

Music, copyright and the Internet

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Introduction

I started preparing this paper by listing as separate headings all the matters that I said I would cover in my abstract, and quickly realised that twenty minutes is not much time in which to cover an enormous amount of ground. I will however cover the ground – albeit we'll skim over the surface rather than excavate for the rich detail. Nonetheless, in giving here what is essentially an overview, I want to acquaint you with the general topography – the approach pictures to Mars from the space probe rather than the close ups of Barnacle Bill from Sojourner.

How does a songwriter make money? – the legal framework

If you own a car, you can keep it garaged and locked to keep it secure. If you own a piece of land, you can build fences around it and keep guard dogs to keep people out. Physical property may be protected by physical means.

Copyright law is intangible, and to prevent other people walking off with intellectual property, is all the owner of the copyright property has to secure his or her property: it must act as garage, lock, fence, and guard dog. However, the difference between intellectual property and physical property is that intellectual property may be pinched and distributed without the copyright owner missing it; it may be infinitely replicated while leaving the original intact.

Copyright law thus acts to allocate property in the products of intellect and the products of talent – songs, literary works, scripts, art, sound recordings, films and so on. What the copyright owner has is a bundle of exclusive rights, enforceable in

the courts under the Copyright Act, which is federal legislation. Insofar as music and lyrics are concerned the rights are as follows:

- the reproduction right (for example, printing, the “mechanical right” and the “synchronisation right”);
- the publication right (that is, the right to make copies of the work available to the public for the first time);
- the public performance right;
- the “adaptation” right (which includes the right to make arrangements and transcriptions, and the right to make translations); and
- the right to reproduce, publish, publicly perform, cable, and broadcast any adaptation.

These rights can be exploited by the copyright owner to generate income, and to exercise some degree of control over how a work is used and distributed. It is important to note that these are sources of income quite separate from any income the songwriter might receive if they are a performer, or from the provision of their talent when commissioned to write material.

Historical development of copyright

The history of copyright law is essentially the history of the response to developments in technology by creative communities – pressure on legislatures by creators and investors winning out over consumer and other groups using/pirating that material.

For example, the development of the printing press led to government allocated monopolies in the ability to print – both in relation to music and in relation to other print material; the development of the music box and the player piano led to the introduction of the mechanical right; the development of broadcasting technologies led to the development of the broadcasting right; the developing use of music in

commercial contexts such as in factories and in shops led to judicial broadening of the concept of public performance.

The question then is how copyright is placed to deal with recent developments in technology such as the Internet.

How does the Internet impact on copyright?

legal aspects

Some of the copyright owner's rights are clearly involved in the use of songs on the Internet. Generally, storing a copyright work such as a song on a computer – either by downloading or by caching – will be a reproduction of the work. Putting music onto your web page will also involve a reproduction of the work. Having songs playing on a computer in an Internet café will clearly involve a public performance of the music on the relevant site.

Other matters are less clear; for example, does viewing a work on screen and storing it temporarily in Random Access Memory involve an exercise of the reproduction right? While it is likely that transmission via the Web is a cable diffusion of the music, is the Internet Service Provider responsible, or does responsibility lie with the telecommunications carrier (that is, Optus or Telstra)?

practical aspects

In practical terms, having copyright rights under copyright law is all very well, however, if you don't know that your work is being copied, then those rights are not much use to you. Similarly, if you can't identify and nail down the person who is making copies or sending your songs around on the Internet, your ability to recover compensation is severely limited.

The Internet has been described as a gigantic copying machine (David Nimmer). To date, the Internet has been dominated by cowboy attitudes to copyright. This is largely a hangover from the origins of the Internet as a means of academic and military communication. As the Internet moves to a commercial tool and a primary means of communication between people, the leakage of value from copyright product such as music is of increasing concern to songwriters, publishers and whose incomes or investment is predicated upon tight control of product – if you can download digital quality recordings from the Net, why buy a CD? Also, if the Net operates as substitute for radio and television type services, what happens to broadcast income? Much of this leakage is the result of “altruistic” piracy – that is, individual copying for personal use by people not realising they are breaking the law and effectively stealing, rather than by organised commercial pirates.

Some commentators – in particular John Perry Barlow, from *The Grateful Dead* have proclaimed the death of copyright, suggesting that value from music and so on will come from the provisions of services, rather than the provision of copies of product – that, essentially, copies of material will be loss-leaders for live services. While the value of physical property is concerned with its scarcity, the value of digitised information is, Barlow argues, based on its contemporaneity. People will, on this argument, pay for “real-time” information. Barlow also suggests that a system of patronage for artists and other creators will return, where people commission the creativity and expertise of others by direct interaction. It will be relationships rather than ownership that will generate income. This interaction will be controlled by the technology, and Barlow can see no role for copyright law in this system.

Like Nietzsche’s claims that God is dead, Barlow’s claims are in my view premature. One of Barlow’s colleagues in *The Grateful Dead* died shortly after Barlow’s views were published; copyright lives.

Generally, encryption, “push” technologies which control access and linking to sites, and tagging of material may in the long term make it easier to trace and

control copyright material, and for song-writers, publishers and record companies to extract an economic value from their talent and investment.

How have music copyright organisations reacted to the Internet?

AMCOS

AMCOS is an organisation of music publishers. On behalf of its members, it has successfully closed down a number of sites which were located within two University Web sites. These sites contained lyrics to popular songs and MIDI files allowing computers to reproduce instrumental versions of the songs.

In response to the approaches of AMCOS, both universities have undertaken to review material available via their sites.

APRA

APRA is the organisation which licences public performance, broadcast and cable diffusion of copyright music and lyrics. In 1996 it offered for the first time a licence to ISPs for the cabling of its music and lyrics to subscribers. The licence would be available at the initial cost of \$1.00 per subscriber – a charge which would initially generate revenue of over half a million dollars to APRA, to be redistributed back to the people whose songs were being distributed over the Net.

Apparently, one ISP from a pool of some 280 ISPs did accept the invitation to take up the licence – and then backed out once it realised that no-one else was taking up the offer of a licence. Many netizens were alarmed or disgusted by APRA's attitude that ISPs should pay for music being provided to their subscribers. Composers and music publishers whose work is being used on the Net presumably have a different attitude.

APRA has now commenced proceedings in the Federal court against OzEmail for failing to take out a licence – result yet to come.

(discuss Australian article)

How has government reacted to the Internet?

Copyright Convergence Group report

In October 1993 the Federal Government set up the Copyright Convergence Group (CCG) to report on proposals to amend the Copyright Act to meet the challenges of new technological realities. In particular, the Group looked at the scope of the diffusion rights, how the Act operates to determine liability for cable diffusion, and the extent to which copyright rights should be varied or extended.

The CCG report was published in August 1994. The CCG made recommendations which included the following:

- that a new, technologically neutral right of transmission to the public replace the existing technologically specific rights (namely, broadcasting and cable diffusion);
- that a new provision should be inserted in the Act to the effect that transmissions of copyright material by electronic or similar means which are made for a commercial purpose should be deemed to be transmissions to the public;

The CCG did not consider that it was necessary to specify who should be liable for making a transmission.

The 1996 Draft exposure bill

The 1996 Draft Exposure Bill circulated by the then Federal Government in February last year contained provisions which would have introduced a

transmission right along the lines proposed by the CCG. That Draft Bill moved liability for transmission from the carrier (that is, Telstra and Optus) to the person providing the content of the transmission. In practical terms, this move would have made it very difficult in many cases for copyright owners to exercise control or to extract any money from the use of their material on the Net. At the least, it would up the cost of administering copyright, having to deal with a myriad of users rather than the one commercial entity.

In my view, both any person responsible for determining the content of the transmission; and the relevant service provider should be liable for transmitting copyright material without the authorisation of the copyright owner. This would mean that a copyright owner could take legal action against a service provider if, for example, the person who is responsible for determining the content of the transmission is outside the jurisdiction or has no assets.

A Copyright Amendment Bill was introduced into Federal Parliament in June this year – without the transmission right provisions. We understand that the transmission right is still subject to discussion in an Interdepartmental Discussion Committee between the Department of Communication and the Arts and the Attorney General's Department. Stay tuned.

Copyright Law Review Committee

In 1995, the Copyright Law Review Committee was given a reference to examine and make recommendations concerning the Copyright Act.

Under its first chairman, Peter Banki, the CLRC in February 1996 issued an issues paper which looked at the rationales, interests and objectives of copyright law. That document is a very wide ranging document which sets out the various arguments for and against copyright protection. Well worth a visit. Following the election, and following the resignation of Mr Banki, the CLRC received a new chairman and a pared down reference, which concentrated on the way copyright

law could be simplified and the Act revised so as to make it more readable and more easily understood.

WIPO

The World Intellectual Property Organisation (WIPO) has co-ordinated international discussion on the impact of the Internet on copyright law, and how copyright law should respond to the Web.

WIPO treaties

For example, late last year, two new international treaties were adopted in Geneva, following a WIPO Diplomatic Conference:

- the WIPO Copyright Treaty; and
- the WIPO Performances and Phonograms Treaty.

New international standards in the treaties include:

- an expanded right of communication to the public, to cover on-line transmissions, such as over the Internet;
- a right of distribution;
- an obligation to provide “adequate legal protection and effective legal remedies against the circumvention of effective technological measures”; and
- an obligation to provide remedies against a person who removes or alters electronic rights management information, or distributes material whose electronic rights management information has been altered or removed.

On the issue of “temporary” reproduction of material, the press release from WIPO stated:

The Conference also discussed whether or not specific provisions are needed concerning the application of the right of reproduction concerning some temporary, transient, incidental reproductions, but did not adopt any such provisions since it considered that those issues may be appropriately handled on the basis of the existing international norms on the right of reproduction, and the possible exceptions to it, particularly under Article 9 of the Berne Convention.

In other words, if Australia ratifies this treaty, it will need to work out its own position on the matter.

A third proposed treaty, the draft Treaty on Intellectual Property Rights in Databases, was not discussed at the Diplomatic Conference; the Conference adopted a recommendation for further preparatory work for this treaty.

Manila

In late April, WIPO held a conference on broadcasting, new communication technologies and intellectual property in Manila on 28 to 30 April. The conference consisted of a series of panel discussions, including:

- Convergence of communication technologies: terrestrial broadcasting, satellite broadcasting and communication to the public by cable.
- Digital transmissions in the Internet and similar networks.

Seville

WIPO conducted an International Forum on *The Exercise and Management of Copyright and Neighbouring Rights in the Face of the Challenges of Digital Technology*, in Spain in May this year. The Forum consisted of a series of panel discussions:

- 1: The impact of digital technology on the protection and exercise of copyright and neighbouring rights.

- 2: The role of the State concerning the exercise and management of copyright and neighbouring rights.
- 3: Exercise of rights in respect of multimedia productions.
- 4: Technological means of protection and rights management information.
- 5: New alternatives for centralised management: “one-stop shops”.
- 6: “Traditional” collective management in the face of digital technology.
- 7: Overview of the present situation of centralised management of rights (“traditional” collective management, “one-stop shops”).
- 8: Review of the principles concerning the establishment and operation of centralised management of copyright and neighbouring rights.

What’s missing and what needs to be done

In a real sense a number of matters are in limbo at the moment. In some ways, the courts are adapting very well to the digital environment – *Virtuacop* has been held to be a film for the purposes of copyright law; in other situations, however, the law is somewhat uncertain, and either litigation or legislation is needed to sort matters out, and find out where the balance between copyright producers and copyright users is to be drawn, and how copyright producers will be able to extract value from their talent and investment.

I understand that an old Chinese curse expresses the wish that the person receiving the curse live in “interesting times” – that is, in a period of instability and danger. As Bob Dylan stated, “The times they are a’changing”. Indeed they are, and that to me is what makes life worthwhile.