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# The hegemonic copyright-regime vs. the sharing copyright users of music?

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## **Abstract:**

In this commentary the increasing discrepancy between the emerging participatory networked culture and the hegemonic copyright and intellectual property regime is contextualised and subsequently problematised. While this is a feature and growing conflict for every form of authored work – news, films, books, academic work, photography, the focus here is on music and more in particular on the sharing of music. Sharing music is not a new phenomenon, but current copyright users share music with weak peers in addition to strong peers which has taken sharing to a whole different level reminiscent of a gift-culture, but with less need for reciprocity. Music audiences attribute less value to a digital product than to an artefact such as a CD or vinyl record. The reaction of the music industry to these phenomena has been hostile up until now, criminalising the copyright user and lobbying for the close monitoring of the online behaviour of all internet users. However, while the industry foregrounds its potential losses based on the number of downloads, as well as the difficulties this provokes for young beginning artists, others are pointing towards the societal benefits of worldwide free access to such a wide variety of music. Furthermore, several counter-voices in the copyright debate have emerged, from copyleft to copyriot and more and more artists mainstream and alternative are engaging fully with the participatory culture. In this commentary an argument is developed in favour of the music industry embracing this participatory networked culture rather than take us back to the future of 1984. Democracy and civic liberties are more important than the corporate interests of a few.

## **Wordcount:**

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## Introduction

The tensions between the current hegemonic copyright regime and new patterns of consumption and use of music has engendered a lot of debate in academia, amongst legal scholars, corporate actors and in the media. Digitalisation, compression techniques and the internet as a potent distribution tool have provided the music industry tremendous benefits in terms of reducing production, reproduction and distribution costs, but at the same time these technologies have also a deterritorialising effect, undermining the current stringent copyright and intellectual property regime.

While the industry still clings on to a past when music symbolised at the same time an artefact – a physical material product, music audiences have long moved on and differentiate in the value they attribute to a digital product compared to a physical product, even if the content is the same. Sharing music, which is not an entirely new phenomenon, has shifted from strong-peers to weak peers enabled by networked technologies. We have also entered an era in which music plays a different role in people's everyday life, is more ephemeral - 'its duration becomes compressed, and it becomes more of a process than a finished product' (Terranova, 2000: 48). Music has become ubiquitous through mobile devices and the internet and quantity is often more important than quality. As a result of all this and despite all the frantic efforts by the industry to put a stop to the downloading and sharing of copy-right protected music, music audiences are less and less willing to pay for the music they listen to (Molteni and Ordanini, 2003; Leyshon et al., 2005).

What we are witnessing here is a good illustration of the widening of the gap between what is called *le pays legal* and *le pays réel*, between the laws and regulations put in place by the state and what is deemed to be acceptable and normal behaviour on the part of citizens/consumers. This growing discrepancy between the legal and the everyday world in relation to music is explored further by first outlining the nature of the hegemonic copyright regime and its gradual universalisation as well as expansion, both in scope and in duration. After this, new patterns of sharing music that challenge this hegemonic copyright regime will be addressed to then focus on the tactics of the industry to discipline these practices. Finally, counter-voices in the intellectual property and copyright debate advocating for a strengthening of the public domain will be outlined.

## **The hegemonic copyright regime**

Historically, old folk culture did not recognise ownership of culture – ‘performance was regarded more highly than authorship’ (Söderberg, 2002: np). Cultures thrived on the sharing of stories that got adapted, transformed, but could not be traced back anymore to a single author. Foucault (1986: 108) points out that discourse was not ‘a product, a thing, a kind of goods’.

The first formalisation of copyright and authorship can be situated in 1710 when the Statute of Anne - An Act for the Encouragement of Learning - was voted in the UK (Rimmer, 2007: 4). It enabled authors to exert their rights on newly produced work and gave them the exclusive rights to print and sell their work for a finite time span, with a maximum of 28 years if the author was still alive. The Statute of Anne created a public domain for literature and sought to strike a balance between the advancement of knowledge and incentives for the creation and creators of culture; it was a social contract in sorts (Deazley, 2004). Limits on the duration of copyright protection were put in place to promote and protect the public domain as much as the author.

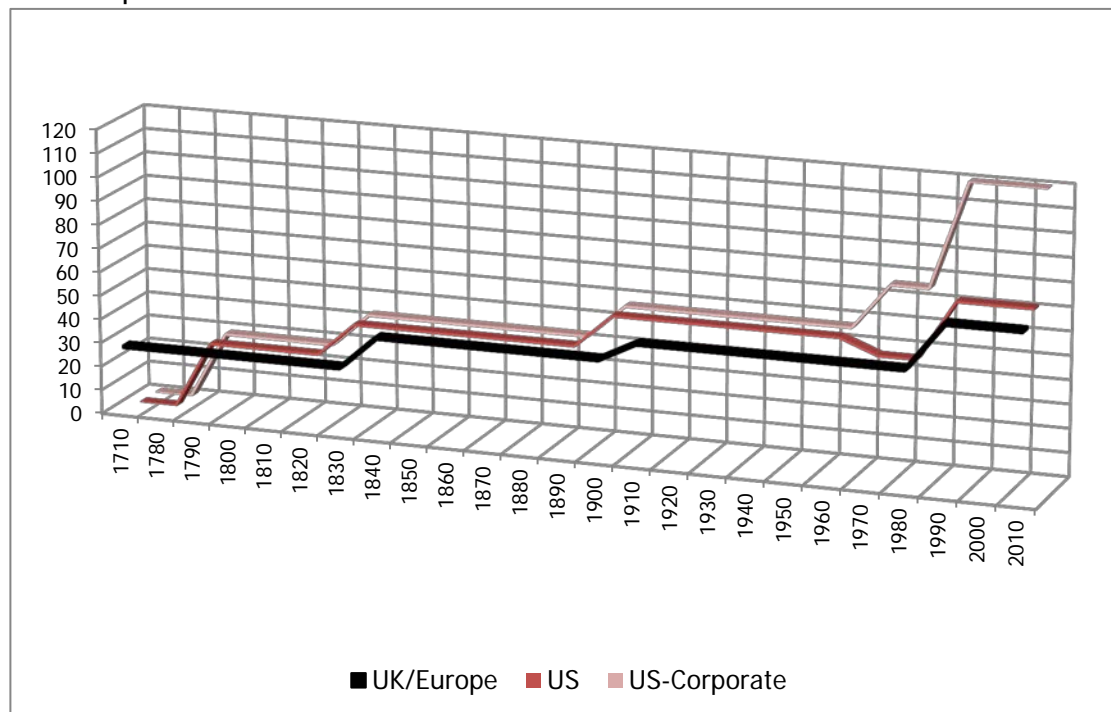
Intellectual property and copyright protection was subsequently slowly but surely universalised through a number of conventions and binding agreements. The Paris Convention for the Protection of Intellectual Property in 1883, the Berne Convention for the Protection of Literary and Artistic Works in 1886, the establishment of World Intellectual Property Organisation (WIPO) in 1967, and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) in 1995 were all geared up to universalize intellectual property and copyright protection. The universalisation of copyright protection is also at the core of the ideology of free and fair trade embedded in the GATT and the WTO (Bettig, 1996). Legal copyright protection became the cornerstone and prime vehicle through which the commodification of culture – ‘the process of transforming use values into exchange values’ (Mosco, 1996: 141) – has been institutionalised and enforced.

Two historical trends can be identified. The first observable trend is that the copyright regime has been gradually expanded from pure texts and print to encompass any possible form of cultural production – paintings, engravings, photographs, music, film, broadcasts, theatre, etc. Most national/regional copyright laws and international agreements have also been updated to include the latest forms of digital reproduction and creation. In this regard can be referred to the 1998 Digital Millennium Copyright Act in the US and the 2001 European Union Copyright Directive.

A second marked trend is the considerable extension of the duration of copyright entitlements on cultural products in recent decades (see figure 1). One of its ground rules of The Berne convention established that copyright holders could assert their rights for a minimum term of the lifetime of the author plus 50 years. Initially the US did not sign up to the Berne convention.

In subsequent decades the US overtook Europe in terms of the prime advocate for copyright protection in order to protect the interests of their entertainment industry. Of great importance here is the distinction between authors' copyright and corporate copyright<sup>1</sup>. Since 1993 in Europe a general rule was adopted, namely 70 years after an author's death (Von Hielmcrone, 2000: 31). In the US, The 1998 Copyright Term Extension Act (CTEA), also dubbed the Sonny Bono or Mickey Mouse Protection Act, drastically extended copyright protection in the US from 50 to 70 after the author's life, in line with the EU directive, but the terms for corporate ownership or 'work for hire' were raised to 120 years after creation or 95 years after publication. (Rimmer, 2007)

**Figure 1:** Overview of changes in the terms for copyright protection in UK/Europe and in US from 1710-2010<sup>2</sup>



**Source:** made by the author, based on legal changes over this period in Europe and the US

### **New forms of sharing music: the peer2peer model**

The emergence of a more participatory consumption culture, freely sharing digital content online, makes that 'the older legal and economic structures that insure commodification on the basis of authorship are disintegrating before our eyes' (Poster, 2004: 421). At the core of this is the phenomenon of sharing digital content amongst (weak) peers.

Whilst online file-sharing – or what Liebowitz (2006: 4) calls 'anonymous file copying' – is a relatively new phenomenon, sharing music as such is not.

Reel-to-reel tapes and music cassettes for example enabled the copying of music onto another format for many years. After the introduction of music cassettes to the consumer market in the 60s and 70s, 'making a tape' became commonplace and was for many conducive to discovering new music and making new (girl)friends (Frith, 1986). In this type of strong-tie sharing of music kinships, friends, school, the local youth-club, (local) radio stations and/or the local record store were highly influential as to which music teenagers and young adults were exposed to and shared amongst friends. However, sharing today is of an entirely different magnitude and nature. One might argue that we have entered an era of weak-tie sharing of music.

Peer-to-peer file sharing is in a sense a potent illustration of the collective 'strength of very weak ties' (Granovetter, 1983) in densely networked environments. The network structure as well as the global nature of the internet makes it possible to share among anonymous and invisible publics that are not connected in any other way besides sharing data online (Lessig, 2004: 17). File-sharing technology has 'facilitated much greater user participation in what had previously been an arcane "gift economy" dominated by enthusiasts and hobbyists' (Currah, 2006: 443).

In his classic anthropological study *The Gift*, Mauss (1950) sets forth a theory regarding gifts and the act of giving and closely relates this to the notion of reciprocity. S/he who gives, often expects something in return at some point and while this leads to a re-enforcement of social relations and cohesion, Mauss argues that this also ferments social dependencies and reproduces existing power relations. However, with the emergence of digital technologies and the internet, in combination with the strength of weak ties, the element of reciprocity, strong social ties and asymmetrical power relations, while still relevant, have become less of an issue or can partially be overcome (Kollock, 1999: 223). Whether we share with a few or with thousands, millions even does not really matter that much in terms of transaction costs. This also explains some of the differences between the act of giving in a material world as described by Mauss and giving in an immaterial peer-to-peer model.

According to the international industry lobby groups, the music industry and the artists lost out on more than 40 Billion US\$ in revenue in 2008 because of piracy and (illegal) file-sharing. Besides this, they estimate that 95% of music being downloaded online constitute in fact illicit downloads (IFPI, 2009: 22). It is generally accepted that the projections of losses due to peer-to-peer sharing of music are greatly exaggerated by the lobby organisations (Ziemann, 2002, 2007; Liebowitz, 2006: 13). Despite this, the majority of (econometric) studies into file-sharing conclude that this activity is plainly rather than creatively destructive and has 'brought significant harm to the recording industry' (Liebowitz, 2006: 24) and is detrimental for the 'creation of artistic work or innovation' (Zetner, 2006: 65).

## Disciplining tactics of the entertainment industries

Precisely because '[t]he network doesn't discriminate between the sharing of copyrighted and uncopyrighted content' (Lessig 2004: 18), the entertainment industries' lobby organisations, as well as some artists, are very adamant in their resistance against these 'immaterial' sharing-practices employed by copyright users, which they depict as illegal piracy and blatant theft. The main tactics currently being enacted by the entertainment industries are three-fold:

- (1) protection
- (2) education and intimidation
- (3) repression

Protection refers to Digital Rights Management (DRM) technologies, such as digital watermarks, as developed by the Secure Digital Music Initiative or Apple's Fair Play DRM, which technically restricts the use of copyrighted content, both online and on devices such as MP3-players. These techniques have proven to be not that successful as hacks to circumvent protection are often quickly available and furthermore not all content producers use it on all their products. Apple calculated that on average under 3% of all content stored on iPods is DRM protected. This represents one of DRMs main weakness, according to Steve Jobs, CEO of Apple:

DRMs haven't worked, and may never work, to halt music piracy. Though the big four music companies require that all their music sold online be protected with DRMs, these same music companies continue to sell billions of CDs a year which contain completely unprotected music. [...] the technical expertise and overhead required to create, operate and update a DRM system has limited the number of participants selling DRM protected music. (Jobs, 2007: np)

A second tactic the industry employs is that of educating the masses and this refers to programs and campaigns that have been set-up to 'close the "knowledge gap" between young people and their parents and teachers, in order to promote the safe and legal use of the internet and mobile phones to download music' (IFPI, 2009: 26). However, many of these PR campaigns do not aim to educate, but above all to intimidate. Through the discourses being produced by lobby organisations in their PR-campaigns<sup>3</sup> the criminalisation of the sharing copyright user is being articulated. On the website of the Alliance Against IP Theft (see Figure 2) illegal downloading and piracy is discursively and visually linked to drug dealing, sweatshops, child labour, illegal immigration and organised crime.

**Figure 2:** Screenshot of website of the Alliance Against IP Theft



Source: <http://www.allianceagainstiptheft.co.uk>

In recent years it became apparent that education and waving a stick was insufficient to deter the sharing of digital content. More radical strategies of repression were gradually enacted by the entertainment industries. First victims of their legal challenges were those facilitating the downloading and peer-to-peer sharing of digital content. A famous case in this regard was Napster, which was forced to close down and subsequently convert to a subscription model (McCourt and Burkhart, 2003). The pressure on MySpace and YouTube to remove copyrighted material from their sites and the gradual compliance of these sites to these requests certainly after having been appropriated by major players is another illustration of the attempts to assert the universal copyright hegemony online.

As the internet was precisely designed to be versatile in adapting to and bypassing disruptions, new loopholes emerge very rapidly, making it near impossible for the content industries to keep up with innovations in terms of content distribution among peers and new ways of circumventing DRM protections. Different peer-to-peer sites and software applications are now available that do not require a central server anymore and are thus impossible to eliminate (e.g Kazaa, Limewire, Bit-Torrent). Blogs are increasingly used as a way to provide links to file-share sites such as RapidShare or Hotfile from where music or software can be downloaded.

As a result of this, the entertainment industries re-directed their efforts to enforce copyright towards individual downloaders and sharers. Despite claims of the industry lobby organisations that they would only target 'individual computer users who are illegally offering *large* amounts of copyrighted music



over peer-to-peer networks' (RIAA, 2009 – emphasis added), many cases being pursued by the RIAA do not fall into that category. According to the Electronic Freedom Foundation, the RIAA sued about 30.000 US individuals between 2003 and 2008; many of whom were not malign or severe users, but 'children, grandparents, unemployed single mothers, college professors', having downloaded only a very limited number of music (EFF, 2008). Through high-profile cases the entertainment industry aims to scare internet users. This is confirmed by the comments of the lawyer of the RIAA in the case against Jamie Thomas, a single mother of two, who was convicted to pay 220.000\$ in damages to the RIAA for downloading and sharing 24 tracks: 'This does send a message, we hope, that both downloading and distributing music is not ok.' (Richard Gabriel, quoted in Bangeman, 2007: np).

The third and most recent actor being targeted by the entertainment industries are the Internet Service Providers (ISPs), considered to be complicit in copyright infringements by internet users. ISPs are increasingly asked to police and monitor their network and hand over information about the download behaviour of their customers (BBC, 2008). In the UK, the Digital Britain report, proposed to give the regulator Ofcom additional powers to force internet providers to report persistent misuse. (DCMS, 2009). Contrary to France, where the National Assembly narrowly stopped a stringent internet anti-piracy law disconnecting internet users after three infringements, as well as requiring them to keep paying their subscription (BBC, 2009), in the UK the fierce battle to curb illegal downloading or anonymous file-sharing of copyrighted content is opening the door to a state-sanctioned monitoring system of the internet usage of everyone and of the content that is being downloaded and/or shared.

### **Counter-voices in the IP-debate**

As is apparent, other voices besides the music industry and governments are also active in this debate. One of the main counter-arguments distinguishes peer-to-peer sharing from piracy with a commercial intent. It is being argued that peer-to-peer sharing involves gaining a private benefit, while at the same time providing benefits to others, which above all takes place outside of the value-chain as no money is exchanged (Jenkins, 2003), very reminiscent to the discourses related to the culture of gifts.

Lessig (2004: 201), one of the most influential voices in developing counter perspectives on copyright and a more participatory culture, argues that if the 'costs [of enforcing the law more severely], intended and collateral, do outweigh the benefits, then the law ought to be changed'. This should result in the emergence of different types of intellectual property regimes allowing for different degrees of freedom and above all establishing an intellectual and creative commons (Lessig, 2004: 204; Bollier, 2009).

There exist a variety of alternative copyright licences of which the 1989 General Public License (GPL); also known as the Copyleft license (see figure 3) and the 2002 Creative Commons ShareAlike licenses which were inspired by the GPL, are the most common. The GPL license was originally developed by Richard Stallman to suit the needs of the Free Software Movement, but it can be used for all kinds of copyright protected works and creations. Copy-left licences use 'copyright law, but flips it over to serve the opposite purpose' (Stallman, 1999: 59). Information is placed into the public domain while copyright law makes sure that it stays there and cannot be commodified.

**Figure 3:** Copy-left Logo



**Source:** <http://en.wikipedia.org/wiki/File:Copyleft.svg> (Public Domain)

For some this radical move went too far, leading to the emergence of more flexible – or rather more restrictive – licenses. For example, Open Source licenses<sup>4</sup> are somewhat different from the GPL in that they restrict what you can actually do with the material, while GPL leaves the user free to do what s/he wants with the licensed material, except commodifying it (Stallman, 2007). Open source licenses are generally seen to be more business friendly (Söderberg, 2002). Likewise, Creative Commons' licenses, co-developed by Lessig (2003), enables authors to impose a variety of restrictions on work placed in the public domain, they can choose whether they allow sharing, commercial use, and the creation of derivatives from the original or not.

It is, however, a misconception to think that the Copyleft/Open Source movement somehow operates beyond or outside the logic, regime and ideology of copyright protection. On the contrary, one of the strengths of Stallman and others is precisely that they remain within a fairly legalistic framework, which is helpful in a context where – often unassumingly – consumers sign legal contracts with content producers when purchasing or accessing cultural products.

Nevertheless, this strictly legalistic approach contrasts with the more normative and sociological position taken by Rob and Waldfogel (2006) and Oberholzer and Strumpf (2007) foregrounding the societal benefits of

anonymous file-sharing, regardless of the legal implications of this. Two citizenship models clearly clash here – citizenship as a legal status with rights and obligations, governed by the rule of law versus cultural and political citizenship, where citizens have the right to resist, to fundamentally challenge laws and to refuse to abide by them legitimised by public interests. From this latter perspective laws can easily be perceived to protect the particularistic (capitalist) interests rather than serving and protecting the common good and copyright laws are a very good example of this.

More radical voices in this debate argue for a complete rejection of the notion of copyright all together, rather than to reason from within an IP and/or copyright paradigm, as does the Copy-left movement. Rasmus Fleischer, one of the co-founders of Swedish Bit-torrent search engine The Pirate Bay and author of the blog Copyriot<sup>5</sup>, rejects copyright outright. He argues that the 'vision of copyright utopia is triggering an escalation of technology regulations running out of control and ruining civil liberties.' (Fleischer, 2008: np). He and others increasingly point to the price we as a society are paying for 'upholding the phantasm of universal copyright' (ibid).

Besides this, we are also seeing that some artists have started to emphasise the advantages of the participatory culture instead of foregrounding the detrimental aspects of it, making good use of its benefits to outweigh the costs. Besides mainstream artists such as Prince and Radiohead, underground scenes are increasingly developing more innovative ways of creating added value other than selling records and CDs. More dance-oriented scenes for example thrive on symbolic capital, label recognition and the sharing of revenues of DJ-ing and live performances with the labels (Webb, 2007). Social media and the participatory culture feed into this and are thus not seen as something necessarily negative.

## **Conclusion**

While music audiences increasingly consider music and other digital content immaterial and ephemeral, without real value compared to a physical product, the entertainment industries clearly stick to a physical and material world where a culture of exchange clashes head on with a collective culture of distributed taking and giving. This tension and deepening conflict is increasingly unsettling the capitalistic paradigm in the production and commercial exploitation of culture.

To some extent digitalisation and the internet have brought us 'back to the future', to use the title of Robert Zemeckis' 1985 movie. With some caveats it could be argued that to the great dismay of the entertainment industries we are slowly returning to an oral era where culture only existed by the grace of sharing and the joy it provoked among its audiences, to a time in which cultural production had to be in the public domain or it did not exist, had no purpose, did not travel far. Poster (2004: 417) asserts that '[w]hen cultural

objects are digitized, they take on certain characteristics of spoken language' and as we know '[t]he model of consumption does not fit practices of speech or singing'. This is a pertinent point, salient in relation to music in particular and concurrent with the analysis developed above. The question that arises then is whether this is necessarily such a bad thing?

As is apparent from the analysis above, opinions on this are starkly divided. From the perspective of the music industry and some artists file sharing is clearly detrimental and their claims are supported by most econometric studies. From the perspective of users and society, file sharing can be articulated as highly beneficial to a participatory culture, strengthening the public domain, facilitating access for the many to an immense variety of cultural products, providing exposure and symbolic capital to artists, at times even serendipitously and a potent marketing tool for musicians big and small.

The point made here is that the genie is out of the bottle. It is becoming ever more clear that the music industry will never be able to fully exploit the advantages of the networked participatory culture while it is at the same time engaged in high profile efforts to contain, curtail and/or destroy that very same culture. They cannot engage fully in the emerging participatory culture, but neither are they able to fully control, let alone destroy, the practices they criminalise. One way out of this Catch22 is for the music industry to also become a participant. Maybe the time has come for the music industry to reconsider its hostile position towards the copyright users and approach them as fans and potential consumers rather than as criminals, in similar ways as quite a number of artists have started doing.

However, a less romantic and more dystopian option is that the entertainment industries, driven by the vast interests they represent and the determined will to counter all fundamental challenges to the current ownership-regime, will continue to fight the copyright users and the most frightening way to do this is through monitoring the online activities of all internet users, potentially through deep-packet inspection technology (Anderson, 2007). How else would internet service providers be able to detect and report persistent 'misuse'? And how persistent does persistent misuse have to be before we get reported? What other categories of misuse might be added to downloading and sharing digital content?

In terms of democracy, privacy and civil liberties it remains a daunting perspective to envisage a future in which a multiplicity of private little digital big brothers will be monitoring our online behaviour in every detail looking for all kinds of misuses, ultimately disciplining us if we transgress a certain limit. Rather than protect global conglomerates' interests and restricting access to cultural products, a future more in tune with the burgeoning participatory culture whilst at the same time providing alternative ways of supporting artists and promoting creativity, should be the aim.

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## Endnotes:

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<sup>1</sup> Corporate authorship refers to 'work made for hire', whereby the original author may be credited or not, retain moral rights to their creation but ownership and copyright rests with the employer or company. For example, publishers hold corporate authorship over academic output, academics keep their moral rights and some fair use rights.

<sup>2</sup> This graph represents the year in which legislation was changed but often this has retroactive consequences for works created earlier. In reality the rise in copyright terms is even more drastic as it appears. While at first copyright terms were absolute and expired when an author died, the Berne Convention of 1883 made it possible for descendents and others to exert the copyrights for a maximum of 50 years after the author's death.

<sup>3</sup> See <http://www.fact-uk.org.uk> or <http://www.respectcopyrights.org> for examples.

<sup>4</sup> See URL: <http://opensource.org/docs/osd>

<sup>5</sup> See URL: <http://www.copyriot.se>