9/EC on the Legal Protection of Databases*, NAUTADUTILH FINAL REPORT 199, available at http://ec.europa.eu/internal_market/copyright/docs/databases/etd2001b53001e72_en.pdf, *199 (last visited Apr. 12, 2015).

the threshold necessary for database protection. By definition, "several" means "more than two but not very many"[21]. So one can only speculate. Even if one assumed that the storage capacity of a CD (assuming that "a" means one and is not just meant exemplary) was once intended to determine the maximum, there would still be an undetermined range between" more than two" and what a CD can hold.

Additionally, today's music consumption is different than in the past. Playlists are more extensive, exceeding the storage space of a CD by far. And, music is more affordable and accessible, people's music collections are bigger, and, the music market is even faster moving.

The question remains if there is a way to get Copyright protection for the act of compiling music and creating playlists outside of the database context. The following case in the United Kingdom might bring some clarity.

A. Copyrightability in the United Kingdom

In 2013, in the case *Ministry of Sound v. Spotify*, the High Court in London was confronted with the question of copyrightability of music compilations and playlists.

Spotify is a music streaming service originating from Sweden. It allows "users to browse or search a catalog of over 20 million songs and play them at will".[22] "Spotify generates its revenue from ad sales and through paid subscriptions to its ad-free "Premium" service."[23] "Spotify also has a social media component, allowing its users to "follow" one another, share what they listen to, and subscribe to other users' playlists."[24] The feature of playlist-sharing brought Spotify the lawsuit.[25] In September 2013, a very successful dance music record label from the United Kingdom called Ministry of Sound (with more than 50 million album sales in the past 20 years[26]) sued Spotify for Copyright infringement.[27]

Ministry of Sound regularly releases compilation albums containing collections of hits from various artists. [28] Spotify users were

---

21. *See Several,* MERRIAM-WEBSTER.COM, http://www.merriam-webster.com/dictionary/several (last visited Apr. 12, 2015).

22. *See* Mark A. Fischer, *United States: Do you Own Your Music Playlist?,* MONDAQ (May 1, 2014), http://www.mondaq.com/unitedstates/x/310898/Copyright/Do+You+Own+Your+Music+Playlist.

23. *Id.*

24. *Id.*

25. *Id.*

26. *See* Lohan Presencer, *Ministry of Sound: 'It is time that Spotify's actions are held to account,'* THE GUARDIAN (Sept. 4, 2013), http://www.theguardian.com/technology/blog/2013/sep/04/ministry-of-sound-spotify-lawsuit.

27. *Id.*

28. *Id.*

posting Ministry of Sound's compilations as their own playlists and calling them "Ministry of Sound".[29] Ministry of Sound had asked Spotify to remove user playlists that allegedly mimicked Ministry of Sound's compilations.[30] As Spotify did not obey, Ministry of Sound sought for an injunction requiring Spotify to remove these playlists and put a permanent block on other playlists that copy its compilations.[31] It also sought for damages and costs.[32]

"Ministry of Sound argued that it did "a lot more than putting playlists together" but actually invested in extensive research for these playlists."[33] Considering a statement from Ministry of Sound's chief executive, Mr. Lohan Presencer, they see themselves rather as curators than mere compilers: "We painstakingly create, compile and market our albums all over the world. We help music fans discover new genres, records and classic catalogues. Millions trust our brands, our taste and our selection."[34]

On the other hand, there is understandable criticism: "Whether Ministry of Sound can sue is a different question from whether they *should* sue, though. Some might say that, in an age where anyone can put together a playlist of 40 popular dubstep tracks in a matter of seconds, the label's business model of doing much the same thing but with a bit of cross-fading may be one worth consigning to the dustbin of history. Going out in a blaze of lawsuits just looks a bit tacky, really."[35]

---

29. *See* Lohan Presencer, *Ministry of Sound: 'It is time that Spotify's actions are held to account',* THE GUARDIAN (Sept. 4, 2013), http://www.theguardian.com/technology/blog/2013/sep/04/ministry-of-sound-spotify-lawsuit (last viewed Apr. 13, 2015).

30. *Id.*

31. *See* Stuart Dredge, *Ministry of Sound sues Spotify for copyright infringement,* THE GUARDIAN (Sept. 4, 2013), http://www.theguardian.com/technology/2013/sep/04/ministry-of-sound-sues-spotify (last viewed Apr. 12, 2015).

32. *See* Alex Hern, *Can the Ministry of Sound sue Spotify – and should they?,* NEWSTATESMAN (Sept. 5, 2013), http://www.newstatesman.com/sci-tech/2013/09/can-ministry-sound-sue-spotify-should-they (last viewed Apr. 12, 2015).

33. *See United States: Do You Own Your Music Playlist?,* MONDAQ (May 1, 2014), http://www.mondaq.com/unitedstates/x/310898/Copyright/Do+You+Own+Your+Music+Playlist (last viewed Apr. 13, 2015).

34. *See* Lohan Presencer, *Ministry of Sound: 'It is time that Spotify's actions are held to account',* THE GUARDIAN (Sept. 4, 2013), http://www.theguardian.com/technology/blog/2013/sep/04/ministry-of-sound-spotify-lawsuit (last viewed Apr. 13, 2015).

35. *See* Alex Hern, *Can the Ministry of Sound sue Spotify – and should they?,* NEWSTATESMAN (Sept. 5, 2013), http://www.newstatesman.com/sci-tech/2013/09/can-ministry-sound-sue-spotify-should-they (last viewed Apr. 12, 2015).

But after all, "[t]he extent of copyright protection for music playlists remains uncertain because the parties settled the case in February 2014."[36]

> Notwithstanding the foregoing, one could consider Ministry of Sound possibly arguing for their compilations to qualify as copyrightable subject matter outside the database context under Part I, Chapter I, Article 3 (1) (a) of the Copyright, Designs and Patents Act of 1988 which states:
> 3. Literary, dramatic and musical works.
> (1) In this Part—
> "literary work" means any work, other than a dramatic or musical work, which is written, spoken or sung, and accordingly includes—
> (a) a table or compilation *other than a database*

Whether Ministry of Sound would have prevailed on this argument remains uncertain. But it also would have had to be viewed in the light of United Kingdom copyright anyway. Copyright law originated in the United Kingdom from a concept of common law; the Statute of Anne 1709. It became statutory with the passing of the Copyright Act 1911. The current act is the Copyright, Designs and Patents Act 1988.[37] "To qualify, a work should be regarded as original, and exhibit a degree of labour, skill or judgment."[38] Regarding the "original" requirement, courts in the United Kingdom do not seem to have adopted a literal reading. However, the "labor" requirement follows the "Sweat of the Brow Doctrine". This could have weighed in favor of Ministry of Sound, had it proven significant expenditure in compiling the music.

However, that approach changed with the decision in *Football Dataco Ltd and Others v. Yahoo! UK Ltd and Others*[39], indicating a renunciation of the labor and skill criterion if there is no creativity. Football Dataco is the firm responsible for protecting the rights acquired in English and Scottish football league fixtures.[40] It grants fee-based licenses to third parties allowing them to reproduce the Premier League, the Football League, Scottish Premier League and Scottish Football

---

36. *See United States: Do You Own Your Music Playlist?,* MONDAQ (May 1, 2014), http://www.mondaq.com/unitedstates/x/310898/Copyright/Do+You+Own+Your+Music+Playlist (last viewed Apr. 13, 2015).
37. *See* THE UK COPYRIGHT SERVICE, http://www.copyrightservice.co.uk/copyright/p01_uk_copyright_law (last viewed Apr. 13, 2015).
38. *See Id.*
39. European Court of Justice (Third Chamber), Case C-604/10, 1 March 2012.
40. *See* Bill Wilson, *Football match fixture list copyright claim rejected*, BBC NEWS (Mar. 1, 2012), http://www.bbc.com/news/business-17218968 (Apr. 13, 2015).

League fixtures. It claimed that Yahoo! UK Ltd and Others had infringed copyright by failing to pay for the use of the match schedules.[41]

Football Dataco and Others claimed that they own, in respect of the English and Scottish football league fixture lists, a 'sui generis' right pursuant to Article 7 of Directive 96/9, a copyright pursuant to Article 3 of that Directive, and a copyright under United Kingdom intellectual property legislation.[42] Yahoo et al. did not accept that such rights exist in law, arguing that they were entitled to use the lists in the conduct of their business without having to pay financial compensation.[43] Originating in the English courts (where those lists were first held eligible for protection by copyright under Article 3 of Directive 96/9, on the ground that their preparation requires a substantial quantum of creative work[44]), the case was referred to the European Court of Justice for preliminary ruling of certain questions of database law.[45]

The European Court of Justice denied copyright protection and found that, inter alia, the football schedules lacked originality in the sense of the 16th recital of the Directive.[46]

Accordingly and applied to databases, the "criterion of originality is satisfied when, through the selection or arrangement of the data which it contains, its author expresses his creative ability in an original manner by making free and creative choices […] and thus stamps his 'personal touch'[…]."[47]

On the contrary, the European Court of Justice continues, the criterion is "not satisfied when the setting up of the database is dictated by technical considerations, rules or constraints which leave no room for creative freedom […]".[48] And finally, "the fact that the setting up of the database required […] significant labour and skill of its author […] cannot as such justify the protection of it by copyright under Directive 96/9, if that labour and that skill do not express any originality in the selection or arrangement of that data."[49] Based on all the above, on remand the national court had no other choice than finding that the database lacks originality and therefore is not protected under the copyright regime.

Overall, it is difficult to predict how the High Court in London would have decided the *Ministry of Sound v. Spotify* case. The *Football Dataco* case indicates that the originality and creativity requirements have

---

41. Bill Wilson, *Football match fixture list copyright claim rejected*, BBC NEWS (March 1, 2012), http://www.bbc.com/news/business-17218968 (April 13, 2015).

42. European Court of Justice (Third Chamber), Case C-604/10, Football Dataco Ltd and Others v Yahoo! UK Ltd and Others, 2012 E.C.D.R. 7.

43. *Id.* at 21.

44. *Id.* at 22.

45. *Id.* at 23.

46. *Id.* at 37 et seq.

47. *Id.* at 38.

48. *Id.* at 39.

49. *Id.* at 42.

become more important in the database context. For *Ministry of Sound* it would still have been crucial to convince the court of the creativity in its compilations. However, the court must have welcomed the parties settling. It does not bear thinking about what would have happened, had the court decided for *Ministry of Sound*, basically establishing different grades of protection in Europe.

B. Copyrightability in Germany

Pursuant to German Copyright Law, there are two comprehensive statutes for approaching the question whether, in light of the *Ministry of Sound* case, music compilations and playlists could be copyrightable subject matter outside of the database context. This could be the case if, in a first step, they could be qualified as "collections of works", and in a second step if they reached the necessary level of creativity.

Article 4, Collections and database works, (1) of the German Copyright Act of 9 September 1965[50] states: "Collections of works, data or other independent elements which by reason of the selection or arrangement of the elements constitute the author's own intellectual creation (collections) are protected as independent works without prejudice to an existing copyright or related right in one of the individual elements."

Assuming that compilations and playlists are collections of works, it would still need to be determined whether, by reason of the selection or arrangement of the elements, they reached the level of creativity within in the meaning of Article 2, Protected Works, (2) of the German Copyright Act, which correspondingly to Article 4 (1) states: "Only the author's own intellectual creations constitute works within the meaning of this Act."

For that, it would be necessary that a mental content gets manifested, which goes beyond the mere sum of the contents of the individual elements; the overall impression would be crucial, which means the mental content in its concrete form, in which it can be perceived by people.[51]

Here, one could argue on both sides. Speaking in favor of copyrightability, obviously, the Spotify users like the selection and arrangement of music compiled by Ministry of Sound to the extent that they want to mimic the compilations. This user behavior could be evidence that the compilation is stamped with creative individuality and that it is more than just the sum of the contents of the individual components. On the other hand, for the users, it could just all be about the

---

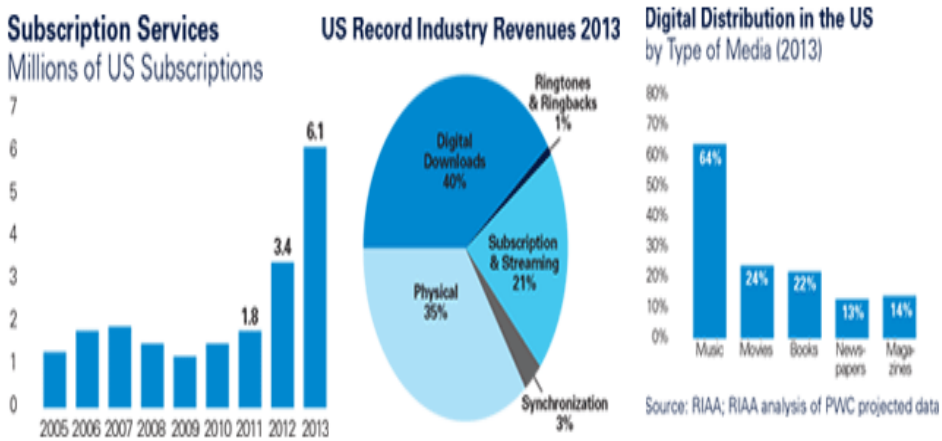
50. Copyright Act of 9 September 1965 (Federal Law Gazette Part I, p. 1273), as last amended by Article 8 of the Act of 1 October 2013 (Federal Law Gazette Part I, p. 3714).

51. BGH, Aug. 11, 1989, Urteil vom - I ZR 14/88 - Rn. 83. (freely translated from the decision of the German Supreme Court).

mere sum of the contents that they want, whether it is convenient or just for the sake of having the complete compilation, or, maybe the users are just too lazy to create their own playlists.

III. RECENT DEVELOPMENTS IN THE UNITED STATES

As already mentioned, internet streaming services have gained significant popularity. The Recording Industry Association of America's (RIAA) diagrams below demonstrate the growth of subscription and streaming services, with music being the leading type of digital media, leaving movies, books, newspapers and magazines far behind.

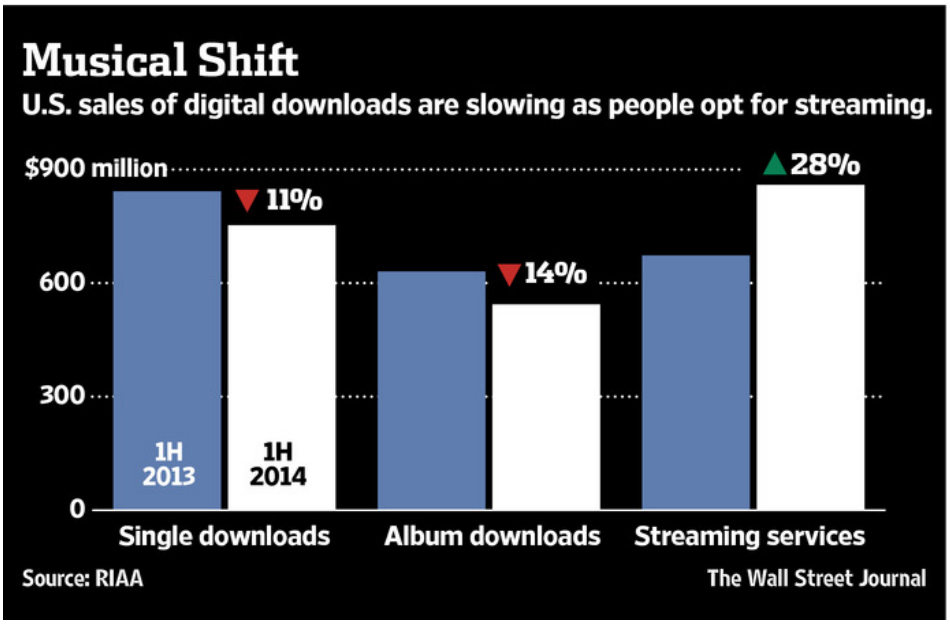


As shown above, in just over five years (meaning since 2009), streaming services have rapidly grown with subscription services leading the trend.[52] In 2013, there were more than six million paid subscribers to streaming services such as Spotify, GooglePlay, and Rhapsody.[53] Streaming services make up a significant portion of America's digital music revenues, totaling $1.4 billion and accounting for 21 percent of music industry revenue in 2013.[54]

From 2013 to 2014, the shift from digital download services, such as iTunes, to the aforementioned streaming services has continued, as shown in the diagram below.

---

52. *See* RIAA, http://riaa.com/media/F39C4C51-0714-035C-3663-0A64B91F86DA.pdf (last viewed Apr. 14, 2015).
53. *See Id.*
54. *See Id.*



However, as most subscription services do not include DJ creations or user-made mixes (which logically have an underlying playlist) in their song libraries, the music industry is now trying to monetize them. The latest trend comes from New York City and is a startup called Dubset[55], partly funded by Rhapsody[56]. It has launched the world's first platform specifically designed to enable royalty-based streaming of DJ-mixed, remixed and derivative content.[57] Their MixSCAN technology "can identify individual tracks within mixes and distribute royalties to underlying rights holders in a matter of seconds." [58] "It can also measure how much of the track was consumed, which helps solve the problem of determining the value of fragments of songs."[59] "The system could be a game-changer: Dubset estimates that 120 billion tracks are sampled each year in mix and re-mix content, which, if monetized, could earn the recording industry an additional $1 billion annually."[60] "Currently, the company is in late-stage licensing discussions with all three major labels, which will likely take a few more months to sew up."[61]

While this seems to be a new way to absorb capital that has been dead so far, it leaves the question about a copyright in a playlist

---

55. DUBSET, http://www.dubset.com/#intro. (last visited Apr. 14, 2015).
56. Megan Buerger, *Dubset Thinks It Has Solved the Big Licensing Problem Behind DJ Mixes*, BILLBOARD (Mar. 9, 2015), http://www.billboard.com/articles/business/6494985/dubset-dj-mixes-licensing-solution. (last visited Apr. 14, 2015).
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.*

untouched. Though, it draws attention to the interesting question whether the act of mixing songs together and creating crossovers can have a higher level of creativity than playing a sequence of tracks on the radio or compiling it on a CD, especially, when this happens outside of the public performance context of 17 U.S.C. 106 (4).

CONCLUSION

The increasing popularity of playlists and music mixes in the fast moving digitalized music market goes hand in hand with legal challenges. Granting copyrights for the selection and arrangement of music could have extensive ramifications. It could lead to different grades of protection in different countries, de-harmonizing copyright law. It could also lead to an unmanageable amount of thin copyrights. Furthermore, determining a threshold for creativity in a compilation or playlist would be equal to quantifying creativity, thereby increasing legal uncertainty. Just to name a few possibilities.

Based on all of the above, copyright protection for music compilations and playlists would not be beneficial enough to outweigh the substantial concerns and risks.