MUSIC COPYRIGHT IN THE DIGITAL AGE: A POSITION PAPER

PREPARED BY
The American Society of Composers, Authors and Publishers

MARCH 2008

ASCAP

A BILL OF RIGHTS
FOR SONGWRITERS AND COMPOSERS

Created by ASCAP, the American Society of Composers, Authors and Publishers

Just as citizens of a nation must be educated about their rights to ensure that they are protected and upheld, so too must those who compose words and music know the rights that support their own acts of creation. Without these rights, which directly emanate from the U.S. Constitution, many who dream of focusing their talents and energies on music creation would be economically unable to do so - an outcome that would diminish artistic expression today and for future generations.

At this time, when so many forces are seeking to diminish copyright protections and devalue artistic expression, this Bill of Rights for Songwriters and Composers looks to clarify the entitlements that every music creator enjoys.

1. **We have the right to be compensated for the use of our creative works, and share in the revenues that they generate.**

2. **We have the right to license our works and control the ways in which they are used.**

3. **We have the right to withhold permission for uses of our works on artistic, economic or philosophical grounds.**

4. **We have the right to protect our creative works to the fullest extent of the law from all forms of piracy, theft and unauthorized use, which deprive us of our right to earn a living based on our creativity.**

5. **We have the right to choose when and where our creative works may be used for free.**

6. **We have the right to develop, document and distribute our works through new media channels - while retaining the right to a share in all associated profits.**

7. **We have the right to choose the organizations we want to represent us and to join our voices together to protect our rights and negotiate for the value of our music.**

8. **We have the right to earn compensation from all types of "performances," including direct, live renditions as well as indirect recordings, broadcasts, digital streams and more.**

9. **We have the right to decline participation in business models that require us to relinquish all or part of our creative rights - or which do not respect our right to be compensated for our work.**

10. **We have the right to advocate for strong laws protecting our creative works, and demand that our government vigorously uphold and protect our rights.**

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EXECUTIVE SUMMARY

If You Read Nothing Else, Read This Section

Below are the key points detailed in this document:

» ASCAP, The American Society of Composers, Authors and Publishers (www.ascap.com), is a membership association of over 300,000 U.S. composers, songwriters, lyricists and publishers of every kind of music.

» A significant right embodied in a copyrighted musical work is the right of public performance. Today, a music "performance" can occur in diverse ways across scores of different media. Music might be directly performed before a live audience at a concert or theatrical production. However, according to copyright law, music can also be "indirectly" performed "by means of any device or process."

» Copyright is a form of protection provided to the authors of "original works of authorship" - which include literary, dramatic, musical, artistic and certain other intellectual works. The Copyright Law does not require an author to officially register his or her work with the Copyright Office. However, registration becomes extremely important if that author ever needs to pursue ownership or infringement of the work in court.

Despite its complexities, copyright...is more relevant today than at any time in its history.

» Music creation is sometimes divided into its essential elements - including the music written by composers, and the words written by lyricists. These skills are oftentimes embodied in a single songwriter. Music creators can publish their own works or can "assign" their copyrights to music publishers who provide writers with the business resources needed to navigate the licensing process to bring the finished product - the song, the symphony, the film score - to the public.

» Despite its complexities, copyright - particularly relative to artistic works such as musical compositions - is more relevant today than at any time in its history. While the growing ease of copying, storing and sharing music in digital formats offers tremendous opportunity to music creators, it also imperils their livelihood. As various parties argue the merits of the current copyright laws and trade accusations of self-interest, individuals who would never consider shoplifting a CD from a store are becoming increasingly comfortable downloading "free" music from the Web.

» Most music creators - individual songwriters, lyricists or composers - are, in reality, the smallest of small business owners. Copyright first and foremost assures their ability to protect and earn income from their creations.

» Beyond supporting the individual songwriter or composer, copyright facilitates many aspects of commerce that surround the creation and consumption of music - which at a macro level, benefits everyone.

» Creativity requires support. Support might mean the space (physical or mental) to bring a work to life. It might mean the willingness of society to accept challenging or unexpected ideas and works. And more often than not, it means the ability to survive economically in a creative profession. Copyright helps protect and enable the creation of music and other artistic works, by allowing music creators to license, control the use of and receive compensation for their work.

» There is a specific area of tremendous concern relative to copyright - the growing number of business entities that profit from content they do not create, while shirking ethical, financial and legal responsibilities to compensate creators and copyright holders. Those working in the digital arena in particular are aware of the tremendous appeal of music and other creative content. Many popular sites and services - from MySpace, to YouTube, to Google - rely on music to attract consumers and build their business models (often based on the sale of advertising). Yet in many cases, these are the same entities testing the boundaries of copyright law.

Many popular sites and services...rely on music to attract consumers and build their business models...

» With the growth of "Web 2.0" platforms like MySpace or blogs, which allow everyday people to post their own creative content online, critics charge that copyright in its current form has become archaic and restrictive. This is one of the factors behind the creation of alternative licensing approaches - which seek to replace copyright's "All Rights Reserved" with a modified "Some Rights Reserved" model. But before making a choice to license away any right irrevocably, music creators should fully understand the terms to which they are agreeing, as well as the potential implications down the line.

Amid the many "shades of grey" of the copyright debates, it is important to remember that some issues remain black and white:

» The creative people who bring vital art forms like music to life have a right to share in the profits generated by their work and earn a living from uses of their work.

» The protection of copyright in the musical realm is ultimately for the benefit of the creator who hopes to make a living from his or her talent and passion to create.

» Without this protection, many who dream of focusing their talents and energies on music creation will be economically unable to do so. This will mean music lost both today and to future generations - as well as an overall diminishment of the diverse artistic expressions today's fans of music have come to expect.

Without this protection, many who dream of focusing their talents and energies on music creation will be economically unable to do so.

Discussions about how copyright should adapt and evolve along with our changing society are both important and productive - as long as these essential truths are not overlooked in the process.

INTRODUCTION

The Purpose of This Paper

Copyright is confusing.

That's an understatement, particularly for a non-legal audience. The history surrounding the development of modern copyright policy is long and dense, laced with legal jargon and technical terms difficult for the lay person to penetrate.

Copyright can also be polarizing, particularly in the Internet era.

From the technology community, one often hears the mantra "information wants to be free" - even among those who make their living from copyright-protected software code and other types of fiercely-guarded intellectual property. There are heated debates regarding the public domain, often referred to as "the commons." In addition, there is rampant confusion concerning the use of copyrighted works like popular songs in emerging channels like pod- and vodcasting. And finally, there is a kind of ethical "double standard" emerging - where individuals who would never consider shoplifting a CD from a store, turn a blind eye when illegally downloading "free" songs from the Web.

Copyright is more relevant and important today than ever before.

The issues touched on above, among many others, underscore the continued and growing importance of recognizing the ownership of created works - particularly in an age where information can be shared more freely and rapidly than at any other moment in history.

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The growing relevance and importance of copyright is directly linked to the expanding reach and functionality of the Internet, as well as the exploding availability of simple but powerful new tools that allow anyone to "publish" virtually any type of content to the Web. These tools include: blogging platforms like LiveJournal and WordPress; photo-sharing sites like Flickr and Photobucket; video sharing sites like YouTube and Revver; social networking sites like MySpace (broad audience) and BlackPlanet.com (highly audience-specific); and the innumerable blogs and Web sites where music files are linked-to or posted.

With this context as a backdrop, this paper will explore the role of the music copyright in the digital age. In doing so, it will seek to explain copyright, simply, as well as:

- Get back to the basics of "what is a right?" and "who is a creator?"
- Review the core aspects of copyright as it relates to music
- Identify the "chain of benefits" that links creators with those who listen to, view, or otherwise "consume" their creative works
- Examine the "best of times, worst of times" paradox faced by creators today
- Explore some of the recent debates regarding copyright
- Address misconceptions and outline the facts about copyright

Who Should Read This Paper?

This paper is intended for a broad audience.
Rather than addressing itself to those already versed in copyright law, this paper is designed to speak to those united by an interest in better understanding the role of music copyright in the digital age.

The reader might be a young songwriter trying to promote his or her works without losing control over their use.

The reader might be a journalist covering the convergence of technology and music - and looking for some basic information on the role of rights.

The reader might be a legislator who is charged with developing laws for a shifting digital landscape.

The reader might be a blogger about to leap into podcasting, but unsure of the rules in terms of how music might be used.

What is ASCAP and Who Are Its Members?

ASCAP is - simply put - the voice of the music creator.

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ASCAP, The American Society of Composers, Authors and Publishers (www.ascap.com), is a membership association of more than 300,000 U.S. composers, songwriters, lyricists and publishers of every kind of music. Through agreements with affiliated international societies, ASCAP also represents hundreds of thousands of music creators around the world.

As a "performing rights organization" or "PRO," ASCAP has licensed and distributed royalties for the nondramatic public performances of copyrighted works created and owned by its members since its founding in 1914. (The next section will provide more detail on the meaning of both "nondramatic" and "public performance").

The original idea behind ASCAP - the first PRO in the U.S. - was to make giving and obtaining permission to publicly perform music a simple process for both creators and users of music. It was, and is, intended to allow those performing music publicly to do so legally, efficiently and at a reasonable price - as well as to compensate music creators in order to help them earn a living from creating music. Those licensed by ASCAP include any entity that wants to "perform" copyrighted music publicly, such as radio stations (traditional, satellite and Internet), network, local and cable television, concert halls and arenas, restaurants and bars, Web sites and many others.

Who Owns ASCAP?

This is perhaps ASCAP's most important point of differentiation as compared to

other PROs. It is the only performing rights organization in the U.S. created, owned and governed by its members - composers, lyricists and music publishers - a structure that ensures its focus remains entirely on the needs of the people creating the music. ASCAP has the lowest operating expense ratio of any PRO in the world, distributing over 88-cents of every dollar collected as royalties to its members.

Who is a "Music Creator"?

Music creators are the people who write the music and lyrics that enrich lives in every corner of the world.

That statement may sound overly sentimental - until one considers the passionate and highly personal place that music has always occupied in human society.

Music creation is sometimes divided into its essential elements - including the music written by composers, and the words written by lyricists. These skills can be embodied in a single songwriter.

Both music creators and publishers earn their living from the licensing of the rights which copyright law grants in their musical works.

Music creators can publish their own works or can "assign" their copyrights to music publishers who provide writers with the business resources needed to navigate the licensing process to bring the finished product - the song, the symphony, the film or television score - to the public.

Entering into an agreement with a publisher is a choice made by many music creators, given the complexity of supporting their work from a business perspective. Music publishers are a critical part of the music creation and distribution process - and work as close partners with those who create music.

Today, ASCAP represents every kind of music creator from every possible genre: pop; rock; alternative; country; R&B; rap; hip-hop; Latin; film and television music; folk; roots and blues; jazz; gospel; Christian; new age; theater and cabaret; dance; electronic; symphonic; concert; and many more.

ASCAP is also home to some of the greatest names in American music, past and present - from Duke Ellington to Dave Matthews, from George Gershwin to Stevie Wonder, from Leonard Bernstein to Beyoncé, from Marc Anthony to Alan Jackson, from Henry Mancini to Howard Shore - as well as many thousands of writers in the early stages of their careers.

Who are Music Publishers?

Today's culture offers an incredible array of opportunities for music to be bought, sold and heard. The complexities of managing the "business end" of the creative process - particularly in terms of taking the greatest possible commercial advantage of musical works - is the key reason why publishers play such a critical role in the lives of many music creators.

When music publishers first came into existence roughly 300 years ago, their primary role was to print and sell sheet music. Today, music creators turn to music publishers to help ensure that their works reach the public through every available channel. Publishers have contacts with record labels, performing artists, movie and television production companies, advertising agencies and myriad other sources that use musical works. Music publishers are skilled at handling the complex processes around licensing a copyrighted musical work to a host of different users, overseeing contractual arrangements, taking care of accounting duties, and numerous other essential tasks.

When a music creator chooses to enter an agreement with a music publisher, he or she transfers the rights inherent in the musical works he or she creates to the publisher in exchange for royalties. The contract may cover a single song, or may be an exclusive agreement including all musical works written after the contract has been signed for an agreed-upon number of years. Exclusive agreements may also include a music creator's past catalog of works

Both music creators and publishers earn their living from the licensing of the rights which copyright law grants in their musical works. One of these rights is the right of public performance. As noted above, ASCAP's primary focus is performance rights - which are discussed in greater detail later in this document.

Another large source of income for writers and music publishers comes from what are known as "mechanical rights." The mechanical right is the right granted by a copyright owner of a musical work to an entity like a record label, allowing that musical work to be reproduced in a sound recording (such as a CD or, increasingly, a digital format like MP3). More information about mechanical rights can be found on the Web site for The Harry Fox Agency (www.harryfox.com) - which, among other things, handles licensing associated with mechanical rights.

Before getting deeper into the discussion of how copyright benefits music creators - as well as the culture at large - it's worth stepping back to explore what a "right" really means.

BACK TO BASICS: DEFINING A "RIGHT"

What is a Right?

Just as citizens of a nation should know their rights, it is critical for those who write music to educate themselves about the specific rights engendered by their own acts of creation.

"Rights" in both concept and practice are larger than copyright - and far older than a digital era still in its infancy.

The discussion of rights is closely tied to notions of citizenship, especially relative to defining those "inalienable" privileges granted to each member of a society.

Identifying the rights of the individual citizen - rights which the government was organized to protect - was a fundamental principle in the formation of the United States. Interestingly, recognition of copyright is found in the U.S. Constitution - as demonstrated in Article I, Section 8:

> *The Congress shall have the power... To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;*

Just as citizens of a nation should know their rights, it is critical for those who write music to educate themselves about the specific rights engendered by their own acts of creation.

While many music creators are excited by the possibility of reaching broader audiences through new channels like MySpace and YouTube, just as many others are confused about the implications of the online and offline choices facing them.

Those who've "made it" tend to have an entire team guiding them - managers, lawyers, financial advisors, record labels, etc. Those starting out often carry the weight of their decisions largely on their own shoulders. Consequently, without a basic understanding of where music fits into the copyright landscape and the economics of making it one's life's work, a music creator might reap a short-term gain - while making a major long-term sacrifice he or she didn't intend. So getting smart about the music creator's rights is probably more important today than at any time in the history of copyright.

Before exploring the challenges (and opportunities) for today's music creator, it's worth backing up to understand the basics of how copyright is defined and governed - and where music enters the picture.

Copyright Basics

Copyright is a form of protection provided to the authors of "original works of authorship" - which include literary, dramatic, musical, artistic and certain other intellectual works.

Under the umbrella of copyright, several core rights are granted to the author:

- *Reproduction* - covering physical (including digital) copies made of the book, song, artistic work, etc.
- *Derivation* - covering works or adaptations made based on the original work
- *Distribution* - covering the ability to sell or otherwise distribute copies of the work to the public
- *Performance and Display* - covering the ability to perform or display a work in public

Copyright protection for a song - as with any other "original work of authorship" - starts from the moment a creative idea is rendered in a fixed form. The idea alone is not enough. It needs to be brought to life, given expression and captured in some tangible format. A most basic rule is that copyright does not protect ideas, but only the expression of ideas.

You might have an idea for a song, but until you fix the song in a tangible format - such as by recording yourself playing it, or by writing out the musical notation - the composition cannot be covered under copyright.

For example, someone longing to be in a snowy clime for the holidays is an idea. The Irving Berlin composition, "White Christmas," is an expression of the idea and, hence, is copyrightable.

Copyright protection for a song...starts from the moment a creative idea is rendered in a fixed form.

Another basic cause of confusion is that musical recordings contain not one, but two entirely separate and distinct copyrights. The first is the musical work, the underlying musical composition, created by a composer, lyricist or songwriter. The second is the sound recording, which is a recording of a performance of a musical work by a performing artist. The rights being discussed in this paper - and the only rights that ASCAP handles - are the rights related to the underlying musical work.

For music creators, capturing their work in a fixed form for copyright purposes can mean transcribing a composition onto sheet music or recording it onto a CD or a DVD. Once the expression of a creative idea is fixed in a tangible form, that creator automatically holds the copyright over that work.

The Copyright Law does not require a creator to register his or her work with the Copyright Office. However, registration becomes extremely important if that creator ever needs to pursue claims in court.

The Meaning of "Performing Rights"

Music creators - as well as the music publishers who help get musical works to a wider audience - earn their living largely from licensing the rights granted to those works by copyright law.

A significant right embodied in a copyrighted musical work is the right of public performance.

Today, a music "performance" can occur in diverse ways across scores of different media. Music might be directly performed before a live audience at a concert or theatrical production. However, according to copyright law, music can also be "indirectly" performed "by means of any device or process."

Consequently, performances occur when music is created for and woven into a television show, broadcast over the airwaves or played as background music in an elevator or restaurant. Performances also take place when someone streams Internet radio or video on their computer.

Apart from the discussion of music's varied media and manifestations, the right of public performance is separated by industry practice into two distinct types: nondramatic (also called "small") and dramatic (also called "grand"). While there are many shades of grey between these two terms, the end points stand in stark contrast.

At the "dramatic" end of the spectrum is a full-scale musical production, where the music is fully integrated into the story - for example, a Broadway show such as "West Side Story" or an opera. At the "nondramatic" end of the spectrum is a singer performing a song from that same show in a nightclub, or a radio station broadcasting a track from the original cast album to its listeners.

A significant right embodied in a copyrighted musical work is the right of public performance.

"Nondramatic" performing rights are extremely significant for music creators and publishers, because these rights tend to be their single largest source of income. Yet the scope of these performances is staggering. How can a songwriter track innumerable performances potentially occurring every minute of every day on every conceivable medium - to ensure he or she is fairly compensated?

This is where the PRO comes into the picture.

The Role of the PRO

Many musical artists write and perform their own songs. But thousands of other music creators are hidden behind the scenes because they do not perform.

Often, the general public associates a hit song with the person who sang it, while the composer or lyricist who authored that song goes unrecognized.

We think Christina Aguilera when we hear "Beautiful." We don't think of songwriter Linda Perry.

We think Kenny Rogers when we hear "The Gambler." We don't think of songwriter Don Schlitz.

We think Barbra Streisand when we hear "The Way We Were." We often don't stop to consider that Alan and Marilyn Bergman wrote the lyrics and Marvin Hamlisch composed the music.

Few of today's classical composers have the broad fame of old masters like Mozart or Beethoven. And aside from a handful of more recognizable names like Randy Newman who scored the music for "Toy Story," most viewers would be hard-pressed to identify a film or television score composer.

While performing artists have potential access to income streams from touring and ticket sales, or sales of merchandise like t-shirts, songwriters and composers depend on the revenues available via the licensing of their nondramatic performing rights. However, it would be impossible for individual creators to license or monitor the many possible nondramatic uses of their works on their own.

...thousands of music creators are hidden behind the scenes because they do not perform.

That's why both music writers and publishers join a PRO like ASCAP, which they empower to collectively license an entire musical repertory on behalf of all members. Thus, when a radio station or restaurant is granted an ASCAP license, it can play any works in the ASCAP repertory. Music creators affiliate with a PRO on a non-exclusive basis - which means anyone can also go directly to the copyright holder to negotiate an agreement.

It's important to note that someone who both writes and performs has access to income streams from their roles as both a music creator and music performer. Their work as a performer does in no way negate the rights inherent in that original act of creating the musical work.

Copyright's Chain of Benefits

While debate over copyright and its evolution is healthy and important, the very foundation of rights can be too easily dismissed - without examining the larger chain of benefits that copyright helps to forge.

Most music creators - those individual songwriters, lyricists or composers - are in reality small business operators. This point is typically overlooked by copyright foes who fail to acknowledge that the purpose of copyright is to protect the rights of that individual creator.

...fair compensation for copyright fosters the continuous creation of new music, which enriches both music lovers and the culture at large.

But the benefit does not end there.

As the first link in copyright's chain of benefits, the creator composes a musical work. The rights vested in that musical work enable the creator to turn his or her passion into a livelihood.

Beyond supporting the individual songwriter or composer, copyright facilitates many aspects of commerce that surround the creation and consumption of music - which at a macro level, benefits everyone.

The chain of economic benefits that starts with the writer is a long one and has a positive impact on a great many people and businesses - from musicians, to concert promoters, to record labels, to digital media businesses that use music to attract customers, to hardware and software manufacturers that build businesses on consumers' love of music.

Ultimately, fair compensation for copyright allows funds to flow back to the music creator - that first link from which the entire chain is derived. But perhaps most critically, it fosters the continuous creation of new music, which enriches both music lovers and the culture at large.

Are Rights Still Relevant in the Digital Age?

Two Sides of the Coin

Music creators have a growing array of tools at their disposal that the founders of ASCAP - way back in 1914 - could not have imagined in their wildest dreams.

Technology allows music creators to develop, document and distribute their works as never before. It enables them to replicate a studio environment in their homes...use software to instantly transcribe a melody-line into musical notation...collaborate on everything from lyrics to musical tracks with someone on the other side of the globe...or post samples of their works online to market themselves and their music.

...in what should be the best of times for music, the people who create it are increasingly left outside in the cold.

New venues like satellite radio, legitimate online music stores and social networking sites are opening an array of music options to new audiences - connecting listeners and creators in an ever-growing web of new relationships. It seems like the passion for music is more pervasive than ever.

Unfortunately there is another side of the coin for many - one characterized by confusion and concern. The old paradigms of the music industry are shifting, while new ones are only half-formed. The physical world is shifting to the digital landscape, where content clearly is king. Yet the value of that content, in economic terms, is hotly debated.

Illegal downloading is at the center of the maelstrom. It is the most contentious issue affecting those who create and make music, as well as those who love music. It is also at the heart of the paradox: if music is so loved, so cherished and so central to our current cultural moment, why is it being devalued by so many of its "consumers"?

Make no mistake. The love of music appears to run as high today as at any time in human history. It is the driver of Apple's renaissance. The jet fuel behind social networking sites. The bandwidth hog on every college campus. The soundtrack for online video.

And yet, in what should be the best of times for music, the people who create it are increasingly left outside in the cold. A party is happening, and music creators are not being invited.

What artist, writer, musician, songwriter doesn't long to quit his or her "day job" to pursue a creative passion?

Rights as a Creative Catalyst

Some of the people seeking to revise or limit copyright law assert that rights curb creativity. Citing the growing trend around the "remix" culture - mashing two songs together, creating humorous new "trailers" for existing films, reworking images found online - these individuals argue that copyright is a deterrent to building off existing works to create new ones.

This line of debate runs counter to the core of copyright, given that creativity requires support. Support might mean the space (physical or mental) to bring a work to life. It might mean the willingness of society to accept challenging or unexpected ideas and works. More often than not, it means the ability to survive economically in a creative profession.

What artist, writer, musician, songwriter doesn't long to quit his or her "day job" to pursue a creative passion? The income provided by copyright ownership helps fuel these creative pursuits. Yes, it also facilitates economic engines that drive big business. But first and most importantly, it allows music creators to license, control the use of and receive compensation for their work.

If music creators lose this vital support for their craft, the "space" to create shrinks - and more art is lost to history.

Reviewing the "Digital Divide"

...the way copyright debates are currently playing out suggests a double standard within the digital community.

The rapid growth of the digital environment clearly complicates the rights arena by making it easier to appropriate, copy and redistribute digital content with or without the creator's permission.

Yet the way copyright debates are currently playing out suggests a double standard within the digital community. How someone looks at copyright in one context might be quite different in another.

Proponents of change to copyright law often assert that many people who "publish" to the Web are non-professionals who never intend to invoke the rights surrounding the personal blog posts, songs, poetry, online videos or other works they create. Bloggers in particular are often cited as "creators" who want to link to and build on the work of others - and who want others to link to, comment on and build upon their works in return - without the need to invoke what they view as draconian copyright law.

Yet putting these populist myths aside, the reality is often far more pragmatic.

Over the past few years, many people using the Web to post personal creative works have raised concerns over individuals who "steal" and re-post their content without links or attribution.

A Boston Globe piece from May 2006 cited a woman in Boston who wrote fun online pieces about her passion for the Red Sox. According to the piece, a reader informed her that dozens of her blog posts were being plagiarized. She expressed her frustration, noting ''What's the point of having a blog if you can't even write your own original content for it?"

Independent online film and A/V review site, Big Picture Big Sound, put it this way:

> "Some say the WWW is not the 'World Wide Web' but the 'Wild Wild West' where anything goes and copyright rules do not apply.

> Not so. Anything published on the Web is as protected by international copyright laws as it is on paper, and this includes not only the printed word, but images as well."
> http://www.bigpicturebigsound.com/smart-house-plagiarism-868.shtml

Copyright can be easy to argue away, when you are not the one actually creating the content.

It is each creator's personal choice to allow various uses of his or her work. Some people who post their works online are not concerned with other sites taking and using their content. But for others - particularly those whose creative work is becoming increasingly "professionalized" - these uses equal theft.

Copyright can be easy to argue away, when you are not the one actually creating the content. It's much more difficult when you are, in fact, the creator - even if you are a passionate believer in the community and collaboration enabled by today's technology.

Profiting from Content - The Expanding Debate

The debate over rights in the digital arena is wide-ranging. It touches not only music, but every form of creative content.

There is a specific area of alarming concern - the growing number of business entities that profit from content they do not create, while shirking their ethical and financial responsibilities to compensate the actual creators and copyright holders.

By the Summer of 2006, social networking site My Space had built tremendous momentum - particularly among music creators and artists eager to promote their work to a wider audience. MySpace had developed a special profile page template for musicians and was actively promoting the service to the music community.

There is a specific area of alarming concern - the growing number of business entities that profit from content they do not create...

Scores of music creators and performing artists built MySpace profiles and uploaded their songs for page visitors to stream. However, one longtime songwriter and performing artist dug deeper to review the "Terms & Conditions" language posted by MySpace to govern these profiles. And he did not like what he saw.

The singer-songwriter was British-born Billy Bragg - a passionate music creator and performer long devoted to social activism and issues such as workers' rights. Bragg noted the following about the MySpace "Terms & Conditions" in the blog on his profile page:

> "Someone who we work with was bright enough to read the small print of the MySpace terms and conditions and found that once an artist posts any content (including songs), it then belongs to MySpace (AKA Rupert Murdoch) and they can do what they want with it, throughout the world without paying the artist."

In removing his songs from the site and speaking out, Bragg drew significant attention to the fact that music creators were, for all intents and purposes, ceding ownership rights through the simple act of uploading it to their MySpace profile.

As one blogger commented in July 2006:

> "He raises a very valid point: many users upload songs and videos to MySpace, YouTube and similar sites without realizing the conditions that they impose: most have terms of use that say that the audio or video pretty much becomes the site's property and that they can do what they want with it: they can use it in an advert or even sell it. I mentioned a few weeks ago about how AOL's online video hosting service terms of service were pretty egregious in this respect..."
> www.camcorderinfo.com/content/British-Musician-Gets-MySpace-to-Change-Their-Rules.htm

In this case, MySpace demonstrated its willingness to adapt its "Terms & Conditions" in respect for the creators it hoped would continue to populate its site, through a non-exclusive and limited use license. Yet Bragg's actions shed light on the potential pitfalls for music creators associated with emerging online media - and the importance of reading the "fine print" associated with new promotional channels.

Those working in the digital arena are well aware of the tremendous appeal of music and other creative content.

More recently, a music creator and performer widely acknowledged to be one of the greatest talents of his generation has stepped up to decry the business practices of certain online players.

In September 2007, Prince announced that he intends to file lawsuits in the U.S. and UK against YouTube, eBay and file-sharing site, The Pirate Bay. The goal of these actions is to "reclaim his art on the Internet," according to a statement released on his behalf.

The statement underscores the issue of central concern for many creators - that YouTube and sites like it are "clearly able (to) filter porn and pedophile material but appear to choose not to filter out the unauthorized music and film content which is core to their business success."

YouTube, along with its parent Google, is already under significant legal pressure from Viacom. Early in 2007, the media giant brought a $1 billion lawsuit against YouTube and Google for "massive copyright infringement of Viacom's entertainment properties." As InformationWeek reported in March 2007:

> ...Viacom said in a statement: "YouTube is a significant, for-profit organization that has built a lucrative business out of exploiting the devotion of fans to others' creative works in order to enrich itself and its corporate parent Google..."

These types of commercial uses of content are a far cry from the collaborative, remix culture of populist myth. That culture does exist. But the efforts of commercial parties to build business models on the backs of content they do not themselves create, nor in many cases pay for, is blatant self-enrichment at work.

Those working in the digital arena are well aware of the tremendous appeal of

music and other creative content. Without it, many popular sites and services - from MySpace, to YouTube, to Google - would have little to attract consumers.

Without consumers, many of these sites - particularly those that receive revenues from advertisers or strategic partnerships - would have nothing on which to base their business models and no way to generate economic value.

Noted computer scientist and pioneer in the area of Virtual Reality, Jaron Lanier, recently underscored the increasing dependence of technology players on "free" content to bolster business models based around advertising (The New York Times Op-Ed, 11/20/07):

> Like so many in Silicon Valley in the 1990s, I thought the Web would increase business opportunities for writers and artists. Instead they have decreased. Most of the big names in the industry - Google, Facebook, MySpace and increasingly even Apple and Microsoft - are now in the business of assembling content from unpaid Internet users to sell advertising to other Internet users.

He goes on to say that "information is free on the Internet because we [technologists] created the system to be that way," and calls for software engineers and Internet evangelists to design and foster systems that enable content creators to be paid.

As compelling as this argument may be, the waters are increasingly being muddied by those who seek to limit or otherwise roll back the scope of rights for creators. This circumstance makes copyright - including the essential right of performance so critical to every music creator - more relevant today than at any time in history.

Questioning the "Commons"

The role of the public domain is an area of hot debate within the universe of copyright. The boundaries of "fair use" - which allows copyrighted works to be utilized for parody or in certain non-commercial or academic contexts without compensation to the rights owner - can be difficult to discern.

...if you don't know what you're licensing, you could be doing serious damage to your career as a music creator.

With the growth of Web 2.0 platforms like Facebook or blogs, which allow everyday people to post their own creative content online, critics charge that copyright in its current form has become archaic and restrictive. It is complex to understand and, therefore, difficult for the average person to know what is protected and what is not. This complexity, they claim, is a deterrent to a freer flow of information, as well as to empowering the individual to build on and "remix" culture.

A growing portion of the current fair use discussions refer to a realm euphemistically called "the commons." The commons is conceived of as a shared space of culture - a space where information, ideas and content are available for use by "the community," i.e., all members of a society.

A major proponent of the "commons" concept is the organization Creative Commons. As explained on its Web site, Creative Commons "provides free tools that let authors, scientists, artists and educators easily mark their creative work with the freedoms they want it to carry. You can use CC to change your copyright terms from 'All Rights Reserved' to 'Some Rights Reserved.'" It offers ways for copyright owners to release some of the rights invested in their work - with the goal of increasing sharing of, and access to, intellectual property.

Alternative systems for licensing content may be effective for many different kinds of people - including certain scientists and academics, as well as others whose primary aim is the broad dissemination of information and exchange of ideas. There are some musicians, songwriters and other creative people who choose to license their work through vehicles like Creative Commons.

It's their decision to do so. However, if you don't know what you're licensing, you could be doing serious damage to your career as a music creator. You may be unwittingly undermining your own ability to control or be compensated for your work.

A music creator, performer or other artist can indeed "give it away," and still retain his or her rights.

Before making a choice to license away any right irrevocably - a key point in the terms of all Creative Commons licenses - music creators should fully understand to what they are agreeing, as well as the potential implications down the line.

There are several issues related to Creative Commons that any serious music creator must take into consideration for the sake of their career, such as confusion over how Creative Commons defines "non-commercial use" and an inability to enforce any rights if someone does not respect the boundaries of a Creative Commons license.

The Addendum to this paper offers a deeper "Questioning of the Commons" - exploring 10 things every music creator should know on this subject.

Promoting Your Work Online

The phenomenal growth of venues like YouTube and MySpace is encouraging music creators and performing artists to leverage the power of social networking and related Web technologies. Stories of acts like Cassie and OK Go exploding onto the national scene thanks to online buzz underscore the value of these evolving platforms.

However, with new opportunities comes a host of questions. Should a music creator "release" his or her song to the Web wilds? What are the implications of offering up an entire track or music video for free download? Is this activity building a career or giving away the farm?

The good news is this: a music creator, performer or other artist can indeed "give it away," and still retain his or her rights.

Posting your song to some kind of social media site for streaming, downloading

or sharing does not void your copyright as the creator. In practical terms, it means you may have little to no control over where it goes or how it's used. But for those starting out in the business, this approach can be a powerful way to promote yourself and, in some instances, can be the key to a major breakthrough.

Let's return for a moment to the discussion of the "commons." When posting a song online for promotional purposes, you could ask whether the "Some Rights Reserved" model might be preferable to simply putting it up there for all to see and hear.

That could be fine in certain cases. But what if the song starts gaining momentum? What if, even better, it starts spreading like wildfire on the Web? As noted above, once an alternative licensing scheme like Creative Commons is applied, the terms are irrevocable. So if you applied an alternative license requiring only "attribution" of your sudden Web wonder (meaning, just listing your name as the composer), there's no going back. You've ceded your commercial rights to that piece of content, voiding the protection of copyright and opening the door for others to use your song - even for their own profit.

Some may view this trade-off as appropriate. But let's look back at the Cassie example. Her first single, "Me & U," exploded to epic proportions through a very creative and deliberate MySpace campaign - masterminded to a large extent by songwriter, producer and ASCAP member, Ryan Leslie.

The track not only broke Cassie onto the national scene, but it became an economic engine all its own - topping music charts, ringing on cellphones, downloading on iTunes, selling as a single and breaking out internationally. In addition to the tremendous peer-to-peer and viral power of the track on the Web, it was monetizing by its creators through many channels - because the rights were retained.

There are few more relevant examples of how the social nature of today's on- and offline culture can be effectively harnessed as a win-win for everyone. The buzz was built, the fans took an active part in creating the zeitgeist and spreading the word, and the artists and creators themselves reaped the economic benefits of their creativity.

CONCLUSION

Amid the many "shades of grey" of the copyright debates, it is important to remember that some issues remain black and white:

...creative people who bring vital art forms like music to life have the right to share in the profits generated by their work...

» The creative people who bring vital art forms like music to life have the right to share in the profits generated by their work and earn a living from uses of their work.

» The protection of copyright in the musical realm is vital to the creator who hopes to make a living from his or her passion to create.

» Without this protection, many who dream of focusing their talents and energies on music creation will be economically unable to do so - which means artistic expression lost both today and to future generations.

Discussions about how copyright should adapt and evolve along with our changing society are both important and productive - as long as these essential truths are not overlooked in the process.

REFERENCES & RESOURCES: WHERE TO LEARN MORE

The following resources contributed to the development of this document:

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» http://www.ascap.com/about/

"Berne Convention for the Protection of Literary and Artistic Works," World Intellectual Property Organization (WIPO) Web site
» http://www.wipo.int/treaties/en/ip/berne/index.html

"The Law," Recording Industry Association of America (RIAA) Web site
» http://www.riaa.com/physicalpiracy.php?content_selector=piracy_online_the_law

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» http://www.informationweek.com/news/showArticle.jhtml?articleID=198000551

ADDENDUM

Setting the Record Straight: Questioning the "Commons"

SETTING THE RECORD STRAIGHT: QUESTIONING THE "COMMONS"

The role of the public domain is an area of hot debate within the universe of copyright. The boundaries of "fair use" - which allows copyrighted works to be utilized for parody or in certain non-commercial or academic contexts without compensation to the rights owner - can be difficult to discern.

"Simpler" does not equal "better" - particularly when it comes to protecting long established rights that make creative professions viable

With the growth of Web 2.0 platforms like Facebook or blogs, which allow everyday people to post their own creative content online, critics charge that copyright in its current form has become archaic and restrictive. It is complex to understand and, therefore, difficult for the average person to know what is protected and what is not. This complexity, they claim, is a deterrent to a freer flow of information, as well as to empowering the individual to build on and "remix" culture.

While copyright law can be difficult to understand, its complexity does not render it invalid. "Simpler" does not equal "better" - particularly when it comes to protecting long established rights that make creative professions viable in a financially-driven culture.

A growing portion of the current fair use discussions refer to a realm euphemistically called "the commons." The commons is conceived of as a shared space of culture - a space where information, ideas and content are available for use by "the community," i.e., all members of a society.

A major proponent of the commons concept is the non-profit organization Creative Commons. As explained on its Web site, Creative Commons "provides free tools that let authors, scientists, artists and educators easily mark their creative work with the freedoms they want it to carry." Through Creative Commons' licenses, or "CC licenses," copyright holders reduce their rights from "All Rights Reserved" to "Some Rights Reserved." Essentially, copyright owners release some or all of their rights.

Alternative systems for licensing content may also be effective for some scientists and academics, as well as others whose primary aim is the non-profit exchange of ideas and information. However, songwriters, lyricists or composers, who depend on their art for their livelihood, may face an entirely different set of considerations. Copyright owners may be unwittingly undermining their own ability to control or be compensated for theirs work.

10 Things Every Music Creator Should Know

For songwriters, lyricists or composers who want their art to be their life and livelihood, it's critically important to get beyond the hype and "hipness" of licensing alternatives, and to look dispassionately at the choices on the table.

Among the "copyright alternatives," the Creative Commons licenses are styled as being friendly and easy to use. To submit a work to be governed under a Creative Commons license, creators click on symbols and icons for attribution,

"share alike" or noncommercial uses, and then upload a digital copy of the work.

While the process appears simple, the meaning of these symbols can be misleading to a creator. Even if he or she takes the time to access what Creative Commons calls the "human readable" terms and conditions of the license, will that creator fully understand to what he or she is consenting?

All the CC licenses are "irrevocable" - meaning they cannot be changed or revoked.

Before committing to a CC license, songwriters or other music creators should consider these 10 important legal issues:

» 1. *Irrevocability* - All the CC licenses are "irrevocable" - meaning they cannot be changed or revoked. Once you place a work under a CC license, the meta-data travels with the digital version of your work - forever. This provision conflicts with a creator's absolute right under the U.S. Copyright Act to end any license or contract regarding a creator's work after 35 years (generally speaking), no matter what the license or contract says. This right of termination can be very valuable, particularly if a work "breaks through," but there is no apparent way to exercise your termination rights under a CC license.

» 2. *Waiving Royalties* - Most CC licenses ask creators to waive the ability to collect royalties - including from public performance rights. Such a waiver illustrates that these licenses are for people who do not make a living primarily from their creative work. For example, academics and scientists enjoy salaried positions, with health care and often with university or subsidized housing. Independent songwriters and composers have no such luxuries.

» 3. *Confusions Over "Noncommercial Use"* - Many CC licenses are for "non-commercial use." While this would seem to preclude a creator's work from being unfairly exploited for monetary gain, a problem immediately arises: there is no definition of "noncommercial use" under the U.S. Copyright Act. Though there are a few narrow exemptions for "noncommercial performances," all other uses of creative works should be licensed, either by the creator or otherwise licensed by reason of a compulsory license. Even "non-commercial" PBS and NPR pay license fees for their right to perform music in their broadcasts and on their web sites. To further complicate matters, CC licenses define peer-to-peer file sharing as "noncommercial" - a position with which the United States Supreme Court has disagreed and is otherwise at odds with U.S. law.

There is no support for rights enforcement under the Creative Commons system.

» 4. *No Support for Rights Enforcement* - There is no support for rights enforcement under the Creative Commons system. There is no larger organization, like an ASCAP, to enforce the scope of creators' rights under these licenses. Creators are on their own when, for example, the boundaries of a non-commercial CC license are breached, and the creator finds out the work is being exploited for compensation by another. Creators who have

not obtained a U.S. Copyright Registration for a CC licensed work will also find out that they have no standing to even sue in a U.S. Court, and thus, are left with few realistic options for recourse.

» 5. *Potential Global Conflicts* - CC licenses are global, which can complicate a creator's ability to enforce his or her rights when those rights are violated. Normally a work's creator can control the geographic territory in which a work is used - or appoint representatives to do so. For example, ASCAP relies on a global network of Performing Rights Organizations to license and collect royalties for performances of ASCAP members' works in other countries. The global nature of the Creative Commons system can interfere with the support and income offered by these types of existing rights infrastructures.

...there is no "authentication" as to whether the true owner of a piece of creative content is the one applying for the CC license.

» 6. *Non-Exclusivity* - CC licenses are "nonexclusive," which means that the work's creator will have no future ability to enter into exclusive deals for a work licensed under the Creative Commons system. In the entertainment industry, producers may want exclusive rights to use, for example, a musical work as the signature theme for a television show or an advertisement. Such an opportunity could be lost to the creator of a work licensed under a CC license.

» 7. *The Issue of Co-Creators* - CC licenses can cause complications for works created by more than one individual. Under the U.S. Copyright Act, unless they have a written agreement otherwise, each "co-creator" has the right to license the work on a non-exclusive basis without the consent of their co-creator. Each co-creator's responsibility is to ensure that the other co-creator receives a share of profits. But what happens when a co-creator places a work under a CC license? If a license eliminates the possibility for payment on that work, and extends both globally and forever, the other co-creator is essentially out of luck.

» 8. *Lack of Distinction Between Types of Uses* - CC licenses do not distinguish between types of uses. A music creator's submission of a work to a CC license means that he or she allows the work to be performed, copied, distributed or even synchronized to an audiovisual work. This can lead not only to lost financial opportunity, but also a conflict of ideology. If a creator gives up control over the use of his or her song, that song could end up being synchronized with an audio-visual work that promotes a point of view offensive to the creator and the creator will be without any remedy.

» 9. *Prohibition of DRM* - CC licenses prohibit use of digital rights management (DRM). While use of DRM continues to change, it has been a core element in today's digital music arena. Preventing DRM from being applied to a musical work can limit its use via certain distribution channels.

» 10. *No "Authentication" When a Work Is Submitted* - Even if a creator doesn't want to submit his or her work to a CC license, someone else can. How? Because there is no "authentication" as to whether the true owner of a piece of creative content is the one applying for the CC license. Any person can go to the Creative Commons web site with a digital song file or photograph, follow the instructions online and claim it as his or her own and release a work, without the copyright holder's consent, to the "commons."

For music creators, there are other considerations relative to Creative Commons in addition to the list above.

For example, below is a note from the FAQ on the Creative Commons Web site regarding how a CC license treats peer-to-peer file sharing under its "noncommerical" provision:

> One thing to note on the noncommercial provision: under current U.S. law, file-sharing or the trading of works online is considered a commercial use - even if no money changes hands. Because we believe that file-sharing, used properly, is a powerful tool for distribution and education, all Creative Commons licenses contain a special exception for file-sharing. The trading of works online is not a commercial use, under our documents, provided it is not done for monetary gain.
> (http://creativecommons.org/learnmore/faq#Questions_for_ people_ thinking_about_applying_a_Creative_Commons_license_to_their_work)

Under U.S. Copyright Law, creators already have the right to waive their rights, give their works away for free or permit the use of their music for sampling or mash-ups.

Creative Commons deems P2P file sharing and distribution a noncommercial activity. And yet there has been debate and confusion in this area. For example, is making and then distributing CDs of a track marked for noncommercial use still noncommercial if the distributor charges for "shipping and handling"? If a description of this same track is mined by Google Adwords to produce contextual ads directly related to the song's content, is such a use still noncommercial?

In its recent primer "7 Things You Should Know About...Creative Commons," online educational resource Educause highlights some of these areas of confusion:

> Creative Commons is designed to be easy to use, but this simplicity comes at the expense of clarity at the extremes - determining what defines a commercial use or constitutes acceptable attribution can be tricky. The "share alike" principle, in particular, quickly runs up against difficult questions.

A review of existing content marked with Creative Commons licenses finds that a vast majority of these licenses are Attribution / Noncommerical / No Derivatives. This designation indicates that most people who are using the system are doing so for promotional purposes - not to enable "remix" culture by allowing others to make derivatives or build off their work.

Under U.S. Copyright Law, creators already have the right to waive their rights, give their works away for free or permit the use of their music for sampling or mash-ups, without necessarily giving up their ownership rights. They also have the right to say "no" to licensing their works for uses with which they disagree, on creative or other grounds.

So before making a choice to license away any right irrevocably, music creators should fully understand the terms to which they are agreeing - and the implications down the line.