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Copyright and Music: Damages to Musical Creation

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In this paper, I argue that copyright is not beneficial to music creation. I define the action of a copyright violation of music in two ways. A violation may either be an act of piracy and illegal redistribution, or a case in which a defendant's piece of music is identified in court as being substantially similar to the plaintiff's. Kretschmer (2000) finds that statutory monopoly, a situation in which intellectual property owners have full control over use of the creation, has gradually become more prevalent in both the corporate and legal sphere of music. Despite its prevalence, various elements of music copyright legislation and prosecution have been brought to question by numerous critics, including musicians themselves. These proponents argue against copyright's inconsistency and poor representation of the musical creative process, wherein infringement claims may be deemed unjustified. This paper identifies the shortcomings of copyright implementation and prosecution, with reference to its either negligible or damaging effects on the creative output of music.

I support my position on copyright not being beneficial to music creation with the following three arguments. First, copyright is not aligned with the standard process of music composition and production. The reductive practices of forensic musicology encourage a system of claiming infringement between two pieces of music that is often musically uncritical (Mopas & Curran, 2016). Second, the legal process of determining infringement lacks adequate consistency. Cronin (2015) suggests that prosecution against substantial similarity stifles musical output, as the modern composition has consistently demonstrated an appropriative component. Finally, copyright prioritizes the welfare of music labels and publishers over musicians themselves. The rhetorical development and income beneficiaries of copyright have been attributed primarily to third parties, as opposed to music creators (Kretschmer, 2000).

I also consider three alternative views to my position. First, some argue increasing music piracy requires stronger implementation of copyright protections to defend revenue

(Bustinza et al., 2013). Second, some posit that copyright provides certain types of musicians with distinctive opportunities for remuneration, which they would not be able to attain through other outlets (Boehm, 2009). Finally, proponents of copyright claim that the protection copyright offers creators is a key element in incentive generation (Liu, 2015). I demonstrate that these claims give merit to the general discussion of copyright. However, they may not be considering the full nuance of the creative music process nor the nature of music consumption. For instance, Mitchell et al. (2018) demonstrate that large scale prosecution programs by the RIAA against music piracy have not only been ineffective, but also caused a decrease in legitimate album sales.

This paper is important because it addresses a variety of questions on copyright in music. These questions include “Why is substantial similarity problematic,” “To what extent is music copyright inconsistent or dated,” and “How are music creators underprioritized in the legal sphere.” Through addressing these questions, the goal of this paper is to clarify an inadequate legal system and economic market failure by bringing attention to the consequences copyright poses. The cause and extent of these consequences must be highlighted from the perspective of music creators for the sake of promoting a productive and authentic creative space in music.

In Support of Copyright in Music

Many claim that copyright is both effective and necessary in promoting music creation. For instance, some critics posit that copyright provides a basis of income for some musicians. In addition, some argue that copyright is necessary to shield revenue from piracy. Critics also suggest that the protective domain copyright offers is an important determinant in incentive generation. While it should be acknowledged that copyright can certainly offer remuneration opportunities, each argument contains weaknesses that must be discussed.

Remuneration Opportunities from Copyright

Some argue that effective copyright offers musicians valuable revenue streams that may not otherwise be attainable. Copyright provides a royalty distribution mechanism that

may be a significant income base for some individuals. Boehm (2017) identifies that even though not all musicians gain incentive from royalties attained through copyright ownership, they are still a necessary income scheme for some. The study discusses artist types who may require the revenue streams attained through copyright, such as those who cannot make income through touring. Boehm discusses schemes of effective revenue distribution methods, concluding that the issuance of compulsory licencing, with revenue attained through royalties distributed to artists, is the most effective.

It should be acknowledged that certain artists may depend on royalty distribution. However, while these artists may benefit from the current models, there are authors that suggest royalty distribution schemes can and should be altered. Liebowitz and Watt (2006) acknowledge that non-copyright remuneration schemes may be a “second-best solution” (p. 525), but should be considered in light of the numerous pressures created by digitization. One of the suggestions proposed by the authors is adjusting pricing schemes in a manner that allows for both remuneration for the artist and copying/distributing from other parties. Liebowitz and Watt suggest that this proposal can be attained by promoting a positive network that increases demand, and thus increases the willingness to pay for original copies. In doing so, owners of the original work can distribute the work while the author receives remuneration.

Several other remuneration models have been suggested by authors. For instance, Frosio (2017) discusses the rising popularity of online registries (such as creative commons), where artists upload their music onto the public domain and can opt-in on attaining complete ownership if they wish to copyright their works. Following this model, music would be distributed without the procedural intervention of a secondary party, such as a record label. Frosio also suggests implementing a use levy on goods or services that facilitate copying, such as certain technologies or internet services. Users would have full access and the ability to circulate a work for non-commercial purposes, and the levy proceedings would be distributed as remunerations for artists on the given service. This suggestion is similar to one

proposed by Leibowitz and Watt (2006), who discuss implementing and redistributing a tax on copying devices. Each of these options offer viable alternatives for artists who may otherwise rely on royalty earnings.

Revenue Damages Caused by Piracy

Critics often refer to the damages that improperly regulated copyright imparts on revenue. More specifically, these proponents raise concerns in regard to the increased usage of peer-to-peer (P2P) file sharing networks, commonly referred to as piracy. According to Das et al. (2014), the International Federation of the Phonographic Industry (IFPI) claims that an immense \$2.7 billion and over 70,000 jobs are lost per year alone because of music piracy. The IFPI also estimates piracy caused a 30% decrease in music sales from 2004-2011. Das et al. describe that piracy and P2P music sharing are highly common because of its ease of access, both practically and monetarily. Furthermore, the study identifies that consumers recognize pirated music as a perfect substitute given that piracy does not diminish the utility or quality of the good.

Some argue that the revenue damages piracy poses are inevitable, given the distribution of music as a digital asset. Bustinza et al. (2013) find evidence that piracy is correlated negatively with revenue, indicating a loss of revenue in the music industry. The study identifies that the increase in piracy is a result of increased digitization of music. Digitization as a result of advancements in technology facilitated the ease of both illegal copying and accessing illegally shared music. As a result, as technology further advances, the extent of piracy will likely follow. Bustinza et al. posit that the damages of piracy indicate a need for an increase in copyright regulation and prosecution, in order to protect revenue earnings. However, the authors do acknowledge that not all revenue loss can be attributed to piracy, but also may be a symptom of new, less profitable ways of consuming music, such as streaming payment models.

Although piracy is certainly a common phenomenon, its impact on revenue is likely overstated. Mitchell et al. (2018) examine the effect of piracy prosecution, with respect to

music sale rates under Recording Industry Association of America (RIAA) owned labels. The authors discuss a large-scale response to piracy, which include the RIAA's prosecution campaign against P2P sharing networks, as well as various lawsuits against individuals. The RIAA claimed that instances of infringement were a reason for the decline in music sales. Mitchell et al. find, in contrast to the RIAA and IFPI's statement, that piracy does not in fact play a significant impact on decreased music sale. The authors argue that responses to piracy in the case of RIAA were unsuccessful as they simply caused a greater decrease in legitimate albums sales.

In addition to revenue damages being overstated, some argue that piracy actually poses benefits to music artists. Mitchell et al. (2018) posit that the self-defeating result of combating piracy was caused by P2P services being shut down, which significantly limited consumers' exposure to music. Herings et al. (2018) build upon this by finding that piracy poses a significant long-term benefit for artists. By attracting a larger consumer base through heightened ease of access, greater availability for consumers allows them to interact with music that they otherwise may not have. Herrings et al. find that this accessibility substantially increases total surplus for both listeners and creators of music. Given that piracy cannot be a primary cause of revenue damage, and instead benefits the market, it should not significantly decrease creative output.

Incentive Generation Mechanisms

Various critics will support copyright in terms of its economic basis as an incentive generator. The productive capacity of an economy, and thus its ability to grow, is largely dependent on intellectual advancements. Copyright is often seen as a necessary legislative measure to protect these advancements. Balganes (2009) describes the prominence of copyright law construction with respect to justification theory, a social psychology theory that suggests individuals feel motivated to protect the status quo. According to the author, the status quo among various scholars and practitioners of copyright is that incentive generation is best actualized through a degree of exclusive control. Balganes identifies this model as

particularly utilitarian. The study finds that copyright is often constructed in a manner that significantly extends the reach and duration of the recipient's utility, more than it may truly need to be.

Some argue that musicians do find incentive-based merit in copyright. A study by Liu (2016) evaluates the utilitarian approach to copyright discussed by Balganes (2009). Liu attempts to dismiss theoretical speculations of "hypothetical rational or romantic artists" (p. 471) by collecting survey information on the views of musicians in China, where piracy is rampant. Evidence from the study actually suggests conflicting sentiments with regards to the "rational" versus "romantic" perspectives on music creation. Artists claim that a lack of copyright does not impact their primary, intrinsic desire to create. However, it is also suggested that musicians find that a threat of piracy and their ability to earn income does affect creative incentives. Liu argues that as long as copyright does not impede on intrinsic desires, it plays a key role in generating incentives. The study depicts that this role does not function as a basic rewards system, but instead creates a diverse support system for artists to feel comfortable entering the industry.

Contrary to the status quo, there are practices that are more important than copyright in promoting incentivization. According to a study by Oberholzer-Gee and Strumpf (2010), monetary input from income streams that are dependent on copyright efficacy (such as royalties) do not play a significant role in income generation. The authors also suggest that a drastically weakened field of copyright, using the example of piracy, does not have significant impact on actual creative output. This effect is a result of internal artistic motivations, as well as the potential for other streams of income and remuneration. The various other key incentives discussed in the study include both monetary and non-monetary forms, such as live performing or social status. Similar to Mitchell et al. (2018), Oberholzer-Gee and Strumpf observe weak links between the increase in music piracy and decrease of legitimate sales. In fact, the authors posit that file sharing can be beneficial to artists as it increases demand for the other potential income routes such as live performance.

Damages of Copyright to Musical Creation

Copyright's damages outweigh its benefits for music creation. One of the issues evident in music copyright is the difference between substantial similarity and established music compositional practices. There are also various inconsistencies in copyright litigation with respect to modern music creation. In addition, music creators are often not a prioritized interest group in welfare distributions from copyright. Although copyright is an accepted form of legal institution, the role of copyright in the music industry presents a number of problems.

The Contradictory Nature of Substantial Similarity

Substantial similarity presents a clash between copyright and music compositional conventions. Various musicians (many of which are popular artists) have faced charges in court on the proclaimed unlawful practice of intellectual theft. The number of substantial similarity disputes that have been settled in court has reached a staggering 260 over the past half century ("Music Copyright Infringement Resource," 2023). While the lengthy process of these cases makes it such that they do not occur as often as piracy or improper use-based cases, which are typically automated, the impact is evident. Musicians who receive these allegations can endure costs of up to millions of dollars, as exemplified by the case of Robin Thicke and Pharrell Williams v. Marvin Gaye. Thicke and Williams lost 50% of their royalty rights on their track "Blurred Lines," and paid a fee of \$5.3 million for theft of the "general vibe" of Gaye's "Got to Give It Up" ("Musicians Institute Library," 2022).

The primary issue with the substantial similarity argument is the problem of forensic musicology. A study by Mopas and Curran (2016) conducts an examination of court practices in the field, where experts reinterpret musical elements into basic visual forms in an attempt to objectify the criteria with which copyright infringement cases are conducted. The study demonstrates, as the term "forensic musicology" implies, that evidence in the form of musical melody is processed in order to make it appear intelligible to a layperson. However, this practice is often negatively reductive in the name of objectivity. Mopas and Curran posit that

this practice abandons the complex nature of music for what they deem “ocular-centrism,” an inaccurate visual expression of music that discards the art’s experiential qualities. Similar to sentiments expressed by Mitchell et al. (2018), who explore this experiential nature of music consumption, Mopas and Curran emphasize that these discrepancies arise with respect to the manner that individuals create and perceive musical information.

Melody, despite the suggestions of forensic musicology, is deeply related to other musical elements. Nicolas (2023) posits that melody cannot be simply reduced to relative pitch combinations on a musical scale. The study describes that the presence of harmony and rhythm are necessary in both constructing and interpreting melody. Nicolas highlights that certain harmonic choices are very common as specific harmonies sound particularly pleasant, at least to accustomed audiences. These common choices are also seen with rhythm, particularly in the case of lyrical music. An interpretation with music theory thus poses two issues with respect to substantial similarity: there is only a limited number of melodic combinations in a musical scale, and composition cannot be interpreted solely in terms of these combinations. As explored by Mopas and Curran (2016) and Nicolas, neither the inherent limitations nor the nuances of melodic composition are adequately considered. Courts scarcely acknowledge that the same melodies can be composed entirely independently, and they may fail to differentiate between the unique contexts in which the melodies occur.

Modern Inconsistencies in Copyright Litigation

Copyright litigation does not currently align with modern advancements in music. Extending musical analysis to law practice, Cronin (2015) finds inconsistencies between copyright litigation and modern music practices, particularly with respect to popular music, which often receives the brunt of infringement accusations. The study frames its approach with an overview of the changing nature of music notation and creation, with respect to musical evolution caused by technology developments. Cronin identifies that despite a decrease in the originality of musical parameters, infringement cases have seen a stark

increase, often on poor or flawed bases. In other words, despite creators having developed a prominent openly shared language of music, they are still faced with charges on this very basis. Cronin asserts that this has created reluctance on the end of creators in fear of the potential damages they may endure from infringement claims. Furthermore, the study posits that if courts were appropriately aware of evolution in musical creation, a large number of infringement cases on the basis of substantial similarity would be dismissed.

The inconsistency of musical copyright litigation manifests in court hearings. Ranger-Murdock (2020) discusses the tendency for musicians to draw explicit musical inspiration from other artists, as highlighted by Cronin (2015). Ranger-Murdock describes that courts attempt to accommodate for this tendency by differentiating between protectable and unprotectable elements in music. However, the result of *Thicke and Williams v. Gaye*, as discussed by the author, implied that artists can also base an infringement claim via the "constellation theory." This theory suggests that a plaintiff can amalgamate cherry-picked, unprotected elements to make an argument in favor of infringement. The study argues that the constellation theory allows for "false positives" (p. 1090), in that there is little room for differentiation between copying and inspired, yet independent, creations. Ranger-Murdock evaluates the theory with the case of *Skidmore v. Zeppelin*, on the claim that Led Zeppelin's track "Stairway to Heaven" infringed upon the track "Taurus" by Spirit. Despite a similar attempt at proving infringement via constellation theory, the hearing was ultimately in favor of Led Zeppelin. Ranger-Murdock argues that the theory's acceptability towards unprotected elements thus makes its application excessively broad, as exemplified by the court hearings that demonstrate ambiguous or inconsistent results.

Interest Groups and Impact on Welfare

The distribution of welfare relative to interest groups depicts the magnitude of musicians' potential benefit from copyright. In the context of music creation and distribution, these interest groups are primarily creators of music, and what a study by Kretschmer (2000) refers to frequently as "investors in creativity," which includes third party distributors such as

publishers and music label owners. Kretschmer finds that the rhetorical arguments for copyright in music consistently have origins in third parties, and to some extent a minority of high earning creators. This distribution parallels with the relative income beneficiaries. According to the study, in 1993, 80% of musicians in the British Performing Right Society earned under £1000 from royalties. Kretschmer emphasizes that these earnings, which do not compose a livable income, are likely consistent across various countries. The study argues that copyright should be drastically altered to limit the financial incentives for third parties, and instead emphasize the direct support of creative endeavors.

The imbalance in royalty distribution often manifests in favor of record labels in court. A study by Aragon (2017) finds that amid changing ways of consuming music (i.e. physical to digital record sales), artists and record labels began to contest over royalty schemes. During the era of physical record sales, labels retained a majority of royalty shares under the premise of covering the physical manufacturing costs. Aragon discusses that despite the advancement of music distribution, contracts for digital sales were constructed under the old royalty scheme. Record labels thus treat sales on digital format as though they are physical sales, despite artists insisting digital sales are more similar to licence sales, given there is no added physical cost. This license-based interpretation of digital sales would grant artists a 50% royalty as opposed to the standard 8-15% under a physical sale. Aragon argues that the license sale scheme is the correct interpretation of the Copyright Act. However, this result was not achieved in all court hearings, as evidenced by *Malmsteen v. Universal Music Group, Inc.* on digital sales. The study finds that ambiguous record label contracts were presented in the case, paired with a subpar interpretation by the court of the terms “sale” and “license.” These occurrences led to the physical sale royalty scheme being maintained, in favor of the Universal Music Group. Ultimately, the interests of the third party, and insufficient activity of the court, has led to poor welfare distribution choices for artists.

Conclusion

In this paper, I argued that copyright in music poses damage to music creation. One of copyright's problems is rooted in the issue of substantial similarity, as the method of forensic musicology does not align with standard musical practices. This issue is emphasized by inadequate legal practice, which is inconsistent with respect to both modern advancements and relative case results. These legal problems work together in discouraging music creation by causing musicians to suffer losses from poorly executed legal cases, or simply because of fear of infringement accusation. Additionally, the construction of music copyright has consistently been attributed to third parties, causing welfare distribution from royalties to scarcely support income opportunities for a majority of musicians.

Despite the evident negative effects that copyright poses on music creation, critics in support of copyright still argue for its importance. For instance, some posit that revenue suffers losses from the threat of piracy and P2P sharing. However, evidence suggests that these damages are overstated and legal action against piracy poses greater harm towards musicians. Additionally, critics suggest that copyright is needed for some artists to have access to income streams through royalties. While it is true that some artists do rely on income from royalties, research demonstrates that there are alternative ways to establish equitable revenue distribution. Some critics also appeal to the incentive generation mechanism of copyright and argue that it motivates artists to enter the industry. Instead, there are more relevant incentives at play that motivate artists.

This paper is important as it highlights a clear struggle with market failures in the music industry, and an inadvertent suppression of creative practices. Although research strongly suggests a discontinuity between the theory and actual effects of copyright, certain critics are outspoken, and the status quo prevails. These critics and practitioners either promote an inaccurate picture of the musical creative process, or simply prioritize the welfare of other parties. As a result, musicians are left second to ulterior interest groups that have greater bargaining power in the legal sphere. If action is not taken to create a viable creative

space, where musicians can thrive without a looming threat of legal action or insufficient income, the negative consequences discussed in this paper will inevitably persist.

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