Decentralizing culture: the effect of digital networks on copyright and music distribution

Benjamin Gibert

Available at: https://works.bepress.com/benjamin_gibert/2/
Decentralizing culture: the effect of digital networks on copyright and music distribution

Abstract

The advance of technology profoundly impacts how people interact with culture as the proliferation of digital networks transforms the effects of copyright in modern societies. This paper argues that the oligopolistic conditions of content markets and the legal discourse of intellectual property law have historically enabled copyright holders to promote a limited conception of art and obscure the complexities of copyright theory. While conceptual ambiguity is inevitable in the construction of aesthetic legal categories, current practices impose too many restrictions. The practical choices made concerning copyright in cyberspace will determine the evolution of culture in increasingly networked societies. The music industry is presented as a valuable case to depict the interaction of technology, oligopoly, culture and law in copyright debates. The objective of copyright - to balance incentive to create with access to information - should not be forgotten as digital technologies precipitate opportunities for diffuse and diverse cultural production.

Keywords
Copyright • technology • culture • oligopoly • music • networks • digital

INTRODUCTION

Copyright is inextricably bound to cultural progress in modern societies. As the logic of intellectual property rights (IPRs) increasingly pervades intellectual and artistic life, understanding the effects and assumptions of copyright law is essential.

Technological advance has played a pivotal role in the evolution of copyright legislation and continues to alter the practical effects of copyright law today as digital technologies profoundly transform how people interact with culture. The persistent call for enhanced legislation and enforcement to combat digital piracy in cyberspace presents an opportunity to reflect on copyright’s capacity to foster innovation and promote the production of cultural works. It is necessary to understand fundamental
copyright concepts and recognize the challenges posed by technology, as well as appreciate the effects of oligopoly in content markets on cultural evolution, in order to protect the public interest in a digital environment.

This paper briefly describes the history of copyright and conventional justifications for IPRs to emphasize their social construction and propose that legal discourse serves to obscure the complexities of fundamental copyright concepts such as originality. It then outlines how the technical characteristics and social implications of new technologies, particularly the Internet, present acute problems for copyright practice. Arguing that digital technologies now provide an opportunity to stimulate diffuse and diverse artistic production, it explains how copyright and technology have historically enabled oligopolistic domination of media industries. While the oligopolistic videogame and film industries may now lead the charge against digital piracy, it is the music industry that first felt the transformative effects of digital networks on content markets and responded by consistently advocating stronger copyright protections and enforcement mechanisms in cyberspace. It is presented here as a valuable case to investigate the impact of digital technologies and copyright on the cultural evolution of digitally networked societies. The growth of digital music markets is chronicled and the effects on artists and record labels appraised. This case demonstrates the importance of digital networks to modern culture and emphasizes the opportunities technology presents for decentralizing artistic production. As the citizens of modern nation-states increasingly inhabit virtual spaces it is necessary to understand the effects of current copyright practices on behavior. Copyright enforcement online will inevitably influence the evolution of culture as social interactions and artistic works increasingly assume digital forms.
Copyright in historical perspective

Since there are already numerous historical accounts of copyright (Battisti 2001; Barron 2006b; Nill & Geipel 2009), its evolution is only briefly conjured here to emphasize that copyright is a constructed, statutory development rather than a natural right. Technological progress has been integral to copyright legislation’s expansion and continues to highlight the public good aspect of informational and cultural resources. The modern institution of copyright is frequently traced to the advent of the printing press and the English Statute of Anne in 1710. Although nations developed their own copyright legislation, this statute is widely considered the first copyright law. Exclusive printing rights were vested in authors in order to prevent the perpetuation of established publishers’ monopoly over valuable older works and to ensure those creating content could make choices over its subsequent exploitation (Barron 2006b: 278; Bide 2009: 249). Copyright was established to provide an incentive to create so that society would be enriched by access to a range of cultural goods. This emphasis on public enrichment and the need to balance content protection with access is often relegated as industries lobby for copyright’s extension in response to new technologies. Debate results from tensions between the perception of copyright as a natural right to protect individual creative property and copyright conceptualized as a vehicle to promote public enlightenment. Despite divergent evolutionary experiences, the outcome of copyright legislation was broadly similar in the three states at the forefront of emergent capitalism in the 19th century: UK, USA, and France (David 2006: 425). Subtle differences, for example France’s emphasis on authors’ moral rights, are rendered irrelevant as copyright law is harmonized under the WTO Agreement on Trade-Related Aspects of Intellectual
Property Rights (TRIPS), which shifts the orientation of copyright towards trade. However, it is significant that IPRs originated from particular states because it suggests they represent a distinct cultural heritage rather than a natural right (Smiers 2000: 386). Crucially, ‘copyright laws are the outcome of a political bargaining process and do not necessarily reflect unwavering norms or values… Intellectual property is a truly artificial construct. It is not based on a natural right’ (Nill & Geipel 2009: 2). The idea of an individual author being sole creator and primary owner of a work is deeply embedded in liberal economic relations and conceptions of individuality (Rose 1995). Critical legal histories of IPRs demonstrate the imperialism inherent in their global proliferation (Drahos & Braithwaite 2002; Sell & May 2006) and ethical frameworks do not substantiate them (Nill & Geipel 2009: 14). While this certainly does not mean copyright protection is unethical, it does challenge its currently sacrosanct status.

To protect or proliferate?

The conventional justifications for IPRs can be subsumed into two categories: economic and politico-philosophic (Breakey 2009: 328). The former highlights the utility of innovation and argues the free market under-produces it. Drawing on public goods theory and emphasizing free-riding problems, IPRs are conceived as artificially established monopoly rights granted by the state to provide incentive to create. The politico-philosophic approach calls on Hegelian and Lockean themes to vindicate a natural property right over ideational entities by asserting the right to one’s embodied ideas; IPRs are justified out of respect for property. This debate is covered extensively in copyright literature (Nill & Geipel 2009; Breakey 2009; Sell & May 2006) and need not be elaborated here. Jefferson challenged the natural right to property in ideas
arguing that ideas are ‘like fire, expansible over all space, without lessening their density in any point, and like the air… incapable of confinement or exclusive appropriation’ (1999: 580). Property in ideas may be granted for the benefit of society but it is not natural right. Copyright has accordingly distinguished between the right to protect the expression of an idea rather than the idea itself. This distinction is problematic and discussed later. Economic rationales linking incentives to immaterial production and proclaiming the utilitarian efficiency of copyright are multifarious (Landes & Posner 2003). However, many studies claim evidence for copyright law’s impact on creative output is inconclusive at best (Png 2006; Ku et al. 2009). Radical critiques suggest copyright is an ‘intellectual monopoly’ that actively inhibits innovation (Boldrin & Levine 2008). Placing piracy at the heart of the interplay between commerce and culture, Johns’ historical analysis argues piracy has often stimulated technological and intellectual innovation rather than inhibited it (Johns 2010). While it is not the aim of this paper to question the justification for IPRs, these tensions demonstrate how legal discourse operates to obscure the complexity of copyright concepts and practice.

There is considerable disagreement on the relationship between IPRs and productivity in the cultural domain. Though some maintain that evidence of IPRs stimulating creative diversity is ambiguous at best (Kretschmer et al 2001: 436), others propose the “marketization” of culture is the very condition for its production (Marshall 2005: 22). Decades of IPR extensions have engendered global counter-movements; open-knowledge, creative commons, and public domain advocates insist innovation requires free circulation of information. Economic justifications for IPRs are inextricably bound to capitalist development and ‘copyright crystallizes the debate over what it is legitimate to commodify’ (Eisenschitz & Turner 1997: 210). While
investment in cultural goods may require incentive, the role of monopoly rights in artistic creation remains uncertain. IPRs reify economic rationalism as natural but forget that humans have historically produced countless technological and cultural artefacts without their enforcement (Bettig 1996: 25). Nill and Geipel demonstrate how ‘there does not seem to be a clear link between the protection awarded to owners of artistic works and the creativity of an epoch’ (2009: 2). Copyright’s balancing act between owners and users of cultural products is further complicated by the fact that authors are also users. Balance has historically been achieved by *fair use* exemptions to copyright for personal, educational, and archival use. Since cultural progress depends on the reasonable use of prior material – especially true for creator’s operating in a digital, media-saturated environment – *fair use* is an integral component of copyright. Applying *fair use* exemptions to new copy technologies is increasingly difficult (Caroll 2007; Depoorter 2009) and critics lament it now simply amounts to ‘the right to hire a lawyer’ in the ensuing legal battle with rightholders (Lessig 2004). Explicitly expanding *fair use* exemptions in digital networks may re-establish the balance between access and incentive without compromising the entire edifice of copyright.

**Copyright, capitalism and accumulation**

Copyright is extensively criticized for concentrating control of IPRs by establishing the legal framework necessary for unprecedented accumulation of ownership of cultural products. Though theoretically supposed to balance the interests of users and producers, in practice copyright protects the owners of information and leads Altbach (1993) to condemn the Berne Convention, the first international copyright treaty, as ‘the OPEC of knowledge distribution’. This critique is even more
salient in the current context of TRIPS. Critical political economy, by emphasizing
the generation of configurations of ownership and power as a result of the relations of
production, yields insights into the link between copyright and capitalism. Copyright
is one strategy used by content corporations to valorize capital and its legal evolution
is bound to the growth of a distinct sector of capitalist production: the culture industry
(Barron 2006b: 281). The ceaseless enclosure of the public domain occurs by
characterizing it as a pool of resources best allocated via market forces to those most
willing to pay for them. Content corporations argue monopoly rights are necessary for
production in volatile, capital-intensive cultural markets. Drawing on prior research,
Elkin-Koren contends that ‘copyright law has always had a centralizing effect. By
allowing the commodification of information, copyright law facilitates a market in
which control over the use of information could be accumulated and could be held by
a relatively small number of giant private entities’ (1995: 194). Game-theoretic
analysis suggests copyright generates collusive behavior and rent-seeking among
record companies which spawns incentives for price-fixing (Klaes 1997). This
correlates with the tendency towards vertical integration in media industries (Towse
1998). The gap between copyright’s theoretical aim of protecting artists and the
current practice of ownership accumulation to private corporations is widening. The
characterization of copyright as a technocratic issue for legal professionals must be
overcome in order to recognize its social and cultural effects. Copyright increasingly
protects corporations rather than individual creators. It is increasingly divorced from
quotidian artistic practice and ignores the constitutive and interactive relationship
between artists and audiences.

Originality: individual creation and the public domain
It is common in the arts to exaggerate contributions of single artists and relegate the importance of the public domain as a stimulus to creation. The Romantic conception of art as an inalienable, yet inheritable, right to the property of one’s individual creative genius – manifest as an original expression rather than the exercise of learned technique or composition – is often promulgated as the basis for copyright (David 2006: 429). This is hardly surprising considering copyright evolved almost exclusively in nations that embraced liberal political philosophy, which deems individuality sacrosanct. Yet Confucian philosophy has long emphasized the transmission of creative works for others to build on rather than creation as individualized activity: ‘I transmit rather than create – I believe in and love the Ancients’ (Analects, cited in Montgomery & Fitzgerald 2006: 408). Access to ideas is as important for creation and innovation as protection. What artist claims to create in a total cultural vacuum? It is highly probable that ‘creativity is most frequently based on the iteration of known concepts, [that] ideas are almost always derivative’ (Eisenschitz & Turner 1997: 210) and that ‘the uniqueness of a work of art is inseparable from its being embedded in the fabric of tradition’ (Benjamin 1968: 223). Even the Romantic paradigm, conventionally equated with a conception of individual creative genius, admits artists give expression to ideas extending beyond the individual. Radical Romanticism characterizes creativity as the co-production of experience and meaning by both artists and audiences over time (traditions) and during production (performance) (David 2006: 427). Becker recognized that the cooperative activities of various groups engaged in multiple, often independent and fluid artistic realms render the art world an amalgam of intersecting, overlapping networks where meaning is intersubjectively defined (1984). The networked nature of artistic creation thus seems to precede the rise of digital networks. Artistic works have
never been stable and fixed entities but are instead continuous processes of production, interpretation, and re-production. ‘Language, grasped in its real essence, is something continual and passing on in every moment. Even its fixing by means of writing always preserves it only incompletely… Language itself is no work (egon) but an activity (energeia)’ (Dahlhaus 1983: 10). Does this not apply to art? Is art’s meaning not better grasped when understood as an inter-textual process of creation and interpretation rather than the necessarily static legal definition of it as a bounded object. Copyright’s insistence on originality as an organizing principle ignores these fundamental problems. Relying on simplistic definitions, it ignores the paradox that ‘the origin of the artist is the work of art, the origin of the work of art is the artist, “neither is without the other”’ (Derrida 1987: 31-2, cited in Sherman 1995: 36).

Treating the individual as the basis for originality renders artistic works as stable, coherent unities that are fixed and determinate. Essentially, ‘copyright law operates with a conception of the cultural artefact as a bounded expressive form originating in the creative efforts of some individual: a fixed, reified work of authorship’ (Barron 2006b: 280). Simplistic legal discourse inevitably obscures internal conflicts in copyright theory by implying consensus regarding such fundamental concepts as originality. In the digital era, this concept of a fixed and bounded “original” work is increasingly challenged.

**Digital sampling and the challenge to copyright**

The advent of digital sampling and the development of MIDI (Musical Instrument Digital Interface) interfaces in the 1980s reduced the cost of recording studio-quality music and challenged conventional interpretations of copyright law. Copyright protects “original” works from unauthorized copying. Because sampling
copies a part of a work to produce a derivative product, infringement occurs in both composition and recording. Yet numerous authors have discussed how sampling challenges the very concept of originality in copyright law (Porcello 1991; Schumacher 1995; McLeod 2001). This debate embodies the antagonism between a conception of an artistic work as a fixed, coherent, and bounded expression of individual genius and one conceiving art as an ongoing inter-textual process of creation between both artists themselves and their audiences. Henry Self remarks that the debate reflects the tension between two perspectives on creativity: ‘a print culture that is based on ideals of individual autonomy, commodification, and capitalism… [and] a folk culture that emphasizes integration, reclamation and contribution to an inter-textual, intergenerational discourse’ (2004: 359, cited in Hesmondhalgh 2006: 54). The apparent stability of copyright concepts are subverted upon recognition that external influences in art are omnipresent, always changing, and more importantly that the very meaning of a work alters according to temporal and geographic context. Legal discourse understandably obscures these complexities and dismisses their interpretive dimension in order to disassociate itself from the contentious realm of aesthetic judgment and present itself as amenable to objective legal definitions.

Digital sampling challenges copyright by rejecting the notion of a stable, fixed, and bounded artistic work. Its proponents perceive the production of music as an ongoing process where meaning is contested according to time and place. Copyright’s denial of this is not just a theoretical dilemma. It precipitates social consequences that consolidate existing inequalities. Genres typically associated with African Americans, such as rap, jazz, or blues, are difficult to reconcile with legal categories of a musical work (Barron 2006a: 33). Copyright in music privileges powerful social actors who have both the legal proficiency and financial resources to
clear the samples used in a work; corporate actors thus gain considerable advantage over individual artists. These ‘traditional interpretations of intellectual property laws [also] quash dialogue by affirming the power of corporate actors to mono-logically control meaning by appealing to an abstract concept of property: laws of intellectually property privilege mono-logic forms against dialogic practice and create significant power differentials between social actors engaged in hegemonic struggle’ (Coombe 1998: 86). At stake is all of society’s ability to contest meaning and participate in processes of cultural production crucial to human development. While infringement is litigated against primarily when derivative products achieve commercial success, the legal basis for such control exists and is increasingly employed online. Copyright enforcement thus advantages commercial interests and is increasingly estranged from what artists do and think as well as the various relationships between artists and their audiences.

The effects of digitization on copyright theory

Today’s social environment is wholly saturated by digital media. Though not felt to the same extent around the globe, the proliferation and exponential advance of digital technologies is nevertheless transforming human behavior. Cultural products are progressively digitized as more and more human interactions occur in virtual spaces. Some consider copyright flexible enough to achieve its historic objectives in cyberspace (Miller 1993), some argue small changes are sufficient (Information Infrastructure Task Force [IITF] 1994: 10), others propose that copyright, initially tailored to address the needs of print culture, will become irrelevant (Barlow 1994; Katsh 1989). Regardless, digital technologies introduce a host of issues to current copyright practices that must be addressed. The characteristics of digital technology
mean copyright’s extension has severe implications in terms of access to information, privacy and freedom of expression. All digital information is stored in binary code: everything from Da Vinci’s Mona Lisa to Mozart’s symphonies is codified by reducing it to a series of ones and zeros. Digital access, because it essentially “copies” a file onto a computer by reproducing the distinct series of ones and zeroes, makes practically every access to content in cyberspace an infringement of copyright. Digitization not only presents practical issues but also challenges copyright’s legal dichotomy between idea and expression as the tangible becomes increasingly intangible in virtual storage (Eisenschitz & Turner 1997: 211). The idea itself becomes protected. While copyright traditionally prevents copying, in a digital context copyright essentially prevents access and thus stifles creation and innovation. Lessig (2007) usefully distinguishes between analogue and digital environments. In an analogue world most “uses” of culture are unregulated and outside copyright’s reach because they are protected by the notion of fair use; the target of copyright law is primarily commercial use. In a digital world every use of culture produces a copy and copyright thus usurps the balance between regulated and unregulated access to culture simply because of the platform through which culture is attained. In a digital context where ‘copying is fundamental to all operations, it is clear that proposed extensions in copyright are set to squeeze out legitimate exceptions for users and even potentially infringe human rights’ (Eisenschitz & Turner 1997: 218). To better comprehend copyright’s current implications it is necessary to understand the potential that digital technologies, most notably the Internet, provide for the diffusion of cultural production.

DIGITAL TECHNOLOGIES AND CULTURE
The Internet and the reduction of distribution costs

Digital networks have radically transformed the communications sector since their inception. Allowing faster and easier access to information, they expand the potential market for copyright works by reducing distribution costs and multiplying available distribution channels. Early discussions of IPRs in cyberspace echoed other over-optimistic assessments of the democratizing potential of the Internet and yielded an idealistic Internet Nirvana theory purporting the new virtual environment to be ‘an arena of free exchange in which everyone wins’ (McCourt & Burkart 2003: 334). Reduced barriers of entry to the market and diminished distributor interference with cultural products led to the belief that creators had regained control over copyright. The envisaged result of greater consumer choice available at lower price paralleled a growing vision of frictionless capitalism where digital networks stimulated continual gains in productivity and perfect equilibrium between producers and consumers (Gates et al. 1996, cited in McCourt & Burkart 2003: 334). Like so many other technologies with revolutionary political and social potential, it soon became clear the Internet would be initially dominated by the exigencies of commerce. It is vital to reject technologically deterministic approaches and accept that digital networks, despite providing opportunities for transforming the creation and dissemination of knowledge, do not inevitably democratize cultural production. Facilitating participation by permitting individuals to directly access, manipulate, and distribute information, they simultaneously increase the ability of powerful actors to control, monitor and prevent its use. Essentially, ‘digital networks present society with a choice – either to perpetuate the existing structure of producing and disseminating knowledge or to take advantage of new opportunities for decentralizing these processes’ (Elkin-Koren 1995: 187-8).
Decentralizing cultural production

Digital technologies have revolutionized individuals’ ability to create content and disseminate it to potentially billions of people (Bide 2009: 429). Direct communication channels allow artists to circumvent traditional market intermediaries and distribute products without negotiating their content. This has challenged centralized control of distribution, marketing, and content in cultural industries. Thresholds of investment and economies of scale that previously enabled considerable corporate mediation of publically available content diminish as the economic structures of print and broadcast industries collapse (Kapor 1993). Cyberspace thus provides potential for the democratization of cultural production (Heim 1987: 220). However, technology does not inevitably concentrate or decentralize production. Rather, technologies are dynamic processes that often have embedded values and components that can be altered through their use (Carey 1989). Copyright practice in cyberspace should, together with new technologies, help facilitate decentralization, encourage participation and stimulate artistic diversity. Caution regarding copyright extensions online is necessary because even ‘imposing the current copyright law in the context of digital technology may reproduce and reinforce the existing structures of power in the creation and dissemination of culture’ (Elkin-Koren 1995: 197). Copyright has historically concentrated ownership of content and distribution, leading to oligopoly in the market for culture and ‘in effect reversing the direction of modernity from the gradual expansion of information participation among social groups over time, to gradual concentration’ (Venturelli 1997: 69). Most content sectors, including the film, videogame and music industries, are dominated by a handful of major corporations (Bettig 1996). Yet evidence
suggests new technologies combined with less rigid copyright enforcement will benefit cultural evolution, particularly in the music industry. Artists will be in a stronger position to create without “selling out” to distributors, allowing consumers access to more socially valuable art-forms that usually have ‘little commercial appeal to the lowest-common-denominator tastes of the mass-market multitudes’ (Holbrook 2005: 30). Risk-management in volatile cultural markets requires record labels and publishers to only distribute products they believe will generate return on their initial investment. Circumventing intermediaries may thus increase the quantity and diversity of available content. While conforming to standards known to meet public approval may lower financial risk it does not contribute to true cultural progress. Though intermediaries remain significant because supply in cultural markets exceeds demand (Kretschmer 2001: 431) it is important to recognize that ‘real cultural variety… can only exist when the majority of artistic cultural expressions in a given society proceed from a substantial variety of independent initiatives, institutes and creative individuals’ (Smiers 2000: 384). The Internet can achieve this, not only because it can reduce distribution costs and decentralize production, but because it also challenges the very distinction between creators and consumers of culture.

Getting past the creator/consumer paradigm

Traditional publishing models conceptualize the vast majority of individuals as passive consumers. Yet digital technologies have encouraged an explosion in the quantity of individuals creating cultural content and established a platform where communities of amateurs and enthusiasts can widely share it (Gillespie 2006: 659). The role of networked communities in constituting multiple art worlds is clearer than ever before and socio-cultural perceptions of art and originality are shifting. Digital
media are easier to manipulate and distribute than physical artefacts and thus permit greater interactivity with and customization of culture. As user input is increasingly integrated into works the passivity of orthodox consumption models is replaced by user engagement in the construction of a highly individualized experience. Rather than the mass duplication of a single prototype typical in print and broadcast industries, culture in the digital domain incorporates user input, stimulating diversity and enabling more participation in the creation of meaning of cultural artefacts (Elkin-Koren 1995: 193). Stringent copyright practices in cyberspace may restrict participation in the meaning and interpretation of cultural artefacts by inhibiting individuals’ ability to engage with and modify an existing work. The European Union has recognized the expanding role of user-created content and acknowledged its increasing economic, social, and cultural impact on content industries (European Commission 2009: 10). As technology becomes progressively cheaper and more powerful, the literacy of future generations is likely to be measured in terms of digital prowess. The concept of read-write culture (RWC) as opposed to read-only culture (ROC) on the Internet highlights copyright’s impediment to participation (Lessig 2007). RWC is manifest online in non-commercial communities like Youtube, Wikipedia, Flickr, and remix-cultures using digital sampling. Lessig argues copyright’s system of permissions conflicts fundamentally with this type of participation and, as currently architected, actively inhibits the proliferation of culture. Copyright laws designed to eliminate piracy eliminate RWC in the process and support ROC instead. ROC – encompassing online retailers like Apple’s iTunes Store, Amazon, and NetFlix – is essentially about perfecting the market’s ability to buy and distribute culture. It restricts the use of culture by embedding control through digital code and is supported by copyright’s legal claim that creators should exercise perfect
control over how people consume their products. The trend towards perfect control has lead to increased use of encryption technologies in content distribution, most notably the implementation of Digital Rights Management (DRM). While the focus of this paper necessitates omitting prolonged analysis of DRM, the restraints such technologies place on user interaction with content is worth noting. Cultural progress should not be measured in terms of the quantity of identical goods distributed but according to individuals’ ability to participate in the creation of diverse artefacts whose meanings are continuously contested and whose form and content undergo continual revision and interpretation in a process of ceaseless evolution. Elkin-Koren argues this eloquently:

‘The notion of progress in the past has been restricted to such considerations as how much is produced and how much is being used and disseminated. Yet, in a technological context that technically allows participation by many, the notion of progress should look at how much power individuals have to participate in the creation of the culture in which they take part, how much power they have to create cultural forms, and how much power they have to react to meaning imposed on them by the culture they consume’ (1995: 196).

Proponents of copyright extension online should define and justify their conception of cultural progress before enacting legislation that will inevitably determine its evolution in digital spaces. It is unfortunate that major content corporations deploy copyright online primarily as a defensive mechanism to accumulate profits and inhibit mass participation in the creative cultural process.

Technology and the convergence of industries

Technological developments have radically transformed the service sectors of advanced economies. As various sectors increasingly utilized the same technological
platforms and networks, analysts predicted the convergence of previously separate industries into a “multimedia industrial complex” (Kretschmer et al. 2001: 417). Technology has indeed led to convergence of these industries, merged previously distinct markets (European Commission 2009: 2) and prompted mergers and acquisitions between multi-national corporations (MNCs) seeking competitive advantages in a global economy. Media conglomerates achieved unprecedented economies of scale and scope through the integration of mechanical reproduction and broadcasting facilities, rights monitoring and royalty collection agencies, marketing and advertising departments, as well as extensive distribution channels. This process complements copyright to concentrate ownership of cultural material. Industrial economic theory suggests ownership concentration occurs due to the large upfront capital investments necessary in these industries and helps explain the growing entrance barrier in international music markets. The complex, capital-intensive logistics of international distribution networks that must respond to rapid changes in demand pressure independent record labels to trade IPRs for global distribution. Although the Internet is changing this, the marketing costs of band promotion still restrain independent artists from reaching global audiences. Ownership concentration also results from ‘the nature of risk in a winner-takes-all market where 10 percent of products account for 90 percent of turnover, and nobody knows the reasons for success’ (Kretschmer et al. 2001: 425). MNCs hedge risk by profiting from back catalogues of music, a strategy unavailable to new market entrants and made possible by copyright extensions. Volatility in music markets means MNCs remain the primary source of finance for new artists since they enjoy greater ability to reduce risk and exploit control over capital-intensive marketing and distribution channels.
It is arguably technology that transformed music into a profitable corporate enterprise. Recording technologies enabled the mass consumption of music, decoupled music from live performance, and led to an era of global music distribution where intermediaries gained substantial power due to the complex infrastructure required (Nill & Geipel 2009: 5). It established concentrated distribution nodes allowing MNCs to dictate the majority of music available worldwide. Appealing to a vision of impoverished artists, these intermediaries lobbied for extended copyright in response to emerging technologies and secured massive profits through economies of scale. New technologies challenge this lucrative business model: the Internet opens creator to consumer markets and recording is progressively cheaper. It is difficult to claim this inhibits cultural progress. Technologies once again provide opportunities for truly diverse, decentralized cultural production and ‘the content industries are being dragged into the future, kicking and screaming, [as] they are forced to reject business models that were enormously profitable for decades’ (Cenite et al. 2009: 217). An analysis of the transformations of the music industry in the digital environment and the concerted protectionist response of MNCs depicts the continued accumulation of ownership of cultural goods under oligopolistic market conditions. It also questions to what extent cultural diversity and progress is served by extending copyright law in cyberspace.

THE MUSIC INDUSTRY IN THE DIGITAL ERA

The growing digital music market

The invention of MP3 compression by the Fraunhofer Institute in 1991 (British Phonographic Industry [BPI] 2010) and persistent improvement of broadband speeds profoundly altered the musical landscape as consumer behavior and
expectations changed fundamentally. Digital technologies engendered the rampant
proliferation of illegal file-sharing and potentially connected billions of fans. The
flood was partially stemmed ten years later when Napster, the earliest popular peer-to-
peer downloading service, was shut down and the first wave of legal digital
subscription services followed in 2001 (BPI 2010). The rise of digital networks is
frequently related to a concomitant decline in creative content sales as illegal
downloading becomes easier, faster, and more convenient. A case study of the music
industry is revealing because it is deemed the ‘pathfinder in the creative industries’
digital revolution’ as it generates more value from the digital than any other creative
industry bar electronic games (IFPI 2010: 4). Though the film and videogame
industries’ responses to digital distribution and piracy often parallel the music
industry, focus remains on music for the sake of analytical clarity and depth. While
digital music sales do not yet account for decline in physical CD sales – piracy
consistently reviled as the sole culprit – the reasons for declining revenue are
complex. Even the British Phonograph Industry’s (BPI) CEO admits the capacity of
consumers to purchase singles over albums and increasing competition for wallet-
share with other entertainment platforms (e.g. phones, DVDs, games) significantly
impacts sales (BPI 2008). Considering music’s economic value – generating £6bn
annually and employing over 130,000 in the UK alone (Department for Business
Innovation and Skills [BIS] 2009) – and its cultural influence, understanding how the
digital environment is changing industry practice is critical. The growing value of
digital music markets also supports the idea that economic exchange and cultural
interaction increasingly take digital forms and thus highlights the interaction of
copyright and culture online.
Several analysts describe the domination of music markets by MNCs previously labeled the Big Five: Universal, EMI, BMG, Sony Music, and Warner Music (McCourt & Burkart 2003; Kretschmer et al. 2001; Smiers 2000). Record companies’ global market-share of music sales in 2003, compiled from the most recent available data published by the International Federation of the Phonographic Industry (IFPI), supports this (see next page):
Sony’s recent merger with BMG (now Sony-BMG) means the Big Four reign over global music and criticisms of market oligopoly are even more salient. These record companies defend their global interests through associations like the IFPI and also exert influence through similar organizations at the national level. The UK represents a typical case where, despite 90% of record labels being independents, the Big Four dominate approximately 80% of the market (see next page):
Figure 2: 2007 UK market share of record labels in singles sales (Source: Department for Business Innovation and Skills [BIS] 2009)

Figure 3: 2007 UK market share of record labels in album sales (Source: Department for Business Innovation and Skills [BIS] 2009)
The strategic response of these market incumbents to online distribution exemplifies their defensive orientation. They initially stalled the opening of digital markets for fear it would encroach on established markets, they pursued legal and proprietary means to assert control over content (extended copyright and DRM), they co-opted new entrants like ISPs, and they sought to promote brand as the navigator of online music (Kretschmer et al. 2001: 426). The Big Four have often acted in concert to achieve ‘a trans-dimensional extension of copyright law and leak-proof control of distribution channels through legislation, litigation, mergers and acquisitions, and anti-copying technologies’ (McCourt & Burkart 2003: 334-6). However, regardless of their protective tendencies, these MNCs increasingly admit the importance of digital distribution.

The explosive growth of legal digital music markets is difficult to deny. In 2003 there were less than 50 digital licensing services, the catalogue of online music contained one million songs and digital revenue amounted to $20 million, a negligible percentage of total industry revenue. By 2009 there were over 400 licensing services, over 11 million tracks available online and revenue soared to $4.2 billion, 27% of total industry revenues (IFPI 2010: 6). In six years digital music transformed from a trivial revenue stream into one generating over a quarter of record companies’ global revenues. The estimated worth of the digital market grew 12% from 2008 to 2009 (IFPI 2010: 4). The UK’s official music chart incorporated digital sales in 2007 to reflect the swelling consumption of legitimate digital music and digital channels accounted for 95% of total single sales – up 17% from 2006 – and 8% of album sales (BPI 2010). In the first quarter of 2008 digital album sales grew to encompass over 13% of total sales (BPI 2008). On February 25, 2010 Apple’s iTunes Store, the most
popular legal downloading service, sold its 10 billionth song (Apple 2010). In China, Indonesia, Thailand, and South Korea digital sales account for half of all music sales and Europe, lagging behind with 15% of total sales from digital channels, is identified as the fastest growing region (IFPI 2010: 11). The digital music market is undeniably in a period of substantial growth and this shift seriously impacts artists and record labels.

Artists, record labels, and the digital environment

The development of cheap recording equipment, MIDI technology and online distribution has reduced label control over musicians. Artists are increasingly able to avoid the bad practices of record labels such as adhesive contracts, plagiarism of copyright, poor royalty and accounting practices, distribution hegemony and artificially inflated CD prices. However, heritage acts (established, famous musicians) are likely to gain most from direct to consumer distribution. Music is characterized as an experience good whose value is revealed after consumption (Nill & Geipel 2009: 5). High uncertainty in the market due to enormous supply and the high costs (in terms of time and money) attributed to searching for content mean consumers rely primarily on past experience to make choices about music consumption; quantitative research reveals past reputation is positively correlated with initial acceptance of new songs (Gopal et al. 2006). Although technology decoupled mass music consumption from live shows in the era of physical global distribution, performance is rejuvenated as digital consumers inundated with choice and operating in media-saturated environments increasingly desire more authentic experience of music. Recently published data suggests the potential benefit to artists:
The claim is that live revenue is increasing and, because live performance provides the most lucrative income for musicians, the digital market may not threaten artists’ livelihoods as much as industry associations depict. If incentives stimulate creativity, as copyright purports, then it is reasonable to assume greater live revenue results in more musical production since artists – not record labels – create music. Because growth in live revenue to artists more than compensates for the drop in their recorded revenue the graph implies artists’ income has, contrary to industry claims, increased in recent years. One caveat is that heritage acts, famous primarily due to labels’
promotional marketing, are the musicians most likely to benefit from increased live revenues. While conclusions about live income are indefinite when one considers the cost differential of various performances (e.g. acts employing numerous session players, dancers, technicians, etc.) and the advantage of heritage acts over unknown bands, it nevertheless undermines simplistic depictions of an ailing music market.

Caricaturing record labels as greedy intermediaries securing unwarranted profits misconstrues their continued relevance. Labels’ initial risk of investment, only 1 in 10 artists recoup costs (Kretschmer et al. 2001), justifies greater returns from recorded revenue than gig promoters claim from performance. They are responsible for identifying, nurturing, and financing talented individuals. Numerous label costs are often ignored – studio recording and mastering, marketing and public relations, pressing and distribution, album finance – but Hollywood accounting phenomena (Bengel & Ikawa 1997) suggest labels with integrated subsidiary services charge artists excessive prices to lower reported net profits and thus reduce royalties paid. As industries converge costs continue to drop, yet artists rarely reap the benefits. The difficulty of gaining traction online restrains the Internet’s potential for independent distribution and labels remain the primary “shop windows of the music world” (BPI 2008). Despite slow progress, labels are increasingly rejecting historically profitable business models unsuited for digital networks and innovating accordingly. Recognizing the challenges, ‘in the digital era, the music industry is diversifying its business models and revenue streams’ (IFPI 2010: 4). The proliferation of music formats available on diverse platforms and the growth of ad-supported online services such as Spotify, Deezer, MySpace Music, and We7 are innovative steps.

CONCLUSION
Copyright has historically concentrated ownership of cultural products on the tenuous basis that IPRs stimulate innovation and creativity. Regardless of the veracity of the latter claim, copyright law implies ontological certainty about the nature of creative endeavor and originality. Promoting individuality as the source of original creation, copyright neglects the importance of access to culture in the public domain. While conceptual simplification of the creative process is necessary to divorce legal categories from contentious aesthetic judgments, this is not just a theoretical dilemma. It has serious practical consequences. If art is a continuous inter-textual process of creation where meaning and form is consistently contested then current copyright practices inhibit cultural evolution by interpreting culture as an amalgam of discrete, legally defined, individual commodities. The danger this poses to cultural progress is compounded by digital technologies. Inability to distinguish between intangible and tangible expression of ideas in digital networks means copyright increasingly restricts access to information online. Initially fostering the convergence of industries and the concentration of ownership over cultural products, technology is again presenting society with a choice to achieve the historic objectives of copyright in cyberspace. The Internet has enormous potential to decentralize the production and distribution of culture and promote a new notion of cultural progress. This potential can be realized under the current copyright system only if current enforcement practices are relaxed (for example by making fair use a reality and not simply the ‘right to hire a lawyer’). The superficial distinction between creator and consumer is being replaced by a notion of elaborately networked communities of enthusiasts contributing to diffuse artistic production. Analysis of the music industry reveals the growing importance of digital networks and technologies to the arts. The persistent calls for copyright extensions in cyberspace should be met with caution. The aim of copyright is to
balance incentive to create with access to culture. This aim should not be forgotten as
digital technologies precipitate opportunities for diffuse and diverse cultural
production. Further research is necessary to better understand the challenges ahead.
Innovative business models and virtual music communities such as Spotify and We7
are valuable cases for comprehending the interaction of commerce and culture on the
Internet. As pioneers in digital music, their maturation will determine the viability of
new approaches. The benefits of alternative copyright systems like Creative
Commons must also be explored. Investigating copyright’s effect on other content
industries is worthwhile and may provide a more complete picture of copyright in
cyberspace. While there are certainly broad parallels across content sectors, the subtle
differences are worth examining. Copyright is a constructed, statutory development
and not a natural right. Its existence should be justified and its aim to promote culture
and innovation. Its practical implications in a digital environment, increasingly
divorced from its historic objective of balancing access to and protection of content,
must be understood to achieve this.

References

Bookseller 22 January.
Apple (2010) Apple Info: All Latest Press Releases (online) Available from:
in the Digital Age’, *WIRED* 2(3): 85.
*IFLA Journal* 27: 82-86.


Figures

*Figure 1: Global market share of music sales in 2003 (Source: IFPI 2004)*

Global music market value in 2003: $32 billion (IFPI 2003: 1)
Figure 2: 2007 UK market share of record labels in singles sales (Source: Department for Business Innovation and Skills [BIS] 2009)
Figure 3: 2007 UK market share of record labels in album sales (Source: Department for Business Innovation and Skills [BIS] 2009)
Record revenue (to labels): revenue to labels from recorded music sales
Record revenue (to artists): revenue to artists from recorded music sales
Live revenue (to artists): revenue to artists from live performance
Live revenue (to promoters): revenue to gig promoters from live performance
PRS revenue: royalties collected on behalf of artists when their music is played in public