Abstract

The intent of this paper is to address the current landscape of American music copyright law by examining the law's development through history, legislation, and relevant case law, and through interviews with contemporary professionals in the music industry. As such, the paper will be divided into two sections; the first containing a historical exploration and an analysis of current legislation and case law, and the second being comprised of two interview transcripts, and relevant analysis.

The primary goal of this research is to answer several important questions about the development of music copyright ownership through time and into the future. The field of music copyright has been and will be in a state of constant flux, because it is by nature a malleable area of the law. As social changes take place and technological progress is made, the requirements and ramifications of music copyright laws change.

Introduction

The goal of copyright law as provided under Article 1, Section 1, Clause 8 of the United States Constitution is as follows:

> 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.

Where did the inspiration for this language originate, and how? How was it decided what should or should not be protected? How much protection do works deserve? Where is the line between promotion and taxation of progress?

The history of American music copyright laws can be traced back to the inception of mass music publication. Legislation or similar legal devices regarding the rights of the composer, the publisher, and the public in relation to music have been in place since Ottaviano Petrucci rendered the printing press a viable producer of notated music in the early sixteenth century. Publishing techniques have changed and developed drastically since the days of Petrucci, but several questions have remained central to the debate over music copyright. What compensation does the publisher owe the composer? What right does the composer have to control the publication of his or her own music? What rights are inherent in purchasing music? These questions have been asked repeatedly by lawmakers through the centuries as technology has developed and changed the meaning of what constitutes publication, what constitutes music copyright infringement, and what constitutes musical intellectual property.

Formative History of American Copyright Law

Before the advent of music printing, in order for music to be distributed it had to be hand-copied. Music could be copied anywhere and by anyone, but it was a slow process, and the only real purposeful copying and distribution of written music took place in the Catholic Church as part of an effort to standardize the chants used in services throughout the Christian world. Without the widespread distribution of music there was little need for laws regarding a composer's ownership of his or her own compositions. Composers of printed music who worked for the church would be compensated for their labors by the charity and tithing of patrons rather than through sale of their music. Even after the invention of movable print in the early fifteenth century, music remained largely hand-copied. In fact, the first printed publication that incorporated music was the Mainz Psalter in 1457, which was printed with large spaces throughout so that the lines of notation could be filled in by hand. There are several different extant examples of this publication that each have a different level of detail put into the written scores, suggesting that the music was even written in by the purchasers rather than by the printers themselves. The reason that the music was not printed, was that early block printers had no method by which to print music into their scores. Though he was not the first to develop music printing, it did not develop into a workable product until Ottaviano Petrucci, a Venetian printer, perfected his methods of music printing. Petrucci discovered that music could be printed much more easily and with fewer necessary blocks if the staff was printed first and then the notes were layered on top. While liturgical music printers had engineered this method prior to Petrucci's work, Petrucci employed a much finer typeset that allowed him to print his scores in a much more refined and well-finished

manner.[1] This new methodology proved especially suited to the technical demands of printing polyphony. In 1498 Petrucci was awarded a Venetian privilege for twenty years. With this privilege, Petrucci was assured by mandate of the Venetian government that the volumes of figured song and polyphony he published would be published and sold by no one else in the Venetian States, and that those volumes could not be imported and sold by any other publisher.[2]

This early example of law governing published music raises and illustrates an important question. Who is protected by such a law? In this case, it is only the publisher. In Petrucci's time, commercial publication of secular music was not widespread, and therefore the composers published in Petrucci's volume neither received nor expected compensation. As music printing across Europe began to catch up with Petrucci's standards, similar protections under royal law for the printing and publication of mainly religious texts became commonplace.

By the time Petrucci's monopoly had ended in 1518, Paris, France had become the major printing hub in Europe. In 1551, Adrian Le Roy and Robert Ballard were granted a "French Royal Privilege for Music Printing" and their company extended their patent to control the Parisian market for music printing for the next 200 years.[3]

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1 Boorman et al. "Printing and Publishing of Music."
2 Boorman, Stanley, "Petrucci, Ottaviano." *Grove Music Online, Oxford Music Online* (Oxford University Press), accessed March 14, 2014, http://0-www.oxfordmusiconline.com.wncln.wncln.org/subscriber/article/grove/music/21484.
3 Boorman et al. "Printing and Publishing of Music."

The Stationers' Company Monopoly

When considering the history of our own copyright right system in the United States of America, it had its beginning in the Royal Letters Patents of the English Crown which were passed down throughout the fifteenth and sixteenth centuries. The Royal Letters Patent were granted to publishing firms of all types, and were a means by which the government could exercise unlimited power over the presses. Patent holders had the unfettered and exclusive right to print and publish the works covered under their patent. The crown, in turn enforced this power through search, confiscation, and imprisonment. This power was vested in the form of the Stationers Company, which was a guild of printers that held sole royal rights to print.

The Stationers' Company, or "The Worshipful Guild of Stationers and Newspaper Makers," was established in London, England in 1403 under the reign of King Henry IV as a guild for copiers, illustrators, and binders of books.[4] Following the introduction of the printing press to England in 1476, the guild began to specialize in this new method of book production, and established themselves as the primary printers and publishers in England. Inherent in this advancement was the beginning of the idea of copyright.[5]

The Stationers' company did not possess true royal authority and copyright until they were granted a charter by Mary I in 1557. With this charter, the constituent member publishers of the Stationers' Company held the sole copyright for all printed works in England. The Stationers' Company was vested with this power by the crown and parliament

4 Cyprian, Blagden, *The Stationers' Company: A History, 1403-1959,* (Cambridge, MA: Harvard University Press), 1960, Print, 20-23.

5 Patterson, Lyman Ray, *Copyright in Historical Perspective* (Nasheville, TN: Vanderbilt University Press), 1968, Print, 20.

in an effort to control the amount of religiously disagreeable and anti-state documents being proliferated at the time. All published works had to be approved of and printed by the Stationers' Company whose power was given to them by the crown, so the crown, in essence held the power to censor the press. Less than a year after the charter was handed down, the Catholic Queen Mary died, and her half sister Elizabeth ascended the throne, and restored England to Protestantism. This religious shift did not end the Stationer's censorship, but merely shifted the focus of the censorship. In fact, Elizabeth I must have seen greater value in the power of governmental censorship, because the powers of the Stationer's Company were augmented during her reign.[6]

Under the rules of the Stationers' Company's charter and royal letters, any book, play, or flier, with few exceptions, had to be printed and published by members of the Stationers' Company. The Stationers were also allowed to create their own set of rules for the governance of liscensure. They created a log in which members of the company would list the book they were going to publish along with their name. This granted that particular publisher the right to print and disseminate that book indefinitely unless they should choose to relinquish or sell that right to another printer.[7] The books that were approved on the register had to also be acceptable to the crown, in turn, the crown granted the Stationer's company the authority to enforce their rules. Anyone found to be printing or selling a book without license was subject to imprisonment and a financial penalty, half of which was given to the crown, and the other half to the Stationers.

Many trade companies in sixteenth and seventeenth century England much larger and

6 Patterson, Lyman Ray, *Copyright in Historical Perspective,* 36-38.

7 Patterson, Lyman Ray, *"Copyright and the Exclusive Right of Authors,"* University of Georgia School of Law: Journal of Intellectual Property Law 1 (Fall 1993), accessed March 14th, 2014, *http://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?article=1342&context=fac_artchop*

more important than the Stationers', operated in a similarly monopolistic fashion. However, due to the Crown's will to censor, over the few decades following the Stationers' Company's charter, their power of monopoly over their trade became greater than that possessed by any other trade company in England. This power created a symbiotic relationship between the Stationers' company and the Government under which the Stationers' flourished.[8]

It could be argued that the idea of copyright may not have surfaced as soon as it did if the Crown had not been so concerned with censoring the press. As mentioned before, however, the idea of copyright was naturally linked to the development of the printing press. The idea of copyright itself stems from the fact that if there is value in a manuscript, then a copy of a manuscript holds as much practical value as the original. For the first time, the printing press allowed an individual to make copies of a manuscript at such a rate that the aggregate value of the copied works which were sold could easily and quickly surpass the amount for which the original manuscript was paid. Thus, the question reasserts itself: Who has the right to this profit: the creator, who does not have the personal means to reproduce and disseminate the work, or the printer, who does have such means, but was not the originator of the creative content? In England, from the much of the sixteenth and seventeenth centuries, where the government was bent on censorship, the right to such profits were held by the printers of the Stationers' Company.

For the 150 years of the Stationers' Company monopoly, the creator of a work was paid initially for his work, but this payment was in recognition of the publisher's copyright rather than an advance on profits from sales. Until the eighteenth century, the majority of authors relied on regents or wealthy patrons to back their work, and it was not until after the

8 Patterson, Lyman Ray, *"Copyright in Historical Perspective,"* 36-37.

fallout of the Bach v. Longman decision in 1797 that composers were able to work independently of such patrons.[9] The Stationers merely had to pay an author an initial fee, which varied depending upon the author's stature, and then they were free to publish and sell the author or composer's work for an indefinite amount of time. The only exception was that sometimes arrangements would be made for the author to be given, in addition to his initial payment, a portion of the first number of copies printed at no cost, so that the author could profit by the sale of these works.

During this time, composers were even more reliant upon patronage or royal appointment. The average person at that time was not able to read music, and musical training of common people was rare. This led to a very small consumer base for printed music. Because of this, as well as the difficulty inherent in the process of printing music, the copyrights for musical compositions were largely ignored. As a result, even highly successful composers were grossly undercompensated for their original works. For example, John Dowland's widow sold the printing rights to a volume of her late husband's lute works in the early 17th century to a London publisher for twenty pounds.[10] This book represented a great deal of creative output on the part of Dowland, and the compensation for all of his time was little more than what a day laborer made in a year.[11] The only brief exception to this rule came in 1575, when Elizabeth I granted the sole right to print and publish polyphonic music to composers Thomas Tallis and William Byrd. With this right, the two were able to operate free from the Stationer's Company to print, publish, and profit by the sale of their own

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9 Patterson, Lyman Ray, *"Copyright in Historical Perspective,"* 64-67.

10 Hunter, David C., "Music Copyright in Britain to 1800." *Music and Letters* 67, no. 3:269-282, 1986, *Music Index,* EBSCO *host.* (accessed March 14th, 2014)

11 Van Zanden, Jan Luiten, "Wages and the cost of living in Southern England (London) 1450-1700," International Institute of Social History, http://www.iisg.nl/hpw/dover.php (accessed April 23, 2014).

music.[12] This arrangement, while novel, was still in place as a form of government censorship, not as a recognition of the rights of two talented composers. The only other music printing privilege of the time was granted to John Day in 1559 for the printing of Protestant Psalters. John Day while renowned for his skill, was a printer, not a composer.[13] The tunes and texts compiled in the psalters were written for the most part by clergymen who did not write them for profit, but even so, the right to proliferation and profit was held by the printer rather than the composer.

The Licensing Act

After the death of Queen Elizabeth I in 1603, rule of England, Ireland, and Wales was returned to the Stuarts of Scotland. The Stuart Kings utilized the censoring powers of the Stationer's Company not only for religious purposes, but to legitimize their rule and glorify themselves as individuals.[14] In 1637 a decree was passed in the Star Chamber which drastically expanded the power of the Stationer's Company and the King to restrict and censor the press. The decree expressly forbade “any Seditious, Schismatical, or offensive Books or Pamphlets, to the scandal of Religion, or the Church, or the Government, or Governors of the Church and State, or Common-wealth, or of any Corporation.”[15]

The 1637 act, however, was short lived, because in 1649 Oliver Cromwell's victory in

12 Lord, Suzanne, *Music from the Age of Shakespeare: A Cultural History*, (Westport, CT: Greenwood Publishing Group, 2003), Print, 69.

13 Miller, Miriam, "Day, John," *Grove Music Online, Oxford Music Online*, Oxford University Press, accessed March 14, 2014, http://0-www.oxfordmusiconline.com.wncln.wncln.org/subscriber/article/grove/music/07324.

14 Patterson, Lyman Ray, *Copyright in Historical Perspective,* 119.

15 'The Star Chamber on printing, 1637', *Historical Collections of Private Passages of State: Volume 3: 1639-40*, pp. 306-316. URL: http://www.british-history.ac.uk/report.aspx?compid=74953 Date accessed: 20 February 2014.

the English Civil War brought about the execution of Charles I and the abolition of the Star Chamber. Parliament, during the Interregnum, did pass provisions for copyright protection, but they were more focused upon the preservation of the book trade as an industry rather than governmental censure. This is not to say that the Interregnum was the end of censorship, however, the penalties for printing objectionable materials were much less harsh, and did not involve the seizure of printing equipment.[16] This fundamental shift in the attitude towards printing was a very important step towards the rights of the creator. The government had supported the Stationer's Company monopoly as a means to censor, so when the government began to take less of an interest in censorship they subsequently took less of an interest in the power of the Stationer's Company.

After the death of Oliver Cromwell and the ensuing restoration of the Monarchy, anti-governmental pamphlets and seditious texts began to circulate beyond the control the Stationer's Company. This fact, coupled with the Stationer's lobbying for renewed governmental protection of their monopoly, led to the passage of the Licensing Act of 1662, or in its full title "An Act for preventing the frequent Abuses in printing seditious treasonable and unlicensed Bookes and Pamphlets and for regulating of Printing and Printing Presses".[17] This was, in essence, a renewal of the 1637 act with a few inconsequential variations. The legislation added a further requirement to the licensing procedure that all books must be printed with a full page in the front which disclosed the book's full licensing procedure. Any books found to be printed without being licensed and registered by the Stationer's Company were destroyed, and the sellers or printers were fined and sentenced to jail time.[18] This act

16 Patterson, Lyman Ray, *Copyright in Historical Perspective,* 131-132.
17 Patterson, Lyman Ray, *Copyright in Historical Perspective,* 134
18 Patterson, Lyman Ray, *Copyright in Historical Perspective,* 130

also empowered the Stationer's Company to send “Messengers of the King” to search any business or private residence at any time in order to search for illegal printing presses. This law naturally met with great public resistance, and had to be renewed on a two year basis.[19]

After the Glorious Revolution in 1688 ended James II's reign, parliament gradually returned to a more apathetic stance on governmental censorship, eventually ending with the lapsing of the Licensing Act in 1694. After the Act lapsed, the Stationers' Company publishers were left with no legislative protection of their monopoly, and the book trade in England descended into chaos until the Act of Anne was passed to restore order.[20]

The Statute of Anne

The passage of the Statute of Anne in 1710 was prompted by petitioning from the Stationers Company. With the lapse of the Licensing Act, the Stationers Company had lost control of the printing market in England. They petitioned parliament initially for a renewal of the Licensing Act, but when parliament refused their request, they pushed for new legislation which would not only reaffirm their business claim, but would encourage and benefit English authors.[21]

The Statute of Anne gave authors the sole right to copy and print their works for a period of fourteen years, and the right could be renewed for a consecutive fourteen.[22] This was benchmark legislation that set a precedent for future copyright laws in the Western world from which we have yet to deviate. Having copyright ownership in the hands of the creators

19 Hunter, David C., “Music Copyright in Britain to 1800.”
20 Patterson, Lyman Ray, *Copyright in Historical Perspective,* 146
21 Hunter, David C., “Music Copyright in Britain to 1800.”
22 Bently & Kretschmer (editors), “Primary Sources on Copyright (1450-1900): Statute of Anne, 1710” (London: www.copyrighthistory.org), http://copy.law.cam.ac.uk/cam/tools/request/showRecord.php?id=record_uk_1710, accessed March 14th, 2014.

rather than the publishers was a novel arrangement which logically encouraged creative growth. Hunter says that "copyright is the modern means of providing creators with rewards."[23] Without the ability to capitalize upon and profit from one's creativity, there exists no incentive to create. Before the passage of the Statute of Anne, composers and authors could only publish works if first allowed by the crown, and then when published reaped few benefits besides authorial notoriety. With the passage of the statute, in accordance with the burgeoning enlightenment ideals of the time, the author or composer was recognized as being the owner of the intellectual value of a work. This value was represented by a work's printed form, and therefore any illicit printing of such material constituted theft of its original creator's property.

After the statute was passed all works were still required to be registered by the Stationers' Company, but instead of censoring and distributing authors' works on the behalf of member publishers, they secured the copyrights of the authors who registered their works. Copies of all printed works were kept in a central library so that issues of copyright infringement could be easily policed and challenged by authors whose works were properly registered.[24]

Bach v. Longman

For all the benefits inherent in the Statute of Anne, it still left something to be desired for composers. Around 1700 there was a big shift from traditional block printing to engraving musical scores.[25] The practice of engraving rendered a much neater and more usable product,

23 Hunter, David C., "Music Copyright in Britain to 1800."
24 Hunter, David C., "Music Copyright in Britain to 1800."
25 Boorman et al. "Printing and Publishing of Music."

which made the publishing and dissemination of printed music a much more common practice. In addition, where before music was not profitable to pirate due to the lack of a larger musically literate public, the gradual rise of a more literate and leisurely bourgeois class in the early to mid eighteenth century led to a greater demand for printed sheet music and exercise books for the home musician.[26] Printed music was only marginally covered under the words of the statute, as evidenced by the fact that between 1710 and 1780 printed music comprised only two percent of works registered with the Stationers' Company.[27] Even when music was duly registered, the Stationers' Company did not enforce its reserved publication due to uncertainty about its coverage beneath the Statute of Anne. Composers in England struggled with the widespread piracy of their music, and unfortunately did not hold enough clout in the financial landscape of eighteenth Century England to successfully lobby parliament.

In 1775, J. C. Bach, one of J.S. Bach's sons who lived in England and was a renowned composer and successful private teacher, began his own lobby to parliament. The process to legislation proved to be much too slow to effect the change he desired, so in 1777 he brought suit against a publishing company that had fraudulently published a Sonata for harpsichord and an accompanied lesson on the viol da gamba that he had registered with the Stationers' Company four years prior.[28] His music had been pirated on many other occasions, but he chose this particular case because the defendant's publishing license was due to expire over the course of the case, which it did.[29] The case was tried before a Judge Mansfield who, upon

26 Hunter, David C., "Music Copyright in Britain to 1800."
27 Hunter, David C., "Music Copyright in Britain to 1800."
28 Bently & Kretschmer (editors), "Primary Sources on Copyright (1450-1900): Bach v. Longman, 1777" (London: www.copyrighthistory.org), http://copy.law.cam.ac.uk/cam/tools/request/showRepresentation?id=representation_uk_1777, accessed March 14th, 2014.
29 Hunter, David C., "Music Copyright in Britain to 1800."

hearing the defendants' case, ruled in favor of Bach before even hearing his attorney's arguments. Mansfield concluded that "the case was so clear and the arguments such that it was difficult to speak seriously upon it."[30] He also ruled that music constituted a science that could be written upon, and that the Statute of Anne designates copyrightable materials as being "books and other writings," ergo, music is covered because it is, in essence, writing.[31]

This case established written music as a legally protected entity under the Statute of Anne. This precedent was immediately embraced by the English public, and between 1780 and 1842, musical compositions rose to twenty-five percent of the total works registered with the Stationers Company.[32]

By 1776, of course, the American colonies were no longer abiding by the rules of parliament. After the American Revolution severed governmental ties with England, the newly formed United States were left with the opportunity to establish their own copyright tradition. The Constitution, as is well known, was written with the ideals of the Enlightenment in mind, and borrowed heavily from the more approved of governmental structures and laws of Britain. Article I, Section 8, Clause 8 of the Constitution is a provision for copyrights modeled after the Statute of Anne. In 1790 The Copyright Act was passed which, similar to the British Statute, protects all written arts and scientific discoveries for a limited duration, set initially at fourteen years.[33]

During the nineteenth century, music publication expanded, and as new demands for

30 Bently & Kretschmer, "Primary Sources on Copyright (1450-1900): Bach v. Longman, 1777."
31 Bently & Kretschmer, "Primary Sources on Copyright (1450-1900): Bach v. Longman, 1777."
32 Hunter, David C., "Music Copyright in Britain to 1800."
33 Kleiner, Peter et al., "Copyright," *Grove Music Online, Oxford Music Online* (Oxford University Press), accessed March 14th, 2012, http://0-www.oxfordmusiconline.com.wncln.wncln.org/subscriber/article/grove/music/40690.

music grew copyright bent slightly with case law, but never strayed far from its constitutional footing. The development of copyright law was viewed in a unique light by American legislators. Initially, music and other media copyrights were treated and thought of in the same manner as scientific or industrial patents. In order to promote a free and competitive market, American legislators sought to limit the length of time for which one could hold the copyrights for an idea. In 1831, the Copyright Act was amended so that copyright privileges were protected for twenty-eight years rather than fourteen, and were renewable for an additional fourteen years.

The Origin of Performance Rights

Even though printed music was technically protected as a written art under the US Copyright Act of 1790, a performed interpretation was not considered an infringement upon the performed work's copyright holder. The pervading opinion in the early nineteenth century was that copyright was an economic privilege that was limited to physical copies of an intellectual work. The impetus for an ideological change in this area came not from jilted composers, but from playwrights.[34]

In the late eighteenth and early nineteenth centuries, the Industrial Revolution created both a stationary urban working class and an empowered urban middle class. As a result, interest in stage entertainment began to grow. Just as this new interest in the arts brought forth a bevy of influential and popular virtuosic instrumental performers, it instigated a drastic rise in the popularity and standing of the dramatic arts in the United States,

34 Bracha, O., "Commentary on the U.S. Copyright Act Amendment 1856", *Primary Sources on Copyright* (London: www.copyrighthistory.org), 2008, eds L. Bently & M. Kretschmer, accessed March 14th, 2014, http://copy.law.cam.ac.uk/cam/tools/request/showRecord?id=commentary_us_1856

subsequently creating the concept of a star actor. Where before, an acting company would consist of stock players and an in-house playwright, specific actors from different important playhouses began to be recognized individually for their talent, and playwrights who wrote works tailored to such actors were able to gain some independent notoriety. As a result of their success, and the potential for great profit, these playwrights began to feel oppressed in their inability to capitalize on staged performances of their work.

Following much lobbying and outcry, congress eventually passed a measure in 1856 that expanded upon the 1790 Copyright Act to give copyright holders the right to public performances of their work. This right only covered dramatic works "designed, or suited for public performance."[35] This extension of rights did not, however, carry any penalty to the violator, and did not cover musical works until it was amended by the Copyright Act of 1897 which made the unlicensed public performance of a dramatic or musical work a criminal offense.[36]

This right to performance opened the door for a whole new area of profit for composers, whose primary source of income had previously only come from the sale of sheet music.[37] This proviso for performance came at the height of the gilded age in America, and successful American composers of the time were able to capitalize on the concert houses filled with the same sort of urban middle class patrons that filled the playhouses earlier in the century.

A performance right inherent in a copyrighted work was to become a very important source of income for composers and songwriters in the coming years. To this day,

35 Patry, William S., *Copyright Law and Practice*, (Arlington, VA: BNA Books, 1994) http://digital-law-online.info/patry/patry6.html (accessed March 14, 2014), 41.
36 Patry, William S., *Copyright Law and Practice,* 36, 41.
37 Patry, William S., *Copyright Law and Practice,* 36, 41-42.

performance royalties are an often contested issue. This will be discussed later in the paper.

White-Smith Music Publishing Co. v. Apollo Co.

Along with the economic improvements of the industrial revolution came technological advancements. The rising middle class led to a burgeoning public consumer market. This new class of people with money to spare were interested in improving their lives with modern conveniences. The modern conveniences they sought were provided to them by companies who had invested in the research and development of such products. Foremost among these minds of invention in the late nineteenth and early twentieth century were Thomas Edison and his associates.

Edison was one of the most influential inventors of the modern era, and he enters the story of American copyright law in 1877 with the invention of the phonograph. The phonograph was the first medium through which sound could be recorded and reproduced. Sounds would be played into the machine and etched onto a rotating wax cylinder. The machine could then read the etchings with a needle as the recorded cylinders were rotated beneath it and reproduce the sound through a rudimentary speaker which was, in essence, an acoustic horn. These cylinders could be reproduced en masse by a machine that simultaneously read the etchings on one cylinder and etched them onto another. This new technology gave people, for the first time, the ability to relive a musical performance repeatedly. Once the public began hear of the wonders of the Edison phonograph through his numerous advertisements, expositions, and traveling demos, it became a product much in demand.[38] Edison sold his phonograph machines along with wax cylinders of various popular

38 Gitelman, Lisa, "Reading Music, Reading Records, Reading Race: Musical Copyright and the U.S.

songs and readings from famous literary works.

This product revolutionized the public's access to music, but also led to a necessary reevaluation of American copyright law. The question to be addressed this time was: what constitutes a written representation of a composers idea? The copyright act protected only "written" works which employed a visual representation of an artist, author, or composer's work. This included books, written music, visual art, and photography. Even film, another Edison invention, gained immediate coverage under the copyright act, as it was in essence mass photography. By the turn of the century, phonograph players corresponding cylinders were being produced by three major companies in the United States, and being sold in large quantities to the American public. In addition to the phonograph machine, musical recordings were being reproduced in the form of pianolas, wax records, and paper piano rolls for player pianos.

At the time, producers of such media were merely required to purchase one copy of the sheet music for any given song, and were then able to record the song, reproduce the recording an infinite number of times, and sell those recordings to the public for profit. To modern sensibility, this constitutes an obvious infringement on the rights of these songs' composers. To lawmakers around the turn of the century however, these new sound recordings did not fall under the traditional classification of notated and legible music which was held as inviolable intellectual property by the Constitution.

The debate, after reaching congress at the urging of President Teddy Roosevelt,[39] came down to whether or not piano rolls, phonograph cylinders, and the like constituted

Copyright Act of 1909," *Music Quarterly*. 81 no. 2: 265-290. 1997.

39 Gitelman, Lisa, "Reading Music, Reading Records, Reading Race: Musical Copyright and the U.S. Copyright Act of 1909,"

legible materials. The only case law precedent was the Supreme Court case White-Smith Music Publishing Co. v. Apollo Co. in which the Supreme Court ruled that the creation of a paper piano roll merely constituted a performance of a piece of music rather than a legible reproduction of the music.[40] Members of the industry on both sides spoke before committees of congress and individual representatives lobbying their cases. A representative of Edison's company, which was intent on keeping recorded music from being contained within the sphere of legible music, cited the example that Edison himself once worked for hours on end attempting unsuccessfully to read on an etched cylinder the markings that elicited the sound of the spoken letter "A."[41] Proponents of extending copyrights to cover sound recordings of course cited their loss of business as a result of these falsely produced recordings.

After debate, congress ended up siding against the recording interest and passed the Copyright Act of 1909. This act lengthened the copyright term to twenty-eight years with a possible extension of another twenty-eight years, and extended protection to composers from any reproductions of of their music in any form whatsoever.[42] Under the terms and spirit of the act, mechanical reproductions were considered unlicensed copies of the original writings and as such were inherently considered legible. Another clause of the law stated that once a composer allowed a work to be recorded, any other recording company had the right to record the work themselves as long as they gave notice to the composer, fulfilled the licensing requirement, and paid the composer a royalty of two cents per recording.[43] This clause was meant to prevent any one recording company to hold a monopoly over the

40 White-Smith Music Publishing Co. v. Apollo Co., 209 US 1 - Supreme Court 1908
41 Gitelman, Lisa, "Reading Music, Reading Records, Reading Race: Musical Copyright and the U.S. Copyright Act of 1909,"
42 Copyright Act of 1909, Pub. L. 60-349, 35 Stat. 1075 (March. 4, 1909), §1 (a)(d)
43 Copyright Act of 1909, § 1 (e)

industry. Because all works could be recorded by any company, the prime commodity became original performances. The leading recording companies, such as Victor Talking Machines which was later Victor/RCA and American Graphophone which is now Columbia Records, began signing exclusive contracts with recording artists.[44] This way, while anyone could record a song if they paid the royalties, only one company would have the original artist. This was the birth of the modern recording contract.

ASCAP and *Herbert v. Shanley*

After the passing of performance rights for musical works, and the passage of the 1909 copyright amendment, there arose a demand from American composers and songwriters for representation. In 1914, the American Society of Composers, Authors, and Publishers (ASCAP) was founded. The organization was a volunteer not-for-profit group with the goal of defending the new found rights of American composers and songwriters to collect and distribute royalties for public performances of their work.[45] In the United States at the time, performances of copyrighted works were taking place daily in numerous clubs, restaurants, and concert halls. Additionally, in the 1920s, the mass proliferation of radio stations saw a significant increase in the broadcasting of popular music.[46] With such a high rate of use taking place over the entire country, composers were essentially powerless individually to claim their payment. ASCAP took up the responsibility of petitioning such businesses as a

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44 Gitelman, Lisa, “Reading Music, Reading Records, Reading Race:...”

45 Larkin, Colin (editor), "ASCAP," *Encyclopedia of Popular Music*, 4th ed.. *Oxford Music Online* (Oxford: Oxford University Press), http://0-www.oxfordmusiconline.com.wncln.wncln.org/subscriber/article/epm/48924 (accessed March 16, 2014).

46 Kleiner, Peter et al. "Copyright," V, 14, (I), American Society of Composers, Authors and Publishers (ASCAP)

single entity and collecting royalties on behalf its member composers.

Initially, businesses were unwilling to pay the new organization, so ASCAP turned to legal action against such infringers in order to solidify their authority.[47] One case which was key to the establishment of their legal right to collect royalties was the 1917 case of *Herbert et al. v. Shanley co*.[48] In *Herbert v. Shanley,* ASCAP has filed suit against the two restaurant owners, one who owned a restaurant in a hotel lobby, and the other the owner of a restaurant on Broadway in New York City. Both defendants had live orchestras in their establishments that played "comic operas" every evening during the dinner hour to entertain their guests. The plaintiffs were the composers who wrote the pieces that they performed. The plaintiffs asserted that the defendants owed them damages for violating the composers sole right to perform for profit. The defendants argued that since they did not charge admission to the performances, they did not owe the plaintiffs any royalties.

The case was initially tried in a district court, and the court found in favor of the defendants. ASCAP then appealed the ruling, which was upheld, and ASCAP took it to the supreme court. The Supreme Court reviewed the case and finally ruled in favor of ASCAP, saying that the performances constituted infringement even if the restaurants were not explicitly charging for concert admission because "if music did not pay it would be given up. If it pays it pays out of the public's pocket. Whether it pays or not the purpose of employing it is profit and that is enough."[49] This decision gave ASCAP the authority to collect royalties on all music played in public places, either by live orchestra, or later by broadcast.

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47 Kleiner, Peter et al. "Copyright," V, 14, (I), American Society of Composers, Authors and Publishers (ASCAP)

48 Herbert v. Shanley co., 242 U.S. 591 (1917), http://scholar.google.com/scholar_case?case=11926631646961398206&q=242+U.S.+591+%281917%29&hl=en&as_sdt=6,34 (accessed March 16, 2014).

49 Herbert v. Shanley co., 242 U.S. 591 (1917)

By the late 1930s, however, ASCAP's control over broadcast royalties began to become somewhat oppressive. ASCAP began utilizing profit percentages to charge royalties from radio stations. These percentages could be manipulated at will by ASCAP, because their catalog was so large and the broadcasters had to pay them to remain on the air. In 1940, after a renewed attempt to raise royalty rates, the National Association of Broadcasters (NAB) decided to boycott the use of ASCAP music by using only public domain music on the air. As a part of their boycott of ASCAP, the NAB started Broadcast Music Inc. (BMI) to control and monitor the music they could use which was not controlled by ASCAP. BMI licensed arrangements of public domain music and sought out artists that ASCAP had been previously unwilling to represent. ASCAP, which was already embroiled in an anti-trust investigation at the time, was forced to compromise with BMI and the NAB. BMI still stands as ASCAP's greatest competitor.[50]

1976 Copyright Amendment

The 1909 copyright amendment held until 1976, when congress decided yet again that advances in technology and issues with the relationship between artists and record companies required an overhaul of US copyright policy. Another contributing factor to the need for a copyright amendment was America's pressure to comply with the Berne Copyright Convention. The Berne Convention was a global initiative sponsored by the World Intellectual Property Organization (WIPO) which had been passed in 1887 that compelled member countries to respect works authored in all other member countries to the bare

50 Kleiner, Peter et al. "Copyright," V, 14, (ii), Broadcast Music Inc. (BMI). This source was used as background for the entire cited paragraph with interpretations of fact based on other previously listed sources, Gitelman, Larkin etc.

minimum that the convention specified and to the same basis of protection as the country in which the works were authored. The US was unable to comply at the time because the US Copyright Act did not meet the minimum requirements of the Berne convention in several areas. Notably, in the United States it was required that in order for a work to be protected by copyright it had to be sent to the copyright office to be registered, and a notice of copyright had to be affixed to the published works. Under the terms of the Berne convention, an author must merely be able to prove authorship of a work for it to be protected. Also, the term of protection for a copyrighted work under the Berne convention was the creator's lifetime plus 50 years.[51] The Copyright Act of 1976 altered the requirements for copyright protection, and extended the period of Copyright Protection to 56 years and a following 50 years after the composer's death. These amendments put US law more in line with the Berne convention, and the US became a signatory member of the convention in 1988.

These drastic changes caused a need for adaptation among media companies and artists in the United States at the time. For example, the extended copyright timeline put recording artists at risk when dealing with record companies. For example, if an artist was desperate, as musicians often are, to have their music recorded and released to the public, they would sell record companies their copyrights in perpetuity, or in other words, record companies would own the exclusive rights to reproduce and sell the music until the copyright term expired. This could become an issue in several circumstances. If the record company decided to stop releasing the artists music, the artist would be unable to profit from or use their music in any way until the copyright term expired, fifty years after their death.

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51 Berne Copyright Convention, Article 2(1), Article 3(3), http://www.wipo.int/treaties/en/text.jsp?file_id=283698#P123_20726 (accessed March 15th, 2014).

Conversely, an issue could arise if a record company made a hit out of a song they acquired cheaply. The artist, in this situation, would be powerless for the rest of her or his life to see any further benefit from her or his own success.[52]

This power disparity between company and artist mirrored the power disparity between publisher and artist in seventeenth century England. The circumstances were different, as the authors in that time had no power over their works past a flat fee, but the question is quite similar. What power should creators have over their work when they are of limited means to publish? Without publishers or recording companies, creators in both situations would remain in obscurity, but once fame is gained in either case the creator was often grossly undercompensated.

Congress averted this issue by adding a provision that allowed artists a "Right of Termination." This clause, which is still in effect, gives artists, after thirty-five years have passed, the ability to terminate their contract with any other entity and reclaim their copyrights. This clause overrules any contract, even if it grants copyrights in perpetuity.[53]

Scorpio Music SA v. Willis[54]

One of the first cases to interpret the termination clause as applied to works copyrighted after the implementation of the 1976 copyright amendment, was the case of *Scorpio Music v. Willis*.[55] Mr. Willis was a member of The Village People, and in the late

52 Caplan, Brian D., "Navigating US Copyright Termination Rights," *WIPO Magazine*, August 2012, http://www.wipo.int/wipo_magazine/en/2012/04/article_0005.html (accessed March 15, 2014).

53 Termination of transfers and licenses granted by the author, 17 U.S. Code § 203

54 *SCORPIO MUSIC SA v. Willis*, No. 11cv1557 BTM (RBB) (S.D. Cal. May 7, 2012), http://scholar.google.com/scholar_case?case=3147549572539751847&q=+Scorpio+Music,+et+al.+v.+Willis&hl=en&as_sdt=6,34 (accessed March 16, 2014).

55 Caplan, Brian D., "Navigating US Copyright Termination Rights," *WIPO Magazine.*

1970s he signed over his copyrights to over thirty songs to a division of Scorpio Music, including hits such as, “YMCA,” “Go West,” and “In The Navy.”[56]

Under the terms of the 1976 amendment, Mr. Willis was entitled to terminate his contract with Scorpio Music after thirty-five years and recover his copyright, provided he supplied the company with a notice two years in advance of the date of termination.[57] Since Mr. Willis' copyrights were transferred in 1978, he furnished Scorpio Music with a notice in 2011 and was able to recover his copyrights in 2013.

Scorpio Music brought suit against Mr. Willis, claiming that since he was not the sole author of the works[58] that he was not eligible to terminate unilaterally. Mr. Willis argued that since he was the only one to assert ownership of the copyright grants, that he was in fact entitled to reclaim the copyrights himself. The court found in favor of Mr. Willis, and as a result, the legal groundwork has been laid for copyright grant termination.[59]

The other key revision to US Copyright effected by the 1976 amendment was a change in the origin of an artist's copyright. Before this act, under the 1909 revisions, in order for a work to be copyrighted, it must have been registered with the United States Copyright Office before being published with a copyright notice. Under the terms of the 1976 act, copyright “subsists” within the creative process. All a composer, author, or creator must do to achieve copyright status is to “fix their idea in any tangible medium of expression.”[60] The language of the amendment also allowed for technological advancements. All that is required for an item of digital media, whether it be musical, written, drawn, or designed, to be

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56 Caplan, Brian D., "Navigating US Copyright Termination Rights," *WIPO Magazine.*
57 17 U.S. Code § 203 (2)(3)
58 The works were originally jointly authored by members of The Village People.
59 Caplan, Brian D., "Navigating US Copyright Termination Rights," *WIPO Magazine.*
60 17 U.S. Code § 301 (a)

considered protected is that it must be saved to a computer hard drive, or even to RAM at any point.[61]

Under these specific terms almost everything on the Internet is technically copyrighted without requiring submission to the copyright office or even a copyright mark. This entitles the creator to the exclusive right to copy, sell, and make adaptations of the work. There are several limitations to their right, however, which in an era of increasingly fluid data are extremely important to examine. The most controversial and frequently contested and of these limitations is the doctrine of "fair use."[62]

Fair Use in the Digital Age

The constitutional language defining the doctrine of "Fair Use" is as follows:

> Notwithstanding the provisions of sections 17 U.S.C.§106 and 17 U.S.C.§106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include:
>
> 1. the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
> 2. the nature of the copyrighted work;
> 3. the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
> 4. the effect of the use upon the potential market for or value of the copyrighted work.
>
> The fact that a work is unpublished shall not itself bar a finding of fair use if such

61 GartnerG2, *Research Publication No.2003-05: Copyright and Digital Media in a Post Napster World,* (The Berkman Center for Internet & 5.pdf.Society at Harvard Law School, 2003), http://cyber.law.harvard.edu/wg_home/uploads/254/2003-0, 4.

62 GartnerG2, *Copyright and Digital Media,* 4.

finding is made upon consideration of all the above factors[63]

Because the law only provides factors to be considered when defining fair use, the difficult decision of what exactly constitutes fair use is left to the courts to decide. The doctrine of fair use is of great importance to the music industry because, the use of a song or a part of a song in a commercial application can be a significant source of revenue for a composer or a recorded musician. These commercial applications include song placements in movies, television shows, video games, and use as samples in other people's music. The way in which the justice system currently considers fair use of digital media has been decided by several key cases in recent years.

A&M Music v. Napster[64]

Piracy is one of the most pressing issues facing composers and musicians today. The ease with which anyone with access to the Internet can create and disseminate copies of digital media has caused a degradation in the salability of such items. Consumers are able to disseminate digital media by transmitting it over the Internet or copy the media onto a portable storage form, such as a CD-ROM, a portable USB drive, or a portable media device such as an Mp3 player or cell-phone.

The capability of the consumer to make a copy of a work at home existed, however, before the rise of digital media. In the early 1980s there was a rise in the availability of home

63 17 U.S.C.§107

64 *A & M RECORDS, INC. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001), http://scholar.google.com/scholar_case?case=14102696336550697309&hl=en&as_sdt=6,34&as_vis=1 (accessed March 15, 2014). All quotations and references in the ensuing section are from the Napster decision at the above link unless otherwise cited.

video recording equipment. For the first time, members of the general public had access to technology which allowed them to record live broadcasts of radio and television. This issue came to a front in 1983 with the case of *Sony Corp. of America v. Universal City Studios, Inc.*[65] Universal et al. claimed that because the recording of broadcast media constituted copyright infringement, the manufacturers of home recording equipment were producing a means for circumventing the law. The court ruled against them, saying that such recording was considered "time-shifting" because the majority of those who used the home recording devices used them to record television shows to watch them at a later date. The court felt that Universal was "unable to prove that the practice has impaired the commercial value of their copyrights or has created any likelihood of future harm." This ruling was important because it showed that in some cases non-commercial home copying of copyrighted media did fall under the fair use doctrine. This decision did not satisfy the RIAA and in the ensuing several years, they brought suit again against Sony's further development of their home recording technology. In 1992, after the issue was brought before congress, the Audio Home Recording Act was passed. This legislation attempted to strike a balance between the fair usage rights of the individual (and vicariously of companies which produced the enabling technology), and the legal rights of the interested copyright holders. Under the terms of the act, manufacturers were required to pay a royalty to a fund benefiting copyright holding parties, and were in turn immune from legal action based on the Copyright Act if their users were using their devices for non-commercial music recording.[66]

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65 *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 104 S. Ct. 774, 78 L. Ed. 2d 574 (1984), http://scholar.google.com/scholar_case?case=5876335373788447272&q=Sony+Corp.+of+America+v.+Universal+City+Studios,+Inc.&hl=en&as_sdt=6,34 (accessed March 15, 2014).

66 17 U.S. Code Chapter 10

As technology progressed through the 1990s, creating copies became easier and easier, and online file-sharing sites began to arise, allowing users to upload their own files for others to download, and to download files that others have posted. These sites made it possible to disseminate digital music and other digital media files very rapidly between many users. Again, at the behest of the entertainment industry, in 1999 congress responded by passing the Digital Millennium Copyright Act.[67] This act expanded the legal protections for digital media, by allowing for and expressly forbidding the circumvention of "technological measures to control access to copyrighted works."[68]

With their case strengthened by this act, in that same year a group of prominent record labels brought suit against Napster.com, one of the foremost file-sharing sites on the Internet at the time. The plaintiffs, A&M Music et al., claimed that since Napster's users were engaging in wholesale copyright infringement, Napster was liable for contributory and vicarious infringement. Napster contended that under the terms of section 1008 of the Audio Home Recording Act, they were immune from prosecution for copyright infringement. The court found however, that the file-sharing process could not be protected under the Audio Home Recording Act for several reasons. Among them were a) the site is not considered a device or medium for copying, b) Napster users copying copyrighted music files onto their hard drives did not constitute recording in the terms of the AHRA, and c) due to the nature of the file-sharing process, Napster users were not only copying copyrighted materials but also publicly distributing them with the website's aid.

The end result of the Napster case was the exclusion of online music piracy from the

67 GartnerG2, *Copyright and Digital Media,* 5-6.
68 GartnerG2, *Copyright and Digital Media, 6.*

protection of fair use. Music piracy may not represent copying for the infringer's commercial profit, but mass file-sharing does have a tremendous effect on the "potential market for and value of the copyrighted work." In the digital age, just because mass copying and distribution has become for all intents and purposes free, does not mean that it is legal.

BMG Music v. Gonzales[69]

Another case which questioned the fair use of digital music on the user end specifically was *BMG Music v. Gonzales*. The defendant, a woman named Cecilia Gonzales, had been found to have illegally downloaded 30 songs from a file sharing website. Gonzales claimed that her illegal downloading of the music in question constituted fair use because she was only sampling the songs to decide if she wanted to purchase them in the future, and that even so the downloading of 30 songs did not cause significant financial harm.

The court found that on no point could her actions be defined as fair use. First, the court decided that illegally downloading music to sample it was still direct infringement. Second, while thirty songs do not represent an extreme financial burden for the record companies, the cumulative effect of such direct infringement by individual users causes tremendous harm to their ability to market their digital products.

Another interesting issue which arose in this case was the amount of restitution owed to the plaintiffs by Gonzales. Gonzales claimed that she was an innocent offender under 17 U.S. Code § 504(c)(2), which states:

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69 *BMG Music v. Gonzalez*, 2005 U.S. Dist. L.E.X.I.S. 910, 2005 W.L. 106592 (2005), http://scholar.google.com/scholar_case?case=13750328162489237159&q=BMG+Music+v.+Gonzales&hl=en&as_sdt=6,34 (accessed March 15, 2014). All quotations and references in the ensuing section are from the above decision unless otherwise cited.

> In a case where the infringer sustains the burden of proving, and the court finds, that such infringer was not aware and had no reason to believe that his or her acts constituted an infringement of copyright, the court in its discretion may reduce the award of statutory damages to a sum of not less than $200.

In 17 U.S. Code § 402(d) however, it states that the above exemption does not apply if a copyright notice was affixed to the published materials which the infringer copied. Gonzales claimed that since she downloaded the songs online, she had no access to the physical notice.

The court decided against her. The decision cited a pair of past cases which established that a claim of mere ignorance did not qualify a defendant for protection under 504(c)(2). Furthermore, since Gonzales had admitted previously in the case that she and her husband had purchased over 200 CD's, there was no way that she could reasonably claim to have been ignorant of the fact that she was infringing. She was charged with $22,500 in damages, which was the minimum penalty of $750 times the 30 songs she was found to have pirated.

This penalty, while seemingly harsh, reflects the sentiment of the court in their finding that Gonzales' actions represent a part of the “cumulative effect” of music piracy. In a sense, the court was showing the how harsh the ramifications for music piracy could be, in an effort to deter future infringement.

Sony BMG v. Tenenbaum[70]

The *Gonzales* case was only one of hundreds in a copyright litigation campaign began by the Recording Industry Association of America (RIAA) in 2004. The campaign lasted five years and included suits against individual users and facilitating organizations similar to Napster.[71] These cases were difficult for the RIAA to litigate because of the difficulty of proving online infringement considering the defendants' possible coverage under the fair use doctrine. On the file sharing websites, the RIAA could track the IP addresses of those posting copyrighted material, but there was no way to prove that the individuals who had posted that material acquired it illegally, or that that specific material was being shared illegally.[72]

In the 2009 case of *Sony BMG v. Tenenbaum*, a group of record companies affiliated with the RIAA brought suit against then college sophomore Joel Tenenbaum for illegally downloading 30 songs from file-sharing networks. The defendant intended to argue that his actions were covered under fair use, and after the long string of cases brought forward by the RIAA and its major affiliates against average individuals, the court was sympathetic to the defendant's position.

> The Court, deeply concerned by the rash of file-sharing lawsuits, the imbalance of resources between the parties, and the upheaval of norms of behavior brought on by the Internet, did everything in its power to permit Tenenbaum to make his best case for fair use... perhaps one supported by facts specific to this individual and this unique

70 *Sony BMG Music Entertainment v. Tenenbaum*, 721 F. Supp. 2d 85 (D. Mass. 2010), http://scholar.google.com/scholar_case?case=12793440140023667012&q=Sony+BMG+v.+Tenenbaum&hl=en&as_sdt=6,34 (accessed March 15, 2014). All quotations and references in the ensuing section are from the above decision unless otherwise cited.

71 Moseley, William S., "A New (Old) Solution for Online Copyright Enforcement after *Tenenbaum* and *Thomas*," *Berkeley Technology Law Journal*, 25, no. 3 (2011): 312-346, 331-332. http://www.btlj.org/data/articles/25_1/0311-0346 Moseley_Web.pdf (accessed March 16, 2014),

72 Moseley, William S., "A New (Old) Solution for Online Copyright Enforcement after *Tenenbaum* and *Thomas*," 316.

> period of rapid technological change. For example, file sharing for the purposes of sampling music prior to purchase or space-shifting to store purchased music more efficiently might offer a compelling case for fair use. Likewise, a defendant who used the new file-sharing networks in the technological interregnum before digital media could be purchased legally, but who later shifted to paid outlets, might also be able to rely on the defense.[73]

This statement of sympathy, while problematic for the RIAA's case against individual infringers was not heeded by the defendant, who focused his defense entirely upon the idea that all file sharing was fair use as long as it was for a non-commercial purpose, and not only that, but that the amount of damages for which he was liable were so high that it was a violation of due process.

As had been decided in both *Napster* and *Gonzales*, non-commercial use still constituted infringement, not because the user was stealing profits from the copyright owner, but, again, because the cumulative effect of such infringement by a large group of similar users effected a great decline in the profitability of the copyrighted material. After a series of appeals, the defendant was finally charged $675,000 in damages. The *Tenenbaum* case was heavily publicized, as were other cases brought forward by the RIAA, and after five years and two rounds of litigation, the RIAA ceased its legal campaign due to financial loss and very poor publicity.[74]

The problem with this sort of litigation, is that the nature of copyright infringement has changed at a much faster rate than the nature of the law (Moseley). When the idea of copyright was introduced, the printers and distributors carried a heavier stake in the process of media consumption than they do today. Even as recently as the twentieth century, record

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73 *Sony BMG Music Entertainment v. Tenenbaum*, 721 F. Supp. 2d 85 (D. Mass. 2010)

74 Moselely, William S., Moseley, William S., "A New (Old) Solution for Online Copyright Enforcement after *Tenenbaum* and *Thomas*," 331.

companies held sway over the music industry through the control of media as a physical product, like cassettes tapes or vinyl records. In such an environment, copyright laws were aimed at stopping big time infringers, or those with the means to produce and distribute illegal commercial products on a large scale. With the proliferation of inexpensive and innovative digital technologies, making exact copies is easier than ever before, and the type of infringement which the RIAA was litigating against was entirely different from the original intended targets of traditional copyright damages.

Digital Rights Management Software

Aside from threatening legal action, in an effort to defend legally purchased digital music files against unlawful copying and distribution, record companies employ something called "digital rights management software," or DRM. DRM is software specifically designed to be attached to a file that limits its use and duplication after purchase. A special provision was included in the DMCA which not only allowed for such software to be implemented, but made it illegal to attempt to circumvent.

> (1)(A) No person shall circumvent a technological measure that effectively controls access to a work protected under this title.[75]

In addition, it is illegal under the DMCA to create or traffic any software or device that is made to circumvent DRM.

> (2) No person shall manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or part thereof,

75 17 USC Chapter 12 § 1201 (1)(a)

> that —
>
> (A) is primarily designed or produced for the purpose of circumventing a technological measure that effectively controls access to a work protected under this title.[76]

These measures have been very controversial of late due to their limitation of the user's rights. While they are designed to prevent fraudulent use, often they restrict fair use of the copyrighted works.[77] These measures are designed by programmers in an effort to provide maximum security for copyrighted files, but oftentimes it goes too far.[78]

Some DRM can even become harmful to a user's computer due to the fact that it cannot legally be tampered with or altered. Such restrictions can potentially harm one's computer if the DRM software is bugged. In one famous case, Sony ran into this issue in 2003 when it attempted to embed DRM into an audio CD. The software that they used created vulnerabilities in users' computer systems that left them open for digital attack. A class action lawsuit was filed against them in 2005, and users who purchased CD's equipped with the dangerous DRM were rewarded with free replacements, cash, and free downloads.[79]

As digital technology moves forward, serious questions will have to be answered about the validity and adaptability of certain types of DRM software and that software's protection under the DMCA.[80]

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76 17 USC Chapter 12 § 1201 (2)(a)

77 Armstrong, Timothy K., "Digital Rights Management and the Process of Fair Use," *Harvard Journal of Law and Technology*, 20, no. 1 (2006): 50-121, http://jolt.law.harvard.edu/articles/pdf/v20/20HarvJLTech049.pdf (accessed March 15, 2014), 51.

78 Armstrong, Timothy K., "Digital Rights Management and the Process of Fair Use," 60.

79 Woellert, Lorraine, "Sony BMG Ends a Legal Nightmare," *Bloomberg Businessweek*, December 29, 2005, http://www.businessweek.com/stories/2005-12-29/sony-bmg-ends-a-legal-nightmare (accessed March 16, 2014).

80 Armstrong, Timothy K., "Digital Rights Management and the Process of Fair Use," 62.

ASCAP's role in the Digital Age: *United States v. ASCAP*[81]

Another important aspect of the DMCA that has come under judicial scrutiny is the clause which requires that Internet radio broadcasters pay performance royalty fees to the copyright owners of the music they play.[82] This amendment to the copyright code placed Internet radio broadcasts under the authority of royalty collecting agencies like ASCAP and BMI. The question that remained from this piece of legislation, is what technically qualifies as a digitally transmitted performance. Due to holes in the legislation, it remained unsure what exactly qualified as an online performance.

The case of *United States v. ASCAP* came up when ASCAP was trying to resolve a royalty dispute with several online music providers. Similar to the case leading up to the 1940 NAB boycott, ASCAP was attempting to raise their online royalty rates. Their argument was that the process of downloading a song technically constituted a public performance because it was in a sense a "transmission," so in addition to receiving copy royalties for every download from the site, ASCAP members should receive a performance royalty for every download.

The court responded by analyzing the ways in which the music websites were used, and by analyzing the statutory definition of a public performance and applying it to the situation. The court decided that a download did not, in fact, represent a public performance. The court stated that the downloads were in no way a perceptible performance but "simply transfers of electronic files containing digital copies from an on-line server to a local hard drive." This decision was an important step in ascertaining ASCAP's role in the digital music

81 No. 09-0539, 2010 WL 3749292 (2nd Cir. 2010) See decision for all case references in the ensuing section.
82 17 U.S. Code § 106 (6)

environment.

The rights of the composer, the performer, the publisher, and the consumer have all changed drastically since the inception of the idea of music copyright. Music is a profession of the passionate, and copyrights are for many merely a means to put food on the table. As technology has progressed, especially in the past decade, the validity and strength of music copyrights have been perennially tested. Cases like *Tenenbaum* and *Gonzales* are outliers in a time when the RIAA has simply given up litigation against the hordes of individual infringers.

As we move further into the digital age, it is likely that copyright enforcement will become increasingly difficult and, as can be seen with the punitive RIAA cases, unpopular. The current scenario is strikingly similar to that which the English government found itself in before the passing of the Act of Anne, albeit minus the intent to censor. The Licensing act was tremendously unpopular, and the harsh penalties it carried, while sometimes deserved, only served to build rancor. Perhaps American lawmakers now could succeed by elasticizing the copyright code in some way, or by making an innovative change on the level of the Act of Anne.

Interview with a Music Publishing Professional

While studying the effects and nuance of copyright legislation and benchmark court cases, it is important to observe and keep in mind the effects of such decisions and legislation on the day to day lives of those working in the music industry. This first interview is with a

music publishing professional who is the COO of an independent music publishing firm in New York City. As will be explained in the interview, music publishers have the best vantage point on the day to day intricacies and pitfalls of managing music copyrights and royalty collection.

Q. You work in the field of music publishing, and I wonder if you could give a brief explanation of what that entails.

A. I'm Chief Operating Officer of Reservoir Media Management in New York. We are music publishers that represent song writers and all the works that they compose. We own the copyrights to music that they write and what we do is look after the copyrights. We administer the copyrights, protect them with registration world-wide, as well as copyright registration here in the US. We make sure that we are on record as being the owner of these copyrights, and from that point forward we try to exploit these copyrights through getting them recorded, getting them covered and placed in film and TV advertisements and getting artists to record our songs. I have producers sample our music, just any method that we can come up with, be it print or mechanical. We are out there to create opportunities for the copyright. As a publisher, what we do is beyond creating opportunities for all these copyrights to earn and generate income. We have to be sure that we are counting all that income worldwide through a network of sub-publishers. So, while Reservoir looks after our copyrights in the US, Canada and the UK, we have a network of partners throughout the world that also look after our copyrights in all these other territories. So we have to collect

money worldwide and bring the income in and put it through all our royalty tracking systems and generate royalty statements for our writers. Then we pay them the royalties that they have earned worldwide. That's it in a nutshell.

Q. What are some of the main issues that you face day-to-day with collecting copyright royalties and enforcing copyright? What are some of the legal issues that you face or things that tend to be roadblocks?

A. Piracy, theft, disregard for the law, lack of respect for the copyright and all the protection that is afforded here in the US. People are putting copyrighted music up on line for free download and making it available to other people. One of the things that we are dealing with right now is terrible sites like "RapGenius" that takes the lyrics of all the rappers that I represent, such as Lil Jon, Pitbull, 2Chainz, Dr. Dre, and 50 Cent, puts them up on the website, using all of our lyrics to generate advertising and to generate hits and views on their website and not compensating the writers. So that's infringement right there. People take our music and put it up on SoundCloud and allow all of their friends to download hundreds of copies of it, you know, just distributing the music for free to their friends and not paying the songwriters their royalties. It goes on and on on a daily basis. This is what the digital age has brought into our business, where we used to have different kinds of pirates who would duplicate CDs and manufacture things. With the digital age it's much easier to steal and we deal with it every day. It's really hurting the song writers.

Q. What are the things you can use to help enforce copyrights like, say, for a RapGenius? If some of your represented artists' lyrics are there, what steps are available for you to take in defending your copyrights?

A. The number one thing is the threat of litigation. We do have the law on our side if we go through the proper steps of serving notice. Oftentimes with these companies and, honestly, all the way up to the biggest companies in the world, such as Google, it's almost like they claim ignorance. We have to go in and notify them of what they are doing, that we are the owners of the material they are using and what they are doing is wrong, and then we go through putting them on notice. You can revoke any sort of implied license that they think they have, you can send them notice for not paying royalties, and eventually, hopefully, they deal with it. RapGenius is currently negotiating a multi-million dollar settlement with the National Music Publishers Association (NMPA) to settle, I think it's a four million dollar settlement so they can pay back for all of their back infringement and to settle all of the claims against them. There are other places like Full Screen and Maker Studios, which are networks that produce videos and put them out on YouTube to the tune of 29 or 30 million views of a video that contains one of my songs, with advertising all over it. But they've never come to us for a single license or to license the song for distribution. And so what you have to do is go through the legal steps and spend money to go after them, spend good money to hire an attorney and chase them to get your portion of a penny for each view. It's a total disregard for copyright and the law. Very frustrating.

Q. Do you see any points in the law in current legislation that are specific issues that allow these websites and other entities to abuse the copyright system, or is it simply an issue of pure volume of piracy?

A. The laws can't keep up with technology. You can go back in time to the 90's when the Digital Millennium Copyright Act was enacted to address all the digital copyright

misuse that was going on. But by the time that you can get a copyright act passed, especially in the 2000's, technology advances much faster and new disruptions come quicker than new laws and rates can be set to address those disruptions. I don't think that we can keep up and stay ahead of the technology, so I think that we are always going to be playing catch up. And it's not necessarily all of these new companies' fault that they can't get a license for something because there are no rates that are set. They don't know how, and it's really never been done. Whenever YouTube first started putting ads on videos there was no set percentage that they were supposed to pay back. So we are constantly going to be playing catch up, which is frustrating for publishers because we really don't have the protection we need. Protection comes years too late. Two to three years into a new technology or a couple of years into the life of RapGenius we are just sitting around having to prove that what they are doing is wrong. It's taking years and hundreds of thousands of dollars to do that, so it is frustrating for us to try to keep up.

Q. Is there any way to remedy this through legislation? How do you foresee these issues being addressed?

A. What will happen is all of the right holders will come together and somehow have one central area to set rates and license material so that everyone is being treated similarly. For example, the way it is now, whenever there is something new, a website wants to launch with some twist on using music or distributing music, or putting videos up, they will go to the major publishers, Sony (which swallowed BMI), and they'll go to Universal and Warner, and they'll do direct deals with them. So there are three direct deals and whenever you do that you have maybe forty to sixty percent of the songs probably covered in those and for the

most part they are licensed. But what happens is all of the other little guys like Reservoir and thousands of other publishers are left out in the cold without licenses and they just continue to operate. So I think that the way that we could solve this is to have one central area where companies like this can go to get a license for everything and have the publishers join together to set rates, and proactively license these new technologies and these new sites. I've been in the music business since 1992, and there has always been talk of a central worldwide database. It's always been talk, but there has always been new effort to get one central database of music copyrights. But especially these days there are just so many songs that are out there and it costs a lot of money to keep it together. I just don't see it happening any time soon, unfortunately.

Q. That reminds me of the Stationers Company back in 16th and 17th century England, where they would take all the books they printed and had the copyrights to and put them in one central log for all of England. In that log they had to write the title of the book, what publisher owns the rights, and the name of the author, so the copyright could be registered.

A. Well, in the UK, since you mentioned that, for example, there is a blanket license for television, which means that to put music on television you don't need to go to all of the individual copyright holders to get a license. You just have a blanket television license where the same rate is paid for all of the music depending on what kind and on what station. In the US, whenever you want to use music for television, if I own half of the song, you have to come to me for the license and if Universal gets the other songwriter, you have to go to them for a license. That's two different deals that you have to go and do and licenses to pay for and collect, just for something to appear on Jimmy Fallon for $500. Whereas, in other

countries they have set rates, you know, there is just one blanket license for all television, and you don't have to go to all the publishers if you want to put something on television, you just do it, and you pay the same, you know, whatever rate it is. And the major publishers are getting paid the same thing as the little publishers. And that tends to work out in those countries, to free up the creators that want to use the music. At the end of the day all the music is licensed and paid.

Q. That makes a lot of sense. So you mentioned Reservoir's international work. You talked about issues with publishing music in foreign countries, such as China. Could you explain some of those issues and how they are being addressed?

A. I don't know that they are really being addressed. I do know that if China wants to expand and export some of their things, and they want other people to pay for things that they create, then they need to start respecting the things that we create. With the big mobile market there, now that music is moving into mobile devices, there are better ways to track music usage and get royalties paid. If you have a subscriber that's paying a fee every month to use a mobile phone and it comes with music or streaming music, there is a way to get proper reporting, and to get people paid. So I hear that money is starting to come out of China although it is very small. Just this week we negotiated a $60,000 license for an ad in China, for them to use some of our music. It was the first license I have ever issued to a Chinese company, and I have been in the business a long time. So what's being done? I think that all we can do is ask China to continue to respect our intellectual property and try to get them to pay for their copyright. The government can do whatever it wants. If they like a CD, they just press it up, sell it themselves, and not pay the royalties. So it really is totally

out of control. But I think as we push them to understand and show them the importance of respecting our product, that's the only way we will respect and buy theirs. So hopefully things will continue to get better that way.

Q. So are there any other specific issues pertaining to copyright or the music industry that you'd like to talk about?

A. Yes, there is a huge issue going on right now with music publishers in the US. It will be an interesting one for you to watch over the next few years. In music publishing, we get about 30-35% of our income from performance royalties. Performance royalties are going to be any time our songs are played out in a bar, on the stage, or anywhere in public. It could be music in an elevator, music that plays when you are on hold, anywhere that the public is out and hears music. Those places are supposed to be licensed for that music and so ASCAP and BMI go around the US and collect all these performance royalties. While it may only be five dollars or six dollars a month per bar, if you do that through the whole country, there is a lot of money at stake. They also go to radio stations, which is where the big money comes in. From terrestrial radio, from satellite radio, and they license and renegotiate those deals every five years. Terrestrial radio is evaporating as people are using I-pods or different streaming services, you know, all the radio stations are disappearing. So performance royalties are really under attack. While terrestrial stations are dying you have SiriusXM, which is growing, so there are new sources that are coming into the mix. A very long time ago ASCAP and BMI were deemed to be a monopoly, but can't be a monopoly in the US. I'm not an attorney, but basically the Justice Department at some point in the 20th century said that they would allow BMI and ASCAP to continue to operate; however, they had to

operate under a consent decree. What that meant was that you guys are basically a monopoly, but if you agree to issue licenses to people at a fair rate, with a willing buyer and a willing seller, then you can continue to operate. And so what that meant was that anyone can go to them and say "Hi, I need a license" and ASCAP can say "Here you go, that'll be ten dollars" and that person or that company can say "Okay we'll take the license but we don't agree with the rate." So what happens is the company's not licensed and that rate goes through a dispute process through a board that's set up- rate court. There's sometimes years of back and forth until the rate is determined. So what that means is there are companies like Pandora that can just go there and say "Hi, I want a license" and they get one. And then for years and years they don't pay royalties to the songwriters that are being performed because they don't agree with the rate. Then they go back and forth and they spend millions of dollars in court trying to fight and fight and Pandora does all sorts of maneuvers such as they went and bought a radio station and South Dakota or North Dakota just so they can say "Well, we own a radio station, which means our rate is supposed to be one point twenty-five percent of our revenue, and so we're gonna pay that to you." Whereas, publishers feel that the rates should be more like 10% of the revenue because they're not really a terrestrial radio station they're an internet radio station- the cost is different, the overhead is different. So ASCAP and BMI are in the position where they've licensed this huge company that's making hundreds of millions of dollars and they're not paying any royalties out to the songwriters or publishers. So, what needs to happen is, well, there's one more interesting wrinkle. So at some point the major publishers pulled their rates out of ASCAP and BMI and said ASCAP and BMI no longer have our catalogue and they're not allowed to license on our behalf.

Which means whenever Apple came around in January of last year and they wanted to launch, Apple Radio or iTunes radio they couldn't go to ASCAP and BMI and get a license for that because they didn't represent their catalogue. So Apple had to go directly to Sony or Universal, the major publishers that pulled their catalogues and they negotiated what was a fair rate. And if you think about Apple, they're one of the most powerful digital music retailers in the world and Apple negotiated a ten percent royalty to the publishers for use of Apple itunes radio. Which if, Apple, who has all the power in the business, you know, can get a ten percent rate that must mean that ten percent is probably on the low side. So, it just shows that the publishers were right all along, that if you have a fair market and you let the publishers negotiate then they can negotiate rates. And by handcuffing ASCAP and BMI to these consent decrees, and then making them go spend millions and millions dollars that we, the publishers and songwriters, pay to go and fight in court for years it's a big waste of time, it's a big waste of money. The rate court ended up signing with Pandora for I think about one point seventy-five percent of revenue, which is a fraction of what Apple negotiated and what the publishers think the rate should be. So it really is a shame that this is going on and I think that the publishers need to overturn and get rid of this consent decree and allow ASCAP and BMI, and there's also a third on, CSAC, so even more so, ASCAP and BMI are not monopolies, to get out there and negotiate fair rates for songwriters and publishers and not be handcuffed anymore. So I think I can tell you right now that this is the top priority of all music publishers. There are others, of course, but that's number one because it's a part of our revenue that's being attacked and so we need to fight for fairer rates. These are digital companies that make hundreds of millions of dollars a year yet they scream poor all the time.

It's just not right, if you don't have money to compensate songwriters and publishers then you shouldn't be using the music. And that'll be our position- we'll continue fighting. But you've got to fight it with the justice department to get rid of this monopoly and this consent decree that we're kind of bound to, so that's gonna be an interesting one for you to keep an eye on.

Q. So I've noticed a growth in the popularity of a lot of these streaming websites, and as far as performance rights go, do these new streaming websites operate on a royalty per performance? Or how do royalties work for them?

A. So the compulsory license that covers mechanical licensing in the Copyright Act, what is it section 115 or something like that?. I mean just this past year they came up with new rates for these things, so in the past they said you get a license for these types of services but for so many years they didn't know what the rate was. So they had to go and set rates and go through all of these court proceedings to calculate the rate and generally what it is is a formula and it's gonna be the greater of like three different things. I can't name it off the top of my head but I think there are eight or nine different types of services like bundled things, tethered downloads, which is a download you get for a certain amount a month, and then it's over. There's purely streaming, there's gonna be ad-based streaming, subscription streaming, there's a lot of different kinds of uses but the good news is they're all covered under the Copyright Act. There are rates and there are ways to calculate it but it's very complicated. Generally until there's masses that are using Spotify and there's much more ad revenue generated and more subscribers, it's gonna continue to be a fraction of a penny per stream, or a fraction of a fraction. So the good news is different streaming sites can launch and they'll

have licenses to do it. Sites like Spotify and Beats mobile. There are all of these streaming services launching but back when Rhapsody launched, and I forget about others, there really was no statutory rates so they had a lot of problems launching and they had go and negotiate these deals with all the publishers at very high rates. So it is good that the copyright laws now provide rates for these things. The latest round of changes to the copyright act allow for mobile services to launch. There's a way you can buy a mobile phone now and have it packed with music, as much music as you want, as long as you pay to keep that mobile device and pay your monthly fees then you just continue to pay these royalties. It used to be that there wasn't even a license for that or a rate for that but now, there is. So the good news is a lot of new technologies can launch and what I think you'll see is gonna be more streaming services launching and starting to focus on certain genres. I think that there's this idea that there will be multiple music services and people will want to subscribe to maybe two or three different music services to where you can maybe go a dollar a month to this great classical service and they really really have everything you could every imagine and maybe there's another one you pay a dollar fifty a month for hip-hop. The good news is these services can now launch and they can be licensed and not have to break the law.

Q. I've heard also that these streaming services have lowered instances of music piracy.

A. I guess piracy is technically decreasing, but people jumping on the streaming services isn't making up for the loss of CD sales that happened- it's still an industry in trouble. It is changing but, yeah, I suppose piracy is probably down.

Interview with a Young Published Classical Composer

This paper began with an examination of the history and formation of copyrights for printed music, so it is only appropriate that it end with a young composer who is striving to continue in the tradition of classical composition and live in part on the sales of his printed music. This composer has studied at two major institutions under some of the most notable teachers of composition of our day.

Q. So you are a student of composition and a published composer who has had works purchased and works performed by major performance ensembles. Explain, if you will, the way a piece of music earns a composer money in the modern era?

A. Okay, so I would say there are actually several ways, maybe a surprising number of ways, that a modern composer, a concert composer, whatever you call it, can make money. There is so much negative, I feel, about contemporary classical music but there's still actually a surprising number of ways you can make money. I would say even adding on to that, that now is a time thats very exciting for me because those opportunities are even magnified compared to like, fifty years ago. So the most obvious like standard ways to earn a living, I guess, are through your royalties. That's sort of the big thing. So when a piece is performed, for instance I had an orchestra piece, *Neon Nights*, that was performed by the Indianapolis Symphony last year as you know, and it was performed three times there, and was performed once a few months later by a group called Symphony in C, so four total performances for the year, and I got paid per performance. But, if that piece were.. now that was a contest situation

where that piece was selected to be performed, through a contest, but let's say I were, you know, ten years down the road and I've got a, you know hopefully I've got a career going, and orchestras are seeking out music, then they would not only pay for the royalties but they would also pay to rent the music, and that's probably even a greater sum of money upfront. So they pay, so now we've got two streams of income: One, they're paying to rent the music, and two, that orchestra as an organization is paying an annual fee to ASCAP or BMI, and BMI and ASCAP are distributing the money to composers, and songwriters, and whatever. And then another sum of money would be the commission, which is when any party commissions a work from you, and I would say of all the different sources of income now, that would be the greatest. Depending on the length of the piece and the magnitude of the work, and who actually commissions it, that commission could range anywhere from a thousand dollars to two-hundred thousand dollars, depending on how big your name is, and whether it's like the New York Phil commissioning it or the Winston-Salem Symphony, whatever. Even still, with all those monies added together, for the majority of composers it's not enough necessarily to live on. So, the majority of them teach in academia, but there are people like the guy I mentioned yesterday, John Mackey, who are self-published, and they take in a hundred percent of their royalties, a hundred percent their rental fees, and they're making bank, a lot of them, and they don't have to teach. But that's a long answer for your short question.

Q. No no that makes a lot of sense, but let's go on to another question. So, you are a self-published composer yourself, and you have many works registered with ASCAP specifically. Would you explain how your relationship with ASCAP works, and what it means

to be self-published as a composer?

A. Sure, so ASCAP, as you said, is one of the two performance rights organizations in this country, the other one being BMI, there's also an international group called CSAC, but BMI and ASCAP are the good ones, and any composer nowadays, getting started, you want to become a member of that, and I think with both organizations there's a $25 one time fee and that's it, and you're a member. They're non-profit organizations themselves, so they don't actually themselves... their goal is not actually to make money but their goal is to distribute monies. They deal with billions of dollars a year to distribute to millions of songwriters and composers. But what they do is they – they're sort of like mailmen. So any, any major orchestra in this country, any radio station, any restaurant that's playing music, pretty much anywhere where music is being streamed, or produced, or performed, they're going to have to pay an annual fee to ASCAP and BMI. Often you'll go into restaurants and see a little ASCAP bumper sticker in the window, so they're just paying an annual block sum of money. And then, ASCAP and BMI are responsible for distributing that money to the songwriters, to the composers, to the lyricists, whatever. Now, where I come in, as a self-published composer, I write the music, print it myself, and then register works online through ASCAP. So that means I send in information about the piece, I don't have to send them any music or anything, but I just tell, I'll say it's like a ten-minute orchestra piece, it calls for thirty-two instrument parts, whatever, or maybe it's a four minute choir piece with only four different parts, et cetera. And then it's registered, and that's all there is too it. Very straight-forward process. Now, because I self-publish my music, I'm responsible for not only making music, printing music, and giving the orchestra the music, but also, I'm in charge of letting ASCAP

know of any performances. So, with the Indianapolis Symphony performances I just mentioned, I sent programs to ASCAP, like PDF scans of programs from those concerts to prove that it actually happened, and gave a contact number for the orchestra in case they wanted to double check, and that was it. And then obviously, the Indianapolis Symphony, it paid a large sum of money to perform ASCAP composers' works, and that money was then given to me later on down the road, about a year later, actually. And then you said you wanted me to explain the self-publishing aspect?

Q. Yeah what, as a composer, what are the differences between being self-published and being published by a publishing company, and what are the advantages or disadvantages– what are the advantages of either side?

A. Okay so this is sort of a huge can of worms nowadays because it's really changed a lot over the past ten or twenty years. Thirty, forty years ago, no matter who you were, if you were an academic composer, I feel like it was college or you were a composer on your own, like an Aaron Copland, he sort of just did his own thing, you wanted to get published, and a publisher was your best friend. They would, they would be your agent a lot of times in a lot of cases, and they'd heard your music and they also would be very fair with the royalties or rental payments and all that sort of thing. And I think at one point it was about fifty-fifty, where the publisher would get fifty percent of the profits, and fifty percent would go to the composer. Nowadays, for various reasons, the situation has become standard where the publisher gets ninety percent and the composer always gets ten percent. One of my teachers, Frank Ticheli, gets fifteen percent and that's one of the highest I've ever heard. It's almost always ten percent, it's standard for the industry. Morten Lauridsen gets twenty percent which

is by far the highest I've ever heard. He's a millionaire as it is, but if he were self-published, he'd be a multimillionaire. I mean, tens of millions probably. So, because ninety to ten, that's obviously not a very good situation for composers, and many of them are doing self-publishing. So that guy I was talking about earlier, John Mackey, writes a lot of music for band and he's really, he's I think the epitome of a great composer businessman today. He has a huge social media presence, he's got Facebook, Twitter, and he's got a very active blog that he keeps up very regularly. He's very funny, very witty, he posts stuff all the time.. I think that, even more than his music, that's how he's been able to spread his work, you know, it's social media, he's got his website down and all that stuff. So what he does is he writes a piece, usually by commission, one band, maybe several bands will commission a work from him, and he will send them, nowadays everyone is sending out PDFs, so he doesn't even print, but he would then print his music, send it to them, and he would be guaranteed one live performance, and then they would send it right back; they truly are renting the music. But, unlike the publishers' situation, he's getting one-hundred percent of the profit. So the bad thing is, you have to do all the extra legwork, so I've talked to him before and he says that publishing to him is his day job and writing is his night job, so early in the morning he'll get up and go to the post office, he'll handle legal stuff if someone has stolen his music, he'll do all of the agent kind of work, that an agent would normally do, himself, including the printing, the binding, the ink purchasing, all that stuff, which can be expensive. But, you're still making a ton of money, so much more money, because you make one-hundred percent of the profit. You can even charge extra based on the printing. So my current teacher, Michael Daugherty, he actually hired me out to do his engraving for him, and I cleaned his scores up,

and made sure that there were no errors, and I typeset and all that kind of stuff, and he pays me a separate fee, and usually in his commission agreement he'll have an allotted money for, for printing and typesetting, and that money would go to me. So, yeah, as a self-published composer, basically basically you have to be more independent, more entrepreneurial, but you potentially make a lot more money. As for being published, I guess the best thing about it is you don't have to worry about anything once you write the music, they pretty much take care of everything for you, they just take all the money [laughs].

Q. Yeah so you don't have to worry about anything except finding another job

A. That's right. I think in publishing for books, I think the publisher gets ten percent and the writer gets ninety percent, and writers complain about that figure all the time. Where we have the complete inverse and we're stuck with it. So in fifteen years, honestly I don't even know if music publishers will exist, certainly not in the same way they currently are. It's going away. And really, it's not that difficult to be self-published, I mean you just have to have good record keeping, you have to be a good businessperson, but aside from that, it's not that hard. And that guy I mentioned [John Mackey], you know now he hires people to do all that for him, and he's purchased four homes in the past five years.

Q. That's crazy. So you were talking about John Mackey before, and about the type of compositions he makes money from specifically, and one of my questions was are there certain types of compositions that are more likely to find financial success in this day and age?

A. Definitely. There's a lot of misconceptions about that. I think a lot of people assume that film music automatically has got dollar signs written all over it, and concert

music does not. In reality, film music is at the highest of the high, it absolutely has more dollar signs, but there are only six or seven film composers who are actually making the big bucks. Everyone else is struggling to get to that point. In the concert world, there's a lot fewer composers trying to do it, and there's a lot less money to be had, but there are still several avenues through which you can make a big profit. Now John Mackey is not only doing a lot of band music, he's doing only band music. I think he's actually pretty upset about that because he wants to be more diverse but for better or for worse he's kind of been pegged as a band composer, and he just churns out music for high school bands, for middles school bands, university bands, and that's his thing. Someone like Morten Lauridsen has made an entire career on just choral music. Both of those worlds you can make a living at. Orchestra music is much more difficult for a couple of reasons: one, there are fewer orchestras, two, it's harder to get into that world because there is a lot of stigma, and three, almost all of the conductors are non-american, and there's no real network where all of the orchestra conductors of this country come together and collaborate. It's much more competitive and every orchestra kind of does their own thing in their own city. With bands and choirs, they have conventions every year, like ACDA [American Choral Directors' Association] for choral people, and CBDNA, College Band Directors' National Association, and they get together and they share ideas, exchange pieces, talk about the hot composers of the day, and there's this really healthy network of promotion and networking. So because of that, I think those are your two best ways to make money as a composer. Bands and choirs. I mean, you can make money in chamber music and orchestra, but you're going to have to be very versatile, and you're probably going to have to teach.

Q. That makes sense. So how does this current, for you personally, does the current financial landscape, and compositional landscape, affect your own creative process, and in what ways does it?

A. Oh man that's tricky. You know, I guess I feel very fortunate that I grew up in band, so I very much love writing for band. And I know I've always loved orchestra music the same way, but band is a natural thing for me. Most composers my age find it unattractive to write for wind ensemble or band, and prefer chamber music or orchestra music. I like all of it, and I guess I consider myself kind of lucky in that. I... actually, choral music is very difficult for me. It's a lot harder for me to work in that medium. But, gosh, in terms of my creative process? I try to... I don't know, I try not to think about it too much, what will sell what will not sell, I don't know what will be popular or not, I just try to write something that... I just try to please a lot of different people. When I write, I obviously write to please myself, I don't want to put anything out there that I'm not happy with, but also if I'm writing a piece for violin and piano, I want the violinist to love playing it, to look at the music and say this is challenging but I can't wait to get into it, and I can't wait to tell all my friends about this piece because it's really cool. That's the mentality I definitely have when I'm writing, same with a large ensemble piece. If I'm writing, you know a big choir piece or something, I want the singers, all of the singers, to love doing it, I want the conductor to love conducting it, and I want them all to want to promote the piece themselves, to be proud of that piece. So I guess in that way I'm thinking, I guess you could say financially, but it's more about just promotionally I want people to like my music and to want to hear more of it. Through that way, I guess, you could make more of a living, easier. I can't imagine writing something and

saying “I don't like this, but I know it will make money.” That's a very backwards, horrible way to do it to me. I think that's also why some people go into film music. They don't necessarily go into it because they love the marriage of visual and music they go into it because they think they can make money, and write music. That's a bad way to go about it. You only do film music if you love movies, and if you love, again the idea of visual plus sound. You don't want to go into it for financial reasons. Anything in music, if you're doing music for money, there's a problem because it's one of the least financially lucrative career worlds you could ever enter. You have to fight fight fight to make money, I mean it's really hard. You have to fight to make a living. So the only way you can do that and be happy and actually sleep at night is to love your music and to love your art beyond belief, and then have faith that it'll happen eventually, and it will.

Q. So I guess in conclusion, are there any important issues in the field of composition that you would like to address, things you want to talk about, or issues that you see are impending? You were talking about issues with like, Pandora and different types of Internet radio.

A. Yeah that's a part of a pulled out of Pandora's box kind of thing, because, you know, there are great things about it and there are bad things about it. The great thing, and this goes for everything this goes for YouTube, the Internet, Soundcloud, everything. The great thing is that there is so much available now, there are more opportunities to learn about music and to experience about music than ever before. There is no time in history where you could have access to everything in the same way with a few clicks like now. That's revolutionary, and that's here to stay, and it's only going to get bigger and bigger. Those

opportunities are only going to get bigger and bigger. That being said, there's just so much out there that I think people, gosh this is a huge issue, you can talk about how it affects people's attention, and their ability to focus on one thing versus everything at once, and I think that even affects music stylistically. Not necessarily in a bad way, but essentially American music is really just this hodge-podge of different things happening. It's kind of cool in a way; all these styles are cross pollinating and coalescing, but it also has the con of being muddled at times, or messy. That's one issue. Going right to Pandora like you said, Pandora, while it's available, it's also for more or less, free. Or let's say you want to go listen to a song on YouTube, you can go listen to a ten second ad, or skip the ad and watch your video. Or, in the case of classical music, there's usually no ads to deal with, you just go into your Britten *War Requiem*, and that's it. The good thing about that is that listeners and audiences can have instant access to music, the bad thing about it is that singers and songwriters and composers and performers get screwed out of the potential profit of that. I don't see where it's going, but I don't see it going in favor of composers. I don't see really how it can, or necessarily if it should. I think it's a consumer driven market, and it's definitely going the way of consumers, and people just sort of made the decision about ten years ago that they don't feel the need to pay for movies or music. So I'm not sure in about ten years where we'll be, but it'll hopefully go down the side of, you know people are going to go back to legally purchasing things. I don't think that's gonna happen. Boot-legging is here to stay. I do have one other thing that really worries me, and that's the issue of the computer: the idea of the computer influencing today's music. The computer allows anyone who can put two notes together on software to assume that they can or want to do composition. A good lot of

people now, because I see them, a lot of people go into music schools thinking that they really want to do composition, but then end up deciding later, “oh this is not for me at all.” Even if you didn't say that, or you were meant to be a composer or whatever, the computer can be an asset and it can be a huge deterrent. I see that it's really affected the current sound. There's a lot of copy-paste going on, which sounds pretty trivial, but it's actually, it's actually affecting people's voices and their styles and you can hear the computer at work in a lot of these pieces, and to me that's a bad thing. Now, I started with a computer myself just like everybody else, but I've since decided that, and realized that I work best by hand, so every piece I write now I do the entire thing by hand, and then the painful part is putting it into the computer. But that works better for me, and I feel like the music is improved because of that. It just feels more organic, more free. When people write only in the computer, often it's very blocky, and you can just hear the segmented aspects of it. That's just a personal aesthetic; some people love that sound.

Reflection

Both of the interviews conducted as a part of this research helped to shed light on different issues in modern music copyright law and proceedings. Both interviews gave valuable information that translated the words of the law into practical terms and implications.

The first interview pointed out several important facts about the current state of music law, and some current issues with its practice and legislation. Musicians and composers cannot function autonomously as an industry. The field of music publishing, the interviewee

explained, is what allows artists to capitalize on their copyright. Music publishing companies, in return for a percentage of sales, negotiate licenses for, market, and sell their clients music. They also defend the rights that they sell against copyright infringement. However, it is music publishing companies as well as record companies that earn bad consumer reputations by speaking out against piracy and pressing legal action against corporations and members of the public alike.

As the music industry progresses in the twenty-first century, it is becoming increasingly difficult to work in the industry without occasionally brandishing the threat of litigation. When a company like Reservoir Media finds issue with a website or company such as RapGenius, as mentioned, their only course of action is to press the threat of litigation to get them to cease their infringement. Small publishing firms and record labels often lack the funding to finance the litigation to back up their threat. The laws on the books are somewhat at fault as well. The interviewee mentioned how companies that existed in the early stages of the digital music realm were willing to pay royalties, but no real structure existed to determine the royalties that should be paid. Legislation takes a great deal of time to pass, and with rapid advancements in technology happening and new methods of music distribution popping up all the time, it is difficult for federal copyright legislation to keep up, especially considering the intricacy of language surrounding copyright theory. For instance, the DMCA was passed more than sixteen years ago, but it remains the basis for the majority of online infringement deterrence. As mentioned previously, the DMCA's provisions for software control are non-specific and increasingly unable to handle developments in online music distribution and copyright protection.

As for online music companies, the interviewee suggested that royalty rates are gradually beginning to become standard, but that they are still behind. There is a great tension between Internet and tech companies that provide means of music distribution and between publishing firms and record labels regarding royalties. The interviewee argued that for Internet radio, where there is far less overhead than terrestrial radio, the artists and composers should receive a greater percentage of the advertisement revenue. The business of music publishing relies almost entirely on profits gained from royalty collection and licensing, so while justifiable rates may be discussed by legislators, lawyers, and the public, the interviewee made a point that it is important to consider that respect for artists' and composers' copyrights is not only abiding by the law, but also providing those composers and artists their primary means of income.

In addition to underscoring the severity of several key issues affecting the music industry, the interview was very helpful in providing perspective on the effects of music copyright law on the day to day life of the industry professional. It is important, when examining the legal theory in a given field, to be aware of the law's practical effects. The interviewee suggested that the day to day difficulties of music publishing would be eased by the existence of a master copyright list. This would not only make licensing a simpler process for both ends of the agreements, but it would help to keep small publishing firms from being out-competed by larger publishing firms. The compilation of such a list would be difficult, as the list would be incredibly lengthy, and would require an agreement among all interested publishers upon a predetermined set of fees.

The second interview brought up some very important issues in regards to the

financial life of a modern day classical composer. It is a daily struggle for many young composers to make a living from their music, and this can be very limiting to their output. Young composers seem to view the current musical landscape as the interviewee does, “I don't see where it's going, but I don't see it going in favor of composers. I don't see really how it can.” As the interviewee indicated, publishing companies are forcing composers to give up the majority of their earnings, and the profusion of free and illegal online access to music is hindering their music's profitability. In addition, advances in composition software and digital distribution methods are causing an overflow of would-be composers, and it would be logical for a budding talented composer to fear being swept away with the detritus.

It is interesting to consider this situation in a historical context. The desperation of composers and the difficulty of establishing their own copyrights, bears a striking resemblance to the arguments of those who proposed the passage of the Act of Anne. Perhaps it is possible that composers will once again have a chance to live from their music if some sort of similarly important legislation is created to change the face of American Copyright Law. What will this legislation look like? Who will suffer by it, and who is to gain? Many questions remain as to how it will be accomplished, but without the defense of copyright laws in society, artists will lose the incentive to create, and our society will suffer greatly as a result.