

COPYRIGHT IN THE DIGITAL AGE; BENEFITING USERS AND CREATORS?

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ABSTRACT. Copyright is supposed to establish a mechanism under which content users contribute to creators' income, thereby providing incentives for creators to create new and original content for end-users to consume. However, in the current digital environment one can suggest that this arrangement is breaking down. The necessary flow of content is not being achieved in such a manner as to provide a satisfactory flow of revenue back to the creators, or is it vice versa? It can also be argued that the copyright system is not providing enough revenue for distributors to provide the sort of services that users would like with the current pricing structures, use restrictions and rights complexity demanded by the major controllers of music copyrights. In this essay I consider the current state of affairs regarding the copyright system, and its effects for all participants along the value chain for protected content.

The justification for copyright is that it enables the creation of a business model that provides incentives for creators to create, through the end-users granting to them, by statute, limited monopoly rights, which has considerable potential benefit to the creators and those who want to invest in their work. In return for this the creators provide new, fresh and original content to the delight and joy of the end-users. For the rest of this piece I will refer to the end users as Users, and the people who provide the pipes and the services that use the creations as the Distributors.

In the current digital environment one can suggest that this arrangement is breaking down and that the necessary flow of content is not being achieved in such a manner as to provide a satisfactory flow of revenue back to the

creators, or is it vice versa? Ironically it is arguable that it is also not providing enough revenue for the Distributors to provide the sort of services that the Users would like with the current pricing structures, use restrictions and rights complexity demanded by the *mélange* of major controllers of music copyrights.

The history of the conversion of limited rights for a limited period, to a situation of controlling rights for a very long period, which require each right to be individually cleared, when combined with every new technology, has led to considerable erosion of the effectiveness of copyright, so that the choice for the User has become whether to pay to select from a limited collection of songs, or to get access to virtually everything for free – although probably technically illegal. Moore's Law has made the attempts of the content industries, and the legal and administrative structures whose development they help to shape, look pathetically and desperately inefficient and ineffective. As the industry and legislators have been playing a rather unimpressive game of catch up with actual User behaviour, the effect on the creators has been catastrophic. Driven by corporate and personal demands the industry has been trying to retain its net revenues by a series of devices that have hindered both the development of services and the ability of new creators to develop a career, while at the same time blaming their customers for their own failure of imagination, and accusing their customers of being pirates.

Part of the problem is that the rights structure in the West is variously effective in its application from nation to nation. Despite its many faults the system within the traditional OECD countries did work (to some extent at least) for local content, and to a lesser extent for international content. In responding to this reality the major labels have built a system that provides ever-increasing economies of scale, with diminishing marginal costs. With

their quasi-monopoly rights permitting them to hold the price far in excess of the costs the business was very attractive. When this was combined with the windfall of selling people their record collection again in a new format (the CD) the record companies boomed. They appeared to be geniuses, and money flowed, and some of it even got to the creators, who were enabled to have a chance to get into the market, and who, when successful, almost invariably ended up with a major. If an artist wanted to be successful and have an international career s/he almost always ended up with a major, to get proper international distribution, and the 'right' level of investment, as the bigger the artist the greater the investment, as risk was reduced and predictability of revenue was increased, and the higher the sales the greater the profitability on the margin.

The CD boom came at the end of an explosion of economic growth world wide (OECD countries at least) in the second half of the 20th century, which had seen the development of whole generations of young consumers, becoming the baby boomers, whose unique iconic art form was recorded music.

The CD however carried the seed of the industries' own destruction , because by putting out unencrypted digital versions of the most popular parts of their catalogue the record companies were opening the door to the use of the internet and domestic digital technology to copy and distribute clone copies of their catalogue. The hoped for repeat of the CD bonanza of selling the public their record collections again, was replaced by the public discovering they did not need to buy music files, payment had become voluntary and MP3 ruled, and not just for the old favourites , but also the new hits.

In attempting to control this phenomenon the recorded music industry made buying digital copies legally complicated and expensive, requiring

purchasing decisions to be made in advance. Often music was not available legally until some time after it had been on the radio, and equally most records were not available at all, at least in terms of titles. Even now I wonder whether the record companies still look on the internet as just one big shop, rather than being a revolutionary change not only in how music is distributed but also how it is ‘used’ by the public.

The application of the new technology was held up by the industry who were more concerned with their traditional business model than coming to terms with change. Margins were held high, and general advance fees and non-returnable deposits and unit sales advances, and equity were all variously collected. Restrictions on what could be done legally with files were enforced, and business models were constantly made more complicated by insisting on differing policies from all the parties, despite the industries collective inability to supply ‘all the music’ in a ‘one-stop-shop’.

Copyright was used to extract money and slow down the growth of the new business models that the technology would have permitted. The existence of the old administrative structures for copyright made it hard for anyone to find all the rights owners of all the music. Anyone trying to run a legal on line or mobile service had to jump through fiery hoops to get all the rights cleared, and even then it had to be done on a territory by territory basis, and with no reliable international registry existing to enable those, willing to pay, to actually pay for the use of music. With every sector of the industry trying to hold onto their business in the declining market, while the development of new uses for discretionary disposable income, and the ready availability of unauthorized music, all combined with the loss of the need for the mass produced physical carrier, chronic problems developed and the last people to be considered would be the weakest – namely the creators.

Royalty rates were effectively reduced, and new realms of obscurity were put into the value chain, to ensure that no creator could know what they should be earning. Using their assignment of copyright to deal with their catalogues, the major companies behaved as though the creators' works belonged primarily to themselves. In an unencumbered manner deals were made which were surrounded with mystery, and were then protected from prying eyes by Non Disclosure Agreements (NDAs).¹ Even where the deals were more open the labels arbitrarily interpreted their contracts in such a way as to reduce the royalties paid to their artists. The equity and consequent capital gains held by the majors in *Spotify*, the payments from major suits for copyright infringement, the equity acquired from *YouTube* all disappear into the vaults of the majors and everything to do with them is surrounded with mystery.

Meanwhile the lawyers conduct arcane Mediaeval theological discussions about whether it is a stream or a download, a mechanical or a performance, or a combination of both, and what is the value of the underlying song as opposed to the recording of that song, whether it is broadcast or a web cast and which section of which act does it all fall under, oh and by the way who owns the song and the recording in which territory, and where was it recorded, and when.

Lets return to basics. What is copyright for? What is the underlying bargain (see the US Constitution)? It is to provide a reward for the creators of work, which is to be paid by those that use that work. Between the Users and the Creators there are a stream of middle-men, including myself. The economic and moral justification for their existence has to lie in their ability to facilitate the effective and useful connection between those two parties. But in the 20th Century these middle men became the main beneficiaries of

¹A Non Disclosure Agreement is basically a secret agreement. It is particularly annoying for artists who cannot know what the deal is between the distributor and the labels/publishers so one cannot tell what the real financial arrangements are between the two.

the system, collected the bulk of the revenues and exercised effective influence over governments and the development of the legal and administrative structures which enforced ‘their rights’, all usually done in the name of the creators.

Clearly the digital world requires a different set of intermediaries. It does not need capital intensive studios and pressing plants, warehouses, sales forces, shipments, returns, invoices and accounts with thousands of retailers that the traditional hard carrier business required. It is about the delivery of a file, a service or services, which in turn delivers whatever is required to the User, all at incredibly low unit or marginal cost. Indeed I would argue the labels do not even need to deliver the files in most cases as they seem to get on the internet before they are delivered to any of the services.

Far from the internet being like a huge shop it is much more like a huge library attached to an interactive radio (if we want analogies, which we do if we are not techies).

Exclusive rights in this context are of little value as they are virtually unenforceable without an army of computers and robots constantly searching the net for the obvious unlicensed music files. We cannot control peer to peer, let alone e-mails, instant messaging, Bluetooth or Virtual Private Networks (VPNs),² let alone memory sticks and swapped hard drives.

How do we cope with locker services, and what will happen to locker services, when the owners of the services realize that their customers just want access to all the music, and sometimes to keep it, and sometimes to listen to it. What is a reasonable price for a listen, what is the price for 100 listens, what is the price for holding that file, what is the price for a downloaded file that is not heard, or is cached on my portable device, is that a download?

²VPNs are used by Bit torrent sites a lot. They are encrypted services so it is hard to know what the files contain, and it makes tracking of content and any form of copyright enforcement very hard, if not impossible.

It is not for the record companies to define the uses, nor are they in a position to decide on their value to the end user, as they do not have a billing relationship with the end-user. It is for the distributors to suggest what they want and for the content owners to try to find a way to monetise these uses for everyone's benefit. The corporations greatest problem is that they have never had a direct relationship with the User, anymore than the label had a relationship with the buyer or listener to a record in the analogue days. The industry has to work out with the direct and indirect distributors of music what the public will pay for what services, and to work with them to enable new types of service to develop, whether in quality, relationship with the artist, discovery, programming, creation, bundled purchases, sharing, interactivity, subscription etc. Indeed we could speculate as to whether the recording of the future will be a continuum or a finished good, or both for different artists or different Users. Can the Users become the Creators and then share in the revenues? How can moral rights work? How can synch rights work in the world of cut and paste?

Given that the system is in general melt down, both from the point of view of the User who is offered partial solutions and restrictions, or else illegal uses both in passive and active terms. At the same time the creator is offered increasingly unattractive deals of dubious long-term value. Given that the importance of marketing and promotion is still there, the need for investment continues if the Creator wants to develop a long term, or international, professional career. Still the most effective promotion comes from the major labels which still control the major filters (though their effectiveness is diminishing). Advertising, marketing, promotion, radio and TV talent shows are still the fastest and most likely way to get a 'hit', and this is the preserve of the majors. But to get these sorts of deals the Creator has to make deals that would not have been considered ten years ago, and

involve degrees of assignment of rights, gig income, web-site, merchandise, etc., which recall in their exploitative nature the deals of the 50's and 60's. The long-term implications of these deals are grim. It is difficult to see what the labels bring to the party apart from traditional recording and distribution expertise, cash and a chance for 15 minutes of fame. It is certainly noticeable that the flow of new, exciting talent seems to be slowing up and that though recorded music is more generally prevalent than ever before, the importance of the latest music sensation in the general cultural zeitgeist seems to be declining.

But these sort of hits seem to have less long term value, and the short term seems to be getting shorter. The artists who build their careers on music blogs, relating to their fan base and building on it through touring are the ones likely to be building long term careers.

The new technology raises other challenges. Most importantly the speed of development of the technology and consumer preferences seems to be accelerating, so that it is very hard to build on what worked last year. *My Space* has been and gone, *Facebook* begins to look a little less all conquering, *Pandora* rules, Satellite radio is uncertain, *Rhapsody* is still hanging in, *Apple* is all conquering but its closed system may in the end be its undoing, as will its cosy relationship with the majors. *Google* don't seem to be able to do a deal with the majors for the *Android*. No one knows what to do with the cloud services, which are almost certainly going to end up as something very different from what they are implying now.

How does anyone deal with User Generated Content? Will anyone deal with creative commons content? Is the industry capable of developing licenses which are truly global and which anyone with a reasonable financial history can hope to obtain to open a new music service? Whether it is a local or an international service access to all the music is required and the

deals need to be as simple and straight forward as they used to be for record shops or radio.

At the moment there is no universal reliable database of recorded music, which describes who is on a recording, who owns the recording, what is the song, who wrote it and who publishes it, who controls the mechanical rights and who controls the performance rights and all this info, needs to be described for all territories and to include length of deal, when written, when recorded and where, when released etc.

All this has bearing on the rights issues, and who needs to get paid. Then there is the question of semantic information, which could be of great interest and value to many commercial and private users. These data issues are truly vital, indeed necessary, to develop the music businesses and services for the future. If people are to be paid, then registries are required so that , however the licensing is done, the licensor can know who to get the licenses from and how. There is no doubt in my mind that the growth of services and revenues will be dependant on making it increasingly easier, faster and simpler to license and to pay for the use of music. Furthermore it is probable that most everyday services will be paid for on an ‘access model’ where the User has access to all the music for a direct or indirect fee and the money will be divided according to use.

Databases will be necessary but not sufficient conditions for the new business models. But they will enable the development of much more transparent behaviour, and information. It is always worth reminding ourselves that equal access to information is a pre condition for perfect markets. At the moment Creators have neither the information about sales nor the ability or experience to sensibly discount the future. Thus corporations should always be able to make unequal bargains with the Creators, just like they do now, but maybe not quite so unequal, and perhaps the collectives will become

more powerful, acting as agents for the Creators. Maybe banks or other financial institutions will be able to use this information to feel more at ease in advancing cash now against future earnings.

But I also see a multiplicity of services and uses. I do not believe that the growth of cut and paste can be stopped, nor the growth of Creative Commons licenses. I see that people will pay extra for segmented services, that provide better quality files, information, assorted exclusive access to the Creators, bundled offers of music with tickets and/or merchandise, curated/recommendation services, discovery, personalisation services, programming. The implications of locker services and pre-loaded devices also present huge challenges requiring swift and flexible response.

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