Music Copyrights: Cui Bono?

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Introduction

Music creators (composers and performers) and music audience need to understand music copyright as part of the legal environment in which the former make their living in collaboration with the latter: this requires, among other things, that accurate information about the legal and practical status of music copyright be part of the public discourse. Correspondingly, the views of music creators and audience members should strongly influence the evolution of music copyright law and practice; this, in turn, requires that those views be accurately represented when the law is updated.

Unfortunately, neither of these has been the case in the U.S. for at least several decades, and possibly much longer. The loudest voices on this important topic today are those of organizations such as the American Society of Composers, Authors and Publishers (ASCAP), the major U.S. society that collects performing rights fees, and the Recording Industry Association of America (RIAA), which have repeatedly made strong statements about copyright and "piracy," claiming to represent the views of music creators both in general and in legislative contexts in particular. The present paper will show that those statements misrepresent law and tradition, and that these organizations also misrepresent the attitudes of the music-creating community. The paper will first review some less well-known background on copyright in

general, and examine some of the actual operation of music copyright today; then it will look at actual primary data from musicians.

What is copyright?

In order to understand how copyright affects musicians, we must first understand the nature of copyright itself. Most people would probably define "copyright" as something like "the right of an author to control copying of the author's work." While this is a reasonable brief definition, it raises issues that require further understanding: the nature of the "right," the nature of a "work," the meaning of "copying," how the right is embodied in law, and how that law is applied in practice.

First of all, where does this "right" originate? U.S. copyright law is based on British law dating back to the 1709 Statute of Anne, which defines copyright as a type of property right (Kretschmer and Kawohl 2004, 25-27); like other property rights, the copyright in a work can be transferred or sold, and indeed until the Statute of Anne, common-law copyright, like ownership rights in real property, was perpetual. This contrasts with the continental European view (*ibid.*, 31-33) that author's rights are "moral rights," which are inalienable -- that is, reside permanently and non-transferably with the author, like the inalienable rights to "life, liberty, and the pursuit of happiness" in the American Declaration of Independence. Typical moral rights include:

- The right to be identified as the author of one's work;
- The right to object to 'derogatory,' 'distorted,' or 'prejudicial' treatment of one's work;
- The right to determine whether and when a work shall be published;
- The right to withdraw or modify a work already published (Frith and Marshall

2004, 10).

Note that moral rights say nothing about copying -- only publication. Thus the question of whether musicians' attitudes follow the U.S./British "property right" or Continental "moral right" tradition is important, since the two view non-published copying (e.g. for personal use) differently.

Next, what is a "work"? The original U.S. Copyright Act of 1790, for example, refers to "map, chart, book or books," which was later broadened to any expression "fixed" in "tangible" form. This definition is broad enough to cover sound recordings, but what about the sounds themselves? Actual performances (that is, the sounds themselves) were not recognized as subject to copyright-like protection in the U.S. until they were added to U.S. law as part of an international treaty in 1994. However, the "anti-bootlegging" provisions of this treaty were subsequently challenged, upheld in 1999, and found to be unconstitutional in 2004 (Lessig 2004), so even though they were updated by Congress in 2006, the status of this law is unclear. This is a key issue in a recent documentary film, *Copyright Criminals* (2008), which examined issues related to copyright of actual sounds (more on this film below).

Even the word "copying" has a different meaning for music than it does for literary works. One might expect copyright for music to cover not only publication, but live performance and playing of recordings as well. However, at present in the U.S., the status of these three activities is different: publication of written music is definitely covered by copyright law, with permission and fees entirely up to the discretion of the copyright holder; recording of live performances has an ambiguous status, as noted in the previous paragraph; and broadcast or other public playing of recordings is subject to mandatory licensing and regulated fees.

Finally, as for many other areas of law, copyright is defined in practice by a combination

of statute law (laws passed by a legislature), case law (cases settled in court), and people's actual behavior in complying with law (or not) and in prosecuting claimed violations of law (or not). The most important legal aspect of this is the concept that certain copying constitutes "fair use" -- a concept well established in case law, but not with sharp boundaries, and not in statute law. But beyond legalities, the public and a few large corporations are locked in a struggle to define the practical application of copyright to music, with musicians caught in the middle. We will return to this issue below.

How does copyright affect music creators?

As just discussed, those who create music in written form have had access to copyright for much longer than those who create it in performance. (I should mention that this insight, that "creation in performance" and "creation in writing" are peers at a philosophical level, was the single most valuable thing I learned in the course of researching this paper.) However, in the U.S., the rights that originally belong to creators are only the beginning of the story, and come into play very differently for the three primary channels by which music creators could expect to make a living from their work.

First, some music creators earn most of their income through performance. For this form of income, the value of copyright is uncertain: as noted above, keeping people from making "bootleg" recordings of performances does not clearly fall under current copyright law.

Second, some music creators make their living primarily from published works. For these composers, copyright is essential, both to protect the actual publication, and for obtaining payment for performances. However, publishers almost always require that the creator sell the copyright to them in exchange for a percentage of the income from the sale of copies. The

creator thus loses any control over future decisions such as whether to eventually place the work in the public domain, or when to allow others to use the work in their own creations. While Internet-based publication does not have these drawbacks, the technology for reliably getting paid for copies made through this channel does not exist. (In my opinion as an experienced technologist, such technology probably cannot exist without "locking down" all PCs and other Internet-connected devices in a way that would probably be very user-unfriendly and that would invite totalitarian control.)

The greatest share of music creators' income today comes from neither of these channels, but from the sale of recordings. Again, copyright is essential. However, in this case the publisher has even more leverage over the creator: the publicity and distribution channels for successful recordings require large resources, and are dominated by four very large companies (Warner, EMI, Sony, and Universal). Because copyright is transferable, it becomes just one more bargaining chip in a purely economic negotiation between the creator and the publisher; and since the publisher has far greater resources, creators other than tiny number of "stars" wind up signing contracts that are not only unfavorable financially but that again deprive them of both practical and (to the extent the law recognizes them) moral rights (Greenfield and Osborn 2004, 98-100).

How have copyright law and practice for music changed over time?

The discussion above has noted the expansion of the subject matter for music copyright from "books" to any printed matter, and later to recordings; to cover musical content beyond literal copying, at least in the case of melody; and perhaps to cover live performances. This expansion has happened over roughly the last two centuries: "musical compositions," in fact,

were first mentioned in the revision of copyright law in 1831, the first major revision since the original U.S. Copyright Act of 1790, and the law has been interpreted subsequently to cover copying of melody, even if not written or recorded. (Unfortunately, I was not able to find references to specific cases.) However, the effect of copyright has also expanded in two other ways, one primarily since 1976, the other just in the last 20 years or so.

In addition to the subject matter, the *term* of copyright has grown enormously in the past century. The Copyright Act of 1790 adopted the same term as the British 1709 Statute of Anne: a term of 14 years, renewable once, requiring registration for both the original and the renewal. This 28-year term was increased to 42 years in 1831, and to 56 years in 1909. Then a major revision of U.S. law in 1976 extended the term to the life of the author plus 50 years, which has subsequently been lengthened yet further, mostly recently (U.S. Senate 1998) to 95, 120, or life of the author plus 70 years. The consequence for musicians is that less and less relatively recent music is available for creative sampling or other kinds of borrowing -- activities that have characterized musical creation throughout history. (The Disney corporation was a major force behind the 1998 extension, clearly with the intent that the copyright on Mickey Mouse would continue to be extended indefinitely; but many of Disney's own most successful works were based on the uncompensated use of older stories and music, such as the classical music in *Fantasia*, which would probably be illegal under the laws that Disney has been so active in promoting.)

More significantly, the *reach* of copyright has expanded, to some extent inappropriately. Until the advent of DRM (Digital Rights Management) hardware and software, it was a matter of individual judgment -- and, if necessary, a court case -- to determine whether a particular act of copying fell within "fair use," or whether the work being copied was even under copyright. With

DRM, technological means prevent copying, so that the rights of fair use and of copying after the end of the copyright term can no longer be exercised. Furthermore, the DMCA (Digital Millenium Copyright Act), also of 1998, criminalizes *any* "circumvention" of DRM, regardless of whether the act of copying is itself legal or not. (At the end of this paper, I will discuss the larger context of these expansions of reach.)

What do contemporary music creators in the U.S. think about copyright?

Since copyright has such importance in music creators' lives, music creators clearly have a large stake in making sure their wishes about it are known to the public and in the political process; but I found very few attempts to document those wishes systematically. In searching for sources that might help answer the question at the head of this section, I found primary material in four categories, in order of decreasing breadth of coverage:

- Two surveys of music creators by respected and neutral third parties on a variety of topics including copyright, sampling, and file-sharing;
- Statements on copyright by organizations that claim to represent music creators;
- A film script, dealing specifically with sampling-based music creation, that included interviews with a variety of music creators and other people involved in music creation;
- An informal poll of the students in a graduate-level seminar for which this paper was originally written.

I will discuss each of these types of sources individually before drawing any general conclusions.

The Pew survey

The larger of the two surveys, by the Pew Foundation, polled approximately 2,800 self-selected American musicians (Madden 2004). The Pew surveys (a group of 3) claim to be "the first large-scale study that looks at artists' and musicians' use of the [I]nternet and their views on copyright" (*ibid.*, 11). The specific survey relevant to the present paper queried 2,755 musicians "recruited via email notices sent to members of various music organizations, through announcements on those organizations' Web sites and through flyers distributed at several musicians' conferences" (*ibid.*, 33). (While this is a predominantly self-selected group, there is no evidence that this skewed the results in any particular direction.) Of these musicians, "94% say they are songwriters, 90% say they are musical performers and 46% say they consider themselves music publishers (in addition to being either a songwriter, performer or both)" (*ibid.*).

The first theme that emerges from the Pew survey is that musicians are quite tolerant of many activities that the publishing corporations label "piracy" and that fall into gray areas with respect to current understanding of "fair use." Nearly all feel that making a copy of music for one's personal use -- whether from a broadcast, a recording, the Internet, or a book -- is allowable (*ibid.*, 37), and they split nearly evenly on whether making a copy of a CD or a movie for a friend should be allowed. (However, nearly all feel that *selling* copies of copyrighted material should be prohibited.) Similarly, strong pluralities feel that making samples of their work available for free downloading has helped their careers; but they are evenly divided on whether file-sharing services benefit or hurt them. The most successful of the polled musicians (the "Success Stories") have more conservative views on these issues, but even they are far more tolerant than the big producers. For example, only 35% of the Success Stories say that file-sharing services are generally bad for artists. Similarly, a significant plurality (but not a majority)

feel that making even personal copies of copyrighted material should be forbidden.

Despite these generally liberal attitudes, two-thirds of the polled musicians say that copyright holders should have "complete control over a piece of art once it is produced" (*ibid.*, 36). We will return to this surprising datum in the final discussion. However, while "61% of those in this sample believe that current copyright laws do a good job of protecting artists' rights, [...] 59% also say that copyright laws do more to protect those who sell art than to protect the artists themselves," the latter echoing the comments in (Greenfield and Osborn 2004).

Finally, musicians, even the Success Stories, do not generally support the actions by the RIAA, which has been prominent and aggressive in pursuing what it calls illegal copying. 60% of all the musicians polled, and even 43% of the Success Stories, think that the RIAA's campaign against on-line music sharers will not ultimately benefit musicians and songwriters (Madden, 48). The only identified group that believe the RIAA's campaign will benefit music creators are the 138 (5%) of the polled musicians who say that their careers have "only been hurt" by free downloading, and even in this group, only 68% support the RIAA (*ibid.*).

One of the most interesting aspects of the Pew survey is its direct comparisons between musicians and the general public on these issues (Madden, 42-44). One might expect musicians to be *less* likely than the public to condone activities such as recording a personal copy of a TV show or burning a copy of a music CD for a friend, but the survey found the opposite. For example, 90% of polled musicians, and 73% of general artists, agree that copying music from a CD you own to your own computer should be legal, but only 66% of the general public agree (Madden, 44). However, the differences were generally not large.

The AFM survey

A second survey polled approximately 2,000 jazz musician members of the American

Federation of Musicians (Jeffri 2003). This survey included two questions relevant to the present paper. In the first, 48% of the total respondents said that they did "hold a copyright in some artistic work of [their] own creation" (Jeffri, Q18). Roughly 700 respondents also answered a group of questions about people downloading their music through the Internet (Jeffri, Q25_A-E). These questions all took the form "How do you feel about people downloading this music without paying for your work? <some statement>" and then asked whether the respondent agreed or disagreed with the statement, with the following percentage in agreement: "Do not mind," 29%; "Like the exposure," 37%; "Object," 53%; "Think I should be paid," 63%. It is striking that less than two-thirds of working musicians feel that they need to be paid for every copy of their work in this context.

Organizational statements

As the background material discussed earlier points out, the large organizations that claim to speak in the interests of music creators have their own interests at heart, which do not always coincide with those of their members or the public. ASCAP is a typical example. ASCAP's "Bill of Rights for Composers and Songwriters" (ASCAP 2008) does not mention the rights of the public (fair use, limited term of copyright, ability to use material after copyright expires), of music creators to build on each others' works (fair use, sampling), or of performers (as opposed to "composers and songwriters") to be compensated for their own contributions to the creation of music. Rather, ASCAP's "Bill of Rights" only mentions those certain rights of certain music creators that contribute to ASCAP's own revenue stream.

ASCAP undoubtedly does speak for a large group of music creators, but there is no way to determine what fraction of music creators agree with their views. In fact, there is no way even to tell what fraction of their own membership agrees or disagrees with their public statements,

because they are nearly a monopoly: music creators in the U.S. must join ASCAP or a similar organization in order to get performing rights payments collected effectively.

Not all music creators' organizations agree with the one-sided stance of organizations such as ASCAP and the RIAA. For example, in 2006, a number of Canadian music creators and publishers, led by the Canadian Music Creators Coalition, broke with the CRIA (Canadian Recording Industry Association), which they viewed as an arm of the foreign RIAA, over the CRIA's extreme stance on copyright enforcement (ZeroPaid.com 2009). However, the present paper focuses on U.S. musicians, and as noted in the background section, music copyright law and practice in the U.S. probably favor corporate interests over creators' interests more than in other Western countries.

Film script

In 2008, two independent filmmakers interviewed over a dozen musicians (and some others, such as attorneys) who based their music on creative transformation of sampling others' work or had had own work sampled substantially (Franzen 2008). The resulting hour-long film, *Copyright Criminals*, was completed in 2008 and has been shown in various venues, but not yet broadcast; I was able to read the script (McLeod 2009) but not see or listen to the actual interviews.

Three themes emerged clearly from the script of *Copyright Criminals*, all consistent with the thesis of the present paper. First, only the two entertainment industry attorneys took the hard line that all unauthorized sampling was illegal and punishable. The worst that any musician would say about sampling was a recording engineer's opinion that it was "lazy" (McLeod at 00:04:56). Even musicians who did not particularly like their work being sampled did not say that it should be prohibited.

The second theme was that zealous enforcement of copyright against sampling artists was having a substantial effect on those artists' ability to create. Some artists said they would be more cautious about what they did in the future; some said they were flat-out unable to afford the time, money, and effort to obtain clearance for every sample they wanted to use; and some defiantly said they would continue to work as outlaws.

Finally, a number of artists expressed a desire for something like "moral rights" in their work -- more, in fact, than expressed a desire for more compensation for their samples. For example, legendary drummer Clyde Stubblefield says, near the end of the film: "I prefer to get my name on the record saying, this is Clyde playing. It's just--the money is not the important thing. It's just to get myself out in the world, knowledgeable with my name, is more important." (McLeod at 00:52:31) This does not necessarily equate to a looser attitude about sampling. For example, according to an attorney who probably did not have a vested interest in any particular explanation, Songwriter Gilbert O'Sullivan sued Biz Markie for the latter's rap version of O'Sullivan's "Alone Again Naturally" not for financial reasons but because "he was just a no nonsense guy. He ... didn't want the song on a rap version." (McLeod at 00:24:48) The right to forbid publication of something derived from one's work because one feels it is derogatory or unsavory is a "moral rights" concept, not one embodied in U.S. copyright law.

Class poll

As an experiment, I polled the students in the class for which this paper was originally written (a graduate-level seminar in the Music department) as part of my final presentation of the paper, before presenting the data from the large surveys. The results mirrored those of the Pew survey closely. (See the attachment at the end of this paper for the data from the class poll.)

Discussion

Musicians' attitudes

The musicians' desire for "complete control" (in the Pew survey) reflects a fundamental misunderstanding about the limited nature of copyright and the reach of copyright law. However, it supports the proposition that their desires may correspond more closely to the European "moral rights" tradition than to the U.S. "property rights" tradition.

The fact that only 48% of the musicians in the AFM survey said that they held copyright in some work they created also indicates ignorance of copyright law: essentially all of the musicians surveyed performed and/or wrote music, both of which lead to works that are protected by current U.S. copyright law, which also confers copyright automatically (without a need for registration).

The conflicting responses to Q25 in the AFM survey suggest that musicians have ambivalent feelings on the issue of downloading, and that the answer may depend on the exact phrasing of the question. The nearly even splits on similar questions in the Pew survey suggest the same. However, the fact that even in the AFM survey, only 63% of the musicians most directly affected by downloading said they felt they should be paid supports the thesis that musicians as a group disagree significantly with the hard-line positions of ASCAP and RIAA.

A substantial majority of musicians feel that the copyright system primarily benefits people other than the actual creators. This suggests that musicians feel that copyright and its application are only of moderate benefit to them. This in turn may help explain the substantial minority that do not object to free downloading of their work: when individuals download for their personal use, rather than someone other than the creator profiting from it, the net value in

exposure may outweigh the loss of per-copy payment.

Reach of copyright

The large corporations such as Disney and the record labels have successfully misled the public into equating "unauthorized" copying with "illegal" copying. This misrepresents the actual state of copyright law, which envisions "fair use" and the eventual passage of copyrighted material into the public domain. These provisions, in turn, stem from the fact that copyright is explicitly conceived in law as a balance between a restricted monopoly right granted to authors, and the public's inherent right to free enjoyment of creative works.

The long terms and rigid enforcement of copyright do not actually work to most musicians' advantage: rather, they benefit a very few music creators, and they primarily benefit music publishers. See (Towse 2004, 57-63) for a much more extensive discussion of this issue.

Conclusions

As we have seen, organizations such as ASCAP and RIAA promote a very strict "property rights" view of music copyright. This focuses attention on those monetizable aspects of music creation and enjoyment that bring revenue to those organizations and that reward only a few "star" creators and performers at the expense of everyone else. Moreover, the claims regarding monetary effects of unauthorized copying are highly untrustworthy and almost certainly tremendously inflated: see (U.S. Government Accountability Office 2010). On the other hand, musicians' actual attitudes, which align more closely with the "moral rights" view than with the hard-line corporate view, and which take the roles of listeners and follow-on creation into account, mirror the fundamental concept of copyright as a balance of rights more fairly. It

would be better for the entire music-loving community if U.S. copyright law could evolve to reflect the broader and more balanced view that musicians, among others, actually hold.

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Note: I have classified the Pew Foundation's report on their survey as a primary source, since the parts of it I used simply select from the tabulated survey data without adding significant comment or discussion. *Copyright Criminals*, whose script I received in private e-mail, is scheduled to be broadcast on PBS in January 2010.

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Attachment: class survey

I distributed the following questions in a graduate-level seminar (11 graduate students in Music) during my presentation on December 1, 2009, and polled them on their responses by a show of hands. The results appear below. For the Pew survey, the percentages are in the form %legal/ %illegal/%other ("other" includes "don't know," "not sure," "it depends,", or no answer). The Pew questions are copied exactly from the survey; the main text of the AFM question is not.

Questions from the Pew survey (2004)

Assuming a person does NOT have permission from the copyright holder, do you think each of the following should be LEGAL or ILLEGAL under the "fair use" portion of copyright laws?

* Recording a movie or TV show on a VHS tape to watch in your own home at a later time
    Pew: 90/6/4; class: 91/9/0

* Burning a copy of a music or movie CD for a friend
    Pew: 47/41/12; class: 54/27/27

* Downloading a music or movie file off a file-sharing network like Kazaa or Morpheus
    Pew: 33/48/19; class: 36/27/37

* Sharing a music or movie file from your computer over a file-sharing network
    Pew: 33/50/18; class: 27/18/55

* Ripping a digital copy of music on your own computer from a CD you purchased
    Pew: 90/6/5; class: 91/9/0

* Sending a digital copy of music over the Internet to someone you know
    Pew: 56/31/13; class: 54/27/19

Questions from the AFM survey (2001)

Assume that you have created some music in tangible form (either by writing it, or in a recorded performance) and have made it available through the Internet. How do you feel about people downloading this music without paying? Choose one or more of the following:

* I don't mind.
    AFM: 29; class: 45

* I like the exposure.
    AFM: 37; class: 91

* I object.
    AFM: 53; class: 9

* I think I should be paid.
    AFM: 63; class: 45