

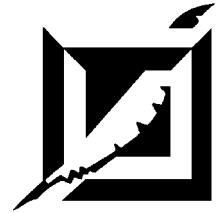
Digital Copyright - the Music Industry Perspective

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In the past ten years the world has borne witness to an unprecedented explosion in the availability of information. The rapid and global expansion of the Internet and the process of digitisation have been the force behind this explosion. This has created new opportunities and challenges for both the creators and users of music.

In particular, these changes have created new challenges to the copyright in musical works. This paper begins by briefly exploring the nature and social function of copyright. It then looks at ways in which those aspects of copyright have been challenged by technological developments. We then take a look at the art and law of music sampling as an example of how these challenges are affecting current copyright law.

The Balances of Copyright

Remember that copyright is but one part of a branch of the law called Intellectual Property.

Intellectual Property is an umbrella term for the combined laws of copyright, trade mark, patents, designs and confidential information all of which seek to balance society's varied interests in creating and using new ideas.

Put simply, on one side of the copyright divide there are the musicians and their sponsors (such as a record or publishing companies). They will wish to have the lyrics and music they have created protected to stop other people using them unfairly.

On the other side, there are the users of music, from the general public who want a second copy of a CD to use in the car, to musicians who wish to incorporate another's song into their own.

For the creators of music, the economic value of their music relies on their music being protected. That protection is afforded mostly by *the Copyright Act 1968*.

The Copyright Act provides the musician with a bundle of exclusive rights that vary according to the nature of the work that has been created. It is the exclusivity of these rights that is of economic value to the musician. They may be licensed to record companies, publishing companies, advertisers and other artists.

If a record company sees the possibility of success in a new song then it may invest substantial money in recording and promoting the song and selling it to the public. The musician might even make some money. The record company would not make the investment if it were possible that a rival company could release the same song.

So what are the exclusive rights of the musician?

The musician as creator of a piece of music enjoys the exclusive rights to reproduce, to broadcast, to publish and adapt that piece.

If that piece is recorded then (depending on who financed that particular recording) the musician may enjoy a similar set of rights including the rights to make copies of the sound recording, to play that recording and to broadcast that recording in public.

More often however, the copyright in the song is owned by a publishing company and the copyright in the sound recording, by the record company. With a hit song each of these rights will be extremely valuable to each of the copyright owners.

But with the practical needs of our general public and other artists in mind, how long should that protection last for and how extensive should it be?

Art, science and technology would soon stagnate if new works could not be created from an inspiration of older work. Rock and hip-hop for example are derivative genres with their roots in blues and jazz music, they may never have developed with stringent copyright laws that exclusively favoured the creator of the original work.

To address these concerns the laws of copyright provide a number of limitations to the exclusive rights described above.

For example,

- (i) copyright is of limited duration, it generally only lasts for 50 years after the death of the creator of the work; and
- (ii) other people may use a copyright work as inspiration for a new work - there is no protection granted in copyright to concepts.

There would be no copyright protection for example in a style of music such as Drum n' Bass, it is merely a concept; and

- (iii) other people may even copy portions of a copyright work to incorporate into their own work provided the portion is not a "substantial" part of the copyright work. This exception is however narrowly defined and if the portion of the work is worth copying, chances are it will be found by a court to be a substantial portion.

Through these and other limitations, the interests of the original creators in financially exploiting their efforts (or protection their artistic integrity) are balanced with practical and other artistic concerns

New Challenges to Copyright

This balance in copyright is continually challenged by developments in technology, culture and society – and with the advent of the digital age, it can be argued that the balance has tipped in favour of the consumers of ideas.

This is not new.

Technology has played an important historical role in the development of copyright. It was in fact invention that created the need for copyright in the first place. The creation of the printing press and the consequential creation of copies for the masses provided the catalyst for the creation of copyright laws.

Subsequent developments such as television and radio have challenged copyright and forced changes in the law to take into consideration the new ways available to use artistic works in society. The Internet and the digitisation of artistic works are simply some of the latest challenges in a long line.

Digitisation

Digitisation refers to process of either creating artistic works, such as music, in digital format or changing the format of an analog work (such as an LP record) into a digital one (such as a CD).

Specifically, "digital" describes electronic technology that generates, stores and processes data in binary code, ie 0's and 1's (referred to in the trade as 'positive) or 0's (referred to as 'non-positives'). Any information, sounds or images, can be expressed, transmitted or stored as a string of 0's and 1's which when deciphered reconstitute recognisable sounds or images from a simple nursery rhyme tune to a detailed reproduction of Leonardo Da Vinci's Mona Lisa.

Analog, digital's predecessor, conveys information as electronic signals of varying frequency or amplitude that are added to carrier waves of a given frequency.

So why digital?

Among other reasons, digital is preferred because the information does not degrade over distance, time or after it has been copied many times.

Analog information tends to distort and degrade, anyone who has ever tried to make a copy of a copy of a music cassette can testify to this. Digital information can also be easily transmitted and is the preferred format for satellite and fiber optic transmissions.

Thus digital format is rapidly becoming an international standard for music, radio, television, film and video. Compact discs carry music in digital format and have rapidly replaced cassettes and records as the preferred format, and in a couple of years Australia's television broadcasts will be digital.

The Internet is a purely digital service.

The Internet

The Internet has provided people with access -access to information. It has connected millions of people across the world and has given them access to an unprecedented level of information. I am not saying it is all quality information, it's probably mostly pornography and web-sites relating to John's Treatise on Hampster Food, but it is information nonetheless and if you want it, it's probably got a web page.

If you were to do a search for "people who enjoy dressing up as goats on fire" you would probably get a response "Too many hits - please specify what kind of goat".

If you want music, you can get it, and you can often get it free. And guess what, it's digital. It's potentially very high quality and you could receive it from Beijing and make 100 copies of it and the sound quality would remain identical.

Music and the Internet

Now that there is growing commercial interest, the music industry is tentatively making its first steps into the latest of a long line of technological advances that have kept it alive.

We've gone from gathering around the piano and singing favourite ballads, the pianola roll, phonograms, radio, records, cassettes, CDs to mini-discs. Now we have the ability to search for, listen to, select, pay for and collect music online.

Technological advances have also meant that promotion and distribution of music online is not restricted to major corporations.

Indeed smaller operations are in many ways better suited to such developing markets. From the Internet's anarchic side of the family comes a host of emergent independent organisations that promote music online.

Organisations like Cerebus (www.cdj.com.au), Chaos Music Market (CMM) (www.cmm.com.au), the Australian Independent Artist Network (www.aian.com.au) and individual artists such as Charlie Chan (www.charliechan.com.au), allow you to listen to the music over the net and order a CD delivered to your door without leaving the terminal.

Alternatively you can download the track onto your computer, listen to the track from there or burn that track onto your own CD with your own CD Burner (which have dropped in price from a couple of thousand dollars to a couple of hundred dollars).

For those without their own CD Burner, Cerebus will allow you to select individual tracks from separate artists and they will "burn" your own mix CD for you, promising a thankful end to those tiring teen days of sitting in front of the stereo mixing your own tapes for those long surf trips out to Cactus beach.

This new form of distribution and publishing is potentially great for the consumer and the distributor but what does it mean for the artist and what does it mean in terms of copyright?

The Internet from a Copyright Perspective:

There are various aspects of the Internet that challenge current copyright laws. It would seem that the combined effect of the Internet and the rapid growth in digitisation has tipped the scales in favour of the copyright user rather than the copyright owner.

This part of the paper looks at the exploitation of sound recordings on line and how this challenges existing copyright laws.

1. Making copyright material available online:

The act of putting a sound recording online and what happens to a sound recording once online is not specifically regulated by the existing provisions of the *Copyright Act*. None of the current rights properly apply to such a process.

Such limitations complicate the ability of the copyright owner to protect their rights and thus receive due recognition and remuneration for the online use of their work.

As artists may be concerned about piracy, the development of online creativity and exhibition may be impeded. Traditional methods of copyright enforcement, such as litigation, are fabulously expensive and face practical difficulties such as simply trying to locate the offender, and the success of such actions remains uncertain.

In response, the Government is now proposing a new flexible right of communication, designed to encompass cable, Internet and traditional broadcast transmissions. The new right will replace the existing broadcast and diffusion rights and seeks to meet Australia's international obligations.

2. Accessing online material:

Current copyright provisions prohibit unauthorised copying of recordings. This prohibition would include the making of temporary copies of images, information or music on a computers hard drive in the course of browsing a web page.

While strictly speaking such temporary copies would be an infringement of copyright, they are simply a technical necessity in order to review a web page. Such copies are rarely used to undermine the interests of the copyright owner.

There is currently no distinction made between such copies and copies made as a result of intentionally downloading pirate copies of musical recordings.

Copyright has dealt with such issues before but in relation to broadcasting.

Copies of sound recordings made incidentally to an intended use are exempted from infringing copyright by the Copyright Act, provided that they are made for the purpose of broadcasting by the person making the copy and are destroyed within 12 months.

This exception recognises the practical and commercial need and reality for these copies to be made to facilitate the exercise of the broadcast right.

The Government, in its Digital Agenda Bill, has proposed several exceptions to copyright infringement relevant to the digital environment. These included temporary copies made in the course of the technical workings of the electronic process of making material available to the public.

Exceptions to Copyright

The Digital Agenda Bill provides for a number of other exceptions to the rights of owners, designed to ensure that the present balance between owners and users is maintained.

These exceptions provide for special conditions in which cultural and educational institutions may copy material in their collections.

For example, such institutions will be able to use material in their collections for preservation and internal management purposes without obtaining permission from the copyright owner.

The reforms would also remove the current requirement that the original must be destroyed where a copy is made for management purposes.

Liability For Internet Service Providers

At present, telecommunications carriers and carriage service providers (including ISPs such as Ozemail) are potentially liable for copyright infringements across their networks.

Under the proposed reforms, this liability will be eliminated. Only the person responsible for determining the content, of a website or electronic transmission, will be liable for copyright infringement.

Typically the person responsible for determining the content of online material would be, for example, a web-site proprietor (ie, not the ISP or carrier).

This addresses the problem raised in the *APRA v Telstra* case where Telstra was held liable for the playing of music-on-hold by its subscribers to their

clients, even though Telstra exercised no control in determining the content of the music played.

The digital age also requires reconsideration of the concept “to the public”. This concept is important from a copyright perspective because a public use of copyright material will generally require that the owner be paid for that use.

The meaning of “the public” in the context of the *Copyright Act* was confirmed in *Telstra v APRA* as being the copyright owner’s public. This means that the public nature of a performance or broadcast of a recording is not defined by the number of people present, but rather the fact that members of the public could enjoy or access the performance or broadcast if they chose.

Sampling

Copying can be an art form and has been around for a long time.

In 1917 Marcel Duchamp, presented a ceramic men’s urinal on its side with the title “Fountain” in a gallery exhibition. Picasso used fragments of newspapers in his Cubist collages, TS Elliot included verbatim passages of pre-existing texts in his poetry and in the 1960’s Andy Warhol’s Campbell’s Soup Tin attracted the attention of the world.. The post-modern movement has popularised the use of other people’s artistic material in new contexts. Intellectually, the process may be described as “recontextualisation”. For the visual artist such use is described as “appropriation” and for the musician it is described as “sampling”.

As discussed above, the use of other people’s creative works has been widely accepted and often encouraged by artists and in wider society. It has stimulated thought and inspired new works of art.

The music industry has thrived on the development of new songs and styles based upon earlier works and the copying ranges from mere inspiration to create a new work to the blatant and exact reproduction of recordings, lyrics or tunes.

In 1998, Paul Kelly, one of Australia’s most celebrated singers and songwriters said:

“Songwriting comes from everywhere and that always comes from something before. We use a Prince drum pattern on a song and that probably came from James Brown.”

Sampling is a cultural phenomenon. In recent years it has been facilitated by technological development, in particular, digitisation. As discussed above, as there is little or no degradation in a digital copy it provides the perfect mechanism to take a sample of old song and incorporate it into a new song.

Samples can be taken from anywhere, from old records, new CDs, radio, television, sounds of a street carnival or your brother in the morning. The sounds would need to be recorded and converted into digital format so that they could be integrated into the song without the sound quality suffering.

The Internet has provided a new source of sounds. There are literally millions of sounds available, people have provided or “up-loaded” digital recordings of just about anything you could imagine from the entire music score from Hollywood films, to the theme from Bonanza, the voices of the Spice Girls, the mating call of the African Elephant to judgements of Australia’s Federal Court. All you need is the right software (and most new computers come with it) and you could make a copy of any of these. In the studio these samples could then form part of your new song.

With the costs of computing power plummeting, more and more people have access to these technological developments – for example a 32 track digital recording studio can now be run on a personal computer for under \$5000.

From a legal perspective, using a sample without the permission of the copyright owner is likely to be an infringement of copyright. Whether the copyright owner is willing to pursue the sample for infringement will often depend on the nature of the sample and how successful the song containing the sample has been.

U2 sued the group Negativland for sampling the song “I Still Haven’t Found What I’m Looking For”, to protect their rights in their music. This action would have cost them more money than they would have received from Negativland in licence fees, but they settled out of court and Negativland agreed to recall and destroy all its CD’s – and U2 successfully discouraged others from using their work without permission.

Example

Lets take a theoretical example to demonstrate how a sample may infringe copyright.

Kate has found a fantastic sound on the internet, it’s a two minute sample of Nirvana’s song “Teen Spirit” from an ‘Unofficial’ Nirvana fan site. She downloads the sound file, emails it to the studio where she is about to record her new single. With widely available software, that sound file is opened and the main riff from “Teen Spirit” is lifted and pasted into the chorus of Kate’s song “Old Blues Eyes”.

As mentioned above, under the Copyright Act, for there to be infringement of copyright, the sample taken must be a “substantial part” of the original work. Substantiality is just as much “quantity” as “quality”. If the main riff of “Teen Spirit” has been used it is likely that this would be a substantial part even if its only four seconds of a five minute song. It is the most recognisable part and therein lies its value, to Nirvana (the original artist), Kate (our sampler) and us the buying public.

It is likely that use of this sample would be:

- (a) a breach of copyright in the original sound recording from which the sound on the internet was created; the copyright would probably be owned by whoever financed the recording and is often the record company;

- (b) a breach of the copyright of the underlying musical work, that is the music and lyrics as written by Kurt Cobain and Nirvana; and, since 1989:
- (c) an unauthorised use of Nirvana's performance.

The owners of the copyright and the performers of the song would be entitled to bring proceedings against Kate to stop her distributing or selling her song and from making any profits from it.

Particularly in countries such as the United States, sampling has become so prolific that the legalities aren't as debated as much as simply how much the copyright owners and performers should be paid so that the sample may be used. There are companies whose sole purpose is to find copyright owners and negotiate licence fees for legal sampling.

That said however, tracking down users of samplers can be difficult and expensive. Even if they are found, they may not be able to afford the licence fee.

Unauthorised use of their material is of great concern to many artists and with the advent of the Internet as a distribution channel for pirated music, this fear has been greatly heightened in recent years.

New technologies such as the liquid audio system (see www.liquidaudio.com) and the proposed MP4 format provide significant protection against piracy with a permanent "watermark" embedded into the sound file which can be identified even after mixing and sampling.

That said, the protection it gives you is akin to the protection a zebra-crossing gives you against being run over by Jose Carreras in his Barina.

Alongside commercial developers, collaborative organisations such as the European Intellectual Multimedia Property Rights Model and Terminology for Universal Reference (IMMPRIMATUR) and parallel organisations in the US (Such as the Secure Digital Music Initiative) are endeavouring to create standards by which intellectual property rights (and thus the rights of the artist) are protected, bought and sold. Such standards of protection will greatly facilitate the expansion of on-line music distribution.

Conclusion

Until such protection is afforded artist's rights are at risk.

Technological developments in this "Digital Age" have currently pushed the balances of copyright in favour of the copyright user rather than the copyright owner.

This is of great concern to many copyright owners and is inhibiting the potential use of the internet as a vehicle for the promotion and distribution of music as well as a source of income for artists.

That said, technology may just as easily reverse the balance over time, new techniques are being developed by which artist's rights may be afforded more protection than ever before.

Greater protection and control will enable the artist to financially exploit their work in ways that are currently impossible or unforeseen.

The music industry is playing an active role in developing this technology to protect the copyright that is its economic lifeblood. The music industry is entering a new age of digital copyright. The role of government in providing the legal framework for this new age is critical and we await that framework eagerly.